St. John's Law Review

Volume 38, May 1964, Number 2 Article 34

# Party Taking His Own Testimony

St. John's Law Review

to conduct a pretrial examination of the other would be denied.[135] More modern decisions, interpreting Section 193-a(2) of the CPA, have held that since a third-party defendant is a party to the action for all purposes and, usually, is the real defendant in the action because he may ultimately be required to satisfy the original plaintiff's claim, the third-party defendant would be permitted to examine the original plaintiff regardless of whether the formal pleadings created an issue between them.[136]

The present statute, Section 1008 of the CPLR, grants a third-party defendant all the rights of a party adverse to the other parties to the action. By designating him an adverse party, section 1008 has adopted the modern approach and, hence, the third-party defendant is immediately afforded the same rights as the original defendant. One of the rights of the original defendant is the right to conduct a pretrial examination of one of his codefendants although neither asserted a claim against the other.[137] Therefore, since the original defendant could have conducted a pretrial examination of his codefendant as to all issues involved in the main action and since the third-party defendant under CPLR Section 1008 and under later CPA decisions is immediately afforded the rights of the original defendant, it would seem that the court, by not permitting the third-party defendant to occupy fully the position of the third-party plaintiff (a codefendant in the main action), has not decided the question within the spirit of section 1008.

### *Party Taking His Own Testimony*

In *Lapensky v. Gordon,*[138] the defendant moved to vacate plaintiff's notice to take a deposition of plaintiff's own testimony. The court denied the motion by liberally construing the pertinent provisions of the CPLR.

Section 288 of the CPA provided that "any party to an action . . . may cause to be taken by deposition, before trial, his own

---

[135] *E.g.,* Salgo v. Amdor Structures, 133 N.Y.S.2d 435 (Sup. Ct. 1954); Gile v. Sears, Roebuck & Co., 110 N.Y.S.2d 211 (Sup. Ct.), 2d case, *aff'd,* 281 App. Div. 95, 120 N.Y.S.2d 258 (3d Dep't 1952); Reizer v. Pardes, 197 Misc. 384, 98 N.Y.S.2d 276 (Sup. Ct. 1950); Anida Realty Corp. v. 6145 Realty Corp., 197 Misc. 157, 94 N.Y.S.2d 56 (Sup. Ct. 1950); Foote v. Joseph Bisceglia & Sons, 195 Misc. 19, 80 N.Y.S.2d 60 (Sup. Ct. 1948).

[136] Argento v. Beech & Bowne Building Corp., 37 Misc. 2d 513, 236 N.Y.S.2d 462 (Sup. Ct. 1962); Sorrentino v. City of N.Y., 14 Misc. 2d 78, 178 N.Y.S.2d 500 (Sup. Ct. 1958).

[137] Hensel v. Held, 17 App. Div. 2d 806, 233 N.Y.S.2d 14 (1st Dep't 1962) (memorandum decision); Frost v. Walsh, 195 Misc. 391, 90 N.Y.S.2d 174, *aff'd,* 275 App. Div. 1017, 91 N.Y.S.2d 689 (3d Dep't 1949) (memorandum decision).

[138] 41 Misc. 2d 958, 246 N.Y.S.2d 442 (Sup. Ct. 1964).

testimony or that of any other party. . . ." Rule 3106(a) of the CPLR provides that "after an action is commenced, any party may take the testimony of any person by deposition. . . ." In comparing the two provisions, it can be observed that the CPLR provision is not as clear as was its CPA counterpart in establishing whether a party can take a deposition of his own testimony. Since this failure to retain the provision as worded in the CPA was not discussed in either the Advisory Committee or the Senate Finance Committee reports,[139] the court was called upon to decide whether the CPLR permits a party to take a deposition of his own testimony.

Several arguments have been made in favor of allowing such self-deposition under the CPLR:

(1) By reading rule 3106(a), which provides that "any party may take the testimony of any person" in conjunction with rule 3106(b), which provides that "where the person to be examined is not a party" one could reasonably conclude that "person" in rule 3106(a) means a party to the action.[140]

(2) By reading the first sentence of rule 3107, which provides that "a party desiring to take the deposition of any person . . . shall give to each party ten days' notice" in conjunction with the last sentence in rule 3107, which provides that "a party to be examined pursuant to notice served by another party" it can be concluded that the first sentence of rule 3107 allows a party to "take the deposition of himself or any other person."[141]

(3) Section 3101(a)(1), which provides that "there shall be full disclosure of all evidence . . . by a party" may be reasonably construed to permit a party to take his own testimony.[142]

Under the mandated liberal interpretation of the CPLR,[143] it would appear that a party should be permitted to take a deposition of his own testimony under any of the suggested constructions. In addition, the Senate Finance Committee stated that the scope of disclosure which existed under the CPA has been carried over into the CPLR.[144] If a party were not permitted to take his own deposition, the scope of disclosure would be narrower under the CPLR than under the CPA. Such a result is obviously not in accord with the avowed intention of the CPLR's draftsmen.[145]

---

139 CARMODY-FORKOSCH, NEW YORK PRACTICE § 623, at 561 (8th ed. 1963).
140 *Id.* at 560-61.
141 *Ibid.*
142 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.22, at 31-26 (1963).
143 CPLR § 104.
144 SIXTH REP. 30, 43.
145 It has been suggested that, at worst, in any instance in which disclosure would have been permitted under the CPA it should be permitted

However, it would be helpful to have legislative resolution of this apparent ambiguity.

It should also be noted that the language used by the court in the *Lapensky* case is that the plaintiff sought to "perpetuate" her testimony. While *any* deposition is a kind of "perpetuation" of testimony, the word should be avoided on such facts as those of *Lapensky* on two grounds. First, the CPA allowed a party to take a deposition of his testimony as an absolute right and there was no requirement that the purpose be the perpetuation of testimony. Secondly, section 3102(c) is the real "perpetuation" of testimony section; it reserves the word to the endeavor of a person to take a deposition *before* an action is commenced. Note that such a deposition requires a court order; mere notice may not be used for a pre-action deposition.

### *Attorney's Work Product and Material Prepared for Litigation*

In *Babcock v. Jackson,*[146] the plaintiff moved to have a certain statement produced for examination. The statement had been taken from the defendant by an adjustment bureau employed by the insurance company which represented the defendant. In an affidavit, plaintiff's attorney stated that the reason for such inspection was the mislaying by the police officer of certain notes pertaining to conversations between the officer and the defendant, now deceased. Hence, the defendant's statement could not be obtained in any other manner. The court held that since the statement was taken by a claim adjuster in the course of a *routine* investigation, and not by an attorney or his agent in preparation for trial, this single circumstance rendered the statement subject to inspection. Such statements obtained by claim adjusters are not immunized by subdivisions (c) and (d) (which respectively protect an attorney's work product and material he prepares for litigation).

Section 3101(c) grants to an attorney's work product unqualified immunity from inspection. However, when that provision was originally drafted, the work product was to be protected from disclosure *"unless the court finds that withholding it will result in injustice or undue hardship. . . ."*[147] The Revisers intended to adopt the rule laid down in *Hickman v. Taylor,* that an attorney's work product is protected from disclosure unless "good cause" for revealing it is shown.[148] When section 3101(c) was

---

under the CPLR. 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.01 (1963).

146 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963).

147 FIRST REP. 119.

148 329 U.S. 495 (1947).