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Priority of Depositions

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In *Beyer v. Keller*,[166] discovery and inspection of a statement made by the mother of an infant plaintiff was permitted. The basis of this decision was that "where there is a disability on the part of the injured person to testify and where there is such a close relationship between the witness whose statement was taken and the person injured" [167] such statement may be obtained. In the *Briggs* case, the court did not consider that "close relationship" should be restricted to blood relationships alone.

It has been suggested that "may obtain a copy of his own statement" may be susceptible of either of two constructions.[168] It could be construed to mean either that a party may do so by mere notice, or must first get a court order. If an order be deemed necessary, the scope of discovery and inspection would be more restrictive than it was under the CPA or RCP. As has been indicated previously, in the first and third departments it was unnecessary to show special circumstances and the second department, too, seemed to have abandoned the "special circumstance" test. Therefore, the law as it existed just prior to the enactment of the CPLR seemed to allow a party to obtain a copy of his own statement by mere notice. "[M]ay obtain a copy of his own statement" should be construed to permit a party to use the notice procedure under the CPLR as well.

Priority of Depositions

Rule 3106 of the CPLR deals with the priority of depositions. It in effect provides that a defendant shall have the initial opportunity to take testimony by deposition. This results because a defendant need only serve notice whereas a plaintiff must obtain leave of court in order to take testimony within twenty days after the service of the complaint. This advantage of the defendant is based on the theory that since he is blameless until proved liable he should, in the absence of special circumstances, be given priority in obtaining the first examination.[169] This provision appears to be an adoption of prior second department practice which permitted the party who first served notice to conduct the first examination.[170]

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[166] 11 App. Div. 2d 426, 207 N.Y.S.2d 591 (1st Dep't 1960), *reargument denied and appeal granted*, 12 App. Div. 2d 740, 210 N.Y.S.2d 965 (1961).

[167] *Id.* at 428, 207 N.Y.S.2d at 593.

[168] CARMODY-FORKOSCH, NEW YORK PRACTICE § 621, at 558 n.9 (8th ed. 1963).

[169] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3106.02 (1963).

[170] *E.g.*, Samuels v. Hirsch, 12 App. Div. 2d 823, 207 N.Y.S.2d 960 (2d Dep't 1961); Desiderio v. Gabrielli, 284 App. Div. 976, 135 N.Y.S.2d 1 (2d Dep't 1954).

On the other hand, pre-CPLR practice in the first department was contrary to that provided by rule 3106. Plaintiffs were given priority in pretrial examinations with few exceptions.[171] However, a case in the first department under the CPLR[172] rejected that old practice and held that the provision of rule 3106, viz., that the party who first serves the notice for a pretrial examination is given priority, should not be deviated from unless special circumstances are shown.

Another recent decision in the first department[173] similarly rejects prior court rules[174] which provided that a notice for a pretrial examination would be premature if served prior to the joinder of issue. The court permitted the plaintiff to examine the defendant prior to the joinder of issue.

These two recent first department opinions are significant in indicating the extent to which the CPLR abrogates prior first department rules.

Production of Documents

In *Williams v. Sterling Estates, Inc.*,[175] the plaintiff moved to compel the custodian of hospital records to file certain records with the court for safekeeping until the trial of the action. The defendant opposed the motion on the ground that since neither the hospital nor the custodian were parties to the action, discovery and inspection was not available. The court held that if special circumstances are shown to exist discovery and inspection of records of non-parties to the action will be permitted upon a court order.

Under the CPA discovery was permitted only on order,[176] unless discovery was sought of a document mentioned in a pleading or affidavit.[177] In the latter situation discovery was permitted on notice. The CPLR was designed to permit discovery on notice after the commencement of an action.[178]

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171 BRONX COUNTY SUP. CT. RULES, TRIAL TERM R. XX; N.Y. COUNTY SUP. CT. RULES, TRIAL TERM R. XI. For example, a pretrial examination would be denied if the party seeking the examination had not served a bill of particulars in response to a notice for a bill of particulars made previously by the adverse party. BRONX COUNTY SUP. CT. RULES, TRIAL TERM R. XX (9); N.Y. COUNTY SUP. CT. RULES, TRIAL TERM R. XI (9).

172 Rodriguez v. Manhattan & Bronx Surface Transit Operating Authority, 40 Misc. 2d 1053, 244 N.Y.S.2d 499 (Sup. Ct. 1963).

173 Revesz v. Geiger, 40 Misc. 2d 818, 243 N.Y.S.2d 744 (Sup. Ct. 1963).

174 *E.g.*, N.Y. COUNTY SUP. CT. RULES, TRIAL TERM R. XI (2).

175 41 Misc. 2d 692, 245 N.Y.S.2d 777 (Sup. Ct. 1963).

176 CPA § 324.

177 CPA § 327.

178 CPLR R. 3120. Rule 3120 should be distinguished from rule 3111. The intent of rule 3111 is to compel the production of books and records