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Production of Documents

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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

Rule 3120 of the CPLR provides that notice of discovery may be served by "any *party* . . . on any other *party*. . . ." Under the CPA [179] and the RCP [180] discovery and inspection was also limited to the parties in the action. This limitation was strictly adhered to.[181]

The court did point out that it recognized that under prior law discovery was limited to material in the possession of a party to the action. However, it was felt that the CPLR was intended to abolish the prior restrictive disclosure provisions.

The court based its decision on section 3101(a)(4) which permits full disclosure of all evidence by any person where there are special circumstances. Special circumstances were found to exist because the hospital was no longer operating and, hence, there was the possibility that the records would be lost prior to trial. Under prior law, however, discovery and inspection were said to be strictly limited to those instances found expressly in the applicable statutory provisions.[182] If a similar approach is taken to Rule 3120 of the CPLR, discovery and inspection after the commencement of an action would be restricted to those books and records in the hands of a party to the action.[183]

However, section 3102(c), which provides for discovery and inspection of documents before the commencement of an action (it makes "disclosure" available at such time and does not limit it to any particular one of the "disclosure devices" set forth in section 3102(a)), apparently may be utilized by a plaintiff in analogous circumstances. Under the circumstances of this case, if a motion had been made under section 3102(c) for discovery and inspection *prior* to commencement of the action, the court

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to be used as aids in the pretrial examination of a party or witness. 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3120.03 (1963). Rule 3120, on the other hand, contemplates the discovery and production of books, papers and things so that they may be inspected, tested, copied or photographed. 7B McKINNEY'S CPLR R. 3120, commentary.

[179] CPA § 324.

[180] RCP 140.

[181] *E.g.*, Lipsey v. 940 St. Nicholas Ave. Corp., 12 App. Div. 2d 414, 212 N.Y.S.2d 205 (1st Dep't 1961); Golding v. Golding, 7 App. Div. 2d 1027, 184 N.Y.S.2d 793 (2d Dep't 1959); Goldstein v. Kaye, 2 App. Div. 2d 889, 156 N.Y.S.2d 238 (2d Dep't 1956); Cunningham v. Schmidt, 18 Misc. 2d 326, 190 N.Y.S.2d 850 (Sup. Ct. 1959); Beasley v. Huntley Estates at Ardsley, 25 Misc. 2d 43, 137 N.Y.S.2d 784 (Sup. Ct. 1954), *aff'd*, 285 App. Div. 887, 137 N.Y.S.2d 787 (2d Dep't 1955); Petition of Cenci, 185 Misc. 479, 57 N.Y.S.2d 231 (Sup. Ct. 1945).

[182] Lipsey v. 940 St. Nicholas Ave. Corp., *supra* note 181.

[183] "[J]udicial legislation may not be sustained on the theory of 'liberal interpretation' of statutes. . . ." Corporation Counsel of City of N.Y. v. Smith, 1 Misc. 2d 813, 153 N.Y.S.2d 72 (Sup. Ct. 1956), wherein an order of a lower court was reversed because there was no statutory authority for it.

would apparently have been able to permit discovery of the hospital records on the grounds that the discovery and inspection would be either an aid in bringing the action or necessary to preserve information.[184] If CPLR authority can be found to support discovery and inspection against a non-party witness *prior* to the action, a fortiori it ought to provide a way of securing the same thing *after* the action is commenced. The *Williams* case has found a way, though its construction may be overly "liberal."

Refusal to Disclose

In *Gaffney v. City of New York*,[185] plaintiff moved to strike defendants' answers for failure to appear for a pretrial examination. The court denied the motion and held that since plaintiff had merely served a *notice* for the pretrial examination the remedy sought was not available because, the court said, a party must obtain a court *order* or a direction of the court before seeking any penalties against a party for failure to appear for a pretrial examination.

Under the CPA, it was held that if a mere *notice* for a pretrial examination were served on a party and that party wilfully failed to appear, the non-appearing party's pleading could be stricken.[186] The court in the principal case, however, has construed Section 3126 of the CPLR which provides that,

> if any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders . . . among them . . . an order striking out pleadings or parts thereof. . . .

to mean that a party must obtain two orders to obtain relief—first, an order compelling disclosure and second, if *that* is disobeyed, an order under section 3126, punishing the disobedience. Therefore, the court in the present case restricts the applicability of section 3126 to only that situation in which a party has first obtained a court *order* for disclosure. It has been pointed out, however, that section 3126 can be used in either of two situations—either where the party has refused to obey an order *or* where there is a wilful failure to disclose when the information should

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184 See In the Matter of Ausnit, 191 Misc. 390, 78 N.Y.S.2d 401 (Sup. Ct.), *modified as to scope of examination*, 273 App. Div. 958, 78 N.Y.S.2d 924 (1st Dep't 1948), wherein it was held that the testimony of a witness would be taken before the commencement of an action in order to protect the rights of one of the parties because the witness might leave the country before the trial.

185 41 Misc. 2d 1049, 247 N.Y.S.2d 419 (Sup. Ct. 1964).

186 Nowak v. Buffalo Elec. Co., 286 App. Div. 987, 14 N.Y.S.2d 425 (4th Dep't 1955); CARMODY-FORKOSCH, NEW YORK PRACTICE § 644, at 595 n.32 (8th ed. 1963).