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Article 39

Refusal to Disclose

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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).

have been disclosed.[187] The latter situation, it is argued, arises when a pretrial examination is sought upon notice.[188] General acceptance of the *Gaffney* construction of section 3126 would frustrate the basic purpose of article 31, which is to encourage the use of notices and to discourage applications for court orders except in special circumstances.[189] Indeed, it has already been held, in an instance in which procedure by notice is available (and it is available in most instances under the CPLR), that a motion for an order compelling disclosure does not lie *unless* the movant has previously sought such disclosure by notice.[190]

If notice must first be used where available, as held in *Schreter v. Brumer,*[191] and yet no penalty is available for its disobedience, as held in *Gaffney,*[192] the result is a disclosure article with a magnanimous quantity of notices, readily available but, unless the other party voluntarily responds, completely useless.

Use of Interrogatories Precluded in Malpractice Action Against a Physician

In *Fiorentino v. Jaques,*[193] the defendant in a malpractice action refused to answer interrogatories propounded pursuant to Rule 3134 of the CPLR on the ground that personal injury actions are statutorily excluded from disclosure. The court held that since the damages in a malpractice action are actually for personal injuries the plaintiff was not entitled to use interrogatories.

The provisions pertaining to interrogatories were enacted in the CPLR with several changes from the Advisory Committee's recommendations.[194] One of these changes forbade interrogatories in actions to recover damages for injury to property or for personal injuries resulting from negligence or wrongful death. The basis for this change was the fear of possible abuse in these actions.[195] Those who disagree with that approach state that interrogatories generally have not been abused in the federal courts,[196] and find

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187 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3126.02 (1963).
188 *Ibid.*
189 *Ibid.*
190 Schreter v. Brumer, (Sup. Ct. Queens County), 150 N.Y.L.J., Oct. 16, 1963, p. 18, col. 7.
191 *Ibid.*
192 41 Misc. 2d 1049, 47 N.Y.S.2d 419 (Sup. Ct. 1964).
193 41 Misc. 2d 972, 246 N.Y.S.2d 421 (Sup. Ct. 1964).
194 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.01, at 31-241 (1963).
195 See N.Y. Sess. Laws 1963, 1969 (McKinney's).
196 See Speck, *The Use of Discovery in the United States District Courts,* 60 YALE L.J. 1132, 1144 (1951).