

## **PRE-ACTION DISCLOSURE AND SPOILIATION OF EVIDENCE**

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This outline explores the scope of pre-lawsuit discovery in New York State and also reviews current concepts in spoliation of evidence.

### **I. PRE-ACTION DISCLOSURE IN NEW YORK STATE COURTS**

If disclosure is necessary before a lawsuit has begun, it can only be obtained by court order. New York's CPLR 3102(c) provides the mechanism for obtaining that discovery. This unusual remedy can only be invoked in three scenarios: (1) to "aid in bringing an action;"(2) to preserve testimony or evidence which may otherwise be lost; and (3) to obtain disclosure in anticipation of arbitration.

CPLR 3102(c) provides as follows:

- (c) Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.

It is singularly important to remember that pre-action disclosure is **not** available to determine whether a meritorious cause of action exists. Rather, movant must be able to demonstrate that facts constituting a viable claim are present, and that

additional information is necessary to identify the correct parties or the form the action must take.

- \* Houlihan-Parnes Realtors v. Cantor Fitzgerald & Co., Inc., 58 A.D.2d 629, 395 N.Y.S.2d 684 (2d Dep't 1977) (an application for pre-lawsuit disclosure requires the existence of a valid claim to prevent the initiation of troublesome and expensive procedures based upon a mere suspicion which may annoy or intrude upon an innocent party)
- \* Stewart v. Socony Vacuum Oil Co., 3 A.D.2d 582, 163 N.Y.S.2d 22 (3d Dep't 1957) (to entitle a party to an examination of some other party in order to frame a complaint something actionable must be demonstrated)
- \* In Re Pelley, 43 Misc.2d 1082, 252 N.Y.S.2d 944 (Supreme Court Nassau County 1964) (CPLR 3102(c) contemplates those situations in which the movant has a cause of action against the defendant, but needs the court's assistance to determine the form of the action or the parties to be sued)

An interesting application of the rule is found in *Peters v. Sotheby's, Inc.*, 34 A.D.3d 29, 821 N.Y.S.2d 61 (1st Dep't 2006). In *Peters*, pre-action disclosure was sought to identify an anonymous purchaser of a famous painting which had been bought at auction from the defendant auction house. The movant claimed to be heir to the true owner of the painting, which movant claimed had been wrongfully misappropriated more than 40 years earlier during the turmoil of World War II. The court denied the discovery on the grounds that the statute of limitations on the movant's potential claims had run and, therefore, irrespective of who purchased the painting, the underlying action had no merit. But see, *Alexander v. Spanierman Gallery*, 33 A.D.3d 411, 822 N.Y.S.2d 506 (1st Dep't 2006) (gallery ordered to reveal name of anonymous buyer who purchased stolen sculpture).

As a matter of procedure, movants for pre-action disclosure would be well advised to include an affidavit of merits with their application. Whether an adequate

showing of merits has been made out to permit the discovery is an issue committed to the sound discretion of the court. See *Peters v. Sotheby's, Inc.*, 821 N.Y.S. 2d 61, *supra*.

#### A. PRE-LAWSUIT DISCOVERY TO IDENTIFY THE WRONGDOERS

It may well be that plaintiff has a viable claim, but needs the assistance of the court to identify the wrongdoers. In such circumstances, CPLR 3102(c) can be employed to compel production of records, or even require the deposition of a witness with knowledge sufficient to supply the missing identities. For example, in *Houlihan-Parnes Realtors v. Cantor Fitzgerald & Co., Inc.*, 58 A.D.2d 629, 395 N.Y.S.2d 684 (2d Dep't 1977), the Petitioner was promised a real estate commission for arranging a sale of property, but was excluded from the closing. The Court granted the broker's request for pre-action disclosure to identify the parties to the transaction, and also to determine if petitioner had additional causes of action sounding in fraud and intentional interference with contract. Similarly, in *Toal v. Staten Island University Hospital*, 300 A.D.2d 592, 752 N.Y.S.2d 372 (2d Dep't 2002), a medical malpractice claim, the adult plaintiff was at a loss to identify all the responsible physicians who treated his infant child. The Court held that CPLR 3102(c) was available to compel the hospital to reveal the names of the physicians who participated in the infant plaintiff's care.

The right to the identity of a potential party has its limits. In *D'Alessio v. Gilberg*, 205 A.D.2d 8, 617 N.Y.S.2d 484 (2d Dep't 1994), a pedestrian was struck and killed by a hit and run driver. An area newspaper reported that the hit and run driver revealed

himself to a local attorney. The administratrix moved for pre-action discovery and for a deposition of the attorney to ascertain the identity of the hit and run driver. Weighing the importance of the attorney-client privilege against the public policy of identifying wrongdoers, the Court came down on the side of attorney-client privilege and denied the discovery.

If some of the responsible parties are known, a plaintiff can avoid a pre-lawsuit application altogether, and serve a summons with notice (CPLR 305(b) and 3012(a)), against the known defendants. Plaintiff can then move for the discovery from the known defendants upon receipt of the notice of appearance and demand for a complaint. While in either event a motion has to be made, if it is made after the summons with notice has been served, plaintiff need only purchase one index number and can serve the motion papers by mail on the attorneys who have appeared for the named defendants, as opposed to personally serving the respondents in a Special Proceeding.

## B. PRESERVATION OF EVIDENCE OR TESTIMONY

CPLR 3102(c) can also be invoked to preserve a key witness' testimony when it is clear the witness may shortly die, or flee the jurisdiction. In the latter case, the CPLR 3102(c) pre-lawsuit application can be much less cumbersome, and far quicker, than obtaining letters rogatory and commissions to depose an out of state witness after the lawsuit has begun. See *Matter of Davis*, 178 Misc.2d 65, 677 N.Y.S.2d 889, (N.Y. Ct. Cl. 1998) (prisoner with terminal lung cancer permitted

to depose himself in advance of contemplated action against the State for alleged negligent failure

to forward his chest x-ray to the hospital); Matter of Stanco, 254 A.D.2d 363, 678 N.Y.S.2d 301 (2d Dep't 1998) (pre-action preservation of testimony of plaintiff who was in extremis was warranted). Williams v. Bouchard Transp. Co., Inc., NYLJ, May 11, 2001, p 23, col 4 (Sup. Ct. Richmond Cty) (the fact that a key party or witness is in extremis or may become unavailable will support an application for pre-action preservation of witnesses' testimony).

The need to preserve information is not limited to testimony. In serious motor vehicle cases, and in products liability cases, it is often imperative to preserve and protect the vehicle, or to inspect or sequester the product, which is the centerpiece of the claim. If there is a valid concern that the item will be destroyed or discarded, the plaintiff may invoke CPLR 3102(c) to order preservation of the item. See Williams v. Bouchard Transportation Co., 5/11/01, N.Y.L.J. p.23, col.4 (Sup. Ct. Richmond Cty 2001) (court orders pre-lawsuit discovery and inspection of ladder used on a barge, because barge was capable of sailing out of New York waters); Spraggins v. Current Cab Corp., 127 Misc.2d 774, 487 N.Y.S.2d 292 (N.Y. Sup. Ct. 1985) (CPLR 3102(c) may be used to prevent taxi cab company from disposing of or altering remnants of a taxicab which had been totaled in a serious motor vehicle accident); Matter of Gonzalez v. UPS, N.Y.L.J. May 11, 2006, Col 3, Sup Ct. Nassau County. (Court permits inspection of conveyor belt at UPS facility and orders that machine's operating manuals and safety manuals be sent to Court for in camera inspection.)

### C. PRE-ACTION DISCOVERY TO AID IN ARBITRATION

Parties who are bound to submit their dispute to arbitration often have no specific mechanism in place to permit discovery prior to the arbitration. CPLR 3102(c) fills that gap by permitting pre-arbitration discovery by court order. The case law makes clear, however, that pre-arbitration discovery will only be granted if “special circumstances” exist. It is the strong preference of the courts that the parties obtain their discovery pursuant to arbitration rules, or by letter application to the arbitrator, and that they only use the Court as a last resort.

- \* De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 362 N.Y.S.2d 843 (1974) (while a court may order disclosure to aid in arbitration, it is a measure of the different place occupied by discovery in arbitration that courts will not order disclosure to aid in arbitration except under extraordinary circumstances.)
- \* Application of Timeplex, Inc., 87 A.D.2d 753, 449 N.Y.S.2d 3 (1st Dep’t 1982) (disclosure to aid in arbitration denied for lack of extraordinary circumstances);
- \* Katz v. State Dep’t of Correctional Services, 64 A.D.2d 900, 407 N.Y.S.2d 967 (2d Dep’t 1978) (pre-arbitration disclosure denied in the absence of extraordinary circumstances);
- \* Hooper v. MVAIC, 42 Misc.2d 446, 248 N.Y.S.2d 255 (Sup Ct. N.Y. County 1963) (disclosure to aid in arbitration must be based on necessity, not convenience);
- \* O’Keefe v. South Shore Internal Medicine Assoc., P.C., 102 Misc.2d 59, 422 N.Y.S.2d 828 (N.Y. Sup Ct 1979) (while a party can seek the court’s assistance in obtaining pre-arbitration discovery, the remedy is disfavored).

In SUM and uninsured motorist arbitrations, the courts generally will compel the claimant to undergo a pre-arbitration deposition and submit to a physical exam by the insurance carrier’s designated physician. See *Allstate Ins. Co. v. Baez*, 269 A.D.2d 392, 702 N.Y.S.2d 878 (2d Dep’t 2000); *State Farm Ins. Co. v. McManus*, 149 A.D.2d

311, 670 N.Y.S.2d 599 (2d Dep't 1998); State Farm Mutual Auto Ins. Co. v. Wernick, 90 A.D.2d 519, 455 N.Y.S.2d 30 (2d Dep't 1982).

**D. PROCEDURAL CONSIDERATIONS: PETITION FOR PRE-ACTION DISCLOSURE SHOULD TAKE THE FORM OF A SPECIAL PROCEEDING (CPLR Art. 4)**

Because CPLR 3102(c) requires a “court order” to obtain the desired pre-action discovery, it is incumbent on the movant to choose the appropriate procedural vehicle to

invoke the Court’s jurisdiction. That vehicle is a Special Proceeding, which is a creature of Article 4 of the CPLR. Article 4 of the CPLR requires that the parties be styled “petitioner” and

“respondent” (CPLR 401), and that the pleadings consist of a notice of petition, petition and answer.

(CPLR 402-403). The petition must comply with the requirements for a complaint.

Alternatively,

the application can be brought on by order to show cause (in lieu of notice of petition), which has

the advantage of a court-ordered return date and court-ordered method of service.

(CPLR 403). Remember, however, after the CPLR 3102(c) application is decided, and plaintiff

is ready to start the lawsuit, the plaintiff must purchase a new index number. The two index number rule was most poignantly brought home in the Court of Appeals decision in Harris v. Niagara Falls Board of Educ., 6 N.Y.3d 155, 811 N.Y.S.2d 299 (2006). In Harris, the plaintiff commenced a special proceeding to serve a late notice of claim

against a municipal entity. The application was successful, and shortly thereafter, plaintiff moved again by special proceeding to file a late notice of claim against additional municipal entities, using the same index number. He later commenced the lawsuit re-using this same index number, now for a third time. The defendant waited for the Statute of Limitations to expire and then moved to dismiss the lawsuit, arguing the Court had no subject matter jurisdiction because the plaintiff failed to obtain a new index number when he started the lawsuit. The Court of Appeals held that the plaintiff needed a new index number for his lawsuit, but declined to hold that the issue was one of subject matter jurisdiction. Recycling the index number was a technical defect which could be waived by a defendant who does not timely object. Here, however, the defendant had raised the defense in its answer, which defense the plaintiff had ignored to his peril, and the case was dismissed. The lesson is clear. After the special proceeding, obtain a new index number to start the lawsuit. The special proceeding must be brought in a court which would have subject matter jurisdiction of the claims later to be asserted. That is, the petition for pre-action disclosure should be brought in the same court plaintiff intends to bring the anticipated litigation. Thus, in *Perez v. New York Presbyterian Hosp.*, 11 Misc.3d 722, 811 N.Y.S.2d 914 (N.Y. Civil Ct. 2006), an application for pre-action disclosure of surveillance videotapes from a hospital respondent was brought in the Civil Court. The application was denied because the Civil Court's jurisdiction would not permit it to also entertain the underlying contemplated lawsuit. Similarly, in *Matter of Estate of Wallace*, 239 A.D.2d 14, 667 N.Y.S.2d 768 (3d Dep't 1998), the Surrogate's Court held that it had no jurisdiction to

hear an application for pre-action discovery to aid in bringing a future wrongful death claim, which lawsuit could only be heard in the Supreme Court.

#### E. PRE-ACTION DISCLOSURE IN FEDERAL COURT

Federal Rule of Civil Procedure 27 authorizes the federal court to order pre-action discovery to perpetuate testimony for later use in a lawsuit. To qualify for the disclosure, the party must demonstrate the expectation of a future lawsuit, identify the substance of the testimony which must be preserved and explain why it must be emergently perpetuated. The movant must also demonstrate the existence of a basis for federal jurisdiction.

Similar to New York practice, Rule 27(a) does not permit pre-lawsuit discovery to determine whether a cause of action exists. It merely permits preservation of testimony that would be useful in proving a known cause of action. *In re Wharton*, 1988 W.L. 134676 (E.D. Pa. 1988); *Petition of Johanason Glove*, 7 F.R.D. 156 (EDNY 1945).

FRCP 27 sets forth the procedural mechanism for obtaining the discovery, which includes a notice of petition and petition served in the manner of a summons and complaint.

## II SPOILIATION OF EVIDENCE

Spoliation is the destruction of evidence. The law imposes upon litigants and potential litigants the responsibility to preserve critical evidence when those parties are on notice that the evidence may be needed in a future litigation. When a litigant intentionally or negligently disposes of critical evidence, the Court may impose sanctions ranging from monetary penalties, to precluding proof on certain issues, to outright dismissal of the claim or defense.

- \* *DiDomenico v. C&S Aeromattick Supplies, Inc.*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dep't 1998) (answer of litigant stricken for purposeful destruction of critical evidence);
- \* *Kirkland v. New York City Housing Authority*, 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dep't 1997) (dismissal of third-party action appropriate where a stove, which was crucial evidence, was negligently destroyed);
- \* *Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243, 633 N.Y.S.2d 493 (1st Dep't 1995) (negligent loss of key piece of evidence supported dismissal of claim);
- \* *Dorsa v. National Amusements, Inc.*, 6 A.D.3d 652, 776 N.Y.S.2d 583 (2d Dep't 2004) (Defendant theater's destruction of its maintenance records in slip/fall case after being placed on notice of plaintiff's claim, warranted theater being precluded from offering evidence about the defective instrumentality (a water fountain) and warranted an adverse inference as to contents of the destroyed records);
- \* *Inframov v. Phoenix Industrial Gas, LLC*, 4 A.D.3d 332, 772 N.Y.S.2d 78 (2d Dep't 2004) (where loss of evidence did not fatally compromise the defense, spoliation sanction would be limited to adverse inference charge);
- \* *Rogala v. Syracuse Housing Authority*, 272 A.D.2d 888, 707 N.Y.S.2d 572 (2000) (appropriate sanction for defendant's unexplained failure to locate architect's drawings in slip and fall case was order precluding defendant from offering evidence of the drawings at trial).

The penalty to be imposed is dependent on the importance of the evidence which was lost or destroyed and the extent to which the aggrieved party is impaired in

presenting or defending the case. See *Tompkins v. Armstrong*, 7 Misc.3d 311, 793 N.Y.S.2d 736 (Sup Ct Kings Co. 2005); *N.Y. Central Mutual Fire Ins. Co. v. Turnerson's Electric, Inc.*, 280 A.D.2d 652, 721 N.Y.S.2d 92 (2d Dep't 2001). In appropriate circumstances, the spoliator will be sanctioned or suffer dismissal even if the loss was unintentional or occurred before the evidence was demanded by the adversary. See, e.g., *Shea v. Spellman*, 4 Misc.3d 1008(A), 791 N.Y.S.2d 873 (Sup Ct. Bronx Cty 2004). The issue is whether the spoliator should have known the evidence would be needed for future litigation. If the parties are impacted equally, "and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation of evidence." *De Los Santos v. Polanco*, 21 AD3d 376, 756 NYS2d 271 (2d Dep't 2003).

"Dismissal of a pleading is called for only where the loss of the subject evidence will fatally compromise the affected party's claim or defense or leave the party without the means to prosecute or defend the action," N.Y. PJI 1:90 commentary at p161. See *De Los Santos v. Polanco*, supra; *Cameron v. Nissan 112 Sales Corp.*, 10 AD3d 591, 781 N.Y.S.2d 661 (2d Dep't 2004). The rule is based on the principle that it is inherently unfair to allow a party to destroy evidence and then benefit from that conduct or omission.

The importance of preserving evidence and maintaining documentation was starkly brought home in the Second Department case of *Baglio v. St. John's Queens Hospital*, 303 A.D.2d 341, 755 N.Y.S.2d 427 (2d Dept 2003). *Baglio* was a brain injured infant medical malpractice case. The defendant hospital lost the fetal monitoring strips reflecting the baby's progress during labor. The Court struck the

hospital's answer for spoliation of critical evidence and the case, which involved very significant damages, proceeded as an inquest on damages only. But see, *Wisman ex rel. Millan v. Staten Island University Hospital*, 12 Misc.3d 1197(A), 824 N.Y.S.2d 770 (N.Y. Sup. Ct. 2006) (no sanction for loss of fetal monitoring strips by hospital in brain damaged infant case because the hospital was not on notice the strips might be needed for future litigation before the strips were lost).

#### A. SPOILIATION BY A NON-LITIGANT

Some decisions in New York recognized spoliation of evidence by a third party as an independent cause of action. See *Curran v. Auto Lab Service Center, Inc.*, 280 A.D.2d 636, 721 N.Y.S.2d 662 (2d Dep't 2001); *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dep't 1998); *Vaugh v. New York*, 201 A.D.2d 556, 607 N.Y.S.2d 726 (2d Dep't 1994). Other decisions rejected spoliation as an independent cause of action. See *Steinman v. Barclay's Bank*, 276 A.D.2d 436, 715 N.Y.S.2d 841 (1st Dep't 2000); *Fairdough v. Hugo*, 207 A.D.2d 707, 616 N.Y.S.2d 944 (1st Dep't 1994).

In 2004, the Court of Appeals weighed in on the issue of whether to recognize a cause of action for third party spoliation of evidence, and on narrow grounds, declined to do so. *Met Life Auto & Home v. Jose Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 775 N.Y.S.2d 754 (2004).

In *Met Life*, a fire started in a vehicle stored in a garage and then spread to the garage itself and an attached home. The homeowner's carrier, Met Life, paid for the

damage to the home. Before any lawsuit began, the automobile insurance carrier, Royal, took possession of the vehicle and agreed in a telephone conversation, to preserve it. Before commencement of the lawsuit, a group of potential parties to the suit arranged for an inspection of the vehicle, but by then Royal had destroyed the car. Met Life sued, and included an independent cause of action against Royal for spoliation of evidence. Royal moved to dismiss the claim. The Court concluded that the burden of forcing a party to preserve evidence when it had no notice of an impending lawsuit, and the difficulty of assessing damages, militated against establishing a cause of action for spoliation in the circumstances presented. Royal had no duty, court order, contract or special relationship requiring it to preserve the vehicle and therefore was not bound to do so. Nonetheless, the language in the decision left open the possibility of a third party spoliation claim if there was destruction of evidence in the face of a contractual duty or court order or some other basis for a duty to preserve the evidence.

Just last month the Court of Appeals laid to rest any lingering question whether New York permits an independent tort claim for third-party spoliation of evidence. It does not. *Ortega v. City of New York*, N.Y.L.J., Oct. 17, 2007, p 26, col. 1, 2007 W.L. 2988760 (2007). In *Ortega*, the City negligently destroyed a vehicle despite a court order to preserve it as an important piece of evidence for a potential products liability action. Serious injuries were sustained by the vehicle's occupants when the vehicle suddenly burst into flames. The injured plaintiffs never sued the vehicle manufacturer, but did assert damage claims for spoliation against the City. Citing public policy grounds, the Court of Appeals dismissed the claim, ruling that New York does not recognize spoliation of evidence as an independent tort claim.

The aggrieved plaintiff is not without a partial remedy against the third party who destroys critical evidence protected by a court order. An application can be made for civil contempt, which permits the aggrieved party to seek compensation from the contemnor. (Judiciary Law, Sec 773; State of New York v. Unique Ideas, Inc., 44 N.Y.2d 345, 405 N.Y.S.2d 656 (1978)). It seems unlikely, however, that such compensation will include recovery for personal injury or pain and suffering, which are damages which cannot proximately be attributed to the spoliation of the item or vehicle.

The lesson of Ortiz is clear. Litigants must take early and affirmative steps to identify critical items of evidence, move for court-ordered preservation of same, or at minimum, enter into written stipulations creating a duty to preserve and protect the evidence. If possible, secure the evidence in the hands of a party, who can then be subject to spoliation sanctions.

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