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CPLR 3101(a)(4): Pre-Subpoena Motion Required to Compel Disclosure by Nonparty Witness

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plaintiff's cause of action is endangered because attempts to satisfy a shifting standard will leave the plaintiff uncertain about the validity of nail and mail service.[105] Since the alternative method of nailing and mailing is reasonably calculated to apprise defendants of an action, there should be no renitence to construing due diligence liberally.[106]

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ARTICLE 31 — DISCLOSURE

CPLR 3101(a)(4): Pre-subpoena motion required to compel disclosure by nonparty witness

CPLR 3101(a)(4) authorizes full disclosure of all necessary and material evidence by "any person where the court on motion determines that there are adequate special circumstances."[107] While

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v. Macy, 236 N.Y. 412, 140 N.E. 938 (1923); Knox v. Beckford, 167 Misc. 200, 3 N.Y.S.2d 718 (Albany City Ct. 1938), *aff'd per curiam*, 258 App. Div. 823, 15 N.Y.S.2d 174 (3d Dep't 1939), *aff'd per curiam*, 285 N.Y. 762, 34 N.E.2d 911 (1941). The rationale for not allowing a 6-month extension where personal jurisdiction does not exist is that if service was improper, the suit was never commenced and thus there was no prior action to which the provisions of the statute could apply. Eisenthal v. Schatzberg, 39 Misc. 2d 330, 240 N.Y.S.2d 547 (Sup. Ct. Queens County 1963). *See generally* CPLR 205(a), commentary at 196 (1972); 1 WK&M ¶ 205.11. One commentator, however, maintains that if the defect is technical only and the defendant receives actual notice, the 6-month extension should apply. *See* SIEGEL § 52, at 54 (citing Amato v. Svedi, 35 App. Div. 2d 672, 315 N.Y.S.2d 63 (2d Dep't 1970)). Although it was unnecessary to resolve the issue, the Court of Appeals recently pointed out that this position conflicts with its holding in the *Smalley* case. George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 178, 390 N.E.2d 1156, 1160-61, 417 N.Y.S.2d 231, 236 (1979).

[105] The harsh consequences of retroactively applying a new standard of due diligence could be mitigated if the plaintiff were granted a 6-month extension under 205(a). *See generally* note 104 *supra*.

Where the plaintiff was not on notice regarding the requirements of due diligence, it is suggested that the defect could be considered "technical" so that CPLR 205(a) would apply under the facts in *Barnes*. *See id.*

[106] CPLR 308 creates a "hierarchy of alternative means of service." Dobkin v. Chapman, 21 N.Y.2d 490, 502, 236 N.E.2d 451, 457, 289 N.Y.S.2d 161, 170 (1968). Due diligence is the mechanism used to guarantee that methods which are most likely to give the defendant notice will be used in the first instance. If the preferred methods of personal delivery and delivery and mail are seriously attempted, but to no avail, nail and mail service seems to be "reasonably calculated, under all the circumstances," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), to give the defendant notice.

[107] CPLR 3101(a)(4) provides:

> There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
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> . . .
>
> (4) any person where the court on motion determines that there are adequate special circumstances.

some courts have interpreted the provision to delimit the scope of disclosure,[108] others have used it to establish the procedure for obtaining the oral deposition of a nonparty witness.[109] Notwithstanding the statutory language indicating the necessity of a motion, nonparty witnesses have been routinely subpoenaed without court orders.[110] Recently, however, in *Kurzman v. Burger*,[111] the Supreme Court, New York County, held that CPLR 3101(a)(4) requires an

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The "material and necessary" phrase of CPLR 3101(a)(4) is derived from its predecessor, CPA § 288. In an effort to emulate the more liberal federal standard, the draftsmen of the CPLR abandoned these qualifiers and substituted the broader criterion of "all relevant evidence and all information reasonably calculated to lead to relevant evidence." FIRST REP. 117; *see* SIEGEL § 344, at 420-21. *See also* FED. R. CIV. P. 26(b). The legislature, however, rejected the "relevance" language and reinstated the "material and necessary" limitation of CPA § 288. SIEGEL § 344, at 420-21. Subsequently, the Court of Appeals in Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), held that the material and necessary test should be "one of usefulness and reason." *Id.* at 406-07, 235 N.E.2d at 432, 288 N.Y.S.2d at 452. In effect, the *Allen* Court established a "relevance" standard, setting the tone of liberal construction for all disclosure devices, in accordance with the original intent of the Advisory Committee on practice and procedure. *See* CPLR 3101, commentary at 11 (1970); SIEGEL § 344, at 421; 3A WK&M ¶ 3101.07, at 31-37.

The "special circumstances" requirement of CPLR 3101(a)(4) is a holdover from § 288 of the CPA. Early decisions under the CPLR held that the requirement could be met by a showing of hostility in a witness. *See, e.g.*, Polisar v. Linz, 39 App. Div. 2d 544, 331 N.Y.S.2d 742 (2d Dep't 1972); *In re* Estate of Macku, 29 App. Div. 2d 539, 285 N.Y.S.2d 973 (2d Dep't 1967). More recent cases, however, construe the test to require only a "mere showing" that the witness's pretrial deposition is necessary to prepare fully for trial. *E.g., In re* Catskill Center For Conservation and Dev., Inc. v. Voss, 63 App. Div. 2d 1091, 416 N.Y.S.2d 881, 883 (3d Dep't 1979) (mem.); Villano v. Conde Nast Publications, Inc., 46 App. Div. 2d 118, 120, 361 N.Y.S.2d 351, 353 (1st Dep't 1974); Kenford Co. v. County of Erie, 41 App. Div. 2d 586, 586, 340 N.Y.S.2d 300, 302 (4th Dep't 1973). Thus, the "special circumstances" and "material and necessary" standards appear to be similar, if not identical. *See generally* CPLR 3101, commentary at 11, Supp. at 8 (1970 & Supp. 1979-1980). The liberal construction of the special circumstances rule is consistent with the Court of Appeals decision in *Allen*. *See* CPLR 3101, commentary at 26 & 27 (1970); 3A WK&M ¶ 3101.32, at 31-89.

[108] *See* Muss v. Util. & Indus. Corp., 61 Misc. 2d 642, 642, 305 N.Y.S.2d 540, 541 (Sup. Ct. Nassau County 1969); Bush Homes, Inc. v. Franklin Nat'l Bank, 61 Misc. 2d 495, 496, 305 N.Y.S.2d 646, 648, (Sup. Ct. Nassau County 1969); CPLR 3101, commentary at 7 (1970); SIEGEL § 344, at 420; 3A WK&M ¶ 3102.01, at 31-159 to -160. In *Bush*, the court noted that CPLR 3101(a)(4) was not meant to establish procedural rules, but to define the scope of disclosure generally. 61 Misc. 2d at 496, 305 N.Y.S.2d at 648. Taking this view, the remainder of Article 31 deals with the various methods of implementing disclosure. *See* CPLR 3101, commentary at 7 (1970); SIEGEL, § 344, at 420; 3A WK&M ¶ 3102.01, at 31-159.

[109] *See* Simon & Schuster, Inc. v. Atheneum Publishers, Inc., N.Y.L.J., May 4, 1976, at 6, col. 2 (Sup. Ct. N.Y. County); Granoff v. Ayerst Laboratories, N.Y.L.J., January 29, 1975, at 15, col. 8 (Sup. Ct. N.Y. County).

CPLR 3106(b) sets forth the power to subpoena nonparty witnesses for disclosure purposes while Rule 3107 requires the examining litigant to give notice of the time and place of the examination to all necessary participants. *See* SIEGEL § 351, at 436.

[110] *E.g.*, Gates v. State, 72 Misc. 2d 844, 846, 339 N.Y.S.2d 568, 571 (Ct. Cl. 1972); CPLR 3101, commentary at 28 (1970); SIEGEL § 351, at 436.

[111] 98 Misc. 2d 244, 413 N.Y.S.2d 609 (Sup. Ct. N.Y. County 1979).

attorney to proceed by motion in the first instance when seeking to depose a potential nonparty witness.[112]

In *Kurzman,* the plaintiff served a nonparty with a subpoena in order to obtain his oral deposition.[113] In response, the defendant moved for a protective order under CPLR 3103 to vacate the subpoena, claiming that no "adequate special circumstances" justified examining the nonparty.[114] Without reaching the defendant's contention, the court quashed the subpoena as a violation of the "express mandate" of CPLR 3101(a)(4) to proceed initially by motion.[115]

Presiding Justice Egeth initially emphasized that *Kurzman* should not be interpreted as a retreat from the trend toward liberalized disclosure, but as an effort to clarify the proper method of obtaining pretrial examination.[116] Reasoning that CPLR 3101(a)(4), 3106(b) and 3107 should be construed as a cumulative statement of the procedure for nonparty disclosure, the court found that the statutory scheme demands an application to the court prior to the issuance of a subpoena.[117]

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[112] *Id.* at 244-45, 413 N.Y.S.2d at 609.

[113] *Id.; see* CPLR 2301 (1974).

[114] 98 Misc. 2d at 244-45, 413 N.Y.S.2d at 609. A court, in its discretion, may issue a protective order to limit, condition, regulate or bar the use of any disclosure device. CPLR 3103 (1970). The provision states that it is "designed to prevent unreasonable annoyance, expense, embarassment, disadvantage, or other prejudice to any person or the courts." *Id.* The language indicates that the CPLR framers intended to accord the provision a broad policing function over the entire disclosure proceedings. *See* CPLR 3103, commentary at 298 (1970). As the draftsmen suggested, "[t]here is no limit but the needs of the parties or the nature of the order or the conditions of discovery." FIRST REP. 124; *see* CPLR 3103, commentary at 298 (1970); 3A WK&M ¶ 3103.01, at 31-192 to -201.

[115] 98 Misc. 2d at 245, 413 N.Y.S.2d at 609.

[116] *Id.,* 413 N.Y.S.2d at 609-10. The court specifically noted the liberal standard for disclosure established in Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), and the generous criterion applied in determining the adequacy of special circumstances pursuant to CPLR 3101(a)(4). Kenford Co. v. County of Erie, 41 App. Div. 2d 586, 340 N.Y.S.2d 300 (4th Dep't 1973). *Id.; see* note 107 *supra.*

[117] 98 Misc. 2d at 246, 413 N.Y.S.2d at 610. Justice Egeth emphasized that the following statutes should be read collectively:

> (CPLR) 3101(a)(4) — "any person where the *court on motion* determines that there are adequate special circumstances."
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> (CPLR) 3106(b) — "Witnesses. Where the person to be examined is not a party . . . *he shall be served with a subpoena.* Unless the Court *orders otherwise, on motion* . . . such subpoena shall be served at least ten days before the examination."
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> (CPLR) 3107 — "A party desiring to take the *deposition of any person* upon oral examination *shall give to each party ten days notice unless the court* orders *otherwise* . . . ."

Id. (emphasis added by the court). In considering 3101(a)(4) separately, the *Kurzman* court also found it necessary to require a motion. *Id.* Whether construed together or independently,

The *Kurzman* court also found that the absence of a preliminary motion places an unfair burden upon a nonparty witness.[118] Discovery without motion to the court would force a nonparty either to ignore the subpoena and hazard a contempt charge[119] or seek a protective order and bear the expense and inconvenience of litigation fees.[120] Moreover, a nonparty witness seeking a protective order would be required to guess at the object of his examination and speculate on the "appropriate grounds to justify the invalidation of the subpoena."[121] By requiring a motion setting forth the grounds upon which discovery is sought, however, Justice Egeth reasoned that a court would be able to excise specious claims. In addition, the burden of coming forward would be placed upon the party best fitted to that role — the examining litigant.[122]

In light of the dearth of judicial precedent in this area, the *Kurzman* case marks a significant step in the evolution of nonparty disclosure procedure. It is submitted, however, that CPLR 3101(a)(4) was not intended to enumerate specific procedural rules, but to "state in general terms what may and may not be the subject of disclosure."[123] The court's literal reading of CPLR 3101(a)(4) re-

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the court determined that the requirement of a motion was needed "[t]o give full effect to [subsection (a)(4) of CPLR 3101], and to implement its full meaning in a context with the other statutory provisions . . . ." *Id.; see* Bonito Maritime Corp. v. St. Paul Mercury Ins. Co., 68 App. Div. 2d 864, 414 N.Y.S.2d 1022 (1st Dep't 1979) (Fein, J., concurring).

[118] 98 Misc. 2d at 248, 413 N.Y.S.2d at 611-12. Justice Egeth's strict interpretation of CPLR 3101(a)(4) appears to have been strongly influenced by several opinions authored by Justice Fein while a member of the Supreme Court, New York County. *See* Simon & Schuster, Inc. v. Atheneum Publishers, Inc., N.Y.L.J., May 4, 1976, at 6, col. 2 (Sup. Ct. N.Y. County); Granoff v. Ayerst Laboratories, N.Y.L.J., January 29, 1975, at 15, col. 8 (Sup. Ct. N.Y. County). In cases decided after *Kurzman,* Justice Fein has continued his literal construction of CPLR 3101(a)(4). *See* Plummer v. R.H. Macy & Co., 69 App. Div. 2d 765, 414 N.Y.S.2d 921 (1st Dep't 1979) (Fein, J., concurring); Bonito Maritime Corp. v. St. Paul Mercury Ins. Co., 68 App. Div. 2d 864, 414 N.Y.S.2d 1022 (1st Dep't 1979) (Fein, J., concurring).

[119] 98 Misc. 2d at 248-49, 413 N.Y.S.2d at 612. CPLR 2308(a) (1974) provides in pertinent part: "Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as contempt of court." *Id.* Included within this ambit is the subpoena issued by an examining attorney to a nonparty witness. CPLR 2308, commentary at 247 (1974). The disobedient party is also liable to the examining party for any actual damage his noncompliance causes. CPLR 2308(a) (1974); *see* SIEGEL § 385, at 503.

[120] 98 Misc. 2d at 249, 413 N.Y.S.2d at 612; *see* Bonito Maritime Corp. v. St. Paul Mercury Ins. Co., 68 App. Div. 2d 864, 865, 414 N.Y.S.2d 1022, 1023 (1st Dep't 1979) (Fein, J., concurring).

[121] 98 Misc. 2d at 249, 413 N.Y.S.2d at 612.

[122] *Id.* The court believed that the burden should rest on "a party with a financial stake in the action" and not "upon the noninvolved nonparty who most often has no financial stake in the outcome of the litigation." *Id.*

[123] Bush Homes, Inc. v. Franklin Nat'l Bank, 61 Misc. 2d 495, 496, 305 N.Y.S.2d 646, 648 (Sup. Ct. Nassau County 1969); *see* 3A WK&M ¶ 3101.33, at 31-92; note 107 *supra.*

quiring a motion in the first instance appears inconsistent with the policy considerations underlying the disclosure provisions of Article 31 and deficient in providing the protection to a nonparty witness which the decision envisions. The express intent of the CPLR framers in enacting the disclosure article was to "prevent overburdening [the] courts with a large number of motions . . ." and establish "maximum control and supervision of litigation by the parties rather than the courts."[124] Indeed, the drafter's intentions could be effectuated without doing violence to the precise wording of CPLR 3101(a)(4) by use of the broad safeguards built into the protective order mechanism of Article 31.[125]

While CPLR 3101(a)(4) states that court review is necessary to establish the existence of special circumstances, "a mere showing by an attorney that the deposition is necessary to prepare fully for trial" will apparently satisfy this requirement.[126] Indicative of the

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[124] FIRST REP. 114. A primary disadvantage of compelling a preliminary application by motion is the inefficient use of judicial time it engenders. *See* Spector v. Antenna & Radome Research Assocs. Corp., 25 App. Div. 2d 569, 569-70, 267 N.Y.S.2d 843, 844 (2d Dep't 1966). Under the rule mandating an initial motion, where a nonparty witness or adverse party moves for a protective order pursuant to CPLR 3103 the court would be required to reexamine evidence which, for the most part, it had already passed upon. As the *Spector* court stated, "what might have been determined in one sitting will have required two determinations with at least part, if not all, of the previous motion papers subject to an unnecessary review." *Id.* at 570, 267 N.Y.S.2d at 844; *accord,* Bush Homes, Inc. v. Franklin Nat'l Bank, 61 Misc. 2d 495, 496, 305 N.Y.S.2d 646, 648-49 (Sup. Ct. Nassau County 1969). By examining the adequacy of the special circumstances only upon motion for a protective order after subpoena, the court avoids unnecessary duplicity and maintains intact the rights of the nonparty. *See* Gates v. State, 72 Misc. 2d 844, 846-47, 339 N.Y.S.2d 568, 571 (Ct. Cl. 1972) (citing Spector v. Antenna & Radome Research Assocs. Corp., 25 App. Div. 2d 569, 267 N.Y.S.2d 843 (2d Dep't 1969); note 114 *supra.*

Justice Egeth also predicated the necessity of a preliminary motion on the ground that it is a useful mechanism to prevent attorneys from examining a plethora of witnesses. 98 Misc. 2d at 249, 413 N.Y.S.2d at 612. The protective order, issued as a result of a motion by an adverse party or, far more rarely, by the court sua sponte, can effectively and more efficiently curb this potential abuse. *See* FIRST REP. 124; SIEGEL § 353. Since the adverse party normally applies for the protective order on the witnesses' behalf, *id.,* the recalcitrant witness often will be relieved of the burden and expense of litigation. On balance, it appears that the protective order can serve the primary functions ascribed to a presubpoena motion while obviating its major disadvantage of needlessly increasing motion practice.

[125] *See* note 114 *supra.* The language of CPLR 3101(a)(4) identifying a "motion" can be interpreted as referring to a motion for a protective order made subsequent to the issuance of a subpoena rather than as a procedural requirement for a presubpoena application to the court. This construction is consistent with the general tenor of Article 31, which allows discovery to proceed with minimal court involvement and with maximum control by the parties. *See* note 124 & accompanying text *supra.*

[126] Kenford Co. v. County of Erie, 41 App. Div. 2d 586, 586, 340 N.Y.S.2d 300, 302 (4th Dep't 1973) (quoting CPLR 3101, commentary at 27 (1970)); *see In re* Catskill Center for Conservation and Dev., Inc. v. Voss, 63 App. Div. 2d 1091, 416 N.Y.S.2d 881, 883 (3d Dep't 1979); note 107 *supra.*

generous construction normally accorded motions for disclosure,[127] this inclusive definition makes it highly unlikely that an examining attorney's motion will be denied. Thus, the protection afforded a nonparty witness under the *Kurzman* rule appears minimal.[128] The intention of the CPLR draftsman would seem to be better served by shifting the burden of coming forward to the adverse party or potential witness. By adjudicating a motion for a protective order, the court can effectively and efficiently determine the adequacy of the special circumstances.[129] In this light, the *Kurzman* court's interpretation dictating a pre-subpoena motion appears too rigid.

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ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Unconditional summary judgment may not be granted against unpleaded cause of action asserted in plaintiff's submissions in response to motion

Under CPLR 3212, summary judgment must be denied upon a showing sufficient to require a trial on any factual issue.[130] Whether

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[127] *See* note 107 *supra;* SIEGEL § 344, at 421; 3A WK&M ¶¶ 3101.04, .07, .08.

[128] Since a motion for a subpoena usually will be granted, *see* note 107 *supra,* it appears that dispensing with the motion will be the most economic mechanism for articulating complaints and correcting abuses. The *Kurzman* court's reading of CPLR 3101(a)(4) to require a court order in every instance, however, seems wastefully nonselective in its breadth. *See* CPLR 3101, commentary at 28 (1970). The protective order, on the other hand, appears to be a better mechanism for judicial review because, by its nature, it would be invoked discriminately.

[129] *See* note 128 *supra.*

[130] CPLR 3212(b) (Supp. 1979) provides:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit . . . shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.

To move successfully under CPLR 3212(b) a party must show all the necessary evidentiary facts and prove that, as a matter of law, no defense is available to preclude relief in his favor. In order to defeat the summary judgment motion, the opposing party must show facts "having probative value sufficient to demonstrate an unresolved material issue." 4 WK&M ¶ 3212.12; *see, e.g.,* Piedmont Hotel Co. v. A.E. Nettleton Co., 263 N.Y. 25, 188 N.E. 145 (1933); Cattonar v. Edward Ermold Co., 279 App. Div. 564, 107 N.Y.S.2d 269 (1st Dep't 1951).

Where damages is the only triable issue, or the basis of the motion is one of the grounds set forth in CPLR 3211(a) or (b), the court may order an immediate trial on those issues.