St. John's Law Review

Volume 59
Number 3 *Volume 59, Spring 1985, Number 3*

Article 10

June 2012

CPLR 3025(c): Amendment of the Pleadings to Conform to the Evidence Adduced at Trial Precluded When Proposed Amendment Would Add New Theory of Liability Based on Previously Unpleaded Facts Resulting in Prejudice

Nancy L. Montmarquet

Nevertheless, *Eisenbach* is a strong reminder of the Court's rapidly developing determination to reverse the expansion of the tolling provision accomplished through past litigation.

Thomas Infurna

CPLR 3025(c): Amendment of the pleadings to conform to the evidence adduced at trial precluded when proposed amendment would add new theory of liability based on previously unpleaded facts resulting in prejudice

The CPLR mandates that pleadings be liberally construed[1] to

---

1980) (discussing different uses of various analgesics in treatment of pain). It is suggested that the penalization of individuals suffering, albeit temporarily, from these afflictions, conflicts with the legislative goal of protecting litigants who already "have difficulty enough." *See* SECOND REP. at 58.

---

[1] *See* CPLR 3026 (1974). CPLR 3026 provides:

> Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.

Id. In addition to CPLR 3026, other provisions of the CPLR counsel against a rigid construction of the pleadings. *See, e.g.*, CPLR 3013 (1974) (requiring statements made in pleading to be "*sufficiently* particular") (emphasis added); CPLR 3017(a) (Supp. 1984-1985) (allowing court to grant "any type of relief . . . appropriate to the proof whether or not demanded"); CPLR 3025(b) (1974) (requiring leave to amend pleading to be freely given).

One of the major accomplishments of the CPLR was the liberalization of pleadings. SIEGEL § 207, at 244. The Civil Practice Act, which preceded the CPLR, prohibited the pleading of evidence and required that pleadings state only material facts. *See* CPA § 241 (repealed 1963). These rigid pleading requirements of the CPA were abandoned by the CPLR, which simply requires that the pleadings give the adverse party "notice" of the "transactions [or] occurrences . . . intended to be proved" and indicate "the material elements of each cause of action or defense." *See* CPLR 3013 (1974). Generally, "if [any] cause of action can be spelled out from the four corners of the pleading," then the pleading is acceptable under the CPLR. *See* SIEGEL § 208, at 245.

In addition to the rejection of strict pleading requirements, the CPLR abandoned the "theory of the pleadings" rule, which permitted a party to recover only on the theory pleaded in his complaint. *See id.* § 209, at 247.

Soon after the enactment of the CPLR, the judiciary embraced the policy of liberality contained in the CPLR in Foley v. D'Agostino, 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). *See* SIEGEL § 208, at 246. In *Foley*, the First Department vacated an order dismissing a complaint for failure to state a cause of action because the pleadings, "when viewed with reason and liberality," were " 'sufficiently particular' " to give the defendants notice of the claims and their material elements. 21 App. Div. 2d at 68-69, 248 N.Y.S.2d at 129-30. The court noted:

ensure the full and fair litigation of a controversy.[2] Section 3025(c) of the CPLR promotes this policy by permitting amendments of the pleadings before or after judgment to conform them to the evidence adduced at trial.[3] It is within the discretion of the courts to allow such amendments "upon such terms as may be just,"[4] pro-

---

> Where a pleading is attacked for alleged inadequacy in its statements, our inquiry should be limited to "whether it states in some recognizable form any cause of action known to our law" . . . "However imperfectly, informally or even illogically the facts may be stated, a complaint . . . is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment.' "

Id. at 65, 248 N.Y.S.2d at 127 (citations omitted). The court added that all pleading problems should be viewed in light of the CPLR mandate that pleadings " 'shall be liberally construed' " and defects ignored unless a substantial right of a party is prejudiced. *Id.* The goal of the CPLR mandate, according to the court, is to facilitate the timely disposition of an action on the merits and to "discourage time-consuming pleading attacks." *Id.* at 65-66, 248 N.Y.S.2d at 127; *see also* Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23, 429 N.E.2d 90, 91, 444 N.Y.S.2d 571, 572 (1981) (one of goals of CPLR is liberalization of pleading practice).

[2] *See* Rife v. Union College, 30 App. Div. 2d 504, 505, 294 N.Y.S.2d 460, 462 (3d Dep't 1968); Foley v. D'Agostino, 21 App. Div. 2d 60, 65 n.2, 248 N.Y.S.2d 121, 127 n.2 (1st Dep't 1964); Martin v. Katz, 15 App. Div. 2d 767, 767, 224 N.Y.S.2d 311, 311 (1st Dep't 1962) (mem.); *see also* CPLR 104 (1974) (CPLR shall be "liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding").

[3] CPLR 3025(c) (1974). Section 3025(c) of the CPLR provides:

> The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

Id. Section 3025(c) is "really an adjunct of the liberalization of pleadings," SIEGEL § 404, at 532, whose purpose is to "divest of impact unprejudicial variances between pleadings and proof," *id.* at 532-33, and to ensure that the pleadings reflect the case as it actually was tried, *id.*; *see* 3 WK&M ¶ 3025.26, at 30-621 to 30-625.

An amendment to conform the pleadings to the proof may be made by the motion of a party, 3 WK&M ¶ 3025.29, at 30-628, or by the court *sua sponte*, SIEGEL § 404, at 533; *see* Suburban Lawn Serv. v. Allstate Ins. Co., 68 Misc. 2d 1010, 1012, 328 N.Y.S.2d 583, 586 (Dist. Ct. Suffolk County 1972), and will be granted freely in the absence of prejudice, *see* SIEGEL § 404, at 532; *infra* note 5 & accompanying text. Absent prejudice, the amendment may be permitted during or after the trial, Murray v. City of New York, 43 N.Y.2d 400, 405, 372 N.E.2d 560, 562, 401 N.Y.S.2d 773, 775 (1977); Dittmar Explosives v. A.E. Ottaviano, Inc., 20 N.Y.2d 498, 502, 231 N.E.2d 756, 758, 285 N.Y.S.2d 55, 58 (1967), or on appeal for the first time, *see* Diemer v. Diemer, 8 N.Y.2d 206, 211-12, 168 N.E.2d 654, 658, 203 N.Y.S.2d 829, 834 (1960); Dampskibsselskabet Torm A/S v. P.L. Thomas Paper Co., 26 App. Div. 2d 347, 352, 274 N.Y.S.2d 601, 606-07 (1st Dep't 1966).

[4] CPLR 3025(c) (1974). The condition clause of section 3025(c) is identical to the clause found in 3025(b); both require amendments to be granted "upon such terms as may be just including the granting of costs and continuances." *Compare* CPLR 3025(c) (1974) (amendment of pleadings to conform with evidence) *with* CPLR 3025(b) (1974) (amendment of pleadings by leave of court to set forth additional transactions and occurrences). A court, therefore, has the same discretionary ability to impose conditions or terms in amending a pleading after trial as it does in amending a pleading before or during trial. *See* 3 WK&M ¶ 3025.30, at 30-630. Conditions are imposed by a court in the interests of justice to alleviate

vided that no prejudice will result to a party.[5] The determination of what constitutes sufficient prejudice to preclude an amendment remains the subject of much uncertainty and often depends upon the facts and circumstances of a particular case.[6] Recently, in *DiMauro v. Metropolitan Suburban Bus Authority*,[7] the Appellate Division, Second Department, declined a CPLR 3025(c) amendment of a third-party complaint because of the prejudicial impact

---

any adverse or prejudicial effect that may result to a party from an amendment of the pleadings. *See* CARMODY-WAIT 2d, *New York Practice*, § 34:47, at 134; 3 WK&M ¶ 3025.30, at 30-630. The two most commonly used conditions are those specifically mentioned in the statute, namely costs and continuances. 3 WK&M ¶ 3025.21, at 30-608; ¶ 3025.30, at 30-631. Costs are generally awarded to reimburse a party for additional expenses incurred as a result of an amended pleading. *Id.*; *see, e.g.*, Mirabella v. Banco Indus., 34 App. Div. 2d 630, 631, 309 N.Y.S.2d 400, 401 (1st Dep't 1970) (per curiam) (amendment to add new defense conditioned upon defendant paying plaintiff costs of litigating new issue). Continuances are generally granted when a party requires additional time to address an issue added or changed by an amended pleading. 3 WK&M ¶ 3025.21, at 30-608; *see infra* note 23.

[5] *See* Young v. Zwack, 98 App. Div. 2d 913, 914, 471 N.Y.S.2d 175, 176 (3d Dep't 1983); Sharkey v. Locust Valley Marine, Inc., 96 App. Div. 2d 1093, 1094, 467 N.Y.S.2d 61, 63 (2d Dep't 1983); *see also* SIEGEL § 404, at 532 (courts today are quite free with amendment provided no party can claim prejudice based on it). It is an abuse of discretion, as a matter of law, for a court to refuse a motion to amend the pleadings to conform them to the evidence in the absence of surprise or prejudice. *Young*, 98 App. Div. 2d at 914, 471 N.Y.S.2d at 176; *see* Fahey v. County of Ontario, 44 N.Y.2d 934, 935, 380 N.E.2d 146, 147, 408 N.Y.S.2d 314, 315 (1978) (mem.); Fultonville Frozen Foods, Inc. v. Niagara Mohawk Power Corp., 91 App. Div. 2d 732, 733, 457 N.Y.S.2d 978, 980 (3d Dep't 1982).

Surprise is the key determinant of the existence of prejudice. *See* SEIGEL § 404, at 532. Prejudice will be found when a party could not reasonably have been expected to be prepared for the variance between the pleading and the proof adduced at trial. *See* CPLR 3025, commentary at 486 (McKinney 1974). Prejudice in this context must be traceable to a party's failure to include certain matters in the original pleading which the amended pleading seeks to add. *See* Wyso v. City of New York, 91 App. Div. 2d 661, 662, 457 N.Y.S.2d 112, 113 (2d Dep't 1982) (quoting SIEGEL § 237, at 289).

The Court of Appeals has defined prejudice in the context of a pleading amendment as follows:

> Prejudice . . . is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.

Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23, 429 N.E.2d 90, 92, 444 N.Y.S.2d 571, 573 (1981) (holding that post-verdict amendment increasing amount of relief requested in *ad damnum* clause was not prejudicial because plaintiff had provided list of damages prior to hearing and defendant's expert had opportunity to investigate damages).

[6] *Compare* Diemer v. Diemer, 8 N.Y.2d 206, 211, 168 N.E.2d 654, 658, 203 N.Y.S.2d 829, 834 (1960) (amendment to change theory of separation action from cruelty to abandonment not prejudicial) *with* Maulella v. Maulella, 90 App. Div. 2d 535, 536-37, 455 N.Y.S.2d 103, 106 (2d Dep't 1982) (proposed amendment to change theory of divorce action from cruelty and abandonment to adultery deemed prejudicial); *see infra* notes 25-26 and accompanying text.

[7] 105 App. Div. 2d 236, 483 N.Y.S.2d 383 (2d Dep't 1984).

of evidence produced at trial that introduced an alternate theory of liability into the case.[8]

In *DiMauro*, the plaintiff was injured while riding as a passenger in an automobile owned and operated by her daughter, the third-party defendant, when the car was involved in a collision with a bus owned by the defendant, Metropolitan Suburban Bus Authority (MSBA).[9] The plaintiff was not wearing a seat belt at the time of the accident because the one at her seat was inoperable.[10] The plaintiff commenced a personal injury action against the MSBA and the driver of the bus.[11] The defendants asserted a "seat belt" defense[12] and impleaded the owner and operator of the automobile in which the plaintiff was riding, alleging that the vehicle was operated in a negligent manner.[13] At trial, the defendants introduced expert testimony to establish that the plaintiff would not have been injured if she had worn a seat belt.[14] This testimony was admitted to substantiate the "seat belt" defense and to support the defendant's contention that the third-party defendant should be liable for that part of the plaintiff's injuries caused by her failure to provide the plaintiff with an operable seat belt.[15]

---

[8] *Id.* at 240-41, 483 N.Y.S.2d at 388-89.

[9] *Id.* at 237, 483 N.Y.S.2d at 386.

[10] *Id.* at 238, 483 N.Y.S.2d at 386. In *DiMauro*, both the plaintiff and the third-party defendant were aware of the fact that the seat belt was not working. *Id.* However, three other seats in the automobile had operable seat belts and were available for use by the plaintiff.

[11] *Id.*

[12] *Id.* Under the well-established rule of Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974), the failure to use an available seat belt can be considered in mitigation of a plaintiff's damages. *See id.* at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920; *DiMauro*, 105 App. Div. 2d at 242, 483 N.Y.S.2d at 390.

In *DiMauro*, the court asserted that the plaintiff's decision to ride in the only seat not possessing a functioning seat belt constituted the "functional equivalent" of "nonuse of an available seat belt." 105 App. Div. 2d at 243, 483 N.Y.S.2d at 390. The court maintained, therefore, that such circumstances could be considered in mitigation of damages. *Id.* at 243-44, 483 N.Y.S.2d at 390.

[13] *DiMauro*, 105 App. Div. 2d at 238, 483 N.Y.S.2d at 386. The defendants also commenced a third-party action against the owner-operator of a third vehicle involved in the collision, but this action was dismissed during the course of the trial. *Id.* at 238 n.2, 483 N.Y.S.2d at 386 n.2.

[14] *Id.* at 238, 483 N.Y.S.2d at 387.

[15] *See id.* In *DiMauro*, the lower court, contrary to the rule of *Spier v. Barker*, *see supra* note 12, erroneously allowed the jury to determine whether the third-party defendant was negligent in failing to furnish the plaintiff with an operable seat belt. *DiMauro*, 105 App. Div. 2d at 242, 483 N.Y.S.2d at 389. This instruction permitted the jury to apportion liability against the third-party defendant twice, once on the issue of liability for causing the collision, and once on the issue of liability for producing the plaintiff's injuries. *Id.* at 242-

When the defective seat belt issue was raised, the third-party defendant requested an adjournment in order to procure her own seat belt expert, but the request was denied.[16] The Supreme Court, Trial Term, entered a judgment for the plaintiff and apportioned liability among the plaintiff, the defendants, and the third-party defendant.[17]

In an appeal by both the plaintiff and the third-party defendant, the Appellate Division reversed the judgment of the trial court and ordered a new trial.[18] The court explained that the third-party complaint, which alleged only negligence in the manner in which the third-party defendant had "operated" her vehicle, was insufficient notice that her alleged negligence in failing to repair or replace the defective seat belt would be a matter in controversy.[19] This lack of notice, the court reasoned, was prejudicial to the third-party defendant because it resulted in her inability to retain a seat belt expert who could refute the testimony offered by the defendants' expert.[20]

Justice Gibbons, writing for the court, determined that the prejudicial impact on the third-party defendant by the addition at trial of a new theory of liability supported by new facts precluded

---

43, 483 N.Y.S.2d at 390.

[16] *DiMauro*, 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389.

[17] *Id.* at 237, 483 N.Y.S.2d at 386. The jury determined that the plaintiff was 30% responsible and the third-party defendant, 50% responsible. *Id.*

[18] *Id.*

[19] *Id.* at 239, 483 N.Y.S.2d at 387-88. CPLR 3013, the basic pleading statute, requires that statements in a pleading be "sufficiently particular" to notify the parties of the transactions and occurrences that will be addressed at trial. *See* CPLR 3013; SIEGEL § 208, at 245. The *DiMauro* court noted that "the essential facts required to give notice of a claim or defense must generally appear on the face of the pleading, and conclusory allegations will not suffice." 105 App. Div. 2d at 239, 483 N.Y.S.2d at 387 (citations omitted). The *DiMauro* court maintained, therefore, that "the third-party complaint failed in its essential purpose to focus the court's and the parties' attention on the principal facts and issues to be decided at the trial" because "the word 'operated' cannot fairly be said to encompass, for the purpose of giving notice, the question of maintaining the seat belts in proper working order." *Id.* at 239, 483 N.Y.S.2d at 387-88 (citations omitted). It is submitted that the *DiMauro* court's determination that the third-party complaint was insufficient on its face to give notice of the seat belt issue was a correct analysis of the pleading requirements.

[20] *DiMauro*, 105 App. Div. 2d at 240, 483 N.Y.S.2d at 388. Justice Gibbons observed that the procurement of a seat belt expert by the third-party defendant was essential to the presentation of an appropriate defense on the contribution claim. *Id.* The court applied the definition of prejudice outlined by the Court of Appeals in Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23, 429 N.E.2d 90, 92, 444 N.Y.S.2d 571, 573 (1981); *see supra* note 5, to determine that the lack of notice on the seat belt issue was prejudicial to the third-party defendant. *DiMauro*, 105 App. Div. 2d at 240, 483 N.Y.S.2d at 388.

an amendment of the pleadings to conform them to the evidence.[21] Although the defective seat belt issue may actually have been revealed to the third-party defendant during discovery, the court maintained that such personal knowledge would not preclude a claim of prejudice because a party cannot be expected to address every cognizable theory of liability arising from an unpleaded set of facts.[22] Finally, the court concluded that Trial Term's refusal to grant an adjournment to allow the third-party defendant the opportunity to procure the services of a seat-belt expert, was an abuse of discretion because such a witness was necessary to the presentation of a successful defense on the defective seat belt issue.[23]

It is submitted that the *DiMauro* court's restrictive interpretation of CPLR 3025(c) violated the spirit of liberality embodied in the CPLR.[24] In the past, courts acting in accordance with this policy of liberality often have permitted 3025(c) amendments to change the cause of action asserted,[25] to introduce a different theory of liability,[26] and to alter the nature and amount of relief de-

---

[21] *DiMauro*, 105 App. Div. 2d at 240, 483 N.Y.S.2d at 388; *see infra* text accompanying note 28.

[22] *DiMauro*, 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389; *see infra* note 37.

[23] *DiMauro*, 105 App. Div. 2d at 241-42, 483 N.Y.S.2d at 389. A continuance or an adjournment is the postponement of a trial to a subsequent day or time, *see* BLACKS LAW DICTIONARY 291 (5th ed. 1979), and is often the appropriate remedy under section 3025(c), *see* CPLR 3025, commentary at 489-90 (McKinney 1974). A variance between a pleading and the proof adduced at trial may legitimately surprise a party who is unprepared to address the new evidence. *See* SIEGEL § 404, at 533. If the surprise can be remedied by giving the party additional time to address the new matter and if the court concludes that such a remedy is more equitable than denying the requested amendment, a continuance becomes the key to the achievement of a just result. *See* CPLR 3025, commentary at 486-87 (McKinney 1974).

[24] *See supra* note 1 and accompanying text.

[25] *See, e.g.*, Kremer Constr. Co. v. City of Yonkers, 73 App. Div. 2d 639, 639, 422 N.Y.S.2d 752, 753 (2d Dep't 1979) (amendment to change cause of action from breach of contract to quantum meruit); Cerrato v. R.H. Crown Co., 58 App. Div. 2d 721, 721, 396 N.Y.S.2d 716, 717 (3d Dep't 1977) (amendment of complaint to set forth additional causes of action in strict liability and breach of warranty). *But see* Fultonville Frozen Foods, Inc. v. Niagara Mohawk Power Corp., 91 App. Div. 2d 732, 733, 457 N.Y.S.2d 978, 980 (3d Dep't 1982) (denial of amendment to add cause of action in negligence).

[26] *See, e.g.*, D'Antoni v. Goff, 52 App. Div. 2d 973, 974, 383 N.Y.S.2d 117, 119 (3d Dep't 1976) (amendment to change theory of liability from fraud and misrepresentation to mutual mistake); Dampskibsselskabet Torm A/S v. P.L. Thomas Paper Co., 26 App. Div. 2d 347, 352, 274 N.Y.S.2d 601, 606-07 (1st Dep't 1966) (judgment theory of liability not originally pleaded). *But see, e.g.*, Forman v. Davidson, 74 App. Div. 2d 505, 506, 424 N.Y.S.2d 711, 712 (1st Dep't 1980) (denial of amendment to change theory of medical malpractice action); Xavier v. Grunberg, 67 App. Div. 2d 632, 632, 412 N.Y.S.2d 22, 23 (1st Dep't 1979) (denial

manded.[27] The *DiMauro* court conceded that while an amendment that merely changes the theory of liability is not generally prejudicial, the same cannot be said of a proposed amendment adding a new theory of liability based on new factual allegations.[28] It is suggested, however, that the interjection at trial of a previously unpleaded fact is not inherently more prejudicial than the mere assertion of a new cause of action or an alternate theory of liability. It is the existence or nonexistence of prejudice itself that is determinative when a court is faced with a motion to amend the pleadings to conform them to the proof adduced at trial.[29] Unless a party can demonstrate that he was substantially misled to his prejudice, any variance between the pleadings and the evidence introduced at trial, should be corrected by a section 3025(c) amendment[30] changing the theory of liability,[31] asserting a new or differ-

---

of amendment to change theory of recovery from constructive notice to actual notice).

The case of Diemer v. Diemer, 8 N.Y.2d 206, 211, 168 N.E.2d 654, 658, 203 N.Y.S.2d 829, 834 (1960), decided by the Court of Appeals prior to the enactment of the CPLR, greatly influenced judicial interpretation of section 3025(c). *See* CPLR 3025, commentary at 488 (McKinney 1974). The court permitted an amendment to change the theory of a separation action from cruel and inhuman treatment to abandonment. *See Diemer*, 8 N.Y.2d at 212, 168 N.E.2d at 658, 203 N.Y.S.2d at 834. The court explained:

> we have advanced far beyond that hypertechnical period when form was all-important and a pleader had to attach the correct label to his complaint, at the risk of having it dismissed. It is enough now that a pleader state the facts making out a cause of action, and it matters not whether he gives a name to the cause of action at all or even that he gives it a wrong name. If this be true of the cause of action itself, it is certainly true of the ground underlying it.

Id.

[27] *See, e.g.*, Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 24, 429 N.E.2d 90, 92, 444 N.Y.S.2d 571, 573 (1981) (post-verdict amendment increasing amount in *ad damnum* clause); DeMund v. Martin, 103 App. Div. 2d 837, 839, 478 N.Y.S.2d 362, 365-66 (2d Dep't 1984) (amendment on appeal increasing amount in *ad damnum* clause); Beck v. General Tire & Rubber Co., 98 App. Div. 2d 756, 757, 469 N.Y.S.2d 785, 786 (2d Dep't 1983) (*ad damnum* clause amended to include demand for punitive damages). In *Loomis*, the Court of Appeals criticized prior judicial rejection of all post-verdict amendments to the *ad damnum* clause as inconsistent with the policy of liberality under the CPLR. *See* 54 N.Y.2d at 22-23, 429 N.E.2d at 91, 444 N.Y.S.2d at 572.

[28] *See* 105 App. Div. 2d at 240, 483 N.Y.S.2d at 385.

[29] *See supra* note 5 and accompanying text; SIEGEL § 404, at 532; *cf.* CPLR 3025, commentary at 487 (McKinney 1974) (irremediable prejudice main barrier to 3025(c) amendment).

[30] *See supra* notes 5 & 29; CPLR 3042, commentary at 689 (McKinney 1974). Absent a showing of demonstrable prejudice, a variance between pleadings and proof requires the application of a 3025(c) amendment. CPLR 3042, commentary at 688 (McKinney 1974). This follows from the fact that the pleadings article of the CPLR is "intolerant of any attempt to make a variance fatal unless the adverse party can say, and he believed, that he was substantially misled to his prejudice." *Id.* at 689.

[31] *See supra* note 26.

ent cause of action,[32] or adding a previously unpleaded fact.[33]

Prejudice exists when a party "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position."[34] Such prejudice manifests itself in situations in which a party has been surprised by the interjection of a relevant issue at trial for which he could not reasonably prepare an answer.[35] A party cannot legitimately claim surprise, however, if a pretrial proceeding put him on notice of an unpleaded matter.[36] In *DiMauro,* the third-party defendant and her attorney were informed of the defective seat belt during the course of discovery proceedings and other prelitigation matters.[37] In addition,

---

[32] *See supra* note 25.

[33] *See* Bernard v. Zeppetelli, 57 App. Div. 2d 999, 1000, 394 N.Y.S.2d 312, 313 (3d Dep't 1977); Pogor v. Cue Taxi Serv., Inc., 43 Misc. 2d 487, 488, 251 N.Y.S.2d 635, 637 (N.Y.C. Civ. Ct. N.Y. County 1964). *But see* Dubose v. Velez, 63 Misc. 2d 956, 958, 313 N.Y.S.2d 881, 885 (N.Y.C. Civ. Ct. N.Y. County 1970) (amendment denied where unpleaded fact would shift liability). In *Bernard,* the court permitted a 3025(c) amendment of the complaint to add factual allegations of negligence. 57 App. Div. 2d at 1000, 394 N.Y.S.2d at 313. The amendment was permitted on the grounds that a 3025(c) motion had been granted without objection in an earlier proceeding which had ended in a mistrial and that the defendant had time to prepare a defense to the new matter since he received sufficient notice of it in the earlier proceeding. *Id.* In *Dubose,* on the other hand, the court refused a 3025(c) amendment which would have changed the allegations of negligence sufficiently to shift liability from one defendant to another. 63 Misc. 2d at 960, 313 N.Y.S.2d at 886.

[34] *See* Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23, 429 N.E.2d 90, 92, 444 N.Y.S.2d 571, 573 (1981) (citation omitted); Kenford Co. v. County of Erie, 93 App. Div. 2d 998, 999, 461 N.Y.S.2d 628, 629 (4th Dep't 1983).

[35] *See* Sharkey v. Locust Valley Marine, Inc., 96 App. Div. 2d 1093, 1095, 467 N.Y.S.2d 61, 63-64 (2d Dep't 1983); *supra* note 5 and accompanying text.

[36] *See* SIEGEL § 404, at 532-33. "Where, for example, a deposition or other pretrial disclosure device puts the other party on notice of what later emerges at the trial, the claim of prejudice dissolves and the amendment lies." *Id.* at 533; *see, e.g.,* Dublirer v. Lascher, 96 App. Div. 2d 474, 475, 464 N.Y.S.2d 790, 791 (1st Dep't 1983) (unpleaded matter raised in prelitigation correspondence and reply papers precluded claim of prejudice); DiBenedetto v. Lasker-Goldman Corp., 46 App. Div. 2d 909, 910, 363 N.Y.S.2d 5, 6 (2d Dep't 1974) (unpleaded matter raised in plaintiff's pre-trial examination precluded claim of prejudice); Averill v. Atkins, 32 App. Div. 2d 738, 738, 302 N.Y.S.2d 153, 154 (4th Dep't 1969) (unpleaded matter raised at pre-trial exam precluded claim of surprise).

[37] *See* 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389. In rejecting the contention that knowledge of the defective seat belt precluded a claim of prejudice, *id.* at 240-41, 483 N.Y.S.2d at 388-89, the court distinguished the case of Rife v. Union College, 30 App. Div. 2d 504, 294 N.Y.S.2d 460 (3d Dep't 1968). In *Rife,* the court permitted the plaintiff to change the theory of his complaint from common law negligence to specific violations of the Labor Law and Industrial Code. *Id.* at 504, 294 N.Y.S.2d at 461. The Appellate Division concluded that there was no prejudice because the amendment simply added a new theory of liability "based upon the facts formerly alleged." *Id.* at 505, 294 N.Y.S.2d at 462.

The *DiMauro* court distinguished *Rife* on two grounds. First, in *Rife,* the bill of particulars was served before trial and included the theory of liability added by the amendment,

the third-party defendant had knowledge of the defective seat belt at least two days prior to the accident.[38] Finally, the court implied that the bill of particulars, although not supplied until after commencement of the trial, had addressed the third-party defendant's failure to provide the passenger with an operable seat belt.[39] It is

---

see id. at 504-05, 294 N.Y.S.2d at 461-62; the bill of particulars in *DiMauro* was not supplied until after the commencement of trial, *see* 105 App. Div. 2d at 241, 483 N.Y.S.2d at 388-89. Second, in *Rife*, the additional theory of liability added by the amendment did not involve the addition of any previously unpleaded facts, *see* 30 App. Div. 2d at 241, 294 N.Y.S.2d at 462; in *DiMauro*, the third-party complaint did not contain any factual allegations regarding the defective seat belt, *see* 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389.

While these distinctions are indeed valid, it is submitted that the *Rife* and *DiMauro* cases are not as dissimilar as Justice Gibbons suggested. In allowing an amendment of the complaint in *Rife*, the court emphasized the fact that the defendant had received notice of the additional theory throughout the pretrial proceedings. *See Rife*, 30 App. Div. 2d at 505, 294 N.Y.S.2d at 462. Similarly, in *DiMauro*, the third party-defendant and her attorney were made aware of the defective seat belt issue during the pretrial proceedings. *See* 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389. It is suggested that if pretrial proceedings were sufficient to provide notice to the defendant in *Rife* of a matter not pleaded in the complaint, then the knowledge of the defective seat belt gained by the third-party defendant through pretrial proceedings in *DiMauro* should have been sufficient to preclude a claim of prejudice based upon absence of notice. In addition, it should be noted that, in both cases, the claim of prejudice involved the defendant's inability to procure witnesses. *Compare Rife*, 30 App. Div. 2d at 505, 294 N.Y.S.2d at 462 (defendant's inability to secure witness) *with DiMauro*, 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389 (third-party defendant's inability to obtain expert seat belt witness). The *Rife* court, however, rejected the defendant's allegation that he was denied the right to call a witness to his defense, on the ground that it was "illusory" and insufficient to serve as the basis of a claim of prejudice. *See* 30 App. Div. 2d at 505, 294 N.Y.S.2d at 462.

[38] *DiMauro*, 105 App. Div. 2d at 238, 483 N.Y.S.2d at 386.

[39] *See id.* at 241, 483 N.Y.S.2d at 388-89. " 'The purpose of a bill of particulars is to amplify the pleadings, limit the proof and *prevent surprise* at the trial.' " CPLR 3041, commentary at 622 (McKinney 1974) (emphasis added) (quoting State v. Horsemen's Benevolent and Protective Assoc., 34 App. Div. 2d 769, 770, 311 N.Y.S.2d 511, 512 (1st Dep't 1970)). A defendant who learns something from a plaintiff's bill of particulars that technically should have been in the pleadings, but was not, is not prejudiced. *See* CPLR 3041, commentary at 628 (McKinney 1974). In addition, "[c]onsidering that the bill of particulars is a relatively early step in the litigation, it will usually be found to appear early enough to divest the adverse party of any claim of prejudice." *Id.*; *see, e.g.*, Murray v. City of New York, 43 N.Y.2d 400, 406, 372 N.E.2d 560, 563, 401 N.Y.S.2d 773, 776 (1977) (matter of workmen's compensation came as no surprise to plaintiff since bill of particulars stated that city was decedent's employer); Miller v. Perillo, 71 App. Div. 2d 389, 390-91, 422 N.Y.S.2d 424, 425 (1st Dep't 1979) (defendant had sufficient information prior to trial by virtue of general content of bill of particulars to preclude claim of surprise).

If a party fails to supply the bill of particulars within the requisite period of time, the opposing party may make a motion to preclude. *See* CPLR 3042(c); CPLR 3042, commentary at 684 (McKinney 1974). If the court grants the preclusion, the party who failed to serve the bill in time will be precluded from introducing into evidence anything as to which he failed to serve particulars. CPLR 3042, commentary at 684 (McKinney 1974). It is suggested that because the third-party defendant in *DiMauro* neglected to make a motion to

submitted that the third-party defendant's subjective knowledge, coupled with the notice received through disclosure devices such as the discovery proceeding and the bill of particulars, should have precluded a claim of prejudice, and that the third-party complaint should have been amended to conform to the evidence provided at trial.

It is suggested that an amendment of the pleadings under section 3025(c) should be barred only by the existence of actual and substantial prejudice incapable of remedy by the imposition of costs and continuances,[40] and should not be precluded by a mere technical defect in the pleading.[41] Such a standard would further the purpose of the CPLR while diminishing the importance of pleadings to underscore the substantive rights involved,[42] and the merits.[43]

Nancy L. Montmarquet

CPLR 3211: Admission that contract existed does not defeat defendant's motion to dismiss based on a statute of frauds defense

Section 3211(a)(5) of the CPLR permits a defendant to move to dismiss a cause of action on the ground that the plaintiff has failed to satisfy the statute of frauds.[1] For purposes of the motion,

---

preclude once the third-party plaintiff had failed to timely serve the particulars, the bill should be treated as if it had been served in a timely manner and should be deemed sufficient notice of the defective seat belt.

[40] *See supra* note 5 and accompanying text; *see also* CPLR 3025, commentary at 487 (McKinney 1974) (irremediable prejudice main barrier to amendment under 3025(c)).

It is suggested that in *DiMauro*, no actual or substantial prejudice existed because any adverse effect on the third-party defendant resulting from the interjection of the seat belt issue at trial could have been alleviated by the granting of a continuance. This would have provided additional time for the third-party defendant to prepare to address this new issue by securing the services of a seat belt expert who could have testified on her behalf. *See DiMauro*, 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389.

[41] *See* Forman v. Davidson, 74 App. Div. 2d 505, 506, 424 N.Y.S.2d 711, 713 (1st Dep't 1980) (Fein, J., dissenting) ("the plea of surprise should be based on actual surprise, not merely deficiencies in pleading").

[42] *See* CPLR 3025, commentary at 486 (McKinney 1974).

[43] *See supra* note 2 and accompanying text.

---

[1] CPLR 3211(a)(5) (1970). Section 3211(a)(5) provides that "[a] party may move for