Buffalo Law Review

Volume 3 | Number 1 Article 17

12-1-1953

Civil Practice—Pre-trial Deposition

Sally Peard

The Court of Appeals, citing *Matter of Western Union Tel. Co.*[29] and *Friedman v. Handelman*,[30] unanimously declared it to be New York policy that where the intention of the parties was clearly and unambiguously expressed in a written agreement, effect should be given to the intent as indicated by the language thereof without adding to or subtracting from the stated rights and obligations.

This meant the above mentioned actions became proper after five years, and, therefore, all territorial restrictions imposed by the lower courts were abolished. The only limits which could be sustained were those set out in the agreement as not limited in time.[31]

Rehabilitation of Domestic Insurer

Section 511 (e) of the Insurance Law allows the superintendent of insurance to apply for rehabilitation if a domestic insurer is found "to be in such condition that its further transaction of business will be *hazardous* to its policy holders, or to its creditors, or to the public." [italics added.] In *Application of Bohlinger*[32] the Supreme Court implied that "hazardous" meant any situation which would render further transactions of business injurious to policy holders, creditors or the public.[33] Although the disposition of the case remained the same, the Court of Appeals, facing such problem for the first time, made it clear that "hazardous" encompasses only dangers financial in nature.[34]

III. Civil Practice

Pre-trial Deposition

Section 288 of the Civil Practice Act authorizes the taking of a deposition of a party to an action, an original owner of a claim not a party, and *of any other person,* as a witness, not a party thereto, where it is material and necessary. The issue before the Court of Appeals in a recent case[1] was whether the scope of the words "any other person" includes officers or agents of the State.

29. 299 N. Y. 177, 86 N. E. 2d 162 (1949).
30. 300 N. Y. 188, 90 N. E. 2d 31 (1949).
31. *Delancey Kosher Restaurant & Caterers Corp. v. Gluckstern*, 305 N. Y. 250, 112 N. E. 2d 276 (1953).
32. 199 Misc. 941, 106 N. Y. S. 2d 953 (Sup. Ct. 1951).
33. *Id.* at 968, 106 N. Y. S. 2d at 977-78, *aff'd unanimously* 280 App. Div. 517, 113 N. Y. S. 2d 755 (1st Dep't 1952).
34. 305 N. Y. 258, 112 N. E. 2d 280 (1953).

1. *Buffalo v. Hanna Furnace Corp.*, 305 N. Y. 369, 113 N. E. 2d 520 (1953).

The City of Buffalo brought an action for a declaratory judgment, seeking a determination that the defendant corporation was required, under contracts with the city, to make alterations of a bridge in connection with the construction of the Buffalo to New York Thruway. The corporation denied liability and moved for an order directing the taking of the deposition of the State Superintendent of Public Works, who was also Chairman of the New York State Thruway Authority, as testimony material and necessary to its defense, under § 288. Neither the State nor the State Superintendent were parties to the action. The Special Term's denial of defendant's motion on the ground that there was no statutory authority for taking such a deposition was affirmed by the Appellate Division.

The Court of Appeals reversed this determination concluding that the lower courts had the power to order the examination of the State Superintendent before trial as a witness. The court stressed the value of pre-trial examination, and noted the trend in recent years, as evidenced by legislative and judicial pronouncement, toward extending and liberalizing the provisions for such examinations.

The court rejected the argument of sovereign privilege, quoting that, "the testimonial duty to disclose knowledge needed in judicial investigation is one that rests on all persons alike,"[2] particularly, as here, where there is no showing that application of the statute would seriously prejudice the State.

The court rejected the argument of the Appellate Division that the interpretation of the word "person" in § 288 is necessarily controlled by previous constructions of the word "party" in the same section. Formerly municipal corporations, though parties to an action, were not subject to examination before trial.[3] To overcome this immunity, C.P.A. § 292-a was enacted in 1941, authorizing deposition of a public corporation through its officers, where it is a party to an action or the original owner of a claim. By analogy, the Appellate Division felt that authority for the pre-trial examination of a state officer as a witness must come from the Legislature. The Court of Appeals, however, maintained that the general trend for greater liberalization,[4] coupled with the duty of every citizen to testify, allows this deposition to be taken.

---

2. *U. S. v. Burr*, 25 Fed. Cas. 30, No. 14,692d (C.C.D. Va. 1807). 8 WIGMORE, EVIDENCE, §§ 2369, 2370 (3d ed., 1940).

3. *Davidson v. City of New York*, 221 N. Y. 487, 116 N. E. 1042 (1917); *Bush Term. Co. v. City of New York*, 259 N. Y. 509, 182 N. E. 158 (1932); *Rucker v. Board of Ed. of City of New York*, 284 N. Y. 346, 31 N. E. 2d 186 (1940).

4. See Saxe, *Civil Remedies and Procedure*, 27 N. Y. U. L. REV. 1201 (1952).