Outside Counsel

# 'Kapon' Resolves Inconsistency on Nonparty Subpoenas

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In *Kapon v. Koch*, the New York State Court of Appeals clarified 30 years of ambiguity and division in the Appellate Departments as to CPLR 3101(a)(4), the provision governing nonparty subpoenas, and made it easier for parties to subpoena nonparties. There had been a split in the Appellate Departments concerning the standard for obtaining disclosure from a nonparty.

In *Kapon*, the Court of Appeals adopted the liberal discovery standard favored by the First and Fourth Departments, holding that the information sought in a subpoena upon a nonparty need only be "relevant," and that it is not necessary for the party seeking disclosure to demonstrate that the information sought is not available from another source.

## Background

"A subpoena is judicial process, a paper whereby a witness is subjected to the jurisdiction of the court and required to give relevant information or produce relative materials 'under penalty' (which is what 'subpoena' means) of contempt for disobedience."[1] CPLR 3104(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, based upon a plain reading of the statute, it would appear that so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.

Further, "an application to quash a subpoena should be granted '[only] where the futility of the process to uncover anything legitimate is inevitable or obvious'…or where the information sought is 'utterly irrelevant to any proper inquiry'"[2] and the one moving to vacate the subpoena has the burden of establishing that the subpoena should be vacated under such circumstances.

CPLR 3101(a)(4) governs disclosure of non-parties and states as follows:

(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(4) any other person, upon notice stating *the circumstances or reasons* such disclosure is sought or required (emphasis added).

The language of this section contrasts with the language of CPLR 3101(a)(1), the section governing disclosure of parties. Both sections are very similar except that (a)(1) does not require that the notice state the "circumstances or reasons" for the requested disclosure.

Until 1984, CPLR 3101(a)(4) required a party seeking disclosure from a nonparty to satisfy two prongs: (1) to obtain a court order directing such disclosure, and (2) to demonstrate that "special circumstances" warranted the disclosure.

In 1984, the Legislature eliminated the requirement of obtaining a court order which allowed a party to obtain disclosure from "any person who possesses material and necessary evidence."[3] While the amendment eliminated the need to obtain a court order and show "special circumstances" in order to obtain discovery from a nonparty, since the language of 3101(a)(1) and 3101(a)(4) are not identical, appellate courts had made inconsistent adjudications as to whether a showing of "special circumstances" was still necessary.

# Prior to 'Kapon v. Koch'

Following the 1984 amendment, there had been a split among the Departments concerning what "circumstances or reasons" are required before disclosure from a nonparty could be obtained pursuant to CPLR 3101(a)(4). The First and Fourth Departments had adopted a "material and necessary" standard, i.e., that the requested discovery is relevant to the prosecution or defense of an action. Illustrative of this approach is *Schroder v. Con. Ed. Co*., 249 A.D.2d 69, 70, 670 N.Y.S.2d 856, 857 (1st Dept. 1998), in which the First Department held that the trial court erred in requiring a showing of "special circumstances" to warrant the deposition of the nonparty doctor finding that the deposition of the doctor is material and necessary.

Subsequently, the Fourth Department applied CPLR 3101(4) in the same vein in *Catalano v. Moreland*, 299 A.D.2d 881, 750 N.Y.S.2d 209 (4th Dept. 2002). There, the Fourth Department rejected the hospital's contention that plaintiffs were required to demonstrate "special circumstances" before being entitled to disclosure from a nonparty pursuant to CPLR 3101(4), because this section was amended in 1984 to eliminate the "special circumstances"; the court held that the more lenient "material and necessary" standard is applicable.

Adhering to a markedly different approach, the Second and Third Departments, while acknowledging that the "special circumstances" requirement no longer applied, nonetheless required the party seeking discovery to go beyond the "material and necessary" standard. Thus, in *Kooper v. Kooper,* 74 A.D.3d 6, 10, 901 N.Y.S.2d 312, 319 (2d Dept. 2010), the Second Department thoroughly explored the applicability of CPLR 3101(4) and held that the trial court providently exercised its discretion in granting the plaintiff's motion to quash the subpoena, because "[t]he 1984 amendment, …, did not change the requirement that a party obtain '[a] court order upon a showing of special circumstances' when further disclosure is sought concerning the expected testimony of an expert witness."

Subsequently, in *American Heritage Realty v. Strathmore Ins. Co.*, 101 A.D.3d 1522, 1523-1524, 957 N.Y.S.2d 495, 496-497 (3d Dept. 2012), the Third Department held that the statute should be held to the same rigorous standard and ruled that CPLR 3101(a)(4) "provides that the parties to an action are entitled to 'full disclosure of all matter material and necessary in the prosecution or defense of an action' from nonparties 'upon notice stating the circumstances or reasons such disclosure is sought or required.'" The test of whether evidence is material and necessary is one of usefulness and reason. Further, something more than mere relevance or materiality must be shown to obtain disclosure from a nonparty witness and the party requesting disclosure must show that "sufficient independent evidence is not obtainable."

In essence, the root of the conflicting conclusions was that the Second and Third Departments relied on the "circumstances or reasons" language in CPLR 3101(a)(4) and ruled that the burden was on the party seeking discovery to make an affirmative showing, whereas the First and Fourth Departments reached the opposite conclusion, noting that the Legislature's removal of "special circumstances" from the language of the statute, relaxed the burden on the party seeking discovery.

# Court of Appeals in 'Kapon'

In 2009, William Koch, a billionaire businessman, commenced a fraud action in California, alleging that he had been sold bottles of counterfeit wine through AMC, a New York corporation that was a retailer and auctioneer of fine wines. Koch served subpoenas on nonparty New York resident John Kapon for information to be used in the California action. Kapon moved to quash the subpoenas on the basis that they were defective because, among other things, they failed to state with particularly the reasons why disclosure was sought. The trial court denied the motion to quash. The First Department affirmed, holding that Kapon failed to show that the requested disclosure was irrelevant to the prosecution of the California action.[4]

Kapon, appealing to the Court of Appeals, contended that CPLR 3101(a) contains distinctions between disclosure required of parties and nonparties, and claimed that on a nonparty's motion to quash a subpoena, the subpoenaing party has the initial burden of demonstrating a need for the disclosure in order to prepare for trial. Kapon further claimed that the CPLR 3101(a)(4) notice requirement established that the subpoenaing party had the burden of establishing the "circumstances or reasons" for the discovery on a nonparty's motion to quash.

The "circumstances or reasons" language replaced former CPLR 3101(a)(4)'s "adequate special circumstances" requirement. It is noteworthy, however, that the appellate Departments, even before the 1984 amendment, liberally interpreted the "special circumstances" requirement as favoring disclosure so long as the party seeking it met the low threshold of demonstrating a need for the disclosure in order to prepare for trial.[5]

Writing for a unanimous Court of Appeals, Judge Eugene Pigott resolved the split between the First and Fourth Departments on the one side, and the Second and Third Departments on the other side, regarding the interpretation and application of CPLR 3101(a)(4). The Court of Appeals concluded that the "material and necessary" standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery. Further, the phrase "material and necessary" as used in CPLR 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."[6]

The Court of Appeals affirmed the First Department's finding that the Supreme Court "providently exercised its discretion in denying petitioners' motion [to quash], since petitioners failed to show that the requested deposition testimony [was] irrelevant to the prosecution of the California action." Further, it also concluded that Kapon and the other petitioners failed to meet their burden of articulating "a sufficient, nonspeculative basis for postponing their depositions or imposing restrictions on the scope and use of their deposition testimony."[7]

Significantly, the Court of Appeals held that the party seeking disclosure from a nonparty must first sufficiently state the "circumstances or reasons" underlying the subpoena, and that in order to succeed in quashing a subpoena, the nonparty must establish either that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious." Should the nonparty meet this burden, then the burden shifts to the subpoenaing party, who must then establish that the discovery sought is "material and necessary."[8]

# Aftermath of Kapon Decision

*Kapon* is a watershed case and was one of the most significant discovery decisions of the Court of Appeals in 2014, as it adopted a policy of liberal discovery upon a nonparty. It also provided a seamless transition for the Second and Third Departments to join the rulings of the First and Second Departments.[9] Setting a standard that reconciles conflicting Departments of the Appellate Division ensures a uniform, consistent application of a much invoked section of the CPLR and remedies the inconsistencies that developed in the Departments.

**Endnotes:**

1. David Siegel, New York Practice, Fifth Edition at 671 (2011)

2. *Anheuser-Busch v. Abrams*, 71 N.Y.2d 327, 331-332, 525 N.Y.S.2d 816, 818 (1988) (internal citations omitted).

3. L. 1984, ch. 294, eff. Sept. 1, 1984.

4. *Kapon v. Koch*, 105 A.D.3d 650, 651, 963 N.Y.S.2d 578, 579 (1st Dept. 2013).

5. *Kapon v. Koch*, 23 N.Y.3d 32, 37, 988 N.Y.S.2d 559, 563 (2014).

6. *Kapon*, 23 N.Y.3d at 38-39, 988 N.Y.S.2d at 564 citing *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).

7. *Kapon*, 23 N.Y.3d at 35, 988 N.Y.S.2d at 562-563.

8. *Kapon*, 23 N.Y.3d at 38, 988 N.Y.S.2d at 565.

9. The Second Department decided two separate cases on July 9, 2014, both of which were consistent with the Court of Appeals' Kapon ruling. In *Ferolito v. Arizona Beverages USA*, 119 A.D.3d 642, 643, 990 N.Y.S.2d 218, 219-220 (2d Dept. 2014), the court noted that "[p]ursuant to the Court of Appeals' recent decision in [*Kapon*]…the subpoena [at issue] plainly satisfied the notice requirement." Similarly, in *Klein Varble & Assoc. v. DeCrescenzo*, 119 A.D.3d 655, 988 N.Y.S.2d 897, 898 (2d Dept. 2014), the court, citing *Kapon*, held that "[c]ontrary to the contention of the nonparties, the plaintiff succeeded in establishing its entitlement to the requested disclosure based on its showing that the information sought is material and necessary in the prosecution of [its] action" (internal quotations omitted). As of this writing, the Third Department has not yet had an opportunity to apply the holding in *Kapon*.

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