Pre-Action Discovery: The Underutilized Leg Remedy

Potential plaintiffs, armed only with a set of facts that evidence wrongdoing and damages, can petition under CPLR 3 (c) for judicial assistance in framing complaints and identifying defendants.

By **Nancy B. Levitin and Jeffrey R. Neuman** | April 02, 2018 at 02:30 PM

The availability of pre-action discovery as a legal remedy belies the sense of many practitioners that alleged wrongdoing must be linked to a specific wrongdoer to be actionable. While a cause of action at its essence is a set of facts that give one person the legal right to hold another person responsible for resulting damages, with pre-action discovery a plaintiff formulates a cause of action from the facts before knowing who to hold responsible for the damages that flowed from those facts.

This article will explore the general implications of initiating legal action without an identified defendant, how New York courts have applied this rule of civil procedure, and the mechanics of pre-action discovery.

CPLR 3102(c)

CPLR 3102(c) provides: "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." Key to the availability of pre-action disclosure in New York is the petitioner's ability to demonstrate to the court a meritorious cause of action.

A fundamental question that comes to mind in the context of pre-action disclosure is whether having an identified defendant is essential to having a cause of action. According to Collins Dictionary of Law, the phrase "cause of action" is understood to mean the right to bring an action. Under this definition, there must be a person in existence who can assert the claim *and also a person who can lawfully be sued on the claim*. The implication is that without a person to sue for damages, a litigant does not have a cause of action. Pre-action discovery turns that implication on its head.

Consider this fact pattern. A homeowner returns from work to find his front door broken down, and muddy footprints tracked throughout his house. Does the homeowner have a cause of action for civil trespass? Perhaps yes if the intruder was a mischievous neighbor, but perhaps not if the intruder was a fire fighter trying to track down a gas leak. With pre-action disclosure the petitioner knows that events occurred that could be actionable, but has not identified a party from whom to seek damages.

Statute of Limitations

Thinking back to the dictionary definition of a cause of action, where a defendant has not yet been identified to sue, has the cause of action yet started to accrue? As a general matter, the statute of limitations on an underlying cause of action is not tolled because the plaintiff needs the court's assistance identifying the defendant or otherwise framing the complaint. *Byramain v. Stevenson*, 278 A.D.2d 619 (3d Dept. 2000); *Application of McQuillan*, 233 A.D.2d 186 (1st Dept. 1996); *Holmes v. City of New York*, 132 A.D.3d 952 (2d Dept. 2015). In *Barillaro v. City of New York*, the judge granting pre-action disclosure expressly found that "this order shall not act as an instrument to extend any applicable statute of limitations for commencing a lawsuit." 53 Misc.3d 307 (Bronx 2016).

Where the statute of limitations of the underlying action is a concern, plaintiffs may be able to use a pre-action disclosure motion in conjunction with naming a "John Doe" defendant to avoid becoming time-barred. Procedurally, such a litigant would need to demonstrate due diligence under CPLR §1024 and petition for a good cause extension of time to serve under CPLR §306-b. *Bumpus v. New York City Transit Auth.*, 66 A.D.3d 26 (2d Dept. 2009).

Meeting the Burden

As noted, New York allows pre-action discovery to be used to aid in bringing an action. CPLR §3102(c). Generally, to avail oneself of pre-action discovery, the petitioner must set forth a prima facie case for a meritorious cause of action. *Ero v. Graystone Materials*, 252 A.D.2d 812, 814 (3d Dept. 1998); however, some courts may set a lower threshold requiring only proof that "some" cause of action exists. *Konig v. WordPress.com*, 112 A.D.3d 936 (2d Dept. 2013). In determining whether petitioner has met the burden of proving a cause of action exists, the court will consider the evidence presented in the light most favorable to the petitioner, and give the petitioner the benefit of every favorable inference that can be reasonably drawn. *McCummings v. New York City Transit Auth.*, 81 N.Y.2d 923 (1993).

Pre-action disclosure cannot be used to build the facts that constitute a cause of action, nor be used as a fishing expedition. *Liberty Imports v. Bourguet*, 146 A.D.2d 535 (1st Dept. 1989). This limitation advances the principle that mere suspicion may not be used to burden, annoy or intrude on an innocent party. But when there is an adequate showing that wrongdoing has occurred, the potential adverse impact on

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the affected party becomes a secondary consideration to the primary goal of bringing all relevant facts to light. *Houlihan-Parnes, Realtors v. Cantor, Fitzgerald & Co.*, 58 A.D.2d 629 (2d Dept. 1977).

While a pre-action disclosure petition can seek information material and necessary to frame the complaint (*Wien & Malkin v. Wichman*, 255 A.D.2d 244 (1st Dept. 1998)), case law is clear that when a plaintiff can identify the defendant, the likelihood of success under CPLR 3102(c) drops. *Verdon v. New York City Transit Authority*, 92 A.D.2d 465 (1st Dept. 1983); ***Ryan v. Marsh & McLennan Intern.*, 70 A.D.2d 567 (1st Dept. 1979). (https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979141310&pubNum=0000602&originatingDoc=N391722D0474411DF91ADA1C02366454D&re 28sc.UserEnteredCitation%29&transitionType=NotesOfDecisionItem)**Pre-action disclosure petitioners looking for help framing a complaint must do the (almost) impossible task of demonstrating the existence of a cause of action, and identifying the parties to the dispute, while still justifying a request for help substantiating specific elements of a claim.

Pre-action discovery is more likely to succeed when used to identify a defendant than to frame a complaint. Examples of such successes in different substantive practice areas include the following:

Pre-action disclosure granted to identify a product manufacturer. *Camara v. Skanska*, 150 A.D.3d 548 (1 Dept. 2017); *Hughes v. Witco—Chemprene Div.*, 175 A.D.2d 486 (3d Dept. 1991).

Pre-action disclosure granted to determine the identity of the recipient of funds. *Banco de Concepcion v. Manfra, Tordella & Brooke*, 70 A.D.2d 840 (1st Dept. 1979).

Pre-action disclosure granted to identify individuals who distributed photograph of petitioner's unclothed body. *Leff v. Our Lady of Mercy Academy*, 150 A.D.3d 1239 (2d Dept. 2017).

Pre-action disclosure granted to identify the individual or entity that purchased a sculpture allegedly stolen from petitioner's home. *Alexander v. Spanierman Gallery*, 33 A.D.3d 411 (1st Dept. 2006).

What is common among the cited cases is the existence of a set of facts that comprise an actionable offense. Each plaintiff has a clear right to hold another person accountable for resulting damages, and pre-action disclosure is needed to enable the plaintiff to identify and seek recovery from the party responsible for the alleged wrongdoing.

In addition to being able to demonstrate the meritorious cause of action, the petitioner for pre-action disclosure must also show that the information sought is "material and necessary to the actionable wrong" following the standard applied to all Article 31 disclosure mechanisms. *Holtzman v. Manhattan and Bronx Surface Transit Operating Authority*, 271 A.D.2d 346 (1st Dept. 2000); *Kapon v. Koch*, 23 N.Y.3d 32 (2014). So long as the petitioner is guided by the material and necessary standard, CPLR §3102(c) does not limit the scope of disclosure prescribed by CPLR §3101. *Barillaro v. City of New York*, 53 Misc.3d 307 (N.Y. 2016). While the disclosure devices are generally outlined in CPLR 3102(a), this is not an exhaustive list of remedies so long as the information sought through the disclosure device is material and necessary.

CPLR 3102(c) does not itself disclose the procedural mechanism to obtain pre-action disclosure. That said, these actions are generally commenced and heard by filing a special proceeding in accordance with Article 4 of the CPLR. Requests for pre-litigation disclosure are made by petition and order to show cause, filed in the court that has subject matter jurisdiction over the future lawsuit, and served in the same manner as a summons and complaint to secure jurisdiction.

When seeking pre-action disclosure, practitioners should pay particular attention to subject matter jurisdiction. Pre-action petitions should be filed in the venue that would adjudicate a case involving the underlying facts.

Petitions for pre-action disclosure should expressly state petitioner's intent to commence the future action in the same court that is being asked to hear the pre-action disclosure application. See *Perez v. NY Presbyterian Hosp.*, 11 Misc.3d 722 (Civ. Ct. N.Y. Cnty. 2006) (denying petitioner's pre-action petition for the failure to allege a future intent to proceed in the Civil Court, which has limited jurisdiction); see also *Estate of Matter of Wallace*, 239 A.D.2d 14 (3d Dept. 1998) (rejecting the special proceeding filed in Surrogate's Court when the cause of action alleged was wrongful death, which belonged in a different court).

Conclusion

Every lawyer would like each referral to arrive with an identified plaintiff, a compelling set of facts that evidence wrongdoing and damages, and a known defendant. Sadly, lawyers do not always get what they want. When that less than perfect case lands on one's desk, remember CPLR 2103(c) and pre-action disclosure.

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