

Advocate's View: Responding to applications for pre-action disclosure CPLR 3201 (c)

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Most discovery skirmishes arise after commencement of an action. On occasion, the battle is waged before an action is commenced, which brings into play CPLR §3201 (c). Pre-action discovery is available to aid in bringing an action, to preserve information or to aid in arbitration, but only by court order. This article will identify issues to consider when representing clients from whom pre-action discovery is sought to aid the applicant in bringing an action or to preserve information.

The method for obtaining a pre-action discovery order often involves an order to show cause. A decision to oppose such relief calls for careful analysis that begins with questions as to the Court's subject matter jurisdiction. In the case of an Order to Show Cause, a responding party should consider whether the order is supported by an underlying pleading that satisfies the procedural requirements of the CPLR. Thus, if the order is issued within the context of a special proceeding, the responding party should consider whether the applicant has complied with the

requirements for a notice of petition and petition; or, if an order has been issued within the context of an action, the responding party should consider whether there is a defect associated with the failure to file properly the underlying pleading, such as a summons on notice or summons with complaint. Courts lack jurisdiction to waive defects associated with the requisite underlying pleading. *See e.g. Wesco Ins. Co. v Vinson*, 137 AD3d 114, 115 (2d Dept. 2016); *Bayridge Prince, LLC v City of New York*, 56 Misc. 3d 684 (Sup.Ct. Kings County 2017).

Responding parties should also consider whether the Court has personal jurisdiction over the responding party. At least one court has held that New York's long arm jurisdiction does not extend to "respondent[s] in a special proceeding brought for pre-action discovery." *Matter of Fidelity Natl. Title Ins. Co.*, 34 Misch3d 508, 510 (Sup. Ct. New York Cty. 2011) (finding that there was "no cause of action" that could provide an anchor for long arm jurisdiction under CPLR §302).



Efforts to obtain pre-action discovery will be denied if it can be shown that the applicant is aware of the relevant parties and possesses sufficient information to draft a complaint. It is well settled that pre-litigation discovery is not permissible as a “fishing expedition to ascertain whether a cause of action exists.” *Bishop v Stevenson Commons Assocs., L.P.*, 74 AD3d 640 (1st Dept. 2010). The applicant must demonstrate a lack of sufficient information to frame a complaint. *In the Application of Loria*, 98 AD2d, 989 (4th Dept. 1983) (reversing a trial court’s order for pre-action inspection of evidence).

Pre-action discovery is not available to determine alternative theories of liability arising out of the same incident. *See e.g. Matter of Johnson v Union Bank of Switzerland, AG*, 150 AD3d 436 (1st Dept. 2017).

Finally, while pre-action discovery is appropriate to preserve evidence, the applicant must make an evidentiary showing to justify pre-action discovery to “prevent the initiation of troublesome and expensive procedures, based upon mere suspicion, which may annoy and intrude upon an innocent party.” *Barash v Waldorf-Astoria*, 2003 N.Y. Misc. LEXIS 245 (S. Ct. New York County 2003) (observing that the applicant should be prepared to set forth the basis, legal and factual, to justify the relief).

Case law establishes that the availability of pre-action discovery depends upon the applicant’s ability to demonstrate, by affidavits and evidentiary facts, the existence of a prima facie cause of action against the named respondents. Applications for pre-action discovery may be denied when the application is supported solely by self-serving and conclusory affirmations of counsel. *Barash*.

The foregoing establishes the value of thorough analysis of applications for pre-action discovery either to oppose the relief outright or for purposes of crafting a mutually acceptable resolution.

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