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Discovery Before the Storm: The Guardrails of CPLR 3102(c)

The New York state courts have a long tradition of permitting plaintiffs, under certain circumstances, to obtain discovery before commencing litigation pursuant to CPLR 3102(c). For the plaintiff's bar, CPLR 3102(c) has been used to flesh out evidence in support of their complaints. However, from the defense perspective, pre-suit disclosure can be an onerous imposition subject to potential "fishing expedition" abuse. This article examines the framework and permissible applications of CPLR 3102(c) pre-suit disclosure, providing both plaintiffs and defendants with useful tools to pursue and combat pre-suit discovery demands.

The Pre-Litigation Discovery Framework

Under CPLR 3102(c), pre-suit discovery requires a court order, and the courts are directed to narrowly construe such requests. To be entitled to pre-action discovery, a prospective plaintiff must make an offer of proof alleging facts sufficient to fairly indicate a cause of action. New York courts have held that these petitions should "only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong". *Uddin v. New York City Transit Auth.*, 27 A.D.3d 265, 266 (2006). The petitioner must also show that the information sought is material and necessary to bring a viable claim. See *Westbrook v. Metro. Transportation Auth.*, 226 A.D.3d 692, 693 (2024) ("Where the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate" (internal quotations omitted)). The information must be essential to pleading a viable claim, not merely helpful.

One of the most established uses of pre-action disclosure is to identify unknown defendants before commencing suit. This frequently arises in cases of defamation, product liability, or internet torts, where the petitioner knows the facts of the harm but lacks the identity of the responsible party. Courts in these cases allow limited discovery – such as subpoenas to internet service providers or employers – to enable prospective plaintiffs to name proper defendants.

For example, in *Konig v. CSC Holdings*, LLC, 112 A.D.3d 934, (2013), the petitioners sought disclosure of the identity of the bloggers and administrators relevant to their defamation allegations. While the court acknowledged that identifying defendants may be proper under CPLR 3102(c), it emphasized that petitioners must still allege "facts fairly indicating that he or she has some cause of action." Id. at 935. The Second Department found that the petitioners failed to meet this threshold, holding that a reasonable reader would have viewed the allegedly defamatory statements as opinion rather than factual assertions. Thus, the petitioners had not "fairly indicated" a viable cause of action. See also *Scattoreggio v. Cablevision Sys. Corp.*, 203 A.D.2d 468, (1994)(holding that petitioner "has not demonstrated facts which fairly indicate that she has some cause of action against the appellant which warrants pre-action disclosure."); *Rosenberg v. Brooklyn Union Gas Co.*, 80 A.D.2d 834, 834, (1981)("Since petitioners have demonstrated that a cause of action exists, CPLR 3102 (subd. (c)) would authorize pre-action discovery to allow

them to frame their complaint and obtain the identity of prospective defendants.").

New York courts have repeatedly cautioned that CPLR 3102(c) is not a means to determine whether a plaintiff has a claim, but rather a mechanism to obtain necessary evidence so a plaintiff can plead a known claim. Taking the example above, CPLR 3102(c), a plaintiff cannot obtain pre-suit disclosure to determine whether they have been defamed, but only to obtain the identity of the defendant when that plaintiff already knows the defamation has occurred. As the Appellate Division held in *Stump v. 209 E. 56th St. Corp.*, 212 A.D.2d 410, 410, 622 (1995), "Although CPLR 3102(c) authorizes discovery to allow a plaintiff to obtain the identity of the prospective defendants, it cannot be used by a prospective plaintiff to determine whether he has a cause of action." Courts have described proper use as "a prospective plaintiff determining the best way to frame a complaint, not whether there is any complaint to frame." All Season*Prot. v. City of New York*, 139 N.Y.S.3d 495, 497 (N.Y. Sup. Ct. 2020). For defamation actions, such as in Konig, the threshold inquiry is whether a reasonable reader or listener would interpret the alleged statements as fact or opinion. See Konig, 112 A.D.3d at 935; see also,*Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32 (2011); *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424 (Sup. Ct. 2009). In Application of Isseks, 544 N.Y.S.2d 471 (Sup. Ct. 1989), the Court held that requesting pre-action "depositions to frame a complaint will not be permitted where a petitioner possesses sufficient information to frame a complaint without the examinations sought."

Other Applications of CPLR 3102(c)

While identity discovery remains the most common use of CPLR 3102(c), courts have explored its application in other contexts. Thus, where a prospective plaintiff cannot ascertain the cause of a dangerous condition that resulted in their injury without technical documentation or internal records, courts have allowed some pre-action discovery aimed at repair logs and maintenance records. See *Ero v. Graystone Materials, Inc.*, 252 A.D.2d 812 (1998) (affirming approval of a petitioner's application for pre-action discovery requesting records relating to "purchase, acquisition, repair, maintenance, [and/or] modification" of the vehicle which caused him injuries.) The provision has also been used to identify third-party information sources or product manufacturers. See *K.J. v. 603 Wyona Plaza,* LLC, 2025 WL 1914204 (N.Y. Sup. Ct. July 8, 2025) (granting pre-action disclosure to inspect a boiler allegedly responsible for hot water injuries, "to determine the manufacturer of the boiler and the cause of any malfunction in order to properly frame their complaint.")

While courts will grant pre-suit disclosure in appropriate circumstances, defense counsel should bear in mind that CPLR 3102(c) should be construed narrowly and thus attempts to obtain expansive pre-suit disclosure or disclosure aimed at finding out whether a claim even exists in the first place are ripe for challenge. Notably, courts have even entertained sanctions motions for the improper use of the pre-suit disclosure statute as a "fishing expedition." Thus, the Court in 1051*Enters., Inc. v. DeBeer*, 230 A.D.2d 731 (1996) held that claims for sanctions pursuant to 22 NYCRR § 130-1.1 may also apply to abuse of discovery motions such as pre-action discovery motions pursuant to CPLR 3102(c).

Takeaway

CPLR 3102(c) plays a significant role in New York civil practice, offering litigants an avenue to obtain critical information before commencing suit. While its most common use involves identifying unknown defendants, courts have permitted its use in a range of scenarios, provided a petitioner can allege facts sufficient to indicate a viable cause of action. At the same time, courts remain vigilant in policing the boundaries of this rule to ensure it does not become a vehicle for speculative "fishing expeditions," and will impose sanctions for egregious misuse of it. Practitioners on both sides of the aisle should familiarize themselves with the

potential uses (and misuses) of CPLR 3102(c) so that they invoke (or oppose) New York's pre-litigation disclosure device, when needed and appropriate.

At Yankwitt LLP, we represent both plaintiffs and defendants in litigation where CPLR 3102(c) may be at issue. As defense counsel, we stand firmly with our clients in opposing improper pre-action discovery attempts and ensuring it is not misused. Pre-action discovery can be a powerful tool—but only when wielded in accordance with its purpose. We make it our business to ensure it is never abused.