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CPLR 3212(b): A Provision That Allows Ambush at Summary Judgment

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Consider the following: You have been litigating a case in New York State Supreme Court. You and your adversary have engaged in initial motion practice at the pleadings stage, suffered through discovery, spent far too many hours in meet-and-confers and sought court intervention on various contested issues. Now, with fact discovery complete, the parties agree that expert discovery is unnecessary. Thus, neither side makes an expert disclosure under CPLR 3101(d)(1)(i) by the court's deadline, and no expert discovery occurs.

After the note of issue is filed, the parties proceed to make their respective summary judgment motions. But when you review your adversary's papers, much to your chagrin, you discover that your adversary has submitted an expert affidavit opining on key issues. Naturally, you cry foul, declare that the expert submission is improper and accuse your adversary of bad faith gamesmanship. You reach out to the court, urging it to reject the expert testimony as out of turn. But to your dismay, the court accepts the submission, noting that it is bound by the CPLR to consider it even though the parties had opted not to make expert disclosures. How can this be?

The above scenario is not as farfetched as it sounds. CPLR 3212(b) expressly provides that, "[w]here an expert affidavit is submitted in

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James Chou, left, and Kelly Schneid, right, of Moritt Hock & Hamroff.

support of, or opposition to, a motion for summary judgment, the court *shall not decline to consider* the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit." CPLR 3212(b) (emphasis added).

This latter provision—CPLR 3101(d)(1)(i)—governs expert disclosure, requiring that, upon request, a party "shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."

At first blush, CPLR 3212(b) appears to endorse ambush on an adversary in violation of basic

notions of fair play, while also divesting courts of their authority to oversee and enforce disclosure deadlines. Why would the Legislature allow the CPLR to provide a means for parties to circumvent expert disclosure requirements, engage in sharp tactics that disrupt the orderly litigation process, and introduce new testimony post-note of issue to either defeat or support summary judgment?

This article explores these questions, starting with a brief discussion on the current CPLR 3212(b)'s legislative history, and proceeding to an examination of how courts have attempted to harmonize CPLR 3212(b) with CPLR 3101(d)(1)(i) and other procedural rules intended to ensure timely and orderly process, including Commercial Division Rule 13(c), which governs expert disclosure in the commercial part, and CPLR 3126, which addresses the court's discretion in imposing sanctions for violations of a discovery order.

In December 2015, the Legislature amended CPLR 3212(b) to include the language quoted above permitting parties to submit expert testimony with a summary judgment motion, while limiting courts' discretion to reject such testimony even if the expert was never disclosed.

The 2015 Amendment specifically sought to "legislatively overrule" a line of cases which recognized judicial discretion to consider expert affidavits at the summary judgment stage where the proponent failed to disclose the expert under CPLR 3101(d)(1)(i) before the note of issue was filed. The 2015 Amendment had admirable goals: (i) promote uniform and consistent court decisions; (ii) provide clear direction to the judiciary; and (iii) afford parties the same right to rely on experts at summary judgment (under CPLR 3212) as they had at trial (under CPLR 3101).

To its credit, the New York State Bar Association's Committee on Civil Practice Law and Rules opposed the 2015 Amendment, but indicated that it would support the amendment if it preserved judicial discretion to exclude an expert affidavit "where the failure to disclose the expert was in violation of an order of the court, a stipulation of the parties, or the rules of the chief administrator." Memorandum in Opposition from the Committee on Civil Practice Law and Rules to the New York State Bar Association (May 18, 2015).

The committee recognized that, without this caveat, the rule would undermine the court's authority to set deadlines, allow surprise, and notably, "turn the summary judgment motion from a device for resolving cases into a discovery device."

No such caveat was codified. In the eight years since the 2015 Amendment, there have been less than a dozen decisions discussing this aspect of CPLR 3212(b), and none has fleshed out its broader implications on the litigation process. Rather, these cases have merely enforced CPLR 3212(b), as amended, and recognized that affidavits of previously undisclosed experts *shall* be considered in support of, or in opposition to, a summary judgment motion. *See, e.g.*, *Brown v. 43-25 Hunter,* 178 A.D.3d 493, 494, n. 1 (1st Dep't 2019); *Moreland v. Huck*, 156 A.D.3d 1396 (4th Dep't 2017); *Kimberlee M. v. Jaffe*, 139 A.D.3d 508, 509 (1st Dep't 2016); *Framan Mechanical v. Dormitory Authority of State of New York*, 63 Misc.3d 1218(A), *7-8 (citation omitted); *Trotman v. Boston Properties,* 59 Misc. 3d 1230(A) (Sup. Ct. Bronx Cnty. 2018).

The struggle to align the inherent inconsistency between CPLR 3212(b) and Commercial Division Rule 13(c) is especially pronounced in *Framan*. Commercial Division Rule 13(c) does not permit belated expert disclosure and requires the parties to "confer on a schedule for expert disclosure—including identification of experts, exchange of reports, and depositions of testifying experts—all of which shall be completed no later than four months after the completion of fact discovery."

In *Framan*, Commercial Division Justice Platkin observed that, while no case has "address[ed] the interplay [of CPLR 3212(b)] with Commercial Division Rule 13(c)," courts should read Commercial Division Rule 13(c) "in harmony with the statutory law enacted by the State Legislature." Therefore, Justice Platkin held that, although the surety did not timely identify an expert prior to defendant's motion for summary judgment, "CPLR 3212 (b) obliges the court to consider any expert proof submitted in opposition to the motion[,]" even if the "reports were not disclosed in strict compliance with Commercial Division Rule 13 (c)."

Justice Platkin, however, did not address how CPLR 3212(b) effectively negates the purpose of Commercial Division Rule 13(c).

Two decisions attempted to address CPLR 3212(b)'s conflict with the trial court's CPLR 3126. In *Washington v. Trustees of Methodist Episcopal Church of Livingston Manor*, the Third Department affirmed the Supreme Court's decision to consider plaintiff's expert affidavit at the summary judgment stage based on CPLR 3212(b), but acknowledged defendant's contention that the Supreme Court erred in considering the affidavit "regardless of the statute" because plaintiff's submission "violated both a November 2016 order directing plaintiff to serve expert discovery by a certain date and the Third Judicial District Expert Disclosure Rule—requiring an opposing party to file its expert disclosure, at the latest, within 60 days after the note of issue was filed, subject to preclusion of the expert unless the court directs otherwise." 162 A.D.3d 1368, 1369 (3d Dep't 2018).

The Third Department, however, punted on the issue, noting that "neither the order at issue nor the Note of Issue were included in the record and therefore, the court could not adequately review whether plaintiff actually violated the order or rule."

That question was left open until Justice Lebovitz took it up in *Theroux v. Resnicow*. 72 Misc. 3d 654, 148 N.Y.S.3d 885 (Sup. Ct. N.Y. Cnty. 2021). Building upon the conceptual foundation laid in *Washington*, *Theroux* asked whether CPLR 3212(b) "eliminate[d] this court's discretion under CPLR 3126 to preclude a party from submitting expert evidence at summary judgment due to the party's failure to comply with a court-ordered deadline for expert discovery."

Applying a narrow reading of 3212(b), the court answered no. After reviewing the history of the 2015 Amendment, its text, and scope, Justice Lebovitz reasoned that CPLR 3212(b) does not usurp the trial court's power to "enforce its own discovery orders—if, and only if, those orders set deadlines for service of expert disclosures."

While *Theroux* is well-reasoned and refreshing in its reassertion of judicial authority, it still appears to conflict with the legislative intent, express language and structure of the CPLR itself. CPLR 3212(b) is a summary judgment device found in CPLR Article 32, and by its express terms, untethered to what occurs during discovery, which is separately governed by Article 31. Thus, the courts that have addressed the interplay between CPLR 3212(b) and Article 31 provisions (or Commercial Division Rule 13(c)) has attempted to draw fine lines.

To bring clarity to the continuing ambiguity and ensure consistency, the Legislature should address what is effectively a head-on collision between CPLR 3212(b) and the procedural rules governing discovery.

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