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SOUTHERN DISTRICT CIVIL ROUNDUP

Broader Pre-Suit Discovery Is Available in State Court

By Edward M. Spiro and Christopher B. Harwood
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Rule 27 of the Federal Rules of Civil Procedure permits pre-suit discovery to "perpetuate testimony about any matter cognizable in a United States court." The Second Circuit has construed Rule 27 as allowing prospective litigants to take depositions to preserve known testimony, but not as a vehicle for generalized pre-suit discovery—whether directed at documents or testimony.

This limitation is derived from Rule 27(a)(3)'s requirement that the petitioner demonstrate that he or she "expects to be a party to an action cognizable in a United States court but cannot presently bring it," and that "the perpetuating the testimony may prevent a failure or delay of justice." The Second Circuit has interpreted the Rule to require that petitioners satisfy three elements: (1) explain what the anticipated testimony will demonstrate; (2) establish that they expect to bring a cognizable federal action but cannot presently bring it; and (3) show that absent a Rule 27 deposition, the testimony would be lost, concealed, or destroyed. *Bryant v. Am. Fed'n of Musicians of the United States & Canada*, 666 F. App'x 14, 16 (2d Cir. 2016).

Southern District Judge Louis L. Stanton's recent decision in *Reyna v. Universal Music Group*, 2025 WL 3650775 (S.D.N.Y. Dec. 15, 2025), is an example of how narrowly federal courts construe Rule 27. The decision highlights the important difference that exists between the scope of available discovery under Rule 27 and New York Civil Practice Law and Rules (CPLR) §3102(c). Under §3102(c), a prospective litigant may obtain discovery "to preserve information" or "to aid in bringing an action." As the text of CPLR §3102(c) indicates, it allows for broader discovery than Rule 27.

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In Reyna, Stanton concluded that the petitioner did not meet the Second Circuit's narrow standard for pre-suit depositions pursuant to Rule 27 because, among other reasons, petitioner did not "make an objective showing that [absent Rule 27 discovery], known testimony would otherwise be lost, concealed, or destroyed." *Reyna*, 2025 WL 3650775, at *4 (quoting *Bryant*, 666 F. App'x at 16). In contrast, New York courts regularly interpret CPLR §3102(c) to permit potential claimants to obtain information as to the identity of

a wrongdoer and to help "determine the form or forms which the action should take." *Stewart v. New York City Transit Auth.*, 112 A.D.2d 939, 940 (2d Dep't 1985). Savvy prospective litigants may be able to take advantage of the broader pre-suit discovery available in state court.

'Reyna v. Universal Music Group'

In *Reyna*, Joseph Reyna, a self-proclaimed artist, trademark holder, director of a nonprofit, and a "federally documented whistleblower," asserted that respondents, Universal Group and UMG Recordings, Inc., infringed, diluted, and harmed his registered trademark of JOECAT®. Reyna allegedly used the trademark for his music releases, on-air and broadcast appearances, digital streaming, live events, branded promotion, and nonprofit activities. In anticipation of bringing an action against respondents for a variety of alleged federal and state law violations, Reyna brought a Rule 27 petition for pre-suit discovery.

Reyna sought pre-suit depositions of UMG executives, preservation of certain specific evidence, and prevention of evidence destruction. He requested an order permitting him to depose certain UMG executives, officers, and employees, on the basis that a loss of evidence was imminent due, among other things, to alleged industry-wide auto-deletion protocols, corporate resignations, and shell company dissolutions.

Rule 27 Is Limited to Preserving Testimony

Stanton began by reviewing the proper basis for granting a Rule 27 petition. According to the Rule, a person who wants to perpetuate testimony prior to litigation "may file a verified petition in the district court for the district where any expected adverse party resides." Fed. R. Civ. P. 27.

The petition "must ask for an order authorizing the petitioner to depose the named persons," and show: "(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; (B) the subject matter of the expected action and the petitioner's interest; (C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it; (D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and (E) the name, address, and expected substance of the testimony of each deponent." Fed. R. Civ. P. 27(a)(1).

Stanton explained that the Second Circuit has interpreted Rule 27 as requiring that petitions "(1) furnish a focused explanation of what they anticipate any testimony would demonstrate; (2) establish in good faith that they expect to bring an action cognizable in federal court, but are presently unable to bring it or cause it to be brought; and (3) make an objective showing that without a Rule 27 hearing, known testimony would otherwise be lost, concealed, or destroyed." *Bryant,* 666 F. App'x at 16 (cleaned up).

Stanton recognized that courts in the Southern District have emphasized that Rule 27 should not be used as a vehicle for document preservation or to obtain generalized pre-suit discovery (whether directed at documents or testimony). See *Wimberly v. Action IQ, Inc.*, 2022 WL 2531818, at *4 (S.D.N.Y. Jan. 10, 2022), *R & R adopted*, 2022 WL 2532175 (S.D.N.Y. Jan. 31, 2022); see also *In re Wolfso*n, 453 F. Supp. 1087, 1096 (S.D.N.Y. 1978). Judge Stanton explained that some courts have "noted that documentary evidence may be discoverable under Rule 27 in connection with a deposition," but not unconnected to a deposition. *Reyna*, 2025 WL 3650775, at *3.

Application

In deciding the Rule 27 petition, Judge Stanton reviewed the reasons Reyna provided for seeking pre-suit discovery to determine whether he sought preservation of known deposition testimony, or instead was seeking to preserve documentary evidence or to obtain generalized discovery. To that end, Judge Stanton noted that Reyna contended he was unable to plead a complaint for damages without the evidence sought in the petition. Stanton also observed that Reyna asserted that he was seeking to preserve evidence because his prior requests to file amicus briefs in proceedings involving UMG had been denied.

Stanton concluded that Reyna's own stated reasons for filing the Rule 27 petition made clear

that he was seeking to preserve documentary evidence and to obtain generalized discovery, not to preserve known testimony. Although Reyna identified some specific individuals he was seeking to depose, Stanton found his Rule 27 petition void of a "focused explanation of what [he] anticipate[s] any testimony would demonstrate." *Bryant*, 666 F. App'x at 16.

Further, Stanton found it problematic that Reyna did not identify why witnesses may be unavailable to be deposed if and when he brings a subsequent action, such as due to illness or imminent death. Because Reyna had failed to satisfy the requirements of Rule 27 and previously had brought Rule 27 petitions that were dismissed on similar grounds, the court dismissed his pro se action without leave to amend.

CPLR §3102

Stanton's opinion demonstrates the limits of using Rule 27 to seek pre-suit discovery in federal court. In contrast, CPLR §3102(c) provides prospective litigants proceeding in state court with the ability to obtain broader pre-suit discovery. New York courts have held that petitions seeking pre-suit discovery under §3102(c) should be granted if an applicant "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 (1st Dep't 2006).

A well-established use of CPLR §3102(c) orders is to obtain the identity of prospective defendants, especially in cases of defamation or product liability where the facts of the harm are often known but the identity of the responsible party is not. See, e.g., *Konig v. CSC Holdings, LLC*, 112 A.D.3d 934 (2d Dep't 2013) (collecting cases). In these types of cases, courts often permit limited discovery for prospective plaintiffs to determine the proper defendants.

Aside from determining the identity of specific alleged wrongdoers, New York courts have also granted §3102(c) orders to help a prospective litigant "frame his complaint" and "determine the form or forms which the action should take," i.e., which cause(s) of action to plead. *Urban v. Hooker Chems. & Plastics Corp.,* 75 A.D.2d 720, 720 (4th Dep't 1980); *Stewart v. New York City Transit Auth.*, 112 A.D.2d 939, 940 (2d Dep't 1985); *see also In re Houlihan-Parnes, Relators*, 58 A.D.2d 629, 630 (2d Dep't 1977) (directing appearance at deposition to aid petitioner in determining whether additional cause of action existed).

Although CPLR §3102(c) allows prospective litigants the ability to obtain more expansive pre-suit discovery than Rule 27, courts have denied §3102(c) petitions if it appears that a prospective litigant is using the device to determine whether he or she has a cause of action at all. See *Stump v. 209 E. 56th St. Corp.*, 212 A.D.2d 410, 622 (1st Dep't 1995). Courts therefore have required that petitioners make a prima facie showing that they have a right to redress, and courts have denied petitions that appear to be "fishing expeditions." When used properly, however, §3102(c) can be a powerful tool to obtain critical information beyond that available under Rule 27 to enable a prospective litigant to plead a known claim.

Conclusion

If pre-suit discovery is necessary to enable a litigant to bring a known claim—rather than merely to preserve testimony that may otherwise be lost—proceeding in state court and taking advantage of CPLR §3102(c) will likely prove more beneficial than proceeding in federal court under Rule 27.

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