

CIVIL PRACTICE & PROCEDURE

IN NEW YORK COURTS

by

LOUIS A. KASS
Member of the New York Bar



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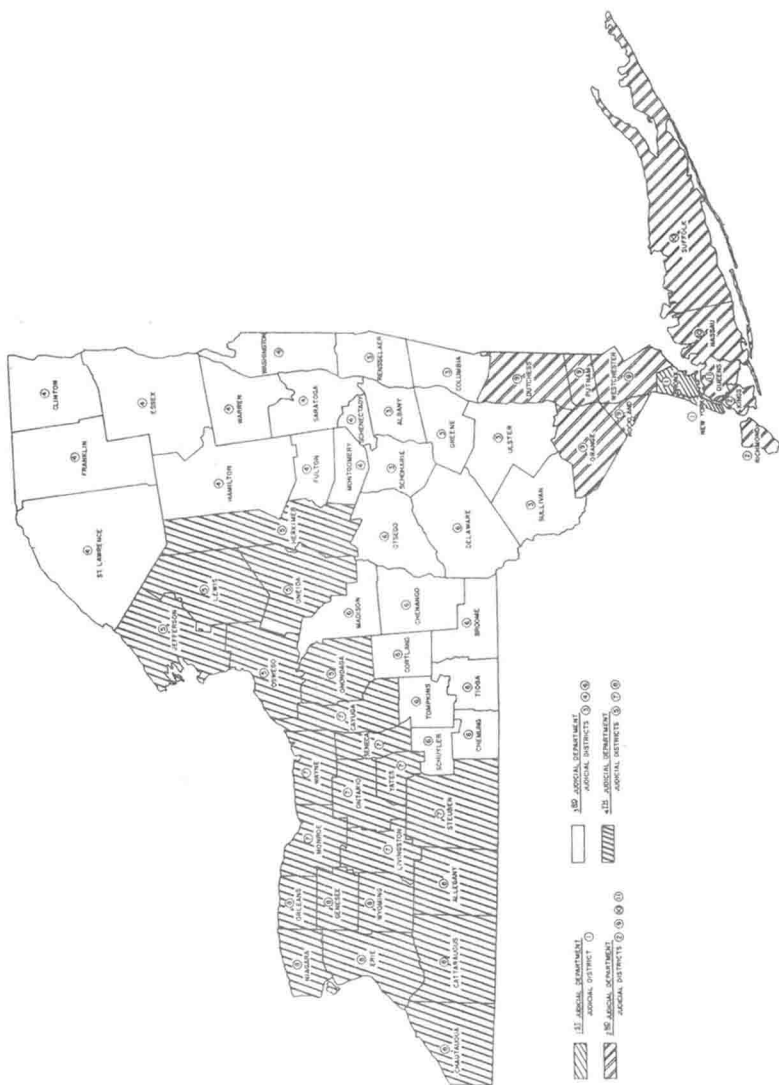


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CHAPTER I

INTRODUCTION

1. The Civil Practice Law and Rules (CPLR) of New York, detail the procedures, forms and method for processing a legal action in the Courts of New York State. Each of these necessary legal steps is time sequenced and dependent upon proper notice, proper jurisdiction and conformance to required form.

2. JURISDICTION. In order to bring an action in a particular court, strict adherence must be given to appropriate jurisdiction. Both the jurisdiction of the court over the parties and the jurisdiction of the subject matter must be complied with. Thus, for example, although a court may have jurisdiction of the parties, it may not have jurisdiction over an equity matter, because its jurisdiction is limited.

3. STATUTES OF LIMITATION. Actions must be brought within the time granted by law. If an action is commenced after the time permitted by statute, the running of the statute can be interposed as a complete defense. However, note that such a defense must be positively asserted and recovery by plaintiff is not barred if defense fails to claim the running of the statute of limitations.

4. SERVICE OF SUMMONS. Personal service of a summons is proper unless such service is unable to be obtained. Domestic and foreign corporations require personal service of certain designated individuals. If personal service within the court's jurisdiction cannot be obtained, then in certain instances proper service can be made by following certain prescribed procedures. Among these other types of service are "Service by Publication" and "Substituted Service".

5. DEFENDANT'S APPEARANCE. The Defendant in an action may appear solely to contest the jurisdiction of the court, or he may appear generally and subject himself to the court's jurisdiction.

VENUE. Within the time allowed by statute, the venue of a particular action, i. e. , the place of trial, can be changed. Such change of venue may be had for "incorrectly designated venue", or the designated venue cannot offer a fair trial, or for the convenience of material witnesses.

6. PLEADINGS comprise the Plaintiff's SUMMONS & COMPLAINT, the Defendant's ANSWER and in certain instances a REPLY by Plaintiff.

7. MOTION PRACTICE comprises requests to the Court by either party to an action, for a ruling on questions which are incidental to the main object of the action. These motions may be requests for amended or supplemental pleadings, corrective motions, motions to dismiss and motions for summary judgment.

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8. PROVISIONAL REMEDIES. Prior to the actual trial of an action, it is sometimes necessary to utilize a provisional remedy to ensure the availability of the defendant or the subject of the action, at the trial. Such remedies, as their name implies, are merely temporary. Provisional remedies comprise CIVIL ARREST, ATTACHMENT, SEQUESTRATION, PRELIMINARY INJUNCTION, NOTICE OF PENDENCY, TEMPORARY RECEIVER, RECOVERY OF A CHATTEL.

9. PRETRIAL PREPARATION includes BILLS OF PARTICULAR, EXAMINATION BEFORE TRIAL, WRITTEN INTERROGATORIES, DISCOVERY AND INSPECTION, ADMISSIONS, SUBPOENAS, TENDER, OFFER TO LIQUIDATE and OFFER TO COMPROMISE. These pre-trial procedures are provided to enable adverse parties to prepare their cases before trial, avoid surprise and avoid unnecessary litigation when pre-trial procedures show the absolute right of one party.

10. TRIAL PRACTICE includes trial preferences, calendar practice, trials with and without juries, motions on the trial, motions during trial, and motions after trial. The presentation of evidence on trial is governed by the rules of evidence.

11. ACCELERATED JUDGMENT. Judgment may be accelerated by certain procedures. These include default judgment, judgment by confession, action on submitted facts, simplified procedure, motions for summary judgment or motions to dismiss the complaint or answering without serving a responsive pleading.

12. JUDGMENTS when obtained, require filing, enforcement and collection. Merely obtaining a judgment does not ipso facto, give the winning party the desired relief or redress.

13. COSTS for improper prosecution of an action, or losing a motion or an appeal, are usually levied against the losing party. Such costs are determined by the point of the action or procedure at which the action or proceeding is terminated.

14. SPECIAL PROCEEDINGS. Certain proceedings are labeled special. These include proceedings relating to Habeas Corpus, proceedings against a body or officer, to enforce an agreement, relating to express trusts, relating to recovery of a penalty or forfeiture or action by the State.

15. INFANTS, INCOMPETENTS AND POOR PERSONS are given special treatment under the law. In order to ensure adequate protection for infants and incompetents, they must be represented by a guardian ad litem. Poor persons are given special consideration in legal actions, costs and expensive briefs usually being dispensed with.

16. ARBITRATION is a form of legal procedure which adheres to certain simplified rules and regulations. When arbitration is valid, the courts will uphold arbitration rulings.

17. DISPOSITION OF PROPERTY in litigation or paid into court is determined by the court on trial, or on motion. Certain procedures in disposition of such property must be observed.

18. APPEALS of court determinations on trial, or on motion, are taken to the proper court for such appeals. Appeals stay any lower court proceeding until decided.

19. TIME TABLE CHARTS

LESS THAN 1 DAY ORDER TO SHOW CAUSE directs a party to show cause why relief demanded by the moving party and referred to in the order should not be granted. An ORDER to SHOW CAUSE obtained ex parte, is used in place of a Notice of Motion because (a) it is a means of abbreviating the prescribed time (8 days) for bringing on a Motion; (b) it makes possible the stay of proceedings. A party may occasionally find that the relief which he seeks, to be effective, must be procured without delay. Because of the urgency of the relief required, a Motion may thus be brought on upon SUCH NOTICE AS THE JUDGE ISSUING THE ORDER PRESCRIBES.

1 DAY ATTACHMENT-DEMAND FOR COPY OF SUPPORTING PAPERS, WHICH OBTAINED ORDER OF ATTACHMENT, EX PARTE.

Papers must be served upon demanding attorney within 1 day of demand (CPLR 6212(d)).

48 HOURS PROVISIONAL ORDER OF CIVIL ARREST

In discretion of court, order of arrest may issue, without notice, before or after service of summons, and before or after judgment (CPLR 6111).

Sheriff must bring arrested defendant before the court, in the county where arrest made, for hearing within 48 hours, exclusive of Sundays and public holidays (CPLR 6111).

2 DAYS DEFECT IN FORM OF PAPERS IN ACTION.

Any objection to a defect in the form of papers served in an action is deemed waived unless, within 2 days after receipt, the papers are returned with statement of objections (CPLR 2101(f)).

3 DAYS ACTION TO RECOVER CHATTEL.

After holding chattel for 3 days, sheriff must deliver it to plaintiff if (1) notice of exception to plaintiff's surety, (2) notice of motion for impounding, or (3) papers to reclaim chattel are not served on him (CPLR 7102 (f)).

3 DAYS SERVICE BY MAIL-ADDITIONAL 3 DAYS' NOTICE REQUIRED.

Where a prescribed period of time is computed from the service of a paper, service by mail adds 3 days to the period (CPLR 2103(b) (2)).

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3 DAYS CROSS-NOTICE OF MOTION, SERVICE OF PAPERS

A cross-notice of motion by the opposing party at least 3 days before the return day of the motion brought by the moving party (CPLR 2215).

5 DAYS DISCLOSURE-PROTECTIVE ORDER APPLICATION

Where notice for discovery and inspection (CPLR 3120), or for physical or mental examination (CPLR 3121) is served, a motion for a protective order must be served within 5 days of the notice (CPLR 3122).

All applications regarding disclosure returnable before referee supervising disclosure. Referee's order may be reviewed by court upon motion made within 5 days; disclosure in the meanwhile is suspended (CPLR 3104(c), (d)).

5 DAYS DEMAND FOR CHANGE OF VENUE-FROM IMPROPERLY DESIGNATED VENUE

If defendant objects on the ground that plaintiff's venue of the action is not in the proper county (according to residence, or other venue rules), a written demand for a change of venue to the specified and proper county must be served with, or before, answering the complaint.

Defendant can move for a change within 15 days after service of his demand, unless within 5 days after such service, plaintiff served a written consent to the change.

If plaintiff does not consent, and does not, within the 5 days, serve an affidavit alleging that the county designated by him is the proper county or that the county designated by the defendant was not proper, the motion can be noticed by the defendant in the county chosen by the defendant (CPLR 511).

5 DAYS BILL OF PARTICULARS

If a party objects to a demand for a bill of particulars, he must make a motion to vacate or modify the demand within 5 days after receipt of the notice of demand for the bill of particulars.

If no such motion is made, the bill of particulars must be served within 10 days of the demand (CPLR 3042(a)).

5 DAYS NOTICE OF MOTION-REQUIRED MINIMUM TIME

A notice of motion and supporting affidavits must be served at least 8 days before the return day.

- 8 DAYS Answering affidavits must be served at least 2
continued days before the return day.
 If notice of motion is served at least 10 days before
 the return day, and so demands, answering affidavits
 must be served at least 5 days before the return day.
 Reply affidavits must be served at least 1 day before
 the return day (CPLR 2214(b)).
- 8 DAYS SPECIAL PROCEEDINGS.
 Petition with notice must be served at least 8 days
 before return day.
 Answer and supporting affidavits must be served
 at least 1 day before return day.
 Reply and affidavits must be served at or before
 the return day.
 If served at least 10 days before return day and
 the notice of petition so demands, answer must be
 served at least 5 days before return day, whereupon
 reply must be served at least 1 day before return day
 (CPLR 403(b)).
- 10 DAYS DISCLOSURE-NOTICE OF EXAMINATION BEFORE
 TRIAL.
 Notice to witnesses, non-party, must be served at
 least 10 days before examination, served with subpoena
 (CPLR 3106(b)).
 Notice to adverse party must be served on 10 days'
 notice to opposing party.
 Party served can serve cross-notice of at least 5
 days to examine opposing party, to follow at same time
 and place (CPLR 3107).
- 10 DAYS DISCLOSURE-DEMAND FOR ADDRESSES.
 Within 10 days after service of notice of demand, a
 verified statement of the address of party, or speci-
 fied officer of a corporation, or assignor must be
 served (CPLR 3118).
- 10 DAYS ENFORCEMENT OF MONEY JUDGMENTS-DIS-
 CLOSURE.
 At any time before judgment is satisfied, or vacated,
 a subpoena can be served giving not less than 10 days'
 notice to the judgment debtor.
 Leave of the court is required only for subsequent
 examination of the judgment debtor within 1 year of his
 previous examination (CPLR 5223, 5224).
- 10 DAYS OFFER TO COMPROMISE.
 Written offer to allow judgment must be made not

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10 DAYS later than 10 days before trial in any action except continued matrimonial.

Offer is accepted by serving written notice within 10 days (CPLR 3221).

10 DAYS OFFER TO LIQUIDATE DAMAGES CONDITIONALLY

Written offer to allow judgment in contract action, if defendant fails in his defense, must be served not later than 10 days before trial.

Offer is accepted by serving written notice within 10 days (CPLR 3220).

10 DAYS REMEDY FOR DEFECTIVE BILL OF PARTICULARS.

Within 10 days after receipt of defective bill of particulars, a motion to preclude, or directing service of a further bill must be made (CPLR 3042(d)).

10 DAYS FILING PROOF OF SERVICE OF SUMMONS.

Required where service of the summons was made by mailing plus either mailing or delivery to a suitable person ("substituted service").

Service is complete 10 days after filing (CPLR 308(3)).

10 DAYS TENDER.

Written tender must be served and filed, together with payment of amount into court deemed sufficient to satisfy a contract cause of action, not later than 10 days before trial.

Claimant can withdraw amount within 10 days upon filing statement that withdrawal is satisfaction of claim (CPLR 3219).

20 DAYS ARTICLE 78 PROCEEDINGS.

At least 20 days before return day, notice of petition must be served with petition and affidavits.

Answer, with supporting papers, must be served at least 5 days before return day.

Reply, with supporting affidavits, must be served at least 1 day before return day (CPLR 7804(c)).

20 DAYS ORDER DETERMINING PROVISIONAL REMEDY APPLICATION.

An order relating to a provisional remedy must be determined by the court within 20 days of its submission.

20 DAYS MOTION TO CORRECT PLEADINGS.

A motion for a more definite statement, or to strike

- 20 DAYS continued scandalous or prejudicial matter, must be served within 20 days after service of the challenged pleading. If the motion is denied, responsive pleading must be served within 10 days after service of notice of entry of the order denying the motion. If the motion is granted, the amended pleading must be served within 10 days after service of notice of entry of the order granting the motion (CPLR 3024(c)).
- 20 DAYS MOTION TO DISMISS COMPLAINT.
In the Supreme Court, within 20 days of service of a complaint, defendant may move for judgment dismissing the complaint upon 1 or more of 10 grounds set forth in CPLR 3211 (a). No more than 1 such motion is permitted. However, a motion to dismiss based on ground 2 (no jurisdiction of the subject matter), or on ground 7 (failure to state a cause of action), or on ground 10 (absence of a party), may be made at any subsequent time. The court may order an immediate trial of issues raised on this motion. Service of motion papers extends the time to serve a responsive pleading until 10 days after service of notice of entry of order denying the motion (CPLR 3211).
- 20 DAYS MOTION FOR SUMMARY JUDGMENT-UPON JUDGMENT, OR UPON INSTRUMENT FOR PAYMENT OF MONEY ONLY.
Summary judgment motion papers in lieu of complaint can be served with the summons and made returnable at least 20 days after service (CPLR 3213).
- 20 DAYS APPEARANCE, IN SUPREME COURT.
Within 20 days after personal service of summons only, exclusive of date of service. Exception: if summons only served by any method other than delivery to defendant within N.Y. State, within 30 days after service is complete (CPLR 320(a)).
- 20 DAYS APPEARANCE IN REAL PROPERTY ACTION.
Within 20 days after appearing, attorney for non-resident defendant in action affecting real property within N.Y. State, must file written authority for appearance, and serve copy or notice of filing (CPLR 322(b)).
- 20 DAYS THIRD PARTY PRACTICE-AMENDMENT OF PLAINTIFF'S COMPLAINT.
Within 20 days after service of a third-party com-

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20 DAYS continued plaint, upon the plaintiff, he may amend his complaint, without leave of the court, to assert a claim against the third-party defendant (CPLR 1009).

20 DAYS SERVICE OF PLEADINGS IN THE SUPREME COURT.

Each party has 20 days exclusive of the day of service, in which to answer the previous pleading of his adversary.

If a Summons only is served by P on D, D has 20 days in which to appear and demand a copy of the Complaint (CPLR 3012(a). Where a Complaint is served, D has 20 days in which to answer (CPLR 3012(d). If D's answer contains a counterclaim, P has 20 days in which to reply thereto.

NOTE: In all cases, if the last day on which to serve a pleading falls on a Sunday or other legal holiday, service may be made on the first business day thereafter (Gen. Const. Law Sect. 20).

However, defendant must serve his answer within 30 days after service is complete if complaint was served with the summons, and service was made in any manner other than by delivery to defendant within N.Y. State (CPLR 3012(c)).

20 DAYS ANSWER TO SUPREME COURT CROSS-CLAIM, INTERPLEADER COMPLAINT, OR THIRD-PARTY COMPLAINT.

Within 20 days after service thereof (CPLR 3011, 3012(a)).

20 DAYS AMENDMENT OF PLEADINGS.

A pleading may be amended once, without leave of the court, within 20 days after its service, or within 20 days of service of a responsive pleading, or if time to plead has been extended, at any time before period for responding expires (CPLR 3025(a)).

28 DAYS SERVICE BY PUBLICATION.

Summons, complaint, order and papers upon which service by publication was based must be filed on or before the first day of publication.

Must be published at least once in each of 4 successive weeks in 2 newspapers.

In matrimonial actions, mailing on or before the first day of publication, in addition to publication.

First publication must be had within 20 days after

- 28 DAYS continued the order was granted.
Publication is complete on the 28th day after the 1st publication (CPLR 316).
- 30 DAYS APPEALS AS OF RIGHT
Within 30 days after service upon appellant of judgment, or order, and notice of entry (CPLR 5513(a)).
Motion for permission to appeal must be made within 30 days after service, upon party seeking permission, of judgment or order and notice of entry (CPLR 5513(c), 5516).
Cross-appeal must be made within 10 days after service of notice of appeal, or 30 days after service of judgment or order, whichever longer (CPLR 5513(b)).
- 30 DAYS ATTORNEY'S DEATH, DISABILITY, ETC. BEFORE JUDGMENT.
No further proceeding against the party is permitted, without leave of the court, until 30 days after notice to him, to appoint another attorney, personally or as court directs (CPLR 321(c)).
- 30 DAYS NOTICE OF PENDENCY
When filed before an action is commenced, a notice of pendency is effective only if, within 30 days, a summons is served upon the defendant, or the first publication is made and subsequently completed.
If defendant dies within this 30-day period before the summons is served or publication completed, the summons must be served upon his executor or administrator within 60 days after letters have been issued (CPLR 6512).
- 60 DAYS ATTACHMENT-GRANTED BEFORE ACTION COMMENCED.
Order valid only if, within 60 days summons served upon defendant, or 1st publication made and subsequently completed. Upon good cause, court can extend time for service of summons up to an additional 60 days (CPLR 6213).
If defendant dies within period, before summons served, or publication completed, summons must be served on his executor or administrator within 60 days after letters issued (CPLR 6213).
- 60 DAYS STATUTE OF LIMITATIONS EXTENDED-BY DELIVERY OF SUMMONS TO SHERIFF.
If summons is delivered to the sheriff for service

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60 DAYS before the deadline, the statute of limitations is extended for 60 days beyond the deadline (CPLR 203(b) (4)).

60 DAYS COURT'S DETERMINATION OF ANY MOTION, OTHER THAN FOR PROVISIONAL REMEDY.

The court must determine any motion, other than for a provisional remedy, within 60 days after it has finally been submitted for decision (CPLR 2219(a)).

60 DAYS COURT'S DECISION.

The decision of the court must be rendered within 60 days after a cause has been finally submitted to the court trying the case without a jury, unless the parties agree to extend this time (CPLR 4213(c)).

4 MONTHS TOLLING OF STATUTE OF LIMITATIONS-ABSENCE FROM N.Y. STATE.

If, when cause of action accrued, defendant was outside N.Y. State, the statute of limitations is tolled until he comes into N.Y. State.

If, after the cause of action accrued, defendant departs and remains absent for 4 months or more, or resides in N.Y. State under a false name, the statute of limitations is tolled for the period of his absence, or residence under the false name.

However, above does not apply where specified alternate methods of serving the defendant are available (CPLR 207).

6 MONTHS TERMINATION OF ACTION.

If an action is terminated in any other manner than by voluntary discontinuance, dismissal for neglect to prosecute, or final judgment on the merits, a new action can be commenced within 6 months after termination, despite the expiration of the statute of limitations (CPLR 205).

1 YEAR VACATING DEFAULT JUDGMENT-SUMMONS NOT PERSONALLY DELIVERED.

A motion to vacate a default judgment must be made within 1 year after defendant, served in any manner other than by personal delivery, or obtains knowledge of entry of the default judgment, but in no event more than 5 years after its entry, if court finds no personal notice of the summons was given to the defendant, who has a meritorious defense (CPLR 317).