

## SELF-HELP CENTER

NOTE: **PERSONS WITHOUT COUNSEL ARE ADVISED TO CONSULT AN ATTORNEY.** COURT STAFF MAY NOT GIVE LEGAL ADVICE, PREPARE YOUR PAPERS OR ACT AS YOUR ATTORNEY.

### **HOW TO RESPOND TO A COMPLAINT** **/ MOTIONS FOR DISMISSAL**

Once a summons and complaint or a summons with notice have or has been served, the defendant (the person being sued) must take certain responsive action within 20 or 30 days (depending on how the papers were served). If the defendant fails to do so, the plaintiff (the person bringing the lawsuit) may quickly be able to obtain the relief (e.g. money, divorce) he or she seeks in the form of what is called a Judgment by default (also called a default judgment).

#### A. How a Default Judgment is Obtained

A plaintiff may take one or two routes to obtain a default judgment, depending on the circumstances. Once the deadline for action by the defendant has passed without such action being taken, the plaintiff in certain cases may apply to the County Clerk's Office for such a judgment. This can only be done where the relief sought is purely money damages and the amount sought is either a sum certain or one that, by calculation, can be made certain (e.g., suit upon a promissory note). The plaintiff must present a statement for judgment including an affidavit explaining the nature of the case, showing that a summons with notice or a summons and complaint were served properly, establishing the fact that defendant has defaulted (that is failed to properly answer) and explaining how the sum sought in the complaint is calculated.

In the alternative, the plaintiff may make an application to the court for a default judgment. This is done by way of a motion for a default Judgment. This motion must be accompanied by an

affidavit (an affidavit is merely a written statement sworn to in the presence of a notary public) by the party establishing the merits of the claim and the sum due and an affidavit establishing the fact of the default. See Civil Practice Law and Rules (Sec. 3215 (or the CPLR for short). If the plaintiffs papers are in proper form and if there is no opposition from the defendant, or if the opposition is unconvincing, the court is likely to grant the motion. A judgment for the relief sought is likely to be entered shortly thereafter.

#### B. How to Avoid a Default

In order to avoid a default, the defendant must take certain responsive actions upon being served with either the summons with notice or the summons and complaint within the applicable deadline. These deadlines are found in the CPLR. The action to be taken differs depending on whether the case started with a summons with notice or a summons and complaint.

Where the plaintiff has served a summons with notice, the defendant may serve a document called a notice of appearance. This document formally announces that the defendant is appearing in the case in order to defend him/her/itself and indicates who the defendant's attorney is or that the defendant is appearing on his or her own behalf. A corporation must appear through an attorney. There is no such thing as a corporation appearing in a self-represented capacity. A corporation that attempts to so appear may lose the case for this reason. If a defendant serves and files a notice of appearance, then he or she has formally appeared in the case but is generally not aware (beyond the brief description on the summons with notice) what the plaintiff claims the case to be about. The notice of appearance is therefore usually accompanied by a demand for a complaint, that is a demand that the plaintiff serve a formal complaint. The service of this demand puts the ball back in the plaintiffs court, requiring him/her to serve a complaint (which is really just a statement of

allegations) within 20 days from the service of the demand. If the plaintiff fails to do that on time, the defendant may make a motion to dismiss the case.

Once a complaint has been served, either at the start of the case or in response to the service of a notice of appearance and a demand for a complaint, the defendant must take action to address the lawsuit started by the plaintiff, the defendant must serve an answer or make and serve a motion to dismiss. The answer and the motion to dismiss are discussed in the following sections.

C. The Answer

An answer, like a complaint, is a formal statement of a party's position (in this instance the defendant's) regarding the case, and, in particular, the plaintiff's accusations. The answer and any other statements of allegations make up the framework of the case.

The format of the answer resembles that of complaint. The body of the answer consists of a series of numbered paragraphs, each corresponding to a paragraph of the complaint and responding to all allegations therein contained. As to each separately numbered allegation in the plaintiff's complaint, the defendant must respond by admitting its truth, denying its truth, or denying possession of knowledge or information sufficient to permit an admission or denial. Each allegation of a complaint that is not so responded to is deemed to have been admitted. An example of an answer is attached hereto as Appendix A.

The answer may and sometimes must contain affirmative defenses. See CPLR 3018(b). Certain defenses, such as lack of proper service of the summons and complaint, are waived if the defendant does not assert them in an answer or in a motion to dismiss made prior to service of an answer. CPLR 321.1. The answer may also contain, if there is a factual and legal basis therefore, a counter suit by the defendant against the plaintiff, that is, claims for relief (e.g., money damages)

sought by the defendant against the plaintiff, which are known as counterclaims. These follow the portion of the answer already described and take the form of allegations such as those contained in a complaint. In regard to these claims, defendant is also a sort of plaintiff. Similarly, in a case with multiple defendants, one defendant may assert his or her own claims against a fellow defendant or defendants, which are known as cross claims.

Generally, if the complaint has been sworn to (Verified, see CPLR 3020), then the answer must be verified as well.

The answer must be served upon the plaintiff and all other parties (that is every plaintiff and defendant). In contrast, with service initiating a lawsuit, service by mail is sufficient.

D. The Motion to Dismiss

Instead of answering, if the defendant believes that the complaint is legally insufficient or that other appropriate grounds (reasons) exist, he or she may make a motion to dismiss the complaint. This motion must be made in a timely fashion (that is, within the same deadline for service of the answer) or the defendant will be in default.

A motion is an application to the court for a specific Court Order within the confines of an existing case. The CPLR defines the kinds of motions that a party may make.

Generally speaking, a motion to dismiss challenges the legal adequacy of a complaint.\* A motion to dismiss may also be used when it is claimed that dismissal is required because the court never acquired power over the defendant as a result of some impropriety in the service of process, [in this context process means either a summons with notice or a summons and complaint however, in general process it means any papers used to initiate (start) a lawsuit], because the action was not commenced on time, or for other reasons.

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\*A plaintiff may also use such a motion to strike an affirmative defense contained in answer.

As to timeliness, every plaintiff's case must be brought within one of various deadlines spelled out in the law, which are known as statutes of limitations. For example, an action for breach of contract must be brought within six years of the breach. CPLR 213. Most personal injury actions must be brought within three years of the injury complained of. CPLR 214. For other limitations, see CPLR Article 2.

If a motion to dismiss is to be made, the party bringing the motion (the movant or moving party) must prepare a notice of motion (or in certain circumstances an Order to Show Cause), which advises all the other parties to the action that the motion is being brought, what the nature of the motion is, what the supporting papers are, what the reasons for the motion are, and when and where the motion will be heard, when, that is, it will be formally presented to the court for decision. (The date of formal presentation to the judge is called the return date. See CPLR 2214(a). An example of a notice of motion is annexed hereto as Exhibit B.

The moving party must submit with the notice of motion an affidavit or other proof that explains the nature of the motion and the reasons therefor and to which is attached copies of the complaint and any other papers that are necessary to the motion. (The complaint and other papers are called exhibits). If, for example, it is contended that the action was not timely commenced, the affidavit must set forth the facts that show that the action is untimely. To present argument about a point of law, the moving party may submit a separate document called a memorandum of law (or "brief"). Legal argumentation and citations to cases and/or statutes should be limited to factual

statements and documentary evidence.

For all motions, at least eight (8) days advance notice must be given to all other parties if the papers are served by hand (personal service) and at least thirteen (13) days notice must be given if the papers are mailed five (5) are added where papers are served by mail). Answering papers to the motion, that is, papers in opposition to the motion, must be served at least two (2) days before the return date. However, if the notice of motion is served at least twelve (12) days (seventeen (17) days by mail) before the return date it may demand that answering papers be served at least seven (7) days before the return date, then the answering papers must be served at least seven (7) days by hand (twelve (12) days by mail) before the motion is to be heard. CPLR 2214(b).

Provision is also made in the rules for reply papers, which are papers presented by the moving party in which the moving party responds to the argument of his or her adversary in the answering papers (but does not present new matter). No other papers are permitted by the CPLR on a motion.\* A movant is permitted to submit reply papers only where the motion papers have been served

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\*However, the CPLR does provide that when a motion is made, another party may make a motion of his or her own in response, known as a cross-motion. CPLR 2215.

at least twelve (12) days before the return date and the movant has properly requested that answering papers be served at least seven (7) days before the return date. Remember if papers are served by mail five (5) more days must be added to the numbers above.

A defendant need to be careful that he or she does not inadvertently waive any defenses depending upon how he or she makes a motion or otherwise responds to the complaint. See CPLR

321 1 (e).

A timely motion to dismiss pursuant to CPLR 321 1 (a) extends the defendant's time to serve the answer until ten (10) days after an order issued by the court in regard to the motion has been entered and notice of entry (entry means that the Court's Order on the motion has been signed and filed by the County Clerk) has been provided.

All motion papers must be served by mail or by hand upon all parties to the case who have not defaulted in appearing (that is, all parties except those whose time to answer has already expired and who are now in default), even if the motion does not seek relief against some of them. An affidavit of service must be prepared; one original should be retained by the moving party and a duplicate original should be attached to the papers submitted to the court so that the court can be certain that timely notice was afforded to all other parties to the case.

The original moving papers must be delivered to the Court Clerk's Office at least five (5) business days prior to the return date so that the motion may be recorded in the court's computer system and place on the calendar. In the first instance, the place at which the motion will be returnable is the assigned Justice's courtroom. Usually argument of any motions takes place at that time. (Generally, argument of motions takes place only when, where and if the assigned Justice directs). This is so for all motions brought in our court by notice of motion. The parties are free upon agreement to adjourn motions (within limits) so as to accommodate their schedules. Answering and reply papers are to be served upon all other parties to the case within the deadlines applicable. The original answering and reply papers (to which must be attached proof that the papers were served on all other parties) must be delivered to the moving/opposing/all other party(ies) at the call of the calendar at 9:30 A.M. on the return date.

Once the motion is marked submitted, it is either retained by the Justice assigned to the case for decision on the papers or is scheduled for oral argument by the assigned Justice. This depends upon the procedures adopted by the Justice in question. Some Justices require oral argument on all motions. Others will direct argument on a case-by-case basis and notice thereof will be provided. Still others (most) take motions on submission and decide them on the papers.

**\*\*\*PLEASE NOTE: A FRIVOLOUS LAW SUIT STATEMENT (CERTIFICATION) IS REQUIRED FOR ALL PAPERS SERVED ON ANOTHER PARTY, FILED OR SUBMITTED TO THE COURT, PURSUANT TO 22 NYCRR 130-1. 1a.**