

## 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 MAKE A MOTION

A motion is a request to the court for a specific order that is made within an existing lawsuit. A motion may seek the taking of some procedural step within the case or, under appropriate circumstances, request that the case be brought to a head before the court on the merits. The kinds of motions that may be made, and the procedures for making them, are defined by the Civil Practice Law and Rules. (called the CPLR for short).

To illustrate what a motion is, how it is made and responded to, this summary will discuss a motion to dismiss. At the conclusion of this discussion, this summary will describe certain other common types of motions. The procedures described in Section A applies to many other motions as well.

The person who makes a motion may be called the moving party or the movant. A person who opposes a motion is called the opposing or answering party.

#### A. The Motion to Dismiss

Generally speaking, a motion to dismiss challenges the legal adequacy of a complaint or petition.<sup>1</sup> A motion to dismiss may also be used when a defendant claims that the court has no jurisdiction over him/her (in this context "no jurisdiction" means that the court lacks the power to order the person involved to do something") by virtue of some impropriety in the service of process

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<sup>1</sup> A plaintiff may also use such a motion to strike an affirmative defense contained in answer.

or because the action was not commenced on time, or for other procedural reasons.

As to timeliness, every case must be brought within one of the 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.

All papers on motions must be typed, or printed legibly, in English, using black ink on 8 1/2 by 11 inch paper, one side only, double spaced.

Except when proceeding by order to show cause (discussed below), the moving party must prepare a notice of motion, a document which advises all the other parties to the action that the motion is being brought, what the movant wants the Court to order (e.g., dismiss the case) what the supporting papers are, what the reasons for the motion are (these are usually called the movant's grounds) and when and where the motion will be heard, when, that is, it will be formally presented to the court for decision (the return date). See CPLR 2214(a). An example of a notice of motion is annexed hereto as Exhibit A.

The moving party must submit with the notice of motion, an affidavit (which is a written statement made under oath and sworn to in the presence of a Notary Public) or other proof that explains the nature of the motion and the reasons therefor and to which is attached copies of all documents necessary to understand the motion and the movant's grounds that support the motion. For example, if it is contended that the action was not timely commenced, the affidavit must state the facts that show this. If the movant wants to also present argument about a point of law, he/she should submit a separate memorandum of law (or "brief"). Legal argumentation and citations to prior court decisions and/or statutes (laws) should be contained only in the memoranda of law, not

in affidavits or exhibits (these should be limited to factual statements and documentary evidence).

The CPLR sets forth deadlines for the service of papers on motions. There are three things to keep in mind here. First, there are the basic deadlines set forth; therefore the moving party should choose a return date so that he or she will comply with those deadlines. Second, in most circumstances when papers are mailed rather than served personally, the rules add five additional days to the deadline(s) for a response to allow for receipt of the papers. Third, the moving party may obtain additional time to prepare and serve a reply. That is, if the moving papers are served a set time in advance and if the notice of motion contains a demand in accord with CPLR 2214(b),<sup>2</sup> then the movant is allowed additional time to review the answering papers and may put in a reply in response to those papers. The following is a summary of the deadlines:

Standard Time(s)

Moving papers: must be served by hand (that is personal service) at least 8 days before return date or by mail 13 days (8 + 5) before the return date.

Answering papers: must be served (by mail or by hand) 2 days before return date.

Reply papers: not provided for.

Additional Time - Papers in Accord with Demand (2214(b))

Moving papers: must be served by hand at least 12 days before return date or 17 days in advance if sent by mail (12 + 5) notice of motion must contain 2214(b) demand.

Answering papers: must be served (by hand or by mail) at least 7 days before return date.

Reply papers: must be served (by hand or by mail) at least 1 day before.

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<sup>2</sup> The demand should state the following: "Please take further notice that you are hereby required to serve copies of your answering papers on the undersigned no later than the seventh day prior to the return date set above."

No other papers are permitted by the CPLR on a motion.'

Attorneys and self-represented persons are free to, and indeed are encouraged to, consult with one another and agree in writing on a schedule that suits the needs of all which of course may be different than the times listed above.

A defendant needs to be careful that he or she does not inadvertently waive any defense 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 pleading known as the answer until ten days after an order issued by the court in regard to the motion has been entered and notice of entry 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 the other duplicate should be attached to the papers submitted to the court so that the court can be certain that timely notice was given to all other parties to the case.

Before a motion can be filed the movant must pay a filing fee of \$45.00. If the case has never come to court before, the movant will have to cause a Justice to be assigned to the case. This is done by the filing of a Request for Judicial Intervention. (called an RJI for short). It costs \$95.00 to file an RJI. Both the filing fee for the motion and the RJI fee (if required) are paid to the County Clerks Office. For more on this subject, see [How to File a Request for Judicial Intervention](#) which is

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3 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.

available from the Law Library Self-Help Center.

The original moving papers must be delivered to the Court Clerk's Office at least five business days prior to the return date so that the motion may be recorded in the court's computer system and placed on the calendar. In the first instance, the place at which the motion will be returnable is the Assigned Justice's Courtroom. Oral (spoken) argument may take place there but usually oral argument 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 Courtroom at the call of the calendar at 9:30 AM on the return date.

A word of caution on return dates. Sometimes the assigned Justice and/or the Court Clerk's Office will direct or require a change in the return date you selected.

Accordingly, a few days after you submit your notice of motion you must check with the Clerk's Office to see if this happened.

You can do this by:

Calling the Court Clerk's Office (Have your Docket Number ready).

Once the motion is marked submitted, it is either sent to the Justice assigned to the case for decision or is scheduled for oral argument in front of that Justice. This depends upon the procedures adopted by the Justice in question.

Another means by which to make a motion is an order to show cause. This device is intended to be used when there is urgency or when the movant seeks a stay (often called a Temporary Restraining Order or "TRO" for short) of some sort from the court, that is, a temporary prohibition

(e.g., a stay against a bank's freezing the defendant's bank account).

If you are seeking a stay of an act by a public officer, board or municipal corporation (e.g., Department of Social Service; City of New York) and want a Temporary Restraining Order, you must give the public officer, board or municipal corporation advance notice of this. You must also swear out an affidavit in the presence of a notary public stating who you notified and when you spoke to them. A form affidavit for this purpose is available from the Public Legal Resource Center and it is recommended that you use it.

An order to show cause (an example of which is attached as Appendix B) is a request for relief by motion, but, unlike a notice of motion, it is presented to a judge and signed by him or her before it is served on the other parties to the case. It requires the other parties to the case to appear on a certain date at a certain time (the return date at a certain place and to state reasons why the movant should not receive the relief asked for in the order to show cause.

**PLEASE NOTE: THE RETURN DATE ASSIGNED DEPENDS ON WHICH JUDGE IS ASSIGNED TO YOUR CASE, AND YOU, THE LITIGANT, DO NOT SET THE RETURN DATE IN THE SIXTH JUDICIAL DISTRICT. IT IS UP TO YOU TO MAKE SURE THAT THE DATE ASSIGNED ALLOWS YOU ENOUGH TIME TO SERVE THE PAPERS AND THE OPPOSING PARTY TO RESPOND.**

Any party who wants to proceed by order to show cause must prepare a proposed order to show cause and submit it to the court for his or her case. The return date should be left blank since that will be filled in by the Justice who signs it. Attached to the order should be the affidavit in support, as described above, and any necessary attachments to that affidavit (e.g., a copy of the

complaint). If there is a memorandum of law, it should be submitted at this time as well. These papers must then be presented to the court.

When the papers are ready, they must be presented to the Court Clerk's Office. That office will review the papers for form. If emergency relief is requested, the movant must also submit an emergency affidavit which explains both the nature of the relief sought (e.g., an order preventing any former spouse from taking my child/children to another country) and why immediate relief is needed (e.g., my former spouse has plane tickets to leave the country tonight and says I will never see my child/children again). The papers will be delivered to the Justice and, if found satisfactory, signed by him or her. The Justice will fill in the return date and will specify when and how the papers should be served on all other parties.

If immediate emergency relief is not required the papers are simply left with the Court Clerk's Office staff.

After the papers are reviewed they will be either:

- a) Marked to be returned to you for correction  
or
- b) sent to the assigned Justice for signature.

You can check the status of your order to Order to Show Cause by calling the Clerk's Office (wait at least 48 hours before calling).

If your papers need corrections you should return to the Clerk's Office, pick them up, correct them as needed and resubmit them.

If your papers are correct as to form they will be forwarded by the Court Clerk's Office staff to the assigned Justice's Chambers for signature. If the Justice finds them satisfactory he/she will sign them, then fill in the return date and specify when and how the papers are to be served.

When the order has been signed, the movant must "conform a copy, " that is, reproduce on a copy of the papers with each and every marking made thereon by the Justice. This copy must then be photocopied and served upon the attorneys for all parties to the case in the manner and within the deadline set by the Justice.

After service is made, the movant must see to it that an affidavit of service is prepared. The original must be presented to the Court on the return date. (The case will be called in the assigned Justice's courtroom). The moving party must be present at that time especially if the Court granted him/her/it a stay (TRO) until the hearing date of the motion and the movant wishes it to continue until the motion is decided. Movants must ask for this when the order to show cause is called before the Court at calendar call. If the other parties do not submit opposing papers and do not appear on the return date, the court may take action on the order to show cause provided that it is satisfied from the affidavit of service that the other parties were properly served with the order to show cause and supporting papers.

The other parties may submit papers in opposition to the motion (usually in the form of opposing affidavits and exhibits). This ordinarily will be done within the time specified by the Justice when the Order to Show Cause is signed. Opposition papers must also be properly served on the original moving party as well as all other parties to the case:

#### B. The Motion for Summary Judgment

A motion for summary judgment attempts to bring to a head the merits of the case or a part thereof on the basis of the pleadings (the complaint and answer in most cases) together with affidavits and exhibits without the necessity of a trial. The moving party to such a motion, who may be the plaintiff or the defendant, asserts, in effect, that there is or can be any real dispute about any



relevant fact that would require a trial, and that the facts show that the moving party is entitled to a judgment in his or her favor as a matter of law. This motion may only be made after an answer has been served. CPLR3212(a). If the motion is made before the adversary has had a chance to request or to obtain discovery about relevant issues, the adversary may oppose the motion on the ground that it is premature and the court might deny the motion with leave to renew after discovery or hold the motion in abeyance. CPLR 3212(f). (if you are unsure about what "discovery means, the Public Legal Resource Center has a handout that helps explain it. Ask for it if you need it). In the Sixth Judicial District, a motion for summary Judgment must be made within 60 days after the filing of a note of issue.

In support of the motion, the moving party must submit a copy of **all** pleadings in the case, an affidavit, and any other available proof (e.g., documentary evidence). The affidavit must be made by a person with knowledge of the facts and must set forth all relevant facts. CPLR 3212(b). The aim of the moving papers on a motion for summary judgment is to show that there are no material facts in dispute and that the facts require judgment in favor of the moving party as a matter of law.

The party opposing the motion for summary judgment is not required to show that he or she is entitled to judgment as a matter of law. It is enough if the opponent shows that one or more questions of material fact require a trial before the movant could win. In that event, the motion must be denied and the case must proceed to trial. On a motion for summary judgment, the job of the Court is to determine whether there are issues that require a trial, not to decide those issues. The party opposing such a motion may not state part of his or her proof and hold back some other parts for another day. There may be no other day. The opponent is obliged to lay bare his or her proof and if that is not sufficiently done so as to show that there is at least one real issue of fact in dispute that must be tried, the motion will be granted. In some circumstances, the court may grant summary

judgment to the opposing party even if no cross motion was made.

A motion for summary judgment (like nearly all motions) maybe denied or granted or it may be granted in whole or in part. CPLR 3212(e).

### C. Other Motions

There are many other types of motions. Another common one is:

(a) Motion to Amend or correct a pleading (e.g., complaint or answer): A party to a case may make a motion to change his or her pleading (motion to amend). Court approval (or a written agreement of all parties to the case (which is called a stipulation) is usually required before such a change maybe made. CPLR3025(b). The movant must attach a copy of the existing pleading and a copy of the proposed new pleading and include an affidavit showing the merits of (the good reasons for) the proposed amendment.