NY CLS CPLR R 2214

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 22 Stay, Motions, Orders and Mandates (§§ 2201 — 2223)

R 2214. Motion papers; service; time.

(a) Notice of motion. A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. Relief in the alternative or of several different types may be demanded.

(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time.

(c) Furnishing papers to the court. Each party shall furnish to the court all papers served by that party. The moving party shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved. Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system. Where such papers are in the possession of an adverse party,

they shall be produced by that party at the hearing on notice served with the motion papers. Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct.

(d) Order to show cause. The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein. An order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 1972, ch 752, eff May 30, 1972; L 1984, ch 177, § 1, eff Aug 4, 1984; L 2007, ch 185, § 1, eff July 3, 2007; L 2014, ch 109, § 1, effective July 22, 2014.

Annotations

Notes

Derivation Notes

Earlier statutes and rules: CPA § 117; RCP 60, 64, 65; CCP 768, 780; Code Proc § 401; Gen Rules Pr 37, 40.

Editor’s Notes

Laws 2007, ch 185, § 3, eff July 3, 2007, provides:

§ 3. This act shall take effect immediately; provided, however, that this act shall apply to a notice of motion served on or after the date on which this act shall have become a law.

Amendment Notes

The 2014 amendment by ch 109 § 1, in (c), substituted “served by that party” for “served by him” in the first sentence, deleted “at the hearing” following “shall furnish” in the second sentence, added the third sentence, and substituted “produced by that party” for “produced by him” in the second to the last sentence.

Commentary

PRACTICE INSIGHTS:

RULES GOVERNING SERVICE OF MOTIONS AND CROSS MOTIONS

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INSIGHT

Prior to 2007, CPLR 2215 provided that cross-motions could be served at least three days before the original motion was noticed to be heard. This presented certain logistical and timing problems, which affected whether the original moving party had sufficient time to respond. A 2007 amendment attempted to cure those problems by permitting the original moving party to demand that cross-motions be served at least 7 days before the return date. While the new amendment served a laudatory purpose, it created a separate set of rules for the service of cross-motions (as opposed to the original motions), by mail or overnight delivery, which created unnecessary confusion among practitioners. Moreover, it failed to address the problems associated with the service of opposing and reply papers by mail. **Of course, many of these problems have been alleviated in electronically filed cases.**

ANALYSIS

Significant changes to timing in motion practice.

The 2007 amendment makes several significant changes in the timing of motion practice:

1. 12-7-1 motions are now 16-7-1; that is, the original movant has the option of serving the motion by hand at least 16 days in advance of the return date instead of the prior 12–day requirement under CPLR 2214(b). If served by overnight delivery, one business day is added. If service is by regular mail within New York State 5 days is added, 6 days if the mailing is made from outside the State but within the geographic boundaries of the United States. *See* CPLR 2103(b) (2), (6).

2. A movant who serves a “16 day” motion, can demand not only that answering papers be served at least 7 days before the return date (in accordance with prior practice), but may also make the demand applicable to any cross-motion. *See* CPLR 2214(b) as amended.

3. To clear up a conflict in the law, the amendment required that if the cross-motion is served by regular or overnight mail, additional time must be provided. *Compare* *Perez v. Perez*, 131 A.D.2d 451, 451, 516 N.Y.S.2d 236, 237 (2d Dep't 1987) and concurring opinion in *Guzetti v. City of New York*, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dep't 2006). However, the amendment created its own set of timing: three extra days if served by regular mail and one day (not one business day), if served by overnight mail. CPLR 2215(b).

The 3-day cross motion remains alive and well.

Thus, the additional time required to serve a cross-motion (that is, seven days) is occasioned only if (i) the original motion is served at least 16 days before the return date and (ii) the notice of motion expressly demands service of cross-motions at least 7 days before the return date. Thus, if a demand is not made, or the motion is served less than 16 days and more than 8 days before the return date, the cross-motion can be served by hand up to three days before the return date; the “new” additional time for mailing (3-1) discussed above applies.

Amendment left no doubt that additional time must be added if cross-motion is served by mail.

Prior to the amendment, the generally accepted (better) practice was to serve cross motions by mail at least 8 days before the return date. *See* *Perez v. Perez*, 131 A.D.2d 451, 516 N.Y.S.2d 236 (2d Dep't 1987) (5 days added). However, a concurring opinion in a First Department case cast doubt on that position. *See* *Guzetti v. City of New York*, 32 A.D.3d 234, 237, 820 N.Y.S.2d 29, 32 (1st Dep't 2006) (no additional time). The amendment left no doubt that additional time must be added.

The timing of papers served by mail or overnight mail should have remained consistent.

The better avenue, however, may have been to make the 5/6 day — one business day requirements in CPLR 2103(b)(2) and (6) applicable to the service of cross-motions. This would have eliminated some of the confusion that arises by having two sets of timing rules applicable to service of motions and cross-motions by mail.

The legislation leaves the other timing problems for another day.

The amendment did not deal with the timing problems associated with the service of opposition and reply papers by mail. In such a circumstance, the additional time is not added under CPLR 2103. Thus, for example, if a briefing schedule is not agreed to by counsel, reply papers served one day before the return date may not be received until after the motion is submitted. As discussed below, this problem is no longer an issue in electronically filed cases.

When should the opposition to the cross-motion be served?

Although not entirely free of ambiguity, it appears that the amendment provided that on a 16-7-1 motion the original movant should serve his opposition to the cross-motion together with his reply on the original motion (that is, up to one day before the return date). The issue as to a response to a “three day” cross motion was not addressed.

Many service issues have been ameliorated by electronic filing.

22 NYCRR § 202.5-b provides that: “Where parties to an action have consented to e-filing, a party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically.” Thus, as electronic filing spreads throughout the state, many service issues will be avoided or rendered academic. However, one must still consult the local court or judge’s rules to determine whether the judge requires courtesy hard copies and there remain courts in New York where e-filing has not been implemented.

Summary Chart

A. 16-7-1 motion

1. If original motion served by hand: at least 16 days before return date. If original motion served by regular mail in New York:, add 5 days, that is, at least 21 days before return date,; if the mailing is outside of New York but within the U.S., add 6 days, that is, at least 22 days before return date. If original motion served by overnight mail: add one business day, that is, at least 16 days plus one business day.

2. If original motion demands that cross-motion be served at least 7 days before return date of original motion, cross-motion papers must be served:

If by hand, at least 7 days before return date.

If by regular mail, at least 10 days before return date.

If by overnight mail, at least 8 days before return date.

B. 8-2 motion

1. If original motion served by hand: at least 8 days before return date. If original motion served by regular mail in New York, at least 13 days before return date; if the mailing is outside of New York, but within the U.S., at least 14 days before return date.

If original motion served by overnight mail: at least 8 days plus one business day before return date.

2. If cross-motion served by hand: at least 3 days before return date.

If by regular mail: at least 6 days before return date.

If by overnight mail: at least 4 days before return date.

Counsel should also be aware of Uniform Rules governing motion practice.

Counsel also need to be aware generally of the Uniform Rules that impact practice, particularly with respect to the significant amendments effective February 1, 2021 (some of which were further amended effective July 1, 2022). *See, e.g.*, 22 NYCRR § 202.8-a (motions in general), Commercial Division Rule 16, 22 NYCRR 202.70 (g), Rule 16; § 202.8-c (no sur-reply), Commercial Division Rule 18; § 202.8-d (using orders to show cause only where it is a "genuine urgency," a stay is required or a statute requires it), Commercial Division Rule 19; § 202.8-f (oral argument), Commercial Division Rule 22; § 202.08-g (statement of material facts on summary judgment motion), Commercial Division Rule 19-a; § 202.23 (staggered court appearances), Commercial Division Rule 34. *See also* David L. Ferstendig, *Significant Amendments to Uniform Rules*, 723 N.Y.S.L.D. 1-3 (2021); David L. Ferstendig, *Amendments to Uniform Rules*, 724 N.Y.S.L.D. 1-4 (2021); David L. Ferstendig, *Significant Amendments to Uniform Rules*, 741 N.Y.S.L.D. 1-2 (2022).

BROAD DISCRETION TO OBTAIN AN ACCELERATED MOTION RETURN DATE BY ORDER TO SHOW CAUSE

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INSIGHT

CPLR 2214(d) provides the often overlooked procedure to obtain an accelerated motion return date by order to show cause. The order to show cause practice can be particularly useful if a stay or other preliminary relief is sought, or if service or timing difficulties are anticipated.

ANALYSIS

Accelerating motion return date through order to show cause is at court's discretion.

Neither the statutes nor case law limits what is deemed a "proper case" under CPLR 2214(d) for issuing an order to show cause to set a motion return date instead of using a standard notice of motion. Normally, motions are scheduled via a notice of motion, and they are made returnable in the minimum 8 to 16 days under CPLR 2214(b), plus the additional time required for service by mail or overnight delivery pursuant to CPLR 2103(b)(2) or (6) if necessary, subject to the individual judge's rules and calendar availability. Under the order to show cause procedure, the judge sets the return date in the order, which is usually a shorter time period. Further, a motion brought by an order to show cause may be made returnable to another location or motion court. See CPLR 2212(a). The show cause order may be served by any method of service authorized by CPLR 308, or as set by the court, such as by email on opposing counsel. The absence of proper service of an order to show cause, however, deprives the court of jurisdiction to entertain the motion. *Serrao v. Slope* Stor., 223 A.D.3d 927, 205 N.Y.S.3d 105 (2d Dep't 2024).

Because the statutes and case law fail to define what constitutes a "proper case" worthy of an order to show cause, whether to grant an order to show cause is entirely in the discretion of the court. *See, e.g., Cook v. Estate of Achzet*, 214 A.D.3d 1369, 183 N.Y.S.3d 881 (4th Dep't 2023); *U.S. Bank Trust, N.A. v. DeLuca*, 173 A.D.3d 1242, 100 N.Y.S.3d 903 (2d Dep't 2019); *Mallory v. Mallory*, 113 Misc. 2d 912, 450 N.Y.S.2d 272 (Sup. Ct. Nassau County 1982). As a result, an order to show cause may be used to accelerate the return date in any situation that counsel feels justifies that procedure. All that is required is some reason for the advanced return date or the need for an alternative method of service, which is set forth in the affirmation in support of the *ex parte* application for an order to show cause. *See Mallory*, 113 Misc. 2d at 914, 450 N.Y.S.2d at 274. Should the order to show cause be denied, counsel can still notice

the motion conventionally (*see Mallory*, 113 Misc. 2d at 914, 450 N.Y.S.2d at 274), so the only reason not to seek the order to show cause is the cost of using an affirmation supporting an order to show cause instead of a notice of motion.

Party typically seeks order to show cause to accelerate motion return date ex parte.

A showing as to why an *ex parte* application for the order to show cause is being made is not generally thought to be necessary, perhaps on the theory that all that is at stake is the timing of the motion return date, even though such orders can have more significance than that. Consequently, an order to show cause for such purposes typically is sought *ex parte*, but with the proliferation of electronic filing in New York courts, the adversary will generally know that an Order to Show Cause has been filed. Typically, the party seeking the order to show cause gets a free approach to the court, and in laying out the grounds for the accelerated return date or special service needs also may be previewing the merits and so conditioning the court. A party opposing the application should read the papers and, if necessary, respond to the court explaining why expedited relief is not necessary or appropriate under the circumstances. The court may refuse to sign the Order to Show Cause and direct that the application proceed on notice. At worst, a practitioner has sensitized the court to the issue.

Order to show cause may be used to request stay.

An order to show cause also can be used to request a stay pending the motion return date pursuant to CPLR 2201. For example, a request to transfer venue may be made via order to show cause and include a request to stay all discovery and other proceedings until the court determines the venue. Similar to CPLR 2214(d), under CPLR 2201 a stay is only available in a "proper case," in the court's discretion, when a stay is necessary to prevent further proceedings or prosecution of an action to preserve the status quo for a specified period of time, or until a condition is fulfilled. *See, e.g., Concord Assoc., L.P. v. EPT Concord, LLC*, 101 A.D.3d 1574, 957 N.Y.S.2d 509 (3d Dep't 2012); *Research Corp. v. Singer-General Precision, Inc.*, 36 A.D.2d 987, 320 N.Y.S.2d 818 (3d Dep't 1971). Given the court's broad discretion to grant such a stay,

seeking such relief is an appropriate technique in many circumstances, and there is little cost in seeking such relief as long as an ostensibly reasonable basis exists to seek the stay.

Limitations on orders to show cause in the commercial division and more recently in the general trial courts.

Note that orders to show cause may be used to bring on a motion only in cases involving "genuine urgency," such as an application for provisional relief or a stay, per Commercial Division Rule 19 and the revised Uniform Rules. *See* 22 NYCRR 202.70(g), Rule 19; 22 NYCRR 202.8-d. If such a case involves an application for a temporary restraining order, however, the order to show cause may not be used ex parte unless the moving party demonstrates that there will be "significant prejudice" by reason of giving notice. *See* Commercial Division Rule 20, 22 NYCRR 202.70(g), Rule 20; 22 NYCRR 202.8-e ("Unless the moving party can demonstrate significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort to provide notice, a temporary restraining order should not be issued *ex parte*."); 22 NYCRR 202.7(f).

Advisory Committee Notes

The first sentence of subd (a) is new; except for the last phrase, it is in accord with New York case law. See, e.g., Deutermann v Pollock, 38 App Div 493, 56 NY Supp 634 (2d Dept 1899); Tripp, A Guide to Motion Practice 6 (rev ed 1949). The requirement that the grounds for the motion be specified in the notice is contrary to former New York law, which generally permits specification of the grounds in the supporting papers rather than in the notice. See Millard v Delaware L. & W. R. R. 204 App Div 80, 197 NY Supp 747 (3d Dept 1923); Rathkopf v Walker, 190 Misc 168, 73 NYS2d 111 (Sup Ct 1947); Tripp, op cit supra at 11. However, § 280 of the CPA requires specification of the grounds for a motion objecting to the pleadings and of RCP 62 makes the same requirement where the motion is based upon a mistake, omission, defect or irregularity. These two provisions have thus been broadened into a general rule requiring specification of the grounds of all motions in order to give adequate and specific notice to an

adversary, facilitating his preparation of opposing papers. Such specifications should be in the notice of motion itself or incorporated in an accompanying memorandum. Affidavits should not be used for this purpose but should be confined to factual statements. The second sentence of this subdivision is derived from CPA § 117.

Subd (b) is derived from RCP 60 and 64 and of CPA § 117. The five-day notice provision, where all the attorneys have their offices in the same city or village, has been eliminated. With the speed of modern communications it is no longer necessary to distinguish between attorneys with offices in the same and different cities. The longer period was chosen as the general rule so that a uniform two-day answer provision could fairly be provided. Moreover, under the five-day rule, an attorney served with a motion on a Friday afternoon often has inadequate time to prepare sufficient opposition papers.

Subd (c) is derived from RCP 65. Rule 65 apparently refers only to papers other than affidavits in support or opposition. Affidavits are also furnished to the court, of course, and the first sentence of the subdivision makes this clear. The last sentence of this subdivision is derived from a provision of RCP 64, relating to answering affidavits which must be furnished at least five days before the hearing. The provision has been expanded so that it applies to all papers required to be served. The expanded provision accords with case law, which holds that papers not served will not be considered. See Kenney v South Shore Nat. Gas Co. 126 App Div 236, 110 NY Supp 503 (4th Dept 1908); Jenkins v Warren, 25 App Div 569, 50 NY Supp 957 (1st Dept 1898); but cf. Rein v Oakside Estates, Inc. 3 AD2d 846, 161 NYS2d 235 (2d Dept), leave to appeal granted, 3 NY2d 706, 143 NE2d 925 (1957). It has been held that the court may allow submission of additional papers at the hearing, giving the adverse party an opportunity to answer. Bucholtz v Florida East Coast Ry. 59 App Div 566, 69 NY Supp 682 (1st Dept 1901). The provision of rule 65 that the pleadings are always deemed before the court has been eliminated as unnecessary. No change is intended.

Subd (d) is derived from RCP 60. Rule 60 is primarily concerned with shortening the time for a notice of motion. See, e.g., In re Argus Co. 138 NY 557, 34 NE 388 (1893); Silverman v

Silverman, 189 Misc 227, 70 NYS2d 90 (Sup Ct 1947). An order to show cause also permits the court to direct the manner of service. See, e.g., CPA §§ 794, 1155, 1170; Stuart v Stuart, 195 Misc 928, 88 NYS2d 608 (Sup Ct 1949). As under former law, the order should be issued under this subdivision only upon an affidavit sufficiently stating the need therefor, and it must contain a direction of the manner and time of its service. Service is of a copy of the order. Under former practice, an order to show cause was often sought, despite the adequacy of the notice of motion procedure, in order to obtain a stay which is incorporated in the order to show cause. While there is no reason why a stay cannot be secured on separate ex parte motion and served with a notice of motion, the court or moving party may prefer that the stay be incorporated in the order to show cause.

2007 Recommendations of the Advisory Committee on Civil Practice:

The Committee recommends amendments to Rule 2214(b) and 2215 of the CPLR to improve practice relating to cross-motions. Currently, Rule 2215 provides that an attorney making a cross-motion shall serve notice of the cross-motion at leastt three days before the reeturn date of the original motion. When read with the time for service of motion papers and responses in Rule 2214(b), several problems are presented:

First, if the original moving party gives 12 days notice instead of eight days notice, the party can demand that the responsive papers be served seven days before the return date, giving sufficient time to reply. However, this demand does not apply to any cross-motion that the responding party may make. Thus, even if the moving party gives additional time, that party has no ability to require service of notice of a cross-motion any earlier than three days before the return date.

Second, three days is very little time for the original moving party to respond to a cross-motion.

Third, and worse yet, if the cross-motion is served by mail, it may not be received by the return date, and the original moving party may appear in court without any knowledge that a cross-motion has been made (While courts are split, a recent concurring opinion in the First

Department noted that the additional five days that are added when papers are served by mail, as provided by Rule 2103(b)(2), are not added when a cross-motion is served. (See Guzetti v. City of New York, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dept., August 10, 2006)).

To resolve these problems, the Committee is proposing several amendments to Rules 2214(b) and 2215. CPLR 2214(b) would be amended to provide that where the moving party gives additional time for service of the answering papers and demands that they be served seven days before the return date, that demand would also be applicable to any cross-motion that the responding party may wish to make. This would give the moving party adequate time to respond to the cross-motion. The Committee would also amend this subdivision to provide that in order to obtain papers seven days in advance, the original motion must be served at least 16 days, rather than 12 days, before the return date. This would give the responding party adequate time to prepare papers, not only in response to the motion but also in support of any cross-motion. Presumably, time is not critical when moving party chooses to give more time in order to receive the answering papers sooner, and the Committee believes that the timetable it proposes for motions and cross-motions give both sides a fair opportunity to prepare papers, making it more likely that all arguments will be ready to be heard on the return date.

The Committee also proposes amending Rule 2215 in several respects. The first is simply to conform to its amendment of 2214(b) with respect to situations in which the moving party demands the cross-motion seven days before the return date. The more significant changes deal with service of cross-motions. The Committee's objective, as noted, is to allow both parties to have adequate time to prepare their papers. However, this objective might fail if the party making the cross-motion could serve by mail on the due date. Because a cross-motion is served much later than the original motion, even if 2214(b) is amended as proposed, the party against whom the cross-motion is made should receive it on the day it is due. Under the current rule, the party serving the cross-motion could mail, and the time between mailing and delivery is time lost to the party who must respond. Therefore, the Committee proposes that 2215 be amended to

require that service be three days earlier when mailing is used. In addition, it proposes that when overnight mail is used, service be made one day before the due date.

The Committee recognizes that there are instances when time is critical. These amendments would not affect those motions where the moving party serves a motion eight days before the return date. In those instances, the current rules will continue to apply, and both parties will be under significant time pressure. However, where time is not critical, there is no reason to provide for unreasonably short timetables. Giving adequate time to both the moving party and the maker of a cross-motion will allow attorneys to thoroughly present their arguments to the court without all-too-common waste of time caused by requests for adjournments on the return day.

Notes To Decisions

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I. Under CPLR

1. In general

An order granting leave to plaintiff “to make a final application to Special Term supported by a proper complaint for leave to serve a further and final amended complaint,” requires the court, in the first instance, to pass upon the sufficiency of the proposed complaint and affidavits to determine if a cause of action 2103 and 2214 was proper since the court already had acquired jurisdiction over the parties. Olsen & Chapman Constr. Co. v Cazenovia, 33 A.D.2d 929, 306 N.Y.S.2d 560, 1970 N.Y. App. Div. LEXIS 5830 (N.Y. App. Div. 3d Dep't 1970).

In view of counsel’s active engagement on June 2, to which date trial was advanced without appropriate notice of application and without hearing, and in view of counsel’s offer to pay

necessary expenses of out-of-country witnesses, short adjournment requested should in exercise of discretion have been granted. Fitzgerald v American Trading & Production Corp., 51 A.D.2d 700, 380 N.Y.S.2d 651, 1976 N.Y. App. Div. LEXIS 11143 (N.Y. App. Div. 1st Dep't 1976).

Affidavit of an Assistant Attorney General in support of a motion for summary judgment was sufficient as a matter of law where the affidavit was founded upon documentary evidence. State v Middletown Beef Co., 84 A.D.2d 834, 444 N.Y.S.2d 184, 1981 N.Y. App. Div. LEXIS 16067 (N.Y. App. Div. 2d Dep't 1981).

In an action to recover damages for false imprisonment, plaintiffs' motion to restore the action to the Trial Calendar was improperly granted, where there was no affidavit of merits submitted by an individual with personal knowledge of the evidentiary facts underlying plaintiffs' action. Baumgartner v Foodarama Supermarkets, Inc., 86 A.D.2d 590, 446 N.Y.S.2d 136, 1982 N.Y. App. Div. LEXIS 15114 (N.Y. App. Div. 2d Dep't 1982).

In a contempt proceeding to enforce a divorce decree, the court was not deprived of subject matter jurisdiction to issue an order to show cause, even though the court issuing the order was in a county different from that in which the decree had been entered where the order to show cause contained all the information necessary to a notice of motion under CPLR § 2214, and was returnable more than eight days after service, in that Dom Rel Law § 245 and Jud Law § 756 authorized the bringing a contempt proceeding by notice of motion or order to show cause. Dahlberg v Dahlberg, 105 A.D.2d 968, 482 N.Y.S.2d 108, 1984 N.Y. App. Div. LEXIS 21059 (N.Y. App. Div. 3d Dep't 1984).

In an action to recover damages for breach of a construction contract, plaintiff's motion to substitute a deceased defendant's widow, who was the administratrix of its estate, as party defendant, was properly denied, even though the case was a proper one for substitution, where the personal representative was not yet a party to the action, so that service of the motion for substitution (or the order to show cause) were required to be made in the manner prescribed for service of summons under CPLR Art 3. Therefore, service of the papers in the manner

prescribed for motion papers generally (CPLR §§ 2103, 2214) did not suffice, in that the personal representative had to be accorded the procedural safeguards required by due process for the court to obtain jurisdiction over her. Topal v BFG Corp., 108 A.D.2d 849, 485 N.Y.S.2d 352, 1985 N.Y. App. Div. LEXIS 43175 (N.Y. App. Div. 2d Dep't 1985).

In matrimonial action, wife would be deemed to have waived any claim of error arising from informal nature of proceedings, including failure of both parties to serve motion papers, since order entered thereon recited that review undertaken by court was requested by parties, wife did not contend that her attorney was not empowered to act on her behalf, counsel for both parties voluntarily appeared and argued, and thus it was within court’s discretionary power under CLS CPLR § 2214 to resolve issues presented. Osterling v Osterling, 126 A.D.2d 965, 511 N.Y.S.2d 989, 1987 N.Y. App. Div. LEXIS 42077 (N.Y. App. Div. 4th Dep't 1987).

Pursuant to general prayer contained in notice of motion or order to show cause, court may grant relief other than that specifically requested if relief granted is not too dramatically unlike relief sought, if proof offered supports it, and if court is satisfied that no one has been prejudiced by formal omission to demand it specifically. HCE Assoc. v 3000 Watermill Lane Realty Corp., 173 A.D.2d 774, 570 N.Y.S.2d 642, 1991 N.Y. App. Div. LEXIS 8103 (N.Y. App. Div. 2d Dep't 1991).

Although there is no per se rule against oral motions, movant must nevertheless present affidavits or other competent evidence in support of factual assertions. Kaiser v J & S Realty, Inc., 173 A.D.2d 920, 569 N.Y.S.2d 787, 1991 N.Y. App. Div. LEXIS 5309 (N.Y. App. Div. 3d Dep't 1991).

Hospital failed to make out prima facie showing of entitlement to summary judgment in medical malpractice action, despite sufficiency of its medical expert’s affidavit and extracts from medical record, where hospital failed to submit such evidence until its reply to plaintiff’s expert’s affidavit, thus obviating need for response from plaintiff. Ritt v Lenox Hill Hosp., 182 A.D.2d 560, 582 N.Y.S.2d 712, 1992 N.Y. App. Div. LEXIS 6275 (N.Y. App. Div. 1st Dep't 1992).

Action on promissory notes, in which plaintiff had been granted summary judgment in lieu of complaint under CLS CPLR § 3213 without hearing on propriety of service, would be remitted for hearing and new determination as to whether service was properly effectuated on defendants where they averred that they were not properly served with motion papers by which action was commenced. Papadopoulos v Park Cafe East, Inc., 251 A.D.2d 388, 673 N.Y.S.2d 327, 1998 N.Y. App. Div. LEXIS 6578 (N.Y. App. Div. 2d Dep't 1998).

Time set forth in CLS CPLR § 2214(b) for answering motion did not apply to criminal defendant’s speedy trial motion. People v Holden, 260 A.D.2d 233, 689 N.Y.S.2d 40, 1999 N.Y. App. Div. LEXIS 3972 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 1003, 695 N.Y.S.2d 749, 717 N.E.2d 1086, 1999 N.Y. LEXIS 2253 (N.Y. 1999).

The trial court properly considered a company’s oral motion in limine and excluded videotaped testimony of a medical witness, because there was no requirement that an in limine motion be made in writing and be in accordance with N.Y. C.P.L.R. 2214. Wilkinson v British Airways, 292 A.D.2d 263, 740 N.Y.S.2d 294, 2002 N.Y. App. Div. LEXIS 3056 (N.Y. App. Div. 1st Dep't 2002).

Parties’ mother had died, and a brother established his ownership and right to possession under N.Y. Real Prop. Acts. Law § 901(1) as he showed that the three-family multiple dwelling building was so circumstanced that a partition thereof could not be made without great prejudice to the owners; a sister’s position that a warranty deed prohibited the alienation of the property without the parties’ consent was inappropriately raised for the first time in a self-entitled “Supplemental Affidavit,” which was an improper sur-reply affirmation under N.Y. C.P.L.R. 2214. Graffeo v Paciello, 46 A.D.3d 613, 848 N.Y.S.2d 264, 2007 N.Y. App. Div. LEXIS 12522 (N.Y. App. Div. 2d Dep't 2007), app. dismissed, 10 N.Y.3d 891, 861 N.Y.S.2d 263, 891 N.E.2d 297, 2008 N.Y. LEXIS 1504 (N.Y. 2008).

Trial court erred in, sua sponte, vacating a summary judgment order and denying, as academic, defendant's summary judgment motion dismissing the complaint as the court did not act under N.Y. C.P.L.R. 2221, 2214 or 5015 since defendant's pending motion to reargue sought only to modify the discontinuance order, and no relief was sought by any party from the summary

judgment order. Baez v Parkway Mobile Homes, Inc., 125 A.D.3d 905, 5 N.Y.S.3d 154, 2015 N.Y. App. Div. LEXIS 1585 (N.Y. App. Div. 2d Dep't 2015).

There is no prescribed time limitation for a motion to reconsider a determination of a motion (CPLR 4405 is inapplicable). In re Ball's Trust, 43 Misc. 2d 1032, 252 N.Y.S.2d 894, 1964 N.Y. Misc. LEXIS 1406 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 820, 259 N.Y.S.2d 1005, 1965 N.Y. App. Div. LEXIS 5589 (N.Y. App. Div. 1st Dep't 1965).

A count of sexual abuse in the third degree in violation of Penal Law § 130.55, which had been previously dismissed with the consent of the People on an erroneous point of law concering the requirement that the victim be present to testify in a sexual abuse case, would be restored to the information charging defendant with public lewdness in violation of Penal Law § 245.00, without treating the prosecutor’s motion as a motion to reargue subject to the requirements of CPLR §§ 2221 and 2214 where, even though the People did not have testimony from any of the women defendant was charged with having abused, defendant could still be convicted of the sexual abuse charge on the basis of police observations of his actions, which are sufficient to allow an inference of lack of consent on the part of the victims. People v Darryl M., 123 Misc. 2d 723, 475 N.Y.S.2d 704, 1984 N.Y. Misc. LEXIS 3070 (N.Y. Crim. Ct. 1984).

Utility company failed to adhere to legal and constitutional prerequisites to replevin in seeking orders of seizure to replevy utility meters at premises of customers who were in arrears in utility payments where company’s supporting affidavits were merely form affidavits with blanks filled in that did not “instill great confidence” as to quality of underlying investigation and certitude of facts alleged therein, and notice to customers consisted only of company forms that failed to state date and time company’s application would be presented to court, and that failed to allow proper time for customers to respond as required by CLS CPLR §§ 2103 and 2214. Consolidated Edison Co. v Haymer, 139 Misc. 2d 95, 527 N.Y.S.2d 941, 1988 N.Y. Misc. LEXIS 212 (N.Y. App. Term 1988).

In criminal prosecution of defendant for traffic infraction, although court was not aware of any reported cases as to use of CPLR to determine filing of opposing or supporting papers, court

followed time frame under CLS CPLR § 2214 and deemed all papers to have been timely filed in accord with that rule. People v Wienclaw, 183 Misc. 2d 727, 704 N.Y.S.2d 445, 2000 N.Y. Misc. LEXIS 43 (N.Y. J. Ct. 2000).

Where plaintiff filed a motion for summary judgment in lieu of complaint pursuant to N.Y. C.P.L.R. § 3213, plaintiff could demand answering papers in advance of the return date of the motion, pursuant to N.Y. C.P.L.R. § 2214, but plaintiff was required to extend the return date by the corresponding number of days requested for the advance. Goldstein v Saltzman, 821 N.Y.S.2d 746, 13 Misc. 3d 1023, 236 N.Y.L.J. 68, 2006 N.Y. Misc. LEXIS 2553 (N.Y. Sup. Ct. 2006).

Sur-reply papers are not permitted under N.Y. C.P.L.R. 2214; the court could not have properly considered a sur-reply filed in a summary judgment proceeding. Samy & Irina, Inc. v Berezentseva, 899 N.Y.S.2d 63, 24 Misc. 3d 1235(A), 2009 N.Y. Misc. LEXIS 2116 (N.Y. Sup. Ct. 2009).

Bank's motion--for an order vacating a prior order of reference and granting a new order of reference--was denied because the bank could not confirm that the affidavit it submitted in support of its original application was properly executed and notarized, it did not provide a factual basis explaining why it could not do so, sworn statements from its representative, or a copy of its previous motion papers, and its equivocal assertions not only precluded granting of the requested relief, but could constitute a basis for a finding of frivolous conduct. Onewest Bank FSB v Escobar, 995 N.Y.S.2d 476, 46 Misc. 3d 587, 2014 N.Y. Misc. LEXIS 4756 (N.Y. Sup. Ct. 2014).

2. Notice of motion

Failure to give requisite notice of motion deprives court of jurisdiction to entertain motion. Morabito v Champion Swimming Pool Corp., 18 A.D.2d 706, 236 N.Y.S.2d 130, 1962 N.Y. App. Div. LEXIS 6272 (N.Y. App. Div. 2d Dep't 1962).

Oral motion by board of assessors to dismiss assessment review proceedings for lack of personal service supported by affidavit, heard by court without notice of motion was not abuse of discretion and complied with rule requiring objection to jurisdiction be made by motion and answer. Shanty Hollow Corp. v Poladian, 23 A.D.2d 132, 259 N.Y.S.2d 541, 1965 N.Y. App. Div. LEXIS 4253 (N.Y. App. Div. 3d Dep't 1965), aff'd, 17 N.Y.2d 536, 267 N.Y.S.2d 912, 215 N.E.2d 168, 1966 N.Y. LEXIS 1626 (N.Y. 1966).

Special Term properly directed the trial court to determine, in connection with plaintiff's motion to vacate a previous order of dismissal that had been entered without opposition from plaintiff based on plaintiff's failure to serve a complaint, whether defendant had served a notice of its motion to dismiss on plaintiff since, though plaintiff failed to submit either a reasonable excuse for his delay in serving the complaint or an affidavit of merit attesting to the validity of his claim, such requirements would only have been applicable had plaintiff appeared to defend the original motion to dismiss, and an absence of proper service constituted a sufficient and complete excuse for plaintiff's default on the prior motion in that the failure to give requisite notice of motion deprives the court of jurisdiction to entertain the motion, and invalidates the motion altogether. Burstin v Public Service Mut. Ins. Co., 98 A.D.2d 928, 471 N.Y.S.2d 33, 1983 N.Y. App. Div. LEXIS 21249 (N.Y. App. Div. 3d Dep't 1983).

Partial summary judgment for plaintiffs would be reversed where Special Term had improvidently converted plaintiffs' order to show cause into motion for summary judgment without notice to defendant, and prior to joinder of issue. Berichi v Allan Sloan, P. C., 121 A.D.2d 884, 503 N.Y.S.2d 578, 1986 N.Y. App. Div. LEXIS 59016 (N.Y. App. Div. 1st Dep't 1986).

Party was not entitled to reduction of claim against it pursuant to CLS Gen Oblig § 15-108 where it failed to serve notice of motion or notice of cross motion demanding such relief. J. A. Valenti Electric Co. v Power Line Constructors, Inc., 123 A.D.2d 604, 506 N.Y.S.2d 769, 1986 N.Y. App. Div. LEXIS 60754 (N.Y. App. Div. 2d Dep't 1986).

Supreme Court had jurisdiction to consider defendant's motion to dismiss, notwithstanding that original notice of motion served by defendant did not contain return date as required by CLS

CPLR § 2214(a), since (1) 22 NYCRR § 202.8(b) permits service of notice of motion without return date when case has not been assigned to judge, (2) plaintiff was served with motion papers by mail on October 19, and defendant then filed papers in compliance with regulation, and (3) plaintiff was notified of November 18 return date as early as November 3. Bush v Hayward, 156 A.D.2d 899, 549 N.Y.S.2d 873, 1989 N.Y. App. Div. LEXIS 16451 (N.Y. App. Div. 3d Dep't 1989), app. denied, 75 N.Y.2d 709, 555 N.Y.S.2d 691, 554 N.E.2d 1279, 1990 N.Y. LEXIS 735 (N.Y. 1990).

Court did not err in declaring motion denominated as one to dismiss complaint to be motion for leave to withdraw notice of appearance and answer served and filed by law firm on behalf of defendant, even though court did not first notify plaintiff of its intention to do so, where movant included general relief clause in motion, and proof supported motion to withdraw notice of appearance and answer. Mastandrea v Pineiro, 190 A.D.2d 841, 594 N.Y.S.2d 49, 1993 N.Y. App. Div. LEXIS 1632 (N.Y. App. Div. 2d Dep't 1993).

Because the defendants argued only that dismissal of the plaintiffs' personal injury complaint was warranted as a N.Y. C.P.L.R. 3126 discovery sanction, instead of showing that the plaintiffs could not establish a prima facie case under any of the causes of action asserted in the complaint, pursuant to N.Y. C.P.L.R. 2214(a), the defendants' motion to dismiss was properly denied. Shah v American Honda Motor Co., Inc., 41 A.D.3d 696, 840 N.Y.S.2d 605, 2007 N.Y. App. Div. LEXIS 7749 (N.Y. App. Div. 2d Dep't 2007).

In proceedings brought against a father by the department of social services pursuant to N.Y. Fam. Ct. Act art. 10 and N.Y. Soc. Serv. Law § 384-b, defective notice of the department's motion to dispense with the obligation to undertake reasonable efforts to reunite the father with his son did not render the family court's order void because although the requisite notice of eight days was not provided by the department as required by N.Y. C.P.L.R. 2214(b) and N.Y. Fam. Ct. Act § 165, any error was harmless because consideration of the severe abuse petition during the fact-finding hearings necessitated an inquiry into the appropriateness of diligent efforts and the extent to which they would be detrimental to the best interests of the child under N.Y. Soc.

Serv. Law § 384-b(8)(a)(iv), and the father did not challenge the severe abuse determination, so the department's motion was "superfluous," and the father could demonstrate no actual prejudice from the failure to give proper notice of that motion. Matter of August ZZ. v Matthew ZZ., 42 A.D.3d 745, 840 N.Y.S.2d 184, 2007 N.Y. App. Div. LEXIS 8385 (N.Y. App. Div. 3d Dep't 2007).

Lawyer was provided notice of the grounds for the possible imposition of sanctions and was afforded a reasonable opportunity to be heard; the order to show cause, entered on the trial court's own initiative, sufficiently put the lawyer on notice of the conduct at issue by referring to her allegedly inappropriate statements in a specified affidavit, and the trial court did not need to list in the order to show cause each particular phrase or portion of that affidavit that was considered inappropriate or frivolous. There was no requirement that the notice of motion list the statute or regulation that was the basis of the sanctions motion as long as some grounds were mentioned. Shields v Carbone, 99 A.D.3d 1100, 955 N.Y.S.2d 216, 2012 N.Y. App. Div. LEXIS 6990 (N.Y. App. Div. 3d Dep't 2012).

Trial court had no authority to sanction the mother on the ground that she engaged in frivolous conduct because, even the court were to assume that a different rule applied to matters commenced under article 8 of the Family Court Act, the mother was not provided with an opportunity to be heard before sanctions were imposed. Ritchie v Ritchie, 184 A.D.3d 1113, 125 N.Y.S.3d 798, 2020 N.Y. App. Div. LEXIS 3452 (N.Y. App. Div. 4th Dep't 2020).

Plaintiff's application for the issuance of a subpoena duces tecum was dismissable, since the defendants had not been given timely notice of the motion. Blaikie v Borden Co., 47 Misc. 2d 180, 262 N.Y.S.2d 8, 1965 N.Y. Misc. LEXIS 2127 (N.Y. Sup. Ct. 1965).

Where the relationship between the town attorney and the town was such as to lead irresistibly to the inference that notice to the town attorney would be promptly transmitted to the supervisor and clerk, and because there was no indication that the town was prejudiced by the method employed, service upon the town attorney, as directed by the court, was deemed effective

service on the town. 110 Manno Realty Corp. v Huntington, 61 Misc. 2d 702, 306 N.Y.S.2d 746, 1970 N.Y. Misc. LEXIS 2008 (N.Y. Sup. Ct. 1970).

In child protective proceeding, court would deny motion by respondent husband for examination before trial and psychological evaluation of wife, children's nonrespondent mother who was added to proceeding and assigned counsel, where notice of motion was not served on assigned counsel. In re Kaitlyn S., 148 Misc. 2d 276, 560 N.Y.S.2d 88, 1990 N.Y. Misc. LEXIS 432 (N.Y. Fam. Ct. 1990).

Creditor's motion for summary judgment in lieu of complaint was denied because, inter alia, the creditor's process server delivered papers to the debtor's mother, but the creditor failed to demonstrate that it completed service of the motion papers upon the debtor in that it did not allege or demonstrate that the affidavit of service was filed as required by N.Y. C.P.L.R. 308(2). Mashantucket Pequot Gaming Enter. v Ping Lin, 895 N.Y.S.2d 656, 27 Misc. 3d 216, 2010 N.Y. Misc. LEXIS 75 (N.Y. Sup. Ct. 2010).

Trial court properly denied defendants' motion pursuant to N.Y. C.P.L.R. 4404 to set aside a verdict for injured parties in a personal injury action; although defendants' motion to set aside the jury verdict was made on insufficient notice, N.Y. C.P.L.R. 2214(b), the injured parties were not prejudiced by this procedural irregularity, and the evidence permitted an inference that officers were in their official capacity when they assaulted the injured parties. Piquette v City of New York, 4 A.D.3d 402, 771 N.Y.S.2d 365, 2004 N.Y. App. Div. LEXIS 1291 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 605, 785 N.Y.S.2d 21, 818 N.E.2d 663, 2004 N.Y. LEXIS 2199 (N.Y. 2004).

Accusatory instrument was dismissed because the People did not have a valid misdemeanor information upon which they could have stated ready for trial until 193 days after the action was commenced where the People failed to file a notice of motion along with the affirmation converting the felony complaint to a misdemeanor information. People v Leal, 50 Misc. 3d 855, 23 N.Y.S.3d 560, 2015 N.Y. Misc. LEXIS 4420 (N.Y. City Crim. Ct. 2015).

3. —Relief demanded

Denial, as academic, of omnibus motion of husband of deceased patient for sundry relief in medical malpractice action against individual was improper. Davis v New York, 47 A.D.2d 529, 363 N.Y.S.2d 599, 1975 N.Y. App. Div. LEXIS 8588 (N.Y. App. Div. 2d Dep't), aff'd, 38 N.Y.2d 257, 379 N.Y.S.2d 721, 342 N.E.2d 516, 1975 N.Y. LEXIS 2348 (N.Y. 1975).

It was improper to treat plaintiff's motion for leave to renew and reargue prior motion (to serve late notice of claim) solely as reargument motion, although motion was based on facts known to plaintiff at time of prior motion, since it was accompanied by supporting affidavit which had not been submitted on prior motion. Albanese v Floral Park, 128 A.D.2d 611, 512 N.Y.S.2d 867, 1987 N.Y. App. Div. LEXIS 44303 (N.Y. App. Div. 2d Dep't 1987).

It was error for court, sua sponte, to grant summary judgment where no summary judgment motion was served under CLS CPLR § 3212, and party did not seek such relief in its papers, as required under CLS CPLR §§ 2214 and 2215. Phoenix Enterprises Ltd. Partnership v Insurance Co. of North America, 130 A.D.2d 406, 515 N.Y.S.2d 443, 1987 N.Y. App. Div. LEXIS 46398 (N.Y. App. Div. 1st Dep't 1987).

On summary judgment motion, it was error to dismiss defamation action as time barred, where such relief was not sought in notice of motion or affidavit accompanying motion. Kantor v Pavelchak, 134 A.D.2d 352, 520 N.Y.S.2d 830, 1987 N.Y. App. Div. LEXIS 50531 (N.Y. App. Div. 2d Dep't 1987).

Supreme Court did not abuse its discretion in failing to consider statue of limitations defense where it was not argued in defendant's notice of motion, and was improperly raised for first time in defendant's reply affidavit. Potter v Blue Shield, 216 A.D.2d 773, 629 N.Y.S.2d 93, 1995 N.Y. App. Div. LEXIS 6592 (N.Y. App. Div. 3d Dep't 1995).

Court properly treated plaintiff's motion for either dismissal or summary judgment as one for summary judgment where motion was filed before service of answer, defendant submitted affidavits and other documentary evidence purportedly substantiating his allegations, and thus

both parties showed intention to chart summary judgment course. State v Ackley, 245 A.D.2d 668, 664 N.Y.S.2d 876, 1997 N.Y. App. Div. LEXIS 12582 (N.Y. App. Div. 3d Dep't 1997).

Defendant was properly granted specific performance of parties' settlement agreement, directing plaintiff to execute and deliver easement allowing defendant to construct, repair and maintain swale on her property, but it was error for court to grant permanent easement on plaintiff's property for purposes of maintaining and repairing swale where such relief was not requested in defendant's motion. Lyon v Lyon, 259 A.D.2d 525, 686 N.Y.S.2d 476, 1999 N.Y. App. Div. LEXIS 2258 (N.Y. App. Div. 2d Dep't 1999).

Trial court lacked jurisdiction under N.Y. C.P.L.R. 2214(a) to declare that plaintiff sister was a co-owner of a cooperative apartment when her motion for injunctive relief sought only that defendant sister not be allowed to sell, transfer, dispose of, assign, or otherwise encumber the apartment during a proceeding to declare the rights of the two sisters in the apartment. Thus, the trial court also erred when it denied what was essentially a N.Y. C.P.L.R. 5015(a)(4) motion by defendant sister to vacate the improper ruling. McGuire v McGuire, 29 A.D.3d 963, 816 N.Y.S.2d 158, 2006 N.Y. App. Div. LEXIS 7113 (N.Y. App. Div. 2d Dep't 2006).

Granting employee's motion to compel her prior employer to produce evidence of prior complaints and lawsuits alleging age discrimination against it for a five-year period was error as the employee had not properly sought such discovery and the relief was dramatically unlike the relief sought in the employee's motion. Ayres v Bloomberg, L.P., 235 A.D.3d 709, 228 N.Y.S.3d 581, 2025 N.Y. App. Div. LEXIS 834 (N.Y. App. Div. 2d Dep't 2025).

Where motion to dismiss complaint was not demanded in notice of motion for dismissal of the third cause of action in the complaint, court would not consider the motion to dismiss the complaint. Holt v Troy, 78 Misc. 2d 9, 355 N.Y.S.2d 94, 1974 N.Y. Misc. LEXIS 1314 (N.Y. Sup. Ct. 1974).

Order to show cause filed by a mother was declined under the fugitive disentitlement doctrine when a warrant had issued earlier for the mother's arrest because the mother had refused to

cooperate with court ordered DNA tests and the mother had refused to produce the child even though temporary custody had been awarded to the father. Peppin v Lewis, 194 Misc. 2d 151, 752 N.Y.S.2d 807, 2002 N.Y. Misc. LEXIS 1531 (N.Y. Fam. Ct. 2002).

Because the general relief clause in a N.Y. C.P.L.R. 2214(b) notice of motion permitted the trial court to consider an alternative ground for granting the motion, and because the relief granted was identical to the ultimate relief demanded, albeit on a different basis, the motion was not decided upon grounds other than those in the parties' submissions. Tirado v Miller, 75 A.D.3d 153, 901 N.Y.S.2d 358, 2010 N.Y. App. Div. LEXIS 4261 (N.Y. App. Div. 2d Dep't 2010).

Tenured teacher's motion to vacate or modify and arbitration award was premature and he was not entitled to costs, disbursements, or attorneys' fees because his motion to bar the admission of evidence was untimely where it was made more than 125 days after the filing of charges against him, the arbitrator's decision to permit evidence to be introduced did not resolve the matter submitted for arbitration, the teacher did not cite any law or state any argument in support of his request and had not obtained a judgment in his favor. Matter of Harris v Board of Educ. of the City of New York, 46 Misc. 3d 835, 3 N.Y.S.3d 279, 2014 N.Y. Misc. LEXIS 5146 (N.Y. Sup. Ct. 2014), dismissed, 2014 N.Y. Misc. LEXIS 5994 (N.Y. Sup. Ct. Dec. 8, 2014).

4. —Waiver of notice

Application for adjournment of motion waives any objection to insufficient notice thereof. Miot v Jocarl Realty Corp., 20 A.D.2d 664, 246 N.Y.S.2d 542, 1964 N.Y. App. Div. LEXIS 4544 (N.Y. App. Div. 2d Dep't 1964).

Defect in service of notice of motion for severance is waived by opposing the motion on the merits. Todd v Gull Contracting Co., 22 A.D.2d 904, 255 N.Y.S.2d 452, 1964 N.Y. App. Div. LEXIS 2581 (N.Y. App. Div. 2d Dep't 1964).

Where the application for the severance of a third party action was made on insufficient notice, the defect in service was waived by opposition to the application on the merits. Todd v Gull

Contracting Co., 22 A.D.2d 904, 255 N.Y.S.2d 452, 1964 N.Y. App. Div. LEXIS 2581 (N.Y. App. Div. 2d Dep't 1964).

Failure to serve Attorney General did not require dismissal of declaratory judgment action where Attorney General had entered a general appearance prior to raising the jurisdictional question. Duffy v Schenck, 73 Misc. 2d 72, 341 N.Y.S.2d 31, 1973 N.Y. Misc. LEXIS 2197 (N.Y. Sup. Ct.), aff'd, 42 A.D.2d 774, 346 N.Y.S.2d 616, 1973 N.Y. App. Div. LEXIS 3695 (N.Y. App. Div. 2d Dep't 1973).

5. Time for service of notice and affidavits

CPLR 2214(b) requires service of a notice of motion and the supporting affidavits to determine if a cause of action is validly set forth. Joffe v Rubenstein, 30 A.D.2d 949, 294 N.Y.S.2d 1, 1968 N.Y. App. Div. LEXIS 3212 (N.Y. App. Div. 1st Dep't 1968), app. dismissed, 23 N.Y.2d 1009, 299 N.Y.S.2d 449, 247 N.E.2d 279, 1969 N.Y. LEXIS 1504 (N.Y. 1969), app. dismissed, 28 N.Y.2d 711, 320 N.Y.S.2d 753, 269 N.E.2d 411, 1971 N.Y. LEXIS 1488 (N.Y. 1971).

Cross motion to compel discovery from the defendant was properly denied where plaintiff served a notice of cross motion and affirmation, seeking to compel discovery, one day prior to the return date of the manufacturer’s motion for a protective order, and where plaintiff attempted to serve a memorandum of law on the return date of the defendant’s motion. Dominski v Firestone Tire & Rubber Co., 92 A.D.2d 704, 460 N.Y.S.2d 392, 1983 N.Y. App. Div. LEXIS 16988 (N.Y. App. Div. 3d Dep't 1983).

Plaintiffs were not entitled to summary judgment on basis that defendants’ answering papers were not served sufficiently in advance of return date of summary judgment motion to ensure that plaintiffs would receive papers prior to return date where notice of motion was served only 9 days before return date, and thus 2-day answering time set forth in CLS CPLR § 2214(b) applied; if plaintiffs wanted answering papers sufficiently in advance of return date to be able to respond, they could have demanded service of answering papers at least 7 days prior to return date by giving at least 12 days’ notice of return date. Alford v Progressive Equity Funding Corp.,

144 A.D.2d 756, 534 N.Y.S.2d 749, 1988 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 3d Dep't 1988).

Court did not abuse its discretion in granting defendant's motion to fix amount of damages owed without affidavit advising court of time limits which justified issuance of order since statute does not require affidavit and court was familiar with time limitations as it had set date certain for trial. Rourke v Fred H. Thomas Assocs. P. C., 189 A.D.2d 1015, 592 N.Y.S.2d 863, 1993 N.Y. App. Div. LEXIS 426 (N.Y. App. Div. 3d Dep't 1993).

It was not abuse of discretion for Supreme Court to deny defendant's CLS CPLR § 3215(c) motion to dismiss for plaintiff's failure to seek default judgment within one year after defendant's default in answering, since record supported plaintiff's contention that he had not been afforded requisite statutory notice under CLS CPLR § 2214(b) where defendant's motion, dated December 9, 1993, was served on him in court on return date of December 10, 1993. Mills v Niagara Mohawk Power Corp., 216 A.D.2d 828, 628 N.Y.S.2d 857, 1995 N.Y. App. Div. LEXIS 7450 (N.Y. App. Div. 3d Dep't 1995).

Trial court properly granted the healthcare providers' motion to enforce a self-executing conditional order of dismissal of a patient's personal injury action because, while the court should have considered her opposition to the motion inasmuch as the patient's service of answering papers two days in advance was timely where the providers failed to invoke the provision requiring service at least seven days in advance, the record was clear that the patient failed to comply with the terms of the conditional order, failed to provide a reasonable excuse for her failure, and made no effort to demonstrate that she had a potentially meritorious cause of action. Williams v Davita Healthcare Partners, Inc., 172 A.D.3d 791, 99 N.Y.S.3d 356, 2019 N.Y. App. Div. LEXIS 3347 (N.Y. App. Div. 2d Dep't 2019).

CPLR 2214(b) requires service of a notice of motion and the supporting affidavits at least eight days before the time at which the motion of notice is to be heard, and CPLR 2103(b)(2) requires an additional three days be added where the service is by mail. Coonradt v Walco, 55 Misc. 2d 557, 285 N.Y.S.2d 421, 1967 N.Y. Misc. LEXIS 1059 (N.Y. Sup. Ct. 1967).

In a landlord's summary proceeding to regain possession of real property against his tenants, the tenants' motion for summary judgment, which was made returnable the day after it was served on the landlord, would not be dismissed on jurisdictional grounds due to the tenants' failure to obtain an order to show cause, since, despite the unfairness of the procedure to the landlord, the trial court was bound to hear the tenants' motion due to the fact that it complied with CPLR § 406, which permits any motion in a special proceeding to be made on little or no notice so long as it is made returnable at the same time as the petition. Goldman v McCord, 120 Misc. 2d 754, 466 N.Y.S.2d 584, 1983 N.Y. Misc. LEXIS 3791 (N.Y. Civ. Ct. 1983).

While the juvenile's motion was defective as to service under N.Y. C.P.L.R. art. § 2214, as dismissing the motion would simply delay the inevitable, the court opted for deciding this motion. In re Charles B, 196 Misc. 2d 374, 765 N.Y.S.2d 191, 2003 N.Y. Misc. LEXIS 756 (N.Y. Fam. Ct. 2003).

6. —Answering affidavits

The procedural requirements of CPLR 2214 regarding the service of answering affidavits upon a motion for summary judgment should be enforced by the courts, in the absence of a showing of good cause such as to warrant a contrary direction, since indifference to these provisions results in unfairness to the movant and an impairment of the administration of justice. Wallin v Wallin, 34 A.D.2d 870, 310 N.Y.S.2d 788, 1970 N.Y. App. Div. LEXIS 4684 (N.Y. App. Div. 3d Dep't 1970).

On town's motion for summary judgment in wrongful death action, town's reply papers were timely served where they were mailed 2 days prior to adjourned return date since (1) CLS CPLR § 2214 only requires reply affidavits to be served at least one day before motion is noticed to be heard when moving papers are served 12 days before return date and there is demand for answering papers to be served 7 days prior to return date, and (2) additional 5-day provision of CLS CPLR § 2103 is inapplicable to service of reply papers; appellate court therefore would reject contention that lateness of town's reply prevented plaintiff from showing sufficient facts to

defeat summary judgment motion, especially since plaintiff never sought leave to submit response to town's reply. Ryan v Cortlandt, 134 A.D.2d 420, 521 N.Y.S.2d 43, 1987 N.Y. App. Div. LEXIS 50606 (N.Y. App. Div. 2d Dep't 1987).

Defendants were not denied due process by court's acceptance of plaintiff's reply affidavits in declaratory judgment action where they were timely served, and therefore properly considered, both under CLS CPLR § 2214(b) and under stipulation of parties extending return date of motion and cross motion. Baker v Grampark Corp., 159 A.D.2d 272, 552 N.Y.S.2d 842, 1990 N.Y. App. Div. LEXIS 2662 (N.Y. App. Div. 1st Dep't 1990).

Order vacating default in tax lien foreclosure action and ordering county to reconvey owner's property was proper because county did not submit any papers or affidavits in response to the owner's motion to vacate, and there was no admissible proof supporting claim that county sent owner notice of foreclosure action; with only a generic affidavit on the default motion which applied to hundreds of property owners or interested parties, and without any affidavits, sworn testimony or other competent evidence to prove that the county mailed the notice of foreclosure to the owner at her actual mailing address or the last address listed in the county's records and that the records had been searched to verify that the mailings to the owner were not returned, the trial court did not err in granting the owner's motion. Matter of County of Sullivan (Basile), 43 A.D.3d 598, 840 N.Y.S.2d 676, 2007 N.Y. App. Div. LEXIS 8900 (N.Y. App. Div. 3d Dep't 2007).

Purpose of requirement that answering affidavits be served at least two days before date on which a motion is noticed to be heard is to prevent the party making a motion from being unfairly burdened with necessity of arguing without adequate time to study the opposing papers; last minute filing, causing adversary to consent to an adjournment, is often unfair, particularly on a motion for summary judgment. Glens Falls Ins. Co. v Russo, 83 Misc. 2d 474, 372 N.Y.S.2d 944, 1975 N.Y. Misc. LEXIS 2925 (N.Y. City Ct. 1975).

Defendant's motion to vacate a default judgment entered against him is denied, where defendant failed to serve his answer to plaintiff's motion for summary judgment within the time requirements of CPLR §§ 2214 and 2215, where due to that failure the answer could not be

read in opposition to plaintiff's motion absent excusable neglect, where defendant's claim of law office failure was insufficient to establish that neglect or to vacate the default, and where the failure to timely serve the answer was not justified by defendant's attorney's belief, based on past experience with plaintiff's counsel, that an extension of time would be granted. Ft. Tryon Nursing Home v Kavanagh, 118 Misc. 2d 320, 460 N.Y.S.2d 473, 1983 N.Y. Misc. LEXIS 3314 (N.Y. Sup. Ct. 1983).

Traditional state motion practice is applicable to requests made on notice for orders of seizure, and under such standards, the notice must contain the date and time the application is to be presented to the court, and allow a proper time to respond calculated under CPLR §§ 2214, 2103; therefore, a notice sent by a public utility company concerning the seizure of a meter was defective, where the requisite warning to the consumer was not at the top of the notice, was not contained in a box, and was less than 12 bold upper case type, where said notice was in the form of a letter on the utility's letterhead, suggesting that notice was given as a matter of courtesy, not as a matter of right, and where the notice stated only that the addressee would have to respond to the clerk "within ten (10) days from the date of [mailing] of this notice," which satisfied neither statute. Consolidated Edison Co. v Church of St. Cecilia, 125 Misc. 2d 744, 480 N.Y.S.2d 284, 1984 N.Y. Misc. LEXIS 3478 (N.Y. Civ. Ct. 1984).

Correctional services commissioner did not violate rule requiring service of papers responding to a petition to be filed at least seven days before the petition was heard, as an affidavit of service showed the correctional services commissioner papers were served on the inmate one week prior to the return date. Maccio v Goord, 194 Misc. 2d 805, 756 N.Y.S.2d 412, 2003 N.Y. Misc. LEXIS 167 (N.Y. Sup. Ct. 2003), aff'd, 4 A.D.3d 688, 772 N.Y.S.2d 745, 2004 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 3d Dep't 2004).

7. —Noncompliance with time limitations

The trial court did not abuse its discretion in refusing to consider plaintiff's affidavit in opposition to defendants' motion for summary judgment, filed the same day but several hours after the

matter had been submitted, despite plaintiff's claim that the affidavit had been inadvertently omitted from his papers, where it was clear that the inadvertence involved was in failing to realize the necessity for an affidavit from plaintiff, rather than from his attorney, and where defendant's notice of motion, served over a month before the date on which the motion was submitted, contained a CPLR § 2214(b) notice requiring service of answering papers at least five days prior to the return date. Foitl v G.A.F. Corp., 64 N.Y.2d 911, 488 N.Y.S.2d 377, 477 N.E.2d 618, 1985 N.Y. LEXIS 15744 (N.Y. 1985).

The trial court erred in striking defendants' amended answer as late to plaintiff's motion for partial summary judgment where defendants had been given permission by a justice to serve their papers four days before the motion's return date rather than five days, see CPLR § 2214(b). Jillsunan Corp. v Wallfrin Industries, Inc., 79 A.D.2d 943, 435 N.Y.S.2d 20, 1981 N.Y. App. Div. LEXIS 9819 (N.Y. App. Div. 1st Dep't 1981).

Fact that attorney in charge of case is on vacation when motion papers are filed does not provide good cause for delay in responding to motions. Henderson v Stilwell, 116 A.D.2d 861, 498 N.Y.S.2d 183, 1986 N.Y. App. Div. LEXIS 51677 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 606, 506 N.Y.S.2d 1030, 498 N.E.2d 150, 1986 N.Y. LEXIS 19785 (N.Y. 1986).

Failure to give timely notice of motion to dismiss as required by CLS CPLR § 2214 deprived court of jurisdiction and rendered dismissal order void; however, moving party would be free to again seek dismissal, on proper notice. Golden v Golden, 128 A.D.2d 672, 513 N.Y.S.2d 171, 1987 N.Y. App. Div. LEXIS 44364 (N.Y. App. Div. 2d Dep't 1987).

In divorce action, it was not abuse of discretion under CLS CPLR § 2214 to grant wife's cross motion requesting further discovery of husband's finances and pendente lite award of expert appraiser fees, although she served notice by mail 4 days before return date of husband's motion instead of 8 days as required by CLS CPLR § 2215, since husband was not prejudiced. Perez v Perez, 131 A.D.2d 451, 516 N.Y.S.2d 236, 1987 N.Y. App. Div. LEXIS 47908 (N.Y. App. Div. 2d Dep't 1987).

Court had jurisdiction over motion to disqualify plaintiff's attorney, despite defendant's error in giving only 13 days' notice and in demanding that answering affidavits be served 7 days prior to return date of motion, since plaintiff's notice of motion was not less than minimum time period authorized by CLS CPLR §§ 2103(b)(2) and 2214(b), and thus defect was not jurisdictional. Capoccia v Brognano, 132 A.D.2d 833, 517 N.Y.S.2d 622, 517 N.Y.S.2d 837, 1987 N.Y. App. Div. LEXIS 49322 (N.Y. App. Div. 3d Dep't 1987), app. dismissed, 70 N.Y.2d 952, 525 N.Y.S.2d 835, 520 N.E.2d 553, 1988 N.Y. LEXIS 285 (N.Y. 1988).

In breach of contract action, court properly refused to consider papers submitted by defendants in opposition to plaintiff's summary judgment motion where papers were not timely served, defendants' excuse of law office failure was insufficient, and defendants never applied for extension of time; it was within court's discretion to refuse to accept late papers. Rivers v Butterhill Realty, 145 A.D.2d 709, 534 N.Y.S.2d 834, 1988 N.Y. App. Div. LEXIS 12382 (N.Y. App. Div. 3d Dep't 1988).

Court did not abuse its discretion in refusing to vacate order (which had been entered on default) extending plaintiff's time to serve complaint and compelling acceptance by defendant of complaint, where defendant had retained complaint for 4 months before making cross motion to dismiss it, and excuse for delay amounted to law office failure. Hartwich v Young, 149 A.D.2d 769, 539 N.Y.S.2d 561, 1989 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 3d Dep't 1989).

On motion to dismiss personal injury action due to failure of plaintiff to serve bill of particulars in compliance with conditional order of preclusion, court properly considered opposing papers of plaintiff, even though papers were not served in timely manner, where plaintiff's counsel explained that papers were late because he had attempted to telephone defense counsel in effort to clarify discrepancy as to extension of time given for service of bill of particulars. Corbett v Zedayko, 151 A.D.2d 941, 545 N.Y.S.2d 216, 1989 N.Y. App. Div. LEXIS 8868 (N.Y. App. Div. 3d Dep't 1989).

Court did not abuse its discretion when it accepted and considered opposition papers and cross motion of third party plaintiff because they were served one and 2 days late where third party

defendant failed to show that it suffered any prejudice. Dinnocenzo v Jordache Enters., 213 A.D.2d 219, 624 N.Y.S.2d 6, 1995 N.Y. App. Div. LEXIS 2751 (N.Y. App. Div. 1st Dep't 1995).

Court did not abuse its discretion by refusing to consider plaintiff's untimely opposition papers notwithstanding apparent lack of prejudice to defendants, and properly granted summary judgment to defendants, where defendants served their motion at least 12 days prior to date it was noticed to be heard and demanded that plaintiff serve answering papers at least 7 days before it was noticed to be heard, pursuant to CLS CPLR § 2214(b), and plaintiff failed to provide valid excuse for late service. Risucci v Zeal Mgmt. Corp., 258 A.D.2d 512, 685 N.Y.S.2d 280, 1999 N.Y. App. Div. LEXIS 998 (N.Y. App. Div. 2d Dep't 1999).

Personal injury plaintiff's amended motion for special trial preference was properly denied where it sought same relief as original motion, it was not served with supporting affidavits or documents, and no excuse was given for failure to timely submit those items. Betke v Archwood Estates, Inc., 266 A.D.2d 328, 698 N.Y.S.2d 172, 1999 N.Y. App. Div. LEXIS 11521 (N.Y. App. Div. 2d Dep't 1999).

Motion court's refusal to consider plaintiff's untimely papers in opposition to summary judgment motion constituted finding of default for which plaintiff's remedy was not appeal but motion to vacate, and thus plaintiff's appeal would be dismissed. Masone v New York City Hous. Auth., 279 A.D.2d 323, 719 N.Y.S.2d 241, 2001 N.Y. App. Div. LEXIS 472 (N.Y. App. Div. 1st Dep't 2001).

While mortgagors' papers in opposition to a mortgagee's summary judgment motion were not filed timely under N.Y. C.P.L.R. § 2214(b), the trial court erred in considering the motion unopposed as the mortgagors' counsel had submitted an affirmation explaining that the delay of less than one week was due to personal problems and law office failures; the mortgagee was not prejudiced by the minimal delay and, in fact, took advantage of an extension granted by the mortgagors to reply to their opposition. Associates First Capital v Crabill, 51 A.D.3d 1186, 857 N.Y.S.2d 799, 2008 N.Y. App. Div. LEXIS 4019 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 702, 864 N.Y.S.2d 389, 894 N.E.2d 653, 2008 N.Y. LEXIS 2551 (N.Y. 2008).

Trial court did not err in considering a dairy's untimely expert affidavit in opposition to engineers' summary judgment motion because the dairy's attorney stated that there were several reasons for his failure to include an expert affidavit pursuant to N.Y. C.P.L.R. 2004, 2214, and any prejudice was alleviated by allowing engineers to submit a reply affidavit; although the delay was approximately five weeks, the dairy specifically requested and was granted permission to serve the late affidavit. Mallards Dairy, LLC v E&M Engrs. & Surveyors, P.C., 71 A.D.3d 1415, 897 N.Y.S.2d 552, 2010 N.Y. App. Div. LEXIS 2212 (N.Y. App. Div. 4th Dep't 2010).

Where a notice of motion is served within less time prior to its return date than is prescribed for service by mail, the court has, upon the objection of the respondent, no jurisdiction to entertain it. Thrasher v United States Liability Ins. Co., 45 Misc. 2d 681, 257 N.Y.S.2d 360, 1965 N.Y. Misc. LEXIS 2255 (N.Y. Sup. Ct. 1965).

Where service of a notice of a motion for an order consolidating two actions and the supporting affidavits was made by mail but only ten days' notice was given rather than the 11 days' notice required under subd (b) of CPLR Rule 2214 and ¶ 2 of subd (b) of CPLR Rule 2103, the notice was inadequate. Thrasher v United States Liability Ins. Co., 45 Misc. 2d 681, 257 N.Y.S.2d 360, 1965 N.Y. Misc. LEXIS 2255 (N.Y. Sup. Ct. 1965).

Where the Attorney General's motion to strike a complaint seeking damages for false imprisonment contained a demand requiring that answering affidavits be served at least five days before the return date of the motion, and the claimant failed to comply with the demand and submitted an affidavit in opposition to the motion subsequent to the adjourned return date, the Attorney General's refusal to accept the affidavit was justified. Davis v State, 50 Misc. 2d 740, 271 N.Y.S.2d 381, 1966 N.Y. Misc. LEXIS 1738 (N.Y. Ct. Cl. 1966).

Defendant's objection to a motion for leave to file a supplemental complaint because he had ten and not eleven days' notice would, in the absence of prejudice to the defendant, be disregarded as a mere procedural irregularity. Baciagalupo v Baciagalupo, 53 Misc. 2d 13, 277 N.Y.S.2d 760, 1967 N.Y. Misc. LEXIS 1743 (N.Y. Sup. Ct. 1967).

Where defendant's reply affirmation, which contained application to strike plaintiff's action from trial calendar pending examination of plaintiff decedent's daughter, was served by mail on Friday and submitted with defendant's main motion for summary judgment, returnable the following Monday, plaintiff had not been afforded a reasonable opportunity, as procedural due process and professional courtesy require, to rebut same; trial court had discretion to award motion costs on defendant because of inadequate notice. Geller v Mahsons Realty Corp., 82 Misc. 2d 599, 370 N.Y.S.2d 332, 1975 N.Y. Misc. LEXIS 2740 (N.Y. Civ. Ct. 1975).

Where notice of summary judgment motion was served in July and was returnable August 19, adjournment was granted at defendant's request to September 9 and only excuse for failure to serve answering affidavit until case was called was that defendant was in Syracuse for four weeks, no good cause was shown for an extension of time and, hence, court would not consider answering affidavit in ruling on motion. Glens Falls Ins. Co. v Russo, 83 Misc. 2d 474, 372 N.Y.S.2d 944, 1975 N.Y. Misc. LEXIS 2925 (N.Y. City Ct. 1975).

Failure of pro se litigant to submit answering papers in opposition to motion as required by CLS CPLR § 2214 and make request for oral argument as required by 22 NYCRR § 208.11(b)(3) did not automatically preclude court from hearing his opposition to motion; court has option to hear pro se litigant and then schedule oral argument if it seems warranted, with litigant being permitted to make evidentiary statement on record. Chrysler Credit Corp. v Smith, 157 Misc. 2d 56, 595 N.Y.S.2d 912, 1993 N.Y. Misc. LEXIS 91 (N.Y. Civ. Ct. 1993).

8. Furnishing papers to court

In Article 78 proceeding challenging school resolution, court did not err in refusing to take evidence proffered by petitioner at hearing of respondents' motion to dismiss and petitioner's motion for summary judgment. Muka v Sturgis, 53 A.D.2d 716, 383 N.Y.S.2d 933, 1976 N.Y. App. Div. LEXIS 13484 (N.Y. App. Div. 3d Dep't 1976).

In an action seeking specific performance of the terms of a settlement agreement entered into in a previous proceeding, the trial court properly granted the motion where defendant's new

attorney filed an affidavit alleging that defendant's original lawyer was not authorized to enter into the stipulation, in that an attorney's affidavit concerning matters about which he has no personal knowledge has little if any probative value and thus the papers opposing the motion to enforce the stipulation were deficient. Carr v Carruth, 85 A.D.2d 800, 445 N.Y.S.2d 613, 1981 N.Y. App. Div. LEXIS 16617 (N.Y. App. Div. 3d Dep't 1981), app. dismissed, 65 N.Y.2d 811, 1985 N.Y. LEXIS 15431 (N.Y. 1985).

In CLS RPAPL Art 15 action to terminate defendant's rights in certain real property, Special Term properly granted plaintiffs' motion for default judgment based on defendant's failure to submit papers on default motion, even though defendant had submitted affidavit of merit in connection with different motion (to compel plaintiffs to accept answer), since defendant had opportunity to submit papers on default motion after returning from overseas, there is no authority for compelling Special Term to consider papers which are not submitted in connection with motion on which it is ruling, and under CLS CPLR § 2214 court may refuse to consider improperly submitted papers. Loeb v Tanenbaum, 124 A.D.2d 941, 508 N.Y.S.2d 688, 1986 N.Y. App. Div. LEXIS 62258 (N.Y. App. Div. 3d Dep't 1986).

Court abused its discretion by accepting and considering respondent's opposing papers that were submitted 21 days after return date of petitioner's motion seeking withdrawal of bank account trust funds, where respondent made no application for extension of time to respond nor offered any excuse for delay and default in opposing motion. In re Conservatorship of Gustina, 135 A.D.2d 1124, 523 N.Y.S.2d 279, 1987 N.Y. App. Div. LEXIS 52989 (N.Y. App. Div. 4th Dep't 1987), app. dismissed, 72 N.Y.2d 840, 530 N.Y.S.2d 555, 526 N.E.2d 47, 1988 N.Y. LEXIS 1038 (N.Y. 1988).

Trial court erred in denying the defendants' motion to compel a deposition and an independent medical examination of the plaintiff in her personal injury action, because the motion was untimely, the docket numbers on the e-filing system of the papers in question were not provided, and the defendants failed to proffer any evidence that there were unusual or unanticipated circumstances warranting vacatur of the note of issue; however, the plaintiff should be directed

to appear at the previously ordered independent medical examination and deposition. Reardon v Macy's, Inc., 191 A.D.3d 712, 141 N.Y.S.3d 100, 2021 N.Y. App. Div. LEXIS 575 (N.Y. App. Div. 2d Dep't 2021).

Absence of a reply did not prejudice a temporary guardian an attorney because they had no right to a surreply; the temporary guardian and attorney had fully briefed the special guardian's motion for their removal, and the only papers outstanding were the special guardian's reply. Matter of Edgar V.L., 214 A.D.3d 501, 185 N.Y.S.3d 122, 2023 N.Y. App. Div. LEXIS 1380 (N.Y. App. Div. 1st Dep't 2023).

Although plaintiff served papers in response to defendant's motion for summary judgment less than 7 days prior to return date and failed to offer excuse for tardy service, defendant was not prejudiced by court's review of plaintiff's papers where defendant was able to timely respond to arguments raised in plaintiff's papers and court also considered defendant's reply papers. Hubbell Electric, Inc. v State, 153 Misc. 2d 810, 583 N.Y.S.2d 112, 1992 N.Y. Misc. LEXIS 122 (N.Y. Ct. Cl. 1992).

Where an airline passenger only submitted an attorney's affirmation referring to the docket entry numbers of previously submitted documents and a memorandum of law in support of her motion for leave to renew or reargue, and failed to submit any of the documents necessary for the determination of the subject motion, the trial court providently exercised its discretion in denying the passenger's motion for leave to renew on the basis that the supporting papers were insufficient. Biscone v JetBlue Airways Corp., 103 A.D.3d 158, 957 N.Y.S.2d 361, 2012 N.Y. App. Div. LEXIS 8959 (N.Y. App. Div. 2d Dep't 2012).

In a mortgagee's motion to voluntarily discontinue its foreclosure action, its submission of a supplemental affirmation was disregarded because it was without leave of court and without good cause shown. Citimortgage, Inc. v Sultan, 47 Misc. 3d 626, 6 N.Y.S.3d 393, 2014 N.Y. Misc. LEXIS 5698 (N.Y. Sup. Ct. 2014), vacated, 2015 N.Y. Misc. LEXIS 11929 (N.Y. Sup. Ct. Mar. 23, 2015).

Receiver's motion for an order dismissing the purchasers' action for a declaratory judgment and equitable relief was denied because the motion was unsupported by any testimony from anyone with personal knowledge of the facts upon which it relied, there was no sworn allegations of fact from anyone with personal knowledge explaining what the annexed documents were purported to be, and although the memorandum of law in support of the motion was signed by the receiver before a notary public, it was not an affidavit inasmuch as it did not state that the facts alleged in the document were sworn under penalty of perjury or that the document was true. Taylor v Fashakin, 53 Misc. 3d 1173, 40 N.Y.S.3d 738, 2016 N.Y. Misc. LEXIS 3793 (N.Y. Sup. Ct. 2016).

Non-profit cemetery association was not entitled to withdraw money from its permanent maintenance fund (PMF) to build a columbarium for a veterans memorial because the memorial was a "capital improvement," the funds in the PMF were meant to preserve the "vital" importance of keeping burial grounds well-maintained and the principal of the PMF could not be invaded at all, only the appreciation, and there were several procedural issues with petitioner's papers, including no sworn proof of notice or approval, documents were not attached to the moving papers. Matter of Rosendale Cemetery Assn., 54 Misc. 3d 556, 42 N.Y.S.3d 738, 2016 N.Y. Misc. LEXIS 4223 (N.Y. Sup. Ct. 2016).

9. Order to show cause

In separation action wherein husband ceased alimony payments and left jurisdiction and wife moved for sequestration, service by mail on husband and on attorneys who represented husband in separation action was sufficient since it was appropriate to advise husband of the relief sought and gave him a reasonable opportunity to be heard, mode of service of the order to show cause being within the court’s discretion. Robinson v Robinson, 24 A.D.2d 138, 264 N.Y.S.2d 816, 1965 N.Y. App. Div. LEXIS 2902 (N.Y. App. Div. 1st Dep't 1965).

CPLR 2214 (subd [d]) permits a court in a proper case to grant an order to show cause, to be served in lieu of a notice of motion, at a time and in the manner to be specified in that order;

thus, if the circumstances warrant it, a court may permit the service of a cross motion on four days' notice. Accordingly, where it is not apparent from the record what facts were brought to the attention of the court issuing an order to show cause, there is no way to determine, on appeal, whether the issuing court abused its discretion in making that order to show cause returnable on only four days' notice. Block v Nelson, 71 A.D.2d 509, 423 N.Y.S.2d 34, 1979 N.Y. App. Div. LEXIS 13838 (N.Y. App. Div. 1st Dep't 1979).

CPLR 2214(d), providing for orders to show cause, does not empower judge or justice of court of original jurisdiction to order that motion be returned before Appellate Court. Moreton v Buffalo Urban Renewal Agency, 110 A.D.2d 1089, 489 N.Y.S.2d 1019, 1985 N.Y. App. Div. LEXIS 48983 (N.Y. App. Div. 4th Dep't 1985).

On motion for preliminary injunction in action for specific performance of provision in lease which gave plaintiff right of first refusal to lease property and to purchase it, court erred in refusing to accept papers from defendant to whom property was transferred which were offered on return date of motion since (1) motion was brought on by order to show cause and there was no court direction limiting time when answering papers were to be filed, and therefore papers could be furnished up to time of argument or submission of motion, and (2) even if motion had been on notice, papers could have been submitted on return date since defendant received only 7 days' notice. W.I.L.D. W.A.T.E.R.S., Ltd. v Martinez, 148 A.D.2d 847, 539 N.Y.S.2d 119, 1989 N.Y. App. Div. LEXIS 2820 (N.Y. App. Div. 3d Dep't 1989).

Remedy of mandamus was not available to compel Supreme Court justice and judicial hearing officer to sign mother's order to show cause seeking change in custody from father to her because (1) mother had adequate remedy by application to Appellate Division under CLS CPLR § 5704(a), and (2) her argument that signing of order in her case was ministerial act because legislature mandated that applications to modify custody awards can be made only by order to show cause, if accepted, would totally remove discretion from judiciary in situations where judicial oversight is crucial. Greenhaus v Milano, 242 A.D.2d 383, 661 N.Y.S.2d 664, 1997 N.Y. App. Div. LEXIS 8495 (N.Y. App. Div. 2d Dep't 1997).

Court properly treated plaintiffs' order to show cause as motion to renew where defendant, in his answering papers, also treated plaintiffs' papers as motion to renew or to reargue, and thus he could not be heard to argue that he was prejudiced thereby. Quirici v Wassinger, 266 A.D.2d 926, 698 N.Y.S.2d 181, 1999 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 4th Dep't 1999).

Abuse of process claim did not lie in a case where an attorney used an order to show cause as a mechanism by which to seek his removal as counsel in a personal injury case because the process was used for the purpose for which it was intended. Palmieri v Biggiani, 108 A.D.3d 604, 970 N.Y.S.2d 41, 2013 N.Y. App. Div. LEXIS 5141 (N.Y. App. Div. 2d Dep't 2013).

Trial court erred in, sua sponte, granting a subway passenger leave to amend his notice of claim as to the facts and legal theories within 30 days of the filing of the note of issue in a subsequent action to recover damages for personal injuries because the relief was dramatically different from the pre-action discovery that was the subject of the petition, the absence of a notice of claim rendered it impossible to determine whether the future notice of claim or any amendments thereto would comply with the General Municipal Law, and the a city and its transit authority were prejudiced insofar as the court's permissive timeline potentially could be, inter alia, beyond the statute of limitations and after the completion of discovery. Matter of Velez v City of New York, 174 A.D.3d 813, 106 N.Y.S.3d 110, 2019 N.Y. App. Div. LEXIS 5780 (N.Y. App. Div. 2d Dep't 2019).

Service of an order to show cause one hour later than directed is not a defect sufficient to constitute invalidity. Brown v Ulster County Bd. of Elections, 100 Misc. 2d 570, 419 N.Y.S.2d 871, 1979 N.Y. Misc. LEXIS 2507 (N.Y. Sup. Ct. 1979).

Whereas personal service upon a town may be obtained by service on the supervisor or clerk, an Article 78 proceeding may be commenced by order to show cause, and notice is to be given in the manner specified by the court. Personal service was affected on respondent town in a proceeding in which a village sought to vacate the imposition of real estate taxes levied on a parcel located in the village where service was affected by personally serving an attorney who, although not the Town Attorney as designated in the order to show cause, had been retained by

the town to represent it on certain matters and who in fact represented the town in the instant proceeding. Highland Falls v Highlands, 110 Misc. 2d 130, 441 N.Y.S.2d 903, 1981 N.Y. Misc. LEXIS 3050 (N.Y. Sup. Ct. 1981).

Movent, who holds a power of attorney from an individual who was the plaintiff in a divorce action, would lack standing to bring an order to show cause seeking to set aside an order vacating a default judgment of divorce in favor of plaintiff husband and against defendant wife, since movent was not one of the parties to the marital action and public policy would not permit such interference with the marital state by a third party; the broad language of the power of attorney authorizing movent to act for plaintiff in "all other matters" under Gen Oblig Law § 5-1502L could not be construed to authorize her, in effect, to obtain a divorce on behalf of her principal. Mallory v Mallory, 113 Misc. 2d 912, 450 N.Y.S.2d 272, 1982 N.Y. Misc. LEXIS 3401 (N.Y. Sup. Ct. 1982).

Although CLS CPLR § 3120(b) notice could be accomplished by notice of motion pursuant to CLS CPLR § 2214(a), where defendant alleged possibility of destruction of material on computers sought to be discovered, he was permitted to proceed via order to show cause pursuant to § 2214(d). In re Lees, 187 Misc. 2d 901, 727 N.Y.S.2d 254, 2001 N.Y. Misc. LEXIS 116 (N.Y. Sup. Ct. 2001).

Although a corporate owner responding to a licensee's motion for an order to show cause in its unlawful eviction action should have properly submitted an affidavit by an officer of the corporation with knowledge of the facts and circumstances, and an answer was an improper method for opposing the relief requested, the court nevertheless held a hearing. By the Stem, LLC v Optimum Props., Inc., 862 N.Y.S.2d 756, 20 Misc. 3d 543, 2008 N.Y. Misc. LEXIS 3070 (N.Y. Civ. Ct. 2008).

10. —Service of process on Attorney General

Constitutional challenge to provisions of Election Law applicable to designating petitions under CLS Elec § 6-136 was unreviewable due to lack of timely notice to allow Attorney-General

opportunity to intervene. Barrett v Manton, 253 A.D.2d 503, 677 N.Y.S.2d 151, 1998 N.Y. App. Div. LEXIS 8957 (N.Y. App. Div. 2d Dep't 1998).

Word “must” in CPLR Rule 2214, subd d is interpreted as being mandatory in its requirement of service of process on attorney general. Randall v Toll, 72 Misc. 2d 305, 339 N.Y.S.2d 72, 1972 N.Y. Misc. LEXIS 1285 (N.Y. Sup. Ct. 1972).

Order obtained by employee of state university against whom charges had been leveled pursuant to Civil Service Law § 75 which contained a direction continuing him in his position without suspension would be vacated where he failed to serve process on attorney general as required by CPLR 2214, subd d. Randall v Toll, 72 Misc. 2d 305, 339 N.Y.S.2d 72, 1972 N.Y. Misc. LEXIS 1285 (N.Y. Sup. Ct. 1972).

Personal service upon an assistant attorney general at his office and service of attorney general by certified mail on the New York City office constituted compliance with requirement of CPLR 2214, subd d, as to personal service on the attorney general. Randall v Toll, 73 Misc. 2d 451, 341 N.Y.S.2d 994, 1973 N.Y. Misc. LEXIS 2311 (N.Y. Sup. Ct. 1973).

In a proceeding to enforce the alimony and support provisions of a divorce decree under the Uniform Support of Dependents Law (Domestic Relations Law, art 3-A), service upon defendant of an order to show cause by certified mail, return receipt requested (CPLR 2214), as directed by the court because plaintiff wife only had defendant’s post-office address box, is proper and sufficient to confer jurisdiction upon the court to grant a default judgment against defendant, who received the notice but refused to accept it, awarding plaintiff a payroll deduction order (Personal Property Law, § 49-b), a money judgment representing arrears and counsel fees; entry of a money judgment upon the husband’s default as a procedural method of enforcing payment of alimony and support, the court having the power to direct the manner in which notice will be served (Domestic Relations Law, § 244), does not contemplate rendition of a new judgment but rather it is part of or incidental to the old judgment, and, hence, no personal service of the notice is required; likewise, the same is true of a proceeding for the issuance of a payroll deduction order which is part of or incidental to the initial judgment in the matrimonial

action and for which no additional personal service of the original process is necessary. Lo Cascio v Lo Cascio, 101 Misc. 2d 679, 421 N.Y.S.2d 807, 1979 N.Y. Misc. LEXIS 2743 (N.Y. Sup. Ct. 1979).

In commencement of Article 78 proceeding challenging denial of permit to mine gravel pit, petitioner’s personal service of order to show cause and verified petition on both Department of Environmental Conservation and Attorney General was untimely, although within time limit prescribed in show cause order, since action was commenced beyond 60-day limitations period of CLS ECL § 23-0307, and statute of limitations cannot be extended by order to show cause. Bonded Concrete, Inc. v New York State Dep't of Environmental Conservation, 134 Misc. 2d 829, 512 N.Y.S.2d 1001, 1987 N.Y. Misc. LEXIS 2116 (N.Y. Sup. Ct. 1987).

II. Under Former Civil Practice Laws

A. In General

11. Generally; courts

Under RCP 60 the City Court of Buffalo had power to grant an order to show cause. Allen v Hungarian Mother's Club, Inc., 259 A.D. 139, 18 N.Y.S.2d 846, 1940 N.Y. App. Div. LEXIS 6073 (N.Y. App. Div.), reh'g denied, 259 A.D. 971, 20 N.Y.S.2d 490, 1940 N.Y. App. Div. LEXIS 7478 (N.Y. App. Div. 1940).

In view of Surrogate’s Court Act § 49, CPA § 117 was inapplicable to proceedings in Surrogate’s Court, notwithstanding Surrogate’s Court Act § 316. In re Sabin, 191 N.Y.S. 766, 117 Misc. 656, 1922 N.Y. Misc. LEXIS 938 (N.Y. Sur. Ct. 1922).

Independently of RCP 60 the surrogate’s court had authority by order to show cause to shorten the time for notice of a motion; applicability of RCP 60 to surrogate’s court questioned. In re Filley's Estate, 20 N.Y.S. 427 (N.Y. Sur. Ct. 1892).

A county judge had no power to make an order to show cause under RCP 60 (R 2214 herein), in an action in the supreme court. Larkin v Steele, 25 Hun 254 (N.Y.).

RCP 60 did not apply to surrogates' courts. Re Harris.

County judge cannot make an order shortening the time of service of an order returnable at special term of supreme court. People ex rel. Brown v Supervisors Herkimer Co., 3 How. Pr. (n.s.) 241.

12. Review

The exercise of the power to shorten the time of notice of motion is subject to review whenever an order to show cause at special term is granted. PEOPLE ex rel. MAYOR OF NEW YORK v NICHOLS, 79 N.Y. 582, 79 N.Y. (N.Y.S.) 582, 58 How. Pr. 200, 1880 N.Y. Misc. LEXIS 83 (N.Y. 1880).

Granting order to show cause under RCP 60 was discretionary with the trial court, and in the absence of a showing that such discretion had been abused, it was not reviewable on appeal. PEOPLE ex rel. MAYOR OF NEW YORK v NICHOLS, 79 N.Y. 582, 79 N.Y. (N.Y.S.) 582, 58 How. Pr. 200, 1880 N.Y. Misc. LEXIS 83 (N.Y. 1880).

Where affidavits filed by the defendant in connection with an application to vacate a notice for plaintiff's examination suggested that the complaint be dismissed for insufficiency, and this was treated by the court as bringing on a motion to dismiss the complaint, which the court denied, held that, while a cross-notice of application to dismiss the complaint was essential, in view of the fact that the sufficiency of the complaint was considered and passed upon at Special Term, the Appellate Division would pass on that question. Willey v Cameron, Michel & Co., 217 A.D. 651, 217 N.Y.S. 248, 1926 N.Y. App. Div. LEXIS 7870 (N.Y. App. Div. 1926), limited, Bernard v Chase Nat'l Bank, 233 A.D. 384, 253 N.Y.S. 336, 1931 N.Y. App. Div. LEXIS 11304 (N.Y. App. Div. 1931).

On an appeal from an order where there is a preliminary objection of an irregularity in the order and the appeal is afterwards argued on its merits, the preliminary objection will not be considered. Buford v New York Iron Mine, 2 N.Y.S. 699, 55 N.Y. Super. Ct. 516, 1888 N.Y. Misc. LEXIS 743 (N.Y. Super. Ct. 1888), aff'd, 119 N.Y. 638, 23 N.E. 1148, 119 N.Y. (N.Y.S.) 638, 1890 N.Y. LEXIS 1177 (N.Y. 1890).

Where a motion for an allowance was made to a judge at chambers in the first district, on a notice of two days, and was opposed without objection to the length of the notice on the hearing of the motion, it cannot be insisted upon for the first time thereafter. Main v Pope, 16 How. Pr. 271.

An order will not be reversed on appeal because the grounds therefor were not sufficiently stated in the notice. Livermore v Bainbridge, 47 How. Pr. 350, 1874 N.Y. Misc. LEXIS 105 (N.Y. Super. Ct.), dismissed, 56 N.Y. 72, 56 N.Y. (N.Y.S.) 72, 1874 N.Y. LEXIS 83 (N.Y. 1874).

13. Service of papers on motions

Prior to amendment of this rule it was the duty of a party to serve papers notwithstanding the opposing party already had copies thereof. Rogers v Pearsall, 21 A.D. 389, 47 N.Y.S. 551, 1897 N.Y. App. Div. LEXIS 2031 (N.Y. App. Div. 1897).

Respondents' failure to serve with their motion papers copies of the detailed schedule of documents which were relied on and produced by them upon the hearing of their motions for summary judgment constituted an irregularity which was disregarded on appeal where appellant's attorney had declined Special Term's offer of an adjournment. Rein v Oakside Estates, Inc., 3 A.D.2d 846, 161 N.Y.S.2d 235, 1957 N.Y. App. Div. LEXIS 5969 (N.Y. App. Div. 2d Dep't 1957).

On appeal from an order opening a default made upon motion based upon order to show cause, inclusion in papers on appeal of pleadings and reference thereto in order was proper and

needed no order from the court permitting it to be done. Sanitary Brass Works, Inc. v Rubin & Marcus, Inc., 175 N.Y.S. 535 (N.Y. App. Term 1919).

Where plaintiff moved for judgment for alimony arrears and defendant cross-moved to modify judgment, and both parties ignored notice published daily in New York Law Journal warning that no additional papers will be allowed for completion of papers on day of argument or submission, both motions were denied without prejudice to new motions upon complete papers. Shapiro v Shapiro, 137 N.Y.S.2d 191, 1954 N.Y. Misc. LEXIS 3609 (N.Y. Sup. Ct. 1954).

B. Notice of Motion

14. Generally

An order denying a motion to vacate a stay of proceedings until determination of an appeal from denial of a motion by defendant to consolidate actions may not be made except upon notice as provided in this rule. Delahunty v Canfield, 106 A.D. 386, 94 N.Y.S. 815, 1905 N.Y. App. Div. LEXIS 2592 (N.Y. App. Div. 1905).

Whether notice of motion should be given to an adverse party is dependent on particular facts presented. Goldreyer v Foley, 154 A.D. 584, 139 N.Y.S. 190, 1913 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 1913).

Where a party was entitled to eight, but had only five days' notice served by mail the special term did not acquire jurisdiction. Palmer v Rotary Realty Co., 233 A.D. 764, 250 N.Y.S. 187, 1931 N.Y. App. Div. LEXIS 12481 (N.Y. App. Div. 1931).

RCP 63 (Rule 2213 herein) controlled as to where motion on notice returnable. Nevelson v Piesner, 272 A.D. 555, 74 N.Y.S.2d 105, 1947 N.Y. App. Div. LEXIS 3339 (N.Y. App. Div. 1947).

CPA § 429 (§ 5015(b) herein), providing for application for jury trial "upon notice" meant usual notice of motion governed by RCP 60. Feldman v Sturm, 278 A.D. 21, 103 N.Y.S.2d 725, 1951 N.Y. App. Div. LEXIS 3727 (N.Y. App. Div. 1951).

RCP 60 (R 2214 herein) applied in cases in which notice was necessary and for which special provision had not otherwise been made by law or by the rules of practice. In re Salmon, 69 N.Y.S. 215, 34 Misc. 251, 9 N.Y. Ann. Cas. 464, 1901 N.Y. Misc. LEXIS 212 (N.Y. Sup. Ct. 1901).

On a motion under CPA § 793 (§§ 5205(e), 5241, Rule 5225 herein) the usual notice of motion prescribed by RCP 60 was sufficient. Adirondack Furniture Corp. v Crannell, 5 N.Y.S.2d 840, 167 Misc. 599, 1938 N.Y. Misc. LEXIS 1747 (N.Y. County Ct. 1938).

Where motion papers to consolidate actions were served by mail on March 26 and motion was returnable April 7, service was timely, and limitation contained in notice of motion in reference to serving answering affidavits merely became ineffective. Sodus Fruit Farm, Inc. v Williams, 41 N.Y.S.2d 49, 181 Misc. 397, 1943 N.Y. Misc. LEXIS 1779 (N.Y. Sup. Ct. 1943).

Where notice of motion under CPA §§ 1291 (§ 7804(c) herein) and 1293 (§§ 404, 7804(f) herein) was mailed to petitioner, three days had to be added, making total of five days' notice of motion required; but two days' notice of motion under CPA § 1294 (§ 405 herein) was sufficient though served by mail. Doch v O'Connell, 107 N.Y.S.2d 348, 201 Misc. 80, 1951 N.Y. Misc. LEXIS 2355 (N.Y. Sup. Ct. 1951).

Receiver is entitled to notice of motion for his removal and an opportunity to be heard. Bruns v Stewart Mfg. Co., 31 Hun 195 (N.Y.).

RCP 60 applied to cases in which a greater time than eight days was fixed by statute. Citizens' Sav. Bank v Bauer, 1 N.Y.S. 450, 49 Hun 238, 1888 N.Y. Misc. LEXIS 1389 (N.Y. Sup. Ct. 1888).

Notice of motion by one defendant to change the place of trial must be given to the other defendants as well as to the plaintiff. Mairs v Ramsen, 3 NY Code R 138.

A motion to vacate an order of arrest must be on notice, not on an order to show cause, if the defendant is not in actual custody. Garrett v Humier, 1 Month L Bull 42.

15. Necessity of notice

It is common practice to give notice of a motion to the opposing party who has a substantial interest in the matter, otherwise an ex parte order will be vacated on motion. People ex rel. New York v Every, 231 A.D. 576, 248 N.Y.S. 92, 1931 N.Y. App. Div. LEXIS 16105 (N.Y. App. Div. 1931).

Where defendant's motion to change place of trial was brought on under notice of at least 8 days, plaintiffs had a right at least three days before defendant's motion was noticed to be heard to serve on his attorneys a notice with affidavits in support thereof specifying any kind of relief to which they claimed to be entitled, whether responsive or not to the relief asked for by defendant. Bald v Kuhnert, 166 N.Y.S. 84 (N.Y. Sup. Ct. 1917), aff'd, 182 A.D. 912, 170 N.Y.S. 1067, 1918 N.Y. App. Div. LEXIS 5164 (N.Y. App. Div. 1918).

16. Waiver of notice

Objection to application to disinter remains of petitioner's wife and son for failure to give 8, instead of 5, days' notice, was waived by general appearance of objector. Application of Glasser, 41 N.Y.S.2d 733, 180 Misc. 311, 1942 N.Y. Misc. LEXIS 2394 (N.Y. Sup. Ct. 1942).

Waiver by admitting service. White v Boice, 1 N.Y. St. 570.

A party who has given admission of due service of an order to show cause, cannot object that it does not expressly direct that less than eight days' service should be sufficient. Anonymous, 3 Abb NC 51, note.

If a party suffers a motion to be made on short notice without objection, he waives the objection afterwards. Main v Pope, 16 How. Pr. 271.

17. Notice served without state

Court will not hear a special motion upon papers served on a party out of the state. French v Kenworthy, 5 N.Y. St. 102.

18. Order to show cause

RCP 60, authorizing the court, upon the presentation of an affidavit showing grounds therefor, to permit a motion to be made, through the medium of an order to show cause, on less than the eight days' notice ordinarily required, only applied to matters already pending and over which the court had acquired jurisdiction, and not to steps to inaugurate a new action or proceeding. In re Quick, 92 A.D. 131, 87 N.Y.S. 316, 1904 N.Y. App. Div. LEXIS 604 (N.Y. App. Div.), aff'd, 179 N.Y. 601, 72 N.E. 1149, 179 N.Y. (N.Y.S.) 601, 1904 N.Y. LEXIS 1280 (N.Y. 1904).

Ordinarily an order to show cause is but an authority for a short notice of motion, and is not permission to make application to modify a final judgment awarding alimony. Preston v Preston, 227 A.D. 670, 236 N.Y.S. 27, 1929 N.Y. App. Div. LEXIS 7051 (N.Y. App. Div. 1929).

An order to show cause was irregular where there was sufficient time to notice the motion under RCP 60. Conant v American Rubber Tire Co., 74 N.Y.S. 409, 37 Misc. 129, 1902 N.Y. Misc. LEXIS 56 (N.Y. Sup. Ct. 1902).

An order to show cause may be made returnable in more than eight days from the granting of the order. In re Ferris, 76 N.Y.S. 159, 37 Misc. 606, 1902 N.Y. Misc. LEXIS 185 (N.Y. Sup. Ct.), rev'd, 74 A.D. 619, 77 N.Y.S. 309, 1902 N.Y. App. Div. LEXIS 1897 (N.Y. App. Div. 1902).

An order to show cause took the place of a notice of motion, and could not be substituted therefor, except in the manner particularly pointed out and authorized by RCP 60. Stryker v Churchill, 80 N.Y.S. 588, 39 Misc. 578, 1903 N.Y. Misc. LEXIS 10 (N.Y. Sup. Ct. 1903).

A motion to vacate an order appointing referee in proceedings for dissolution of a corporation might be brought on for hearing in less than the period provided by RCP 60 by an order to show cause where such course was necessary to determination of such motion before the return of

another order in the proceeding before the referee. In re Application of Ehret, 127 N.Y.S. 934, 70 Misc. 576, 1911 N.Y. Misc. LEXIS 136 (N.Y. Sup. Ct. 1911).

An order to show cause is equivalent to a notice of motion, and hence where a copy of the petition for the voluntary dissolution of the corporation was served upon the attorney general more than eight days before the beginning of the term no notice of the application for the order to show cause was required to be served upon him. In re Geneva Basket Co., 127 N.Y.S. 943, 71 Misc. 156, 1911 N.Y. Misc. LEXIS 192 (N.Y. Sup. Ct. 1911).

Under Municipal Ct. Act, § 254, where time to move to amend judgment expired in five days, court was without jurisdiction to amend where party obtained order to show cause on fourth day returnable on the fifth day. Porter v Chieffo, 149 N.Y.S. 956, 87 Misc. 318, 1914 N.Y. Misc. LEXIS 971 (N.Y. App. Term 1914).

Service made by defendant of order to show cause on seven days' notice is insufficient, especially where the affidavit shows service by leaving the papers in a sealed envelope addressed to the defendant, at his employer's office, which was closed at the time. Kloeppel v Kloeppel, 15 N.Y.S.2d 932, 172 Misc. 630, 1939 N.Y. Misc. LEXIS 2468 (N.Y. Sup. Ct. 1939).

The court is authorized to direct when and how the order shall be served. Rose v Brown, 58 N.Y.S.2d 654, 186 Misc. 553, 1945 N.Y. Misc. LEXIS 2495 (N.Y. Sup. Ct. 1945).

County judge of Oneida may sign order to show cause to bring on motion to change venue from Herkimer to Broome county. Gokey v Moate, 74 N.Y.S.2d 32, 190 Misc. 213, 1947 N.Y. Misc. LEXIS 3175 (N.Y. Sup. Ct. 1947).

Under RCP 60 an order to show cause had to contain a direction of when and how it should have been served and the time and method of service should have followed the direction in the order and not the rule for service of the papers generally so that where service was made on defendant husband by service on his New York attorney of record where he was outside the state where such an attorney stated he no longer represented such defendant, such service could not be the basis for adjudging defendant in contempt, nor might money judgment for

arrears of temporary alimony be entered on such service of order to show cause and notice of adjournment contained in such order to show cause not effected. Patillo v Patillo, 12 Misc. 2d 645, 178 N.Y.S.2d 154, 1958 N.Y. Misc. LEXIS 3304 (N.Y. Sup. Ct. 1958).

Where plaintiff had secured visitation rights of children in habeas corpus proceeding and defendant thereafter removed the children to Florida, the order to show cause on plaintiff's motion to punish defendant for contempt was properly served on her by certified mail in Florida where the court had directed that manner of service. People ex rel. Taylor v Taylor, 19 Misc. 2d 101, 187 N.Y.S.2d 190, 1959 N.Y. Misc. LEXIS 3874 (N.Y. Sup. Ct. 1959).

An order to show cause is merely a written permission of a judge that a moving party may give his adversary less than eight days' notice, and the refusal to grant such order in no way bars the right of the applicant to serve a regular eight days' notice of motion. Grossman v Supreme Lodge of Knights & Ladies of Honor, 5 N.Y.S. 122, 52 Hun 611, 1889 N.Y. Misc. LEXIS 2846 (N.Y. Sup. Ct. 1889).

A motion cannot be made to dismiss an appeal upon notice of less than eight days, unless the time may be shortened by an order made for that purpose. Salters v Sheppard, 11 NY Week Dig 189.

Every order to show cause must fix a day for showing cause less than eight days after the same is made; otherwise such order may be treated as a nullity. Vale v Brooklyn Cross-Town R. Co..

19. —Supporting affidavits for order to show cause

Where the motion papers failed to show that an order to show cause was made in conformity to RCP 60, the motion should have been denied. Halfmoon Bridge Co. v Canal Board, 156 A.D. 880, 140 N.Y.S. 1122, 1913 N.Y. App. Div. LEXIS 5387 (N.Y. App. Div. 1913).

It is within the discretion of the court to permit answering affidavits to be filed one day prior to that on which a motion is to be heard, and to permit such affidavits to be used upon the hearing, where ten days' notice of the motion was given. Joyce v Eastman Kodak Co., 163 N.Y.S. 623,

99 Misc. 361, 1917 N.Y. Misc. LEXIS 678 (N.Y. Sup. Ct.), aff'd, 178 A.D. 911, 164 N.Y.S. 1097, 1917 N.Y. App. Div. LEXIS 6065 (N.Y. App. Div. 4th Dep't 1917).

Petition to strike primary nomination of political party from board of elections records, stating that prompt action was necessary so that ballots could be printed and sent to men in armed forces, was sufficient. Application of McGovern, 44 N.Y.S.2d 132, 180 Misc. 508, 1943 N.Y. Misc. LEXIS 2399 (N.Y. Sup. Ct.), rev'd, 266 A.D. 985, 44 N.Y.S.2d 140, 1943 N.Y. App. Div. LEXIS 5605 (N.Y. App. Div. 1943).

Show cause order, on two days notice, instead of 5 days as required by CPA § 924 (§§ 924, 6221 herein) for return of attached property, conferred jurisdiction, where supporting affidavit recited that immediate possession of stock was needed for prospective sale. Shulock v Scott, 82 N.Y.S.2d 896, 193 Misc. 77, 1948 N.Y. Misc. LEXIS 3258 (N.Y. Sup. Ct. 1948).

One of two defendants who appeared separately moved for a change of the place of trial on the ground of convenience of witnesses. Three days before the motion day an additional affidavit was served showing that the other defendant consented to the motion and adopted the affidavits on which it was noticed, which affidavit was returned as not served in time. Held, that it was error to allow such additional affidavit to be read on the motion under RCP 60. Zimmer v Matteson, 15 N.Y.S. 607, 61 Hun 619, 1891 N.Y. Misc. LEXIS 69 (N.Y. Sup. Ct. 1891).

Where the affidavit in support of an order to show cause fails to show the existence of an exigency requiring the shortening of notice, the motion will be dismissed. In re Lyman, 60 N.Y.S. 76 (N.Y. Sup. Ct.), aff'd, Lyman v Korndorfer, 29 A.D. 390, 52 N.Y.S. 1145, 1898 N.Y. App. Div. LEXIS 1068 (N.Y. App. Div. 1898).

An order to show cause could not be substituted for a notice of motion where the affidavits therefor did not comply with RCP 60. Proctor v Soulier, 31 N.Y.S. 472, 82 Hun 353, 1 N.Y. Ann. Cas. 118 (1894).

20. Second motion for same purpose

A notice of motion before it is returnable does not confer exclusive jurisdiction on the court wherein it is made; and another motion in the same matter returnable at an earlier date before another special term may be made. People ex rel. New York v Every, 231 A.D. 576, 248 N.Y.S. 92, 1931 N.Y. App. Div. LEXIS 16105 (N.Y. App. Div. 1931).

C. Relief Obtainable

21. Generally

While on motion under CPA § 183 (§ 507 herein) to change the place of trial of an action to the county in which the land involved is situated, it was improper to permit plaintiff to read affidavits tending to show that the greater convenience of witnesses would be served by retaining the cause in the county where instituted, especially where he has failed to serve the notice required by this section, after the venue had been changed on such motion the court might entertain his motion for a change of venue on account of the convenience of witnesses, under CPA § 187 (§§ 510, 602(b) herein). Johnson v Millard, 199 A.D. 73, 190 N.Y.S. 865, 1921 N.Y. App. Div. LEXIS 6606 (N.Y. App. Div. 1921).

The provision of CPA § 117 as to the right to ask alternative relief was permissive, not mandatory. Fiorello v New York Protestant Episcopal City Mission Soc., 217 A.D. 510, 217 N.Y.S. 401, 1926 N.Y. App. Div. LEXIS 7845 (N.Y. App. Div. 1926).

Summary motion to turn over moneys alleged to be due against the trustee of a voluntary trust; unauthorized. In re Schwartzberg, 228 A.D. 174, 239 N.Y.S. 513, 1930 N.Y. App. Div. LEXIS 12131 (N.Y. App. Div. 1930).

Where a plaintiff is concerned with two groups of facts, one of which can only be brought into the action through an amended complaint, and the other through a supplemental complaint, both may be authorized at the same time. Watson v Consolidated Laundries Corp., 235 A.D. 234, 256 N.Y.S. 891, 1932 N.Y. App. Div. LEXIS 7929 (N.Y. App. Div. 1932).

Order denying motion to change place of trial and order granting motion to retain place of trial affirmed. Flynn v Murphy, 240 A.D. 994, 268 N.Y.S. 946, 1933 N.Y. App. Div. LEXIS 7811 (N.Y. App. Div. 1933).

The provisions of an order denying a motion to strike from the record the appearance of attorneys purporting to represent the defendant and denying defendant’s motion to vacate a warrant of attachment are independent of and disconnected from each other, permitting acceptance of the favorable determination on the motion and refusing to abide by the determination with respect to the other separate motion brought on as a matter of convenience at the same time. Hiller v Russo-Asiatic Bank, 242 A.D. 688, 273 N.Y.S. 594, 1934 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div.), rev'd, 266 N.Y. 434, 195 N.E. 142, 266 N.Y. (N.Y.S.) 434, 1934 N.Y. LEXIS 933 (N.Y. 1934).

“General relief” granted must be pertinent to action. Spector v Rosman Metal Body Co., 268 A.D. 929, 51 N.Y.S.2d 468, 1944 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 1944).

Application to serve amended complaint and supplemental complaint may be made in one motion. Ponticello v Prudential Ins. Co., 281 A.D. 549, 121 N.Y.S.2d 305, 1953 N.Y. App. Div. LEXIS 3093 (N.Y. App. Div. 1953).

CPA § 117 authorized a plaintiff to move to vacate a notice for examination pursuant to CPA §§ 288, 289 and 290 (§§ 3101, 3102, Rule 3106, 3107, 3109, 3111 herein) on the ground that the answer was insufficient in law in respect of the defenses raising the issues upon which the examination is sought, and at the same time to move for summary judgment under RCP 113 (Rule 3212 herein). Continental Sec. Co. v Interborough Rapid Transit Co., 193 N.Y.S. 892, 118 Misc. 11, 1922 N.Y. Misc. LEXIS 1170 (N.Y. Sup. Ct.), aff'd, 200 A.D. 794, 193 N.Y.S. 903, 1922 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 1922), aff'd, 202 A.D. 804, 194 N.Y.S. 986, 1922 N.Y. App. Div. LEXIS 5812 (N.Y. App. Div. 1922).

A motion under CPA § 117 was proper for the purpose of directing the attention of the court to an improper joinder of causes of action and of parties defendant. 137 East 66th St. v Lawrence, 194 N.Y.S. 762, 118 Misc. 486, 1922 N.Y. Misc. LEXIS 1292 (N.Y. Sup. Ct. 1922).

In view of CPA § 117, a plaintiff moving for leave to serve an “amended and supplemental complaint” was permitted to serve an amended and a supplemental complaint, respectively, it not appearing that defendant will be prejudiced thereby. Markowitz v Markowitz, 196 N.Y.S. 828, 119 Misc. 609, 1922 N.Y. Misc. LEXIS 1578 (N.Y. Sup. Ct. 1922).

CPA § 117 did not prevent the combination in one motion of requests for leave to amend a complaint and for service of supplemental summons, if each kind of relief sought was separately permissible. Hernandez v Brookdale Mills, Inc., 198 N.Y.S. 277, 119 Misc. 824, 1922 N.Y. Misc. LEXIS 1799 (N.Y. Sup. Ct. 1922), aff'd, 205 A.D. 882, 198 N.Y.S. 920, 1923 N.Y. App. Div. LEXIS 5735 (N.Y. App. Div. 1923).

An amendment of answer so as to plead counterclaim was denied. 379 Madison Ave., Inc. v Stuyvesant Co., 267 N.Y.S. 755, 149 Misc. 523, 1933 N.Y. Misc. LEXIS 1711 (N.Y. City Ct. 1933).

On motion to vacate examination of plaintiff before trial, plaintiff may also move to dismiss defendant’s affirmative defenses for insufficiency allegedly justifying such examination. Barrett v Matson, 32 N.Y.S.2d 59, 177 Misc. 863, 1942 N.Y. Misc. LEXIS 1261 (N.Y. Sup. Ct. 1942).

Relief may be given other than that specifically asked for. Kellogg v Commodore Hotel, Inc., 64 N.Y.S.2d 131, 187 Misc. 319, 1946 N.Y. Misc. LEXIS 2569 (N.Y. Sup. Ct. 1946).

Complaint in action against city for fraud and deceit allegedly sustained by plaintiff because of misrepresentations made to her by mayor that she would receive city job was dismissed since such agreement was void and illegal as against public policy. The motion to dismiss for insufficiency, made after service of the answer may be treated as a motion for judgment on the pleadings, though no supporting affidavits were submitted with the notice. Brill v Wagner, 5 Misc. 2d 768, 161 N.Y.S.2d 490, 1957 N.Y. Misc. LEXIS 3388 (N.Y. Sup. Ct. 1957).

Where a movant prays for general relief in addition to the specific relief requested, relief other than that specifically requested may be granted. Kesten v Cooper, 25 Misc. 2d 760, 206 N.Y.S.2d 424, 1960 N.Y. Misc. LEXIS 2489 (N.Y. Sup. Ct. 1960).

Under Code Civ Proc § 768 it was held that, although the plaintiff moved for judgment as of a default for refusal of defendant to accept an amended complaint, an order may be made under the demand for further or different relief, denying such motion, and compelling defendant to accept the amended complaint. Mt. Morris v Pavilion Natural Gas Co., 190 N.Y.S. 38, 1921 N.Y. Misc. LEXIS 1646 (N.Y. Sup. Ct. 1921).

Where a former order of the court decided only that judgment could not be entered in an action against an executrix, after her death, on the ground that all her personal executors, her successors in interest, had not been served, and did not pass on the question whether judgment could be entered against the successors of such executrix, it was within the power of the court, in view of this section, on plaintiff's motion for leave to withdraw his former motion papers and make a new application for judgment against such successors, and a showing that by reason of a change in the fact situation since the former motion was decided no reason existed for denying an application for such judgment, to grant an application for such judgment, to grant the same, without prejudice to the right of either party to argue the question whether judgment should be entered as prayed. Thorburn v Mitchell, 195 N.Y.S. 920, 1922 N.Y. Misc. LEXIS 1432 (N.Y. Sup. Ct. 1922).

22. Alternative relief

CPA § 117 authorized moving at the same time for several kinds of relief, in the alternative or otherwise. Barrett Mfg. Co. v Sergeant, 149 A.D. 1, 133 N.Y.S. 526, 1912 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 1912).

Where plaintiff moved for alternative relief after main motion had been decided, application was entertainable as new motion, rather than as application for reargument. Tiber v Tiber, 282 A.D. 473, 124 N.Y.S.2d 420, 1953 N.Y. App. Div. LEXIS 4493 (N.Y. App. Div. 1953).

Where defendant moved in alternative to set aside service of summons or for leave to serve answer but did not appear on return day or request hearing, and where there was sufficient proof by way of affidavits to justify denial of motion, there was no abuse of discretion in denying motion to vacate service of summons and in permitting service of answer. Conron v Mettenleiter, 286 A.D. 981, 144 N.Y.S.2d 201, 1955 N.Y. App. Div. LEXIS 4780 (N.Y. App. Div. 3d Dep't 1955).

The provision permitting a notice of motion to demand one or more kinds of relief in the alternative or otherwise refers to a situation, where upon the same state of facts two different kinds of relief may be appropriate and not to motions based upon entirely different papers and upon matters wholly disconnected. Chapman v George R. Read & Co., 133 N.Y.S. 281, 73 Misc. 401, 1911 N.Y. Misc. LEXIS 530 (N.Y. City Ct. 1911), aff'd, 149 A.D. 52, 133 N.Y.S. 625, 1912 N.Y. App. Div. LEXIS 6351 (N.Y. App. Div. 1912).

23. Other and further relief“

On appeal, it was held that although the motion to vacate the order of interpleader had been properly denied, under the “other and further relief” clause, the motion should have been treated as one to resettle the recitals in the order so as to incorporate a list of all papers on which the order was based, and the appellate court modified the order to include the appropriate directions. Lanaris v Mutual Ben. Life Ins. Co., 9 A.D.2d 1015, 194 N.Y.S.2d 718, 1959 N.Y. App. Div. LEXIS 5424 (N.Y. App. Div. 4th Dep't 1959).

24. Joinder of motions

As to third-party complaint, if motion is made before answer, motions to correct and to dismiss for insufficiency may be combined. Van Pelt v New York, 69 N.Y.S.2d 116, 188 Misc. 995, 1947 N.Y. Misc. LEXIS 2194 (N.Y. Sup. Ct. 1947).

D. Time of Filing Affidavits

25. Generally

Plaintiff failed to show good cause for leave to serve a reply affidavit after the argument of a motion for summary judgment. Gnozzo v Marine Trust Co., 258 A.D. 298, 17 N.Y.S.2d 168, 1939 N.Y. App. Div. LEXIS 6425 (N.Y. App. Div. 1939), reh'g denied, 259 A.D. 788, 18 N.Y.S.2d 752, 1940 N.Y. App. Div. LEXIS 6644 (N.Y. App. Div. 1940), aff'd, 284 N.Y. 617, 29 N.E.2d 933, 284 N.Y. (N.Y.S.) 617, 1940 N.Y. LEXIS 1262 (N.Y. 1940).

Where notice of motion of 10 days has been given and answering affidavits have been requested, additional answering affidavits may be filed in the discretion of the court if not as matter of right one day prior to the time at which the motion is noticed to be heard. Joyce v Eastman Kodak Co., 163 N.Y.S. 623, 99 Misc. 361, 1917 N.Y. Misc. LEXIS 678 (N.Y. Sup. Ct.), aff'd, 178 A.D. 911, 164 N.Y.S. 1097, 1917 N.Y. App. Div. LEXIS 6065 (N.Y. App. Div. 4th Dep't 1917).

Procedural device created by RCP 64 was salutary; it was to be encouraged and, where invoked, it was to be enforced by courts as aid in disposition of their heavy motion calendars. Nassau Suffolk Lumber & Supply Corp. v Feldman, 125 N.Y.S.2d 27, 1953 N.Y. Misc. LEXIS 2269 (N.Y. Sup. Ct. 1953).

Notwithstanding time limitations of this rule, court, in its discretion, may accept answering affidavits served late. Trumpet v Trumpet, 220 N.Y.S.2d 11 (N.Y. Sup. Ct. 1961).

26. Time of service

Failure to serve reply affidavit to affidavit in another court in another proceeding, charging that claimant was physically able to act during 60-day period after accident, barred leave to serve notice of claim of injuries after expiration of 60-day period. McGrath v Orange County, 277 A.D. 1003, 100 N.Y.S.2d 183, 1950 N.Y. App. Div. LEXIS 4238 (N.Y. App. Div. 1950).

Answering reply affidavits which were not served two days before hearing of motion, were unauthorized. Braun v Carey, 280 A.D. 1019, 116 N.Y.S.2d 857, 1952 N.Y. App. Div. LEXIS 4580 (N.Y. App. Div. 1952).

Answering affidavits not served on plaintiff's attorney until appearance in court not considered on motion to dismiss defense and counterclaim, though such attorney after expiration of time limited for service urged making of service and waived delay. Security Mut. Life Ins. Co. v Danzilio, 260 N.Y.S. 222, 145 Misc. 750, 1932 N.Y. Misc. LEXIS 1574 (N.Y. Sup. Ct. 1932).

Supplemental affidavit, served by defendant on plaintiff's attorney in court on return day of motion, was held to form no part of motion papers. Gasperini v Manginelli, 92 N.Y.S.2d 575, 196 Misc. 547, 1949 N.Y. Misc. LEXIS 2860 (N.Y. Sup. Ct. 1949).

Failure of defendant to give plaintiff necessary time within which to answer does not invalidate service of motion papers, but merely eliminates from defendant right to insist upon service of answering affidavits within five-day period. Meyers v Jeffe, 108 N.Y.S.2d 606, 1951 N.Y. Misc. LEXIS 2560 (N.Y. Sup. Ct. 1951).

27. —Additional time

It is within the discretion of the court to permit the filing of answering affidavits in proper case even if not served within time limit by the moving party. And the exercise of this discretionary power will not be interfered with on appeal unless it is made to appear that substantial rights of the parties have been adversely affected thereby. McMasters v Allcutt, 151 A.D. 559, 136 N.Y.S. 144, 1912 N.Y. App. Div. LEXIS 7787 (N.Y. App. Div. 1912).

It seems that defendant may be granted additional time to serve and file answering affidavits. Lawrence Textile Corp. v American R. E. Co., 211 N.Y.S. 699, 125 Misc. 858, 1925 N.Y. Misc. LEXIS 1011 (N.Y. Mun. Ct. 1925).

28. Effect of notice requiring answering affidavits

Service of notice under RCP 64 gave a party the right to meet answering affidavits. Girardon v Angelone, 234 A.D. 351, 254 N.Y.S. 657, 1932 N.Y. App. Div. LEXIS 10434 (N.Y. App. Div.), app. dismissed, 259 N.Y. 565, 182 N.E. 183, 259 N.Y. (N.Y.S.) 565, 1932 N.Y. LEXIS 1044 (N.Y. 1932).

If moving party consented to adjournment of motion, and he was furnished with answering affidavits five days before argument, such service complied with the five-day requirement of RCP 64. Croop v Odette, 25 Misc. 2d 57, 205 N.Y.S.2d 753, 1960 N.Y. Misc. LEXIS 2726 (N.Y. Sup. Ct. 1960).

Where answering affidavits, merely containing denials of movant's contentions, were sworn to and served five days before adjourned date of motion, at which time it was argued, court deemed it proper to read the affidavits although not served five days before original return day. 3 Hour Laundry & Dry Cleaning Stores, Inc. v Swan Cleaners Syracuse Corp., 25 Misc. 2d 597, 206 N.Y.S.2d 69, 1960 N.Y. Misc. LEXIS 2808 (N.Y. Sup. Ct. 1960).

Where on motion for order to preclude for deficient bill of particulars defendant served motion papers by mailing them to plaintiff on August 21, returnable Sept. 3, and notice of motion contained notice requiring plaintiff to serve any answering affidavit at least five days before hearing or return day, and where on August 31 plaintiff mailed his answering affidavit, verified on that date, to defendant's attorney, plaintiff's affidavit was not read in opposition to motion, where plaintiff did not offer any excuse. Nassau Suffolk Lumber & Supply Corp. v Feldman, 125 N.Y.S.2d 27, 1953 N.Y. Misc. LEXIS 2269 (N.Y. Sup. Ct. 1953).

E. Particular Actions and Proceedings

29. Special term matters generally

Under RCP 60 a notice of less than eight days may be prescribed for the argument upon a return to certiorari order. PEOPLE ex rel. MAYOR OF NEW YORK v NICHOLS, 79 N.Y. 582, 79 N.Y. (N.Y.S.) 582, 58 How. Pr. 200, 1880 N.Y. Misc. LEXIS 83 (N.Y. 1880).

RCP 60 applied not only to motions but also to all matters of argument to be taken up at special term, such as a hearing in a special proceeding. In re Cutting, 49 A.D. 388, 63 N.Y.S. 246, 1900 N.Y. App. Div. LEXIS 752 (N.Y. App. Div. 1900).

RCP 60 did not apply to an order where more than eight days intervened between the time it was made and served and the time at which the motion was to be and was in fact heard; nor did the requirements of this rule that the grounds for granting such an order be contained in the moving affidavit, apply. Gross v Clark, 24 Hun 343 (N.Y. 1881).

RCP 60 did not apply to a motion at a special term, upon less than eight days' notice, to settle the form of a judgment then recovered, and to direct the entry thereof. Parker v Linden, 13 N.Y.S. 95, 59 Hun 359, 1891 N.Y. Misc. LEXIS 973 (N.Y. Sup. Ct. 1891).

30. Stockholder's petition to determine value of stock

Petition by stockholder, under Stk Corp L § 21, was not dismissable because order to show cause was made returnable on 5 instead of 8 days' notice. Application of Bazar, 50 N.Y.S.2d 521, 183 Misc. 736, 1944 N.Y. Misc. LEXIS 2369 (N.Y. Sup. Ct. 1944), aff'd, 271 A.D. 1007, 69 N.Y.S.2d 910, 1947 N.Y. App. Div. LEXIS 5599 (N.Y. App. Div. 1947).

31. Contempt proceeding

RCP 60 did not apply to an application to punish for contempt. Becker v Gerlich, 129 N.Y.S. 614, 72 Misc. 157, 1911 N.Y. Misc. LEXIS 353 (N.Y. Sup. Ct. 1911).

32. Matrimonial action

An application for judgment in an action of divorce made pursuant to former RCP 194 upon the failure of the defendant to appear, being in the nature of a motion, had to be made on notice as provided by RCP 60. Boller v Boller, 96 A.D. 163, 89 N.Y.S. 200, 1904 N.Y. App. Div. LEXIS 2241 (N.Y. App. Div. 1904).

In separation action, plaintiff applied for temporary alimony and counsel fee but gave defendant only 7 instead of 8 days' notice of application, and on return day court "of its own instance" adjourned motion for 2 days; held that special term did not acquire jurisdiction and that order was void. Silverman v Silverman, 261 A.D. 1106, 27 N.Y.S.2d 11, 1941 N.Y. App. Div. LEXIS 8987 (N.Y. App. Div. 1941).

Where plaintiff had secured visitation rights of children in habeas corpus proceeding and defendant thereafter removed the children to Florida, the order to show cause on plaintiff's motion to punish defendant for contempt was properly served on her by certified mail in Florida where the court had directed that manner of service. People ex rel. Taylor v Taylor, 19 Misc. 2d 101, 187 N.Y.S.2d 190, 1959 N.Y. Misc. LEXIS 3874 (N.Y. Sup. Ct. 1959).

33. Vacation of default judgment

An order to show cause returnable in ten days, bringing on a motion to vacate a default judgment, was improvidently issued where no reason appeared why the usual notice of motion contemplated by this rule should not have been employed, and where such order restrained plaintiff from enforcing the judgment, although there had been no attempt to comply with the provisions of CPA § 886 (Rule 6312(b)(3), herein), making the giving of security a condition precedent to such a stay. Walton Foundry Co. v A. D. Granger Co., 203 A.D. 226, 196 N.Y.S. 719, 1922 N.Y. App. Div. LEXIS 7164 (N.Y. App. Div. 1922).

34. Vacation of notice for examination before trial

Where a notice for examination before trial served under CPA § 290 (§ 3102(b) Rules 3107, 3109, 3111 herein) on June 21, fixed June 27 as the date for examination, a notice of motion to vacate such notice could have been made for a Special Term to be held on July 1 under this rule, on eight days' notice, or for a Special Term to be held June 24, under the provision of the same rule for a shorter notice on order to show cause, in view of Rules 37 (§ 1101(a), (b) herein) and 63 (§ 2213 herein), Rules of Civil Practice. Richmond v Josephthal, 203 A.D. 281, 196 N.Y.S. 571, 1922 N.Y. App. Div. LEXIS 7178 (N.Y. App. Div. 1922).

35. Motion to dismiss appeal

A motion to dismiss an appeal cannot be heard on a notice of less than eight days, unless the time is shortened by an order to show cause. Hand v Callaghan, 33 N.Y.S. 176, 12 Misc. 88, 1895 N.Y. Misc. LEXIS 327 (N.Y.C.P. 1895).

36. Proceeding under US Judicial Code

Period of notice prescribed by RCP 60 was immaterial in proceeding, under section 29 of the Judicial Code (US Code, tit 28, § 72), to remove a cause to the federal court. Kueck v Northwestern Mut. Life Ins. Co., 2 F. Supp. 400, 1932 U.S. Dist. LEXIS 1638 (D.N.Y. 1932).

Research References & Practice Aids

Cross References:

Correction of defects in papers, CPLR § 405.

Motions in special proceedings, CPLR § 406.

Motion in supreme court actions, CPLR § 2212.

Motion in county court actions, CPLR § 2213.

Relief demanded by other than moving party, CPLR Rule 2215.

Default, CPLR § 2216.

Prior motion, CPLR § 2217.

Trial of issue raised on motion, CPLR § 2218.

As to the application of the Uniform Civil Rules for the City of New York to this section, see CLS Unif Civ Rls NYC Civil Ct § 208.11 [22 NYCRR § 208.11] in CLS Volume 43.

Calendaring of motions; uniform notice of motion form, CLS UDCR § 212.10.

Submission of papers to judge, CLS UDCR § 212.5.

Codes, Rules and Regulations:

Calendaring of motions; uniform notice of motion form; affirmation of good faith. 22 NYCRR § 202.7.

Motion procedure. 22 NYCRR § 202.8.

Practice Rules of the Appellate Division. 22 NYCRR § 1250.1 et seq.

Federal Aspects:

Computation of time for service of motions and affidavits in United States District Courts, Rule 6(d) of Federal Rules of Civil Procedure, USCS Court Rules.

Defenses and objections presented by motions in United States District Courts, Rule 12 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion to terminate or limit oral examination in United States District Courts, Rule 30(d) of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for order compelling discovery in United States District Courts, Rule 37(a) of Federal Rules of Civil Procedure, USCS Court Rules.

Time for motion for new trial or amendment of judgment in United States District Court, Rule 59 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion day in United States District Courts, Rule 78 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for change of venue in United States District Courts, 28 USCS § 1404.

Application to United States court for making and hearing of motion relating to arbitration, 9 USCS § 6.

Papers filed with order on motions in arbitration proceedings, 9 USCS § 13.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2214, Motion Papers; Service; Time.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 105.02; 2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 403-a.08, 404.09, 607.02; 6 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 2303.05, 2701.03, 2701.08.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.01.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 15.01. Motions and orders — in general.

CPLR Manual § 15.03. Motion procedure.

CPLR Manual § 24.05. Relief from judgment or order.

CPLR Manual § 27.07. Overview of enforcement devices and the courts out of which they issue or to which application must be made.

Matthew Bender's New York Practice Guides:

LexisNexis Practice Guide New York e-Discovery and Evidence § 9.09

LexisNexis Practice Guide New York e-Discovery and Evidence § 9.11

2 New York Practice Guide: Business and Commercial § 12.23; 4 New York Practice Guide: Business and Commercial § 24.12.

1 New York Practice Guide: Domestic Relations §§ 3.39, 3.43, 3.45, 4.13, 11.02, 11.21, 11.22, 12.16, 12.22, 16.10; 2 New York Practice Guide: Domestic Relations §§ 34.16, 34.25, 34.27; 3 New York Practice Guide: Domestic Relations §§ 36.04, 36.09, 37.25, 37.26; 4 New York Practice Guide: Domestic Relations §§ 48.10, 48.15.

Matthew Bender's New York AnswserGuides:

LexisNexis AnswerGuide New York Civil Litigation § 14.19. Meeting Procedural Requirements for Obtaining Preliminary Injunction.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 3.48.

Matthew Bender's New York Checklists:

Checklist for Pretrial Motions Generally LexisNexis AnswerGuide New York Civil Litigation § 7.02.

Checklist for Obtaining, Vacating, or Modifying Temporary Restraining Order (TRO) or Preliminary Injunction LexisNexis AnswerGuide New York Civil Litigation § 14.16.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 2214:1 et seq.

LexisNexis Forms FORM 461-5:12.— Notice of Motion for Summary Judgment, R.P.A.P.L. Article 15 Action to Declare Mortgage Void; Statute of Limitations Expired.

LexisNexis Forms FORM 461-7:13.— Notice of Motion for Default Judgment on Mortgage Note.

LexisNexis Forms FORM 70-CV12:2.— Notice of Motion by Member of News Media to Vacate Sealing Order.

LexisNexis Forms FORM 140-37.34.— Notice of Notion For Summary Judgment In Action to Enforce Trust On Vendee’s Advances Under Lien Law.

LexisNexis Forms FORM 380-11:101.— Notice of Motion Skeleton Form.

LexisNexis Forms FORM 380-11:102.— Notice of Cross Motion Skeleton Form.

LexisNexis Forms FORM 380-11:103.— Order to Show Cause Skeleton Form.

LexisNexis Forms FORM 380-11:104.— Notice Demanding Trial by Jury of Issues of Fact Raised on Motion.

LexisNexis Forms FORM 380-11:105.— Affidavit in Support of, or in Opposition to, Motion Skeleton Form.

LexisNexis Forms FORM 380-11:106.— Affirmation by Attorney in Support of, or in Opposition to, Motion Skeleton Form.

LexisNexis Forms FORM 380-11:301.— Notice of Motion to Vacate Ex Parte Order for Failure to State Result of Prior Motion for Similar Relief.

LexisNexis Forms FORM 380-11:302.— Affirmation in Support of Motion to Vacate Ex Parte Order For Failure to State Result of Prior Motion for Similar Relief.

LexisNexis Forms FORM 380-11:406.— Notice of Motion to Reargue and Renew by Plaintiff.

LexisNexis Forms FORM 380-11:407.— Notice of Motion for Resettlement and Reargument.

LexisNexis Forms FORM 380-11:408.— Affidavit in Support of Motion for Resettlement and Reargument.

LexisNexis Forms FORM 380-11:409.— Affidavit in Opposition to Motion for Resettlement and Reargument.

LexisNexis Forms FORM 380-11:501.— Notice of Motion for Stay in Action.

LexisNexis Forms FORM 380-11:502.— Affidavit in Support of Motion to Dismiss, or for Stay of Action on Ground That Another Action is Pending.

LexisNexis Forms FORM 461-10:96.— Notice of Motion Empowering Receiver to Engage Counsel.

LexisNexis Forms FORM 461-16:13.— Notice of Motion for Leave to Amend Complaint to Add Mortgaged Parcel and Lienor Thereon As a Defendant.

LexisNexis Forms FORM 461-19:1.— Notice of Motion to Dismiss Complaint; Lack of Jurisdiction.

LexisNexis Forms FORM 461-19:10.— Notice of Motion to Dismiss Complaint; No Legal Capacity to Sue, Failure to State Cause of Action.

LexisNexis Forms FORM 461-19:3.— Notice of Motion to Dismiss Complaint; Failure to State Cause of Action.

LexisNexis Forms FORM 461-19:5.— Notice of Motion to Dismiss Complaint; Defense Founded Upon Documentary Evidence, Failure to State Cause of Action.

LexisNexis Forms FORM 461-19:8.— Alternate Form: Notice of Motion to Dismiss Complaint, Junior Mechanic’s Lienor Foreclosing Upon Senior Mortgagee.

LexisNexis Forms FORM 461-21:8.— Defendant’s Notice of Motion for Summary Judgment.

LexisNexis Forms FORM 461-27:12.— Notice of Motion to Renew Motion for Judgment of Foreclosure and Sale (Excise Unnecessary Defendants).

LexisNexis Forms FORM 461-32:1.— Notice of Motion for Order Directing Payment of Use and Occupation, Strict Foreclosure.

LexisNexis Forms FORM 461-34:2.— Notice of Motion to Amend Judgment of Foreclosure and Sale (to Impose Deficiency Liability).

LexisNexis Forms FORM 461-37:40.— Notice of Motion for Summary Judgment; Co op Deficiency Action.

LexisNexis Forms FORM 461-41:43.— Notice of Motion to Dismiss Complaint of Junior Mechanic’s Lienor.

LexisNexis Forms FORM 140-358.1.— Notice of Motion for Summary Judgment in Action to Terminate Tenancy and Occupancy or in the Alternative to Reform a Lease Agreement.

LexisNexis Forms FORM 140-434.49.— Action/Proceeding to Invalidate Adoption of Zoning Code for Failure to Comply with SEQRA: Notice of Cross-Motion to Dismiss.

LexisNexis Forms FORM 140-445.1.— Notice of Motion to Extend Effective Period of Notice of Pendency.

LexisNexis Forms FORM 140-506.— Notice of Motion for Appointment of Referee to Compute Where No Defendants are Infants or Absentees.

LexisNexis Forms FORM 140-507.— Notice of Motion to Confirm Referee’s Report and for Judgment of Foreclosure and Sale.

LexisNexis Forms FORM 140-509.— Notice of Motion to Confirm Report of Sale and For Leave to Enter a Deficiency Judgment.

LexisNexis Forms FORM 140-508.1.— Notice of Motion to Confirm Report of Sale by Referee and For Reference.

LexisNexis Forms FORM 140-505.13.— Notice of Motion to Extend Receivership.

LexisNexis Forms FORM 140-501.15.— Notice of Motion for Leave to Commence Action on Debt After Foreclosure Action Commenced.

LexisNexis Forms FORM 140-505.19.— Notice of Motion to Settle Receiver’s Accounts.

LexisNexis Forms FORM 140-506.2.— Notice of Motion For Reference to Compute Where an Infant or Absentee is Defendant.

LexisNexis Forms FORM 140-507.20.— Notice of Motion To Confirm Referee’s Report of Sale.

LexisNexis Forms FORM 140-502.5.— Notice of Motion for Leave to Defend Where Defendant Served by Publication.

LexisNexis Forms FORM 140-505.5.— Notice of Motion for Order Authorizing Receiver to Employ Counsel and an Agent.

LexisNexis Forms FORM 140-509.6.— Notice of Motion to Confirm Referee’s Report of Deficiency and for Judgment.

LexisNexis Forms FORM 140-508.7.— Notice of Motion to Confirm Report of Referee In Surplus Money Proceedings.

LexisNexis Forms FORM 140-507.8.— Notice of Motion For Appointment of Substitute Referee.

LexisNexis Forms FORM 140-576.3.— Notice of Motion for Summary Judgment in Action for Partition.

LexisNexis Forms FORM 140-581.— Notice of Motion for Reference to Ascertain Parties’ Rights Before Interlocutory Judgment.

LexisNexis Forms FORM 140-582.— Notice of Motion for Order Dispensing with Reference to Ascertain Creditors.

LexisNexis Forms FORM 140-583.1.— Notice of Motion for Order Confirming Report of Referee to Take Proof and for Interlocutory Judgment of Sale.

LexisNexis Forms FORM 140-589.1.— Notice of Motion to Confirm Report of Sale in Partition Action; Application for Additional Allowance; Application for Final Judgment.

LexisNexis Forms FORM 140-597.— Notice of Filing of Referee's Report of Distribution and Motion to Confirm.

LexisNexis Forms FORM 140-604.5.— Notice of Motion for Appointment of Guardian ad Litem.

LexisNexis Forms FORM 140-668.6.— Notice of Motion to Determine if Class Action May Be Maintained.

LexisNexis Forms FORM 140-715.2.— Notice of Motion for Summary Judgment in Action to Enforce Restrictive Covenant.

LexisNexis Forms FORM 140-722.— Notice of Motion for Preliminary Injunction Tolling Cure Period for Breach by Tenants and Staying Commencement of Summary Proceedings.

LexisNexis Forms FORM 140-732.13.— Proceeding for Hospital Use and New Multiple Dwelling Exemptions: Petitioner's Notice of Motions for Summary Judgment.

LexisNexis Forms FORM 140-737.3.— Proceeding to Review Grant of Use Variance: Notice of Motion to Dismiss and Affidavit.

LexisNexis Forms FORM 140-809.15.— Notice of Motion by Defendant for Summary Judgment in Action for Cutting Trees.

LexisNexis Forms FORM 140-808.3.— Application for Security.

LexisNexis Forms FORM 70-IS3420:22.— Notice of Motion for Summary Judgment Declaring Insurer Must Defend and Indemnify Plaintiff.

LexisNexis Forms FORM 70-IS5102:21.— Notice of Motion for Summary Judgment Based on Lack of ``Serious Injury''.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 11:101 et seq .(stays, motions, orders and mandates).

Texts:

3-45 New Appleman New York Insurance Law § 45.04.

1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 10.19; 2 Bergman on New York Mortgage Foreclosures (Matthew Bender) §§ 16.04, 19.04, 27.06; 3 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 37.08, 41.16.

New York Juvenile Delinquency Practice § 3-1; New York Juvenile Delinquency Practice § 4-1; New York Juvenile Delinquency Practice § 5-1.

1 New York Trial Guide §§ 7.12, 7.51, 7.52, 7.53.

Hierarchy Notes:

NY CLS CPLR, Art. 22

Forms

Forms

Form 1. Skeleton Form for Notice of Motion

SUPREME COURT, _____ COUNTY

Notice of Motion

[Title of cause] Index No. _____ [if assigned]

PLEASE TAKE NOTICE that on the annexed affidavit of _____, sworn to the _____ day of _____, 20_____ and

_____ [insert description of other papers] a motion will be made at a motion term [Part _____] of this court to be held in and for the County of _____, at the County Court House in the City of _____, on the _____ day of _____, 20_____, at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel can be heard for an order _____ [insert nature of motion] and for such other and further relief as to the court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits are required to be served on the undersigned not later than 7 days before the _____ day of _____, 20_____, the date for the hearing specified above.

Dated _____, 20_____.

_____

Attorney for _____

Office and P. O. Address

Telephone No.

To:_____

Attorney for _____

Form 2. Skeleton Form for Order to Show Cause

SUPREME COURT, _____ COUNTY

Order to Show Cause

[Title of cause] Index No. _____ [if assigned]

PRESENT: Hon. _____, Justice.

On reading the affidavit of _____, sworn to the _____ day of _____, 20_____, and on motion of _____, attorney for the defendant, it is

ORDERED that the plaintiff herein show cause at a motion term [Part _____] of this court, to be held in and for the County of _____, at the County Court House in the City of _____, on the _____ day of _____, 20_____ at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel can be heard, why an order should not be made _____ [set forth nature of relief requested] and why the defendant should not have such other and further relief as may be just; and it is further

ORDERED that service of a copy of this order and the papers upon which it is granted upon plaintiff's attorney, either personally, or otherwise in accordance with the provisions of Rule 2103 of the Civil Practice Law and Rules, on or before the _____ day of _____, 20_____ shall be good and sufficient service.

Signed this _____ day of _____, 20_____ at _____, New York.

_____

[Print signer's name below signature]

Justice, Supreme Court

_____ County

Form 3. Skeleton Form of Affidavit to Obtain Order to Show Cause

SUPREME COURT, _____ COUNTY

Affidavit

[Title of cause] Index No. _____ [if assigned]

	ss:
STATE OF NEW YORK	

COUNTY OF _____

_____, being duly sworn, deposes and says:

1 He is the _____ named in the above entitled action.

[Insert other statements necessary for the particular affidavit.]

7 No prior application has been made for the relief herein requested or for any similar relief.

8 The reason an order to show cause is sought rather than proceeding by notice of motion is _____ [insert reasons, as deponent must answer the complaint herein on or before the _____ day of _____, 20_____ and this motion, which is necessary to permit the deponent to properly answer the said complaint cannot be made and decided in sufficient time to permit deponent to so answer the complaint herein. If deponent be granted an order to show cause returnable on the _____ day of _____, 20_____ the motion may be decided before the said _____ day of _____, 20_____].

WHEREFORE deponent prays that an order be issued directing the _____, to show cause why _____ [insert nature of relief requested] and why such other and further relief as to the court may appear just and proper should not be granted to the deponent.

_____

[Print signer's name below signature]

[Jurat]

Form 4. Skeleton Form of Affidavit in Support of Motion

SUPREME COURT, _____ COUNTY

[Title of cause] Index No. _____ [if assigned]

STATE OF NEW YORK

COUNTY OF _____

ss:

_____, being duly sworn, deposes and says:

1 He is the _____ in the above entitled action and makes this affidavit in support of a motion for _____ [insert nature of motion].

2 [Insert other statements required in the particular affidavit.]

WHEREFORE deponent prays an order be entered _____ [insert nature of relief requested] and that deponent have such other and further relief as to the court may seem just and proper.

_____

[Print signer's name below signature]

[Jurat]

Form 5. Skeleton Form of Affidavit on Motion for Ex Parte Order

SUPREME COURT, _____ COUNTY

Affidavit

[Title of cause] Index No. _____ [if assigned]

STATE OF NEW YORK

ss:

COUNTY OF _____

_____, being duly sworn, deposes and says:

1 He is the _____ named in the above entitled action.

2 This action was commenced for _____ [insert name of action].

3 This action was commenced by personal service of a copy of the summons and complaint on the defendant on the _____ day of _____, 20_____. The defendant appeared and answered by _____, his attorney on the _____ day of _____, 20_____. A note of issue was duly filed by the attorney for the plaintiff on the _____ day of _____, 20_____ and the action is now on the general trial calendar of this court, No. _____. No further proceedings have been taken in this action.

[Insert other statements necessary for the particular affidavit.]

8 No prior application has been made for the relief herein requested or for any similar relief.

WHEREFORE, deponent prays that an order be issued directing _____ [insert nature of relief requested].

_____

[Print signer's name below signature]

[Jurat]

Form 6. Notice to Produce Papers upon Hearing

SUPREME COURT, _____ COUNTY

Notice to Produce Papers

[Title of cause] Index No. _____ [if assigned]

PLEASE TAKE NOTICE, that you are hereby required to produce upon the hearing of this motion on the _____ day of _____, 20_____ the following papers or copies thereof _____ [insert description of papers to be produced] which are now in your possession and are necessary for the consideration of the questions involved herein.

Dated _____, 20_____.

_____

Attorney for _____

Office and P. O. Address

Telephone No.

To_____

Attorney for _____

Form 7. Order Granting Motion on Failure of Opposing Party to Produce Papers

SUPREME COURT, _____ COUNTY

Order

[Title of cause] Index No. _____ [if assigned]

PRESENT: Hon. _____, Justice

The plaintiff having moved for an order _____ [state nature of relief requested] and said motion having duly come on to be heard,

NOW, on reading and filing the notice of motion dated the _____ day of _____, 20_____ and the affidavit of _____, sworn to the _____ day of _____, 20_____ with proof of due service thereof and it appearing that due demand was made upon the defendant in the said notice of motion to furnish and produce _____ [insert description of papers] on the

return date of this motion and the said _____ having failed to produce the papers demanded in such notice,

NOW, on motion of _____, attorney for the plaintiff, it is

ORDERED that this motion be and the same hereby is granted.

[Insert any other provisions that the facts require.]

Signed this _____ day of _____, 20_____ at _____, New York.

_____

[Print signer's name below signature]

Justice, Supreme Court

_____ County

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