NY CLS CPLR R 3402

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Consolidated Laws Service **>**

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

Article 34 Calendar Practice; Trial Preferences (§§ 3401 — 3410)

R 3402. Note of issue.

(a) Placing Case on Calendar. At any time after issue is first joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing, within ten days after service, with proof of such service two copies of a note of issue with the clerk and such other data as may be required by the applicable rules of the court in which the note is filed. The clerk shall enter the case upon the calendar as of the date of the filing of the note of issue.

(b) New Parties. A party who brings in a new party shall within five days thereafter serve him with the note of issue and file a statement with the clerk advising him of the bringing in of such new party and of any change in the title of the action, with proof of service of the note of issue upon the new party, and of such statement upon all parties who have appeared in the action. The case shall retain its place upon the calendar unless the court otherwise directs.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1963, ch 530, § 1; L 1968, ch 19, § 1, eff Sept 1, 1968.

Annotations

Notes

Derivation Notes:

Earlier rules: RCP 150.

Advisory Committee Notes:

This rule is the same as former rule 150 with minor language changes and a number of omissions but no change in substance. References to terms of court have been omitted. It should be possible to file a note of issue at any time. The separate problem of the term at which the case should be tried can be treated, if it is necessary to do so, by calendar rules adopted pursuant to CPLR rule 3401. The third paragraph and the second sentence of the second paragraph of former rule 150 dealt with abolition of notice of trial and lack of necessity for a further note of issue; they are omitted as unnecessary. The final paragraph of former rule 150, which provided that a case should not be tried if there had not been time to appear, plead or make motions with respect to the pleadings, has also been omitted. It is specifically covered by CPLR § 1010 so far as third parties are concerned, and the time specified in the first clause of subd (a) of this rule protects original parties.

The portion of former § 433 which provided that a case might be brought to trial by filing a note of issue is omitted as unnecessary. That portion which provided for dismissals on default is covered in CPLR § 3215(a).

Commentary

PRACTICE INSIGHTS:

DEADLINES FOR MAKING SUMMARY JUDGMENT MOTIONS

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INSIGHT

The minimum 30-day period after filing the note of issue provides no discretion and the judge should not be able to preclude a party from making and having a timely summary judgment motion heard. Further, a judge should not be permitted to schedule the trial in an insufficient amount of time so as to theoretically or practically eliminate a party's opportunity to have the motion heard within the statutory period. Indeed, the Appellate Division has rejected judges' attempts to refuse to entertain summary judgment motions under similar circumstances.

ANALYSIS

Statute provides deadlines for seeking summary judgment motions.

After issue has been joined, the court can set a deadline for filing summary judgment motions, which can be no earlier than 30 days after the filing of the note of issue. If the court does not set a date, the motion must be made within 120 days of filing of the note of issue “except with leave of court on good cause shown.” CPLR 3212(a).

The Court of Appeals has held that the lower court did not abuse its discretion in entertaining and then granting the defendants’ cross-motion for summary judgment made more than 120 days after the filing of the note of issue. The Court found good cause in defendants' prompt motion to vacate the note of issue served by the plaintiff. Before the note of issue had been served, a notice to depose an employee of the third-party defendant was outstanding and the deposition had not taken place. As is not uncommon, although the lower court did not strike the note of issue, it permitted the discovery to be completed. Shortly after the deposition, defendants moved for summary judgment. *Gonzalez v. 98 Mag Leasing Corp.,* 95 N.Y.2d 124, 128, 711 N.Y.S.2d 131, 133-34, 733 N.E.2d 203, 205-06 (2000).

In its decision, the Court noted that the primary reason behind the 1996 amendment that created the statutory time limit for moving for summary judgment was to prevent the practice of moving for summary judgment on the eve of trial:

So long as issue had been joined, a party could make a motion for summary judgment, even on the eve of trial, thereby disrupting the court's calendar and leaving an adversary little or no time to reply (citations omitted). Moreover, the belated motion, sometimes used as a dilatory tactic, was most burdensome for the court and for parties who had already prepared for trial (citation omitted). Thus, the amendment to CPLR 3212(a) was a step toward alleviating the practice of "eleventh hour" summary judgment motions. *Gonzalez v. 98 Mag Leasing Corp.,* 95 N.Y.2d 124, 128, 711 N.Y.S.2d 131, 133-34, 733 N.E.2d 203, 205-06 (2000)

Discretion under the statute is limited.

Gonzalez dealt with the outer limit for bringing a summary judgment motion, that is, the 120-day deadline. If, however, a court sets the trial within 30 days after the filing of the note of issue, resulting in either the inability of a party to move for summary judgment or for the motion to be heard before the trial, the language of the statute would appear not to permit a court to, in essence, preclude the filing of such a motion. The discretion provided in the statute is limited to setting an outside deadline beyond 30 days and permitting a motion after the 120-day period "upon good cause shown."

Moreover, as the *Gonzalez* court notes, the time limits provided were intended to alleviate "eleventh hour" motions. Preventing a party from seeking summary judgment relief when done in a timely fashion would be unconscionable. Waiting until after the filing of the note of issue to make the motion (i) provides the movant with the benefits of all discovery conducted, and (ii) avoids an argument presented in opposition that the motion is premature, that is, before discovery is complete. Precluding a party from seeking summary judgment by, in essence, scheduling the trial too soon, is particularly illogical where the motion is a strong one. Forcing the parties to try a less than meritorious claim is a waste of resources, judicial or otherwise. Practitioners should note that the Appellate Division has rejected attempts by judges to refuse to entertain summary judgment motions. *See Goldheart International Ltd. v. Vulcan Construction Corp.,* 124 A.D.2d 507, 508 N.Y.S.2d 182 (1st Dep't 1986).

PRESERVING RIGHT TO MOVE FOR SUMMARY JUDGMENT

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INSIGHT

Filing the note of issue and certificate of readiness certifies that all discovery is complete and begins the running of the deadline for filing summary judgment motions. If there is still outstanding discovery, the remedy is to move to strike the note of issue. Occasionally a judge will deny the motion, however, but permit discovery to go forward. In that case, the practitioner should seek a court order extending the time to file summary judgment motions until a specified time, between 30 and 120 days after discovery is complete. Otherwise, the summary judgment motion deadline may pass in the interim.

ANALYSIS

Party should move to vacate note of issue if discovery is not complete.

A note of issue and the accompanying certificate of readiness certifies that discovery is complete and the case is ready to be tried. If “it appears that a material fact in the certificate of readiness is incorrect,” for example, discovery is not complete, a party can move to vacate the note of issue within 20 days of service. 22 NYCRR § 202.21(e). If the judge believes discovery is not complete, the note of issue should be stricken. On occasion, however, a judge will permit particular discovery to go forward, and will leave the case on the calendar. In fact, that trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced. *See Lisa I. v. Manikas*, 188 A.D.3d 1369, 135 N.Y.S.3d 192 (3d Dep’t 2020) (“Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced’ (citation omitted). The child's deposition took place on April 22, 2019; however, the deposition was not completed. The parties contacted Supreme Court that day seeking permission to conclude the child's deposition. The parties' dispute as to the completion of the child's deposition was ongoing and began long before the note of issue was

filed (citation omitted). Neither party will be prejudiced by having the child's deposition completed post-note of issue (citation omitted).”).

Deadline to file summary judgment motions runs from filing of note of issue.

After issue has been joined, a court can set a deadline for filing summary judgment motions, which can be no less than 30 days after the note of issue is filed. Because the deadline is tied to the filing of the note of issue, if a motion to vacate is denied while permitting discovery to go forward, a party should be given the opportunity to make the summary judgment motion after discovery is complete. Consequently, the parties should request, and the court should issue, an order setting a deadline 30 to 120 days after the discovery is completed. As to the danger in permitting the summary judgment deadline to pass and the Court of Appeals' unwillingness to permit such late summary judgment motions, even when they are meritorious, see “ David L. Ferstendig on *Brill v. City of New York*,” LexisNexis Expert Commentary (LexisNexis 2008), 2008 Emerging Issues 823. *See also Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶ 3212.05 (David L. Ferstendig, 2d Ed. 2023). *But see Andujar v. Boyle*, 190 A.D.3d 902, 136 N.Y.S.3d 912 (2d Dep’t 2021) (“‘“Pursuant to Uniform Rules for Trial Courts, a note of issue must be accompanied by a certificate of readiness, which must state that there are no outstanding requests for discovery and the case is ready for trial”’ (citations omitted). Here, the certificate of readiness filed with the first note of issue on February 19, 2019, failed to indicate whether physical examinations were completed and whether medical reports were exchanged. As the first certificate of readiness failed to materially comply with the requirements of 22 NYCRR 202.21, this note of issue was a nullity (citations omitted). As that note of issue was a nullity, the plaintiff's time to move for summary judgment began to run when the new note of issue was filed on March 6, 2019. Thus, the plaintiff's motion for summary judgment was timely.”).

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Although disclosure may be had at any time, it is essential that issue be joined before a trial or hearing may be held. Consequently an order of Special Term granting a hearing on 10 days' notice was premature where defendant had not filed an answer. Lakeland Water Dist. v Onondaga County Water Authority, 24 N.Y.2d 400, 301 N.Y.S.2d 1, 248 N.E.2d 855, 1969 N.Y. LEXIS 1376 (N.Y. 1969).

An early trial was necessary where defendant-landlord's potential harm was measurable in dollars should it be determined that the tenant's lease was not renewed, and potential harm to plaintiff-tenant might well be irreparable in that ouster from the premises would result in the irretrievable loss of its restaurant business. Red Raven Grill, Inc. v West 45th Street Associates, 37 A.D.2d 702, 322 N.Y.S.2d 897, 1971 N.Y. App. Div. LEXIS 3581 (N.Y. App. Div. 1st Dep't 1971).

The fact that the county court had not formally concluded its criminal term and established a date for commencement of the civil term did not prevent respondent from filing a note of issue to place case on calendar at next civil term and thus did not constitute a justifiable excuse for delay in filing note of issue. Prezio v Milanese, 40 A.D.2d 910, 337 N.Y.S.2d 842, 1972 N.Y. App. Div. LEXIS 3347 (N.Y. App. Div. 3d Dep't 1972).

The trial court properly denied plaintiff's motion to enjoin defendant from taking other proceedings pending determination of the action, and provided that all disclosure proceedings be conducted and completed and the action set down on the calendar by and for a date certain, since an order directing a trial of the action immediately after the completion of expedited disclosure proceedings is a proper exercise of the court's discretion. Fancy Industries, Inc. v Commerce Labor Industry Corp., 88 A.D.2d 581, 450 N.Y.S.2d 433, 1982 N.Y. App. Div. LEXIS 16747 (N.Y. App. Div. 2d Dep't 1982).

The mere filing of a note of issue without the required service upon all parties to an action does not satisfy the statutory requirement of CPLR § 3402 and is therefore ineffective for purposes of permitting the action to be placed on the calendar. Wainwright v Elbert Lively & Co., 99 A.D.2d 490, 470 N.Y.S.2d 433, 1984 N.Y. App. Div. LEXIS 16681 (N.Y. App. Div. 2d Dep't 1984).

Court should have granted defendants' motions to vacate plaintiffs' note of issue and certificate of readiness where certificate was filed when action had been pending for less than year, at time when plaintiffs were aware that defendants anticipated further discovery. Fultz v D. Benvenuti Properties, 155 A.D.2d 794, 548 N.Y.S.2d 72, 1989 N.Y. App. Div. LEXIS 14207 (N.Y. App. Div. 3d Dep't 1989).

In absence of any showing of prejudice to defendant, it was abuse of discretion for trial court to force plaintiffs to trial without first providing reasonable opportunity for completion of discovery where plaintiffs had actively pursued discovery throughout 3 months following joinder of issue, made allowances for defendant's counsel's scheduling conflicts, and sought court assistance in obtaining discovery after other methods failed. Lipson v Dime Sav. Bank, FSB, 203 A.D.2d 161, 610 N.Y.S.2d 261, 1994 N.Y. App. Div. LEXIS 4135 (N.Y. App. Div. 1st Dep't 1994).

In absence of special, unusual, or extraordinary circumstances spelled out in factual detail, court should not have allowed physical examination of plaintiff after note of issue and statement of readiness had been filed. Tedesco v Murawski, 212 A.D.2d 1053, 624 N.Y.S.2d 1007, 1995 N.Y. App. Div. LEXIS 1949 (N.Y. App. Div. 4th Dep't 1995).

Because plaintiff's motion to compel discovery was still outstanding, defendant's note of issue stating that "discovery proceedings now known to be necessary" had been completed was incorrect, and thus note of issue would be stricken, and plaintiff's motion to compel discovery, which had been improperly denied, would be restored. Syllman v 67-25 Dartmouth St. Corp., 238 A.D.2d 579, 657 N.Y.S.2d 964, 1997 N.Y. App. Div. LEXIS 4391 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied plaintiffs' motion to extend their time to file note of issue where action had been pending for over 6 ½ years, during which plaintiffs had ample opportunity to complete discovery. Zeitlin v Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, P.A., 262 A.D.2d 406, 690 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 6318 (N.Y. App. Div. 2d Dep't 1999).

Medical malpractice complaint was properly dismissed under CLS CPLR § 3216 for failure to file note of issue where, after parties certified that all discovery and pretrial motions were complete, court directed plaintiffs to serve and file note of issue within 90 days, court's order stated that failure to comply within 90 days might serve as basis for dismissal under § 3216, that order was valid, plaintiffs failed to comply with it by filing note of issue or moving for extension under CLS CPLR § 2004, and plaintiffs did not show reasonable excuse for their noncompliance and meritorious cause of action. Seletsky v St. Francis Hosp., 263 A.D.2d 452, 692 N.Y.S.2d 708, 1999 N.Y. App. Div. LEXIS 7764 (N.Y. App. Div. 2d Dep't 1999).

Dental malpractice action would be dismissed under CLS CPLR § 3216 for failure to prosecute where plaintiff failed to comply with 90-day notice by filing note of issue or by moving, before default date, either to vacate notice or extend 90-day period, and she failed to show justifiable excuse for her delay and that she had meritorious cause of action. Timko v Loreto, 263 A.D.2d 480, 693 N.Y.S.2d 202, 1999 N.Y. App. Div. LEXIS 7878 (N.Y. App. Div. 2d Dep't 1999).

Where no note of issue placing action on court's calendar was filed, court incorrectly dismissed action pursuant to CLS CPLR § 3404; correct procedure to dismiss action required motion under CLS CPLR § 3216. P. Cubed Enters. v Roach, 265 A.D.2d 537, 696 N.Y.S.2d 889, 1999 N.Y. App. Div. LEXIS 10793 (N.Y. App. Div. 2d Dep't 1999).

Grant of defendants' motion under CLS CPLR § 3216(b)(3) to dismiss medical malpractice action was properly conditioned on plaintiff's failure to serve and file note of issue and certificate of readiness within 90 days after receipt of copy of order and notice of entry where defendants affirmatively contributed to delay in filing of note of issue. Tu Ying Chen v Nash, 266 A.D.2d 279, 698 N.Y.S.2d 511, 1999 N.Y. App. Div. LEXIS 13063 (N.Y. App. Div. 2d Dep't 1999).

Motion by defendant, in personal injury action, to strike note of issue on ground that discovery had not been completed was properly denied where motion was made in 1997, defendant failed to request vacatur of note of issue in 1995 when it moved to vacate default judgment, and defendant had reasonable time to conduct discovery proceedings. Cornelius v Friends of Crown

Heights Day Care Ctr. No. 2, 246 A.D.2d 621, 667 N.Y.S.2d 314, 1998 N.Y. App. Div. LEXIS 608 (N.Y. App. Div. 2d Dep't 1998).

Defendant was entitled to move for summary judgment more than 120 days after filing of note of issue where defense counsel's affirmation proved requisite "good cause" for delay in making motion, and delay caused no prejudice to plaintiffs, who did not oppose that branch of motion. Andaloro v Hidden Ponds Dev. Corp., 273 A.D.2d 185, 709 N.Y.S.2d 432, 2000 N.Y. App. Div. LEXIS 7182 (N.Y. App. Div. 2d Dep't 2000).

Note of issue would not be vacated in order to accommodate defendant's request for disclosure that could and should have been made before note of issue was filed where (1) defendant claimed that plaintiff's improper assertion of attorney-client privilege at its deposition and in its response to notice to admit had prevented completion of disclosure, (2) plaintiff's deposition was taken almost one month before compliance conference, at which plaintiff was directed to file note of issue within 3 weeks, and (3) for unexplained reasons, defendant did not mention plaintiff's claim of privilege at compliance conference and did not object when plaintiff was directed to file note of issue. Co-Star Constr., Inc. v Fray, 281 A.D.2d 339, 722 N.Y.S.2d 516, 2001 N.Y. App. Div. LEXIS 3202 (N.Y. App. Div. 1st Dep't 2001).

Medical malpractice plaintiff's showing that in 1997 she served bills of particulars and authorizations for medical records and sought preliminary conference, after service on her of 90-day notices to serve and file note of issue and statement of readiness, was insufficient to show justifiable excuse for her failure to respond to such 90-day notices in 1999. Medical malpractice plaintiff, who failed to respond to defendants' 90-day notices to serve and file note of issue and statement of readiness, did not show existence of meritorious cause of action against hospitals, so as to avoid CLS CPLR § 3216 dismissal of action against them, where she did not attribute any specific acts or results to hospital, and her injuries could have resulted from defaulting defendant physician's improperly performed hysterectomy. Medical malpractice plaintiff's failure to respond to defendant hospitals' 90-day notices to serve and file note of issue and statement of readiness did not entitle individual defendant to dismissal of action against him where there

was no proof that he served such notice, which is prerequisite to dismissal under CLS CPLR § 3216. Cohen v Silverman, 281 A.D.2d 445, 722 N.Y.S.2d 48, 2001 N.Y. App. Div. LEXIS 2389 (N.Y. App. Div. 2d Dep't 2001).

Court properly denied plaintiffs' motion to compel defendants to accept their bill of particulars where (1) case was stricken from trial calendar, not restored within one year, and thus deemed abandoned and automatically dismissed under CLS CPLR § 3404, (2) fact that note of issue might have been stricken on consent was of no moment, and (3) plaintiffs neither specifically sought restoration nor addressed factors relevant to that issue. Gray v Jim Cuttita Agency Inc., 281 A.D.2d 785, 722 N.Y.S.2d 289, 2001 N.Y. App. Div. LEXIS 2499 (N.Y. App. Div. 3d Dep't 2001).

Affidavit of plaintiffs' attorney, who lacked personal knowledge of facts, even when combined with "generalized details" set forth in plaintiffs' verified complaint, was insufficient to prove meritorious cause of action for negligence, and thus complaint was properly dismissed under CLS CPLR § 3216, where plaintiffs neither filed note of issue within 90 days after demand therefor nor moved to vacate demand or to extend time within which to file note of issue. Wasielewski v Town of Cheektowaga, 281 A.D.2d 944, 722 N.Y.S.2d 674, 2001 N.Y. App. Div. LEXIS 2723 (N.Y. App. Div. 4th Dep't 2001).

Defendants' motion to vacate their default, and to vacate plaintiffs' note of issue and certificate of readiness, should have been granted where certificate of readiness erroneously asserted that all physical examinations had been conducted and all medical reports had been exchanged, and plaintiffs failed to comply with preliminary conference order requiring them, as filing party, to submit either stipulation from defendants asserting that all discovery was complete or affirmation that they had twice tried in writing to get defendants to so stipulate. Ortiz v Arias, 285 A.D.2d 390, 727 N.Y.S.2d 879, 2001 N.Y. App. Div. LEXIS 7494 (N.Y. App. Div. 1st Dep't 2001).

Personal injury plaintiff was not entitled to vacatur of dismissal of complaint for failure to file note of issue where plaintiff did not show reasonable excuse for that failure and existence of

meritorious cause of action. Trapani v Ou Hai Zhu, 286 A.D.2d 764, 730 N.Y.S.2d 726, 2001 N.Y. App. Div. LEXIS 8702 (N.Y. App. Div. 2d Dep't 2001).

Order permitting a plaintiff to file a note of issue, where no statement of readiness had been filed, as provided by Supreme Court Rules, Appellate Division, Second Department, Rule VIII, part 7, was available only if there was a compliance with part 6, which required that papers on application for a preference be filed, and this conclusion did not nullify CPLR 3402, which permits the filing of a note of issue 40 days after service of the summons was complete, since CPLR 3401 authorizes the adoption of rules regulating the hearing of causes and the filing of notes of issue. Bedingfield v Dairymaid Farms, Inc., 46 Misc. 2d 146, 259 N.Y.S.2d 292, 1965 N.Y. Misc. LEXIS 2025 (N.Y. Sup. Ct. 1965).

Although no note of issue was filed in connection with inmate’s action against state for personal injuries, such filing was inferentially waived by court when trial date was established, neither party objected to trial date, and neither party advised court that claims were not ready for trial; thus, court’s letter setting trial date equated to date of filing of note of issue. Auger v State, 171 Misc. 2d 866, 656 N.Y.S.2d 157, 1997 N.Y. Misc. LEXIS 93 (N.Y. Ct. Cl.), rev'd, 236 A.D.2d 177, 666 N.Y.S.2d 760, 1997 N.Y. App. Div. LEXIS 13197 (N.Y. App. Div. 3d Dep't 1997).

2. Bifurcated personal injury trial

In bifurcated personal injury trial, court erred in permitting trial on damages to proceed without note of issue and certificate of readiness, and should have provided defendant with at least one additional business day, where defendant’s doctor had conducted physical examination of plaintiff just one business day earlier, and defendant had not yet received written report of findings from examination; court’s failure to permit more time effectively precluded defense. Petti v Pollifrone, 170 A.D.2d 494, 565 N.Y.S.2d 841, 1991 N.Y. App. Div. LEXIS 2036 (N.Y. App. Div. 2d Dep't 1991).

3. Calendar fee

Although request for judicial intervention (RJI) form should be completed and filed, and requisite fee paid, when petition is filed in connection with proceeding under CLS Unif Tr Ct Rls § 202.6(a) (22 NYCRR § 202.6(a)), if RJI is submitted and case is placed on calendar within 4-year period set forth in CLS RPTL § 718, mere fact that RJI number was not purchased when petition was filed is not jurisdictional defect mandating dismissal. Atlantic Ref. & Mktg. Corp. v Assessor of Ithaca, 246 A.D.2d 875, 667 N.Y.S.2d 803, 1998 N.Y. App. Div. LEXIS 535 (N.Y. App. Div. 3d Dep't 1998).

4. Court of Claims proceeding

In claims against state by prison inmates who contracted food poisoning, Court of Claims properly denied their motion for extension of time to serve and file note of issue and properly dismissed claims for failure to prosecute where (1) claimants did not send out discovery demands until nearly 5 years after poisoning incident, over 4 years after first claim was filed, and nearly 2 years after issuance of first order to file note of issue, and (2) when served with 90-day demand, claimants waited until one day before it expired to request extension and then failed to show that they genuinely needed extension or that good cause existed for their significant past delay. McCrory v State, 281 A.D.2d 797, 721 N.Y.S.2d 712, 2001 N.Y. App. Div. LEXIS 2485 (N.Y. App. Div. 3d Dep't 2001).

5. Effect of lack of counsel

Court properly extended plaintiff’s time to file note of issue where he appeared to have been unrepresented by counsel during period of time that he was initially allotted to file such note. Brault v Wyckoff Heights Hosp., 265 A.D.2d 442, 696 N.Y.S.2d 865, 1999 N.Y. App. Div. LEXIS 10428 (N.Y. App. Div. 2d Dep't 1999).

Defendants were entitled to dismissal of action under CLS CPLR § 3216 where plaintiff was served with notice to resume prosecution of action and to serve and file note of issue within 90 days, plaintiff did not do so and did not move for extension under CLS CPLR § 2004, its sole

excuse was that it had retained “several attorneys during the last several years,” and it did not submit affidavit of merit by person having personal knowledge of facts. Hy-Tech Coatings v Middle Country Cent. Sch. Dist., 266 A.D.2d 264, 698 N.Y.S.2d 277, 1999 N.Y. App. Div. LEXIS 11327 (N.Y. App. Div. 2d Dep't 1999).

6. NYC as party

Plaintiff’s notice of issue and statement of readiness would be vacated and its action against the City of New York stricken from the trial calendar, without prejudice to refile upon completion of disclosure, where plaintiff attempted to utilize the Freedom of Information Law to obtain information normally discoverable by authorized discovery devices after filing the statement of readiness, which effectively gave plaintiff a trial preference without compliance with the requisite rules. John T. Brady & Co. v New York, 84 A.D.2d 113, 445 N.Y.S.2d 724, 1982 N.Y. App. Div. LEXIS 14911 (N.Y. App. Div. 1st Dep't), app. dismissed, 56 N.Y.2d 504, 1982 N.Y. LEXIS 5315 (N.Y. 1982), app. dismissed, 56 N.Y.2d 711, 451 N.Y.S.2d 735, 436 N.E.2d 1337, 1982 N.Y. LEXIS 3372 (N.Y. 1982).

7. Tax proceeding

In tax assessment proceedings, Special Term properly granted corporate taxpayer extension of time within which to file its note of issue and certificate of readiness where good cause was shown for extension, and motion was made within 4-year period provided by CLS RPTL § 718 at time when precise method of assessment valuation had not been finally resolved; however, order would be modified on appeal to provide that taxpayer should file its note of issue and certificate of readiness within 20 days from receipt of written notice that town tax assessor had filed appraisal reports with clerk of Supreme Court as provided by 22 NYCRR § 202.59. National Fuel Gas Distribution Corp. v Coffman, 126 A.D.2d 939, 511 N.Y.S.2d 985, 1987 N.Y. App. Div. LEXIS 42040 (N.Y. App. Div. 4th Dep't 1987).

1994 tax certiorari proceedings were not abandoned, even though no notes of issue were filed, where town board of tax assessors entered into stipulation, dated March 30, 1995, which specifically provided that joint trial of 1994 proceedings, scheduled for May 8, 1995, be adjourned sine die, and CLS RPTL § 718(1) provides that “unless a note of issue is filed and the proceeding is placed on the court calendar within four years from the date of the service of petition or petition and notice, the proceeding thereon shall be deemed to have been abandoned...except where the parties otherwise stipulate.” Fox Meadow Partners, Ltd. v Board of Assessment Review, 273 A.D.2d 472, 710 N.Y.S.2d 610, 2000 N.Y. App. Div. LEXIS 7358 (N.Y. App. Div. 2d Dep't 2000).

Defendants’ motion to strike plaintiffs’ note of issue was improperly denied, as plaintiffs submitted no opposition to defendants’ timely motion to vacate the note of issue pursuant to N.Y. C.P.L.R. 3402 and 22 NYCRR § 202.21(e), and the recital in the certificate of readiness that discovery was complete was incorrect, because defendants had not been able to identify and depose essential firefighter witnesses. Munoz v 147 Corp., 309 A.D.2d 647, 767 N.Y.S.2d 1, 2003 N.Y. App. Div. LEXIS 10971 (N.Y. App. Div. 1st Dep't 2003).

B. Effect Of Placing Action On Calendar

8. Generally

Where plaintiff in civil action filed statement of readiness without having taken defendant’s deposition, plaintiff could not thereafter assert as “unusual and unanticipated conditions” those which arose solely out of proceedings in court subsequent to filing of such statement of readiness, and therefore was not entitled to compel defendant to appear for examination before trial after such statement had been filed. Petrosky v Vissicchio, 59 A.D.2d 938, 399 N.Y.S.2d 692, 1977 N.Y. App. Div. LEXIS 14174 (N.Y. App. Div. 2d Dep't 1977).

In a personal injury action in which, after a note of issue was filed, the lower court granted disclosure of a report of plaintiff’s expert witness, and in which plaintiff then opposed defendant’s

motion for an order to dismiss the complaint for failure to obey the disclosure order by claiming that no expert's report existed and therefore there was nothing to disclose, the court properly precluded plaintiff from introducing any evidence regarding any expert's findings, since, by filing a note of issue, and presumably a certificate of readiness, at a time when no expert's report had been prepared, plaintiff indicated that he was ready for trial without such information. Miceli v Van Curler Motor Co., 105 A.D.2d 580, 481 N.Y.S.2d 519, 1984 N.Y. App. Div. LEXIS 20596 (N.Y. App. Div. 3d Dep't 1984).

Plaintiffs' request for additional discovery was properly denied where their certificate of readiness had stated that there were no outstanding discovery requests, and they failed to demonstrate that they had taken measures to obtain information during 3 years that their action was pending. LaVigna v Capital Cities/ABC, Inc., 257 A.D.2d 470, 683 N.Y.S.2d 536, 1999 N.Y. App. Div. LEXIS 465 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff was entitled to file motion for summary judgment more than 120 days after filing of note of issue where motion was based on New England Mut. Life Ins. Co. v Doe, 93 NY2d 122, which was decided after 120-day period had expired. Malitizis v First Unum Life Ins. Co., 275 A.D.2d 621, 713 N.Y.S.2d 471, 2000 N.Y. App. Div. LEXIS 9182 (N.Y. App. Div. 1st Dep't 2000).

Examination of defendant under § 3212(f) hereof was barred where case had been put on calendar. Hubbell v South Nassau Communities Hospital, 46 Misc. 2d 847, 260 N.Y.S.2d 539, 1965 N.Y. Misc. LEXIS 1904 (N.Y. Sup. Ct. 1965), limited, Young v Brooklyn Women's Hospital, Inc., 54 Misc. 2d 645, 283 N.Y.S.2d 212, 1967 N.Y. Misc. LEXIS 1244 (N.Y. Sup. Ct. 1967).

Where neither the dealer nor his authorized agent has signed an automobile sales contract containing the words "The order is not valid unless signed and accepted by dealer", no binding contract of sale exists between buyer and seller. Thus, plaintiff automobile dealer who failed to execute a sales and exchange contract containing such a provision entered into with defendant automobile owner, had no more than an equitable right to seek title to defendant's trade-in automobile and therefore lacked the right to immediate possession essential to maintenance of an action to replevy it pendente lite an action on the contract. Plaintiff is, however, under the

circumstances, entitled to an order restraining removal, sale or permitting such automobile to become subject to a security interest pending the outcome of such action (CPLR 7103, subd [c], par 2) and a trial preference to ensure the automobile will not substantially diminish in value. Scutti Pontiac, Inc. v Rund, 92 Misc. 2d 881, 402 N.Y.S.2d 144, 1978 N.Y. Misc. LEXIS 1979 (N.Y. Sup. Ct. 1978).

Although N.Y. Uniform Dist. Ct. Act § 1001 reads in part that motion practice in District Court, including time provisions for the making of motions shall be governed by the Civil Practice Law and Rules, this provision is not a basis for applying the one hundred twenty day time limitation of N.Y. C.P.L.R. 3212(a) to summary judgment motions in the District Court, as the latter statute only refers to the note of issue. The note of issue is part of the calendar practice of the Supreme and County Courts. It is not utilized in District Court practice, in which a “notice of trial” is employed. Custis v Travelers Prop. Cas. Ins. Co., 899 N.Y.S.2d 578, 27 Misc. 3d 928, 243 N.Y.L.J. 71, 2010 N.Y. Misc. LEXIS 669 (N.Y. Dist. Ct. 2010).

9. Bill of particulars

The amendment or supplementing of bill of particulars is addressed to a court’s discretion and is allowable where no prejudice has been demonstrated or claimed and generally the proffered supplemental bill furnishes particulars as to expenses incurred and injuries manifested subsequent to the original bill; however, in the interest of orderly procedure, the designation of items in the amended or supplemental bill, as well as those of the original, should correspond with that of the demand. Laskaris v Hogan, 35 A.D.2d 859, 315 N.Y.S.2d 267, 1970 N.Y. App. Div. LEXIS 3584 (N.Y. App. Div. 3d Dep't 1970).

Ordinarily the filing of a note of issue at the same time as the service of a bill of particulars might not logically permit the inference that there has been ample time to complete disclosure; nevertheless, each case must be looked at upon its own facts as to the past conduct of the parties to determine whether or not there has been a sufficient opportunity. Accordingly, where plaintiff had filed with defendant insurance company a sworn statement of her proof of loss, had

been examined under oath prior to the filing of the bill of particulars and defendant's motion to strike the note of issue, in which the accompanying affidavits had no allegation of any further need to examine plaintiff, was not made until at least 20 days after service of the bill of particulars, such facts establish that there had been a reasonable time for disclosure and the motion to strike should be dismissed. Polsinelli v Hanover Ins. Co., 62 A.D.2d 376, 405 N.Y.S.2d 781, 1978 N.Y. App. Div. LEXIS 10844 (N.Y. App. Div. 3d Dep't 1978).

In medical malpractice action, defendants were entitled to grant of their unopposed motion to strike plaintiff's amended bill of particular where that bill was served without leave of court, after note of issue had been filed, and thus was nullity under CLS CPLR § 3042(b). Golub v Sutton, 281 A.D.2d 589, 723 N.Y.S.2d 59, 2001 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 2d Dep't 2001).

Under CPLR 3402, unless the party upon whom the demand for a bill of particulars is served moves to vacate or modify such demand within 5 days after service, the bill of particulars is due within 10 days after demand. Grow Constr. Co. v State, 61 Misc. 2d 697, 306 N.Y.S.2d 582, 1970 N.Y. Misc. LEXIS 1988 (N.Y. Ct. Cl. 1970).

10. Pre-trial proceedings

Where action was placed on calendar and there was no timely motion to strike the cause from the calendar, plaintiff was entitled to protective order against further disclosure proceedings notwithstanding fact that examination of plaintiff was incomplete when statement of readiness and note of issue were served and filed. Pioneer Jewelry Corp. v All Continent Corp., 24 A.D.2d 436, 260 N.Y.S.2d 700, 1965 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 1st Dep't 1965).

In action for separation and to declare Mexican divorce void, plaintiff's motion for pretrial examination of her husband's finances was properly denied where it was returnable nine months after she filed a note of issue and statement of readiness and no subsequently developed unusual or unanticipated conditions were shown. Ruggieri v Ruggieri, 24 A.D.2d 466, 260 N.Y.S.2d 615, 1965 N.Y. App. Div. LEXIS 3995 (N.Y. App. Div. 2d Dep't 1965).

Plaintiff’s motion for further examination of defendant before trial was improperly granted where, without seeking judicial direction compelling defendant to answer questions which were apparently not answered at an earlier examination, or judicial permission to file a statement of readiness with leave to complete said examination at a future date, plaintiff filed a note of issue and statement of readiness; it was immaterial that the examination of defendant was incomplete at the time that the readiness statement was served and filed once the case was calendared. Anthony v Alesci, 86 A.D.2d 586, 446 N.Y.S.2d 315, 1982 N.Y. App. Div. LEXIS 15110 (N.Y. App. Div. 1st Dep't 1982).

In medical malpractice action brought by mother on behalf of injured infant, where maternal grandmother was substituted as party plaintiff on death of infant’s mother after discovery had been completed and plaintiff had served note of issue and statement of readiness, court properly denied defendants’ motion to depose grandmother; defendants were not prejudiced since they never sought to depose grandmother as nonparty witness on showing of special circumstances prior to her substitution, and mother and infant had been fully deposed. Ellis v Brookdale Hospital Medical Center, 133 A.D.2d 806, 520 N.Y.S.2d 395, 1987 N.Y. App. Div. LEXIS 51846 (N.Y. App. Div. 2d Dep't 1987).

It was error for court to grant defendant’s eve-of-trial motion to conduct physical examination of plaintiff, on ground that physical examination might enhance prospect of settlement without prejudice to plaintiff, where defendant had failed to arrange to conduct examination within time prescribed in preliminary conference order and failed to seek vacatur of note of issue and certificate of readiness within 20 days of service; pretrial proceedings, such as physical examination, are not permitted after note of issue is filed. Price v Bloomingdale's, Div. of Federated Dep't Stores, Inc., 166 A.D.2d 151, 560 N.Y.S.2d 288, 1990 N.Y. App. Div. LEXIS 11581 (N.Y. App. Div. 1st Dep't 1990).

Court erred in granting defendant’s motion for further disclosure after filing of note of issue and certificate of readiness where defendant merely alleged that discovery was incomplete, especially given that nearly 8 years had elapsed after issue was joined and before note of issue

was filed, and another year passed after filing of note of issue before he sought further discovery. Welch v County of Clinton, 203 A.D.2d 749, 610 N.Y.S.2d 674, 1994 N.Y. App. Div. LEXIS 4164 (N.Y. App. Div. 3d Dep't 1994).

Party who seeks discovery after filing of note of issue must move for vacatur of note of issue within 20 days after service thereof. Stella v Ahmed, 223 A.D.2d 698, 637 N.Y.S.2d 472, 1996 N.Y. App. Div. LEXIS 664 (N.Y. App. Div. 2d Dep't 1996).

Plaintiffs' were not entitled to conduct additional discovery against particular defendants where they had filed note of issue and certificate of readiness, without exclusion for claims against those defendants. Elghanayan v Elghanayan, 265 A.D.2d 262, 697 N.Y.S.2d 268, 1999 N.Y. App. Div. LEXIS 10876 (N.Y. App. Div. 1st Dep't 1999).

Defendants were not entitled to order compelling plaintiff to provide records of doctor who had treated her many years prior to accident that was subject of litigation where plaintiff's note of issue and statement of readiness had been filed one year before defendants' motion to compel, and defendants failed to establish any special, unusual or extraordinary circumstances. Sims v Ferraccio, 265 A.D.2d 805, 695 N.Y.S.2d 641, 1999 N.Y. App. Div. LEXIS 9831 (N.Y. App. Div. 4th Dep't 1999).

Plaintiffs were not entitled to conduct further discovery after filing of note of issue and certificate of readiness where they failed to show that unusual or unanticipated circumstances developed after filing that required additional pretrial proceedings to prevent substantial prejudice. Santana v Seagrave Fire Apparatus Corp., 266 A.D.2d 369, 698 N.Y.S.2d 168, 1999 N.Y. App. Div. LEXIS 11543 (N.Y. App. Div. 2d Dep't 1999).

In insured's action on fire insurance policy, insured was not entitled to compel further discovery in preparation for new trial where note of issue and statement of readiness had been issued before original trial, and no timely motion to strike them was made; neither lack of diligence in conducting discovery nor remittal for new trial on ground that judgment was unsupported by adequate proof is extraordinary circumstance warranting belated discovery. 10 Park Square

Assocs. v The Travelers, 266 A.D.2d 859, 698 N.Y.S.2d 196, 1999 N.Y. App. Div. LEXIS 11689 (N.Y. App. Div. 4th Dep't 1999).

Plaintiffs were not entitled to order compelling further discovery on issue of workers' compensation defense asserted by defendant where plaintiffs did not explain why they waited over 4 years after filing of note of issue before they moved for subject order. Laudisio v Diamond "D" Constr. Corp., 281 A.D.2d 942, 722 N.Y.S.2d 207, 2001 N.Y. App. Div. LEXIS 2715 (N.Y. App. Div. 4th Dep't 2001).

In an action against the City of New York, the city will be allowed pretrial discovery four years after a note of issue was filed, upon the condition that the physical examination and oral deposition take place within two weeks of the date of the decision and the city pays plaintiff's attorney's fees for these proceedings, in spite of the fact that the city should be held to the same rule as other parties and not be entitled to special rules and that the granting of disclosure at this point will violate the spirit and letter of the rules pertaining to notes of issue, since no litigant should be compelled to go to trial without having availed itself of full disclosure and the opposing party is not prejudiced because the case has not been assigned to Trial Part. De Fino v New York, 99 Misc. 2d 594, 416 N.Y.S.2d 692, 1979 N.Y. Misc. LEXIS 2284 (N.Y. Sup. Ct. 1979).

Filing of note of issue did not constitute waiver of further discovery where note of issue was filed in 1993 and discovery had nevertheless been conducted on applications of both parties in 1999. Mastroianni v County of Suffolk, 181 Misc. 2d 1003, 696 N.Y.S.2d 395, 1999 N.Y. Misc. LEXIS 413 (N.Y. Sup. Ct. 1999).

C. Striking Or Vacating Action

11. Generally

Motion to dismiss was not proper remedy where party failed to serve note of issue, but proper remedy was to move to strike case from trial calendar. Jackson v Long Island Lighting Co., 59

A.D.2d 523, 397 N.Y.S.2d 104, 1977 N.Y. App. Div. LEXIS 13305 (N.Y. App. Div. 2d Dep't 1977).

The “law of the case” did not preclude a consideration of the merits of a motion to strike a note of issue and statement of readiness and remove the action from the calendar where another justice, at a pretrial conference and without the benefit of motion papers before him, had denied an oral application to strike the cause from the calendar. Further, the absence of any order determining the motion in the record invited the trial court’s consideration of the merits. Figueroa v Scharfberg, 79 A.D.2d 966, 435 N.Y.S.2d 281, 1981 N.Y. App. Div. LEXIS 9836 (N.Y. App. Div. 1st Dep't 1981).

In a personal injury case, plaintiffs’ motion to vacate their defaults on the defendants’ motion to strike should have been granted where the circumstances which led to the order striking the case from the trial calendar were sufficient to constitute an excuse for their failure to comply with Trial Term’s order to file a note of issue by a certain date. Shillingford v Eckert, 80 A.D.2d 890, 437 N.Y.S.2d 121, 1981 N.Y. App. Div. LEXIS 10754 (N.Y. App. Div. 2d Dep't 1981).

It was error to grant third-party defendants’ motion for a trial preference, where the court had vacated a note of issue that had been filed, and had struck the case from the calendar, and where no new note of issue placing the case upon the calendar had ever been served or filed. Merchants Nat'l Bank & Trust Co. v Cargian, 101 A.D.2d 702, 476 N.Y.S.2d 43, 1984 N.Y. App. Div. LEXIS 18262 (N.Y. App. Div. 4th Dep't 1984).

Court properly denied defendant’s motion to strike note of issue filed by plaintiff in medical malpractice action where defendant failed to demonstrate existence of any special or unusual circumstances, or that unanticipated conditions developed during 17-month delay between filing of note and date of motion. Russell v Bessen, 126 A.D.2d 716, 511 N.Y.S.2d 313, 1987 N.Y. App. Div. LEXIS 41861 (N.Y. App. Div. 2d Dep't 1987).

Court should have granted defendants’ motion to vacate plaintiff’s note of issue where plaintiff had agreed but failed to turn over certain items which were germane to issue of damages to be

decided at court-ordered inquest. McCormack v Graphic Machinery Services, Inc., 139 A.D.2d 631, 527 N.Y.S.2d 271, 1988 N.Y. App. Div. LEXIS 4394 (N.Y. App. Div. 2d Dep't 1988).

Court properly denied defense motion to strike plaintiffs' note of issue where affidavits submitted in support of motion, made by defendants' attorneys, were not based on first-hand knowledge and did not contain evidence to support assertions made therein. Bova v Vinciguerra, 139 A.D.2d 797, 526 N.Y.S.2d 671, 1988 N.Y. App. Div. LEXIS 3640 (N.Y. App. Div. 3d Dep't 1988).

Summary denial of defendant's motion to vacate plaintiff's note of issue was mandated where motion was made without any affirmation of good faith as required by CLS Unif Tr Ct Rls § 202.7(a) (22 NYCRR § 202.7(a)). Matos v Mira Realty Mgmt. Corp., 240 A.D.2d 214, 658 N.Y.S.2d 880, 1997 N.Y. App. Div. LEXIS 6163 (N.Y. App. Div. 1st Dep't 1997).

In proceeding to review assessment of 2 parcels of real property under CLS RPTL Art 7, owner properly joined its claims in single petition, and owner would not be penalized for failing to file 2 separate notes of issue, where same grounds for review were asserted as to each parcel. Owner was not required to provide accounting of income attributable to those properties or to estimate amount that would be "reasonably allocable for rent" under CLS Unif Tr Ct Rls § 202.59(b) (22 NYCRR § 202.59(b)) where owner expressly represented, on note of issue, that properties were "occupied by the owner." Atlantic Ref. & Mktg. Corp. v Assessor of Ithaca, 246 A.D.2d 875, 667 N.Y.S.2d 803, 1998 N.Y. App. Div. LEXIS 535 (N.Y. App. Div. 3d Dep't 1998).

Court erred in denying defendants' motions to strike from supplemental bill of particulars allegation that physician defendant was negligent "in failing to advise (plaintiff's conservatee) of the risks associated with intubation without prior insertion of a naso-gastric tube, and of the reason for insertion of a naso-gastric tube," since complaint was based solely on medical malpractice and did not contain separate action for lack of informed consent, and surgery herein was of emergency nature. Connelly v Warner, 248 A.D.2d 941, 670 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 2973 (N.Y. App. Div. 4th Dep't 1998).

Court erred in vacating note of issue pending resolution of plaintiffs' appeal where there was no indication that case was not ready for trial or that certificate of readiness was incorrect. Rossi v Arnot Ogden Med. Ctr., 252 A.D.2d 778, 676 N.Y.S.2d 699, 1998 N.Y. App. Div. LEXIS 8317 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff's note of issue was properly vacated where action had been terminated by filing of express stipulation of discontinuance signed by both parties; scheduling of court conferences could not revive action. Lazare v Pfizer, Inc., 257 A.D.2d 498, 682 N.Y.S.2d 850, 1999 N.Y. App. Div. LEXIS 422 (N.Y. App. Div. 1st Dep't), dismissed, 93 N.Y.2d 1000, 695 N.Y.S.2d 745, 717 N.E.2d 1082, 1999 N.Y. LEXIS 1972 (N.Y. 1999).

Plaintiff was not entitled to vacatur of order dismissing her complaint for failure to comply with order to serve and file note of issue within 90 days where her conclusory and unsubstantiated assertions of law office failure were insufficient to excuse her extensive delay, and she did not show that her causes of action for tortious interference with contract and prima facie tort were meritorious. Flomenhaft v Baron, 281 A.D.2d 389, 721 N.Y.S.2d 381, 2001 N.Y. App. Div. LEXIS 2072 (N.Y. App. Div. 2d Dep't 2001).

Motion to vacate note of issue, served more than 20 days after note of issue had been served, was properly denied as untimely where there was no showing of special circumstances or adequate reason for delay. Arnold v N.Y. City Hous. Auth., 282 A.D.2d 378, 723 N.Y.S.2d 369, 2001 N.Y. App. Div. LEXIS 4138 (N.Y. App. Div. 1st Dep't 2001).

Where plaintiff places a cause of action on the calendar by filing a note of issue and statement of readiness without taking defendant's deposition, absent any special circumstances, this action constitutes a waiver. Bierzynski v New York C. R. Co., 59 Misc. 2d 315, 298 N.Y.S.2d 584, 1969 N.Y. Misc. LEXIS 1676 (N.Y. Sup. Ct. 1969), modified, 29 N.Y.2d 804, 327 N.Y.S.2d 365, 277 N.E.2d 412, 1971 N.Y. LEXIS 949 (N.Y. 1971).

Court granted defendant's motion to vacate plaintiff's note of issue and certificate of readiness, and denied defendant's cross-motion to obtain special age preference without prejudice, where

no discovery had been conducted and no preliminary conference had been held. Muller v Brailofsky, 179 Misc. 2d 634, 685 N.Y.S.2d 884, 1999 N.Y. Misc. LEXIS 24 (N.Y. Sup. Ct. 1999).

In a personal injury action in which plaintiffs, injured children and others, alleged that while the injured children were attending a camp sponsored by defendants, an organization and others, they were assaulted by older campers, and that the assaults and ensuing personal injuries were attributable to inadequate supervision; the trial court properly denied defendant’s motion to vacate a note of issue pursuant to N.Y. C.P.L.R. 3402, as the motion was untimely and defendants had previously been afforded a full opportunity to conduct the sought examinations before trial, and properly denied defendants’ motion for summary judgment pursuant to N.Y. C.P.L.R. 3212, as the record disclosed the existence of triable issues as to whether there was a breach of the camp’s duty of reasonable care and supervision, whether the alleged assaults followed foreseeably from any such breach, and whether the organization had sufficient control over the operation of the camp to be answerable for harm caused by negligence in the camp’s supervision of its charges. Phelps v BSA, 305 A.D.2d 335, 762 N.Y.S.2d 32, 2003 N.Y. App. Div. LEXIS 6115 (N.Y. App. Div. 1st Dep't 2003).

12. Effect of arbitration

Defendant’s motion to strike action from trial calendar would be granted where only 4 months had elapsed between joinder of issue and notice of trial, particularly since defendant had refrained from initiating disclosure proceedings during pendency of its unsuccessful motion to stay action pending arbitration in order to avoid jeopardizing its position on arbitration issue. Diamond's Run, Ltd. v Rebel Fabrics, Inc., 134 Misc. 2d 568, 511 N.Y.S.2d 996, 1987 N.Y. Misc. LEXIS 2064 (N.Y. Civ. Ct. 1987).

Court would grant defendant’s motion to strike matter from calendar where prior arbitration had resulted in dismissal of plaintiff’s cause of action and he failed to make demand for trial de novo within 30 days after award was filed with court, as required by 22 NYCRR § 28.12. Greenberg v

Brooks Woolen Co., 140 Misc. 2d 611, 531 N.Y.S.2d 741, 1988 N.Y. Misc. LEXIS 498 (N.Y. Civ. Ct. 1988).

13. New parties

The plaintiffs' note of issue and certificate of readiness for trial would be vacated, where they only referred to plaintiffs' original action but not to to a supplemental summons and amended complaint that were served by plaintiffs without leave of the trial court, on the newly added defendants, after service of a third-party summons and complaint. Levine v Durastick Sales Co., 92 A.D.2d 585, 459 N.Y.S.2d 730, 1983 N.Y. App. Div. LEXIS 16836 (N.Y. App. Div. 2d Dep't 1983).

Defendant was entitled to vacatur of plaintiff's note of issue and striking of action from trial calendar where (1) note of issue and statement of readiness were served at time when defendant had yet to be joined as party defendant in main action brought by plaintiff and, consequently, had not yet served its answer therein, and (2) defendant clearly had no reasonable opportunity to complete discovery vis-a-vis plaintiff. Bentley v Solomon Equities, Inc., 188 A.D.2d 418, 591 N.Y.S.2d 1007, 1992 N.Y. App. Div. LEXIS 14517 (N.Y. App. Div. 1st Dep't 1992).

14. Pre-trial proceedings

Order which denied defendant's motion to strike the action from the trial calendar modified to the extent of permitting defendant to complete its pre-trial proceedings, where defendant by appealing from an order vacating its notice for discovery and inspection and providing that a ruling should be obtained as to the validity of plaintiff's objections, had not waived its right to seek such a ruling. J. Bogat & Co. v Hamill, 23 A.D.2d 755, 259 N.Y.S.2d 348, 1965 N.Y. App. Div. LEXIS 4338 (N.Y. App. Div. 1st Dep't 1965).

Where plaintiff had not waived right to an examination before trial and the case was not ready for trial and should not have been on trial calendar, as motion to vacate note of issue and certificate of readiness should have been granted. Mazzara v Pittsford, 30 A.D.2d 634, 290 N.Y.S.2d 435, 1968 N.Y. App. Div. LEXIS 3997 (N.Y. App. Div. 4th Dep't 1968).

Where it would be unfair to compel defendants to go to trial in a protracted, complicated dispute without pretrial examination of plaintiff, particularly examination of defendants covering a four-year period and resulting in almost 1300 pages of testimony, plaintiff's note of issue and statement of readiness served and filed before defendants had a reasonable opportunity to conduct discovery proceedings were vacated. Sado v Sado, 32 A.D.2d 546, 299 N.Y.S.2d 743, 1969 N.Y. App. Div. LEXIS 4254 (N.Y. App. Div. 2d Dep't 1969).

A trial court did not commit reversible error in denying defendant's motion to vacate a note of issue and certificate of readiness and in directing the filing of an amended complaint and amended answer where the amended complaint had already been served and there remained sufficient time to comply with the trial court's order for completion of discovery before trial. Hutchins v Wand, 82 A.D.2d 928, 440 N.Y.S.2d 735, 1981 N.Y. App. Div. LEXIS 14657 (N.Y. App. Div. 3d Dep't 1981).

A motion to strike a case from the court calendar and vacate a note of issue and certificate of readiness would be granted on the basis of premature filing where only one week after the issue was joined, plaintiffs filed note of issue and statement of readiness in which they avowed defendant had waived his right to serve a bill of particulars and as to all other discovery proceedings, and, although defendant did exhibit a certain vagueness as to how much time would be required for discovery to be completed, there was no foundation or authority for plaintiff's assertion that defendant had waived discovery and the court retained the power should the need have arisen, to prevent abuse by establishing appropriate restrictions. Empire Mut. Ins. Co. v Moore Business Forms, Inc., 88 A.D.2d 819, 451 N.Y.S.2d 98, 1982 N.Y. App. Div. LEXIS 17127 (N.Y. App. Div. 1st Dep't 1982).

The trial court erred in denying defendants' motion to strike an action from the calendar where plaintiff's statement of readiness and note of issue stated that "[t]here are no outstanding requests for discovery," which statement was false, in violation of an applicable court rule, in that defendants had earlier served a notice to take plaintiff's deposition, and had also filed a motion for summary judgment, neither of which had been disposed of as of the date plaintiff filed his statement of readiness. Ortiz v Valdescastilla, 98 A.D.2d 610, 469 N.Y.S.2d 347, 1983 N.Y. App. Div. LEXIS 20893 (N.Y. App. Div. 1st Dep't 1983).

In an action in which defendant moved to strike the case from the trial calendar on the grounds that it was unable to complete pretrial proceedings due to problems in locating witnesses, it was error for the trial court to deny the motion but grant defendant leave to conduct examinations prior to trial where the court implicitly found by this order that defendant had not had a reasonable opportunity to complete disclosure before plaintiff filed its note of issue and certificate of readiness. Hoffman Music Shop, Inc. v Honeywell Protection Services, Inc., 106 A.D.2d 857, 483 N.Y.S.2d 548, 1984 N.Y. App. Div. LEXIS 21758 (N.Y. App. Div. 4th Dep't 1984).

Defendant was entitled to order striking plaintiffs' note of issue where note of issue was based on false statement of readiness since there were outstanding discovery requests for certain depositions and documentary materials, and since note of issue was served following departure of defendant's attorney on vacation after defendant's attorney had received assurances that plaintiffs would await his return before proceeding with matter. H & Y Realty Co. v Baron, 121 A.D.2d 238, 503 N.Y.S.2d 35, 1986 N.Y. App. Div. LEXIS 58228 (N.Y. App. Div. 1st Dep't 1986).

Defendants in personal injury action were entitled to order striking plaintiffs' second note of issue where plaintiffs filed first note indicating that they did not want jury trial, they then moved for leave to amend note so as to demand jury trial, motion to amend was denied, plaintiffs did not seek renewal or reargument nor did they appeal from denial, plaintiffs instead withdrew their original note and filed second note before pretrial disclosure was completed, and, in second note, they demanded jury trial and nonetheless stated that disclosure had been completed.

Smalley v Poughkeepsie, 133 A.D.2d 621, 519 N.Y.S.2d 635, 1987 N.Y. App. Div. LEXIS 51661 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 70 N.Y.2d 1002, 526 N.Y.S.2d 438, 521 N.E.2d 445, 1988 N.Y. LEXIS 107 (N.Y. 1988).

It was abuse of discretion for court to deny defense motion to strike note of issue, even though motion was untimely and defendant's excuse did not adequately explain entire period of his delay, where plaintiff served and filed note of issue and statement of readiness prematurely (prior to expiration of defendant's time to serve answer), and defendant demonstrated his need for discovery. Hyman & Gilbert, P. C. v Greenstein, 138 A.D.2d 678, 526 N.Y.S.2d 492, 1988 N.Y. App. Div. LEXIS 3230 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs had adequate time to conduct disclosure, and their lack of diligence in pursuing their lawsuit did not constitute special or unusual circumstance which would justify striking defendant's note of issue, where action was commenced and issue was joined in December 1986, discovery was promptly commenced by defendant in December 1986, plaintiffs took no steps to further their discovery during 13 months which elapsed from date issue was joined until defendant filed note of issue in January 1988, and plaintiffs failed to comply with defendant's discovery demands until ordered to do so by conditional order of preclusion. Simmons v Kemble, 150 A.D.2d 986, 541 N.Y.S.2d 875, 1989 N.Y. App. Div. LEXIS 7019 (N.Y. App. Div. 3d Dep't 1989).

Court abused its discretion in denying defendant's timely motion under CLS Unif Tr Ct Rls § 202.21(e) to vacate note of issue and strike matter from trial calendar where plaintiff's certificate of readiness contained incorrect material fact by asserting that discovery proceedings known to be necessary had been completed, although it was undisputed that defendant still sought to depose plaintiff, since note of issue should be vacated when it is based on certificate of readiness which contains erroneous fact. Savino v Lewittes, 160 A.D.2d 176, 553 N.Y.S.2d 146, 1990 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 1st Dep't 1990).

Defendant was entitled to have note of issue stricken, and to have case removed from calendar, since discovery had not been completed where plaintiff had not answered interrogatories or

complied with notice to produce, and record did not support contention that items requested were duplicative equivalent of items previously turned over. Silverman v Caplin, 194 A.D.2d 602, 599 N.Y.S.2d 997, 1993 N.Y. App. Div. LEXIS 5995 (N.Y. App. Div. 2d Dep't 1993).

Court did not err in denying plaintiffs' motion for order striking action from trial calendar and directing further discovery where (1) motion was made more than 3 years after plaintiffs had filed note of issue and certificate of readiness and more than 9 ½ years after they had commenced action, and (2) record showed that plaintiffs had ample opportunity to conduct discovery. Bilotti by Bilotti v City of New York, 199 A.D.2d 297, 606 N.Y.S.2d 1003, 1993 N.Y. App. Div. LEXIS 11820 (N.Y. App. Div. 2d Dep't 1993).

It was abuse of discretion to deny defendants' motion to strike plaintiff's note of issue where it was conceded that defendant had not yet taken deposition of plaintiff, and plaintiff filed note of issue 5 weeks before expiration of court-ordered deadline to take plaintiff's deposition. Barnett v DeMian, 207 A.D.2d 693, 616 N.Y.S.2d 491, 1994 N.Y. App. Div. LEXIS 8822 (N.Y. App. Div. 1st Dep't 1994).

Party moving to vacate note of issue must demonstrate that unusual and unanticipated circumstances developed subsequent to filing of note of issue and certificate of readiness which require pretrial proceedings to prevent substantial prejudice. Stella v Ahmed, 223 A.D.2d 698, 637 N.Y.S.2d 472, 1996 N.Y. App. Div. LEXIS 664 (N.Y. App. Div. 2d Dep't 1996).

It was not abuse of discretion to refuse to strike action from trial calendar, despite defendants' contention that depositions of plaintiffs were still pending, since defendants failed to provide any valid reason for their delay of more than 3 years in pursuing discovery. Tsikos v Ottas, 233 A.D.2d 389, 650 N.Y.S.2d 566, 1996 N.Y. App. Div. LEXIS 11631 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied defendant's motion to vacate plaintiff's note of issue and certificate of readiness since any uncompleted discovery was primarily due to defendant's own inaction. Tang

v Hong Kong Chinese Herbal Co., 235 A.D.2d 282, 652 N.Y.S.2d 37, 1997 N.Y. App. Div. LEXIS 266 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff failed to set forth good cause to vacate note of issue under CLS Unif Tr Ct Rls § 202.21(e) and to amend his bill of particulars where, in response to one defendant's demand to set forth in his bill of particulars any alleged violations of statutes or regulations, plaintiff responded with allegations directed only at another defendant. Morales v Lia, 238 A.D.2d 786, 656 N.Y.S.2d 458, 1997 N.Y. App. Div. LEXIS 3958 (N.Y. App. Div. 3d Dep't 1997).

Defendant's motion to strike trial note of issue would be granted where note was filed before issue was joined and before defendant had opportunity to conduct discovery. Varieur v Varieur, 238 A.D.2d 931, 661 N.Y.S.2d 155, 1997 N.Y. App. Div. LEXIS 4750 (N.Y. App. Div. 4th Dep't 1997).

Defendant was not entitled to vacation of note of issue where plaintiff produced all but one item directed in discovery order and made colorable attempt at full compliance by providing redacted copy of remaining item. Moretti v 860 West Tower, 242 A.D.2d 461, 662 N.Y.S.2d 50, 1997 N.Y. App. Div. LEXIS 8809 (N.Y. App. Div. 1st Dep't 1997).

Defendant in personal injury action was not entitled to have note of issue and statement of readiness stricken to allow him to obtain discovery where his right to discovery was forfeited by his default in answering complaint. Santiago v Siega, 255 A.D.2d 307, 679 N.Y.S.2d 341, 1998 N.Y. App. Div. LEXIS 11579 (N.Y. App. Div. 2d Dep't 1998).

Order denying defendants' motions to vacate note of issue would be modified to permit them to conduct post-note of issue depositions where action had previously been dismissed as against them, they failed to pursue their appeal from sua sponte order recalling that dismissal, and instant appeal from denial of their motion to vacate note of issue did not bring recall order up for review. 600 Partners Co. v Berger, 260 A.D.2d 227, 686 N.Y.S.2d 305, 1999 N.Y. App. Div. LEXIS 3995 (N.Y. App. Div. 1st Dep't 1999).

15. —Banking information at issue

In an action by a vendor of meat, alleging that the purchaser's bank had defrauded the vendor by conspiring with the purchaser to manipulate stop-payment orders, the bank's motion to strike the case from the trial calendar would be granted where the bank had been denied a reasonable opportunity to complete discovery. Kenosha Beef International, Inc. v Bankers Trust Co., 92 A.D.2d 457, 458 N.Y.S.2d 601, 1983 N.Y. App. Div. LEXIS 16646 (N.Y. App. Div. 1st Dep't 1983).

16. —Breach of agreement cases

In an action to recover damages for the alleged breach of an agreement, the trial court improperly denied defendant's motion to strike the action from the Trial Calendar, where discovery by defendant was neither completed nor even commenced as of the date plaintiffs filed a note of issue and certificate of readiness for trial, and where defendant, which did not waive its right to discovery, timely moved to strike the action from the Trial Calendar. Najjar v National Kinney Corp., 89 A.D.2d 845, 453 N.Y.S.2d 27, 1982 N.Y. App. Div. LEXIS 18004 (N.Y. App. Div. 2d Dep't 1982).

17. — —Breach of warranty

Where plaintiff's cause of action for breach of warranty was based on a purchase of certain machinery in August of 1967, where issue was joined by service of an answer in June of 1971, where plaintiff served its bill of particulars in January of 1972, and where defendant thereafter examined certain officers and former officers of plaintiff, the trial court properly exercised its discretion in denying defendant's motion, made three years and one month after issue was joined, to strike the action from the trial calendar on the ground that defendant had not completed all its desired pretrial procedures. Northern Lumber Co. v U. S. Natural Resources, Inc., 47 A.D.2d 593, 363 N.Y.S.2d 687, 1975 N.Y. App. Div. LEXIS 8695 (N.Y. App. Div. 4th Dep't 1975).

18. —Child custody proceedings

The trial court erred in denying defendant's motion to strike a note of issue and a statement of readiness filed in an action to recover child support, where plaintiffs had waited almost 20 years to commence the action, where the action had been placed on the trial calendar only a few months after it had been commenced, where during those few months defendant substituted counsel, who attempted to settle the matter and after the failure of settlement negotiations advised the plaintiffs that he had meritorious affirmative defenses to the action, and where no meaningful discovery had been conducted despite the fact that the financial resources of the parties would be a key issue at trial. Hogerman v Monroe, 101 A.D.2d 714, 475 N.Y.S.2d 695, 1984 N.Y. App. Div. LEXIS 18284 (N.Y. App. Div. 4th Dep't 1984).

19. —Divorce cases

In light of short time which had elapsed between commencement of divorce action de novo, filing of note of issue and statement of readiness, and instant motion, and particularly in view of demonstrated necessity for husband to take wife's oral deposition, refusal to vacate note of issue and statement of readiness and to strike matter from trial calendar on defendant husband's motion constituted abuse of discretion. Garrel v Garrel, 59 A.D.2d 885, 399 N.Y.S.2d 36, 1977 N.Y. App. Div. LEXIS 14071 (N.Y. App. Div. 2d Dep't 1977).

In an action for divorce in which the plaintiff's certificate of readiness filed with the court contained false affirmations, the court did not abuse its discretion in denying the defendant's motion to vacate the note of issue and to strike the action from the calendar, where the court granted the defendant a reasonable time in which to examine plaintiff, thereby avoiding prejudice to the defendant. Kinney v Kinney, 81 A.D.2d 942, 439 N.Y.S.2d 512, 1981 N.Y. App. Div. LEXIS 11676 (N.Y. App. Div. 3d Dep't 1981).

A matrimonial action was clearly not ready for trial and defendant’s motion that it be stricken from the trial calendar should have been granted where the plaintiff had served a note of issue and statement of readiness a mere two days after issue had been joined by service of a reply, and where at issue, at the very least, were equitable distribution rights arising out of a 22-year marriage. Gross v Gross, 83 A.D.2d 809, 442 N.Y.S.2d 8, 1981 N.Y. App. Div. LEXIS 15166 (N.Y. App. Div. 1st Dep't 1981).

A matrimonial action was properly ordered stricken from the trial calendar after plaintiff served and filed a statement of readiness and note of issue despite the fact that pretrial discovery was far from complete where each of the parties then had outstanding notices to take the deposition of the other and where plaintiff’s demand for written interrogatories had not yet been complied with and defendant was in the throes of discovery of the books and records of plaintiff’s wholly owned corporations. Russack v Russack, 85 A.D.2d 542, 448 N.Y.S.2d 420, 1981 N.Y. App. Div. LEXIS 16321 (N.Y. App. Div. 1st Dep't 1981).

In a matrimonial action in which defendant, after failing to reschedule a deposition of furnish financial statements, served a note of issue in which he indicated completion of financial disclosure statements and further deleted the space provided to certify discovery proceedings now known to be necessarily completed, plaintiff’s motion to vacate the note of issue and strike the case from the calendar would be granted, since it was clear that defendant’s statement of readiness was incorrect and it was undisputed that defendant had not complied with plaintiff’s notice to examine him before trial, together with the fact that the deletion of the portion of the statement of readiness relating to exchange of financial statements was arbitrary and self serving; a court may strike a case and vacate a note of issue if it appears that a material fact in the statement of readiness is incorrect. Saljoughy v Saljoughy, 97 A.D.2d 935, 470 N.Y.S.2d 731, 1983 N.Y. App. Div. LEXIS 20727 (N.Y. App. Div. 3d Dep't 1983).

In a matrimonial action, the wife was entitled to an order striking a note of issue and statement of readiness, and to an additional 30 days in which to complete discovery, even though the failure to complete discovery in a timely fashion was due to the conflict between the wife and her

attorneys, where the note and statement were served prior to the completion of discovery and where there was a recognized need for broad disclosure in matrimonial actions. Malamut v Malamut, 100 A.D.2d 897, 474 N.Y.S.2d 583, 1984 N.Y. App. Div. LEXIS 18022 (N.Y. App. Div. 2d Dep't 1984).

A divorce action would be struck from the trial calendar, where the husband had filed a statement of readiness at the same time he served his answers to his wife's interrogatories and his net worth statement, and where such an action denied the wife a reasonable opportunity to determine whether the answers were adequate and to move for corrective relief if they were not. Kantor v Kantor, 100 A.D.2d 928, 474 N.Y.S.2d 842, 1984 N.Y. App. Div. LEXIS 18058 (N.Y. App. Div. 2d Dep't 1984).

Wife was entitled to order striking note of issue, and to removal of case from calendar, where reasonable time to conduct discovery proceedings in husband's action to dissolve 23-year marriage had not elapsed, and wife, confronted with spouse who was reluctant to disclose information as to his assets, had not been afforded adequate opportunity to substantiate her claims. Katsaros v Katsaros, 133 A.D.2d 611, 519 N.Y.S.2d 718, 1987 N.Y. App. Div. LEXIS 51648 (N.Y. App. Div. 2d Dep't 1987).

20. —Medical information at issue

In an action for personal injuries, the trial court improperly denied defendant city's motion to strike the case from the calendar and for leave to conduct further discovery, where plaintiffs were earlier granted leave to increase the ad damnun as warranted by facts which had only recently come to light, and where plaintiffs' attorney served a note of issue and a certificate of readiness containing the statement "there are no outstanding requests for discovery," even though the defendant had served a notice of discovery and inspection and demand for medical information on plaintiffs, neither of which were complied with. Arroyo v New York, 86 A.D.2d 521, 445 N.Y.S.2d 753, 1982 N.Y. App. Div. LEXIS 15038 (N.Y. App. Div. 1st Dep't 1982).

A medical malpractice action should not have been struck from the trial calendar, even though defendant failed to respond timely to plaintiff's notice of availability for physical examination and plaintiff refused to respond to an untimely request for a physical examination, where plaintiff would not be prejudiced by submitting to an examination, where defendant forced the case onto the trial calendar by serving a 90-day notice, and where defendant opposed plaintiff's motion to extend time to file a note of issue. De Chiaro v Rendell, 95 A.D.2d 792, 463 N.Y.S.2d 506, 1983 N.Y. App. Div. LEXIS 18711 (N.Y. App. Div. 2d Dep't 1983).

In a personal injury action, the trial court should have denied in its entirety defendant's motion to strike the case from the trial calendar to the extent of directing plaintiffs to submit to physical examinations, where by failing to move to strike the statement of readiness within 20 days after its service defendants were deemed to have waived their right to thereafter conduct physical examinations, and where defendants were likewise deemed to have waived their right to physical examinations of plaintiffs by failing to have established any reasonable excuse for their noncompliance with the rules regarding notices of availability and setting times and places for physical examinations. Sloan v Briggs Leasing Corp., 97 A.D.2d 818, 468 N.Y.S.2d 695, 1983 N.Y. App. Div. LEXIS 20593 (N.Y. App. Div. 2d Dep't 1983).

Defendants were not entitled to vacatur of note of issue where their motion to vacate was made over 45 days after note of issue was filed, and their realization, as they prepared for trial, that they had neglected to conduct independent medical examination of plaintiff was too late under CLS Unif Tr Ct Rls § 202.21(d) (22 NYCRR § 202.21(d)) and was not "good cause" under CLS Unif Tr Ct Rls § 202.21(e) (22 NYCRR § 202.21(e)). Marks v Morrison, 275 A.D.2d 1027, 714 N.Y.S.2d 167, 2000 N.Y. App. Div. LEXIS 9552 (N.Y. App. Div. 4th Dep't 2000).

Physician was not entitled to order striking note of issue in medical malpractice action on ground that plaintiff failed to provide all requested authorizations, where plaintiff asserted that only unprovided authorization was result of oversight which had since been remedied, and physician failed to rebut such assertion. Martell v St. Charles Hospital, 137 Misc. 2d 980, 523 N.Y.S.2d 342, 1987 N.Y. Misc. LEXIS 2749 (N.Y. Sup. Ct. 1987).

21. —NYC proceedings

New York City Civil Court could not strike case from calendar where motion to strike was made long beyond expiration of 20-day period after service of notice of trial specified in 22 NYCRR § 208.17(c), notwithstanding facts that discovery proceedings were incomplete, there were outstanding requests for discovery, and case was not ready for trial, since nothing in 22 NYCRR Part 208 authorizes court to act sua sponte to strike case after untimely motion. Rigattieri v Aetna Life & Casualty Co., 146 Misc. 2d 155, 549 N.Y.S.2d 575, 1989 N.Y. Misc. LEXIS 833 (N.Y. Civ. Ct. 1989).

Motion to vacate note of issue and certificate of readiness, on ground that discovery was not complete, was denied where counsel for moving party did not serve and file affirmation of good faith in compliance with CLS Unif Tr Ct Rls § 202.7(a) and (d). Nikpour v City of New York, 179 Misc. 2d 928, 686 N.Y.S.2d 920, 1999 N.Y. Misc. LEXIS 80 (N.Y. Sup. Ct. 1999).

22. —Tax proceedings

In proceedings to review municipal tax assessments, Supreme Court properly denied motion to vacate notes of issue and certificates of readiness where certificates of readiness, which stated that there were no outstanding discovery requests, did not contain any material misstatements requiring court to vacate notes of issue filed, since certain interrogatories were not submitted by moving parties until after notes of issue were filed and, in any event, court ordered opposing party to serve its answer to interrogatories within 45 days of issuance of that order; furthermore, court did not abuse its discretion in refusing to strike proceedings from trial calendar based upon moving parties' allegation that discovery proceedings had not yet been completed where portions of proceedings had been pending for over 9 years, thus providing moving parties with ample opportunity to conduct discovery proceedings, and where court ordered that all discovery be completed by certain day. Long Island Lighting Co. v Assessor of Brookhaven, 122 A.D.2d 794, 505 N.Y.S.2d 679, 1986 N.Y. App. Div. LEXIS 59309 (N.Y. App. Div. 2d Dep't 1986).

23. Restoration of case to calendar

In an action for false imprisonment, the trial court improperly granted the plaintiff's motion to restore the action to the trial calendar where the plaintiff's motion was not supported by affidavits demonstrating the merits of the action 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 negligence action to recover damages for personal injuries the court properly denied plaintiffs' motion to restore the action to the Trial Calendar, where counsel for plaintiffs failed to appear on the date the action was to be tried, where the court clerk called the office of plaintiffs' counsel and was informed that no one in the office knew about the case and that no one would appear that day, where the case was adjourned for one week, where counsel for plaintiffs thereafter made two requests for adjournment, each of which was denied, and where plaintiffs failed to sufficiently establish the unavailability of the medical witness for which such adjournments were sought. Spodek v Stables, 89 A.D.2d 892, 453 N.Y.S.2d 706, 1982 N.Y. App. Div. LEXIS 18068 (N.Y. App. Div. 2d Dep't 1982).

Special Term properly found that plaintiffs made a showing necessary to restore an action for money damages to calendar, where plaintiffs' attorney stated that at the calendar call, it was intention of all the parties to have the case marked "ready" and that he believed it had been so marked, even though in fact the case had been marked "settled." Rogers v Hillside Associates, 89 A.D.2d 1045, 456 N.Y.S.2d 116, 1982 N.Y. App. Div. LEXIS 18320 (N.Y. App. Div. 3d Dep't 1982).

Special Term injudiciously granted plaintiff's motion to restore her case to the trial calendar where the papers supporting her application were deficient in that she failed to provide an affidavit concerning the merits of her cause of action by one with the knowledge of facts. Moreover, the excuse offered for her failure to appear, that she was provided erroneous

information by her calendar service, constituted law office failure and as such was unacceptable. Rothenberg v Parkway Exterminating Co., 90 A.D.2d 497, 454 N.Y.S.2d 747, 1982 N.Y. App. Div. LEXIS 18524 (N.Y. App. Div. 2d Dep't 1982), overruled, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

An action would be restored to calendar where plaintiff's counsel had submitted an affidavit which recited that counsel was actually engaged in a trial in another county, that plaintiff's important witnesses were unavailable and that the court's law secretary had indicated that an adjournment would be granted, and where, under the circumstances, it was an improvident exercise of discretion not to grant plaintiff a reasonable adjournment. Ziv International, Inc. v Pathe News, Inc., 90 A.D.2d 753, 456 N.Y.S.2d 55, 1982 N.Y. App. Div. LEXIS 18950 (N.Y. App. Div. 1st Dep't 1982).

In a personal injury action, Special Term erred in granting plaintiff's motion to restore the action to the Trial Term Calendar, where pretrial discovery proceedings had not yet been completed. Smart v T.E. Conklin Brass & Copper Co., 96 A.D.2d 591, 465 N.Y.S.2d 284, 1983 N.Y. App. Div. LEXIS 19123 (N.Y. App. Div. 2d Dep't 1983).

In action against deceased defendant, plaintiff was entitled to enforce stipulation of settlement by seeking restoration of action to calendar where (1) plaintiff had agreed to accept and defendant's estate had agreed to pay certain sum in satisfaction of claim, on strength of defense counsel's representation that creditors' claims exceeded assets of estate, (2) trial court had stated that it would maintain jurisdiction and that it would entertain plaintiff's motion to set aside settlement and restore action to calendar if material misrepresentations had been made to plaintiff, and (3) defense counsel unjustifiably refused to accept plaintiff's release and stipulation of discontinuance even though they were in accordance with stipulation of settlement; however, order restoring action to calendar should be modified to provide that such restoration would occur unless defendant complied with stipulation of settlement by accepting release and stipulation of discontinuance and by paying amount agreed upon in settlement. Rea v Halpern,

124 A.D.2d 358, 507 N.Y.S.2d 297, 1986 N.Y. App. Div. LEXIS 61379 (N.Y. App. Div. 3d Dep't 1986).

Taxpayer was entitled to restoration to calendar of his first and second proceedings under CLS RPTL Art 7 against town board of assessment review where 2 proceedings had been joined on both parties' stipulation that common issues existed, first proceeding was stricken from calendar to permit discovery regarding second proceeding, and motion to restore was made within time specified in order of joinder. Nuckel v Giltner, 124 A.D.2d 957, 508 N.Y.S.2d 708, 1986 N.Y. App. Div. LEXIS 62267 (N.Y. App. Div. 3d Dep't 1986).

Supreme Court properly granted plaintiff's motion to restore action to trial calendar even though action was stricken after parties' attorneys agreed to settlement, since settlement was neither reduced to writing and signed by plaintiff nor entered in open court, and thus plaintiff was not bound by its terms. Salmi v Aetna Casualty & Surety Co., 134 A.D.2d 765, 521 N.Y.S.2d 579, 1987 N.Y. App. Div. LEXIS 50940 (N.Y. App. Div. 3d Dep't 1987).

Trial court did not abuse its discretion by granting motion to restore action to trial calendar on condition of payment by plaintiff's counsel to defendants' counsel of costs and expenses where, after jury selection and repeated representations to court that he would try case, trial counsel from plaintiff's law firm advised court that another attorney from firm would be trying case, but that he was attending to other business until that afternoon. Norfolk & Dedham Mut. Ins. Co. v Lightening Electric Corp., 182 A.D.2d 415, 582 N.Y.S.2d 149, 1992 N.Y. App. Div. LEXIS 5593 (N.Y. App. Div. 1st Dep't 1992).

When case was removed from trial calendar as result of plaintiffs' motion for leave to serve amended and supplemental bill of particulars, plaintiffs were not entitled to have case restored to its original position on calendar once action was ready for trial; thus, court acted properly in restoring it to normal position at foot of calendar. Lear v New York Helicopter Corp., 192 A.D.2d 645, 192 A.D.2d 646, 597 N.Y.S.2d 411, 597 N.Y.S.2d 600, 1993 N.Y. App. Div. LEXIS 3859 (N.Y. App. Div. 2d Dep't 1993).

Court properly exercised its discretion in restoring case to trial calendar where requirements of 22 NYCRR § 202.21(f) were satisfied, defendant’s contention that plaintiff made “deliberate and knowing misrepresentation” to court was unsubstantiated, and court, in its prior order, had clearly given plaintiff option of moving again to restore case. Stock Shop v New York Times Co., 223 A.D.2d 426, 637 N.Y.S.2d 39, 1996 N.Y. App. Div. LEXIS 372 (N.Y. App. Div. 1st Dep't 1996).

Medical malpractice action was properly dismissed, despite plaintiff’s request that case be restored to calendar, because neurosurgeon’s letter submitted by plaintiff did not satisfy court’s order requiring expert’s “affidavit of merit,” where letter was not sworn to, was not in admissible evidentiary form, and did not include author’s expert opinion either that defendants deviated from accepted medical practice in their treatment of plaintiff or that their actions proximately caused plaintiff’s injuries. Papineau v Powell, 251 A.D.2d 924, 675 N.Y.S.2d 169, 1998 N.Y. App. Div. LEXIS 7747 (N.Y. App. Div. 3d Dep't 1998).

Plaintiffs’ failure to file note of issue was properly excused where (1) note of issue was served on defendants, and all parties believed it had been filed until error was discovered and immediately rectified by plaintiffs, (2)affidavit demonstrated merits of plaintiffs’ case, (3) plaintiffs’ exchange of discovery and response to defense motions rebutted presumption of abandonment, and (4) mere passage of time was not overly prejudicial since action turned on medical records rather than witnesses’ memories. Esbri v Westchester Square Med. Ctr., 260 A.D.2d 217, 688 N.Y.S.2d 54, 1999 N.Y. App. Div. LEXIS 3952 (N.Y. App. Div. 1st Dep't 1999).

Where action was not struck from calendar due to any default on plaintiff’s part, and motion to restore was not untimely, plaintiff need not be held to standards as rigorous as those applicable to party in default. Action was properly restored to trial calendar, although plaintiff’s counsel neglected to submit certificate of readiness with his motion papers, where action had initially been stuck from calendar because plaintiff had filed petition for relief under Bankruptcy Code and was in process of obtaining new counsel, and not because of plaintiff’s default. Electronic Servs. Int'l. v Silvers, 260 A.D.2d 533, 688 N.Y.S.2d 244, 1999 N.Y. App. Div. LEXIS 4078 (N.Y.

App. Div. 2d Dep't 1999), overruled in part, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

It was error to deny plaintiff's motion to renew and reargue motion to restore where she submitted affidavit of merit setting for details of accident, and court, in striking action from calendar, did not issue formal order setting forth its disposition of case, so that plaintiff's counsel's mistaken belief that case was only marked off was not unreasonable. Telep v Republic Elevator Corp., 267 A.D.2d 57, 699 N.Y.S.2d 380, 1999 N.Y. App. Div. LEXIS 12658 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff's motion to restore action to trial calendar was properly denied where disclosure was not complete when action was stricken, no disclosure took place while case was off calendar, and defendants would be prejudiced by having to complete disclosure 11 years after incident and 8 years after action was stricken. Frankola v Mainco Co., 277 A.D.2d 178, 717 N.Y.S.2d 129, 2000 N.Y. App. Div. LEXIS 12449 (N.Y. App. Div. 1st Dep't 2000).

Court properly denied plaintiff's motion to restore made within one year of action's being marked off trial calendar, and in granting cross motion to dismiss, as plaintiff failed to establish that he had complied with requirements previously set by court as condition for restoration of action and, given that action was 16 years old, prejudice to defendants was manifest. Frongillo v Action Diagnostic Ctr., Inc., 277 A.D.2d 200, 716 N.Y.S.2d 870, 2000 N.Y. App. Div. LEXIS 11183 (N.Y. App. Div. 2d Dep't 2000), overruled in part, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

A malpractice case stricken from the calendar for failure to file a statement of readiness would be restored, where the statute of limitations was about to deprive plaintiff of her day in court, where there was a sufficient demonstration that plaintiff intended to proceed with the action and where the defendants had not shown any prejudice resulting from delay and had contributed to the overall delay. Burger v Barnett, 48 Misc. 2d 660, 265 N.Y.S.2d 499, 1965 N.Y. Misc. LEXIS 1229 (N.Y. Sup. Ct. 1965).

A landlord's motion to restore to the trial calendar a holdover proceeding which had been discontinued pursuant to a stipulation of settlement entered into by the landlord and the tenant would be granted, although the tenant had been paying rent since the settlement, where the stipulation had set forth various terms and conditions binding the tenant, where the landlord alleged in his motion that the tenant had failed to comply with any of the terms and conditions, and where no judgment had been entered in the discontinued proceeding. Geletey v Sea Gull Food Market, 108 Misc. 2d 670, 438 N.Y.S.2d 700, 1981 N.Y. Misc. LEXIS 2268 (N.Y. Civ. Ct. 1981).

New York City Civil Court granted landlord's post-appeal motion to restore holdover proceeding to calendar, notwithstanding CLS CPLR § 5703(a) stipulation resulting in entry of judgment absolute against appellant (landlord) upon Appellate Division's affirmance of Appellate Term order, where appellate courts' determination, affirming question of law presented on appeal (namely, whether Civil Court had jurisdiction to consider whether Department of Housing Preservation and Development properly denied respondent's application to succeed to his mother's tenancy), resulted in incomplete record and required new trial to resolve now-relevant questions of fact. City of New York v Scott, 178 Misc. 2d 836, 680 N.Y.S.2d 819, 1998 N.Y. Misc. LEXIS 546 (N.Y. Civ. Ct. 1998).

24. —Effect of other CPLR provisions

When plaintiff moved to restore case to Trial Calendar within year following its being stricken therefrom, plaintiff has burden of showing adequate excuse for delay, and thus plaintiff will be adducing proof similar to that with which she would oppose motion to dismiss for failure to prosecute under CLS CPLR 3216, and plaintiff must demonstrate existence of meritorious cause of action, show sufficient excuse for delay, and show that adversary has not been prejudiced by delay, and motion to restore was properly denied where plaintiff failed to demonstrate in affidavit why it took so long to ascertain inadequacy of her former attorneys and to prepare case for trial as well as her failure to offer adequate excuse for 11 month delay in seeking restoration. Kunker

v Charbonneau Contracting Corp., 119 A.D.2d 884, 500 N.Y.S.2d 439, 1986 N.Y. App. Div. LEXIS 55825 (N.Y. App. Div. 3d Dep't 1986).

Supreme Court properly restored to preferred trial calendar wrongful death action which had been dismissed pursuant to CLS CPLR § 3404 where defendant did not show that it would be prejudiced by restoration, plaintiff appeared to have meritorious cause of action, plaintiff's counsel had suffered debilitating stroke prior to time case was dismissed, and he indicated that he had understood opposing counsel was going to mark case as ready. Smigel v Rensselaerville, 125 A.D.2d 847, 510 N.Y.S.2d 34, 1986 N.Y. App. Div. LEXIS 63046 (N.Y. App. Div. 3d Dep't 1986).

It was abuse of discretion to deny plaintiff's timely motion to restore action to calendar where he provided satisfactory explanation of why his attorney missed calendar call, he stated that he was ready for trial and did not intend to abandon case, and defendant suffered no prejudice. Rivera v Cambridge Mut. Ins. Co., 136 A.D.2d 688, 524 N.Y.S.2d 104, 1988 N.Y. App. Div. LEXIS 635 (N.Y. App. Div. 2d Dep't 1988).

Motion by plaintiff in action for breach of contract to reinstate note of issue and restore action to trial calendar was properly granted, and defendant's argument that action was voluntarily discontinued pursuant to CLS CPLR § 3217 was properly rejected, where (1) no written stipulation of discontinuance signed by attorneys of record for all parties was ever filed with clerk of court as required by CLS CPLR § 3217(a)(2), (2) notation of clerk's calendar docket card did not constitute "order of court" under CLS CPLR § 3217(b), and (3) parties intended to execute, but did not execute, formal stipulation discontinuing action, and counsel never reached agreement in open court. Millicent Bender, Inc. v J.D. Posillico, Inc., 144 A.D.2d 548, 534 N.Y.S.2d 412, 1988 N.Y. App. Div. LEXIS 11940 (N.Y. App. Div. 2d Dep't 1988).

Personal injury plaintiff was not entitled to restoration of matter to trial calendar where (1) after pre-trial conference, parties agreed in presence of court to settle case, (2) court marked original note of issue to conform with agreement, and (3) clerk entered notice of settlement in court's calendar and on clerk's return, which information was entered into court's computer record

system; court's documentation and entry into computer records equated to requirement of entry into clerk's minute book and complied with CLS CPLR § 2104 and 22 NYCRR § 202.26(f). Popovic v New York City Health & Hosp. Corp., 180 A.D.2d 493, 579 N.Y.S.2d 399, 1992 N.Y. App. Div. LEXIS 1285 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff's motion to restore action to trial calendar was properly treated as motion to vacate dismissal of action pursuant to CLS CPLR § 3404. Lebron v New York City Hous. Auth., 257 A.D.2d 541, 685 N.Y.S.2d 27, 1999 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1999).

Action was properly dismissed under CLS CPLR § 3216, and plaintiff's belated motion for leave to file note of issue and have matter restored to trial calendar was properly denied, where plaintiff's conclusory assertions of law office failure were insufficient to excuse his delay of almost one year in complying with court's order to file note of issue, he did not serve affidavit of merit in opposition to motion to dismiss or in support of his motion to restore, and he did not otherwise show merit of action. Gray v Gray, 266 A.D.2d 261, 698 N.Y.S.2d 262, 1999 N.Y. App. Div. LEXIS 11332 (N.Y. App. Div. 2d Dep't 1999).

Defendant was not entitled to dismissal of action for failure to prosecute, and action would be restored to trial calendar, where plaintiff sought discovery throughout course of action, including period after defendant's service of 90-day demand under CLS CPLR § 3216(b)(3), and defendant's failure to cooperate with plaintiff's discovery attempts contributed to plaintiff's delay in filing note of issue. Coleman v Baker/Mellon Stuart Constr., Inc., 286 A.D.2d 924, 730 N.Y.S.2d 630, 2001 N.Y. App. Div. LEXIS 8898 (N.Y. App. Div. 4th Dep't 2001).

II. Under Former Civil Practice Laws

A. In General

25. Generally

RCP 150 applied with Yonkers City Court Act. Mercandande v Prudential Ins. Co., 258 A.D. 283, 16 N.Y.S.2d 475, 1939 N.Y. App. Div. LEXIS 6420 (N.Y. App. Div. 1939), reh'g denied, 258 A.D. 1055, 17 N.Y.S.2d 746, 1940 N.Y. App. Div. LEXIS 8877 (N.Y. App. Div. 1940).

RCP 4 (Rule 2104 herein) requiring stipulations to be in writing unless made in open court was applicable only to agreements relating to matters in the action and did not apply to an agreement completely disposing of the action and of the claim on which it was based and a new note of issue filed after such settlement vacated. Langlois v Langlois, 5 A.D.2d 75, 169 N.Y.S.2d 170, 1957 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 3d Dep't 1957).

The service of an amended answer as of course does not destroy the issue, and no new note of issue need be filed. Franks v Bankers Trust Co., 293 N.Y.S. 2, 161 Misc. 724, 1937 N.Y. Misc. LEXIS 1481 (N.Y. Sup. Ct. 1937).

Where Supreme Court inadvertently signed order removing case from City Court to Supreme Court under CPA §§ 110 (§§ 325(a), 2001, Rule 326(b) herein), 110-a (§ 325(b), Rule 326(b) herein), which included provision granting trial preference, permissible only on motion pursuant to provisions of RCP 151, such order was resettled to provide that action be placed on jury calendar in position it would have occupied had it been originally instituted therein and been noticed for term for which it was originally noticed in lower court. Lopez v Wirzberger, 5 Misc. 2d 8, 139 N.Y.S.2d 539, 1954 N.Y. Misc. LEXIS 1865 (N.Y. Sup. Ct. 1954).

Amendment by leave of defendant, merely increasing amount of demand in action for services, served and accepted two months after noticing case for trial, did not break issue joined, nor warrant striking case from calendar. Apex Binding Corp. v Good Humor Corp., 85 N.Y.S.2d 647, 1949 N.Y. Misc. LEXIS 1684 (N.Y. Sup. Ct. 1949). See Krokow v Bridge Hardware Co., 115 N.Y.S.2d 844, 1952 N.Y. Misc. LEXIS 1759 (N.Y. App. Term 1952).

26. Condition of cause

A note of issue for trial was prematurely served on plaintiff's attorney while an appeal from an order of reference was pending. Hilton v Mack, 257 A.D. 709, 15 N.Y.S.2d 187, 1939 N.Y. App. Div. LEXIS 7860 (N.Y. App. Div.), app. dismissed, 281 N.Y. 881, 24 N.E.2d 507, 281 N.Y. (N.Y.S.) 881, 1939 N.Y. LEXIS 1276 (N.Y. 1939).

27. New trial

Mistrial requiring new trial at next trial term of court, did not require new note of issue, justifying taxation of costs for only one note of issue. Wheat v Van Dyne Oil Co., 30 N.Y.S.2d 478, 177 Misc. 272, 1941 N.Y. Misc. LEXIS 2296 (N.Y. Sup. Ct. 1941).

28. Third-party practice

Where case was already on calendar when third-party defendant served his answer, third-party plaintiff must serve copy of notice of issue on all adversaries and third-party defendant. Fortune v Hyle Holding Corp., 69 N.Y.S.2d 877, 188 Misc. 1011, 1947 N.Y. Misc. LEXIS 2324 (N.Y. City Ct. 1947).

B. Decisions Under Rule 150 Subsequent To Effective Date Of March 15, 1935

29. Generally

Note of issue had to be filed at least 12 days before commencement of any term. Roman v Caputo, 278 A.D. 327, 104 N.Y.S.2d 749, 1951 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 1951).

30. "Adjourned term"

Clerk of court had duty, under this rule, to add causes of action to general calendar for session of Trial Term of Supreme Court, Oneida county, opening April 5, 1937, where issue was joined

on February 20, 1937, and certain defendants' notes of issue were filed, with proof of service, with clerk on March 22, 1937; April session of "the March continued in April" term of said court, as fixed by order of Appellate Division, was "adjourned term" within meaning of former RCP 150. Shoff v Taylor, 295 N.Y.S. 484, 162 Misc. 681, 1937 N.Y. Misc. LEXIS 1670 (N.Y. Sup. Ct. 1937).

31. Computation of time

A note of issue for the March, 1939, term of the Supreme Court, Kings county, beginning on March 6, 1939, must be served at least twelve days before the commencement of the term, or not later than February 21, 1939. February 22, 1939, being a legal holiday, must be excluded from the reckoning under the provisions of section 20 of the General Construction Law. Brooklyn Bus Corp. v Edwards, 11 N.Y.S.2d 875, 171 Misc. 85, 1939 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1939).

32. Service by mail

Only seven days are required for the service of a notice of trial by mail in the Municipal Court of the City of New York, including the day of service. Haber v Gingold, 11 N.Y.S.2d 187, 170 Misc. 817, 1939 N.Y. Misc. LEXIS 1709 (N.Y. Mun. Ct. 1939).

C. Decisions Under Earlier Rule 150

33. Generally

Cited on question of cancellation of lis pendens. Seventeenth Ave. & Seventy-Third Street Corp. v Ocean Operating Corp., 215 A.D. 106, 213 N.Y.S. 608, 1926 N.Y. App. Div. LEXIS 10920 (N.Y. App. Div. 1926).

Motion to docket case for immediate trial denied, since issue had not been joined. Manarrow Realties, Inc. v E. J. Conrad Corp., 222 A.D. 652, 225 N.Y.S. 374, 1927 N.Y. App. Div. LEXIS 7864 (N.Y. App. Div. 1927).

Court was without authority to permit the plaintiff to serve and file notice of trial and note of issue nunc pro tunc, or to grant a preference until the case was properly on the calendar. Zimmerman v Rahmeyer, 230 A.D. 719, 243 N.Y.S. 570, 1930 N.Y. App. Div. LEXIS 8844 (N.Y. App. Div. 1930).

34. Notice before filing amended answer

Service of notice of trial and filing of a note of issue was insufficient, in view of this rule and Rule 151, to support an order placing an action upon the special calendar as a preferred cause, where after such service and filing the original issue between the parties was destroyed by the filing of an amended answer, notwithstanding the enlarged powers of the court on granting leave to amend under Rule 166, and notwithstanding the fact that the amended pleading was filed pursuant to a stipulation that the issue should date as if no extension of time to answer had been granted. Pelzer v Perry, 203 A.D. 58, 196 N.Y.S. 342, 1922 N.Y. App. Div. LEXIS 7124 (N.Y. App. Div. 1922).

35. Effect of notice and note of issue

In Monroe county, when a case was noticed and note of issue filed, it remained on the calendar without further notice. Hoffman v Crittenden, 248 N.Y.S. 373, 139 Misc. 325, 1931 N.Y. Misc. LEXIS 1134 (N.Y. Sup. Ct. 1931), aff'd, 242 A.D. 671, 273 N.Y.S. 441, 1934 N.Y. App. Div. LEXIS 6664 (N.Y. App. Div. 1934).

36. Delay in service of notice

Cause properly dismissed where there had been unexplained delay of more than three years to serve notice of trial and defendant's principal witnesses had died. Robertson v Smith, 200 A.D. 653, 193 N.Y.S. 549, 1922 N.Y. App. Div. LEXIS 8247 (N.Y. App. Div. 1922).

37. Delay in bringing case to trial

With nothing in the record to excuse plaintiff's delay in bringing case to trial, motion to dismiss was granted. Lorenzen v Cavanaugh, 222 A.D. 679, 225 N.Y.S. 13, 1927 N.Y. App. Div. LEXIS 8144 (N.Y. App. Div. 1927).

38. Vacating note of issue

An order striking plaintiff's cause of action from the calendar and vacating the note of issue therein was affirmed where the record showed that respondent refused and returned the notice of trial on the ground that the action was not at issue, in that additional defendants, impleaded at the instigation of respondent, had not answered when the notice of trial was served. Chicago Title & Trust Co. v Fox, 239 A.D. 156, 268 N.Y.S. 260 (N.Y. App. Div. 1933).

39. Notice of trial under former rule

Where form of action was changed from equitable to legal by supplemental complaint, it was improper to direct that the cause retain its place on the calendar, defendant being entitled to notice of trial at the trial term. Rose Danceland, Inc. v Decker, 231 A.D. 802, 246 N.Y.S. 483, 1930 N.Y. App. Div. LEXIS 7893 (N.Y. App. Div. 1930).

Order bringing in new defendant was not binding on him and his motion to strike case from calendar because he had not been served with notice should have been granted. De Karolis v Enterprise Cabinet Co., 231 A.D. 841, 246 N.Y.S. 383, 1930 N.Y. App. Div. LEXIS 8296 (N.Y. App. Div. 1930).

Plaintiffs, by failing to file notice of trial within fourteen days before the commencement of term, in accordance with this rule, waived right to trial by jury under Civil Practice Act, § 426, subd. 5. Johnston v Payson, 235 A.D. 824, 257 N.Y.S. 196, 1932 N.Y. App. Div. LEXIS 9824 (N.Y. App. Div. 1932).

In Monroe county, when a case was noticed and note of issue filed, it remained on the calendar without further notice. Hoffman v Crittenden, 248 N.Y.S. 373, 139 Misc. 325, 1931 N.Y. Misc. LEXIS 1134 (N.Y. Sup. Ct. 1931), aff'd, 242 A.D. 671, 273 N.Y.S. 441, 1934 N.Y. App. Div. LEXIS 6664 (N.Y. App. Div. 1934).

D. Decisions Under Earlier Rule 150 Prior To Rules Of Civil Practice

40. Generally

In an action the plaintiff noticed the case for trial at the October term and the defendants did not serve any notice of trial or file any note of issue for the October term, but served a notice of trial for the December term accompanied by a notice of motion for a preference; held, that the action of the defendants in noticing the case for the December term and filing another note of issue was not authorized by this rule, and that the court was without power to grant a preference. Montgomery v Daniell, 91 A.D. 18, 86 N.Y.S. 344, 1904 N.Y. App. Div. LEXIS 324 (N.Y. App. Div. 1904).

41. Form of notice

No particular form was prescribed and any form was sufficient that apprised the opposite party when and where the cause would be brought on for trial. Townsend v Hillmann, 9 N.Y.S. 629, 1890 N.Y. Misc. LEXIS 301 (N.Y. City Ct. 1890).

42. Service by mail

A notice of trial could be served by mail sixteen days before the day of trial including the day of service, and it was not necessary that twice fourteen days should elapse. Ahern v Ahern, 61 N.Y.S. 931, 29 Misc. 421, 1899 N.Y. Misc. LEXIS 826 (N.Y. Sup. Ct. 1899).

The registry of the package containing the plaintiff's notice of trial, served by mail, did not invalidate such service; but where, by reason of illness, the defendant did not receive it until five days after the court had convened, a judgment obtained by the plaintiff on an inquest would be set aside. Sears v Tenhagen, 100 N.Y.S. 469, 50 Misc. 275, 1906 N.Y. Misc. LEXIS 58 (N.Y. County Ct. 1906).

43. Service before answer

A notice of trial could not be served before an answer served even though the answer was served later on the same day. Wallace v Syracuse, B. & N. Y. R. Co., 27 A.D. 457, 50 N.Y.S. 329, 1898 N.Y. App. Div. LEXIS 655 (N.Y. App. Div. 1898).

44. Service pending appeal from interlocutory judgment

Where a plaintiff failed to serve a reply within the twenty days allowed to him by an interlocutory judgment sustaining a demurrer to one defense and overruling the demurrer in all other respects, and took an appeal from the interlocutory judgment, but did not obtain a stay of proceedings, the defendant could properly file a note of issue and serve a notice of trial pending the appeal; however the subsequent filing of replies with leave of appellate court required a new notice and note of issue. Ward v Smith, 103 A.D. 375, 92 N.Y.S. 1107, 1905 N.Y. App. Div. LEXIS 1077 (N.Y. App. Div. 1905).

45. Service after motion for dismissal

On a motion for a dismissal of an action for failure to prosecute it, the fact that a notice of issue was filed was not considered where a notice of trial was not served until after the motion for

dismissal was made. McMann v Brown, 92 A.D. 249, 87 N.Y.S. 38, 1904 N.Y. App. Div. LEXIS 627 (N.Y. App. Div. 1904).

46. Service as affecting time for notice of motion for reference

It was not necessary that a notice of motion for a preference be served at the same time as the notice of trial; it was sufficient if it was served at any time within which the cause might have been noticed for trial. Thompson v Post & McCord, 125 A.D. 397, 109 N.Y.S. 724, 1908 N.Y. App. Div. LEXIS 2794 (N.Y. App. Div. 1908).

47. Short notice

While the court had power, as a condition of granting a favor, to require the party seeking the favor to accept a short notice of trial, it had no power to require the acceptance of such notice by the party who had returned a former notice of trial served in time on the ground that the party serving it was stayed because of nonpayment of motion costs, and consequently had sought no favors from court, but stood upon her strict statutory rights. Roberts v Schaf, 76 A.D. 433, 78 N.Y.S. 778, 1902 N.Y. App. Div. LEXIS 2576 (N.Y. App. Div. 1902).

Except as a condition for a favor granted, the court could not shorten the notice of trial, Leland v Smith, 11 Abb Pr NS 231, mod on other grounds 3 Daly 315; for example, a defendant’s time to answer could be extended on condition that he take short notice of trial. Burroughs v Garrison, 15 Abb Pr NS 144. See, however, Civ Prac Act, § 433.

48. Return of notice

An attorney receiving an insufficient notice of trial should immediately return it, but if a notice was returned on the ground that the party serving the notice was in default in paying costs, the latter should proceed and bring the case on for trial. Koehler v Kelly.

49. Waiver of notice

Where a cause was placed on the calendar by the defendant without service of a notice of trial on the plaintiff, he waived right to such notice by appearing and procuring a postponement of the trial. Rosenthal v Friedman, 112 N.Y.S. 449, 60 Misc. 553, 1908 N.Y. Misc. LEXIS 751 (N.Y. Sup. Ct. 1908).

Parties to an action who joined in a stipulation setting the case down for trial on a given day, were estopped from asserting that the action was not in a condition to be tried on the day upon which they have agreed to try it. Hooper v Beecher, 13 N.Y.S. 212, 59 Hun 624, 1891 N.Y. Misc. LEXIS 1036 (N.Y. Sup. Ct. 1891).

One who appeared, answered ready, and asked postponement of the trial waived notice thereof. Haberstich v Fischer, 33 Hun 661, 67 How. Pr. 318, 1884 N.Y. Misc. LEXIS 114 (N.Y. App. Term June 1, 1884).

50. Effect of delay in moving for trial after notice

Noticing a case for trial at circuit and delay for two months in moving, constituted a waiver of the right to a trial at special term, although there was no issue for trial by jury. Tubbs v Embree, 35 N.Y.S. 320, 89 Hun 475 (1895).

51. Who may move for trial

Under ordinary circumstances, only the party who noticed a cause for trial could move it for trial. Haberstich v Fischer, 33 Hun 661, 67 How. Pr. 318, 1884 N.Y. Misc. LEXIS 114 (N.Y. App. Term June 1, 1884).

52. New notice after amendment

When a defendant amended his answer after note of issue filed and notice of trial served with a claim for a preference, the date of issue was changed, and the case not being properly on the

day calendar could not be set down as a preferred cause. Van Norden Trust Co. v Murphy, 125 A.D. 369, 109 N.Y.S. 725, 1908 N.Y. App. Div. LEXIS 2785 (N.Y. App. Div. 1908).

Where, after plaintiff noticed a case for trial and placed it on the calendar, the defendant, prior to the expiration of the time to do so, served an amended answer, the plaintiff could not thereafter move the case for trial and obtain a judgment without serving a new notice of trial and filing a new note of issue unless he first caused the amended answer to be stricken out. Murphy v Lyon, 127 A.D. 448, 112 N.Y.S. 152, 1908 N.Y. App. Div. LEXIS 2008 (N.Y. App. Div. 1908).

A notice of trial served before the expiration of the time within which to serve an amended answer was regular, but, on service of the amended answer, plaintiff had to serve a new notice of trial. Grossman v Silverman, 128 N.Y.S. 7, 71 Misc. 143, 1911 N.Y. Misc. LEXIS 187 (N.Y. App. Term 1911).

Under Civil Prac Rules 150, 151, a case must be stricken from the calendar where the notice of trial was served within 14 days of the commencement of the term after joinder of issue by the service of an amended answer, unless the amended answer was interposed for delay, in which event it could be stricken out under CPA § 244, and the case allowed to remain on the calendar. 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).

Where, after a cause has been noticed for trial and placed upon the calendar the complaint is amended on motion of the plaintiff, a new notice of trial must be served and a new note of issue filed; but the court may, it seems, as a condition of granting the amendment, direct that the cause be tried when reached under the original notice of trial and a note of issue. Graham v Stirling Ins. Co., 13 N.Y.S. 562, 1880 N.Y. Misc. LEXIS 3 (N.Y.C.P. 1880).

Any delay caused by a new notice was for the plaintiff to consider when he applied for his amendment. Ingraham v Sterling Ins. Co. (1890) 12 NYS 4.

53. —After reply

After the service of a reply the party moving the action for trial had to not only file a new notice of trial, but also a new note of issue. Ward v Smith, 103 A.D. 375, 92 N.Y.S. 1107, 1905 N.Y. App. Div. LEXIS 1077 (N.Y. App. Div. 1905).

E. Decisions Under Earlier Rule 151 Prior To March 15, 1935

54. Generally

Issue was not joined until the last pleading which presents the issues to be tried is served, and the cause cannot be noticed for trial until that time; although on issue joined by the service of the answer the plaintiff had properly noticed the cause for trial, it would be stricken from the calendar where new issues were afterward raised by the service of a reply which the plaintiff was ordered to make. Grant v Cananea Consol. Copper Co., 129 A.D. 77, 113 N.Y.S. 502, 1908 N.Y. App. Div. LEXIS 1248 (N.Y. App. Div. 1908).

Litigants should not be encouraged to answer “ready” upon call of the calendar and then gamble upon the chance that the case will not be reached. Motion to open default, granted, in view of the importance of the case. Bloomfield v Kanarick, 227 A.D. 606, 235 N.Y.S. 776, 1929 N.Y. App. Div. LEXIS 6514 (N.Y. App. Div. 1929).

55. Amendment of complaint

Since the date of issue is important, under this rule, only as determining the position of the case on the calendar when the note of issue was filed, it was unnecessary to provide that the date of issue shall be unchanged by the granting of leave to serve and file an amended complaint, it being within the power of the court, under § 105, Civil Practice Act, to include in the order a provision that the cause should retain its place on the calendar. Kelly v Hilbert, 200 A.D. 489, 193 N.Y.S. 263, 1922 N.Y. App. Div. LEXIS 8209 (N.Y. App. Div. 1922).

F. Decisions Under Earlier Rule 151 Prior To Rules Of Civil Practice

56. Generally

Requirement that note of issue be filed could not be evaded by stipulation of attorneys. Weaver v Miller, 187 A.D. 827, 175 N.Y.S. 609, 1919 N.Y. App. Div. LEXIS 6484 (N.Y. App. Div. 1919).

57. Effect of delay

Where a party omitted to file a note of issue, the court on application the first day of the term could allow the note to be filed. Clinton v Myers, 43 How. Pr. 95, 1872 N.Y. Misc. LEXIS 175 (N.Y. Sup. Ct. Mar. 1, 1872).

58. Calendar practice

Every court had the general power to regulate its own calendar, subject to statutory requirements. Kellum v Durfoo, 78 N.Y. 484, 78 N.Y. (N.Y.S.) 484, 1879 N.Y. LEXIS 940 (N.Y. 1879).

A motion to put a case on the calendar where a counterclaim was interposed and no reply served was denied, as there was no issue to be tried. Adams v Robert, 25 Hun 118 (N.Y. 1881).

59. —Position of cause

The position of a cause on the calendar was determined by this section by date when the last pleading was served and was not to be changed by the court as a condition of granting an amendment to the complaint. Ziegler v Trenkman, 31 A.D. 305, 52 N.Y.S. 613, 1898 N.Y. App. Div. LEXIS 1483 (N.Y. App. Div. 1898).

A cause could not, because of the defendants being in actual imprisonment, be granted a preference under subd 19, § 138, CPA and be placed upon the day calendar for trial until

fourteen days' notice of trial had been served, as required by rule 150, and the cause had been placed upon the general calendar. Veinstok v Veinstok, 63 A.D. 16, 71 N.Y.S. 195, 1901 N.Y. App. Div. LEXIS 1538 (N.Y. App. Div. 1901).

Where two actions brought by the same plaintiff against different defendants were both on the trial term calendar of the supreme court, the court had no power to transfer the action last brought to the place on the calendar occupied by the action first brought upon the mere allegations of plaintiff's attorney that the action first brought was begun by mistake. Crawford v New York C. R. Co., 108 A.D. 190, 95 N.Y.S. 769, 1905 N.Y. App. Div. LEXIS 3141 (N.Y. App. Div. 1905).

An order restoring to the calendar a case involving an equitable cause of action which had been stricken from the special term calendar when the court had no separate equity calendar, should have directed it to be placed on the equity calendar. Trasselli v Allen, 35 N.Y.S. 469, 14 Misc. 183, 1895 N.Y. Misc. LEXIS 812 (N.Y. Super. Ct. 1895).

Where a cause, which by stipulation had been adjourned to a particular day, was dismissed by the clerk on the call of the calendar the day before the adjourned day, the court could restore the cause and set a day for the trial over defendant's objection. Johnson v Monahan, 94 N.Y.S. 351, 47 Misc. 689, 1905 N.Y. Misc. LEXIS 342 (N.Y. App. Term 1905).

If a cause was put on the calendar as of the wrong date of issue, the error could be corrected on motion but the court would not fix the date as of which the cause was to be placed on the calendar. North v Sargeant, 14 Abb. Pr. 223, 1862 N.Y. Misc. LEXIS 67 (N.Y. Sup. Ct. Feb. 1, 1862).

A defendant could not place an action for fraud and deceit upon the special circuit calendar, merely because the plaintiff's case was shorn of every element of success. Donohue v Wood, 1 Month L Bull 20.

60. —Striking cause

An order that a cause be stricken from the special term calendar and be placed on the trial term calendar and on the first call calendar was not authorized by any provisions of the CPA or the Rules of Civil Practice. Poerschke v Baldwin, 83 A.D. 284, 82 N.Y.S. 159, 1903 N.Y. App. Div. LEXIS 1480 (N.Y. App. Div. 1903).

Where a transitory action was brought on for trial, at a term of court held in the county in which the venue was laid, the judge presiding in such court could not, of his own motion, and without any request from either of the parties, strike the case from the calendar simply because it appeared that both the parties were residents of another county. Phillips v Tietjen, 108 A.D. 9, 95 N.Y.S. 469, 1905 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 1905).

Court could on its own motion strike a case from the calendar if it had been there an unreasonable time and it deemed it not a live one. Frederick v Oliver & Burr, 154 A.D. 346, 139 N.Y.S. 320, 1912 N.Y. App. Div. LEXIS 11877, 1912 N.Y. App. Div. LEXIS 9942 (N.Y. App. Div. 1912).

61. Recovery of fee on discontinuance

The fee of $3 to be paid the clerk in the first judicial district upon filing note of issue was required, and once paid to him and turned over to the comptroller of the city, could not be recovered afterward, although the cause was not brought to trial by reason of discontinuance by consent. Kerwin v Valentine, 13 N.Y. St. 331.

G. Decisions Under CPA § 433

62. Generally

A party must appear and raise any objection to any proceedings in the trial before the judge and except to adverse rulings. Greenleaf v Brooklyn, F. & C. I. R. Co., 102 N.Y. 96, 5 N.E. 786, 102 N.Y. (N.Y.S.) 96, 1886 N.Y. LEXIS 806 (N.Y. 1886).

Motion to set case down for immediate trial, denied, not being at issue as required by RCP 150 (Rule 3402 herein). Manarrow Realties, Inc. v E. J. Conrad Corp., 222 A.D. 652, 225 N.Y.S. 374, 1927 N.Y. App. Div. LEXIS 7864 (N.Y. App. Div. 1927).

It is the right of a party to be at all times present at a trial. Chandler v Avery, 47 Hun 9, 14 N.Y. St. 165 (N.Y.).

63. Permitting service and filing of note of issue nunc pro tunc

Court was without authority to permit the plaintiff to serve and file note of issue (or noticed trial as then required) nunc pro tunc, or to grant a preference until the case was properly on the calendar. Zimmerman v Rahmeyer, 230 A.D. 719, 243 N.Y.S. 570, 1930 N.Y. App. Div. LEXIS 8844 (N.Y. App. Div. 1930).

64. Service of amended pleading

Where a complaint has been served, even though it is superseded by an amended complaint, rights accrued to defendant by the service of an original answer and the action stood at issue, and had the defendant desired, he could have noticed the case for trial under CPA § 433 (§§ 3215, 3217 herein) and service of an amended complaint would not have broken the issue as far as filing a note of issue is concerned and the provisions of Rule 301 were no longer available to plaintiff. Ardell Marine Corp. v Duchinsky, 13 Misc. 2d 111, 179 N.Y.S.2d 832, 1958 N.Y. Misc. LEXIS 3289 (N.Y. Sup. Ct. 1958).

Opinion Notes

Agency Opinions

I. Under CPLR

A. In General

1. Calendar fee

A county clerk may properly charge a calendar fee pursuant to CPLR 8020 for placing a case on a trial term calendar pursuant to CPLR 3402; for placing an inquest such as an infant settlement or an uncontested action for divorce on the calendar; or for placing the hearing of a factual issue on the calendar that has been presented by a motion or a special proceeding. The county clerk may not properly charge a calendar fee for placing a motion or special proceeding on a special term calendar. 1973 NY Ops Atty Gen Nov 13.

Research References & Practice Aids

Cross References:

Rules governing notes of issue, CLS CPLR Rule 3401.

Note of Issue and Certificate of Readiness, CLS Unif Tr Ctr Rls § 202.21.

Special preferences, CLS Unif Tr Ctr Rls § 202.24.

Objections to applications for special preference, CLS Unif Tr Ctr Rls § 202.25.

Pretrial conference, CLS Unif Tr Ctr Rls § 202.26.

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3402, Note of Issue.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.06.

Matthew Bender’s New York CPLR Manual:

CPLR Manual § 22.02. Note of issue and certificate of readiness.

CPLR Manual § 23.03. Trial by jury.

Matthew Bender’s New York Practice Guides:

1 New York Practice Guide: Domestic Relations § 5.04.

Matthew Bender’s New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 8.04. Filing Note of Issue and Certificate of Readiness.

LexisNexis AnswerGuide New York Civil Litigation § 8.06. Seeking a Trial Preference.

LexisNexis AnswerGuide New York Civil Litigation § 8.13. Transferring Action to Lower Court.

Warren’s Weed New York Real Property:

Warren’s Weed: New York Real Property § 28.50.

Matthew Bender’s New York Checklists:

Checklist for Filing Note of Issue and Certificate of Readiness LexisNexis AnswerGuide New York Civil Litigation § 8.02.

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 3402:1 et seq.

LexisNexis Forms FORM 380-17:201.— Note of Issue.

LexisNexis Forms FORM 380-17:202.— Certificate of Readiness.

LexisNexis Forms FORM 380-17:212.— Notice of Motion to Reinstate Note of Issue and Restore Case to the Trial Calendar.

LexisNexis Forms FORM 380-17:203.— Affidavit of Service of Note of Issue and Certificate of Readiness.

LexisNexis Forms FORM 380-17:204.— Affidavit in Support of Motion to Vacate Note of Issue and to Strike Action From Calendar.

LexisNexis Forms FORM 380-17:205.— Affirmation in Support of Motion to Strike Action From Calendar; Deposition Not Completed.

LexisNexis Forms FORM 380-17:206.— Affirmation in Opposition to Motion to Strike Action From Calendar.

LexisNexis Forms FORM 380-17:207.— Statement Filed With Clerk Where Note of Issue Has Been Served on New Party.

LexisNexis Forms FORM 380-17:208.— Affidavit in Support of Motion to Reinstate Note of Issue Where Action Previously Not Ready for Trial.

LexisNexis Forms FORM 380-17:209.— Affidavit in Support of Motion to Permit Filing of Note of Issue With Leave to Conduct or Complete Pretrial Proceedings at Later Date.

LexisNexis Forms FORM 380-17:210.— Affidavit in Support of Motion for Leave to Conduct Pretrial Deposition After Filing Note of Issue and Certificate of Readiness.

LexisNexis Forms FORM 380-17:211.— Notice of Motion to Vacate Note of Issue and Strike Case From Trial Calendar, and/or for Permission to Conduct Additional Pretrial Proceedings.

LexisNexis Forms FORM 521-20-10.— Affirmation in Support of Motion to Strike Note of Issue and Certificate of Readiness in Action for Personal Injuries Where Defendant Has Had Insufficient Time to Complete Disclosure and Notice a Physical or Mental Examination of Plaintiff.

LexisNexis Forms FORM 521-20-11.— Order on Court’s Own Motion Striking Note of Issue on Grounds That All Necessary or Proper Preliminary Proceedings Have Not Been Completed.

LexisNexis Forms FORM 521-20-12.— Notice of Motion to Restore Action Where Previously Not Ready for Trial.

LexisNexis Forms FORM 521-20-13.— Affidavit in Support of Motion to Restore Note of Issue Where Action Previously Not Ready for Trial.

LexisNexis Forms FORM 521-20-14.— Order Restoring Note of Issue Where Action Previously Not Ready for Trial.

LexisNexis Forms FORM 521-20-15.— Notice of Motion to Permit Filing of Note of Issue and Certificate of Readiness Where This Is Prevented by Reason Beyond the Party's Control.

LexisNexis Forms FORM 521-20-16.— Affidavit in Support of Motion to Permit Filing of Note of Issue With Leave to Conduct or Complete Pretrial Proceedings at Later Date.

LexisNexis Forms FORM 521-20-17.— Order Permitting Filing of Note of Issue With Leave to Conduct or Complete Pretrial Proceedings Before Trial.

LexisNexis Forms FORM 521-20-18.— Notice of Motion for Leave to Conduct Pretrial Deposition After Filing of Note of Issue and Certificate of Readiness.

LexisNexis Forms FORM 521-20-19.— Affidavit in Support of Motion for Pre-Trial Deposition After Filing the Certificate of Readiness.

LexisNexis Forms FORM 521-20-20.— Order Permitting Deposition After Certificate of Readiness Filed.

LexisNexis Forms FORM 521-20-21.— Statement Filed With Clerk Where Note of Issue Has Been Served on New Party.

LexisNexis Forms FORM 521-20A-2.— Request for Judicial Intervention.

LexisNexis Forms FORM 521-31-69.— Note of Issue.

LexisNexis Forms FORM 521-31-70.— Certificate of Readiness.

LexisNexis Forms FORM 521-20-11A.— Notice of Motion to Strike Note of Issue for Outstanding Physical Examination of Plaintiff.

LexisNexis Forms FORM 521-20-11B.— ``Good Faith'' Affirmation in Support of Motion to Strike Note of Issue for Outstanding Physical Examination of Plaintiff.

LexisNexis Forms FORM 521-20-11C.— ``Good Faith'' Letter to Plaintiff's Attorney Before Motion to Strike Note of Issue for Outstanding Physical Examination of Plaintiff.

LexisNexis Forms FORM 521-20-11D.— Affirmation in Support of Motion to Strike Note of Issue for Outstanding Physical Examination of Plaintiff.

LexisNexis Forms FORM 521-20-1.— Note of Issue.

LexisNexis Forms FORM 521-20-2.— Certificate of Readiness.

LexisNexis Forms FORM 521-20-3.— Affidavit of Service of Note of Issue and Certificate of Readiness.

LexisNexis Forms FORM 521-20-4.— Notice of Motion to Strike Action from Calendar and to Vacate Note of Issue as Prematurely Filed.

LexisNexis Forms FORM 521-20-5.— Affidavit in Support of Motion to Vacate Note of Issue and to Strike Action from Calendar.

LexisNexis Forms FORM 521-20-6.— Order to Strike Note of Issue.

LexisNexis Forms FORM 521-20-7.— Motion to Strike Note of Issue on Grounds That Action Is Not Ready for Trial.

LexisNexis Forms FORM 521-20-8.— Affirmation in Opposition to Motion to Strike Action from Calendar on Grounds That Action Is Not Ready for Trial.

LexisNexis Forms FORM 521-20-9.— Notice of Motion to Strike Note of Issue and Certificate of Readiness in Action for Personal Injuries Where Defendant Has Had Insufficient Time to Complete Disclosure and Notice a Physical or Mental Examination of Plaintiff.

LexisNexis Forms FORM 1434-19153.— CPLR 3402, 22 NYCRR 202.21: Certificate of Readiness.

LexisNexis Forms FORM 1434-19155.— CPLR 3402, 22 NYCRR 202.21: Note of Issue.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 17:101 et seq .(calendar practice; trial preference).

Texts:

1 New York Trial Guide (Matthew Bender) § 1.20.

Hierarchy Notes:

NY CLS CPLR, Art. 34

Forms

Forms

Form 1

Body of Notice of Motion for an Order Vacating Plaintiffs' Note of Issue and Certificate of Readiness on Grounds that all Pre-Trial Discovery Has Not Been Completed *

PLEASE TAKE NOTICE, that upon the annexed Affirmation of _____, dated the _____ day of _____, 20_____, and upon all of the prior pleadings and proceedings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable _____, IAS Part _____, Supreme Court, _____ County, at the Courthouse located at _____ Avenue, _____, New York on the _____ day of _____, 20_____, at _____ a.m./p.m. or as soon thereafter as counsel can be heard for an _____

* This form was submitted courtesy of Jay L.T. Breakstone, Esq., Slater, Vanderpool & Breakstone, Garden City, New York.

Order vacating plaintiffs' Note of Issue and Certificate of Readiness on the grounds that all pre-trial discovery has not been completed and directing the following outstanding disclosure:

1. That plaintiffs serve medical reports of examining and/or treating physicians pursuant to the Rules Governing Exchange of medical data or plaintiffs be precluded from offering any evidence at the time of trial regarding the physical condition of _____;

2. That _____ submit to physical examinations at the offices of Dr. _____ and Dr. _____ within thirty (30) days;

3. That plaintiffs be directed to respond fully to each and every item of the Notices for Discovery and Inspection of moving defendant dated _____, 20_____ and _____, 20_____;

4. That plaintiffs be directed to complete and execute the transcript of their testimony and respond with every request made at the depositions of _____ and _____ as enumerated on various pages of the transcripts;

5. That plaintiffs be directed to provide the Supplemental Bill of Particulars in response to the Demand of defendants _____, _____ and _____ pursuant to the Preliminary Conference Order of Justice _____;

6. That the co-defendants be directed to provide a copy of the culture and sensitivity report of _____, 20_____ or an Affidavit regarding its non-existence pursuant to the Preliminary Conference Order;

7. That the plaintiffs and co-defendant be directed to provide the names and addresses of witnesses, opposing party statements and photographs pursuant to the Preliminary Conference Order;

8. That the co-defendant be directed to provide copies of the CAT-scans taken of the plaintiff and Rules and Regulations of the Departments of Medicine and Orthopedics pursuant to the Preliminary Conference Order; and for such other, further and different relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that answering Affidavits, if any, are required to be served upon the undersigned at least seven (7) days prior to the return date of this motion pursuant to CPLR 2214(b).

Form 2

Body of Affirmation In Support of Motion for an Order Vacating Plaintiffs' Note of Issue and Certificate of Readiness on Grounds that all Pre-Trial Discovery Has Not Been Completed *

_____, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am associated with the firm of _____, _____, _____ & _____, P.C. attorneys for the defendants, _____, M.D., _____, M.D. and _____, M.D., and am fully familiar with the facts and circumstances of this matter.

2. This Affirmation is respectfully submitted in support of the within motion which seeks an Order vacating plaintiffs' Note of Issue and Certificate of Readiness on the grounds that all pre-trial discovery has not been completed and directing the following outstanding disclosure:

a. That plaintiffs serve medical reports of examining and/or treating physicians pursuant to the Rules Governing Exchange of medical data or plaintiffs be precluded from offering any evidence at the time of trial regarding the physical condition of _____;

b. That _____ submit to physical examinations at the offices of Dr. _____ and Dr. _____ within thirty (30) days;

c. That plaintiffs be directed to respond fully to each and every item of the Notices for Discovery and Inspection of moving defendants dated _____, 20_____ and _____, 20_____;

_____

* This form was submitted courtesy of Jay L.T. Breakstone, Esq., Slater, Vanderpool & Breakstone, Garden City, New York.

d. That plaintiffs be directed to complete and execute the transcript of their testimony and respond with every request made at the depositions of _____ and _____ as enumerated on various pages of the transcripts;

e. That plaintiffs be directed to provide the Supplemental Bill of Particulars in response to the Demand of defendants _____, _____ and _____ pursuant to the Preliminary Conference Order of Justice _____;

f. That the co-defendants be directed to provide a copy of the culture and sensitivity report of _____, 20_____ or an Affidavit regarding its non-existence pursuant to the Preliminary Conference Order;

g. That the plaintiffs and co-defendant be directed to provide the names and addresses of witnesses, opposing party statements and photographs pursuant to the Preliminary Conference Order; and

h. That the co-defendant be directed to provide copies of the CAT-scans taken of the plaintiff and Rules and Regulations of the Departments of Medicine and Orthopedics pursuant to the Preliminary Conference Order.

3. This action was commenced by way of a Summons and Complaint (Exhibit “A”). Issue was joined by service of an Answer on behalf of defendants _____, M.D., and _____, M.D., and a separate Answer was later served on behalf of _____, M.D. (Copies of these Answers are annexed collectively as Exhibit “B”). A Bill of Particulars was served in _____, 20_____ (Exhibit “C”).

4. A Preliminary Conference of this action was held at the Supreme Court, _____ County on _____, 20_____. A copy of the Order is annexed as Exhibit “D”. This Order provides for, amongst other things, that plaintiffs serve specific Bills of Particulars as to moving defendants, that all parties exchange the names and addresses of witnesses, opposing party statements and photographs, that the co-defendant

hospital provide a copy of the culture and sensitivity report of _____, 20_____ or an Affidavit regarding its non-existence, and that plaintiffs submit to physical examinations.

5. The failure of the opposing parties to complete disclosure necessitated a motion in _____, 20_____. This motion culminated in the decision of Justice _____ dated _____, 20_____ directing compliance with the Preliminary Conference Order. It was noted in the Order that failure to adhere to the directives of the Court "shall subject the defaulting parties to sanctions including but limited to dismissal and or inquest." A copy of the Judge's Order is annexed hereto as Exhibit "E". Although certain disclosure was provided to our office, plaintiffs have not nearly completed discovery. Annexed thereto as Exhibit "F" are copies of Notices for Discovery and Inspection dated _____, 20_____ and _____, 20_____. To date, plaintiffs have not responded to these Notices for Discovery and Inspection. Significantly there are voluminous authorizations demanded which are vital to a proper defense of this action. Additionally, the deposition transcripts of the defendants have not been furnished to our office even though these depositions were conducted months ago. This disclosure must be accomplished prior to trial.

6. Letters were written to the office of _____, P.C., demanding compliance with the Notices for Discovery and Inspection, the Preliminary Conference Order and requests made at the examinations before trial. Annexed hereto as Exhibit "C" are copies of letters dated _____, 20_____ and _____, 20_____ requesting this disclosure. These follow-up letters also did not elicit a response.

7. Letters were written to counsel for the co-defendant on _____, 20_____ and _____, 20_____ requesting copies of Rules and Regulations and the culture and sensitivity report or Affidavit regarding its non-existence pursuant to the Preliminary Conference Order. Counsel for the codefendant has similarly failed to respond to these requests.

8. It is respectfully submitted that an Order of this Court is necessary directing the voluminous discovery from the plaintiffs and co-defendant. In particular, there are numerous authorizations and data demanded from the plaintiffs which have gone unanswered for quite some time. An Order of this Court should be issued directing this disclosure.

9. Annexed hereto as Exhibit “H” are copies of pages from the deposition transcript of _____ and _____. At the examinations before trial, plaintiffs did not recall or remember various health providers or treating doctors and other information which is vital to a proper defense of this case. The following pages are attached as Exhibit “I” wherein various information was requested (pages “50”, “56”, “58’’, “59”, “60”, “78”, “79”, “139”, “143”, “145”, “146”, “147”, “188” and “191”). It is respectfully submitted that an Order of this Court is necessary directing plaintiffs to complete the information requested therein and furnish the data demanded at the examinations before trial.

10. On _____, 20_____, a letter was written to counsel for the plaintiff designating Dr. _____ and Dr. _____ as examining physicians. Annexed hereto as Exhibit “J” is a copy of that letter. As the Bill of Particulars (see Exhibit “C”) clearly reveals, alleged neurological and cardiac injuries are being claimed in this case. Hence, a cardiologist and neurologist have been designated as examining physicians. Your affirmant was contacted by Dr. _____’s office and advised that the plaintiff will not travel to the doctor’s office for the physical examination.

11. Annexed hereto as Exhibit “H” are copies of the following pages from the deposition transcript of the plaintiff: pages “28”, “48” and “141”. Mr. _____ clearly testified at page “28”of his deposition transcript that the last time he went out was to visit his children and grandchildren in _____, New York. Additionally _____ visits Dr. _____ on a regular basis and is taken to the doctor’s office by his daughter (see pages “48” and “141” of the deposition transcript).

12. It is respectfully submitted that in light of the very serious injuries claimed by the plaintiffs the physical examinations must be conducted at the offices of the examining physicians. Mr.

_____ and his wife have acknowledged that the plaintiff regularly leaves his house to visit Dr. _____, who he sees at least once a month. Additionally, Mr. _____ as recently as early 1989 has gone to his child's home in _____, New York (i.e., upstate New York). Defense counsel deposed the plaintiffs at their home at the request of their attorney and merely to accommodate the witnesses.

13. Annexed hereto as Exhibit "K" is plaintiffs' purported Note of Issue and Certificate of Readiness. In light of the voluminous discovery outlined above which remains outstanding, it is obvious that this case is not ready for trial. It is respectfully requested that this Honorable Court vacate the Note of Issue and Certificate of Readiness and Order the disclosure outlined in detail in this motion. The moving defendants have been pursuing this discovery for quite some time and request an Order directing the disclosure.

14. Your affirmant notes that the plaintiffs have not, to date, served the report of an examining or treating physician. Despite this failure to serve such a report mandated by the Court Rules, plaintiffs nevertheless served a Note of Issue and Certificate of Readiness indicating that they are ready for trial. It is respectfully requested that this Honorable Court preclude plaintiffs from offering any evidence at the time of trial regarding the physical condition of _____. The defendants would be severely prejudiced if the plaintiffs were able to wait until the eve of trial to serve a medical report of a physician who has examined or treated the plaintiff and who the defendants have not had an opportunity to gain any discovery from. Such conduct in filing of Note of Issue where there has been no exchange of medical reports should not be allowed by this Honorable Court and it is respectfully submitted that the Order of preclusion be granted.

15. Additionally, there are a number of aspects of the Preliminary Conference Order which have not been complied with, Particularly the specific Bills of Particulars as to moving defendants, the exchange of names and addresses of witnesses, opposing party statements and photographs, and certain disclosure from the co-defendant. It is respectfully requested that this discovery be Ordered as well.

WHEREFORE, it is respectfully requested that the within motion be granted in its entirety.

Form 3

Statement Where New Party Is Brought In

SUPREME COURT, _____ COUNTY

[Nature of paper]

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

PLEASE TAKE NOTICE that by a supplemental answer dated the _____ day of _____, 20_____, _____ has been brought in as a new party defendant in the above-entitled action by the defendant _____ and the title of said action originally entitled _____, plaintiff against _____, defendant has been changed to read as above entitled. A copy of the note of issue heretofore filed has been duly served upon said _____ as more fully appears from the affidavit of _____, sworn to the _____ day of _____, 20_____ a copy of which is annexed hereto and made a part hereof. A copy of this statement has been duly served upon the attorneys for all parties who have appeared in this action as more fully appears from the affidavit of _____, sworn to the _____ day of _____, 20_____ a copy of which is annexed hereto and made a part hereof.

Dated, _____, 20_____.

_____

Attorney for Defendant _____

_____ Office and

P. O. Address

_____ Telephone No.

_____

To:

Clerk of _____

Form 4

Body of Order Vacating Note of Issue

Upon reading and filing the notice of motion herein dated the _____ day of _____, 20_____ with proof of due service thereof and the affidavit of _____, sworn to the _____ day of _____, 20_____ and after hearing _____, attorney for the defendant in support of this motion and no one having appeared in opposition thereto,

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

ORDERED, that the motion be and the same hereby is granted, and it is further

ORDERED that the above-entitled case be and the same hereby is struck from the calendar of this court and the note of issue heretofore filed in the above entitled case be and the same hereby is vacated on the ground that the said note of issue was prematurely filed in that 40 days had not elapsed since the service of the summons herein at the time of filing the said note of issue.

Form 5

Body of Notice of Motion to Strike Case From Calendar Where It Is Not Ready for Trial

PLEASE TAKE NOTICE _____, sworn to the _____ day of _____, 20_____, a motion will be made at a [motion] Term 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 striking the above-entitled action from the calendar on the ground that it is not ready for trial.

Form 6

Body of Affidavit on Motion to Strike Case From Calendar Where It Is Not Ready for Trial

_____, being duly sworn, deposes and says:

1. He is the attorney for the defendant named in the above-entitled action. The above-entitled action was commenced on the_____ day of _____, 20_____ by the service of a summons and complaint on the defendant herein. Issue was duly joined on the _____ day of _____, 20_____ by the service of an answer by the defendant. Thereafter, defendant demanded a bill of particulars from the plaintiff, and plaintiff complied with this demand on the _____ day of _____, 20_____. On or about the _____ day of _____, 20_____, the defendant demanded that the plaintiff appear for an examination before trial on the _____ day of _____, 20_____. The plaintiff did not appear at the said examination. The defendant intends to conduct an examination before trial of the plaintiff at the earliest possible time and will not be ready for a trial of this action until after such examination is conducted.

2. A note of issue was filed by the plaintiff in this action on the _____ day of _____, 20_____. The said note of issue was accompanied by a statement that all necessary and proper proceedings allowed by Article 31, $ 3041, R 3042 and R 3043 of the Civil Practice Law and Rules had been completed and the case was ready for trial.

3. This action is not ready for trial for the defendant intends to conduct an examination of the plaintiff before trial.

WHEREFORE, defendant requests that this action be stricken from the calendar on the ground that it is not ready for trial.

Form 7

Body of Order Striking Case From the Calendar Where It Is Not Ready for Trial

The defendant having moved to strike this case from the calendar of this court on the ground that it is not ready for trial, and said motion having regularly come on to be heard,

NOW, upon reading and filing the affidavit of _____, sworn to the _____ day of _____, 20_____ in support of said motion and the notice of motion herein dated the _____ day of _____, 20_____ and no affidavit having been filed in opposition thereto, it is, on motion of _____, attorney for the defendant.

ORDERED that the above-entitled action be and the same is hereby stricken from the calendar of this court.

Form 8

Body of Notice of Motion to Restore to Calendar Action Which Has Been Stricken

PLEASE TAKE NOTICE that upon the annexed affidavit of _____ , sworn to the _____ day of _____, 20 _____ , and upon the annexed statement of readiness, a motion will be made at [specify appropriate term and calendar part thereof, depending upon the requirements of applicable court rules] _____, to be held in and for the County of _____ at the County Courthouse 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 restoring the above-entitled action to the [specify proper calendar] _____ calendar for trial on the ground that said action is ready for trial and good cause exists for its restoration to the calendar, and for such other and further relief as to this court may seem just and proper.

Form 9

Body of Order Restoring Action to Calendar

R 3402. Note of issue.

The plaintiff having moved to restore this action to the calendar of this court on the ground that the action is ready for trial and that good cause exists for restoration of the action to the calendar, and said motion having regularly come on to be heard,

NOW, upon reading and filing the affidavit of _____ , sworn to the _____ day of _____, 20 _____, in support of said motion, the statement of readiness filed herein, and the notice of motion herein dated the _____ day of _____, 20 _____, and no affidavit having been filed in opposition thereto, it is on motion of _____, attorney for the plaintiff,

ORDERED that the above-entitled action be and the same is hereby restored to the calendar of this court for trial, and the clerk of this court is directed to place the said action upon the _____ [specify appropriate calendar] calendar of this court as of this date [or such other directions for restoration of the cause as applicable court rules may provide].

End of Document