# NY CLS CPLR § 2218

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***New York***

***Consolidated Laws Service*** **>**

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

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

## § 2218. Trial of issue raised on motion

The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried.

## History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963.

Annotations

## Notes

**Advisory Committee Notes:**

This section is new. There were some former provisions which concern a trial on certain motions. E.g., NY Civ Prac Act § 237-a; NY R Civ P 108. This section is applicable to motions generally. It also incorporates the former practice applicable to all motions of hearing testimony or directing a reference on motions. See Dege v Mascot Realty Corp. 243 App Div 546, 275 NY

Supp 884 (2d Dept 1934); McCanliss v McCanliss, 268 App Div 138, 49 NYS2d 289 (2d Dept 1944).

The issues of fact decided under this rule will be narrow. It does not change former practice, which will not ordinarily permit a motion to effect a preference for a trial of the whole case on the merits. Cf. Conrad v Conrad, 123 App Div 384, 107 NY Supp 1093 (1st Dept 1908); Hill v Hermans, 59 NY 396 (1874).

As in former practice, the order made under this section would direct payment of any trial or jury fee required.

## Notes to Decisions

Where the issues raised on a motion are serious and will require a lengthy hearing, the provisions of CPLR 3211 subsection c and CPLR 2218 do not apply, and the motion for summary judgment should be denied under the provisions of CPLR 3212 subsection b. Stowell v Berstyn, 26 A.D.2d 828, 274 N.Y.S.2d 120, 1966 N.Y. App. Div. LEXIS 3400 (N.Y. App. Div. 2d Dep't 1966).

Where there is a direct conflict between the parties not only as to whether any settlement was ever reached, but also, if reached, the terms thereof, that conflict should be resolved upon common law evidence before a court or referee, pursuant to CPLR 2218. Kirkeby-Natus Corp. v Gevinson, 33 A.D.2d 883, 307 N.Y.S.2d 586, 1969 N.Y. App. Div. LEXIS 2639 (N.Y. App. Div. 4th Dep't 1969).

Although pursuant to Workmen’s Compensation Law Article 9 service by mail of notice of determination of employer liability and of time to request review thereof comported with due process, employer should have been given a hearing pursuant to CPLR § 2218, prior to entry of default judgment against him, as to whether he actually received said notice. Workmen's Compensation Board v Eriksen, 43 A.D.2d 597, 348 N.Y.S.2d 794, 1973 N.Y. App. Div. LEXIS 3236 (N.Y. App. Div. 3d Dep't 1973).

Where issues were presented that necessitated trial, trial court properly denied motion by automobile liability insurer to vacate prior order joining it as respondent and entered judgment declaring insurer's disclaimer of coverage under automobile insurance policy to be invalid and decreeing that insurer be required to defend and indemnify insured against claim and permanently staying arbitration proceedings by insured against another insurer. In re Empire Mut. Ins. Co., 51 A.D.2d 909, 381 N.Y.S.2d 67, 1976 N.Y. App. Div. LEXIS 11571 (N.Y. App. Div. 1st Dep't 1976).

It was within sound discretion of trial court in wrongful death action to consider plaintiff's postverdict motion for new trial on affidavits alone. Markman v Kotler, 52 A.D.2d 579, 382 N.Y.S.2d 522, 1976 N.Y. App. Div. LEXIS 12156 (N.Y. App. Div. 2d Dep't 1976).

In action at law in which jury trial had been demanded, material issues of fact could not be referred to referee for trial. Marshall, Bratter, Greene, Allison & Tucker v Mechner, 53 A.D.2d 537, 384 N.Y.S.2d 787, 1976 N.Y. App. Div. LEXIS 13147 (N.Y. App. Div. 1st Dep't 1976).

Provision of Civil Practice Law and Rules governing trial of issues raised on motion contemplates a trial of narrow, clear cut issues, rather than of lengthy, complicated ones which are central to main issues at trial. Korn v Korn, 56 A.D.2d 837, 392 N.Y.S.2d 73, 1977 N.Y. App. Div. LEXIS 11163 (N.Y. App. Div. 2d Dep't 1977).

When the facts on which respondent relied to establish a prima facie case for an order of attachment were put in dispute by the affidavits of appellant executrix and her witnesses, they should have been resolved at a hearing, and it was reversible error for the surrogate to make findings of these contested material facts based on the affidavits alone; furthermore the surrogate's ruling was not in conformity with the law as it now exists. In re Sabatino, 59 A.D.2d 992, 399 N.Y.S.2d 339, 1977 N.Y. App. Div. LEXIS 14262 (N.Y. App. Div. 3d Dep't 1977).

An issue raised by a counterclaim for breach of contract as to whether there was an agreement should not have been tried by a referee as that issue was the essence of defendants'

counterclaim. Graphic Offset Co. v Torre, 78 A.D.2d 788, 433 N.Y.S.2d 13, 1980 N.Y. App. Div. LEXIS 13441 (N.Y. App. Div. 1st Dep't 1980).

In action in which the plaintiff served the summons and complaint by affixing a copy to the door of the defendant's home and mailing, the trial court properly ruled that the defendant failed to make a requisite showing on his motion to set aside and vacate the default judgment, but, although it was requested, the trial court erred by failing to allow a defense based on the allegation that the defendant did not personally receive notice of the summons in time to defend and that the defendant had a meritorious defense and by failing to direct a trial of the issue of fact as to whether the defendant personally received notice of the summons in time to defend. National Bank of Northern New York v Grasso, 79 A.D.2d 871, 434 N.Y.S.2d 553, 1980 N.Y. App. Div. LEXIS 14286 (N.Y. App. Div. 4th Dep't 1980).

In a personal injury action, plaintiffs were entitled to demand a jury trial on the issue of personal service of a summons, where defendant had interposed an affirmative defense of lack of personal jurisdiction, and where a finding adverse to plaintiffs on that issue would preclude any further proceedings in the case. Cerrato v Thurcon Constr. Corp., 92 A.D.2d 89, 459 N.Y.S.2d 765, 1983 N.Y. App. Div. LEXIS 16594 (N.Y. App. Div. 1st Dep't), app. dismissed, 59 N.Y.2d 763, 1983 N.Y. LEXIS 5030 (N.Y. 1983).

Judgment debtors who had returned informational subpoenas with patently untrue and evasive answers were nevertheless entitled to a hearing on the judgment creditor's motion to hold the debtors in contempt, since a hearing must be held if issues of fact are raised, and since the debtors purported to offer an explanation for their evasion. Quantum Heating Services, Inc. v Austern, 100 A.D.2d 843, 474 N.Y.S.2d 81, 1984 N.Y. App. Div. LEXIS 17951 (N.Y. App. Div. 2d Dep't 1984).

A policeman's failure to submit an order in an Article 78 proceeding for the judge's signature for over four years, which order compelled a village to hold a hearing within 20 days on the policeman's right to reinstatement to his job, constituted laches barring both his right to the hearing and to reinstatement and back pay as alleged in a second Article 78 proceeding filed

after the order was signed, where he failed to show diligence in obtaining the signed order and where the village showed that critical documents and witnesses were now missing. Vickery v Saugerties, 106 A.D.2d 721, 483 N.Y.S.2d 765, 1984 N.Y. App. Div. LEXIS 21662 (N.Y. App. Div. 3d Dep't 1984), aff'd, 64 N.Y.2d 1161, 490 N.Y.S.2d 735, 480 N.E.2d 349, 1985 N.Y. LEXIS 15863 (N.Y. 1985).

Hearing must be held on motion to hold party in contempt if issues of fact are raised; reversal of default finding for contempt is required where failure to oppose motion and delay in doing so was attributable to law office failure; reversal of contempt order may be conditioned upon payment by attorney of sum of $1,500 within 30 days after service upon him of copy of order. Kluge v Walter B. Cooke, Inc., 112 A.D.2d 230, 491 N.Y.S.2d 446, 1985 N.Y. App. Div. LEXIS 55976 (N.Y. App. Div. 2d Dep't 1985).

Individual defendants were entitled to hearing on plaintiff’s motion to hold them in contempt of court and to fine them for violating court orders prohibiting corporate defendants and their employees and agents from paying any money out of either corporation except in ordinary course of business where conflicting affidavits were submitted on issue of whether expenses charged by individual defendants on corporate credit cards were incurred in ordinary course of business. Gallant v Kanterman, 135 A.D.2d 480, 522 N.Y.S.2d 571, 1987 N.Y. App. Div. LEXIS 52442 (N.Y. App. Div. 1st Dep't 1987).

In personal injury action wherein court concluded that, in connection with plaintiffs’ motion to disqualify defense counsel, hearing was necessary to determine whether defendant was driving with appellant’s permission at time of accident, court erred in ordering hearing and determining issue without giving parties opportunity to demand jury trial. Lipetz v Palmer, 216 A.D.2d 367, 628 N.Y.S.2d 180, 1995 N.Y. App. Div. LEXIS 6261 (N.Y. App. Div. 2d Dep't 1995).

Trial court erred in holding a hearing, which was, in effect, a nonjury trial, because the shareholders were entitled to a jury trial where their motion for a preliminary injunction had already been granted, the issues of fact on the motion were the ultimate issues in the case, and they sought monetary relief on behalf of the corporation and a shareholder individually for

breach of contract, which was a legal claim. KNET, Inc. v Ruocco, 145 A.D.3d 989, 45 N.Y.S.3d 126, 2016 N.Y. App. Div. LEXIS 8694 (N.Y. App. Div. 2d Dep't 2016).

Where defendant interposed as a defense lack of jurisdiction over his person because of defective service, and plaintiff moves to dismiss such defense as inadequate, both sides submitting affidavits on such motion, the court may direct an immediate trial by a referee of the issue of service of process, raised on the motion, instead of waiting for trial to dispose of the issue. Kukoda v Schneider, 41 Misc. 2d 308, 245 N.Y.S.2d 271, 1963 N.Y. Misc. LEXIS 1225 (N.Y. Sup. Ct. 1963).

In an action to recover for personal injuries and property damage commenced following a collision involving a motor vehicle owned and driven by plaintiff and an automobile owned by defendant Port Authority and driven by another party, wherein defendant denied operation and control, plaintiff is not entitled to an accelerated trial on the issue of operation and control; CPLR 603 merely empowers the court, in a case reached for trial, to order a separate trial of any claim or issue, and CPLR 2218 merely authorizes the court to direct the trial of an issue of fact before determining a motion. Moreover, a trial preference in the interests of justice, pursuant to CPLR 3403 (subd [a], par 3) would be violative of the intendment of the statute. McKenzie v Port Authority of New York & New Jersey, 101 Misc. 2d 8, 420 N.Y.S.2d 556, 1979 N.Y. Misc. LEXIS 2618 (N.Y. Civ. Ct. 1979).

CPLR 3212 (subd [c]) provides for an immediate trial of issues of fact raised in a motion to dismiss under CPLR 3211 (subds [a], [b]) before a Referee, the court, or the court and a jury, whichever may be proper; CPLR 2218 directs a jury trial if the issue raised by the motion, rather than the case, is triable as of right by a jury; and CPLR 4101 states that issues of fact shall be tried by a jury, except that equitable defenses and equitable counterclaims shall be tried by the court, which is so even if the issues raised by the complaint are tried by a jury. Accordingly, where negligence is the theory of the main action, that issue would certainly be triable to a jury if the main action is reached, but where the issue raised by the plaintiff on a motion to dismiss a defense in that action is whether the defendant’s conduct should give rise to an equitable

remedy, estoppel, to bar an affirmative defense of the Statute of Limitations, that matter is for the court to determine; moreover, where plaintiff had ample opportunity to demand a jury before the issue was tried by the court, but did not do so until a hearing on the estoppel issue was in progress, his right to a jury trial, if any such right existed, was thereby waived. Marable v Robinson, 102 Misc. 2d 96, 422 N.Y.S.2d 630, 1979 N.Y. Misc. LEXIS 2829 (N.Y. Civ. Ct. 1979), aff'd, 114 Misc. 2d 437, 454 N.Y.S.2d 170, 1981 N.Y. Misc. LEXIS 3492 (N.Y. App. Term 1981).

Sufficient reason to vacate order of affiliation under CPLR §§ 5015, 2218 existed where, more than nine years after admitting paternity, putative father discovered that child's mother had been having sexual intercourse with two other men when she conceived and had brought paternity suits against all three men, and where no harm to the child could be anticipated if the order were set aside, child and putative father never having had a relationship of any kind. Wilkins v Kelly, 108 Misc. 2d 598, 438 N.Y.S.2d 72, 1981 N.Y. Misc. LEXIS 2248 (N.Y. Fam. Ct. 1981).

Issue of estoppel, in the context of a statute of limitations defense to a medical malpractice claim, was not to be submitted to a trial jury, but rather was to be separately determined upon a hearing pursuant to N.Y. C.P.L.R. 2218. Abraham v Kosinski, 305 A.D.2d 1091, 759 N.Y.S.2d 278, 2003 N.Y. App. Div. LEXIS 4876 (N.Y. App. Div. 4th Dep't 2003).

In an effort to balance the discovery rights of defendants in motor accident cases against New York's strong public policy of encouraging HIV/AIDS testing by protecting against disclosure of HIV status, a court ordered that the injured person, whose HIV positive status, as it affected life expectancy, might well prove relevant to determination of future damages, submit medical records for in camera review by medical experts and the court; the court would determine, after a hearing, if there was a compelling need for further disclosure and, if so, would make all required redactions. Doe v G.J. Adams Plumbing, Inc., 794 N.Y.S.2d 636, 8 Misc. 3d 610, 2005 N.Y. Misc. LEXIS 884 (N.Y. Sup. Ct. 2005).

Defendants, who included a diocese and a priest, in a mother's negligent supervision case, were entitled to a dismissal of the case pursuant to N.Y. C.P.L.R. § 3211, even though the mother

claimed that they had concealed for 35 years the contributing cause of her son's death by drowning at their summer camp. The mother was given a jury trial pursuant to N.Y. C.P.L.R. § 2218 to decide the facts underlying the issues of the statute of limitations and of whether equitable estoppel, based on the alleged concealment, barred the diocese and the priest from raising the limitations defense; the jury specifically found in response to a jury verdict questionnaire that 35 years earlier, neither the diocese nor the priest had intentionally concealed or misrepresented the facts about the level of supervision at the camp when the son died, so that the factual predicate for an application of the doctrine of equitable estoppel, to bar the statute of limitations defense, did not exist. Piacentino v Quinn, 816 N.Y.S.2d 674, 12 Misc. 3d 1057, 2006 N.Y. Misc. LEXIS 1471 (N.Y. Sup. Ct. 2006).

In a mother's action for negligent misrepresentation against defendants, a diocese and a priest, following her son's drowning death 35 years earlier at defendants' summer camp, the mother's right to a jury trial under N.Y. Const. art. I, § 2, was protected when a trial was held pursuant to N.Y. C.P.L.R. § 2218 to determine whether defendants had misrepresented the level of supervision at the camp when the son died and whether the doctrine of equitable estoppel barred her tort claim, filed in 2003, for negligent supervision; when defendants filed a motion to dismiss the action pursuant to N.Y. C.P.L.R. § 3211, the mother was afforded a jury trial in the proceeding under § 2218, as N.Y. Const. art. I, § 2, required. Piacentino v Quinn, 816 N.Y.S.2d 674, 12 Misc. 3d 1057, 2006 N.Y. Misc. LEXIS 1471 (N.Y. Sup. Ct. 2006).

In a mother's action for negligent supervision against defendants, a diocese and a priest, which suit she filed 35 years after he son had drowned at defendants' camp, the mother failed to prove that defendants had intentionally misrepresented the level of supervision that was or was not extant at the camp. A jury in a proceeding under N.Y. C.P.L.R. § 2218, which was held after defendants filed a motion to dismiss pursuant to N.Y. C.P.L.R. § 3211, specifically found that defendants did not make any misrepresentations in order to conceal the mother's cause of action; equitable estoppel, therefore, did not bar application of the statute of limitations, and the mother, as a result, failed to state a cause of action because she did prove the alleged

intentional misrepresentation by the requisite clear and convincing evidence. Piacentino v Quinn, 816 N.Y.S.2d 674, 12 Misc. 3d 1057, 2006 N.Y. Misc. LEXIS 1471 (N.Y. Sup. Ct. 2006).

Because the trial court did not indicate in its order granting partial summary judgment on liability the time within which a demand for a jury trial had to be made, and no note of issue was filed, pursuant to N.Y. C.P.L.R. 2218, the plaintiff had until the commencement of the trial to demand a jury without waiving the right. Caplan v Tofel, 33 A.D.3d 748, 822 N.Y.S.2d 457, 2006 N.Y. App. Div. LEXIS 14795 (N.Y. App. Div. 2d Dep't 2006).

Individual’s denial of the jurisdictional allegations warranted holding a motion to dismiss in abeyance under N.Y. C.P.L.R. 2218 since the allegation that the individual used a New York bank account to further the misdeeds might be sufficient to establish long-arm jurisdiction, and a corporation alleged that an individual traveled to New York to conduct business for the corporation, and that the individual contracted to provide goods for clients in New York. American BankNote Corp. v Daniele, 45 A.D.3d 338, 845 N.Y.S.2d 266, 2007 N.Y. App. Div. LEXIS 11626 (N.Y. App. Div. 1st Dep't 2007).

With respect to a medical center’s dismissal motion of a wrongful death complaint against it, the best course of action was to hold an evidentiary hearing pursuant to N.Y. C.P.L.R. 2218 on the issue of whether the parties were mistaken in using a prior notice of claim proceeding for a dismissal motion and stipulation of discontinuance. Mosey v Erie County Med. Ctr. Corp., 920 N.Y.S.2d 612, 32 Misc. 3d 240, 2011 N.Y. Misc. LEXIS 1084 (N.Y. Sup. Ct. 2011).

## Research References & Practice Aids

**Jurisprudences:**

5 NY Jur 2d Arbitration and Award §§ 106., 119., 199., 211. .

23 NY Jur 2d Conversion, and Action for Recovery of Chattel § 132. .

73A NY Jur 2d Jury §§ 26., 44. .

92 NY Jur 2d References §§ 1., 7., 10., 19., 20. .

**Treatises**

**Matthew Bender’s New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2218, Trial of Issue Raised on Motion.

**Matthew Bender’s New York CPLR Manual:**

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

CPLR Manual § 15.05. Oral argument; hearing; default.

CPLR Manual § 27.15. Installment payment order.

CPLR Manual § 31.05. Enforcing and resisting arbitration.

**Warren’s Weed New York Real Property:**

Warren’s Weed: New York Real Property § 89.38.

**Annotations:**

Right to a jury trial on motion to vacate judgment. 75 ALR3d 894.

**Forms:**

Bender’s Forms for the Civil Practice Form No. CPLR 2218:1 et seq.

LexisNexis Forms FORM 75-CPLR 2218:1.—Provision in Order for the Separate Trial of Issue of Fact Raised on Motion.

LexisNexis Forms FORM 75-CPLR 2218:2.—Notice Demanding Jury of Issue of Fact Raised on Motion.

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

**Hierarchy Notes:**

NY CLS CPLR, Art. 22

## Forms

**Forms**

**Form 1**

**Provision in Order Directing Trial of Questions by Referee**

Ordered, that the following questions of fact: [clearly and succinctly state the questions of fact] be and they are hereby referred to _____, who is hereby appointed referee to try and report the same, pursuant to $ 2218 of the Civil Practice Law and Rules, and that such referee report in writing his findings thereon to this court for its further action.

**Form 2**

**Demand for Jury Trial of Issues Raised on Motion**

| | |
|---|---|
| | Demand for jury trial |
| [Title of court and cause] | Index No. _____ [if assigned] |

Please take notice, that the plaintiff, [defendant] demands a trial of the issues of fact herein, raised upon the motion noticed for hearing before this court at a motion term thereof held on the _____ day of _____, 20_____, by jury [of 6 or 12 jurors].

Dated the _____ day of _____, 20_____.

_____

Attorney for _____

Office and P. O. Address

Telephone No.

To_____

Attorney for _____

Address _____

**Form 3**

**Provision in Order Directing Trial of Questions by Jury**

Ordered that the following stated questions of fact be tried by a jury: [State questions of fact clearly and succinctly], and that such trial be had at a trial term of this court appointed to be held in and for the County of _____ at the county courthouse in the City of _____, on the _____ day of _____, 20_____, or as soon thereafter as the same may be tried, and that this cause be placed on the day calendar for that day; and it is further

Ordered that the findings of the jury be reported to the court in writing for such further action as may be proper in the premises.