NY CLS CPLR R 2219

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

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

R 2219. Time and form of order

(a) Time and form of order determining motion, generally. An order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after the motion is submitted for decision. The order shall be in writing and shall be the same in form whether made by a court or a judge out of court. An order determining a motion made upon supporting papers shall be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper. Except in a town or village court or where otherwise provided by law, upon the request of any party, an order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or otherwise recorded.

(b) Signature on appellate court order.An order of an appellate court shall be signed by a judge thereof except that, upon written authorization by the presiding judge, it may be signed by the clerk of the court or, in his absence or disability, by a deputy clerk.

History

Formerly § 2219, add, L 1962, ch 308, § 1; amd, L 1962, ch 318, § 7, eff Sept 1, 1963; L 1996, ch 38, § 1, eff Jan 1, 1997.

Annotations

Notes

Prior Law:

Earlier statutes and rules: CPA §§ 127, 823; RCP 70; CCP § 767; Code Proc § 400.

1996 Recommendations of Advisory Committee on Civil Practice:

The Committee recommends that CPLR 2219(a), relating to the time and form of an order determining a motion, be amended to provide that an order or ruling made by a judge in an action, other than in a town or village court (courts not of record), whether upon written or oral application or motion of a party or *sua sponte* , shall, upon the request of any party, be reduced to writing or otherwise recorded.

Oral determinations frequently are made by judges, often during conference in chambers with no court reporter present. If the court disposes of a motion or application of a party orally, or make an oral *sua sponte* order or determination affecting a party, and if such oral order or determination is neither recorded nor reduced to writing, it becomes almost impossible for the party to preserve objections for purposes of appeal. The Committee believes that a party is entitled to preserve all rulings and objections for possible appeal and that the CPLR should provide a procedure to do this. The procedure should come into play only upon request of a party, since it is not necessary that every oral order or determination be so recorded, but upon request of a party, it should be.

It is not intended by this amendment that this requirement apply to jury selection because, at the end of the *voir dire* , an appeal may be taken upon affidavit of an attorney who states that the jury panel is not satisfactory.

Advisory Committee Notes:

The portion of the first sentence of subdivision (a) relating to provisional remedies is based upon the last sentence of CPA § 823; the remainder is new. The rest of subd (a) is derived from CPA § 127 and RCP 70. Section 127 defines all orders, including the final order in a special proceeding, but the latter is covered in article 4 dealing with special proceedings—where the final order has been converted into a judgment. Neither the former section nor this subdivision covers oral motions made to the court during a trial. Such motions "are not strictly applications for orders, and are determined by oral rulings of the trial court entered upon the stenographic record of the case." Carmody, New York Practice 41 n. 3 (7th ed Forkosch 1956). Furthermore, an entry in the clerk's minutes, without any subsequent preparation or signing of a formal order, has sometimes been held to be a sufficient compliance with § 127 and its forerunners. See Gerity v Seeger & Guernsey Co. 163 NY 119, 57 NE 290 (1900) (order referring case to referee to hear and determine); Howard v Robinson, 186 App Div 530, 174 NY Sup 330 (2d Dept 1919) (order granting new trial upon the judge's minutes); Loper v Wading River Realty Co. 143 App Div 167, 127 NY Supp 1000 (2d Dept 1911) (order striking case from trial calendar); Gersman v Levy, 58 Misc 174, 108 NY Supp 1107 (Sup Ct, App T 1908) (order staying execution). To conform with the general approach in this article of abolishing the distinction between court and judge orders and its consequences, this subdivision requires that all orders be the same in form. Thus, the judge who makes the order or presides at the term where it is made is to sign his name and state the court of which he is a judge, including the county if he is a Supreme Court justice. The former distinctions in the use of the words "enter" and "filing" are unnecessary since all orders will be entered and filed under new rule 2220. The last sentence of this subdivision is based on the first paragraph of RCP rule 70. It applies only to motions made with supporting papers. See Howard v Robinson, 86 App Div 530, 533, 174 NY Supp 330, 331 (2d Dept 1919). The former rule derives from amendments made to § 767 of the Throop Code in 1911 and 1912 (NY Laws 1911, c. 368; NY Laws 1912, c. 66), designed to authorize the short form of order commonly in use today. See 1 Carmody-Wait, Cyclopedia of New York Practice 695 (1952). It authorizes a long form order indirectly by stating that "nothing herein contained shall prevent the

court from making an order either originally or on an application for resettlement in more extended form." This subdivision authorizes either a short or long form order by the phrase "in such detail as the judge deems proper." Rule 70 expressly authorizes the practice of endorsing or appending a short form order to the motion papers; this is omitted as unnecessary by the new subdivision. Although RCP 70 is entitled "Form and resettlement of order," the only reference to resettlement is in the phrase quoted above authorizing an order in more extended form. No reference to resettlement is made in the new subdivision; none is required for it is an inherent power of the court. See Robertson v Hay, 12 Misc 7, 33 NY Supp 31 (NY Com Pleas 1895).

The provision of subd (b) is based on the second paragraph of RCP 70. The second paragraph of rule 70 was added in 1935 on recommendation of the Judicial Council to cover a special problem of the Appellate Division. See 2 NY Jud Council Rep 16 (1936). It is made applicable to all appellate courts to include both the Court of Appeals and the appellate terms of the Supreme Court. This subdivision allows any judge of appellate court to sign order even though presiding judge is not absent or disabled, to avoid the possibility of questions about the authority of an associate judge to sign an order based on whether or not the presiding judge was under a disability.

In one of its supporting studies, appearing in the Third Preliminary Report, in discussing the form of order under the Civil Practice Act and the Rules of Civil Procedure, the Advisory Committee on Practice and Procedure says:

"The distinction between court and judge's orders regarding place of making an entry have spawned differences in the form of orders. Thus, the word 'enter' appears at the end of a court order but not a judge's order, and the recital part of a court order begins with the words 'upon reading and filing' the motion papers while a judge's order omits the words 'and filing'. Further, the caption of a judge's order simply states the title of the action while a court order caption recites the term and part and the justice who is presiding. Also, although rule 70 expressly makes the form of signature immaterial, it is customary for the judge to sign his initials alone on a court order and his full name on a judge's order."

See, Third Preliminary Report of the Advisory Committee on Practice and Procedure (Legislative Document (1959) No. 17) p. 583.

Later, in discussing the proposed form of order under the CPLR, the Advisory Committee says:

“Nor would there be any reason under the proposed rules to retain the present distinctions in form between court and judges’ orders. Since all orders would be entered, all could contain the word ‘enter’ at the end and the reference to ‘filing’ in the recital part; these are presently used only in court orders. The caption need only recite the title, the court and the judge who made the order, whether it is made during a term or not. The minor differences regarding the judge’s signature and the place where the date appears could be resolved either way . . .”

See Third Preliminary Report of the Advisory Committee on Practice and Procedure (Legislative Document (1959) No. 17) p. 608.

Notes to Decisions

I. Under CPLR

1. Generally

An entry in the clerk’s minutes stating that the defendants’ motion to dismiss the complaint was granted, which was neither signed nor initialed by the judge, is not an order which may be the subject of an appeal under subd (a) of this section. Carter v Castle Electric Contracting Co., 23 A.D.2d 768, 258 N.Y.S.2d 564, 1965 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 2d Dep't 1965).

In the absence of a recitation of the papers used on a motion, an order denying such motion cannot be treated as an appealable order under CPLR 2219 subd [a]. Arena v New York, 23 A.D.2d 847, 259 N.Y.S.2d 259, 1965 N.Y. App. Div. LEXIS 4309 (N.Y. App. Div. 2d Dep't 1965).

A motion for temporary injunction, as modified, granted to enjoin defendant, his agents, servants, employees and attorneys, during pendency of action from further erecting, constructing or reconstructing any structure or building on premises owned by defendant without first securing a building permit as required by village ordinance. Catskill v Winter, 35 A.D.2d 854, 315 N.Y.S.2d 149, 1970 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 3d Dep't 1970).

An earlier order containing improper decisional material, factual findings and conclusions, should have been stricken upon motion for resettlement. Catskill v Winter, 35 A.D.2d 854, 315 N.Y.S.2d 149, 1970 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 3d Dep't 1970).

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 calender 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 calender. 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 mortgage foreclosure action the determination of the trial court that plaintiff must deliver satisfaction pieces to defendant would be deemed to have been incorporated into a certain order of the trial court, although the determination had been recited only in a memorandum decision which the court had entered on the same date as the order, where the ommision had been merely a matter of form. Central Funding Co. v Deglin, 81 A.D.2d 601, 437 N.Y.S.2d 719, 1981 N.Y. App. Div. LEXIS 11087 (N.Y. App. Div. 2d Dep't), app. dismissed, 54 N.Y.2d 753, 1981 N.Y. LEXIS 4912 (N.Y. 1981).

In a proceeding for leave to serve late notices of claim against a city and a school board, respondents would be denied the right to appeal from the trial court’s determination of their motion to resettle, after the time to appeal from the original order granting leave had expired, since, though the original order had not recited the papers considered on the motion as required by CPLR § 2219(a), the original order was nonetheless an appealable one, and respondents could not properly seize upon such omission to circumvent the prohibition contained in CPLR § 5514(c) against extending the time to appeal. Singer v Board of Education, 97 A.D.2d 507, 468 N.Y.S.2d 25, 1983 N.Y. App. Div. LEXIS 20105 (N.Y. App. Div. 2d Dep't 1983).

Absence of minutes made it impossible for Appellate Division to pass on correctness of Special Term’s ruling on motion, and appeal from such ruling would be dismissed. Bernstein v Bernstein, 122 A.D.2d 96, 504 N.Y.S.2d 1019, 1986 N.Y. App. Div. LEXIS 59165 (N.Y. App. Div. 2d Dep't 1986).

Judicial hearing officer properly barred wife's challenge to court's jurisdiction over enforcement of parties' visitation agreement in divorce proceeding, although previous order denying wife's cross motion to compel arbitration was never signed, entered or served on her as required, since she had actual notice of proposed order, was aware of court's repeated assertions of jurisdiction, and nevertheless waited 2 years until eve of hearing on visitation to challenge court's jurisdiction. Lowinger v Lowinger, 125 A.D.2d 370, 509 N.Y.S.2d 96, 1986 N.Y. App. Div. LEXIS 62655 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358, 1987 N.Y. LEXIS 16388 (N.Y. 1987).

In personal injury action, dismissal of appeal was warranted where purported order appealed from was merely unsigned transcript of court's oral decision and did not comply with CLS CPLR § 2219. Blaine v Meyer, 126 A.D.2d 508, 510 N.Y.S.2d 628, 1987 N.Y. App. Div. LEXIS 41649 (N.Y. App. Div. 2d Dep't 1987).

Motion to dismiss plaintiff's claim for punitive damages did not affect prior order denying motion to dismiss complaint (on grounds of legal insufficiency) within meaning of CLS CPLR § 2221, and thus was not required to be referred to justice who heard prior motion; in any event, requirement that motions be referred to judge who decided prior motion has been modified to be consistent with Individual Assignment System mandate that all motions be addressed to assigned judge. Ministry of Christ Church v Mallia, 129 A.D.2d 922, 514 N.Y.S.2d 563, 1987 N.Y. App. Div. LEXIS 45588 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 746, 519 N.Y.S.2d 1032, 514 N.E.2d 390, 1987 N.Y. LEXIS 18608 (N.Y. 1987).

Granting motion for renewal and reargument is discretionary with court in interest of justice even if plaintiff has not met technical requirements for motion. Sciascia v Nevins, 130 A.D.2d 649, 515 N.Y.S.2d 578, 1987 N.Y. App. Div. LEXIS 46662 (N.Y. App. Div. 2d Dep't 1987).

Sixty-day time limit to submit order or judgment under 22 NYCRR § 207.37 applies only to successful parties in case of action or proceeding, and successful movants in case of motions; thus, having unsuccessfully petitioned court not to sign proposed order denying substituted service with respected to decedent's will, petitioner could not object to court's signing of that

order on ground of untimeliness under statute. In re Estate of Germain, 138 A.D.2d 918, 526 N.Y.S.2d 662, 1988 N.Y. App. Div. LEXIS 3386 (N.Y. App. Div. 3d Dep't), app. dismissed, 72 N.Y.2d 952, 533 N.Y.S.2d 58, 529 N.E.2d 426, 1988 N.Y. LEXIS 2505 (N.Y. 1988).

Divorce court did not abuse its discretion in “resettling” prior order by limiting husband’s obligation to pay wife’s car expenses to include only financing payments, insurance and necessary repairs where parties had become involved in sharp dispute as to what was intended by term “car expenses.” Ross v Ross, 140 A.D.2d 683, 529 N.Y.S.2d 106, 1988 N.Y. App. Div. LEXIS 6099 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff was entitled to resettlement of order extending duration of notice of pendency for additional 3-year period, nunc pro tunc, as of date of original order, where plaintiff timely obtained and filed order extending notice of pendency, but—because subject property was not described—county clerk did not index and record order and instead returned it to plaintiff after original notice of pendency had lapsed. Yan Hen Moy v Young T. Lee & Son Realty Corp., 187 A.D.2d 287, 589 N.Y.S.2d 170, 589 N.Y.S.2d 457, 1992 N.Y. App. Div. LEXIS 12825 (N.Y. App. Div. 1st Dep't 1992).

Action was timely commenced in state court within 6 months after federal action was terminated where (1) federal court orally announced its decision to dismiss case on September 15, 1989 but did not issue dismissal order until December 19, 1989, and (2) instant action was commenced on May 3, 1990. Extebank v Finkelstein, 188 A.D.2d 513, 591 N.Y.S.2d 434, 1992 N.Y. App. Div. LEXIS 14413 (N.Y. App. Div. 2d Dep't 1992).

Where there is conflict between court’s decision and court’s written order, decision controls. Dunlevy v Youth Travel Assocs., 199 A.D.2d 1046, 608 N.Y.S.2d 30, 1993 N.Y. App. Div. LEXIS 12660 (N.Y. App. Div. 4th Dep't 1993).

There was no basis on which Appellate Division could make decision regarding substance of special master’s directive, whether defendants breached that directive, and whether IAS Court improvidently granted drastic remedy of striking defendants’ answer for any such breach, absent

record containing either written directive or transcript of proceeding reflecting it. Brown v 303 West 42nd St. Realty Corp., 240 A.D.2d 248, 658 N.Y.S.2d 308, 1997 N.Y. App. Div. LEXIS 6520 (N.Y. App. Div. 1st Dep't 1997).

Under CLS CPLR § 2219(b) and written authorization of Presiding Justice of Appellate Division, court clerk has authority to sign orders of Appellate Division. Nation's Bank Mortg. Corp. v Jones, 242 A.D.2d 979, 668 N.Y.S.2d 958, 1997 N.Y. App. Div. LEXIS 10661 (N.Y. App. Div. 4th Dep't 1997).

First action was effectively dismissed when hearing court determined that defendant had not been properly served, notwithstanding defendant’s failure to reduce court’s decision to writing, and thus new action commenced by plaintiff within 120 days of hearing but not served on defendant prior to expiration of that time period should have been dismissed under CLS CPLR former § 306-b(b) then in effect. Martino v Ford, 261 A.D.2d 516, 692 N.Y.S.2d 77, 1999 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 2d Dep't 1999).

Court erred in granting plaintiffs’ cross motion for default judgment because service of cross motion one day before return day of motion date, and court’s decision of cross motion 7 days before date it was deemed submitted, violated CLS CPLR §§ 2215 and 2219(a) and unfairly prejudiced and precluded defendant’s ability to respond. Flannery v Goldsmith, 268 A.D.2d 267, 701 N.Y.S.2d 46, 2000 N.Y. App. Div. LEXIS 357 (N.Y. App. Div. 1st Dep't 2000).

In action by State Department of Environmental Conservation (DEC) to enforce consent order against operators of solid waste disposal plant, DEC’s letter requiring operators to submit amended remediation plan within 7 days and to remove materials from site did not render operators unable to comply with consent order where letter merely reiterated terms of order; goal of parties was to close facility, not to allow operators to resume its operation. New York State Dep't of Envtl. Conservation v O'Neill, 273 A.D.2d 852, 709 N.Y.S.2d 280, 2000 N.Y. App. Div. LEXIS 6701 (N.Y. App. Div. 4th Dep't 2000).

In action by State Department of Environmental Conservation (DEC) to enforce consent order against operators of solid waste disposal plant, court properly directed operators to pay fines and civil penalties to which parties had stipulated in consent order where force majeure clause of order was not implicated by DEC’s actions, and operators did not invoke that clause as required by order. New York State Dep't of Envtl. Conservation v O'Neill, 273 A.D.2d 852, 709 N.Y.S.2d 280, 2000 N.Y. App. Div. LEXIS 6701 (N.Y. App. Div. 4th Dep't 2000).

Court’s alleged failure to decide defendant’s motions in 1990 to resettle order and to compel arbitration did not warrant vacatur of default judgment for plaintiff where, even assuming that court did not comply with CLS CPLR § 2219(a), under which order determining motion must be made within 60 days after motion is submitted for decision, proper procedural vehicle to address such failure was Article 78 proceeding to compel court to decide motions. Miller v Lanzisera, 273 A.D.2d 866, 709 N.Y.S.2d 286, 2000 N.Y. App. Div. LEXIS 6943 (N.Y. App. Div. 4th Dep't), app. dismissed, 95 N.Y.2d 887, 715 N.Y.S.2d 378, 738 N.E.2d 782, 2000 N.Y. LEXIS 3759 (N.Y. 2000), reh'g denied, 715 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 9507 (N.Y. App. Div. 4th Dep't 2000).

Trial court’s excusal of a broker’s default, made sua sponte during oral argument, was not an appealable order where the transcript was not “so ordered” by the trial court; there was no indication that the court would have refused to “so order” the transcript or sign a written order if plaintiff had so requested. The creditor merely served a notice of default on broker, but did not actually apply to the trial court for a default judgment, although it had time to do so before oral argument, and further, at oral argument, the creditor did not claim that the broker should have been held in default. Nam Tai Electronics, Inc. v UBS PaineWebber Inc., 46 A.D.3d 486, 850 N.Y.S.2d 11, 2007 N.Y. App. Div. LEXIS 13279 (N.Y. App. Div. 1st Dep't 2007).

Trial court did not err by granting summary judgment on the foreclosure complaint in favor of the mortgagee because the mortgagors were not deprived of real property without due process of law, since there was nothing in the record to suggest that the trial court declined to consider the mortgagors’ opposing papers and the mortgagee met its prima facie burden of establishing its

entitlement to an order of reference by producing the mortgage, the unpaid note, and evidence of default. Emigrant Funding Corp. v Kensington Realty Group Corp., 178 A.D.3d 1020, 116 N.Y.S.3d 95, 2019 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div. 2d Dep't 2019).

Absent from the rule is any specific direction as to how courts are to treat motions and cross motions that present multiple or alternative requests for relief; while courts may address the merits of each separate branch of a motion or cross motion and will often do so, the statute does not require the court to do so if one branch is controlling or dispositive of the others. Courts may dispose of one or more branches of lesser importance as being without merit or rendered academic by other aspects of the order. Charalabidis v Elnagar, 188 A.D.3d 44, 132 N.Y.S.3d 129, 2020 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 2d Dep't 2020).

When the transcript is to become the written version of an order determining a motion, arrangements must be made for the transcript to be provided to the judge or justice for signature or initials; only when the transcript is actually signed or initialed by the judge or justice with the direction that the transcript be entered does it meet the requirements to be enforceable as an order, and only then upon its entry does the transcript become an appealable paper. Charalabidis v Elnagar, 188 A.D.3d 44, 132 N.Y.S.3d 129, 2020 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 2d Dep't 2020).

When a transcript is used, a party may provide a copy of it to the judge or justice with a proposed order for signature, with notice of settlement to all parties; under this method, the transcript need not be signed and can be treated as a mere decision, but the accompanying proposed order, once signed or initialed, becomes enforceable and constitutes an appealable paper. Charalabidis v Elnagar, 188 A.D.3d 44, 132 N.Y.S.3d 129, 2020 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 2d Dep't 2020).

Defendants’ motion to disqualify plaintiffs’ counsel was decided in court but the justice failed or refused to later sign the transcript, which never qualified as an order for purposes of enforcement or appeal; the court reporter’s certification did not substitute for the obligation that a judge or justice sign his name or initials to the document, and the absence of the justice’s

signature prevented plaintiffs from directly appealing the adverse determination to the appellate division. Charalabidis v Elnagar, 188 A.D.3d 44, 132 N.Y.S.3d 129, 2020 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 2d Dep't 2020).

Where plaintiffs made several unsuccessful attempts to obtain an appealable paper, their only alternative was to commence a mandamus proceeding; absent such, plaintiffs could receive no relief on this appeal. The court cannot compel under the guise of the rules relief that can only be properly accomplished by mandamus, which was untimely in this case. Charalabidis v Elnagar, 188 A.D.3d 44, 132 N.Y.S.3d 129, 2020 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 2d Dep't 2020).

Where at close of trial on April 15 decision was reserved on all motions pending submission of memoranda by both sides, and one side as late as August 28 promised to submit his brief within one week, and when it finally appeared to the court on October 17, that no brief would be forthcoming, the matter was considered “fully submitted”, and decision rendered October 18, such decision was timely. Menter v Westchester County Playland Com., 42 Misc. 2d 5, 247 N.Y.S.2d 3, 1964 N.Y. Misc. LEXIS 2144 (N.Y. County Ct. 1964).

Plaintiff barred himself from the relief sought by waiting for the decision and order which was adverse to him, and was estopped from any collateral attack based on the theory that the order had been entered more than 60 days following the submission of the motion. Kaminsky v Abrams, 51 Misc. 2d 5, 272 N.Y.S.2d 530, 1965 N.Y. Misc. LEXIS 1468 (N.Y. Sup. Ct. 1965).

There was no enforceable Family Court order of support which could have been continued in divorce decree, where order was not reduced to writing nor signed by judge who made it and was not entered for more than two years after date of divorce decree which purported to continue it. Parsons v Parsons, 82 Misc. 2d 454, 368 N.Y.S.2d 988, 1975 N.Y. Misc. LEXIS 2699 (N.Y. Fam. Ct. 1975).

Sixty-day time limit of N.Y. C.P.L.R. 2219(a) for determining a motion was not a rigid jurisdictional limitation, and the appropriate procedural vehicle to address the trial court’s failure

to decide plaintiff mother's motion for contempt within 60 days after the motion was submitted for decision was a N.Y. C.P.L.R. art. 78 proceeding to compel the trial court to issue an order determining the motion; thus, the trial court's failure to comply with the statutory timing did not require reversal of the contempt order against defendant father. Slavuter v Slavuter, 304 A.D.2d 820, 757 N.Y.S.2d 874, 2003 N.Y. App. Div. LEXIS 4517 (N.Y. App. Div. 2d Dep't 2003).

City failed to show by clear and convincing evidence that the operation of a business as a lounge constituted a public nuisance which immediately required the issuance of temporary restraining and closure orders in order to protect the public health, safety, or welfare pursuant to the Nuisance Abatement Law, New York City, N.Y., Admin. Code ch. 7, tit. 7, as it only showed that the lounge failed to display or provide for review a copy of its liquor license; there was no showing that the premises were unlicensed, no showing of a violation of N.Y. Penal Law § 240.45(2), and due to the delay of over three months from the time that police officers visited the premises to the application for relief, issuance of an order to show cause under N.Y. C.P.L.R. 2219(d) was not deemed appropriate. City of New York v West Winds Convertibles Intl., Inc., 837 N.Y.S.2d 555, 16 Misc. 3d 646, 238 N.Y.L.J. 1, 2007 N.Y. Misc. LEXIS 3900 (N.Y. Sup. Ct. 2007).

Worker's N.Y. C.P.L.R. art. 78 proceeding was an improper basis to compel the state insurance fund (SIF) to pay a judgment issued in favor of the worker against his former employer because there was no evidence that the SIF was enjoined by law to do so, there was no undisputed agreement for it to do so, and it was exempt from having to do so under Insurance Law; the SIF was entitled to an order to show cause for an order dismissing the petition. The court lacked subject matter jurisdiction over the action, which should have been brought in the Court of Claims, because the worker was trying to collect money damages against a state agency. Miraglia v State Ins. Fund, 920 N.Y.S.2d 633, 32 Misc. 3d 471, 2011 N.Y. Misc. LEXIS 1454 (N.Y. Sup. Ct. 2011).

II. Under Former Civil Practice Laws

2. Generally

The decision of a judge settling interrogatories is an order. Uline v New York C. & H. R. R. Co., 79 N.Y. 175, 79 N.Y. (N.Y.S.) 175, 1879 N.Y. LEXIS 1008 (N.Y. 1879).

A writ of attachment is a “mandate” and also falls within the definition of an “order”. Lowenthal v Hodge, 120 A.D. 304, 105 N.Y.S. 120, 1907 N.Y. App. Div. LEXIS 1164 (N.Y. App. Div. 1907).

Where jury rendered a verdict in favor of one defendant and reported a disagreement as to the other two, determination of court denying a motion to dismiss the complaint was not an “order” from which an appeal could be taken but a “ruling made during the course of the trial,” which could be reviewed only upon an appeal from the judgment rendered after the trial. Reade v Halpin, 180 A.D. 157, 167 N.Y.S. 624, 1917 N.Y. App. Div. LEXIS 8136 (N.Y. App. Div. 1917).

Paper unusual and irregular in form was held an order where not ambiguous in its terms and contained all the elements of an order as provided in CPA § 127. Pearson v Wilson, 214 A.D. 847, 211 N.Y.S. 929, 1925 N.Y. App. Div. LEXIS 8344 (N.Y. App. Div. 1925).

Where official referee filed memorandum decision to effect that plaintiff employee was not in course of her employment when injured while bus passenger, and directed the order be settled on notice, and thereafter signed and directed entry of paper designated as order but which was nothing more than his restatement of conclusion of law stated in his previous decision, such so-called order was neither order nor judgment. Attolino v Stow, 285 A.D. 759, 141 N.Y.S.2d 381, 1955 N.Y. App. Div. LEXIS 5579 (N.Y. App. Div. 1955).

An indorsement upon an order for the examination of a judgment debtor in proceedings supplementary to execution: “Proceedings dismissed upon objection made by judgment debtor that proceeding is entitled in an action . . . McAlpin v Stoddard, 105 N.Y.S. 9, 54 Misc. 647, 1907 N.Y. Misc. LEXIS 518 (N.Y. App. Term 1907).

An indorsement on an order for the examination of a judgment debtor in supplementary proceedings, that the judgment creditor made default in appearing and the proceeding was

dismissed, was an order within the provisions of CPA § 127. Consolidated Agency Co. v Townsley, 129 N.Y.S. 773, 72 Misc. 155, 1911 N.Y. Misc. LEXIS 351 (N.Y. Sup. Ct. 1911).

Any direction or disposition made by court or judge in action or special proceeding, apart from judgments which are governed by special rules and practice, must be made by written order, and until court's disposition is so embodied it is without effect. School of Music, etc. v Moritt, 135 N.Y.S.2d 43, 1954 N.Y. Misc. LEXIS 2869 (N.Y. Sup. Ct. 1954).

Oral disposition, made by court upon argument is simply direction and guide to parties and their attorneys for preparation and submission of formal order. School of Music, etc. v Moritt, 135 N.Y.S.2d 43, 1954 N.Y. Misc. LEXIS 2869 (N.Y. Sup. Ct. 1954).

RCP 278 (now Dom. Rel. Law 235), prohibiting officer of court to permit taking of copy of details of matrimonial action except "by order of court" was limited by CPA § 127 requiring direction of court or judge in action or special proceeding to be in writing, and judge's oral permission to reporter to look at files on table in anteroom of courtroom was not "order of Court." Stevenson v Hearst Consol. Publications, Inc., 214 F.2d 902, 1954 U.S. App. LEXIS 2794 (2d Cir. N.Y.), cert. denied, 348 U.S. 874, 75 S. Ct. 110, 99 L. Ed. 688, 1954 U.S. LEXIS 1531 (U.S. 1954).

3. Opinion as order

An opinion filed in office of clerk was not final order, within CPA § 78 (now Judiciary Law 7-b). Gable v Raftery, 65 N.Y.S.2d 520, 1946 N.Y. Misc. LEXIS 2869 (N.Y. Sup. Ct. 1946).

Opinion of court is not order. Eberhardt v 11 West 42nd Street, Inc., 69 N.Y.S.2d 126, 1947 N.Y. Misc. LEXIS 2195 (N.Y. App. Term 1947).

4. Entry of order

Order denying new trial must be in writing and entered by the clerk. These prerequisites are jurisdictional. Mass v Ellis, 9 N.Y. St. 512.

Where the clerk enters an order upon the decision of a judge, the decision must be strictly followed, but where the judge settles the order himself this order controls. Post v Cobb, 13 N.Y. St. 555.

If the party entitled to enter the order neglects to do so, within twenty-four hours any other party to the action may do so. In re Rhinebeck & C. R. Co., 8 Hun 34 (N.Y.), aff'd, 67 N.Y. 242, 67 N.Y. (N.Y.S.) 242, 1876 N.Y. LEXIS 378 (N.Y. 1876).

5. Form and requisites of order

An order appointing a receiver should describe with sufficient particularity the property he is to take; otherwise he cannot hold. O'Mahoney v Belmont, 62 N.Y. 133, 62 N.Y. (N.Y.S.) 133, 1875 N.Y. LEXIS 484 (N.Y. 1875).

It is improper to include in final order upon a referee's report fixing damages, under injunction undertaking, a provision requiring plaintiff to pay the same. Lawton v Green, 64 N.Y. 326, 64 N.Y. (N.Y.S.) 326, 1876 N.Y. LEXIS 76 (N.Y. 1876).

Rule requiring an order on a nonenumerated motion to specify "all papers used or read on the motion" is not satisfied by a statement that the motion was made upon all the papers and proceedings in the action. Hobart v Hobart, 85 N.Y. 637, 85 N.Y. (N.Y.S.) 637, 1881 N.Y. LEXIS 158 (N.Y. 1881).

An entry made by a clerk that a case was reached and referred to a party named, held to be a full compliance with CPA § 127 which requires that the order of the court be in writing. Gerity v Seeger & Guernsey Co., 163 N.Y. 119, 57 N.E. 290, 163 N.Y. (N.Y.S.) 119, 1900 N.Y. LEXIS 1045 (N.Y. 1900).

An order which was not in the usual form but consisted entirely of a written entry in the minutes of the clerk was nevertheless valid, and complies with CPA § 127. Loper v Wading River Realty Co., 143 A.D. 167, 127 N.Y.S. 1000, 1911 N.Y. App. Div. LEXIS 788 (N.Y. App. Div. 1911).

Paper signed by justice held order though unusual and irregular in form, where it was not ambiguous in its terms and contained all the elements of an order as provided in RCP 70 and in CPA § 127. Pearson v Wilson, 214 A.D. 847, 211 N.Y.S. 929, 1925 N.Y. App. Div. LEXIS 8344 (N.Y. App. Div. 1925).

Where record on appeal contained no “order” granting motion of defendant to dismiss cross claim, nor any judgment to that effect, as defined and described in CPA § 127, appeal from such “order” was dismissed. Bruno v Vernon Park Realty, Inc., 2 A.D.2d 770, 154 N.Y.S.2d 587, 1956 N.Y. App. Div. LEXIS 4574 (N.Y. App. Div. 2d Dep't 1956).

Mere oral statements denying appellant’s applications at the trial without any showing that they were reduced to writing signed by the judge and entered are insufficient to constitute an appealable order. Le Glaire v New York Life Ins. Co., 5 A.D.2d 171, 170 N.Y.S.2d 763, 1958 N.Y. App. Div. LEXIS 6892 (N.Y. App. Div. 1st Dep't 1958).

Mere oral statements denying appellant’s applications at the trial without any showing that they were reduced to writing signed by the judge and entered are insufficient to constitute an appealable order. Le Glaire v New York Life Ins. Co., 5 A.D.2d 171, 170 N.Y.S.2d 763, 1958 N.Y. App. Div. LEXIS 6892 (N.Y. App. Div. 1st Dep't 1958).

The statement in a case on appeal of a motion to set aside the verdict is not equivalent to an order. Carlson v Winterson, 20 N.Y.S. 897, 1 Misc. 207, 1892 N.Y. Misc. LEXIS 68 (N.Y. City Ct. 1892), rev'd, 22 N.Y.S. 553, 3 Misc. 63, 1893 N.Y. Misc. LEXIS 187 (N.Y.C.P. 1893).

A so-called short form order attached to moving papers carrying a memorandum of judge to effect that “motion to direct judgment debtor . . . to appear for examination is granted on default. Submit order” constitutes a mere memorandum. In re Friedman, 267 N.Y.S. 56, 149 Misc. 278, 1933 N.Y. Misc. LEXIS 1369 (N.Y. City Ct. 1933).

A sheriff was justified in treating, as an order of the supreme court, an order made by a justice thereof approving an undertaking furnished on behalf of a husband after his arrest for nonpayment of alimony as to the form and the sufficiency of the “sureties” named therein,

although there was actually only one surety. Lang v Dreyer, 9 N.Y.S.2d 970, 170 Misc. 207, 1939 N.Y. Misc. LEXIS 1537 (N.Y. Sup. Ct. 1939).

An order should not contain decisional discussion in the directory provisions thereof. Ayman v Teachers' Retirement Board, 19 Misc. 2d 355, 193 N.Y.S.2d 2, 1959 N.Y. Misc. LEXIS 2867 (N.Y. Sup. Ct. 1959), aff'd, 10 A.D.2d 835, 200 N.Y.S.2d 352, 1960 N.Y. App. Div. LEXIS 10572 (N.Y. App. Div. 1st Dep't 1960).

In action on bond given in injunction proceedings, judgment for plaintiff could not stand where supported solely by a mere memorandum of decision assessing damages but containing no direction as required by CPA § 127. Aristo Hosiery Co. v Moore, 178 N.Y.S. 344 (N.Y. App. Term 1919).

It is improper to insert in an order for the discovery of books and papers, the consequence of disobeying it; but such a provision does not render the order irregular or invalid, Rice v Ehle (1874) 55 NY 518, and should not be set aside for that reason. People ex rel. Tull v Kenny, 2 Hun 346 (N.Y.).

It is doubtful whether a verbal decision is an order from which an appeal may be taken. Lovatt v Watson, 35 Hun 553 (N.Y.).

6. —Recitals

Where plaintiff has used a deposition in defeating a motion for leave to serve an amended answer he cannot be heard to contend that the same was insufficient for the purpose of defeating defendant’s right to have it recited in the order denying such motion. Farmers' Nat'l Bank v Underwood, 12 A.D. 269, 42 N.Y.S. 500, 1896 N.Y. App. Div. LEXIS 3297 (N.Y. App. Div. 1896).

Where an important affidavit made and used upon motion resulting in order was omitted from such order, it was error to exact conditions upon the resettlement of such order, the motion

therefor disclosing sufficient excuse for the omission. Thousand Island Park Ass'n v Gridley, 25 A.D. 499, 49 N.Y.S. 722, 1898 N.Y. App. Div. LEXIS 121 (N.Y. App. Div. 1898).

A party is entitled to have recited in an order all the papers which he or his adversary has used upon the motion from which the order results unless there be scandalous or similar matter which the court is authorized to strike out. Deutermann v Pollock, 36 A.D. 522, 55 N.Y.S. 829, 1899 N.Y. App. Div. LEXIS 88 (N.Y. App. Div. 1899).

Where court denies motion to resettle order by adding thereto a recital of certain papers used on the motion pursuant to which it was made and fails to recite the papers used on second motion which are the same as those omitted from the first order, the remedy of the aggrieved party is by appeal from the second order and not by motion for its resettlement. Deutermann v Pollock, 36 A.D. 522, 55 N.Y.S. 829, 1899 N.Y. App. Div. LEXIS 88 (N.Y. App. Div. 1899).

A party is entitled to have recited in an interlocutory judgment the papers on which it was based with the notice of motion and the affidavits thereto annexed and affidavits in opposition submitted by the defendant. Adams v Bristol, 108 A.D. 303, 95 N.Y.S. 628, 1905 N.Y. App. Div. LEXIS 3174 (N.Y. App. Div. 1905).

An order of compulsory reference is defective which does not recite the papers considered by the trial justice as the basis thereof. Henry Huber Co. v Rogers, 142 A.D. 642, 127 N.Y.S. 329, 1911 N.Y. App. Div. LEXIS 363 (N.Y. App. Div. 1911).

An entry, indorsed by the Special Term judge on the notice of motion for judgment on the pleadings, which merely gives a memorandum of the determination of the motion without a recital of the papers used on the motion, is insufficient in form as an order. Traub v Arrow Mfg. Corp., 207 A.D. 292, 202 N.Y.S. 121, 1923 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1923).

Injunction order vacated upon the ground that it failed to mention the summons and complaint in the action. Terry v Green, 103 N.Y.S. 1014, 53 Misc. 10, 1907 N.Y. Misc. LEXIS 139 (N.Y. Sup. Ct. 1907).

Under the Code even a “short form order” was required to recite a determination of substantive factors of the issues involved. Goldsmiths & Silversmiths Co. v Haas, 134 N.Y.S. 602, 76 Misc. 210, 1912 N.Y. Misc. LEXIS 781 (N.Y. App. Term 1912).

An order should contain a recital of the papers used upon motion either by reference to number or otherwise. Kirschner v Abbotts Bakeries, 156 N.Y.S. 107, 92 Misc. 402, 1915 N.Y. Misc. LEXIS 998 (N.Y. App. Term 1915).

An order entered on the decision of a motion should not contain parts of the decision of the court, unless the inclusion of the parts ordering the doing or refraining from doing of certain acts is necessary to give effect to the relief granted. Ordinarily it is necessary to recite in the order only the ultimate conclusion with sufficient language to describe the application. White v White, 22 N.Y.S.2d 776, 175 Misc. 66, 1940 N.Y. Misc. LEXIS 2223 (N.Y. Sup. Ct. 1940).

An order should not contain decisional discussion in the directory provisions thereof. Ayman v Teachers' Retirement Board, 19 Misc. 2d 355, 193 N.Y.S.2d 2, 1959 N.Y. Misc. LEXIS 2867 (N.Y. Sup. Ct. 1959), aff'd, 10 A.D.2d 835, 200 N.Y.S.2d 352, 1960 N.Y. App. Div. LEXIS 10572 (N.Y. App. Div. 1st Dep't 1960).

An order denying a motion to open default should recite all the papers used upon the hearing or refer to the papers used by number. Solomon v Rothbaum, 156 N.Y.S. 1093 (N.Y. App. Term 1916).

A recital in an order to show cause why an order should not be vacated, that it was made without notice, is a sufficient specification of the irregularity. Swift v Wheeler, 46 Hun 580, 12 N.Y. St. 737 (N.Y.).

An order which recited that it was made on the reading of certain papers “and on all papers and proceedings herein” was defective in view of RCP 70. Faxon v Mason, 33 N.Y.S. 802, 87 Hun 139 (1895).

7. Resettlement of orders

Where recitals in order should have been resettled so as to incorporate a list of all papers upon which the order had been based, Appellate Division modified the denial of a motion by granting such relief under the movant's prayer for "other and further relief." Lanaris v Mutual Ben. Life Ins. Co., 9 A.D.2d 1015, 194 N.Y.S.2d 718, 1959 N.Y. App. Div. LEXIS 5424 (N.Y. App. Div. 4th Dep't 1959).

The court has power to correct or clarify an order by resettlement so that it shall provide for such matters as were before the court, but it has no power to change or amplify the direction of the court. Application of H. C. Roberts Electric Supply Co., 226 N.Y.S. 211, 131 Misc. 119, 1927 N.Y. Misc. LEXIS 1273 (N.Y. Sup. Ct. 1927).

Resettling by successor judge of predecessor judge's order misreciting that motion was "granted" instead of "denied", to express real content of latter's opinion, does not amount to entering original order by successor judge upon opinion or decision of another judge. Carilli v Bianco & Pepe, Inc., 1 Misc. 2d 835, 153 N.Y.S.2d 327, 1955 N.Y. Misc. LEXIS 2275 (N.Y. County Ct. 1955), aff'd, 1 A.D.2d 898, 150 N.Y.S.2d 537, 1956 N.Y. App. Div. LEXIS 6037 (N.Y. App. Div. 2d Dep't 1956).

Where resettlement of a judgment merely corrected an inadvertent omission from the judgment and the court's formal decision contained such directions, resettlement is permissible. Zigman v McMackin, 8 Misc. 2d 249, 167 N.Y.S.2d 460, 1957 N.Y. Misc. LEXIS 2573 (N.Y. Sup. Ct. 1957), aff'd, 6 A.D.2d 907, 177 N.Y.S.2d 723, 1958 N.Y. App. Div. LEXIS 5069 (N.Y. App. Div. 2d Dep't 1958).

Where defendants have moved to vacate a notice for examination before trial, such motion acted as a stay, and where order denied but defendants given leave to renew upon proper papers, failure of defendant to move promptly thereafter does not justify striking answers where the order for examination did not fix the time and place at which defendant should appear for examination and the plaintiff's remedy was to move to resettle the order and plaintiff not entitled to enter judgment. Semsky v Jo-Mar Bake Shop, Inc., 12 Misc. 2d 371, 177 N.Y.S.2d 560, 1958 N.Y. Misc. LEXIS 3722 (N.Y. Sup. Ct. 1958).

Resettlement is permissible only for inclusion in a judicial pronouncement of some recital or provision which was initially omitted through inadvertence. It is a procedure of correction or clarification, not one to change or amplify the direction of the court. Hayes v Hayes, 204 N.Y.S.2d 195 (N.Y. Sup. Ct. 1960).

8. —Resettling resettled order

Where acting surrogate, between terms of court and in absence of regular surrogate on vacation, entered order fixing attorney's lien upon decedent's estate, entry of order resettling order to include certificate of surrogate's absence was error, and where later executor obtained certificate from surrogate stating that he could have been present had there been any term of court and asked to resettle resettled order to include latter certificate, such motion was denied, as effect of certificate would be argumentative only. In re Evans' Estate, 33 N.Y.S.2d 79, 178 Misc. 6, 1942 N.Y. Misc. LEXIS 1325 (N.Y. Sur. Ct. 1942).

9. Effect of order

Order allowing alimony, made subsequent to a final decree of divorce a vinculo, which made no provision therefor, is without jurisdiction and void. Kamp v Kamp, 59 N.Y. 212, 59 N.Y. (N.Y.S.) 212, 1874 N.Y. LEXIS 404 (N.Y. 1874).

An order of county court recommending board of supervisors to correct erroneous assessment is mandatory, and a mandamus will lie to compel obedience to the order. People ex rel. Pells v Board of Supervisors, 65 N.Y. 300, 65 N.Y. (N.Y.S.) 300, 1875 N.Y. LEXIS 346 (N.Y. 1875).

In cases where a motion is addressed to the favor of the court, which it may, in its discretion, grant or refuse, it may impose terms as a condition of granting the motion, and is not reviewable in court of appeals. In re Application of Waverly Water-Works Co., 85 N.Y. 478, 85 N.Y. (N.Y.S.) 478, 1881 N.Y. LEXIS 110 (N.Y. 1881).

Granting of motion for new trial effectually did away with general verdict in plaintiffs' favor, and another justice could grant motion to vacate and set aside judgments. Howard v Robinson, 186 A.D. 530, 174 N.Y.S. 330, 1919 N.Y. App. Div. LEXIS 5836 (N.Y. App. Div. 1919).

A hearing on a construction issue concerning a will in an intermediate accounting proceedings is not terminated until the court has rendered its opinion-decision which then becomes a decree. In re Casper's Will, 291 N.Y.S. 585, 161 Misc. 199, 1936 N.Y. Misc. LEXIS 1503 (N.Y. Sur. Ct. 1936).

An order setting aside an execution is a defense in an action against the sheriff for an escape, though made in the wrong county. Pinckney v Hagerman, 1871 N.Y. App. Div. LEXIS 307 (N.Y. App. Term Sept. 1, 1871).

A refusal by the court of appeals to stay a motion to dismiss an appeal until appellants can procure the requisite certificate from the court below, does not interfere with their right to thereafter make application for such certificate in the court below. Good v Daland, 28 N.Y. St. 935.

Court has no power to insert in order a direction for payment of sheriff's fees by plaintiff; they can move to strike out such direction. Hall v United States Reflector Co., 31 Hun 609 (N.Y.), aff'd, 96 N.Y. 629, 96 N.Y. (N.Y.S.) 629, 1884 N.Y. LEXIS 541 (N.Y. 1884).

Recitals in an order or judgment are presumed to be true and when uncontradicted are conclusive. Smith v Grant.

10. Collateral effect

Although improper recitals have been embodied in an order, a respondent who made default in appearing on the motion cannot raise the question by an appeal from the order. The proper practice is to move to resettle the order and to appeal from the order denying such motion. In re Bostwick, 114 A.D. 199, 99 N.Y.S. 925, 1906 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 1906).

The direction of the general term as to costs on appeal to that court, if erroneous, should be corrected by an application to that court for a modification or revocation of the order; it cannot be attacked on an application from another order. Clark v Sullivan, 10 N.Y.S. 397, 57 Hun 585, 1890 N.Y. Misc. LEXIS 2134 (N.Y. Sup. Ct. 1890).

An order of general term upon an appeal from an order came within CPA §§ 127 and 115 (§ 2212 herein). Phipps v Carman, 26 Hun 518 (N.Y.).

11. Res judicata

Order relegating plaintiff to plenary action, as a matter of procedure only, and not determining the merits, is not res judicata in plaintiff's subsequent action. Guinan v Trotta, 28 Misc. 2d 695, 219 N.Y.S.2d 964, 1960 N.Y. Misc. LEXIS 2119 (N.Y. App. Term 1960).

12. Nunc pro tunc order

The function of order nunc pro tunc is to correct irregularities in entry of judicial mandates or like procedural errors. Mohrmann v Kob, 291 N.Y. 181, 51 N.E.2d 921, 291 N.Y. (N.Y.S.) 181, 1943 N.Y. LEXIS 1041 (N.Y. 1943).

Supreme Court has power to make order which will take effect retroactively as of return day of motion, if court had jurisdiction of action of special proceeding in which motion was made; otherwise order nunc pro tunc is unauthorized. Polizotti v Polizotti, 305 N.Y. 176, 111 N.E.2d 869, 305 N.Y. (N.Y.S.) 176, 1953 N.Y. LEXIS 822 (N.Y. 1953).

A nunc pro tunc order may be granted to permit belated filing of proof that service of process has taken place within the required time, but such order cannot be granted to allow proof to be filed nunc pro tunc as of a time when the event had not yet taken place. Thus, an order for service by publication within a forty-two-day period, void for failure to first attach defendant's property, cannot be validated by an order amending such order nunc pro tunc so as to provide that the publication was the method of service by substitution, since the service cannot be

completed within 20 days, and the nunc pro tunc order cannot cure the defect of failure to file proof of service within 20 days from the date of the order. Soemann v Carr, 8 A.D.2d 489, 188 N.Y.S.2d 611, 1959 N.Y. App. Div. LEXIS 7614 (N.Y. App. Div. 4th Dep't 1959).

Where divorce defendant had remarried without applying for modification of the decree so as to permit him to do so, his second wife was not entitled after his death to order modifying the decree nunc pro tunc as of date antedating their marriage. Newins v Newins, 10 A.D.2d 856, 199 N.Y.S.2d 266, 1960 N.Y. App. Div. LEXIS 10831 (N.Y. App. Div. 2d Dep't), app. denied, 8 N.Y.2d 707, 1960 N.Y. LEXIS 1820 (N.Y. 1960).

Although an interlocutory judgment in an action for divorce becomes final as of course three months after the entry thereof, a final judgment in the discretion of the court may be directed to be entered nunc pro tunc as of the day the court made oral findings, where the application is meritorious and it is necessary to avoid vitiation of a remarriage made in good faith, since the receipt and signing of formal findings was a ministerial act and the function of orders nunc pro tunc is to correct irregularities or procedural errors. Lynch v Lynch, 16 A.D.2d 157, 226 N.Y.S.2d 491, 1962 N.Y. App. Div. LEXIS 10490 (N.Y. App. Div. 4th Dep't 1962), aff'd, 13 N.Y.2d 615, 240 N.Y.S.2d 604, 191 N.E.2d 90, 1963 N.Y. LEXIS 1223 (N.Y. 1963).

13. Arrest orders

In view of CPA § 823 a motion to vacate an order of arrest, made under CPA § 844 (§ 6118 herein), would have been granted, where the plaintiff had also secured an order of attachment, provided defendant gave adequate security for the payment of any judgment which plaintiff may have recovered. Todd-Buick, Inc. v Smith, 192 N.Y.S. 459, 118 Misc. 102, 1922 N.Y. Misc. LEXIS 990 (N.Y. Sup. Ct.), aff'd, 202 A.D. 774, 194 N.Y.S. 985, 1922 N.Y. App. Div. LEXIS 5458 (N.Y. App. Div. 1922).

Where sufficient property of a defendant has been attached to satisfy plaintiff’s claim, and an order of arrest, the propriety of which is questionable, has also been issued, plaintiff should be

required to elect between the attachment and the order of arrest. Duncan v Guest, 27 Hun 467 (N.Y. 1882).

A plaintiff who has obtained an order of arrest or other provisional remedy cannot defeat a motion to vacate or modify it, by objecting that it has been under consideration more than twenty days, and an order referring the question of fact arising upon the motion, though made after the lapse of the twenty days, cannot be set aside on the plaintiff's motion. Stafford v Ambs, 8 Abb NC 237.

Opinion Notes

Agency Opinions

1. Generally

Subpoena issued by Grievance Committee and signed by Clerk of Appellate Division does not supplant requirement of court order set forth in CLS Dom Rel § 235. 2002 N.Y. Op. Att'y Gen. No. 2002-20, 2002 N.Y. AG LEXIS 56.

Research References & Practice Aids

Cross References:

Entry and filing of order, CPLR Rule 2220.

Motion affecting prior order, CPLR Rule 2221.

Docketing order as judgment, CPLR Rule 2222.

Duties of officer receiving mandate, CPLR Rule 2223.

Submission of orders for signature, CLS Family Ct R § 205.15.

Submission of orders, judgments and decrees for signature, CLS Unif Tr Ctr Rls § 202.48.

Federal Aspects:

Protective orders governing discovery and depositions generally in United States District Courts, Rule 26(c) of Federal Rules of Civil Procedure, USCS Court Rules.

Order relating to depositions before action or pending appeal in United States District Courts, Rule 27(a)(3), (b) of Federal Rules of Civil Procedure, USCS Court Rules.

Order for physical and mental examination of persons in United States District Courts, Rule 35 of Federal Rules of Civil Procedure, USCS Court Rules.

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

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

Jurisprudences:

4 NY Jur 2d Appellate Review §§ 15, 253.

28 NY Jur 2d Courts and Judges § 320.

30 NY Jur 2d Creditors' Rights and Remedies §§ 11, 12, 90, 179.

64 NY Jur 2d Habeas Corpus § 93.

67A NY Jur 2d Injunctions §§ 165, 166, 187, 188.

73 NY Jur 2d Judgments § 9.

84 NY Jur 2d Pleading §§ 234, 268, 289.

84 NY Jur 2d Pleading §§ 22, 266, 287.

56 Am Jur 2d, Motions, Rules, and Orders § 57.

5A Am Jur Pl & Pr Forms (Rev), Captions, Prayers, and Formal Parts, Forms 602– 604.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2219, Time and Form of Order.

2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶601.03.

3 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 39.05.

Matthew Bender's New York CPLR Manual:

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

CPLR Manual § 15.02. The Individual Assignment System (IAS).

CPLR Manual § 15.06. Conversion of motions and applications.

CPLR Manual § 28.16. Injunction as a provisional remedy.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Domestic Relations §§ 4.13, 5.05.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 7.05. Filing Motion Papers.

LexisNexis AnswerGuide New York Civil Litigation § 13.09. Appealing to Appellate Division.

Matthew Bender's New York Checklists:

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

Checklist for Determining Where and When to File Appeal LexisNexis AnswerGuide New York Civil Litigation § 13.06.

Checklist for Obtaining, Vacating, or Modifying Attachment LexisNexis AnswerGuide New York Civil Litigation § 14.02.

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

Checklist for Appointing or Removing Temporary Receiver LexisNexis AnswerGuide New York Civil Litigation § 14.22.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 2219:1 et seq.

LexisNexis Forms FORM 75-CPLR 2219:2—Order on Motion Under CPLR 3024 (Long Form).

LexisNexis Forms FORM 75-CPLR 2219:2A—Order Skeleton Form.

LexisNexis Forms FORM 75-CPLR 2219:3—General Form of Order Determining Motion.

LexisNexis Forms FORM 75-CPLR 2219:4—Another Form of Order Determining Motion.

LexisNexis Forms FORM 75-CPLR 2219:5—Short Form of Order.

LexisNexis Forms FORM 75-CPLR 2219:6—Notice of Settlement of Order.

LexisNexis Forms FORM 75-CPLR 2219:7—Notice of Motion to Resettle Order.

LexisNexis Forms FORM 75-CPLR 2219:8—Affidavit on Motion to Resettle Order.

LexisNexis Forms FORM 75-CPLR 2219:9—Order Directing Resettlement of Order.

LexisNexis Forms FORM 75-CPLR 2219:10—Skeleton Form for Decision Directing Settlement of Order.

LexisNexis Forms FORM 380-11:503—Order Granting Stay of Action.

LexisNexis Forms FORM 70-BC1218:1—Complaint in Action for Appointment of Receiver to Preserve Local Assets of Foreign Corporation.

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

General Form of Order

SUPREME COURT, _____ COUNTY

R 2219. Time and form of order

_____ Plaintiff

vs

_____ Defendant

Order

Index No. _____ [if assigned]

PRESENT: Hon. _____, Justice.

A motion etc. _____ _____

Now, on reading and filing, etc. _____ _____ it is

Ordered, etc. _____ _____.

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

Enter

_____

[Print signer's name below signature]

Justice, Supreme Court

_____ County

[Name and address of attorney or party serving or filing order]

[Certification and notice of entry]

Form 2

Long Form of Order.

[Some courts prefer this form of order to Form 1]

At a [Special] Term of the [Supreme] Court, Part [I] thereof, held in and for the County of [Monroe], at [the County Court House] in the City of [Rochester] on the _____ day of _____, 20_____.

Present: Hon. _____, Justice.

[Supreme] Court of [the State of New York]

[County] of [Monroe]

R 2219. Time and form of order

_____X

[John Jones]

Plaintiff,

against

Richard Doe

Defendant

_____X

Order

[or: Order to show cause]

Index No. _____

Upon reading and filing the notice of motion [or: order to show cause] dated the _____ day of _____, 20_____ [made by Hon. _____, Justice of the Supreme Court], and the affidavit of _____, sworn to the _____ day of _____, 20_____, in support thereof, and the affidavit of _____, sworn to the _____ day of _____, 20_____, in opposition thereto, and after hearing _____, attorney for _____, in support thereof, and _____, attorney for _____, in opposition thereto, and due deliberation having been had thereon,

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

ORDERED that said motion be and the same is hereby denied, but with leave to renew said motion upon new papers as said _____ may be advised.

Enter

_____

[Signed with judge's signature or initials]

_____

[Printed name of signature]

Justice, [Supreme] Court

Forms of Indorsements on Order

A. Name and Address of Attorney or Party Serving or Filing Order

Doe and Doe,

Attorneys for plaintiff,

Office and P.O. Address, Telephone No.

12 Westminster Road,

Albany, New York.

478-2626

Form 3

Short-form Order

NEW YORK SUPREME COURT

COUNTY OF _____

SPECIAL TERM, [PART _____]

_____ Plaintiff,

against

_____ Defendant.

Index number _____,

year 20_____.

PRESENT: Hon. _____, Justice.

The following papers numbered 1 to _____ [4] read on this motion, to set aside the service of the summons in the above-entitled action, this _____ day of _____, 20_____.

R 2219. Time and form of order

Calendar No. _____.

Papers Numbered

Notice of motion and affidavits annexed	[1, 2, 3]
Order to show cause and affidavits annexed	_____
Answering affidavits	[4]

Replying affidavits

Affidavits

Filed papers (county clerk's office)

Filed papers (county clerk's office)

Filed papers (county clerk's office)

(Assignment)

Order for examination and affidavits annexed

Exhibits

Copies, papers

Commission

Referee's report

Stenographer's minutes

Stipulation

Printed books

Upon the foregoing papers this motion is granted with $10. costs.

Opinion filed herewith.

Dated, New York, _____, 20_____.

_____

[Signature, with name

printed underneath]

Justice, Supreme Court

Plaintiff’s brief.

Defendant’s brief.

Relator’s brief.

Respondent’s brief.

Petitioner’s brief.

_____

Attorneys for _____

Office and P. O. Address

_____

Form 4

Order Entered on Consent

SUPREME COURT, _____ COUNTY

Order

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

PRESENT: Hon. _____, Justice.

On reading the annexed consent of the attorneys for the plaintiff and the defendant in this action, duly executed the _____ day of _____, 20_____ and on motion of _____, attorney for _____, it is

ORDERED that _____ [as—the above-entitled action be and the same is hereby discontinued without costs to either party as against the other].

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

_____

[Print signer's name below signature]

Justice, Supreme Court

_____County

Form 5

Notice of Settlement of Order

SUPREME COURT, _____ COUNTY

Notice

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

PLEASE TAKE NOTICE that the within proposed order will be presented to Mr. Justice _____, at a motion term of the Supreme 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 forenoon of that day for settlement and signature.

Dated _____, 20_____.

_____

Attorney for _____

Office and P. O. Address

Telephone No.

To:_____

Attorney for _____

Office and P. O. Address

Form 6

Notice of Entry

Sir:

Please take notice that the foregoing order is a true copy of an order entered and filed in the office of the clerk of the Supreme Court, held in and for _____ County.

Dated: _____.

Yours, etc.,

[Signature, with name

printed underneath]

Attorneys for _____

Office and P. O. Address,

Telephone No. _____

End of Document