

# NY CLS CPLR R 2217

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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)*

## **R 2217. Prior motion; ex parte motion; transfer of motion**

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- (a) Prior motion. Any motion may be referred to a judge who decided a prior motion in the action.
- (b) Affidavit on ex parte motion. An ex parte motion shall be accompanied by an affidavit stating the result of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown.
- (c) Transfer of motion. If a motion is made to a judge who is or will be for any reason unable to hear it, it may be transferred by order of such judge or by written stipulation of the parties to any other judge to whom it might originally have been made.
- (d) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivisions (a) and (c) of this rule.

## **History**

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Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 1986, ch 355, § 4, eff July 17, 1986.

Annotations

## **Notes**

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## **Prior Law:**

Earlier statutes and rules: RCP 61, 67; CCP § 771; Code Proc § 404; Gen Rules Pr 25.

## **Advisory Committee Notes:**

**Subd (a)** omits the requirements of compulsory referrals of motions seeking relief similar to that sought on a prior motion, and instead leaves referral of any motion to a judge who heard a prior motion within the discretion of the judge before whom it is brought.

**Subd (b)** assures that the judge will be advised of prior motions, for ex parte motions are made without the presence of an adverse party to advise the judge of any prior motions. The provisions of CPA § 118 and of RCP 61 specifying the consequences of noncompliance—i.e., vacatur of the order and contempt—have been omitted. These sanctions are discretionary. Power to cite for contempt and to vacate an order improperly obtained is obviously inherent in the court and need not be specifically mentioned.

**Subd (c)** is derived without change of substance from RCP 67. Like the other rules of this title, it is intended to apply to an order to show cause as well as a motion begun by service of notice, and the explicit reference to an order to show cause in the former rule is omitted. The statement that the order of transfer should be made at or before the time when the motion “is to be made” is apparently based on the old rule that a motion was “made” on the return date, which was changed by a 1941 amendment to CPA § 113. It is in any event omitted as unnecessary since it is understood that the order would have to be made at or before the return date.

## **Notes to Decisions**

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**I. Under CPLR**

**1. Generally**

While no rule in Criminal Procedure Law corresponds to CLS CPLR § 2217(b), when prosecutors make second application for search warrant to different magistrate, disclosure of prior warrant application is proper and preferred practice. *People v Bilsky*, 95 N.Y.2d 172, 712 N.Y.S.2d 84, 734 N.E.2d 341, 2000 N.Y. LEXIS 1422 (N.Y. 2000).

Where a trial term justice denied a motion to consolidate several causes of action for trial, and the motion was renewed before a calendar term justice, it must be referred for decision to the justice who made the original ruling, and the calendar term justice should not rule upon the motion himself. *George W. Collins, Inc. v Olsker-McLain Industries, Inc.*, 22 A.D.2d 485, 257 N.Y.S.2d 201, 1965 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 4th Dep't 1965).

In Article 78 proceeding to enjoin a Justice of the Supreme Court from hearing a case brought pursuant to § 330(4) of the Election Law, where justice who issued show cause order could not be present on the return date, but on that date signed an order pursuant to subd (c) of this

section, which was received in the mail the next day by the parties, and which ordered the matter transferred to another justice to be heard when he might determine, there was no lapse of jurisdiction, and the petition must be dismissed since prohibition does not lie unless there is a lack of jurisdiction or the court is exceeding its jurisdiction. *Schick v Kane*, 26 A.D.2d 386, 274 N.Y.S.2d 699, 1966 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 3d Dep't 1966).

Under CPLR § 2221 and § 2217, subd a, city seeking additional extension of time in which to file report of appraisal in tax assessment review proceeding should have applied to same judge who granted original extension, but the original extension was allowed to stand where it was based on an application for modification on a showing of a change in circumstances, i.e. a major reassessment of all city property, and a major illness of tax assessor, occurring between first and second motions. *Lansingburgh Realities, Inc. v Commissioner of Assessments & Taxation*, 42 A.D.2d 646, 345 N.Y.S.2d 152, 1973 N.Y. App. Div. LEXIS 4113 (N.Y. App. Div. 3d Dep't 1973).

In a medical malpractice action, the court properly vacated its order permitting expedient rather than personal service on defendants, but erred in basing its vacatur of the order upon plaintiff's failure to apprise the court of the existence of an ongoing traverse hearing at the time of plaintiff's ex parte application for the order permitting expedient service, where plaintiff had made no prior ex parte application for similar relief, and thus the specter of coordinate review did not present itself. *Markoff v South Nassau Community Hosp.*, 91 A.D.2d 1064, 458 N.Y.S.2d 672, 1983 N.Y. App. Div. LEXIS 16399 (N.Y. App. Div. 2d Dep't 1983), *aff'd*, 61 N.Y.2d 283, 473 N.Y.S.2d 766, 461 N.E.2d 1253, 1984 N.Y. LEXIS 4070 (N.Y. 1984).

Neither CPLR § 2217(a) nor CPLR § 2221 required the judge hearing a motion for summary judgment to transfer the hearing to the judge who had before him a previously filed motion for a permanent injunction in the same proceeding where there had been no decision on the motion for permanent injunction. *People v United Funding, Inc.*, 106 A.D.2d 846, 484 N.Y.S.2d 245, 1984 N.Y. App. Div. LEXIS 21748 (N.Y. App. Div. 3d Dep't 1984), *app. denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 1985 N.Y. LEXIS 18846 (N.Y. 1985).

CPLR § 2217(a) does not apply to successive Article 78 proceedings, since each such proceeding may be regarded as a separate suit. *Panzer v Berman*, 53 Misc. 2d 122, 277 N.Y.S.2d 186, 1967 N.Y. Misc. LEXIS 1836 (N.Y. Sup. Ct. 1967), limited, *Harvey v Finnicks*, 112 Misc. 2d 686, 447 N.Y.S.2d 397, 1982 N.Y. Misc. LEXIS 3181 (N.Y. Sup. Ct. 1982).

A proceeding brought by a district attorney to compel that he be paid the same salary as a county judge would be transferred to the judge who dismissed a prior proceeding brought several months earlier by the same petitioner against the same respondent for the same relief where, in the interim, petitioner had been elected to a new term of office and the salary figure had changed; CPLR § 2217 provides for a transfer of a motion “to a judge who decided prior motion in the action,” and the phrase “in the action” should be construed broadly to encompass successive proceedings closely related in time and with nearly identical issues in that it would be incongruous for a second court to arrive at a different result. *Harvey v Finnicks*, 112 Misc. 2d 686, 447 N.Y.S.2d 397, 1982 N.Y. Misc. LEXIS 3181 (N.Y. Sup. Ct.), dismissed, 453 N.Y.S.2d 388 (N.Y. App. Div. 4th Dep’t 1982).

Landlord was entitled to vacation of tenant’s ex parte application for stay, and court would also order that no further 72-hour notice was required to be served, and that no further ex parte applications were to be entertained by Civil Court to stay enforcement of final judgment of possession, where “countless” specious applications had been brought by and on behalf of tenant to frustrate judgment of possession that had been rendered on landlord’s behalf, applications were often presented to judges and justices of Civil and Supreme Courts who were unfamiliar with history of proceeding, and applications failed to properly recite such history. *Four Keys Leasing & Maintenance Corp. v Simithis*, 138 Misc. 2d 88, 526 N.Y.S.2d 325, 1988 N.Y. Misc. LEXIS 297 (N.Y. App. Term 1988).

Petitioner’s application in New York City Civil Court, Bronx County, did not conform to requirements of CLS CPLR § 2217(b) for ex parte motions where supporting affidavit failed to state that identical relief had previously been sought in Queens County; however, court would consider defect as cured by petitioner’s renewal application, and would entertain merits of

application. *In re Rivera*, 165 Misc. 2d 307, 627 N.Y.S.2d 241, 1995 N.Y. Misc. LEXIS 244 (N.Y. Civ. Ct. 1995).

Although motion to change venue from Westchester county to New York county was properly brought in Bronx county as “adjoining” county under CLS CPLR § 2212(a), court would exercise its authority to transfer motion to proper court under CLS CPLR § 2217(c), and thus motion would be denied without prejudice to renewal in Westchester county. *Sullivan & Donovan, L.L.P. v Bond*, 175 Misc. 2d 386, 669 N.Y.S.2d 131, 1997 N.Y. Misc. LEXIS 659 (N.Y. Sup. Ct. 1997).

Any subsequent application for the same relief as sought in a “robo-signed” affidavit supporting an eviction motion, had to comply with the requirements of N.Y. C.P.L.R. 2217(b) and the court’s directives. *2132 Presidential Assets, LLC v Carrasquillo*, 965 N.Y.S.2d 694, 39 Misc. 3d 756, 2013 N.Y. Misc. LEXIS 1054 (N.Y. Civ. Ct. 2013).

## **II. Under Former Civil Practice Laws**

### **2. Generally**

The sureties on a bond conditioned upon the prosecution of an application by a judgment debtor for a discharge before a special county judge might not escape liability thereunder although the failure of their principal to perform the condition was due to the disability of the named judge to act; under RCP 67 the application could have been made to the county judge of an adjoining county. *Cobb v Harmon*, 23 N.Y. 148, 23 N.Y. (N.Y.S.) 148, 1861 N.Y. LEXIS 11 (N.Y. 1861).

The making of a second application for an order vacating an order of arrest is a waiver of the right to appeal from the denial of the first order, and this although there was no formal leave to renew the motion. *Harris v Brown*, 93 N.Y. 390, 93 N.Y. (N.Y.S.) 390, 1883 N.Y. LEXIS 297 (N.Y. 1883).

Where, after an allowance of alimony with counsel fees pending an action for divorce, a motion to reduce the allowance is made before another justice by mutual consent of parties, the motion

will be treated as one for reargument. *Horn v Horn*, 142 A.D. 848, 127 N.Y.S. 448, 1911 N.Y. App. Div. LEXIS 402 (N.Y. App. Div. 1911).

A failure to state that no previous application has been made is not an irregularity which compels the court to refuse to grant the order or to vacate it after it has been granted. *Wooster v Bateman*, 24 N.Y.S. 112, 4 Misc. 431, 1893 N.Y. Misc. LEXIS 545 (N.Y. Super. Ct. 1893).

Motion for an order for assistance granted upon showing of new facts justifying renewal and granting of the application. *Smith v Brotsch*, 163 N.Y.S. 986, 99 Misc. 371, 1917 N.Y. Misc. LEXIS 686 (N.Y. Sup. Ct. 1917).

Where an order for the examination of judgment debtor before trial was never served and the return day has passed, such order is a nullity and may be disregarded upon application for a new order; except that the fact it was issued should be stated in the second application, and this is true whether the application for the second order is before the same or a different judge. *Dorfman v Jacobs*, 166 N.Y.S. 403, 100 Misc. 592, 1917 N.Y. Misc. LEXIS 893 (N.Y. Sup. Ct. 1917).

RCP 61 should have been followed in presenting to a justice of the supreme court for his approval the certificate of incorporation of a membership corporation. *In re Daughters of Israel Orphan Aid Soc.*, 210 N.Y.S. 541, 125 Misc. 217, 1925 N.Y. Misc. LEXIS 877 (N.Y. Sup. Ct. 1925).

Omission to state in application for ex parte order that no previous application has been made for such order is mere irregularity, especially where none had ever been made. *Floccher v Magnelli*, 106 N.Y.S.2d 305, 1951 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1951).

RCP 61 related exclusively to ex parte applications made out of court to "judge or justice" upon affidavits. It did not apply to an application to open an order so as to allow a party to introduce additional affidavits with a view to procuring a vacation of the order previously entered. *Belmont v Erie Ry.*, 52 Barb. 637, 1869 N.Y. App. Div. LEXIS 1 (N.Y. Sup. Ct. Jan. 4, 1869).

Application for correction of order denied upon the ground that it was not made before the justice making the original order. *Dinkelspiel v Levy*, 12 Hun 130 (N.Y.).

A motion noticed for chambers in the first district, if not heard on the day for which it is noticed, stands over, as a matter of course, until the next day, unless otherwise disposed of by one party or the other. *Mathis v Vail*, 10 How. Pr. 458, 1855 N.Y. Misc. LEXIS 153 (N.Y. Sup. Ct. Feb. 1, 1855).

### **3. Purpose**

RCP 61 was salutary and its enforcement was necessary for the protection of the court, to prevent application to a judge after the same application had been made to and refused by another judge, and where objection was seasonably taken the rule would have been enforced. *Mitchell v Greene*, 121 A.D. 677, 106 N.Y.S. 449, 1907 N.Y. App. Div. LEXIS 1874 (N.Y. App. Div. 1907).

### **4. Where unauthorized**

Where a motion has been denied without leave to renew, another motion for the same object may not be made upon the same state of facts. *Mugler v Castleton Hotel & Realty Co.*, 168 A.D. 492, 153 N.Y.S. 1025, 1915 N.Y. App. Div. LEXIS 8380 (N.Y. App. Div. 1915).

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

### **5. Noncompliance**

While RCP 61 required that an application for an order state that no previous application therefor had been made, the omission so to do was a mere irregularity, and failure to recite in the order that the application was objected to upon that ground was not prejudicial to the



objecting party. In re Directors of National Gramophone Corp., 82 A.D. 593, 81 N.Y.S. 853, 1903 N.Y. App. Div. LEXIS 1231 (N.Y. App. Div. 1903).

Omission to state whether previous application had been made for order extending term of office of appraisal commissioners in proceeding to acquire realty for New York City, is not jurisdictional, and such irregular order may be validated by subsequent order nunc pro tunc. In re Gillespie, 271 A.D. 767, 65 N.Y.S.2d 113, 1946 N.Y. App. Div. LEXIS 2908 (N.Y. App. Div. 1946), aff'd, 296 N.Y. 989, 73 N.E.2d 567, 296 N.Y. (N.Y.S.) 989, 1947 N.Y. LEXIS 1728 (N.Y. 1947).

The absence of a recital in the moving papers of the defendant, who has been indicted for bigamy, that the previous application for an inspection of the grand jury minutes was denied, would of itself justify the denial of the present motion for such inspection. People v Knight, 10 N.Y.S.2d 914, 170 Misc. 738, 1939 N.Y. Misc. LEXIS 1654 (N.Y. County Ct. 1939).

Where wife applied by notice of motion to modify divorce decree as to her right to visit children, without disclosing prior applications, third application was denied without prejudice. Colucci v Colucci, 119 N.Y.S.2d 535, 203 Misc. 53, 1952 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct. 1952).

Compliance with RCP 61 was condition precedent to granting of motion. Fucelli v American Soc. for Prevention, etc., 23 N.Y.S.2d 983, 1940 N.Y. Misc. LEXIS 2408 (N.Y. City Ct. 1940).

A failure to comply with the rule requiring a statement of any prior application for an order is an irregularity. Bean v Tonnelle, 24 Hun 353 (N.Y.).

Bean v Tonnelle, 24 Hun 353 (N.Y.).

## **6. —Discretion of court**

It is within the discretion of the court to deny a second examination of a judgment debtor before trial where the affidavit purporting to show reasonableness for such second examination is upon information and belief and does not state the source of such information. Schermerhorn v

Owens, 62 N.Y.S. 763, 29 Misc. 674, 7 N.Y. Ann. Cas. 280, 1899 N.Y. Misc. LEXIS 922 (N.Y. Sup. Ct. 1899).

It is within the discretion of the court to disregard the failure of an affidavit in support of a motion to vacate an injunction order to state whether any previous application for such order had been made. *Terry v Green*, 103 N.Y.S. 1014, 53 Misc. 10, 1907 N.Y. Misc. LEXIS 139 (N.Y. Sup. Ct. 1907).

## **7. Review**

Where a party fails to object at special term that a motion was made without complying with this rule, he will be deemed to have waived such objection; it may not be considered on the appeal. *In re Flaherty*, 184 A.D. 428, 171 N.Y.S. 624, 1918 N.Y. App. Div. LEXIS 6092 (N.Y. App. Div. 1918), rev'd, 226 N.Y. 76, 123 N.E. 157, 226 N.Y. (N.Y.S.) 76, 1919 N.Y. LEXIS 836 (N.Y. 1919).

## **8. Application to special proceedings**

As to whether RCP 67 applied to a special proceeding. See *In re Buchsbaum v Laue*, 118 N.Y.S. 419, 63 Misc. 374, 1909 N.Y. Misc. LEXIS 137 (N.Y. Sup. Ct. 1909).

## **9. Motion to punish judgment debtor for contempt**

An order to show cause why the defendant should not be punished for contempt may be returnable before the court or another justice than the one who issued the original order to examine the judgment debtor in supplementary proceedings. *Burr Chevrolet, Inc. v Deforest*, 274 N.Y.S. 252, 152 Misc. 912, 1934 N.Y. Misc. LEXIS 1642 (N.Y. Sup. Ct. 1934).

## **Research References & Practice Aids**

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### **Cross References:**

R 2217. Prior motion; ex parte motion; transfer of motion

Pleadings in special proceedings, CPLR § 402.

Motion affecting prior order, CPLR Rule 2221.

Procedure in proceeding against body or officer, CPLR § 7804.

### **Jurisprudences:**

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

56 Am Jur 2d, Motions, Rules, and Orders § 46.

1B Am Jur PI & Pr Forms (Rev), Affidavits, Forms 1 et seq.

### **Treatises**

#### **Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2217, Prior Motion; Ex Parte Motion; Transfer of Motion.

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 19.06.

#### **Matthew Bender's New York CPLR Manual:**

#### **Matthew Bender's New York Civil Practice:**

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

CPLR Manual § 15.03. Motion procedure.

CPLR Manual § 28.02. Provisional remedies in general; availability and election.

#### **Matthew Bender's New York Practice Guides:**

2 New York Practice Guide: Domestic Relations § 34.16.

#### **Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Civil Litigation § 7.03. Making Pretrial Motions Generally.

**Matthew Bender's New York Checklists:**

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

**Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 2217:1 et seq.

LexisNexis Forms FORM 75-CPLR 2217:1.—Notice of Motion to Vacate Ex Parte Order on Ground That Affidavit on Which It Was Granted Failed to State the Result of a Prior Motion for Similar Relief.

LexisNexis Forms FORM 75-CPLR 2217:2.—Affidavit in Support of Motion to Vacate Ex Parte Order on Ground That Affidavit on Which It Was Granted Failed to State the Result of a Prior Motion for Similar Relief.

LexisNexis Forms FORM 75-CPLR 2217:3.—Order Vacating Ex Parte Order on Ground That the Affidavit on Which It Was Granted Failed to State the Result of a Prior Motion for Similar Relief.

LexisNexis Forms FORM 75-CPLR 2217:3A.—Affidavit on Ex Parte Motion.

LexisNexis Forms FORM 75-CPLR 2217:4.—Stipulation Transferring Motion.

LexisNexis Forms FORM 75-CPLR 2217:5.—Order Transferring Motion.

LexisNexis Forms FORM 380-11:107.—Stipulation Adjourning Motion.

LexisNexis Forms FORM 380-11:201.—Stipulation Transferring Motion.

LexisNexis Forms FORM 380-11:202.—Order Transferring Motion.

LexisNexis Forms FORM 461-21:2.—Attorney's Affirmation of Regularity.

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

**Texts:**

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) §§ 20.02., 21.05., 27.06.

**Hierarchy Notes:**

NY CLS CPLR, Art. 22

**Forms**

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**Forms**

**Order Transferring Motion**

SUPREME COURT, \_\_\_\_\_ COUNTY

Order

[Title of cause]

Index No. \_\_\_\_\_ [if assigned]

A motion by the \_\_\_\_\_, named in the above entitled action for an order \_\_\_\_\_ [set forth nature of relief sought] being originally returnable before me at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ at my chambers in the City of \_\_\_\_\_ and it appearing that I will be absent on the said day [or state other inability to hear the motion] the said motion is hereby transferred to Mr. Justice \_\_\_\_\_ for a hearing on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day at his chambers in the County Court House in the City of \_\_\_\_\_.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ at \_\_\_\_\_, New York.

Enter

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[Print signer's name below signature]

Justice, Supreme Court

\_\_\_\_\_ County

New York Consolidated Laws Service

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