NY CLS CPLR § 3012

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

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

Article 30 Remedies and Pleading (§§ 3001 — 3045)

Notice

This section has more than one version with varying effective dates.

§ 3012. Service of pleadings and demand for complaint.

(a) Service of Pleadings. The complaint may be served with the summons, except that in an action arising out of a consumer credit transaction, the complaint shall be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.

(b) Service of Complaint Where Summons Served Without Complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days

after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

(c) Additional Time to Serve Answer Where Summons and Complaint Not Personally Delivered to Person to Be Served Within the State. If the complaint is served with the summons and the service is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf or if service of the summons and complaint is made pursuant to section 303, paragraphs two, three, four or five of section 308, or sections 313, 314 or 315, service of an answer shall be made within thirty days after service is complete.

(d) Extension of Time to Appear or Plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 1964, ch 388, § 10; L 1970, ch 852, § 3, eff Sept 1, 1970; L 1978, ch 528, § 4, eff Jan 1, 1979; L 1983, ch 318, § 2, eff June 21, 1983; L 2021, ch 593, § 6, effective May 7, 2022.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 193-a, 227-a, 228, 229, 233, 235, 257, 263, 264, 271, 273, 285; CCP §§ 419, 422, 431, 443 subds 2, 3, 5, 479, 480, 520, 521, 566 (part), 820-a (part); Code Proc §§ 130, 156, 183.

Advisory Committee Notes

Subd. (a) Former practice in respect to not requiring the complaint to be served with the summons is continued. The last sentence of CPA § 263 is omitted. It allowed an extension of time to answer where the defendant had been arrested before answer, but only applied to arrest on the grounds specified in CPA § 826, which has been abolished. See CPLR § 6101; introduction to article 61 of the CPLR. The granting of a provisional remedy under the new CPLR does not of itself affect the time to answer. Cf. 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 307, note 263 (1915).

Subd. (b) of this section is based upon CPA § 257. It is necessary where the summons is served without the complaint. The requirement that the demand be served within 20 days after service of the summons is omitted as unnecessary; time to appear is covered by CPLR rule 320(a). The provision that the demand may be incorporated in a notice of appearance has been deleted as unnecessary.

Subd. (c) of this section replaces former provisions which added ten days to the time to respond where the defendant was served by delivering the summons to an official of the state. CPA §§ 228(9), 299(2); Banking Law § 34; Gen Ass'ns Law § 19; Ins Law § 59(2); cf. Workmen's Comp Law § 150-a (board may order continuance). It also replaces the similar provisions that service was complete ten days after an event such as filing proof of service. CPA §§ 227-a, 229-b, 223, 235 (filing); Gen Bus Law § 250 (same); id. § 352-b (return receipt received); Ins Law § 59-a(2) (filing); Soc Welfare Law § 482-d (return receipt received); Vehicle & Traffic Law § 52 (filing); cf. Real Prop Law § 442-g (20 days after mailing). In a few cases, there were no former provisions for extending time to answer after service by delivery to a state official. E.g., Vehicle & Traffic Law § 94-p; Banking Law § 131(3) (as to clerk of Surrogate's Court). All of these provisions gave recognition to the fact that the party might not have been notified of the claims against him until some time after service was complete. Additional time to answer should be given in all such cases. Former provisions in the Consolidated Laws granting additional time to answer have been repealed so that there can be no question that only one

automatic extension is intended to be granted. This subdivision parallels the extension of time to appear granted by subd. (a) of CPLR rule 320. See the notes to that subdivision.

1977 Recommendations of the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules:

Under former practice in an action commenced by service of a summons without complaint, default was avoided by service of notice of appearance and demand for service of complaint, both steps time-limited to 20 days. In re-storing the pre-CPLR practice of permitting commencement of an action by service of a summons without complaint, the CPLR eliminated the time limit for the demand, as unnecessary (Sen. Fin. Comm. Rep. (Leg. Doc. No. 15) 418 (1961)). While this deviation from C.P.A. practice spared the defendant from exposure to a double risk of default, viz., failure to serve a notice of appearance and failure to serve a demand for a complaint, the solution produced undesirable side effects. It introduced uncertainty as to how to proceed where a summons is served without a complaint.

The basic problems created by the pertinent provision, CPLR 3012(b), are the uncertainty as to when a demand for a complaint shall be made if a summons is served without a complaint, the uncertainty as to whether and how the complaint may be served without a demand by the defendant, and the effect of the service of a demand for a complaint upon the time to appear (see Homburger and Laufer, supra at 395-398).

These questions would be resolved by providing time limits in CPLR 3012(b) which would cover all contingencies, and by requiring service of the complaint without a demand when defendant appears timely after service of an unaccompanied summons.

More specifically, the proposed amendment would provide that the demand be made within the time provided in CPLR 320(a) for an appearance, normally 20 days after service of summons.

It would further be provided that service of the complaint shall be made within 20 days after the service of the demand, or if no demand is made, within 20 days after service of the notice of appearance.

Regarding the problem of the effect of the service of the demand for a complaint upon the time to appear, the proposed amendment would provide that service of the demand would extend the time to appear until 20 days after service of the complaint.

It would also be provided that the court upon motion may dismiss the action if timely service of the complaint is not made.

Finally, if the defendant neither makes en appearance nor a demand for the complaint, he would be in default of appearing. It would then be incumbent upon the plaintiff to take proceedings for entry of judgment within one year after the default in order to avoid a dismissal of the complaint under CPLR 3215(c). The proposed mandatory 305(b) notice would assure that plaintiff could so proceed. On the other hand, if defendant appears timely it would be incumbent upon the plaintiff to serve the complaint within 20 days after service of the notice of appearance without imposing the burden of making a demand on the defendant (see Homburger and Laufer, supra at 396).

Editor's Notes

Laws 2021, ch 593, § 1, eff November 8, 2021, provides:

Section 1. This act shall be known and may be cited as the "consumer credit fairness act".

Laws 2021, ch 593, § 15, eff November 8, 2021, provides:

§ 15. This act shall take effect immediately; provided, however, that sections two, three, five, six, seven, eight, nine, ten, eleven and twelve shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to actions and proceedings commenced on or after such date; and provided, further, that section four of this act shall take effect on the one hundred fiftieth day after this act shall have become a law.

Amendment Notes

The 2021 amendment by ch 593, § 6, added "except that in an action arising out of a consumer credit transaction, the complaint shall be served with the summons" in the first sentence of (a).

Commentary

PRACTICE INSIGHTS:

DETERMINING WHEN SERVICE IS COMPLETE

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INSIGHT

At the outset of the litigation, the parties should determine under which statutory provision(s) service was effected and when service is complete. Such provisions are contained both in and outside of the CPLR. If a question about the method of service arises, the practitioner should consult the court file to determine if proof of service has been filed.

ANALYSIS

Defendant's response due within 20 days of service or within 30 days after service is complete.

Generally, a defendant has 20 or 30 days to respond to the initiating pleadings, for example, a summons with notice or summons and complaint, depending on how, upon whom, and where service is effected. CPLR 320. The 20-day period is limited to instances where service was effected within New York State, and (a) the defendant is a natural person and the summons was personally delivered to the defendant; or (b) the defendant is not a natural person, for example, a corporation, and it was either served personally, or through an agent designated by the defendant. With respect to the 30-day period, the statute states that the period begins to run

from when “service is complete.” Thus, close attention must be paid to the applicable statutes — some of which are not located in the CPLR —- to determine when service is complete. It is important to note that service may not be complete upon either actual service or upon filing of proof of service. For example,

1. With respect to leave and mail service and nail and mail service under CPLR 308(2) and (4), service is not complete until 10 days after proof of service has been filed with the clerk. Thus, a defendant has at least 40 days to appear when a summons and complaint is served by these methods.

2. Under BCL § 307, service on an unauthorized foreign corporation is complete 10 days after proof of service, affidavit of compliance and other applicable documents are filed.

3. Service upon non-resident motorists involved in accidents in New York through the Secretary of State is complete upon filing the proof of service, affidavit of compliance and other applicable documents under VTL § 253.

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I. Under CPLR

1. In general

Recommencement of libel actions pursuant to CPLR 205(a) was proper as an alternative to a motion to open a default judgment pursuant to CPLR 5015, where plaintiff's original actions has been dismissed on defendant's motion made under CPLR 3012(b), since the dismissal was without prejudice and not equivalent to a dismissal for failure to prosecute under CPLR 3216, where plaintiff's delay in serving complaints was minor and of short duration. Virgilio v Ketchum, 54 Misc. 2d 111, 281 N.Y.S.2d 376, 1967 N.Y. Misc. LEXIS 1414 (N.Y. Sup. Ct. 1967).

2. Purpose of statute

A motion to dismiss for failure to serve a timely complaint is denied in a *pro se* action commenced January 4, 1979 by service of a bare summons three days after the amendments to CPLR 305 (subd [b]) and 3012 (subd [b]) providing that a summons must be accompanied by a complaint or contain an indorsement as to the nature of the action and the relief sought, as well as the sum of money for which judgment may be taken in case of default, and that service of a notice of appearance warrants service of a complaint within 20 days (L 1978, ch 528), became effective; the penalty of dismissal for failure to serve a complaint is discretionary (CPLR 3012, subd [b]), and defendant's service of the notice of appearance and demand for a complaint, albeit in the wrong court, conferred jurisdiction. CPLR 305 (subd [b]) was intended as a shield to protect an unwary defendant from default judgment without proper notice, not a sword to trap a tardy or inattentive plaintiff into dismissal. Bal v Court Employment Project, Inc., 73 A.D.2d 69, 424 N.Y.S.2d 715, 1980 N.Y. App. Div. LEXIS 9719 (N.Y. App. Div. 1st Dep't 1980).

3. Service of pleadings

In civil action commenced by service of summons with notice, defendant's answer or CLS CPLR § 32ll(a)(5) motion to dismiss was not required to be served on plaintiff within 20 days from service of summons with notice, since CLS CPLR § 3012(a) provides that service of answer or reply shall be made within 20 days after service of pleading to which it responds, and under CLS

CPLR § 3011 plaintiff's initial pleading in action is complaint rather than summons with notice served without complaint. Olsen v 432 East 57th Street Corp., 145 Misc. 2d 970, 548 N.Y.S.2d 864, 1989 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 1989).

Tenant in a rent stabilized apartment was given leave to file an amended answer after his landlord brought a holdover proceeding seeking possession of the unit because an excuse for the delay could be found and there was no surprise to the landlord because nothing in the amended answer was new. Kuper v Bravo, 61 Misc. 3d 274, 82 N.Y.S.3d 805, 2018 N.Y. Misc. LEXIS 2870 (N.Y. Civ. Ct. 2018).

In a diversity mortgage foreclosure action in which "nail and mail" service was made under N.Y. C.P.L.R. § 308(4), defendant had 21 days from the mailing of process, which was the latter of the two steps performed, to file an answer; the time limit under Fed. R. Civ. P. 12(a) applied rather than the 30-day period under N.Y. C.P.L.R. § 3012(c), nor did the extended time period under Fed. R. Civ. P. 6(d) apply to service of the original complaint. Although the answer was filed two days after the deadline, it was accepted absent willful default or prejudice. Kondaur Capital Corp. v Cajuste, 849 F. Supp. 2d 363, 2012 U.S. Dist. LEXIS 43257 (E.D.N.Y. 2012).

4. —Generally

Where plaintiffs are relieved of their default on condition that sum of money be paid simultaneously with service of complaint, such payment should be $250, rather than $1,000. Passas v Razis & Ross, P.C., 111 A.D.2d 377, 489 N.Y.S.2d 860, 1985 N.Y. App. Div. LEXIS 51475 (N.Y. App. Div. 2d Dep't 1985).

Plaintiffs were not entitled to entry of default judgment in personal injury action, even though corporate defendant defaulted in appearing when it failed either to answer or make motion to dismiss within 20 days of date of service on Secretary of State, where defendant had, in fact, appeared byservice of answer 2 years before service on Secretary of State, albeit under misnomer, and plaintiffs were granted leave to amend their summons and complaint in order to

correct misnomer. Ober v Rye Town Hilton, 159 A.D.2d 16, 557 N.Y.S.2d 937, 1990 N.Y. App. Div. LEXIS 8850 (N.Y. App. Div. 2d Dep't 1990).

Where in a mortgage foreclosure action plaintiff prepared an amended complaint to meet statutory requirements necessary to include the United States as a party defendant by reason of federal tax liens recorded against other defendants, and that amended complaint contained no new or additional claim for relief against the defaulting defendant, service of a copy of the amended pleading upon defaulting defendant was not required, since liability remained unchanged. Brandenberg v Tirino, 59 Misc. 2d 630, 300 N.Y.S.2d 142, 1969 N.Y. Misc. LEXIS 1558 (N.Y. Sup. Ct. 1969), aff'd, 34 A.D.2d 737, 311 N.Y.S.2d 965, 1970 N.Y. App. Div. LEXIS 6569 (N.Y. App. Div. 2d Dep't 1970).

Where affidavits of service annexed to moving papers indicated that only summons with notice was served on defendants when action was commenced and where notice of motion and moving affidavit were dated September 11, 1974, once defendants served their notice of appearance and demand on August 22, 1974, they became entitled to a copy of plaintiff’s complaint. Chemical Bank--Eastern, N. A. v Love Lumber Co., 80 Misc. 2d 415, 361 N.Y.S.2d 1001, 1974 N.Y. Misc. LEXIS 1902 (N.Y. Sup. Ct. 1974).

A motion by defendant corporation served out-of-state with a summons and complaint to vacate a default judgment entered after its failure to serve an answer within 20 days would be granted on the basis that defendant had served an answer with 30 days, in that the reference to CPLR § 313 in CPLR § 3012(c) is intended in all cases to give a defendant who is served out-of-state 30 days to answer the complaint, including defendant corporation under CPLR § 311(1); moreover, plaintiff itself extended defendant’s time to answer to 30 days after service of process, by serving a notice of summons on defendant that clearly stated defendant had 30 days to answer if the summons was delivered without the state. Quality Food Oils, Inc. v Caruso Products Distributing Corp., 127 Misc. 2d 1097, 488 N.Y.S.2d 341, 1985 N.Y. Misc. LEXIS 2864 (N.Y. Sup. Ct. 1985).

Service of supplemental summons and amended complaint in pending action upon party rather than party's attorney as required by CPLR 2103 and 3012 does not divest court of personal jurisdiction where jurisdiction has previously been properly obtained over that party. Cooky's Island Steak Pub, Inc. v Yorkville Electric Co., 130 Misc. 2d 869, 497 N.Y.S.2d 1005, 1986 N.Y. Misc. LEXIS 2441 (N.Y. Sup. Ct. 1986).

5. —Acceptance of pleadings

Where plaintiff was free to make service of complaint, there was no basis for compelling defendant to accept service of complaint. Maidenbaum v Ellis Hospital, 51 A.D.2d 1075, 380 N.Y.S.2d 825, 1976 N.Y. App. Div. LEXIS 11913 (N.Y. App. Div. 2d Dep't 1976).

Defendant's retention of complaint does not serve to waive late service thereof. De Jose v Hempstead, 25 Misc. 2d 780, 208 N.Y.S.2d 6, 1960 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Ct. 1960).

6. —Service without complaint

Court erred in denying defendant's motion to dismiss for plaintiffs' failure to timely serve complaint where plaintiffs proffered no excuse for their delay and failed to submit affidavit of merit. DeRosier v Crowley, 226 A.D.2d 1117, 642 N.Y.S.2d 834, 1996 N.Y. App. Div. LEXIS 5620 (N.Y. App. Div. 4th Dep't 1996).

Plaintiff husband had right to discontinue his divorce action through service of notice on wife, without seeking court order, where neither complaint nor responsive pleading was ever served. Newman v Newman, 245 A.D.2d 353, 665 N.Y.S.2d 423, 1997 N.Y. App. Div. LEXIS 12867 (N.Y. App. Div. 2d Dep't 1997).

There is no provision in Civil Practice Law and Rules for service of counterclaim where summons is served without complaint, and subsequent complaint is never filed; counterclaim

may be interposed only through service of answer. Newman v Newman, 245 A.D.2d 353, 665 N.Y.S.2d 423, 1997 N.Y. App. Div. LEXIS 12867 (N.Y. App. Div. 2d Dep't 1997).

Purported counterclaim asserted by defendant wife in divorce action was nullity where husband had served summons without complaint, and no subsequent complaint was ever filed. Newman v Newman, 245 A.D.2d 353, 665 N.Y.S.2d 423, 1997 N.Y. App. Div. LEXIS 12867 (N.Y. App. Div. 2d Dep't 1997).

Dismissing father's actions against his daughter and son-in-law and a mortgagee (defendants) in their entirety for failure to serve a summons without a complaint under the Rule was error because he had submitted an affidavit of merit and a proposed verified complaint in opposition to defendants' motions showing merit to his proposed cause of action for conversion, and defendants did not take issue with the trial courts' rulings in that regard. Barker v Gervera, 218 A.D.3d 1159, 193 N.Y.S.3d 598, 2023 N.Y. App. Div. LEXIS 4081 (N.Y. App. Div. 4th Dep't 2023).

7. —Affirmative defense

Where plaintiff attempted to serve a summons and complaint on defendant by substituted service, defendant's answer included an affirmative defense of lack of personal jurisdiction on the basis of improper service, and plaintiff re-served the same summons and complaint personally on defendant, defendant was obligated to serve a new answer to the complaint which accompanied the properly served summons; however his refusal to do so was not ground for a default, since a failure timely to serve a pleading as a result of a legitimate disagreement between opposing counsel does not constitute law office failure, and thus, defendant's time to serve an answer would be extended pursuant to CPLR § 3012(d). Heusinger v Russo, 96 A.D.2d 883, 466 N.Y.S.2d 36, 1983 N.Y. App. Div. LEXIS 19478 (N.Y. App. Div. 2d Dep't 1983).

8. —Cross-complaint

Where plaintiff appeared and argued that court should vacate a prior order dismissing their cause of action and no appeal was taken within the proper time of denial of such motion, plaintiff could not later move to vacate the order on the grounds that there was an “excusable default” since there was no default on the prior motion and they were not entitled to relitigate question of excuse for default. Piaker v Strong, 40 A.D.2d 1057, 338 N.Y.S.2d 978, 1972 N.Y. App. Div. LEXIS 3046 (N.Y. App. Div. 3d Dep't 1972).

A defendant may compel his codefendant to accept service of his answer containing a cross complaint against the latter under this section. Kaufman v Mallin, 45 Misc. 2d 541, 257 N.Y.S.2d 193, 1964 N.Y. Misc. LEXIS 1127 (N.Y. Sup. Ct. 1964).

Naming persons in plaintiff’s summons did not make them parties, but personal service of summons, complaint and copy of answer containing cross claim was compliance with statute and was analogous to third-party complaint insofar as third persons were concerned, and they became defendants to extent of cross claims against them. Rubin v A. C. Kluger & Co., 86 Misc. 2d 1014, 383 N.Y.S.2d 828, 1976 N.Y. Misc. LEXIS 2567 (N.Y. Civ. Ct. 1976).

Cross claim for apportionment of damages, based upon a contingency which has not yet occurred, raises issues of law and no default judgment can be entered on the cross claim until trial so that one defendant, even though tardy in serving its cross claim, was not in default where the case has not yet been noticed for trial and would not be required to file affidavit of merits in order to obtain permission to serve the cross claim. Meckley v Hertz Corp., 88 Misc. 2d 605, 388 N.Y.S.2d 555, 1976 N.Y. Misc. LEXIS 2711 (N.Y. Civ. Ct. 1976).

Court did not have jurisdiction over state’s counterclaim, and was powerless to enter judgment on counterclaim, where state mistakenly served its amended answer and counterclaim on its own former attorney rather than attorney for claimants, and service was never made on attorney for claim ants; judgment for state on counterclaim would be vacated despite state’s contentions that, since its counsel referred to counterclaim during trial, claimants were not taken by surprise and suffered no prejudice from failure to serve counterclaim. Gildea v State, 133 Misc. 2d 269, 507 N.Y.S.2d 127, 1986 N.Y. Misc. LEXIS 2862 (N.Y. Ct. Cl. 1986).

In commercial nonpayment summary proceeding involving premises alleged to be commercial space in loft, counterclaim, even if valid, would be dismissed for lack of personal jurisdiction where respondent did not properly serve summons and answer containing counterclaims as required by CLS CPLR §§ 3019(d) and 3012(a). Linzer v Bal, 184 Misc. 2d 132, 706 N.Y.S.2d 831, 2000 N.Y. Misc. LEXIS 106 (N.Y. Civ. Ct. 2000).

9. —Defendant already in case

There is no statute or decisional precedent which would require in all cases that a defendant already in an action be served with original process if a new claim is to be made against it, whether by a newly added plaintiff or otherwise. Patrician Plastic Corp. v Bernadel Realty Corp., 25 N.Y.2d 599, 307 N.Y.S.2d 868, 256 N.E.2d 180, 1970 N.Y. LEXIS 1619 (N.Y. 1970).

10. Limitation of actions

Where plaintiffs, injured in an accident allegedly caused by defective condition of their new car's exhaust pipe, served a summons without complaint on car manufacturer in August of 1971, where the action lay dormant until December of 1972 when a complaint was attempted to be served on defense attorneys who returned it, and where plaintiffs then commenced a new action by serving a new summons and complaint, Special Term correctly applied the then applicable law and, under the Uniform Commercial Code's statute of limitations, dismissed the complaint on the ground that over four years had elapsed between the September, 1968 sale of the car and service of the second summons with complaint. Weinstein v General Motors Corp., 51 A.D.2d 335, 381 N.Y.S.2d 283, 1976 N.Y. App. Div. LEXIS 11073 (N.Y. App. Div. 1st Dep't 1976).

Cause of action in negligence for personal injury was barred by statute of limitations where it was commenced over three years after mishap in question and over one year after decedent's death and action similarly grounded in negligence was also time barred, even though nominally

a contract action. Lynch v Albany Medical Center Hospital, 52 A.D.2d 653, 381 N.Y.S.2d 554, 1976 N.Y. App. Div. LEXIS 12311 (N.Y. App. Div. 3d Dep't 1976).

In a personal injury action, the trial court improperly granted defendant an enlargement of time within which to answer the complaint, where under either party's version of the facts, defendant attempted to serve its answer either 28 or 33 days after the expiration of the last extension of time to answer and 10 months after the answer was due under CPLR § 3012(a), and the affidavit submitted by defendant respecting a purported oral stipulation contained nothing indicating that defendant had any basis for believing that its answer could be interposed at some later date if it decided to litigate rather than compromise. Plouff v Brooklyn Union Gas Co., 94 A.D.2d 739, 462 N.Y.S.2d 502, 1983 N.Y. App. Div. LEXIS 18189 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 702, 1983 N.Y. LEXIS 6259 (N.Y. 1983).

Time for filing cause of action otherwise barred by 3-year limitation period provided in CPLR § 214, subd 4 was not extended by 6 month savings provisions of CPLR § 205, subd (a) where dismissal pursuant to CPLR § 3012, subd (b) for failure to serve a complaint was a dismissal "for neglect to prosecute action" within meaning of CPLR § 205, subd a. Fisher v Tier Oil Co., 75 Misc. 2d 162, 347 N.Y.S.2d 512, 1973 N.Y. Misc. LEXIS 1702 (N.Y. Sup. Ct. 1973).

CLS CPLR § 3012 provision that "court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served" does not authorize judicial extension of time to plead beyond time prescribed by statute of limitations; accordingly, court could not excuse commencement of personal injury action one day after running of 3-year limitation period because of illness of plaintiff's attorney. Peterson v Long, 136 Misc. 2d 725, 519 N.Y.S.2d 201, 1987 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1987).

11. Demand for complaint, generally

Where no demand was ever made by defendant for complaint, there was no basis for dismissal for failure to serve complaint. Maidenbaum v Ellis Hospital, 51 A.D.2d 1075, 380 N.Y.S.2d 825, 1976 N.Y. App. Div. LEXIS 11913 (N.Y. App. Div. 2d Dep't 1976).

Appearance of defendant does not automatically entitle him to a copy of complaint in absence of a demand. Ardila v Roosevelt Hospital, 55 A.D.2d 557, 389 N.Y.S.2d 853, 1976 N.Y. App. Div. LEXIS 15240 (N.Y. App. Div. 1st Dep't 1976).

There could be no default in service of the complaint in absence of a demand therefore and, hence, trial court was without power to grant motion of defendant to dismiss for failure to serve complaint and plaintiff was not required to offer an excuse for failure and affidavit on merits. Ardila v Roosevelt Hospital, 55 A.D.2d 557, 389 N.Y.S.2d 853, 1976 N.Y. App. Div. LEXIS 15240 (N.Y. App. Div. 1st Dep't 1976).

In an action arising out of a rent strike to enjoin defendants from interfering with contractual relations between plaintiff and its tenant by collecting rent from plaintiff's tenants, it was an abuse of discretion to deny a preliminary injunction where plaintiff had shown a likelihood that it would succeed in obtaining an injunction and where plaintiff had made a clear showing that it would suffer irreparable harm unless granted the temporary relief in that the loss of rental income would jeopardize plaintiff's ability to maintain services for the premises. Further, plaintiff's failure to serve a complaint would not bar the issuance of a preliminary injunction since the action had been properly commenced by service of the summons with notice (CPLR § 305, subd. [b], CPLR § 3012, subd. [b]), and since the notice and affidavit in support of the injunction established the existence of a cause of action for a permanent injunction (CPLR §§ 6301, 6312, subd. [a]). Fairfield Presidential Associates v Pollins, 85 A.D.2d 653, 445 N.Y.S.2d 229, 1981 N.Y. App. Div. LEXIS 16468 (N.Y. App. Div. 2d Dep't 1981).

Where plaintiff challenged defendant's dismissal motion for lack of standing, the challenge was without merit because defendant filed an appearance, made a demand for a complaint pursuant to N.Y. C.P.L.R. 3012(b), and moved to dismiss the complaint on statute of limitations grounds before plaintiff ever served plaintiff's complaint and cross-moved for a default judgment. Dooley v 603 W. 139th St. Realty Corp., 11 A.D.3d 403, 783 N.Y.S.2d 562, 2004 N.Y. App. Div. LEXIS 12715 (N.Y. App. Div. 1st Dep't 2004).

12. Dismissal for failure to serve complaint, generally

Where there was neither excuse nor justification for plaintiff's failure to serve complaint over 40 months, action was properly dismissed under subdivision (b) hereof. Waldron v Ward, 24 A.D.2d 470, 260 N.Y.S.2d 850, 1965 N.Y. App. Div. LEXIS 3935 (N.Y. App. Div. 2d Dep't 1965).

The plaintiff's failure to comply with a demand to resume prosecution of the action, or, in the alternative, to produce papers in opposition to a motion to dismiss setting forth an adequate statement justifying its delay of more than two years together with an affidavit of merit required a dismissal of the action. Huether v Blad, 35 A.D.2d 774, 316 N.Y.S.2d 746, 1970 N.Y. App. Div. LEXIS 3644 (N.Y. App. Div. 4th Dep't 1970).

Dismissal of first action, pursuant to CPLR 3012, subd (b), for failure to serve a complaint constitutes a dismissal of the complaint for neglect to prosecute the action under the terms of CPLR 205. Wright v Farlin, 42 A.D.2d 141, 346 N.Y.S.2d 11, 1973 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 3d Dep't), app. dismissed, 33 N.Y.2d 657, 348 N.Y.S.2d 980, 303 N.E.2d 705, 1973 N.Y. LEXIS 1064 (N.Y. 1973).

Defendant was entitled to dismissal of personal injury action where plaintiffs failed to serve complaint for more than 6 months after defendant served notice of appearance and demand for complaint, defendant promptly rejected service as untimely, plaintiffs failed to demonstrate legal merit of claims by failing to submit attorney's affirmation or verified complaint by someone with personal or firsthand knowledge of underlying facts of victim's fall and defendant's alleged negligence, and excuse of law office failure amounted to mere inadvertence and inexcusable neglect. Marion v Notre Dame Academy High School, 133 A.D.2d 614, 519 N.Y.S.2d 721, 1987 N.Y. App. Div. LEXIS 51651 (N.Y. App. Div. 2d Dep't 1987).

In medical malpractice action against municipal hospital, plaintiff's decedent, 70 years of age, sustained fall in hospital, which resulted in fractured hip, and consequential surgery–decedent expired little over three months later–although death certificate clearly indicates long–standing coronary conditions as cause of death, plaintiff contends that death proximately resulted from

fall–plaintiff served summons, which was followed by defendant's demand for complaint–plaintiff failed to serve complaint until seven months later, which was then rejected as untimely–motion court did not abuse its discretion in concluding that plaintiff's original allegations did not suffice as reasonable excuse for delay in serving verified complaint (CPLR 3012 [b], [d])–nor should discretion be exercised to grant plaintiff relief on basis of allegations of law office failure (CPLR 2005). Watson v New York City Health & Hosps. Corp., 159 A.D.2d 288, 552 N.Y.S.2d 296, 1990 N.Y. App. Div. LEXIS 2634 (N.Y. App. Div. 1st Dep't 1990).

Supreme Court abused its discretion in conditionally allowing plaintiff to serve late complaint and not dismissing it outright pursuant to CPLR 3012 (b); failure to serve timely complaint is generally dismissible default unless motion is successfully met by satisfactory excuse and affidavit of merits; here, no satisfactory or credible excuse for delay is offered. Dattoria v Dattoria, 161 A.D.2d 1009, 557 N.Y.S.2d 579, 1990 N.Y. App. Div. LEXIS 6252 (N.Y. App. Div. 3d Dep't 1990).

Defendant is entitled to summary judgment on his counterclaim; plaintiffs' failure to serve reply or move to dismiss counterclaim within 20 days from service of defendant's answer renders them in default; plaintiffs made no application to be relieved of their default, nor did they offer explanation for their failure to comply with statutory pleading requirements; even now, they do not seek to serve late reply; there is no authority for permitting court to sua sponte abrogate pleading requirement in absence of proffered justification; accordingly, plaintiffs' remedy is to seek to be relieved of their apparently unintended default pursuant to CPLR 3012 (d). Brody v St. Onge, 167 A.D.2d 671, 563 N.Y.S.2d 251, 1990 N.Y. App. Div. LEXIS 13597 (N.Y. App. Div. 3d Dep't 1990).

Medical malpractice action should have been dismissed for failure to serve complaint where (1) defendant served notice of appearance and demand for complaint on October 18, 1993, (2) on November 6, 1993, plaintiff's counsel made written request for extension of time to file complaint, (3) defendant did not respond to this request, but moved to dismiss under CLS CPLR § 3012(b), and (4) plaintiff moved for extension of time under CLS CPLR § 2004 on December

15, 1993, but did not provide affidavit of merit. Hommell v Albany Medical Ctr. Hosp., 209 A.D.2d 772, 617 N.Y.S.2d 991, 1994 N.Y. App. Div. LEXIS 10881 (N.Y. App. Div. 3d Dep't 1994).

Defendant was not precluded from moving to dismiss action for plaintiffs' failure to serve complaint on demand by virtue of plaintiff's automatic stay in bankruptcy; automatic stay is inapplicable to suits by bankrupt or debtor. Kuntz v Lake Placid Olympic Organizing Committee of 1980, Inc., 148 Misc. 2d 649, 561 N.Y.S.2d 518, 1990 N.Y. Misc. LEXIS 531 (N.Y. Sup. Ct. 1990).

Where plaintiff served the complaint four days late and his opposition papers failed to address the service issue or address any explanation for the delay, it was not necessary to consider whether he demonstrated a potentially meritorious cause of action and the action was dismissed. Antoine v White, 60 Misc. 3d 348, 76 N.Y.S.3d 821, 2018 N.Y. Misc. LEXIS 2398 (N.Y. Sup. Ct. 2018).

13. —Dismissal not mandatory

Defendant was not entitled to dismissal of action to recover sum due on personal guarantee, despite plaintiff's attorneys' failure to timely serve complaint, where there was apparent merit to action, plaintiff did not intend to abandon action, delay in serving complaint was neither willful nor protracted, and defendant was not prejudiced thereby. Joseph T. Ryerson & Son, Inc. v Petito, 133 A.D.2d 668, 519 N.Y.S.2d 947, 1987 N.Y. App. Div. LEXIS 51709 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 71 N.Y.2d 889, 527 N.Y.S.2d 770, 522 N.E.2d 1068, 1988 N.Y. LEXIS 224 (N.Y. 1988), app. dismissed, 72 N.Y.2d 909, 532 N.Y.S.2d 756, 528 N.E.2d 1229, 1988 N.Y. LEXIS 1793 (N.Y. 1988).

Under subdivision (b), dismissal of an action is not mandatory if the complaint is not served within 20 days after service of the demand. Kreiling v Jayne Estates, Inc., 51 Misc. 2d 895, 274 N.Y.S.2d 291, 1966 N.Y. Misc. LEXIS 1420 (N.Y. Sup. Ct. 1966).

The liberal reading of subd (b) of this section does not require an interpretation that the complaint must be served within the 20 days after the demand, but it merely provides that if it is not served within that time the court upon motion may dismiss. Geffen Motors Inc. v Chrysler Corp., 54 Misc. 2d 403, 283 N.Y.S.2d 79, 1967 N.Y. Misc. LEXIS 1339 (N.Y. Sup. Ct. 1967).

14. —Discretion of court

Where, in a personal injury action, Special Term denied a motion by the defendant to dismiss due to plaintiff's failure to serve a complaint within 20 days following service of a demand for the complaint (CPLR 3012, subd [b]) and the Appellate Division affirmed, certifying for consideration by the Court of Appeals the issue whether Special Term's order constituted an abuse of discretion as a matter of law, the issue certified by the Appellate Division posed a question of law "decisive of the correctness of its determination" (CPLR 5713); while the Court of Appeals has no power to review an exercise of discretion by the courts below in the ordinary case, the possibility that the lower court's discretion was abused gives rise to a question of law cognizable in the Court of Appeals. Barasch v Micucci (1980) 49 NY2d 594, 427 NYS2d 732, 404 NE2d 1275 superseded by statute as stated in State Farm Mut. Auto. Ins. Co. v Viger (1983, 3d Dept) 94 App Div 2d 592, 464 NYS2d 857, Wagenknecht v Government Employees Ins. Co., 97 A.D.2d 407, 467 N.Y.S.2d 237, 1983 N.Y. App. Div. LEXIS 19986 (N.Y. App. Div. 2d Dep't 1983) and Eldre Components, Inc. v Comten, Inc., 97 A.D.2d 940, 468 N.Y.S.2d 734, 1983 N.Y. App. Div. LEXIS 20737 (N.Y. App. Div. 4th Dep't 1983).

Granting of a dismissal pursuant to subd (b) of this section is an exercise of judicial discretion. Lehigh V. R. Co. v North American Van Lines, Inc., 25 A.D.2d 923, 270 N.Y.S.2d 83, 1966 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 3d Dep't 1966).

A motion to dismiss for failure to serve a complaint is addressed to the court's discretion. Estate of Le Bost v Chrysler Motors Corp., 36 A.D.2d 834, 320 N.Y.S.2d 934, 1971 N.Y. App. Div. LEXIS 4308 (N.Y. App. Div. 2d Dep't 1971).

The determination of a motion to dismiss for failure to timely serve a complaint pursuant to CPLR § 3012, subd b rests in the sound discretion of the court. Murphy v Sullivan, 42 A.D.2d 665, 345 N.Y.S.2d 231, 1973 N.Y. App. Div. LEXIS 4028 (N.Y. App. Div. 3d Dep't 1973).

Defendants' motions to dismiss on the ground of untimely service of the complaint would be granted where delay of 15 months after demand had been made was inexcusable in that counsel had waited more than a year for the results of an unrelated investigation, and the complaint had not been served until five months after counsel had obtained the results. Krantz v Albert Mendel & Son, Inc., 89 A.D.2d 762, 454 N.Y.S.2d 47, 1982 N.Y. App. Div. LEXIS 17880 (N.Y. App. Div. 3d Dep't 1982), app. dismissed in part, 58 N.Y.2d 822, 459 N.Y.S.2d 270, 445 N.E.2d 653, 1983 N.Y. LEXIS 2824 (N.Y. 1983), aff'd, 60 N.Y.2d 667, 468 N.Y.S.2d 99, 455 N.E.2d 658, 1983 N.Y. LEXIS 3371 (N.Y. 1983).

Default judgment was properly vacated; defendant's timely demand for complaint extended his time to appear until 20 days after service of complaint; complaint was never served; therefore defendant was never in default (see, CPLR 3012 [b])–Supreme Court did not improvidently exercise its discretion in dismissing action pursuant to CPLR 3012 (b). Lombardo v Reed, 171 A.D.2d 779, 567 N.Y.S.2d 607, 1991 N.Y. App. Div. LEXIS 3688 (N.Y. App. Div. 2d Dep't 1991).

Supreme Court had power to entertain divorce action in interest of judicial economy where it was aware that no complaint had been served or filed but allowed trial to begin, and to continue for 3 days, on representations that complaint would be forthcoming. Anostario v Anostario, 255 A.D.2d 777, 680 N.Y.S.2d 279, 1998 N.Y. App. Div. LEXIS 12485 (N.Y. App. Div. 3d Dep't 1998).

A court has discretionary power to permit late service of a complaint beyond the 20-day period fixed by subd (b) of CPLR 3012 upon good cause shown and regardless of whether the application was made before or after the expiration of the time fixed by CPLR 2004. Geffen Motors Inc. v Chrysler Corp., 54 Misc. 2d 403, 283 N.Y.S.2d 79, 1967 N.Y. Misc. LEXIS 1339 (N.Y. Sup. Ct. 1967).

15. — —Abuse of discretion found

In a personal injury action wherein the complaint was served some five and one-half months after the defendant served a demand for the complaint, it was an abuse of discretion for the Supreme Court to deny a motion by the defendant to dismiss (CPLR 3012, subd [b]) on the ground that the defendant had not been prejudiced by plaintiff's delay in serving the complaint, since the absence of prejudice to the defendant cannot serve as a basis for withholding relief under CPLR 3012 (subd [b]), and moreover, although the Supreme Court found that plaintiff had a meritorious cause of action, its finding is without support, since it was based solely upon the affidavit of plaintiff's attorney, who had no personal knowledge of the facts. Finally, plaintiff failed to present any credible justification for the protracted delay in serving the complaint, in that "law office failures" are insufficient as a matter of law to defeat a motion for dismissal under CPLR 3012 (subd [b]); although the decision to grant or deny relief under CPLR 3012 (subd [b]) is ordinarily a matter of the lower courts' discretion, defendant is entitled to dismissal in this case as a matter of law. Barasch v Micucci (1980) 49 NY2d 594, 427 NYS2d 732, 404 NE2d 1275 superseded by statute as stated in State Farm Mut. Auto. Ins. Co. v Viger (1983, 3d Dept) 94 App Div 2d 592, 464 NYS2d 857, Wagenknecht v Government Employees Ins. Co., 97 A.D.2d 407, 467 N.Y.S.2d 237, 1983 N.Y. App. Div. LEXIS 19986 (N.Y. App. Div. 2d Dep't 1983) and Eldre Components, Inc. v Comten, Inc., 97 A.D.2d 940, 468 N.Y.S.2d 734, 1983 N.Y. App. Div. LEXIS 20737 (N.Y. App. Div. 4th Dep't 1983).

The failure to serve a complaint more than four years after the accident and the complete neglect to serve a complaint for 18 months after service of defendant's demand for complaint is inexcusable, and an extension granted by Special Term was an improvident exercise of discretion. Kushniruk v Gorczyca, 25 A.D.2d 615, 267 N.Y.S.2d 739, 1966 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 4th Dep't 1966).

Lower court abused its discretion in denying defendant's motion to dismiss medical malpractice action for failure to timely serve complaint where 20 months elapsed between defendant's demand therefor and filing of motion to dismiss and where plaintiff's excuse and affidavit of

merits submitted in opposition to motion were unsatisfactory. Delia v Ramapo General Hospital, 47 A.D.2d 522, 362 N.Y.S.2d 567, 1975 N.Y. App. Div. LEXIS 8576 (N.Y. App. Div. 2d Dep't 1975).

Where record failed to disclose any sufficient excuse for delay of more than 20 months in service of complaint following demand thereof, denial of defendant's motion to dismiss malpractice action was an abuse of discretion. Frangione v Cordasco, 47 A.D.2d 996, 368 N.Y.S.2d 88, 1975 N.Y. App. Div. LEXIS 9493 (N.Y. App. Div. 4th Dep't 1975).

Where hospital records indicated that female plaintiff's operation took place in 1966, at which time she was not a minor, and she did not allege that she was adjudicated an incompetent, it was abuse of discretion for the Supreme Court, Special Term, to vacate order dismissing medical malpractice action for failure to serve a complaint after receiving a demand therefor, regardless of whether defendant was prejudiced in its ability to present a defense on merits. Floria v Cook, 59 A.D.2d 771, 398 N.Y.S.2d 725, 1977 N.Y. App. Div. LEXIS 13814 (N.Y. App. Div. 2d Dep't 1977).

It was error as matter of law not to unconditionally grant defendant's motion to dismiss for failure to serve complaint under CLS CPLR § 3012 where, in response to motion, plaintiff submitted only affirmation of her attorney who made no reference to merits or nature of plaintiff's case. Jones v TSS Seedman's, Inc., 131 A.D.2d 728, 516 N.Y.S.2d 786, 1987 N.Y. App. Div. LEXIS 48184 (N.Y. App. Div. 2d Dep't 1987).

It was abuse of discretion to deny defendant's motion to dismiss action for plaintiff's failure to timely serve complaint where plaintiff failed to show reasonable excuse for her delay, and affidavit of merit submitted to court failed to show meritorious cause of action. Snyder v Blinder, 230 A.D.2d 728, 646 N.Y.S.2d 299, 1996 N.Y. App. Div. LEXIS 8284 (N.Y. App. Div. 2d Dep't 1996).

Trial court erred in denying a driver's motion to dismiss a passenger's personal injury action and in granting the passenger's cross-motion to extend the time to serve the complaint because the

passenger failed to serve her complaint upon the driver after the driver served her with a notice of appearance and demand for a complaint, the passenger failed to demonstrate either a reasonable excuse for the delay in serving the complaint or that her causes of action were meritorious, and the uncertified police accident report constituted inadmissible hearsay and did not contain any admission by the driver against her interest bearing on how the accident occurred. Ganchrow v Kremer, 157 A.D.3d 771, 69 N.Y.S.3d 352, 2018 N.Y. App. Div. LEXIS 285 (N.Y. App. Div. 2d Dep't 2018), overruled in part, Yassin v Blackman, 188 A.D.3d 62, 131 N.Y.S.3d 53, 2020 N.Y. App. Div. LEXIS 5171 (N.Y. App. Div. 2d Dep't 2020).

16. — —Abuse of discretion not found

In a medical malpractice action in which defendant hospital moved to dismiss the complaint as not timely served after a three month period had elapsed from the date of service of a demand for the complaint, the reviewing court properly denied the motion and dismissed the complaint since it could not be said that the court abused its discretion in so acting pursuant to CPLR § 3012(b). Scarborough v Zimmon, 56 N.Y.2d 784, 452 N.Y.S.2d 400, 437 N.E.2d 1157, 1982 N.Y. LEXIS 3435 (N.Y. 1982).

Law firm did not serve the complaint until 87 days after its former client filed a demand for complaint. As the firm’s complaint alleged sufficient facts to support its claim for legal fees and there was no indication it intended to abandon the suit, the court exercised its discretion and declined to dismiss for the firm’s violation of N.Y. C.P.L.R 3012(b). Morelli & Gold, LLP v Altman, 240 N.Y.L.J. 12, 2008 N.Y. Misc. LEXIS 9931 (N.Y. Sup. Ct. 2008).

17. —Length of delay

In the absence of a satisfactory explanation of plaintiffs’ inordinate delay in serving a complaint and an adequate showing of a meritorious cause of action it was an improvident exercise of discretion on the part of the trial court to permit its service where the defendant’s original demand for a complaint was made in October 1961, and the complaint was not served until

October 1964. Graziano v Albanese, 24 A.D.2d 712, 263 N.Y.S.2d 20, 1965 N.Y. App. Div. LEXIS 3406 (N.Y. App. Div. 1st Dep't 1965).

Where a summons was served without a complaint and more than 18 months elapsed after the defendant served a notice of appearance and a written demand for a copy of said pleading, and moved for a dismissal, upon the motion's return, plaintiff neither appeared nor submitted a proposed complaint, or an excuse for the default or a showing of merit, the motion for dismissal should have been granted unconditionally. Harris v Hampton Hotel Corp., 36 A.D.2d 999, 321 N.Y.S.2d 302, 1971 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 3d Dep't 1971).

Trial court should not have permitted plaintiffs in personal injury action to serve their complaint some 15 months after written demand therefor by defendant in absence of successful motion by plaintiffs to be relieved of their default and without plaintiffs' having submitted proper affidavit of merit in opposition to motion to dismiss. Simons v Sanford Plaza, Inc., 44 A.D.2d 710, 354 N.Y.S.2d 697, 1974 N.Y. App. Div. LEXIS 5205 (N.Y. App. Div. 2d Dep't 1974).

Where defendant's motion to dismiss was made about six months after his demand for a complaint in malpractice action, such motion was never decided on the merits but was stricken from the calendar more than six months later, plaintiffs thereafter served complaint, which was promptly returned by defendant, who again moved to dismiss, and plaintiffs failed to demonstrate an adequate excuse for inordinate delay in serving complaint, and failed to submit affidavit of merits, it was improvident exercise of discretion to deny defendant's motion on ground that there was laches by all parties. Sakvarelidze v Epstein, 45 A.D.2d 864, 358 N.Y.S.2d 549, 1974 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 2d Dep't 1974).

Dismissal of complaint for failure to serve it upon defendants until approximately four months after defendants had served notice of appearance with demand for complaint was within trial court's discretion absent more than minimal excuse for the extended delay, despite contention that delay of three or four months was general custom among lawyers in the locality. Johnson v Johnson, 45 A.D.2d 899, 357 N.Y.S.2d 208, 1974 N.Y. App. Div. LEXIS 4520 (N.Y. App. Div. 3d Dep't 1974).

Court erred, as matter of law, by denying defendant's motion to dismiss for failure to serve complaint on condition that plaintiff pay defendant $150 where complaint was served more than 3 ½ months past statutorily required date and plaintiff failed to submit affidavit of merit in opposition to motion to dismiss. Estate of Ward v Hoffman, 139 A.D.2d 691, 527 N.Y.S.2d 447, 1988 N.Y. App. Div. LEXIS 4572 (N.Y. App. Div. 2d Dep't 1988).

Court should have granted defendant's motion to dismiss malicious prosecution action since plaintiffs failed to timely comply with defendant's demand for service of complaint dated December 17, 1984 where (1) affidavit of service indicated that complaint was served on defendant on April 23, 1985, and (2) plaintiffs' attorney's affirmation merely asserted that plaintiffs had valid cause of action and that defendant was not prejudiced by delay; to avoid dismissal under CLS CPLR § 3012, plaintiffs were required to demonstrate reasonable excuse for their 3- ½ -month delay and to submit affidavit establishing meritorious nature of their cause of action. Niedermeier v Nassau County Dep't of Social Services, 143 A.D.2d 78, 531 N.Y.S.2d 328, 1988 N.Y. App. Div. LEXIS 8164 (N.Y. App. Div. 2d Dep't 1988).

In view of plaintiff's minimal and nonprejudicial 9-day default in service of complaint, court properly denied defendant's motion to dismiss action and granted plaintiff's cross motion to compel acceptance of untimely served pleading, notwithstanding plaintiff's failure to tender excuse for delay or to establish meritorious cause of action. Hayes v Berman, 249 A.D.2d 881, 671 N.Y.S.2d 1025, 1998 N.Y. App. Div. LEXIS 4836 (N.Y. App. Div. 3d Dep't 1998).

Appellate court reversed an order denying a law firm's motion to dismiss their clients' complaint because the clients were required to establish a prima facie case of legal malpractice pursuant to N.Y. C.P.L.R. 3012(d) after the clients did not serve the complaint within the 20-day time period in Rule 3012(b), and the clients' complaint, at best, could only establish the law firm's negligence and conflict of interest but not that the clients would have been successful "but for" those failings. Amodeo v Gellert & Quartararo, P.C., 26 A.D.3d 705, 810 N.Y.S.2d 246, 2006 N.Y. App. Div. LEXIS 2183 (N.Y. App. Div. 3d Dep't 2006).

18. —Excessive delay

Failure to serve complaint during the 46 months between the service of a notice of appearance on behalf of defendants and a demand for a complaint and plaintiff's original motion for extension of time constructed inordinate delay under the circumstances presented and, since excuse offered and the affidavit of merits were inadequate, it was an improvident exercise of discretion to grant plaintiffs an extension of time in which to file the complaint. Bock v Board of Education, 51 A.D.2d 566, 378 N.Y.S.2d 473, 1976 N.Y. App. Div. LEXIS 10836 (N.Y. App. Div. 2d Dep't 1976).

Where plaintiff was allegedly injured approximately 35 months before bringing negligence action by service of summons, where plaintiff ignored defendant's demand for service of complaint and two letters further requesting service of complaint, and where plaintiff served unverified complaint 13 months after first demand therefor, plaintiff's failure to serve her complaint during 13-month period constituted an inordinate delay under circumstances of case, and thus it was an improvident exercise of discretion for special term to have denied defendant's motion to dismiss negligence action. Ferreri v Winston Mall, Inc., 54 A.D.2d 970, 388 N.Y.S.2d 675, 1976 N.Y. App. Div. LEXIS 14902 (N.Y. App. Div. 2d Dep't 1976).

More than seven years passed between defendant's second demand for service of complaint and this motion by defendant to dismiss action pursuant to CPLR 3012 (b); plaintiff failed to offer reasonable excuse for such long delay; thus Supreme Court acted properly in denying plaintiff's motion for extension of time to serve complaint and in dismissing action. J. M. Heinike Assoc., Inc. v Ransom Enterprises, Inc., 154 A.D.2d 892, 547 N.Y.S.2d 260, 1989 N.Y. App. Div. LEXIS 12838 (N.Y. App. Div. 4th Dep't 1989).

19. —Reasonable excuse for delay

An inordinate and unexcusable delay in the service of a complaint constitutes good ground for dismissal of the action for lack of prosecution. Cohen v Boykin, 20 A.D.2d 632, 246 N.Y.S.2d 275, 1964 N.Y. App. Div. LEXIS 4483 (N.Y. App. Div. 1st Dep't 1964).

Special Term committed reversible error in allowing plaintiffs to serve complaint approximately 28 months after written demand therefor by defendant in the absence of a motion by plaintiffs to be relieved of default. Gelch v Malrich Realty Corp., 47 A.D.2d 644, 364 N.Y.S.2d 16, 1975 N.Y. App. Div. LEXIS 8819 (N.Y. App. Div. 2d Dep't 1975).

In an action to recover for injuries resulting from an assault, the trial court properly exercised its discretion in denying defendant's motion to dismiss the complaint for failure of plaintiff to serve the complaint until 57 days beyond the 20-day period after service of the demand specified in CPLR 3012(b), where the record demonstrated a meritorious claim and a reasonable excuse for the delay in that plaintiff, fearing threats to her safety, awaited the outcome of defendant's criminal trial before serving her complaint to be sure he was safely behind bars. Dean v Bodette, 84 A.D.2d 876, 444 N.Y.S.2d 741, 1981 N.Y. App. Div. LEXIS 16126 (N.Y. App. Div. 3d Dep't 1981).

Special Term did not err in excusing plaintiff's default where plaintiff served verified complaint approximately 3 weeks after expiration of 2-week extension period and in response to defendants' motion to dismiss under CLS CPLR § 3012, since delay was minimal, verified complaint served as affidavit of merit, and public policy favors resolving cases on merits; nevertheless, plaintiff would be ordered to pay $250 to each defendant as sanction because nature of plaintiff's excuse evinced lack of diligence. Rait v Bauer, 121 A.D.2d 704, 504 N.Y.S.2d 144, 1986 N.Y. App. Div. LEXIS 58689 (N.Y. App. Div. 2d Dep't 1986).

Affidavits submitted by plaintiff in opposition to defendants' motion, made pursuant to CPLR 3012(b), to dismiss action for failure to serve complaint within 20 days of demand, were insufficient to demonstrate reasonable excuse for delay and that plaintiff's action has merit; consequently, court did not abuse its discretion by dismissing plaintiff's action. Iafallo v Dolan, 162 A.D.2d 965, 559 N.Y.S.2d 204, 1990 N.Y. App. Div. LEXIS 9700 (N.Y. App. Div. 4th Dep't 1990).

Plaintiff was not required to tender excuse for delay in serving complaint nor to establish meritorious cause of action in order to avoid dismissal under CLS CPLR § 3012(b) where delay

was only 6 days, and there was no evidence that defendant was prejudiced. Mills v Niagara Mohawk Power Corp., 216 A.D.2d 828, 628 N.Y.S.2d 857, 1995 N.Y. App. Div. LEXIS 7450 (N.Y. App. Div. 3d Dep't 1995).

Delay of 2 ½ months in serving answer in personal injury action would be excused, in light of public policy in favor of resolving cases on merits, where there was meritorious defense and absence of prejudice to plaintiffs. Kaiser v Delaney, 255 A.D.2d 362, 679 N.Y.S.2d 686, 1998 N.Y. App. Div. LEXIS 11825 (N.Y. App. Div. 2d Dep't 1998).

Dismissal of plaintiffs' complaint for failure to comply with the time requirements in N.Y. C.P.L.R. 3012(b) was improper; defendant's demand, made prior to service of summons with notice, was premature and service of plaintiffs' verified personal injury complaint 27 days after the demand was made was not untimely. Micro-Spy, Inc. v Small, 9 A.D.3d 122, 778 N.Y.S.2d 86, 2004 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 2004).

Trial court did not abuse its discretion in allowing a county to file a late amended answer in an action against it by a student, where the answer was filed 15 days beyond the statutory deadline, because pursuant to N.Y. C.P.L.R. 3012(d), a reasonable excuse for the delay was shown where there was a personnel change during the pendency of the action. Planck v SUNY Bd. of Trs., 18 A.D.3d 988, 795 N.Y.S.2d 147, 2005 N.Y. App. Div. LEXIS 5166 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 5 N.Y.3d 844, 805 N.Y.S.2d 545, 839 N.E.2d 899, 2005 N.Y. LEXIS 3162 (N.Y. 2005).

Trial court properly granted a contractor's cross motion to serve a late answer to worker's complaint under circumstances in which the contractor filed its cross motion to serve a late answer 23 days after the deadline for a timely answer, and 15 days after the worker mailed the required N.Y. C.P.L.R. 3215(g)(4) notice to the contractor; the general contractor's excuse for its nearly three-week delay in seeking leave to serve a late answer, which was that the delay was occasioned by the intervening time required for the Secretary of State's copy to be served upon it, for that copy to be forwarded to the contractor's insurance carrier and for counsel to be appointed, was hardly overwhelming, but the delay was brief, there was no prejudice to the

worker, and public policy favored the resolution of disputes on their merits. Jones v 414 Equities LLC, 57 A.D.3d 65, 866 N.Y.S.2d 165, 2008 N.Y. App. Div. LEXIS 8024 (N.Y. App. Div. 1st Dep't 2008).

Given the brevity of the delay, the lack of evident intention to abandon the suit, and the absence of prejudice to defendants, the trial court did not abuse its discretion in finding plaintiff's illness to be a reasonable excuse for her failure to serve the complaint within 20 days of defendants' demand for a complaint. Nath v Chemtob Moss Forman & Beyda, LLP, 231 A.D.3d 546, 220 N.Y.S.3d 707, 2024 N.Y. App. Div. LEXIS 5366 (N.Y. App. Div. 1st Dep't 2024).

20. — —Reasonable excuse not found

Where plaintiff failed to come forward with any excuse whatsoever for its failure to serve a complaint until approximately 9 months after the demand therefor, at which time it was rejected by defendants, and in addition plaintiff served no affidavit of merits, complaint was properly dismissed. Boardman v Glissando Enterprises of New Jersey, 41 A.D.2d 523, 340 N.Y.S.2d 45, 1973 N.Y. App. Div. LEXIS 5253 (N.Y. App. Div. 1st Dep't 1973).

In medical malpractice action in which plaintiff failed to serve complaint within time permitted despite demand therefor by defendant physician and fact that plaintiff had knowledge of gravamen of action at least two years prior to its commencement and that plaintiff's intestate had brought two malpractice actions against defendant during his lifetime, both of which were dismissed for lack of prosecution and plaintiff's affidavit of merits was valueless for failure to include expert medical evidence, trial court abused its discretion in denying defendant's motion to dismiss on condition that plaintiff be permitted 20 days to serve complaint. O'Halloran v Eller, 43 A.D.2d 955, 352 N.Y.S.2d 216, 1974 N.Y. App. Div. LEXIS 5774 (N.Y. App. Div. 2d Dep't 1974).

Absence of showing of any justification or excuse for failure to serve complaint until 25 months subsequent to service of summons required dismissal of complaint. Morris v Dunham, 46 A.D.2d 717, 360 N.Y.S.2d 297, 1974 N.Y. App. Div. LEXIS 3778 (N.Y. App. Div. 3d Dep't 1974), app.

dismissed, 35 N.Y.2d 968, 365 N.Y.S.2d 524, 324 N.E.2d 883, 1975 N.Y. LEXIS 1719 (N.Y. 1975).

Where wrongful death action was commenced by service of summons without complaint in 1964 and complaint was demanded but the verified complaint was not served until 1974 and no valid excuses were offered to explain the delay in serving the complaint, the action was subject to dismissal for failure to serve complaint. Witz v Renner Realty Corp., 47 A.D.2d 622, 364 N.Y.S.2d 529, 1975 N.Y. App. Div. LEXIS 8778 (N.Y. App. Div. 1st Dep't 1975), app. dismissed, 38 N.Y.2d 905, 382 N.Y.S.2d 754, 346 N.E.2d 555, 1976 N.Y. LEXIS 2347 (N.Y. 1976).

Permitting plaintiff, who was allegedly injured at work by coal tripping machine installed by defendant, to serve complaint more than 18 months after demand therefor was made by defendant was an improvident exercise of discretion, where only excuse for failure to serve complaint earlier involved attempt of plaintiff's attorney to require insurer of plaintiff's employer to share cost of hiring experts to examine machine, where plaintiff's attorney knew in June, 1972, the insurer would not participate, and where he nevertheless failed to respond to defendant's invitations in May and August 1973, to serve complaint. Vaccaro v Fairfield Engineering Co., 47 A.D.2d 986, 366 N.Y.S.2d 723, 1975 N.Y. App. Div. LEXIS 9472 (N.Y. App. Div. 4th Dep't 1975).

Where malpractice action was not instituted until almost three years after plaintiff became aware of claimed acts of negligence by defendant, delay of nine months in serving complaint after defendant had served notice of appearance was substantial, and plaintiff accordingly had heavy burden of explanation to justify dilatory conduct, and failed so to do. Ritchie v Gabler, 55 A.D.2d 847, 390 N.Y.S.2d 339, 1976 N.Y. App. Div. LEXIS 15666 (N.Y. App. Div. 4th Dep't 1976).

In automobile negligence action, trial court abused its discretion in denying defendant's motion to dismiss for failure to prosecute, in view of plaintiff's failure to satisfy her burden of showing that 16-month period of delay in prosecution, which delay occurred while plaintiff was represented by counsel, was excusable, and that her claim was meritorious. Warren v Baker, 57

A.D.2d 709, 395 N.Y.S.2d 271, 1977 N.Y. App. Div. LEXIS 11759 (N.Y. App. Div. 4th Dep't 1977).

Action to recover damages for personal injuries would be dismissed, on motion of defendant, for failure to timely serve a complaint, since plaintiff failed to demonstrate a valid justification for the protracted delay in serving the complaint, since there was no imminent danger that the statute of limitations would expire, since service of another and redundant notice of appearance by substituted counsel did not excuse the delay, and since the fact that the codefendant accepted belated service was not determinative of defendant's rejection of the proffered complaint served immediately prior to the return date of defendant's dismissal motion. Wainwright v Nassau Recycle Corp., 59 A.D.2d 891, 399 N.Y.S.2d 46, 1977 N.Y. App. Div. LEXIS 14079 (N.Y. App. Div. 2d Dep't 1977).

Where a plaintiff failed to move to be relieved of her default prior to her tardy service of a complaint and neither presented a reasonable excuse for her delay of more than two months in serving the complaint upon the defendants nor submitted a sufficient affidavit containing an evidentiary showing of merit, the defendants were entitled to have their motions to dismiss granted and it was an abuse of discretion to deny the motions as academic on the ground that the complaint had eventually been served prior to the return date of the defendants' motions. Jellinger v Mollad, 80 A.D.2d 872, 437 N.Y.S.2d 15, 1981 N.Y. App. Div. LEXIS 10718 (N.Y. App. Div. 2d Dep't 1981).

In the absence of a "reasonable excuse" for an inordinate delay in the service of the complaint, Special Term acted within its discretion in granting the motion of defendant in a personal injury action to dismiss pursuant to CPLR § 3012(b). Sprague v Luna Park Co-op, 83 A.D.2d 877, 441 N.Y.S.2d 1011, 1981 N.Y. App. Div. LEXIS 15274 (N.Y. App. Div. 2d Dep't 1981).

Where 18 months had elasped from the service of a notice of appearance and demand for a copy of the complaint, and where plaintiff had offered no opposition to defendants' motion to dismiss for failure to serve the complaint, and in fact, a representative had consented to the dismissal, no justification existed upon which to condition the dismissal of the action "without

prejudice." Grayco Builders, Inc. v Sherrill, 87 A.D.2d 783, 449 N.Y.S.2d 491, 1982 N.Y. App. Div. LEXIS 16217 (N.Y. App. Div. 1st Dep't 1982).

In a personal injury action against a city for injuries allegedly sustained when a police officer used excessive force on plaintiff, in which plaintiff was given permission to file his complaint after a hearing mandated by Gen Mun Law § 50-h, the action was properly dismissed, where plaintiff had failed to serve the complaint more than 13 months after said hearing and where, when plaintiff in fact attempted to serve the complaint, he failed to file an affidavit of merit to demonstrate the legal merit of his claim but instead sought to substitute therefore a notice of claim and the transcript of the § 50-h hearing. Gigliotti v Rensselaer, 87 A.D.2d 958, 451 N.Y.S.2d 216, 1982 N.Y. App. Div. LEXIS 16489 (N.Y. App. Div. 3d Dep't 1982).

In action to recover damages for personal injuries, Special Term erred in denying defendant's motion to dismiss the complaint, pursuant to CPLR § 3012(b), for failure to timely serve a complaint where the action was commenced on March 9, 1982 by a service of summons with notice, where defendant served a notice of appearance and a demand for a complaint on April 20, 1982, where plaintiff neither served the complaint nor moved for an extension of time to do so, where on April 27, 1983, defendant moved to dismiss the action and where plaintiff at no time submitted an affidavit of merits. McNamara v Past Time Pub, Inc., 100 A.D.2d 618, 473 N.Y.S.2d 577, 1984 N.Y. App. Div. LEXIS 17601 (N.Y. App. Div. 2d Dep't 1984).

In personal injury action, defendant was entitled to dismissal where plaintiffs failed to establish reasonable excuse for delay and prima facie showing of legal merit following failure to serve complaint after 20-day statutory period, did nothing after defendant rejected their complaint as untimely served, and failed to oppose defendant's motion to dismiss pursuant to CLS CPLR § 3012. Piscopo v Delman, 127 A.D.2d 826, 512 N.Y.S.2d 221, 1987 N.Y. App. Div. LEXIS 43319 (N.Y. App. Div. 2d Dep't 1987).

Court should have granted motion to dismiss personal injury action where plaintiff failed to serve complaint for more than 2 years after service was required, since plaintiff failed to make adequate showing that her claim had merit in absence of affidavit of merit; neither complaint,

which was based in part on information and belief, nor affirmation submitted by plaintiff's attorney in opposition to motion to dismiss, constituted sufficient affidavit of merit. Nitze v Gallagher, 138 A.D.2d 466, 526 N.Y.S.2d 404, 1988 N.Y. App. Div. LEXIS 2873 (N.Y. App. Div. 2d Dep't 1988).

Action under CLS RPAPL Art 15 should have been dismissed for inordinate delay in serving complaint where complaint was not served until more than one year after defendant filed notice of appearance and demand for complaint, and plaintiffs' counsel took responsibility for tardy service but offered no excuse; counsel's admission was not substitute for reasonable excuse. Concerned Citizens of Albany-Shaker Rd. v State, 140 A.D.2d 842, 528 N.Y.S.2d 230, 1988 N.Y. App. Div. LEXIS 5018 (N.Y. App. Div. 3d Dep't 1988).

Plaintiff's proffered excuse for failing to comply with demand for complaint after action was initiated by service of summons with notice (i.e., that demand languished in files of prior attorney's office after associate assigned to case left) did not excuse 2 years of neglect in producing complaint, and thus defendant was entitled to dismissal of action pursuant to CLS CPLR § 3012. Johnson v Golub Corp., 152 A.D.2d 803, 543 N.Y.S.2d 584, 1989 N.Y. App. Div. LEXIS 9319 (N.Y. App. Div. 3d Dep't 1989).

Defendant's motion to dismiss action for failure to serve complaint should have been granted–plaintiffs commenced action by service of summons with notice dated January 7, 1988; on May 9, 1988, defendant served notice of appearance and demand for complaint; by letter dated July 28, 1988, defendant again demanded copy of complaint be served within 20 days thereafter; on August 29, 1988, defendant moved to dismiss action as against him pursuant to CPLR 3012 (b); thereafter, on September 22, 1988, plaintiffs served verified complaint which defendant rejected as nullity due to its untimeliness; plaintiffs submitted physician's unsworn affirmation which asserted injuries allegedly due to malpractice, without detailing any evidentiary facts–CPLR 3012 (b) requires that plaintiff serve complaint within 20 days after service of defendant's demand therefor; if complaint is not thereafter properly served, and defendant moves to dismiss, plaintiff must include in his opposition to motion reasonable excuse for delay and sworn affidavit

of merit; nowhere in record does there appear excuse, reasonable or otherwise, for delay; although verified complaint may constitute adequate substitute for affidavit of merit, failure of verified complaint and affirmation of physician fails to adequately set forth evidentiary facts regarding claimed malpractice sufficient to establish prima facie case. DeSiena v Maimonides Hosp. Center, 163 A.D.2d 351, 558 N.Y.S.2d 97, 1990 N.Y. App. Div. LEXIS 8833 (N.Y. App. Div. 2d Dep't 1990).

Summons with notice was served on defendants April 4, 1988 in malicious prosecution action; despite defendants' timely demand for service of complaint, plaintiff did not serve verified complaint until on or about June 8, 1988; that service was promptly rejected as untimely by defendants, which had previously moved to dismiss action pursuant to CPLR 3012 (b); motion should have been granted–plaintiff did not demonstrate reasonable excuse for delay and meritorious nature of claim; affirmation of plaintiff's counsel is conclusory and fails to set forth specific efforts made to avoid or minimize delay; moreover, proffered excuse for delay in service upon defendants is neither reasonable nor acceptable; similarly, plaintiff has failed to establish meritorious claim, inasmuch as statements in affidavit of his criminal trial attorney are unsubstantiated and document does not contain evidentiary facts set forth by one having personal knowledge of those facts; finally, plaintiff's verified complaint contains no specific factual allegations to demonstrate merit of his malicious prosecution cause of action. Ferrara v Guardino, 164 A.D.2d 932, 560 N.Y.S.2d 40, 1990 N.Y. App. Div. LEXIS 10823 (N.Y. App. Div. 2d Dep't 1990).

It was abuse of discretion to deny defendants' motion to dismiss action for failure to serve complaint where plaintiff failed to provide either affidavit of merit or verified complaint, and plaintiff did not show that 2-month delay in serving complaint was excusable. Grant v City of N. Tonawanda, 225 A.D.2d 1089, 639 N.Y.S.2d 193, 1996 N.Y. App. Div. LEXIS 2964 (N.Y. App. Div. 4th Dep't 1996).

In consolidated actions for breach of contract, third-party plaintiff was entitled to default judgment against surety company where surety company failed to offer reasonable excuse for

its 3-month delay in answering third-party complaint, and surety company served its answer only in response to motion for default judgment. Jerrick Waterproofing Co. v Park Plaza Owners Corp., 251 A.D.2d 628, 676 N.Y.S.2d 490, 1998 N.Y. App. Div. LEXIS 7952 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff was entitled to default judgment where defendant failed to offer reasonable excuse for his delay in answering complaint or to show meritorious defense, and defendant served answer only in response to plaintiff's motion for judgment. Palermo v Rodriguez, 255 A.D.2d 567, 682 N.Y.S.2d 602, 1998 N.Y. App. Div. LEXIS 12867 (N.Y. App. Div. 2d Dep't 1998).

It was abuse of discretion to deny defendants' motion under CLS CPLR § 3012(b) to dismiss dental malpractice action for failure to timely serve complaint where plaintiff failed to submit affidavit of merit by expert, and excuses proffered for almost 8-month delay were not reasonable. Elbaz v Lieb, 269 A.D.2d 489, 704 N.Y.S.2d 499, 2000 N.Y. App. Div. LEXIS 1994 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 754, 711 N.Y.S.2d 833, 733 N.E.2d 1102, 2000 N.Y. LEXIS 1390 (N.Y. 2000).

Personal injury action was properly dismissed under CLS CPLR § 3012(b) for failure to timely serve complaint after demand for complaint was made where plaintiff showed neither reasonable excuse for delay nor meritorious cause of action. Meiselman v Central Suffolk Hosp., 273 A.D.2d 209, 709 N.Y.S.2d 436, 2000 N.Y. App. Div. LEXIS 6267 (N.Y. App. Div. 2d Dep't 2000), app. dismissed, 95 N.Y.2d 874, 714 N.Y.S.2d 707, 737 N.E.2d 950, 2000 N.Y. LEXIS 3283 (N.Y. 2000), app. dismissed, 96 N.Y.2d 779, 725 N.Y.S.2d 634, 749 N.E.2d 203, 2001 N.Y. LEXIS 660 (N.Y. 2001).

Trial court properly granted defendants' motion pursuant to N.Y. C.P.L.R. 3012(b) to dismiss a personal injury action for failure to timely serve the complaint, because the injured party failed to demonstrate a reasonable excuse for the delay and a meritorious cause of action. Brenner v Cross County Shopping Ctr., 308 A.D.2d 469, 764 N.Y.S.2d 638, 2003 N.Y. App. Div. LEXIS 9345 (N.Y. App. Div. 2d Dep't 2003).

Where appellant was put on notice that its address was incorrect and failed to provide a correct address for five years, it had not provided a reasonable excuse. Accordingly, the appellate division did not have to determine whether appellant demonstrated the existence of a meritorious defense. HSBC Bank USA, N.A. v Rothbeind, 212 A.D.3d 912, 182 N.Y.S.3d 762, 2023 N.Y. App. Div. LEXIS 4 (N.Y. App. Div. 3d Dep't 2023).

A wife's application pursuant to CPLR § 3012(b) to dismiss her husband's divorce actions for failure to serve the complaints would be granted, where the husband failed to provide the court with an affidavit of merit, where one of the actions was commenced several years ago and laid dormant, and where the other action involved settlement negotiations and an attempt to serve a complaint which were sporadic and insufficient to justify the year and one-half delay therein. Bryant v Bryant, 116 Misc. 2d 828, 456 N.Y.S.2d 622, 1982 N.Y. Misc. LEXIS 3965 (N.Y. Sup. Ct. 1982).

Pursuant to N.Y. C.P.L.R. 3012-b, the court granted defendants' motion to dismiss plaintiffs' personal injury action because plaintiffs failed to establish a reasonable excuse for their two-and-a-half-month delay in serving a complaint on defendants after defendants' demand had been made. Two-and-a-half-month delay was not a relatively brief delay so as to obviate the duty to demonstrate a reasonable excuse for the delay and a meritorious claim. Imperiale v Prezioso, 781 N.Y.S.2d 580, 4 Misc. 3d 716, 2004 N.Y. Misc. LEXIS 1112 (N.Y. Sup. Ct. 2004).

21. —Illustrative cases

Trial court properly exercised its discretion in denying motion to dismiss action for failure to make timely service of complaint where it appeared that complaint was served 32 days after notice of demand therefor, and in such case it was not incumbent on plaintiff to serve an affidavit of merits and an excuse for delay and also to cross-move to be relieved of the default, since, while there were cases which indicated that such requirements were applicable with respect to subd (b) of this section, in all such cases the delay appeared to be considerably longer than the 12 days in the present case, and the courts in most of those cases made reference to

“inordinate” or “prolonged” delays, and therefore it was clear that the actual length of the delay, although not contained as a test in the statute, was an overriding consideration and was at the root of the requirement that the plaintiff justify his case as well as his delay, and in this case it could not be said that the 12-day delay was “inordinate” or “prolonged”. Lehigh V. R. Co. v North American Van Lines, Inc., 25 A.D.2d 923, 270 N.Y.S.2d 83, 1966 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 3d Dep't 1966).

Where more than a year had elapsed from the time when plaintiffs were required to serve complaint and they had failed to appear or submit a proposed complaint or offer any excuse for their default, dismissal should have been ordered. Wemple v Cadoret, 29 A.D.2d 1033, 289 N.Y.S.2d 443, 1968 N.Y. App. Div. LEXIS 4159 (N.Y. App. Div. 3d Dep't 1968).

In a medical malpractice action, wherein service of an answer to the amended complaint was made 16 days late, such short delay would be excused in light of public policy favoring determination of cases on their merits, notwithstanding defendants’ failure to clearly articulate a reasonable excuse for the delay, where defendants’ continued defense of the claim over a three-year period indicated they never intended to abandon the action, and where plaintiff raised no claim of prejudice. Leogrande v Glass, 106 A.D.2d 431, 482 N.Y.S.2d 525, 1984 N.Y. App. Div. LEXIS 21472 (N.Y. App. Div. 2d Dep't 1984).

Dismissal of action for failure to serve complaint was not on merits where (1) plaintiff’s prior attorneys commenced action by service of summons, (2) defendants’ attorney filed notice of appearance and demand for complaint, (3) defendants moved for dismissal for failure to file complaint, and (4) motion was granted on default. Anillo v Rodriguez, 142 A.D.2d 528, 530 N.Y.S.2d 154, 1988 N.Y. App. Div. LEXIS 7811 (N.Y. App. Div. 1st Dep't 1988).

Failure of other defendants to file notice of appearance did not constitute reasonable excuse for plaintiff’s 8-month delay in serving complaint on defendant who demanded it, and thus court properly dismissed action against that defendant pursuant to CLS CPLR § 3012(b). V.D.R. Realty Corp. v New York Property Ins. Underwriting Ass'n, 186 A.D.2d 645, 589 N.Y.S.2d 779, 1992 N.Y. App. Div. LEXIS 11319 (N.Y. App. Div. 2d Dep't 1992).

22. Sufficiency of excuse or justification for delay, generally

While prior order denying renewed motion of plaintiff to compel defendant to accept verified complaint filed well beyond 20-day time limitation imposed by statute was not res judicata when no judgment was entered, practice followed by plaintiff in case of thereafter commencing a second action by service of a new summons and complaint and, upon dismissal of action, on moving to discontinue action without prejudice in order to bring suit de novo and, thus, circumvent requirement that he seek leave of court to cure his default resulted in one judge overruling a judge of coordinate jurisdiction and, as such, so violated concepts of orderly procedure that subsequent order granting plaintiff's motion to cure his default in service of complaint was subject to being reversed. Begler v Saltzman, 53 A.D.2d 578, 385 N.Y.S.2d 60, 1976 N.Y. App. Div. LEXIS 13218 (N.Y. App. Div. 1st Dep't 1976).

Defendants' motion to dismiss a medical malpractice action for failure to serve a complaint was properly granted where no complaint was ever served with regard to the first summons served on defendant and plaintiff subsequently instituted a new action against defendants by serving a new summons and corresponding complaint. Sutton v Winston, 93 A.D.2d 884, 461 N.Y.S.2d 412, 1983 N.Y. App. Div. LEXIS 21360 (N.Y. App. Div. 2d Dep't 1983).

Plaintiff was entitled to commence second action for same relief following dismissal of first action for failure to serve timely complaint, since dismissal was not on merits. Joseph T. Ryerson & Son, Inc. v Piffath, 132 A.D.2d 527, 517 N.Y.S.2d 538, 1987 N.Y. App. Div. LEXIS 49054 (N.Y. App. Div. 2d Dep't 1987).

Res judicata did not bar timely action where prior identical action was dismissed for failure of plaintiff to respond to demand for complaint, since dismissal was not on merits. Samuels v Rosenberg, 178 A.D.2d 639, 577 N.Y.S.2d 880, 1991 N.Y. App. Div. LEXIS 16915 (N.Y. App. Div. 2d Dep't 1991).

23. —Excuse not sufficient

The dismissal of a hospital malpractice action was warranted where the plaintiff had been granted an extension of time for service of her complaint when she asserted, five months after the service of a summons on the defendant, that its records were required in order to draft her complaint; where 11 months after delivery of the records to plaintiff she had failed to serve the complaint; where the plaintiff claimed the records were illegible but offered no explanation as to why it took so long to discover the defect, and where a subsequently drawn complaint was properly rejected for untimely service pursuant to CPLR § 3012(b). Donlan v Albert Einstein Hospital, 79 A.D.2d 583, 434 N.Y.S.2d 358, 1980 N.Y. App. Div. LEXIS 13912 (N.Y. App. Div. 1st Dep't 1980).

Plaintiff’s action arising from a motor vehicle accident had to be dismissed where there was a delay of more than one year after the service of the court’s order denying dismissal for inadequate service of summons, during which the complaint had not been served, and where the excuse for the delay that prompt prosecution was inhibited because of injuries the plaintiff had suffered as a result of an intervening criminal assault was not adequately documented. Premo v Cornell, 83 A.D.2d 981, 442 N.Y.S.2d 831, 1981 N.Y. App. Div. LEXIS 15449 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 962, 449 N.Y.S.2d 195, 434 N.E.2d 264, 1982 N.Y. LEXIS 3145 (N.Y. 1982).

In an action for conversion plaintiff’s cause of action should have been dismissed on the basis that after commencing suit by service of a bare summons, plaintiff neglected to serve a complaint for nearly 4 years at which point she served a complaint accompanying a new summons, thereby instituting a new cause of action against defendant, since plaintiff’s neglect to serve a complaint for nearly 4 years would be deemed an abandonment of the earlier action and the service of a stale complaint years after demand without a demonstration of excusable delay and a meritorious cause could not defeat the defendant’s right to a dismissal for tardy service of a properly rejected complaint. Moreover even if the new summons on a company complaint were deemed properly served the conversion cause of action would be barred by the statute of

limitations on the basis that plaintiff's last genuine attempt to retrieve the personal property was 6 years prior to service. Lancaster v Kindor, 98 A.D.2d 300, 471 N.Y.S.2d 573, 1984 N.Y. App. Div. LEXIS 16480 (N.Y. App. Div. 1st Dep't 1984), aff'd, 65 N.Y.2d 804, 493 N.Y.S.2d 127, 482 N.E.2d 923, 1985 N.Y. LEXIS 15425 (N.Y. 1985).

In an action for damages and injunctive relief, a motion to dismiss, for failure to serve a complaint under CPLR § 3012(b), would be granted where plaintiff served the summons on October 26, 1981 but failed to serve a complaint until January 8, 1982, despite demands therefor made within a month of the service of the summons in view of the fact that the complaint, when finally served, was not verified and that plaintiff failed to submit any affidavit of merit in opposition to defendants' motion to dismiss. Reilly v Lopez Publications, Inc., 99 A.D.2d 1006, 473 N.Y.S.2d 796, 1984 N.Y. App. Div. LEXIS 17435 (N.Y. App. Div. 1st Dep't 1984).

It was not abuse of discretion to dismiss legal malpractice action for failure to timely serve complaint, or to deny plaintiff's cross-motion to compel acceptance of complaint, since it affirmatively appeared that complaint was without merit. Teichman v Birbrower, 126 A.D.2d 543, 510 N.Y.S.2d 481, 1987 N.Y. App. Div. LEXIS 41677 (N.Y. App. Div. 2d Dep't 1987).

Court should have dismissed malpractice action for failure to comply with defendant's demand for complaint where affidavit of merit did not indicate that defendant physician departed from accepted medical standards or that any such departure proximately caused plaintiff's injuries. Daponte v Weber, 134 A.D.2d 319, 520 N.Y.S.2d 796, 1987 N.Y. App. Div. LEXIS 50501 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 801, 527 N.Y.S.2d 767, 522 N.E.2d 1065, 1988 N.Y. LEXIS 208 (N.Y. 1988).

Court properly granted defendant's motion to dismiss for failure to serve complaint where plaintiffs did not submit affidavit of merit but merely offered plaintiff's medical records as substitute. McMillan v Ryan, 135 A.D.2d 1104, 523 N.Y.S.2d 323, 1987 N.Y. App. Div. LEXIS 52963 (N.Y. App. Div. 4th Dep't 1987), app. denied, 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066, 1988 N.Y. LEXIS 1179 (N.Y. 1988).

Court should have granted wife's motion to dismiss for failure to serve timely complaint in action for divorce based on cruel and inhuman treatment where allegations in complaint failed to show serious misconduct by wife and failed to demonstrate in evidentiary form that continued cohabitation would be unsafe or improper. Weis v Weis, 138 A.D.2d 968, 526 N.Y.S.2d 301, 1988 N.Y. App. Div. LEXIS 2613 (N.Y. App. Div. 4th Dep't 1988).

Court did not abuse its discretion in dismissing action for breach of contract on defendant's motion under CLS CPLR § 3012(b) for plaintiff's failure to serve timely complaint where (1) plaintiff opposed motion on ground of law office failure, and thus was required to demonstrate meritorious nature of her claim, and (2) plaintiff's affidavit set forth no supporting factual allegations and her verified complaint merely pleaded legal conclusions. Brice v Westchester Community Health Plan, 143 A.D.2d 170, 531 N.Y.S.2d 621, 1988 N.Y. App. Div. LEXIS 8464 (N.Y. App. Div. 2d Dep't 1988).

Motion to dismiss pursuant to CLS CPLR § 3012(b) for lack of prosecution was properly granted in action to recover damages for assault, battery and violation of civil rights since plaintiff neither offered reasonable excuse for failing to timely serve complaint nor showed that he had meritorious action by furnishing sworn statement from person having personal knowledge of facts such as would be sufficient to defeat motion for summary judgment. Innerarity v County of Westchester, 144 A.D.2d 645, 535 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 12360 (N.Y. App. Div. 2d Dep't 1988).

Court properly dismissed action where (1) after delay of 16 months, defendant served demand for complaint and plaintiff was granted 20 additional days in which to serve complaint, (2) plaintiff failed to serve complaint for approximately 4 ½ months after entry of order granting additional time, (3) defendant's attorney rejected complaint and made motion to dismiss for failure to serve complaint, and (4) plaintiff offered inadequate excuse for delay. Puccini v Owens-Illinois Glass Co., 146 A.D.2d 758, 537 N.Y.S.2d 242, 1989 N.Y. App. Div. LEXIS 879 (N.Y. App. Div. 2d Dep't 1989).

Court properly denied plaintiff's motion under CLS CPLR § 3012(d) for extension of time to serve complaint, and dismissed action under CLS CPLR § 3012(b), where more than 7 years elapsed between defendant's second demand for service of complaint and filing of motion to dismiss. J. M. Heinike Assoc., Inc. v Ransom Enterprises, Inc., 154 A.D.2d 892, 547 N.Y.S.2d 260, 1989 N.Y. App. Div. LEXIS 12838 (N.Y. App. Div. 4th Dep't 1989).

Defendants' motions to dismiss action for personal injuries and wrongful death were properly granted where plaintiff failed to respond to defendants' demands for complaint under CLS CPLR § 3012(b) until instant motions to dismiss were made over 8 months later, plaintiff's excuse for her default was conclusory assertion of law office failure, and she failed to submit affidavit of merit. Sarles v Village of Tarrytown, 245 A.D.2d 440, 666 N.Y.S.2d 468, 1997 N.Y. App. Div. LEXIS 13103 (N.Y. App. Div. 2d Dep't 1997).

Wife's complaint was properly dismissed under N.Y. C.P.L.R. 3012(b) for her failure to effect timely service, and the supreme court providently exercised its discretion in denying the wife her motion to extend the time for service since the delay was over 15 months, she failed to show good cause for it, and she failed to show a meritorious cause of action. Her claim of actual abandonment was insufficient since the alleged abandonment occurred less than one year prior to commencement of the action. Fotiadis v Fotiadis, 18 A.D.3d 699, 795 N.Y.S.2d 729, 2005 N.Y. App. Div. LEXIS 5639 (N.Y. App. Div. 2d Dep't 2005).

Trial court erred in granting the defendants' motion to vacate their default in answering the executors' complaint and to extend their time to answer the complaint and compel acceptance of service of the answer because they failed to provide a reasonable excuse for the delay in answering where their assertion that they risked waiving the right to compel arbitration if they served an answer was not reasonable given the procedural means that were available to them to avoid default while preserving their right to demand arbitration of the dispute. Duprat v BMW Fin. Servs., NA, LLC, 142 A.D.3d 946, 38 N.Y.S.3d 32, 2016 N.Y. App. Div. LEXIS 5859 (N.Y. App. Div. 2d Dep't 2016).

In an action by automobile occupants against an insurer, seeking recovery of an unsatisfied judgment against its insured, the insurer was not entitled to be relieved of its default in answering and to compel acceptance of its answer, as it failed to show that it had a reasonable excuse for its failure to serve a timely answer. Clarke v Liberty Mut. Fire Ins. Co., 150 A.D.3d 1192, 55 N.Y.S.3d 400, 2017 N.Y. App. Div. LEXIS 4188 (N.Y. App. Div. 2d Dep't 2017).

In a suit alleging causes of action in services rendered, quantum meruit, and implied contract, the order granting partial summary judgment to plaintiff was reversed because defendants were precluded from answering the complaint, thus, the case was remitted for plaintiff to have the opportunity to make a late motion for a default judgment. Gerster's Triple E. Towing & Repair, Inc. v Pishon Trucking, LLC, 167 A.D.3d 1353, 92 N.Y.S.3d 163, 2018 N.Y. App. Div. LEXIS 8930 (N.Y. App. Div. 3d Dep't 2018), aff'd, 196 A.D.3d 876, 151 N.Y.S.3d 524, 2021 N.Y. App. Div. LEXIS 4369 (N.Y. App. Div. 3d Dep't 2021).

Supreme court properly granted a mortgagee’s motion to confirm the referee’s report and for a judgment of foreclosure and sale and properly denied a mortgagor’s cross motion to compel the mortgagee to accept his late answer because he failed to demonstrate a reasonable excuse for his delay in answering the complaint. Bank of N.Y. Mellon v Tedesco, 174 A.D.3d 490, 104 N.Y.S.3d 193, 2019 N.Y. App. Div. LEXIS 5395 (N.Y. App. Div. 2d Dep't 2019).

Trial court properly denied a borrower’s motions to vacate two orders and to compel the lender to accept her late answer because she failed to demonstrate a reasonable excuse for her delay in answering the complaint, and her submissions were insufficient to establish her entitlement to vacatur. Wells Fargo Bank, N.A. v Hernandez, 204 A.D.3d 958, 167 N.Y.S.3d 149, 2022 N.Y. App. Div. LEXIS 2433 (N.Y. App. Div. 2d Dep't), app. dismissed, 204 A.D.3d 957, 164 N.Y.S.3d 874, 2022 N.Y. App. Div. LEXIS 2455 (N.Y. App. Div. 2d Dep't 2022).

Where all information necessary to preparation of complaint was before plaintiff’s attorney when summons was served and, most certainly, when notices of appearance and demands were served, and plaintiff’s papers failed to establish any “communication” in nature of negotiations for approximately eight months after expiration of ten-day period that was clearly, firmly and

unequivocably specified in carrier's offer of settlement, almost eight-month delay in serving complaint, after expiration of settlement offer was inordinate and entitled defendants to dismissal of medical malpractice action. Selwitshka v Glens Falls Hospital, 89 Misc. 2d 519, 393 N.Y.S.2d 848, 1976 N.Y. Misc. LEXIS 2858 (N.Y. Sup. Ct. 1976), aff'd, 56 A.D.2d 941, 392 N.Y.S.2d 583, 1977 N.Y. App. Div. LEXIS 11349 (N.Y. App. Div. 3d Dep't 1977).

Unpublished decision: In a foreclosure action, the supreme court did not err in denying defendants' motion for leave to file a late answer or the motion to vacate their default because they failed to demonstrate reasonable excuse as required by CPLR 3012(d), 5015(a)(1) as the complaint clearly informed defendants of the requirement to answer, and their failed attempt to retain pro bono legal representation and the impact of a death in their family were not temporally relevant as they occurred either well before or well after the time to answer. Carrington Mtge. Servs., LLC v Fiore, 206 A.D.3d 1306, 171 N.Y.S.3d 209, 2022 N.Y. App. Div. LEXIS 3855 (N.Y. App. Div. 3d Dep't 2022).

24. —Excuse sufficient

In order to avoid dismissal for failure to timely serve a complaint, the plaintiff must demonstrate a reasonable excuse for the delay, and while the decision as to what constitutes a reasonable excuse ordinarily lies within the sound discretion of the trial court, those excuses roughly categorized under the heading of "law office failures" cannot properly serve as a basis for defeating a motion to dismiss under CPLR 3012 (subd [b]). The plaintiff must also demonstrate that the claim against the defendant has legal merit, and this requirement may be satisfied by the filing of one or more "affidavits of merit" containing evidentiary facts and attested to by individuals with personal knowledge of those facts; generally, these affidavits must be sufficient to establish prima facie that the plaintiff has a good cause of action, and decisions concerning the sufficiency of a plaintiff's affidavits of merit should ordinarily be left to the discretion of the lower courts. Additionally, a variety of other factors such as the length of the delay, the complexity of the facts underlying the plaintiff's claim and the existence of prior settlement

negotiations may have a bearing upon a court's decision to grant or deny relief under CPLR 3012 (subd [b]). Barasch v Micucci (1980) 49 NY2d 594, 427 NYS2d 732, 404 NE2d 1275 superseded by statute as stated in State Farm Mut. Auto. Ins. Co. v Viger (1983, 3d Dept) 94 App Div 2d 592, 464 NYS2d 857, Wagenknecht v Government Employees Ins. Co., 97 A.D.2d 407, 467 N.Y.S.2d 237, 1983 N.Y. App. Div. LEXIS 19986 (N.Y. App. Div. 2d Dep't 1983) and Eldre Components, Inc. v Comten, Inc., 97 A.D.2d 940, 468 N.Y.S.2d 734, 1983 N.Y. App. Div. LEXIS 20737 (N.Y. App. Div. 4th Dep't 1983).

Denial of motion to dismiss for failure to serve a timely complaint must be based upon a reasonable excuse presented for the delay. Ellis v Board of Education, 46 A.D.2d 840, 361 N.Y.S.2d 223, 1974 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 3d Dep't 1974).

An action would be dismissed for failure to serve a complaint where plaintiffs offered no excuse for their delay, and where they had failed to show that their claim had merit. Kirschenbaum v Schreiber, 91 A.D.2d 649, 457 N.Y.S.2d 91, 1982 N.Y. App. Div. LEXIS 19515 (N.Y. App. Div. 2d Dep't 1982).

Plaintiff who seeks to serve complaint after expiration of 20-day statutory period following service of demand therefor as specified in CLS CPLR § 3012(b) must demonstrate that there was reasonable excuse for delay and make prima facie showing of legal merit. Puccini v Owens-Illinois Glass Co., 146 A.D.2d 758, 537 N.Y.S.2d 242, 1989 N.Y. App. Div. LEXIS 879 (N.Y. App. Div. 2d Dep't 1989).

Defendant was entitled to dismissal of action based on plaintiff's failure to timely serve complaint, although plaintiff was proceeding pro se, since (1) record showed that plaintiff chose to proceed in such manner and never claimed that she was unable to obtain attorney, and (2) pro se litigant acquires no greater rights than those of other litigants. Brooks v Inn at Saratoga Ass'n, 188 A.D.2d 921, 591 N.Y.S.2d 625, 1992 N.Y. App. Div. LEXIS 14629 (N.Y. App. Div. 3d Dep't 1992).

Given the strong public policy in favor of resolving cases on the merits, a carpenter/painter's lack of a willful default or intent to abandon a customer's breach of contract action, and the lack of prejudice to the customer, the trial court should have granted the carpenter/painter's N.Y. C.P.L.R. §§ 3012(d), 5015(a)(1) motions to vacate a default and to file an amended answer. Ahmad v Aniolowiski, 28 A.D.3d 692, 814 N.Y.S.2d 666, 2006 N.Y. App. Div. LEXIS 4764 (N.Y. App. Div. 2d Dep't 2006).

Although a trial court granted a motion filed pursuant to N.Y. C.P.L.R. 3012(d) by dentists and their dental firm to dismiss a complaint filed by a patient and others as to its dental malpractice claims, the trial court providently exercised its discretion in finding that the patient and others had a reasonable excuse for delay in serving the complaint as to its negligence claims and granting them an extension to serve the complaint as to those claims under N.Y. C.P.L.R. 3012(d); they adequately demonstrated the potential merit of the negligence claims, and there was no indication that any prejudice was caused by the relatively short delay in serving the complaint. Pristavec v Galligan, 32 A.D.3d 834, 820 N.Y.S.2d 529, 2006 N.Y. App. Div. LEXIS 10632 (N.Y. App. Div. 2d Dep't 2006), dismissed, 2011 N.Y. Misc. LEXIS 6849 (N.Y. Sup. Ct. May 17, 2011).

The service of a reply to a counterclaim put in within the time limited but after notice of a trial is irregular. Reilly v Byrne.

In plaintiff's action under N.Y. Real Prop. Acts. Law § 1501(4) to cancel and discharge a senior mortgage, the court properly granted defendant bank's request to vacate its default as the affidavit of its loan servicer satisfied the admissibility requirements of N.Y. C.P.L.R. 4518(a), and defendant established a potentially meritorious defense to the action with evidence that the statute of limitations to foreclose the senior mortgage had not expired. Stewart Tit. Ins. Co. v Bank of N.Y. Mellon, 154 A.D.3d 656, 61 N.Y.S.3d 634, 2017 N.Y. App. Div. LEXIS 6943 (N.Y. App. Div. 2d Dep't 2017), app. denied, 30 N.Y.3d 909, 94 N.E.3d 484, 71 N.Y.S.3d 2, 2018 N.Y. LEXIS 41 (N.Y. 2018).

In a mortgage foreclosure case, acceptance of defendant's late answer was not in error because defendant showed a reasonable excuse for the delay or default and set forth a potentially meritorious defense to the action, contending that the action was time-barred. Federal Natl. Mtge. Assn. v Sajdak, 192 A.D.3d 764, 143 N.Y.S.3d 691, 2021 N.Y. App. Div. LEXIS 1453 (N.Y. App. Div. 2d Dep't 2021).

Supreme Court properly granted appellee's cross-motion seeking leave to serve a late answer because defense counsel attributed the delay in serving an answer to appellee's unsuccessful pro se negotiations with appellant, after which he promptly sought legal counsel upon receiving the motion for default judgment. Deutsche Bank Natl. Trust Co. v Deluca, 225 A.D.3d 91, 207 N.Y.S.3d 174, 2024 N.Y. App. Div. LEXIS 1093 (N.Y. App. Div. 3d Dep't 2024).

Litigant's request to excuse a default was granted and the litigant, who was not personally served with process, was permitted to file an answer as the litigant's excuse of not receiving notice due to the litigant moving was reasonable, the litigant promptly filed moved after learning of the action, and public policy favored resolving cases on the merits. The claimant failed to articulate any prejudice by the delay in appearing and the litigant's defenses were potentially meritorious. Doggart v Praeger, 229 N.Y.S.3d 311, 2025 N.Y. Misc. LEXIS 905 (N.Y. Civ. Ct. 2025).

25. —Law office and lawyer failures

The trial court erred in denying defendant's motion to dismiss New York City's civil action under CPLR § 3012(b), which required a plaintiff to serve its complaint within 20 days of defendant's demand therefor and which permitted the trial court to dismiss the action if the plaintiff did not comply, where the city had failed to serve its complaint for over three years after it had been demanded by defendant and where the city's excuse, that the financial crisis of the mid-1970's

had compromised the functioning of its corporation counsel's office, alleged a "law office failure" insufficient to defeat a motion to dismiss under CPLR § 3012(b). Laffey v New York, 52 N.Y.2d 796, 436 N.Y.S.2d 707, 417 N.E.2d 1248, 1980 N.Y. LEXIS 2882 (N.Y. 1980).

The trial court did not abuse its discretion in determining that plaintiff in an action for libel or slander had established a meritorious claim, or in conditioning dismissal of the action upon plaintiff's service of a complaint within 20 days, where a failure timely to serve the complaint as a result of a disagreement between opposing attorneys with respect to discovery was not a law office failure, in view of the requirement of CPLR § 3016(a) that in an action for libel or slander "the particular words complained of shall be set forth in the complaint," in that defendant was fully aware from the verified summons of the nature of the action except for the words complained of, and where defendant demonstrated no prejudice from the short delay produced by the impasse between the opposing attorneys. Donnelly v Pepicelli, 58 N.Y.2d 268, 460 N.Y.S.2d 781, 447 N.E.2d 724, 1983 N.Y. LEXIS 2918 (N.Y. 1983).

Law office failure of an attorney to serve a complaint is an inadequate excuse. Galanos v New York, 35 A.D.2d 829, 317 N.Y.S.2d 243, 1970 N.Y. App. Div. LEXIS 3422 (N.Y. App. Div. 2d Dep't 1970).

Action against county, arising out of an alleged single-car accident in which the infant plaintiff allegedly, without any notice or warning, drove his car into an excavated area across highway, would be dismissed because of plaintiffs' inordinate delay of over two years and eight months in serving a complaint, coupled with the failure to offer any valid excuse for the delay; the excuse of "inadvertence" offered by plaintiffs' counsel constituted law office failure, which has consistently been rejected in New York, and plaintiffs' reliance on the excuse that settlement negotiations had continued during the period of delay was not borne out by the record. Jones v County of Rensselaer, 59 A.D.2d 982, 399 N.Y.S.2d 323, 1977 N.Y. App. Div. LEXIS 14252 (N.Y. App. Div. 3d Dep't 1977).

The trial court should have granted defendant's motion to dismiss for failure to serve a timely complaint where the only justification offered for a delay of almost eight months was that

defendant's notice of appearance and demand for a copy of the complaint was misrouted in the mailroom of the office of the Corporation Counsel. A "law office failure" cannot serve to defeat a motion to dismiss made pursuant to CPLR 3012(b). New York v AFA Protective Systems, Inc., 80 A.D.2d 820, 437 N.Y.S.2d 323, 1981 N.Y. App. Div. LEXIS 10628 (N.Y. App. Div. 1st Dep't 1981).

Defendant's motion for an order pursuant to CPLR § 3012(b) dismissing an action because of plaintiffs' failure to serve a timely complaint was improperly denied and would be reversed, where the excuses offered by plaintiffs were "law office failures," notwithstanding "a time-honored and usual practice" allowing conditional rather than absolute dismissal orders; a general custom among the lawyers of a locality cannot justify ignoring the plain requirements of the CPLR. Hall v Golub Corp., 90 A.D.2d 634, 456 N.Y.S.2d 212, 1982 N.Y. App. Div. LEXIS 18709 (N.Y. App. Div. 3d Dep't 1982).

The trial court improperly denied a motion to dismiss an action to recover damages for personal injuries, where the complaint was not served until over nine months after it was due and some four months after the original return date of defendant's motion to dismiss plaintiff's action, plaintiff's attorney's claim that an unidentified agent from the law firm representing defendant had agreed to an unlimited extension of time to serve the complaint lacked merit since plaintiff did not produce a written stipulation to that effect, as required by CPLR § 2104, plaintiff's attorney's conclusory assertion that an investigation of the incident was necessary before the complaint could be drafted was not supported by the record, counsel's inability to contact his client to prepare the complaint because plaintiff was on an extended summer vacation was also an insufficient excuse in that the complaint was already five and one half months overdue, numerous delays encountered by counsel in attempting to obtain plaintiff's verification of the complaint and his temporary misplacement of the file, which excuses purported to account for the last two months of an almost 10-month delay in serving the complaint, merely constituted law office failure and where plaintiff failed to make an adequate showing that her claim had legal

merit. Egan v Federated Dep't Stores, Inc., 108 A.D.2d 718, 484 N.Y.S.2d 883, 1985 N.Y. App. Div. LEXIS 43058 (N.Y. App. Div. 2d Dep't 1985).

Court should have granted defendants' motion to dismiss medical malpractice action unconditionally because plaintiff failed to serve complaint due to law office failure, rather than dismissing action because it was improperly captioned, since affidavit of plaintiffs' attorney and unsworn letter from their expert witness failed to state evidentiary facts warranting imposition of liability against defendant hospitals; therefore, plaintiffs were not entitled to statute of limitation extension (under CLS CPLR § 205) when they recommenced action, and action was time-barred. Cummings v St. Joseph's Hospital Health Center, 130 A.D.2d 957, 516 N.Y.S.2d 376, 1987 N.Y. App. Div. LEXIS 46938 (N.Y. App. Div. 4th Dep't 1987).

Plaintiff waived rejection of late service of answer where pleading was retained for 8 days before her attorney orally notified defendants' attorney that it would be returned as untimely, but thereafter did not return pleading for additional 45 days, especially since statement by plaintiff's attorney did not clearly and unequivocally express current rejection but merely indicated that rejection would be accomplished in future and declared that means of rejection, when it did occur, would be return of answer; thus, since defendants' belief that they were not required to take any action until return of answer was reasonable, court should not have granted plaintiff's motion for default judgment. Minogue v Monette, 138 A.D.2d 851, 525 N.Y.S.2d 961, 1988 N.Y. App. Div. LEXIS 2957 (N.Y. App. Div. 3d Dep't 1988).

Town sued regarding a traffic collision had a reasonable excuse, under N.Y. C.P.L.R. 3012(d), for its failure to respond timely to the injured party's complaint in that newly-hired and inexperienced personnel in the town clerk's office inadvertently mishandled the summons and complaint. Aabel v Town of Poughkeepsie, 301 A.D.2d 739, 753 N.Y.S.2d 201, 2003 N.Y. App. Div. LEXIS 2 (N.Y. App. Div. 3d Dep't 2003).

26. — —Misplaced file

Inadvertent misplacement of file of case by plaintiff's attorney was rejected as inadequate excuse for two and one-half year's delay in serving complaint. Gallagher v New York, 19 A.D.2d 623, 241 N.Y.S.2d 66, 1963 N.Y. App. Div. LEXIS 3666 (N.Y. App. Div. 2d Dep't 1963).

That attorney had misplaced file of case was insufficient to excuse two years' delay in serving complaint. Steuerman v Feinman, 19 A.D.2d 847, 244 N.Y.S.2d 571, 1963 N.Y. App. Div. LEXIS 3083 (N.Y. App. Div. 2d Dep't 1963).

Default in serving complaint should not be opened where the excuse for the delay is the loss of the file, which easily could have been reconstructed sufficiently to serve a complaint, and there is no affidavit of merit submitted either by plaintiff or someone having knowledge of the facts. Houle v Wilde, 22 A.D.2d 727, 253 N.Y.S.2d 234, 1964 N.Y. App. Div. LEXIS 2990 (N.Y. App. Div. 3d Dep't 1964).

Where the only reason offered by the plaintiff for her failure to serve the complaint for more than 2 ½ years following the service of the summons was that her attorney had misplaced the file, such excuse is inadequate to excuse the delay. Bradley v New York, 24 A.D.2d 490, 261 N.Y.S.2d 406, 1965 N.Y. App. Div. LEXIS 3878 (N.Y. App. Div. 2d Dep't 1965).

Where the only reason offered by plaintiff for his failure to serve a complaint for 29 months following the service of summons was that his attorney had misplaced the file, such an excuse is inadequate to justify the delay. Francisco v Walgreen Eastern Co., 25 A.D.2d 681, 269 N.Y.S.2d 170, 1966 N.Y. App. Div. LEXIS 4671 (N.Y. App. Div. 2d Dep't 1966).

Plaintiff's delay of over 18 months in serving his complaint was not justified by his attorney's excuse that "the file was lost." Pellerin v Groveville Corp., 34 A.D.2d 650, 310 N.Y.S.2d 15, 1970 N.Y. App. Div. LEXIS 5195 (N.Y. App. Div. 2d Dep't), app. dismissed, 27 N.Y.2d 590, 313 N.Y.S.2d 405, 261 N.E.2d 404, 1970 N.Y. LEXIS 1271 (N.Y. 1970).

Where the only reason offered by the plaintiff for his failure timely to serve the complaint that was the attorney had misplaced the file of the case during office renovations, such excuse was inadequate to justify a delay of about 35 months after a demand was made for service of the

copy of the complaint and the complaint was served after the motion to dismiss was made. Kroner v Flora, 35 A.D.2d 835, 317 N.Y.S.2d 459, 1970 N.Y. App. Div. LEXIS 3429 (N.Y. App. Div. 2d Dep't 1970).

Court did not improvidently exercise its discretion in striking defendant's answer for untimeliness where her counsel merely asserted that his 6-month delay in filing answer was caused by some unspecified personal problems which affected his office's operations, although trial court under CLS CPLR § 2005 may in interests of justice excuse delay resulting from law office failure, since defense counsel did not substantiate excuse for instant delay. Korea Exchange Bank v Attilio, 186 A.D.2d 634, 589 N.Y.S.2d 48, 1992 N.Y. App. Div. LEXIS 11308 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff's assertion that it had misplaced defendant's notice of appearance and demand for complaint was insufficient excuse for untimely service of complaint. Iagrossi v Gerber, 205 A.D.2d 586, 613 N.Y.S.2d 249, 1994 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 805, 626 N.Y.S.2d 756, 650 N.E.2d 415, 1995 N.Y. LEXIS 1324 (N.Y. 1995).

It was abuse of discretion to deny plaintiff's motion for leave to enter judgment on defendants' default in appearing and granting defendants' cross motion for leave to interpose late answer where only excuse offered was that "the file which was opened for this claim was misplaced and could not be located." Ortiz v Delmar Recycling Corp., 244 A.D.2d 392, 665 N.Y.S.2d 551, 1997 N.Y. App. Div. LEXIS 11271 (N.Y. App. Div. 2d Dep't 1997).

27. — —Affidavit of merit

In a legal malpractice action in which plaintiffs served the complaint upon defendant more than three and one-half months past the statutorily required date, the trial court erred in refusing to grant defendant's motion to dismiss without condition pursuant to CPLR § 3012(b) in light of plaintiff's failure to submit an affidavit of merit, since a party opposing such a motion based upon law office failure is obligated to submit an affidavit of merit containing evidentiary facts sufficient

to establish a prima facie case. Kel Management Corp. v Rogers & Wells, 64 N.Y.2d 904, 488 N.Y.S.2d 156, 477 N.E.2d 458, 1985 N.Y. LEXIS 15918 (N.Y. 1985).

28. — —Length of delay

Action would be dismissed where plaintiff neglected to serve a complaint until 45 months after demand where only excuse offered was that plaintiff's attorney mistakenly believed that action had been consolidated with other pending actions arising out of same accident and had been followed on his calendar as such. But plaintiff's attorney was also attorney of record in one of the consolidated actions. Cerf v Ackerly, 30 A.D.2d 687, 291 N.Y.S.2d 917, 1968 N.Y. App. Div. LEXIS 3730 (N.Y. App. Div. 2d Dep't 1968).

Two-year lapse between service of summons and motion to dismiss for failure to timely serve a complaint was not excused by inadvertence attendant upon moving of office of plaintiff's attorney, and failure to move for default against defendant for failure to serve a timely answer did not support allegation that complaint had been served. Sinder v 345 Cypress Realty Corp., 34 A.D.2d 777, 311 N.Y.S.2d 127, 1970 N.Y. App. Div. LEXIS 4662 (N.Y. App. Div. 1st Dep't 1970).

The trial court's order granting defendants' motion for summary judgment would be reversed, and plaintiff's cross motion for leave to file a bill of particulars would be conditionally granted, where, though plaintiff failed to comply with a conditional order of preclusion by serving a bill of particulars, plaintiff's excuse that his counsel had been deluged during the tax season, and had later misplaced the case file, was reasonably satisfactory under CPLR §§ 2005, 3012, which now permit law office failure to be treated as a reasonable excuse under appropriate circumstances, where the delay amounted to only five months and evinced no intent on plaintiff's part to abandon his claim, where defendants failed to show that they had been prejudiced by the delay, and where the plaintiff's complaint had merit. Paoli v Sullcraft Mfg. Co., 104 A.D.2d 333, 479 N.Y.S.2d 37, 1984 N.Y. App. Div. LEXIS 19797 (N.Y. App. Div. 1st Dep't 1984).

Summary judgment in favor of property owner in trespass action against adjoining landowner would be reversed even though adjoining landowner had failed to serve bill of particulars within 20-day period required under preclusion order, since oversight occasioned by law office failure was not willful or deliberate nor was delay inordinate or prejudicial. Kenosian v Service, 126 A.D.2d 790, 510 N.Y.S.2d 293, 1987 N.Y. App. Div. LEXIS 41943 (N.Y. App. Div. 3d Dep't 1987).

Defendant's motion to dismiss complaint should have been granted–action is based upon fall plaintiff allegedly suffered while on defendant's property; defendant immediately served notice of appearance and demand for complaint, but no complaint was forthcoming; two years later, defendant moved to dismiss action–defendant's motion should have been granted by default since plaintiffs failed to serve their papers in opposition two days prior to return date and there is no reference in record to motion having been adjourned; even if extension had been granted, defendant was entitled to dismissal for plaintiffs failed to submit affidavit of merit or verified complaint in lieu thereof; moreover, while plaintiffs' proffered excuse, that because associate assigned to their case left their prior attorney's office demand for complaint languished in their file unanswered, might suffice to excuse failure to meet 20-day deadline in CPLR 3012 (b), it does not excuse two years of neglect in producing complaint. Johnson v Golub Corp., 152 A.D.2d 803, 543 N.Y.S.2d 584, 1989 N.Y. App. Div. LEXIS 9319 (N.Y. App. Div. 3d Dep't 1989).

Court properly denied third-party plaintiff's motion for leave to enter default judgment against third-party defendant, despite latter's failure to interpose timely answer to third-party complaint, and despite concession that delay in serving answer was due to "law office failure," since delay in service was short and not willful, and there was no prejudice as result thereof. Bungay v Joy Power Prods., 243 A.D.2d 527, 663 N.Y.S.2d 100, 1997 N.Y. App. Div. LEXIS 9793 (N.Y. App. Div. 2d Dep't 1997).

Trial court abused its discretion in rejecting defendant's proffered excuse of law office failure in seeking leave to interpose a late answer because defendant's attorney explained that her brief delay of four days in filing the defendant's answer resulted from her inadvertent failure to

calendar the deadline for such filing, and defendant demonstrated that it had a potentially meritorious defense to the action based upon the expiration of the statute of limitations. Wilmington Trust, N.A. v Pape, 192 A.D.3d 947, 140 N.Y.S.3d 712, 2021 N.Y. App. Div. LEXIS 1612 (N.Y. App. Div. 2d Dep't 2021).

29. — —Discretion of court

Defendants' failure to serve a verified answer and notice of appearance on plaintiff until some 19 days after the time in which they were required to answer had expired would be excused in the exercise of discretion where, although the delay was apparently the result of law office failure, the delay was minimal and the verified answer contained a sufficient statement of merits. Buderwitz v Cunningham, 101 A.D.2d 821, 475 N.Y.S.2d 300, 1984 N.Y. App. Div. LEXIS 18485 (N.Y. App. Div. 2d Dep't 1984).

In an importer and supplier's action for goods sold and delivered, summary judgment for defendants, based upon an order precluding evidence for defendants' failure to serve a bill of particulars, would be reversed in accordance with the court's discretion under CPLR §§ 2005, 3012[d], where the default was occasioned in part by law office failure to timely serve a bill of particulars, comply with a conditional order of preclusion, and appear in opposition to the motion for summary judgment. Domino Imports, Ltd. v Style Shop, Inc., 107 A.D.2d 639, 484 N.Y.S.2d 23, 1985 N.Y. App. Div. LEXIS 42619 (N.Y. App. Div. 1st Dep't 1985).

The trial court improperly denied a motion to dismiss an action to recover damages for personal injuries, where the complaint was not served until over nine months after it was due and some four months after the original return date of defendant's motion to dismiss plaintiff's action, plaintiff's attorney's claim that an unidentified agent from the law firm representing defendant had agreed to an unlimited extension of time to serve the complaint lacked merit since plaintiff did not produce a written stipulation to that effect, as required by CPLR § 2104, plaintiff's attorney's conclusory assertion that an investigation of the incident was necessary before the complaint could be drafted was not supported by the record, counsel's inability to contact his

client to prepare the complaint because plaintiff was on an extended summer vacation was also an insufficient excuse in that the complaint was already five and one half months overdue, numerous delays encountered by counsel in attempting to obtain plaintiff's verification of the complaint and his temporary misplacement of the file, which excuses purported to account for the last two months of an almost 10-month delay in serving the complaint, merely constituted law office failure and where plaintiff failed to make an adequate showing that her claim had legal merit. Egan v Federated Dep't Stores, Inc., 108 A.D.2d 718, 484 N.Y.S.2d 883, 1985 N.Y. App. Div. LEXIS 43058 (N.Y. App. Div. 2d Dep't 1985).

Although CPLR §§ 2005, 3012(d) empower courts to exercise discretion in determining motions to vacate defaults emanating from law office failure, legislation did not intend routine vacatur of such defaults; law office failure may be considered along with several other relevant factors in determining motions to open defaults. Montalvo v Nel Taxi Corp., 114 A.D.2d 494, 494 N.Y.S.2d 406, 1985 N.Y. App. Div. LEXIS 53192 (N.Y. App. Div. 2d Dep't 1985), app. denied in part, app. dismissed, 68 N.Y.2d 643, 505 N.Y.S.2d 73, 496 N.E.2d 232, 1986 N.Y. LEXIS 19036 (N.Y. 1986).

Although CLS CPLR § 2005 provides that court is not precluded from excusing delay resulting from law office failure, there must still be reasonable excuse for delay and meritorious claim, and motions to dismiss complaint for untimely service were properly granted where plaintiff did not submit affidavit of merit, his attorney's affirmation was not based on personal knowledge and did not set forth sufficient evidentiary facts, and plaintiff's verified complaint was devoid of evidentiary facts or details and thus could not serve as sufficient affidavit of merit. Oversby v Linde Div. of Union Carbide Corp., 121 A.D.2d 373, 503 N.Y.S.2d 85, 1986 N.Y. App. Div. LEXIS 58311 (N.Y. App. Div. 2d Dep't 1986).

Defendants' motions to dismiss action for personal injuries and wrongful death were properly granted where plaintiff failed to respond to defendants' demands for complaint under CLS CPLR § 3012(b) until instant motions to dismiss were made over 8 months later, plaintiff's excuse for her default was conclusory assertion of law office failure, and she failed to submit affidavit of

merit. Sarles v Village of Tarrytown, 245 A.D.2d 440, 666 N.Y.S.2d 468, 1997 N.Y. App. Div. LEXIS 13103 (N.Y. App. Div. 2d Dep't 1997).

In denying motion to dismiss action based on plaintiff's failure to serve complaint, court erred in accepting explanation of plaintiff's counsel that his delay in serving complaint was caused by unspecified law office failure. Bravo v New York City Hous. Auth., 253 A.D.2d 510, 676 N.Y.S.2d 871, 1998 N.Y. App. Div. LEXIS 9110 (N.Y. App. Div. 2d Dep't 1998).

In an action to vacate the conveyance of three parcels of property to defendant county after tax foreclosure proceedings, the trial court did not abuse its discretion in impliedly granting county defendants' motion to compel a property owner to accept service of their late answer to the amended complaint under N.Y. C.P.L.R. § 3012(d) and in denying a cross-motion for default judgment because the delay was only six days, was attributable to law office failure, and was not willful. Case v Cayuga County, 60 A.D.3d 1426, 875 N.Y.S.2d 705, 2009 N.Y. App. Div. LEXIS 2174 (N.Y. App. Div. 4th Dep't), app. dismissed, 13 N.Y.3d 770, 886 N.Y.S.2d 869, 915 N.E.2d 1167, 2009 N.Y. LEXIS 3507 (N.Y. 2009).

Court has discretion to excuse a delay resulting from law office failure; illness and death of trial counsel and the reassignment of the case to new counsel are compelling and mitigating circumstances for finding the delay in prosecution excusable, in absence of claim of prejudice to defendants. Herron v Dortch, 119 Misc. 2d 531, 464 N.Y.S.2d 979, 1983 N.Y. Misc. LEXIS 3552 (N.Y. Civ. Ct. 1983).

To the extent that an answer/reply to a counterclaim contained in an amended answer was late, the late filing was excused because the answer/reply was deemed timely filed and served nunc pro tunc. Counsel dealt with a heavy workload, the verified complaint sufficed for meritorious defense, and the delay was brief. 350 Oakford St. Inc. v Old Republic Natl. Title Ins. Co. Minn, 2025 N.Y. Misc. LEXIS 2628 (N.Y. Sup. Ct. 2025).

30. — —Illustrative cases

Where action was initiated approximately one day prior to expiration of statute of limitations by service of summons without complaint, and defendant demanded complaint from plaintiff, and no complaint was served because of counsel's inadvertence, action dismissed. Carroll v Estron Realty Corp., 31 A.D.2d 903, 297 N.Y.S.2d 972, 1969 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 1st Dep't 1969).

On motion to dismiss action for failure to serve a complaint, excuse offered by plaintiff's attorney that extensions of time lulled him into believing the complaint had already been served was inadequate to justify the delay. Welsh v Kaskel, 33 A.D.2d 803, 307 N.Y.S.2d 184, 1969 N.Y. App. Div. LEXIS 2532 (N.Y. App. Div. 2d Dep't 1969).

Where the only explanation offered by plaintiff to support the long delay in serving the complaint was difficulty in investigation, inadequate secretarial help, and the fact that the case had been referred to plaintiff's present attorney after service of summons had been made, but where there was no indication as to when such referral took place, these factors constituted law office failure and as such were insufficient to excuse the delay, regardless of whether plaintiff's suit would now be barred by the statute of limitations; furthermore, plaintiff failed to show a meritorious cause of action. Coons v After Dark in Rochester, 56 A.D.2d 738, 392 N.Y.S.2d 742, 1977 N.Y. App. Div. LEXIS 10926 (N.Y. App. Div. 4th Dep't 1977).

Where the only reason offered for delay in serving complaint from April 18, 1975 until March 12, 1976 immediately preceding the adjourned returned date of defendant's motion to dismiss was that sometime in June, 1975 plaintiff's counsel moved his office and at that time misplaced the case file, denial of defendant's motion to dismiss the cause of action was an abuse of discretion, especially where plaintiff made no showing of evidentiary facts establishing that he had a viable cause of action. Manfreda v Kendall Agency, Inc., 57 A.D.2d 727, 395 N.Y.S.2d 560, 1977 N.Y. App. Div. LEXIS 11782 (N.Y. App. Div. 4th Dep't 1977).

Claim that law office was understaffed during summer months was not a sufficient explanation for plaintiff's delay in serving complaint after receiving a demand therefor in medical malpractice action. Floria v Cook, 59 A.D.2d 771, 398 N.Y.S.2d 725, 1977 N.Y. App. Div. LEXIS 13814 (N.Y. App. Div. 2d Dep't 1977).

In a negligence action commenced by service of a summons, the defendants were entitled to having the action dismissed, where 28 months had elapsed after a notice of appearance and a demand for service of the complaint had been served upon the plaintiff's attorney before the complaint was served. A fire in the office of the plaintiff's attorney 10 months after the demand and a subsequent burglary of his office did not excuse the delay. Nor did the defendants waive the right to have the complaint dismissed by waiting for 16 days from service before rejection of the complaint and another three days for bringing a motion to dismiss. Nieto v Lipshitz, 82 A.D.2d 875, 440 N.Y.S.2d 319, 1981 N.Y. App. Div. LEXIS 14573 (N.Y. App. Div. 2d Dep't 1981).

A motion to enter judgment based upon defendant's default in timely answering the complaint in a negligence action for personal injuries was properly denied where defendant's delay in answering was only 33 days after the statutory period, where defendant affirmatively demonstrated its intent to defend the action by serving the answer before any application was made by plaintiff to enter default judgment, and where, notwithstanding that defendant's excuse for the delay could be characterized as "law office failure," the extension of time to plead was properly granted in that the delay in service was not wilful or lengthy, and did not cause prejudice to the plaintiff. Junior v New York, 85 A.D.2d 683, 445 N.Y.S.2d 503, 1981 N.Y. App. Div. LEXIS 16508 (N.Y. App. Div. 2d Dep't 1981).

In a medical malpractice action, defendant's motion to dismiss the action as to it for failure to timely serve a complaint was improperly denied where the excuses proffered by plaintiff for his failure to serve a complaint until some five months after receiving a notice of appearance amounted to nothing more than law office failure. Getlin v St. Vincent's Hospital & Medical

Center, 90 A.D.2d 495, 454 N.Y.S.2d 754, 1982 N.Y. App. Div. LEXIS 18519 (N.Y. App. Div. 2d Dep't 1982).

In an action on an insurance contract commenced by service of only a summons, the trial court improperly refused to dismiss the proceeding for failure to serve a complaint within 20 days after demand for such service as required by CPLR § 3012, where the absence of plaintiff from the state for the critical period amounted to law office failure and was insufficient to excuse the failure, in that the record indicated that plaintiff's attorney had ample time to confer with his client and to prepare a complaint. Sotirakis v United Services Auto. Asso., 91 A.D.2d 1067, 458 N.Y.S.2d 677, 1983 N.Y. App. Div. LEXIS 16404 (N.Y. App. Div. 2d Dep't 1983).

In a medical malpractice action, an order granting defendant's motion dismissing the action for failure to serve the complaint pursuant to CPLR § 3012 would be affirmed in light of plaintiff's failure to serve the complaint within the specified 20-day period, where the inability to obtain the services of a medical expert and to overcome, in a timely manner the other complexities and difficulties inherent in malpractice litigation constituted law office failures and were not legally sufficient to excuse the delay in service. Corrado v Bendell, 93 A.D.2d 876, 461 N.Y.S.2d 426, 1983 N.Y. App. Div. LEXIS 17752 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 552 (N.Y. 1983), app. dismissed, 60 N.Y.2d 645, 1983 N.Y. LEXIS 6241 (N.Y. 1983).

A motion to open a default judgment and compel acceptance of an answer in a personal injury action resulting from an automobile collision would be denied, where an affidavit by an attorney for the trial counsel to defendant's attorneys demonstrated at best that the failure to timely serve the answer was due to the law office failure of defendant's attorneys, where the attorney's statement in the affidavit, upon information and belief, that defendant's vehicle was stolen by his female tenant and her boyfriend and that the driver of the vehicle was apparently much younger than defendant did not demonstrate a competent legal defense, where the attorney did not explain why defendant did not submit an affidavit of merits or even set forth the source of his own hearsay statements, and where there was no indication in the affidavit of the name of the tenant and her boyfriend or that defendant ever reported his vehicle stolen. Stellato v Petrillo, 95

A.D.2d 704, 463 N.Y.S.2d 818, 1983 N.Y. App. Div. LEXIS 18603 (N.Y. App. Div. 1st Dep't), app. dismissed, 60 N.Y.2d 821, 1983 N.Y. LEXIS 6422 (N.Y. 1983).

The trial court in a mortgage foreclosure action properly denied defendant's motion to vacate the default judgment that had been entered against him where defendant's default had resulted from law office failure, and where, though recent amendments to CPLR §§ 2005, 3012 have empowered the courts to exercise their discretion to excuse such defaults, defendant's conduct demonstrated a lengthy and deliberate pattern of unexplained delay, and defendant was an attorney appearing pro se, so that the results of his dilatory conduct would fall only upon himself rather than upon an innocent client. De Leo v Bertucci, 98 A.D.2d 708, 469 N.Y.S.2d 107, 1983 N.Y. App. Div. LEXIS 21009 (N.Y. App. Div. 2d Dep't 1983).

The trial court erred in vacating its order granting a default judgment based on defendant's failure to timely answer where, although the trial court had discretion to excuse defendant's three month delay that had resulted from law office failure, it was improper to do so absent a showing of merit; defendant's unverified proposed answer was insufficient for such purpose in that it merely denied "knowledge or information sufficient to form a belief" as to plaintiff's causes of action, and counterclaim set forth only conclusory facts in a skeletal manner and failed to address the gravamen of plaintiffs' claims. Klenk v Kent, 103 A.D.2d 1002, 478 N.Y.S.2d 204, 1984 N.Y. App. Div. LEXIS 19678 (N.Y. App. Div. 4th Dep't), app. dismissed, 63 N.Y.2d 953, 1984 N.Y. LEXIS 6413 (N.Y. 1984).

As defaulting party, defendant is required to supply both reasonable excuse for default and affidavit of merits from person competent to attest to meritorious nature of claim; accordingly, order denying plaintiffs' motion for default judgment is affirmed since defendant's excuse for default, delay in transmission of complaint from defendant's insurer to defendant's counsel and subsequent law office failure, was reasonable, and verified answer may constitute sufficient statement of merit for purposes of vacating default. Elgart v Raleigh Hotel Corp., 115 A.D.2d 165, 495 N.Y.S.2d 492, 1985 N.Y. App. Div. LEXIS 54421 (N.Y. App. Div. 3d Dep't 1985).

Defendant was entitled to vacation of default judgment where its delay in answering complaint was relatively short (14 days) and was largely attributable to law office failure due to length of time defendant's insurer took to forward papers to defense counsel, where defendant demonstrated arguably meritorious defense, and where plaintiffs did not show any prejudice to them; CLS CPLR § 3012 generally views with liberality excusing of nonprejudicial defaults. Shure v Westhampton Beach, Inc., 121 A.D.2d 887, 503 N.Y.S.2d 802, 1986 N.Y. App. Div. LEXIS 59019 (N.Y. App. Div. 1st Dep't 1986).

It was error as matter of law to deny, as academic, defendant's motion to dismiss under CLS CPLR § 3012 on ground that complaint had been served while motion was pending since plaintiff's attorney's affirmation, attributing delay to his client's absence and an investigation following which he determined that he could verify pleading himself, was at best conclusory and failed to include specific efforts he undertook and their timing; thus, Special Term was presented with no adequate explanation for delay or showing of merit sufficient to deny defendant's motion. Benson v Rana Management, Inc., 131 A.D.2d 798, 517 N.Y.S.2d 162, 1987 N.Y. App. Div. LEXIS 48247 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was not entitled to vacatur of his default in serving complaint where (1) in 1988, plaintiff commenced breach of contract action against defendant by substituted service of summons and complaint, but action was dismissed for lack of personal jurisdiction, (2) in July 1990, plaintiff commenced instant breach of contract action by personal service of summons only, (3) defendant twice demanded service of complaint, but no complaint was served, (4) 65 days after complaint was due, defendant moved to dismiss pursuant to CLS CPLR § 3012(b), and plaintiff served complaint on next day, (5) complaint served was essentially identical to complaint served in 1988 action, and (6) defendant rejected complaint as untimely; default was not excused by statement that plaintiff attorney's practice had been neglected because he was overwhelmed by efforts to aid injured friend who eventually died, especially as case involved simple breach of contract and complaint had already been prepared in 1988. Bardales v Blades, 191 A.D.2d 667, 595 N.Y.S.2d 553, 1993 N.Y. App. Div. LEXIS 3151 (N.Y. App. Div. 2d Dep't 1993).

In action for partition, defendant was entitled to vacatur of her default in answering where (1) delay occurred as result of law office failure occasioned by her counsel's assumption that communication of request for extension of time to his adversary's office was sufficient to avoid default, and (2) plaintiff's counsel acknowledged receipt of request for extension but offered no explanation for failure to respond in timely fashion. Busa v Busa, 196 A.D.2d 267, 609 N.Y.S.2d 452, 1994 N.Y. App. Div. LEXIS 2799 (N.Y. App. Div. 3d Dep't 1994).

Court did not err by failing to reinstate mechanic's liens on ground of law office failure, where lienors stated only that it was somehow their attorney's fault that verified statement of accounting demanded under CLS Lien § 38 was not submitted in timely fashion. Gardinier v Healey, 222 A.D.2d 868, 635 N.Y.S.2d 728, 1995 N.Y. App. Div. LEXIS 12890 (N.Y. App. Div. 3d Dep't 1995).

Court should have dismissed complaint under CLS CPLR § 3012(b) for failure to serve complaint, even though excuse proffered for serving complaint 14 months after it was due, and 3 months after service of motion to dismiss, was that plaintiff's counsel had burglary in his office of unspecified date and "all of (his) files were thrown out and scattered around (his) office," since date of burglary was not specified, defendants had twice demanded service of complaint without response, and plaintiff did not seek extension of time to serve complaint; further, plaintiff failed to make prima facie showing of legal merit for her claim that food she ingested from defendants' restaurant caused her alleged injuries. Quinn v Wenco Food Sys., 269 A.D.2d 437, 703 N.Y.S.2d 222, 2000 N.Y. App. Div. LEXIS 1386 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 2, 734 N.E.2d 1213, 2000 N.Y. LEXIS 1732 (N.Y. 2000).

Court improperly denied defendants' motions to dismiss under CLS CPLR § 3012(b) where excuses proffered by plaintiff, that attorney in charge of plaintiff's case ceased her employment at law firm retained by plaintiff on unspecified date, and that unspecified delays arose, were not reasonable. Goldstein v Lopresti, 284 A.D.2d 497, 726 N.Y.S.2d 579, 2001 N.Y. App. Div. LEXIS 6823 (N.Y. App. Div. 2d Dep't 2001).

Dismissal of action against disabled firefighters who demanded a complaint pursuant to CPLR § 3012(b) was proper where no complaint was served, and the city failed to offer an excuse for the protracted and continuing delay; the neglect to prosecute was a proper exercise of discretion under § 3012(d). City of Albany v Wise, 298 A.D.2d 783, 750 N.Y.S.2d 653, 2002 N.Y. App. Div. LEXIS 10336 (N.Y. App. Div. 3d Dep't 2002).

Granting a husband judgment to set aside a prenuptial agreement negotiated and consented to by the parties merely because the wife failed to timely reply to the husband's counterclaims was inappropriate because the judgment would have had longstanding and unintended repercussions. The wife's counsel asserted that the failure to reply was due to an office oversight, the default did not appear to have been willful, the wife had been actively litigating and mediating the matter, and there was no prejudice to the husband. J.M. v G.V., 225 N.Y.S.3d 859, 2025 N.Y. Misc. LEXIS 31 (N.Y. Sup. Ct. 2025).

31. —Agreement to postpone service

Plaintiff's motion to compel defendant to accept late service of complaint, some 3 years after service of summons and notice, will be denied where plaintiff offers only unembelished statement to effect that, at some point during 3 year period, there were some negotiations of unspecified length. Alos Micrographics Corp. v JML Optical Industries, Inc., 112 A.D.2d 965, 492 N.Y.S.2d 776, 1985 N.Y. App. Div. LEXIS 52183 (N.Y. App. Div. 2d Dep't 1985).

Letter from defendant's claims adjuster indicating that he was conducting investigation into matter was not equivalent to agreement to postpone service of complaint and did not justify nearly 11-month delay in doing so; thus, court should have granted defendant's motion to dismiss action for failure to timely serve complaint, even though affidavit of plaintiffs' counsel and annexed medical records competently established that plaintiff sustained injuries, no first-

hand evidence was presented to show that defendant had any part therein. Honohan v Hannaford Bros. Co., 208 A.D.2d 1177, 617 N.Y.S.2d 941, 1994 N.Y. App. Div. LEXIS 10791 (N.Y. App. Div. 3d Dep't 1994).

32. —Difficulties and complexities of case

Attorney's allegation that plaintiff's absence from state for period of two years, beginning seven months prior to service of summons, disabled him in preparation of a complaint, coupled with absence of affidavit of merits, was insufficient to justify 14-month delay in service of complaint after demand by defendant. Dolendi v Maksiks, 30 A.D.2d 687, 292 N.Y.S.2d 209, 1968 N.Y. App. Div. LEXIS 3731 (N.Y. App. Div. 2d Dep't 1968).

It was an improvident exercise of discretion to dismiss complaint served almost 2 years after demand therefor was made where delay was occasioned by plaintiff's difficulty, due in part to defendant city's obstructionism, in obtaining medical records from city hospital. Maldonado v New York, 41 A.D.2d 918, 343 N.Y.S.2d 622, 1973 N.Y. App. Div. LEXIS 4475 (N.Y. App. Div. 1st Dep't 1973).

Alleged complexity of litigation, difficulty in investigating it and interviewing witnesses and inherent difficulties of medical malpractice actions related to mere law office failures and were insufficient to excuse 13-month delay in serving complaint on defendants in medical malpractice action; thus, such delay entitled defendants to dismissal of action for failure to prosecute. Rabetoy v Atkinson, 49 A.D.2d 691, 370 N.Y.S.2d 755, 1975 N.Y. App. Div. LEXIS 10541 (N.Y. App. Div. 4th Dep't), app. dismissed, 37 N.Y.2d 708, 1975 N.Y. LEXIS 2855 (N.Y. 1975), app. dismissed, 37 N.Y.2d 803, 375 N.Y.S.2d 111, 337 N.E.2d 616, 1975 N.Y. LEXIS 2175 (N.Y. 1975).

Where plaintiff delayed service for a year and a half to attach to complaint lengthy schedule of defects which it knew it would ultimately have to provide to defendants in complex, million-dollar action involving construction of cooperative housing, and defendants knew reason for delay either because they had been told by plaintiff or because similar procedure had been used in

other cases in which they were involved, failure to dismiss was not abuse of discretion. Orloff Towers, Inc. v Vermilya-Brown Co., 50 A.D.2d 740, 377 N.Y.S.2d 8, 1975 N.Y. App. Div. LEXIS 11522 (N.Y. App. Div. 1st Dep't 1975).

Delay of approximately 22 months in serving complaint in medical malpractice action was not excused by indication that difficulty was encountered in obtaining medical proof regarding defendant's negligence. Dobbins v County of Erie, 58 A.D.2d 733, 395 N.Y.S.2d 865, 1977 N.Y. App. Div. LEXIS 12852 (N.Y. App. Div. 4th Dep't 1977).

Where carpet company had suffered extensive losses due to dishonesty, but had encountered serious difficulty in tracing source of its losses, dismissal order would be modified to extent of denying motions to dismiss because of delay in serving complaint filed by insurers against whom carpet company had brought action seeking compensation for losses due to dishonesty, but, due to delay, carpet company would be required to pay each insurer $1,000 plus costs and disbursements of action within 30 days after service of copy of order. Stephen-Leedom Carpet Co. v Arkwright-Boston Mfrs. Mut. Ins. Co., 59 A.D.2d 673, 398 N.Y.S.2d 431, 1977 N.Y. App. Div. LEXIS 13605 (N.Y. App. Div. 1st Dep't 1977), app. dismissed, 43 N.Y.2d 949, 1978 N.Y. LEXIS 2890 (N.Y. 1978), app. dismissed, 43 N.Y.2d 894, 403 N.Y.S.2d 499, 374 N.E.2d 396, 1978 N.Y. LEXIS 1818 (N.Y. 1978).

In negligence action, it was error for court to deny plaintiff's motion to set matter down for inquest on issue of damages, and to grant defendant's cross motion to vacate her default and compel plaintiff to accept her answer, where only excuse offered for defendant's 4-month delay in serving her answer was administrative delay ostensibly caused by her insurance carrier, and she failed to investigate or to advise court of reason for delay. Peters v Pickard, 143 A.D.2d 81, 531 N.Y.S.2d 332, 1988 N.Y. App. Div. LEXIS 8131 (N.Y. App. Div. 2d Dep't 1988).

Attorney was entitled to restoration of 5-year-old fee dispute case to calendar, notwithstanding his failure to enter default judgment within one year after defendant client failed to answer, where attorney had been retained with regard to underlying case in Iran, attorney had migrated to New York and had become member of New York bar after dispute arose, and merit of

attorney’s cause of action was indicated by translation of Iranian statute relating to legal fees. Khadem v PAN AM, 151 A.D.2d 311, 542 N.Y.S.2d 581, 1989 N.Y. App. Div. LEXIS 16890 (N.Y. App. Div. 1st Dep't 1989).

Action to recover on bond, commenced by plaintiff school district in 1993 by service of summons with notice on defendant, was properly dismissed based on plaintiff’s failure to serve complaint within prescribed 20-day period following defendant’s demand or to establish reasonable excuse for delay, where plaintiff contended that it was unable to ascertain amount of its damages until conclusion of arbitration proceeding, but it failed to account for fact that such proceeding was concluded more than one year prior to its eventual service of complaint in 1999 and, moreover, record showed that damages could have been calculated and complaint served as early as October 1996. Greater Amsterdam Sch. Dist. v Int'l Fid. Ins. Co., 285 A.D.2d 944, 727 N.Y.S.2d 831, 2001 N.Y. App. Div. LEXIS 7667 (N.Y. App. Div. 3d Dep't 2001).

In a case involving a maze of technicalities, including defendant’s objection to late service of the complaint, defendant’s motion to dismiss for untimely service would be denied where the motion followed defendant’s service of its answer, the court noting the mandate of § 104 of the CPLR and availing itself of the discretionary features of subd (b) of this section. Kreiling v Jayne Estates, Inc., 51 Misc. 2d 895, 274 N.Y.S.2d 291, 1966 N.Y. Misc. LEXIS 1420 (N.Y. Sup. Ct. 1966).

33. — —Obtaining expert

Failure to serve a complaint against a hospital on time required dismissal where the inability to obtain the services of a medical expert was an unacceptable excuse for delay. Scarborough v Zimmon, 85 A.D.2d 892, 446 N.Y.S.2d 751, 1981 N.Y. App. Div. LEXIS 16731 (N.Y. App. Div. 4th Dep't 1981), aff'd, 56 N.Y.2d 784, 452 N.Y.S.2d 400, 437 N.E.2d 1157, 1982 N.Y. LEXIS 3435 (N.Y. 1982).

Medical malpractice plaintiffs’ inability to obtain the services of a medical expert was tantamount to law office failure and, as such, was an unacceptable excuse for delay. Scarborough v

Zimmon, 90 A.D.2d 989, 456 N.Y.S.2d 584, 1982 N.Y. App. Div. LEXIS 19274 (N.Y. App. Div. 4th Dep't 1982), aff'd, 59 N.Y.2d 945, 466 N.Y.S.2d 301, 453 N.E.2d 530, 1983 N.Y. LEXIS 3251 (N.Y. 1983).

Allegation of inability to draft complaint until receipt of opinion of medical opinion is law office failure which is not legally sufficient to excuse delay in service of complaint. Courell v Kurzner, 118 A.D.2d 677, 500 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 49116, 1986 N.Y. App. Div. LEXIS 54543 (N.Y. App. Div. 2d Dep't 1986).

There was insufficient excuse for plaintiff to avoid dismissal of his 2 actions for medical malpractice where in each case there was timely appearance and demand for complaint by defendant, but plaintiff failed to serve any complaint and alleged only that he was having trouble finding expert to review medical records; attempts to file complaints subsequent to defendant’s filing of dismissal motion were also properly rejected. Kaveny v Fine, 122 A.D.2d 304, 504 N.Y.S.2d 64, 1986 N.Y. App. Div. LEXIS 59647 (N.Y. App. Div. 3d Dep't 1986).

34. — —Illustrative cases

In an action to recover damages for defamation, the trial court erred in denying defendant’s motion to dismiss the action for failure to serve a complaint and in granting plaintiffs an additional 30 days in which to serve a complaint where plaintiffs failed to demonstrate a reasonable excuse for the delay through their allegations that their temporary residence in Florida prevented close communication with counsel in New York, that the ill-health of one plaintiff may have caused plaintiffs to be indecisive about pressing the action, and that the newspaper articles, correspondence and legal documents involved in the action were so voluminous that there was insufficient time for counsel to draft a proper complaint after being advised to go forward with the action. Caton v Schenectady Gazette, 82 A.D.2d 949, 440 N.Y.S.2d 760, 1981 N.Y. App. Div. LEXIS 14681 (N.Y. App. Div. 3d Dep't 1981).

In an action against the estate of a deceased attorney, alleging negligence in the attorney’s drafting of a will, the action would be dismissed where a copy of the complaint had not been

mailed to the estate's counsel until two months after the time to serve the complaint had expired, and where the alleged complexity of the case, that involved only the omission from the will of certain specific bequests and of a contingency clause for a predeceasing spouse, had not justified the delay in drafting the complaint. Ellis v Ellis, 91 A.D.2d 711, 457 N.Y.S.2d 593, 1982 N.Y. App. Div. LEXIS 19597 (N.Y. App. Div. 3d Dep't 1982).

Plaintiff's explanation that the delay in serving complaint was due to the "complexity" of medical malpractice case could not stand in the face of her own affidavit describing the alleged malpractice of defendants as consisting of their causing a portion of needle to break off in her gum, and plaintiff showed no other legally cognizable excuse for the delay in serving the complaint. Wiggins v Leipsic, 92 A.D.2d 893, 459 N.Y.S.2d 882, 1983 N.Y. App. Div. LEXIS 17286 (N.Y. App. Div. 2d Dep't 1983).

A medical malpractice action would be dismissed for plaintiff's failure timely to serve a complaint, where plaintiff failed to demonstrate a reasonable excuse for her delay in serving the complaint, in that the excuse proffered by her attorney for the delay, that the case was complicated and required more research, was clearly insufficient in view of the fact that the attorney possessed the same general information at the time the summons was served that he had when he eventually asserted the general allegations in the complaint, where plaintiff failed to establish the legal merits of her claim by an affidavit containing evidentiary facts by a medical expert, and where her affidavit was inadequate on its face and merely conclusory. Horvath v Bayonne Hospital, 99 A.D.2d 824, 472 N.Y.S.2d 418, 1984 N.Y. App. Div. LEXIS 17229 (N.Y. App. Div. 2d Dep't 1984).

In an action to recover damages for tortious interference with contract rights which was commenced by service of summons with notice on March 19, 1982, in which defendant appeared on March 30, 1982 by serving a notice of appearance and demand for complaint, and in which the complaint was not served until August 20, 1982, 123 days after it was due, a motion to dismiss was improperly denied where the explanations offered by plaintiff's attorney to excuse the long default in the case consisted of a mere conclusory assertion that the drafting of a

proper complaint was impeded by the existence of complex legal and factual issues, was unsupported by the record, and amounted to nothing other than inexcusable neglect. De Vito v Marine Midland Bank, N.A., 100 A.D.2d 530, 473 N.Y.S.2d 218, 1984 N.Y. App. Div. LEXIS 17501 (N.Y. App. Div. 2d Dep't 1984).

Court should have granted defense motion to dismiss action to recover for property damage pursuant to CLS CPLR § 3012 where (1) general statement of plaintiffs' attorney, that he engaged in negotiations with defendants' insurance company during 13-month period of delay, did not constitute reasonable excuse for such lengthy delay in serving complaint after defendants' demand therefor, and (2) attorney's unsupported claim that he required more time to investigate matter because of his difficulty in securing fire department's investigative reports was insufficient in that he did not seek extension of time pursuant to CLS CPLR § 2004. Weiss v Kahan, 209 A.D.2d 611, 619 N.Y.S.2d 112, 1994 N.Y. App. Div. LEXIS 11552 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied motions to dismiss medical malpractice action for failure to serve complaint within 20 days after service of summons with notice under CLS CPLR § 3012(b) where (1) plaintiffs claimed that they needed additional time to obtain medical expert's review of extensive hospital records so that they could proffer physician's affidavit of merit, (2) expert affidavit demonstrated meritorious claim, describing series of operations performed by defendant doctors at defendant hospital, claiming that traumatic injury was caused to plaintiff's spleen during exploratory laparotomy, and stating that improper placement of stents in plaintiff's urethra caused painful, bloody incontinence, and (3) plaintiffs did not evince any intent to abandon their claim or otherwise prejudice defendants. Rose v Our Lady of Mercy Med. Ctr., 268 A.D.2d 225, 700 N.Y.S.2d 467, 2000 N.Y. App. Div. LEXIS 70 (N.Y. App. Div. 1st Dep't 2000).

In defamation action arising from defendant's false accusations of sexual misconduct against plaintiff school teacher, defendant was not entitled to dismissal under CLS CPLR § 3012(b) based on plaintiff's failure to timely serve complaint where (1) plaintiff's opposing affidavit

detailed facts and circumstances prompting his action, damages allegedly suffered and school district's failure to respond to his requests for disclosure of precise statements published by defendant, and (2) affidavit of his attorney demonstrated that heavy workload prevented him from seeking precomplaint discovery, and reiterated obstacles encountered in drafting complaint because school district would not voluntarily disclose defendant's statements. Porter v Beaulieu, 282 A.D.2d 980, 723 N.Y.S.2d 713, 2001 N.Y. App. Div. LEXIS 4178 (N.Y. App. Div. 3d Dep't 2001).

While plaintiff's process server did not reach the individual defendant's "actual place of business" because the building where defendants were located did not allow the process server to go to defendant law firm's floor, the building's concierge told the process server to deliver the summons to the "Building Mailroom Clerk"; under these circumstances, the outer bounds of the individual defendant's actual place of business were deemed to extend to the location at which the process server's progress was arrested. Nath v Chemtob Moss Forman & Beyda, LLP, 231 A.D.3d 546, 220 N.Y.S.3d 707, 2024 N.Y. App. Div. LEXIS 5366 (N.Y. App. Div. 1st Dep't 2024).

35. —Illness of party or attorney

Where motion for dismissal is denied by reason of affidavit of ill health filed by party opposing the motion and it is subsequently discovered at the trial that the statements made in the affidavit were false, the original movant's motion should be reheard and granted. Di Russo v Kravitz, 21 N.Y.2d 1008, 290 N.Y.S.2d 928, 238 N.E.2d 329, 1968 N.Y. LEXIS 1421 (N.Y.), reh'g denied, 22 N.Y.2d 972, 1968 N.Y. LEXIS 2281 (N.Y. 1968).

Defendant's motion to rehear and to dismiss the case on the ground that plaintiff had failed to serve the complaint for one year after demand therefor had been made was granted and case was dismissed where record showed that denial of original motion had been on basis of false statements in plaintiff's affidavit regarding his health. Di Russo v Kravitz, 27 A.D.2d 926, 279 N.Y.S.2d 586, 1967 N.Y. App. Div. LEXIS 4314 (N.Y. App. Div. 1st Dep't 1967).

Excuse of illness of attorney of record is inadequate to excuse a delay in the service of a complaint following a demand therefor when it does not appear that the condition existed throughout period of delay. Frangione v Cordasco, 47 A.D.2d 996, 368 N.Y.S.2d 88, 1975 N.Y. App. Div. LEXIS 9493 (N.Y. App. Div. 4th Dep't 1975).

In action relating to a mortgage in default, denial of defendant mortgagors' motion to dismiss for failure of plaintiff mortgagees to serve a complaint within 20 days of their demand was not an abuse of discretion, in light of fact that there was obvious merit to the action and that mortgagees assertedly withheld service of complaint at request of mortgagors' former counsel because a mortgagee was ill. Reinhardt v Biegas, 58 A.D.2d 1025, 397 N.Y.S.2d 51, 1977 N.Y. App. Div. LEXIS 13250 (N.Y. App. Div. 4th Dep't 1977).

In an action to recover on a policy of fire insurance, the court properly denied the defendant's motion to dismiss the action unless the plaintiff served a complaint within a specified time where the plaintiff's former counsel had decided to serve the complaint after the defendant had examined the plaintiff's president under oath, since the defendant had been adamant in its assertion that such an examination was a condition precedent to recovery on the policy, and where such an examination had been delayed by the president's prolonged illness. B & F, Inc. v New York Property Ins. Underwriting Assoc., 79 A.D.2d 645, 433 N.Y.S.2d 822, 1980 N.Y. App. Div. LEXIS 14009 (N.Y. App. Div. 2d Dep't 1980).

In a medical malpractice and wrongful death action, Special Term's denial of a motion to dismiss the action based on plaintiffs' failure to timely serve the complaint constituted an abuse of discretion where, under the circumstances, the poor health of plaintiffs' attorney was not accepted as a satisfactory excuse for plaintiffs' failure to serve the complaint until approximately 15 to 18 months after the attorney had returned to work following a serious illness, in that although counsel eventually retained another attorney to process the complaint, it would have behooved a reasonable and diligent attorney in the circumstances either to have obtained legal assistance sooner or else removed himself from the case. Borgia v Interboro General Hospital, 90 A.D.2d 531, 455 N.Y.S.2d 97, 1982 N.Y. App. Div. LEXIS 18581 (N.Y. App. Div. 2d Dep't

1982), aff'd, 59 N.Y.2d 802, 464 N.Y.S.2d 736, 451 N.E.2d 483, 1983 N.Y. LEXIS 3139 (N.Y. 1983).

Personal injury plaintiffs were entitled to vacatur of default attributable to law office failure given (1) disability of attorney assigned to work on file and his ultimate resignation from firm, (2) absence of attorney in charge of case due to critical illness leading to death of his grandson in Colorado, and (3) resignation from firm of lead attorney's secretary, who ordinarily would have alerted him to impending default; moreover, there was no intent to abandon case, no undue prejudice demonstrated by defendants, and record indicated that plaintiffs had meritorious claim. Mathiesen v Desadora, 132 A.D.2d 872, 518 N.Y.S.2d 71, 1987 N.Y. App. Div. LEXIS 49349 (N.Y. App. Div. 3d Dep't 1987).

In action to foreclose mortgage, court should have granted defendant's application to compel acceptance of answer; CPLR 3012 (d) authorizes court to compel acceptance of untimely pleading upon showing of reasonable excuse for delay or default; circumstances demonstrate reasonable excuse; summons had been sent by Secretary of State to deceased attorney; immediately upon learning of existence of lis pendens, defendant asked for and received copy of summons and complaint; answer was thereupon promptly sent to plaintiff's counsel; defendant's allegation of plaintiff's bad faith in unreasonably refusing to make further advances on construction loan, in attempt to gain complete control of project, is sufficient to make out meritorious defense. Sackman Mortg. Corp. v 111 West 95th Street Realty Corp., 152 A.D.2d 463, 542 N.Y.S.2d 656, 1989 N.Y. App. Div. LEXIS 9359 (N.Y. App. Div. 1st Dep't 1989).

Personal injury plaintiffs failed to show reasonable excuse for their more than 6-month delay in responding to defendant's demand for verified complaint, and thus action would be dismissed under CLS CPLR § 3012(b), where plaintiffs were already in default in responding to defendant's demand at onset of their counsel's illness, and counsel's family crisis involving his mother's heart surgery had subsided well before plaintiffs finally responded to defendant's demand. Rios v Skaters World Roller Rink, 246 A.D.2d 882, 667 N.Y.S.2d 821, 1998 N.Y. App. Div. LEXIS 555 (N.Y. App. Div. 3d Dep't 1998).

Defendant surgeon was entitled to dismissal of medical malpractice action on ground of plaintiffs' failure to serve complaint in December 1999 after service of defendant's November 4, 1999, demand for complaint where (1) after plaintiff wife's 1997 car accident, defendant performed exploratory laparotomy and thereafter informed plaintiff husband that he had accidentally cut part of wife's small intestine but had resectioned and repaired it, (2) wife had been hospitalized since February 2000 and had undergone 9 surgeries, "the majority of which [were] related to the spinal cord injury," (3) plaintiffs' attorney averred that he had been unable to communicate with wife since February 2000 because of her physical condition, and (4) plaintiffs did not show meritorious cause of action or reasonable excuse for their delay. Bergey v Flynn, 286 A.D.2d 971, 730 N.Y.S.2d 609, 2001 N.Y. App. Div. LEXIS 8918 (N.Y. App. Div. 4th Dep't 2001).

36. —Settlement negotiations

In personal injury action, where complaint was not served until more than 25 months after the demand, almost 18 months after the last claim negotiation and more than 5 years after the accident itself, a disputed "negotiation" was not a sufficient explanation for the delay, particularly where it appeared that it was plaintiff's counsel who initiated it after defendant had demonstrated its settled intention by promptly rejecting the complaint as untimely in bringing on a motion to dismiss. Horowitz v Bay Terrace Cooperative Section X, Inc., 35 A.D.2d 953, 317 N.Y.S.2d 969, 1970 N.Y. App. Div. LEXIS 3260 (N.Y. App. Div. 2d Dep't 1970).

Neither time needed to obtain medical information, physicians' reports, records of drug purchases, hospital records, and physician to testify for plaintiff, nor alleged settlement negotiations between plaintiff and defendant's insurer justified plaintiff's 16-month period of delay in serving complaint in medical malpractice action, and trial court erred in denying defendant's motion to dismiss action for failure to prosecute. Solomon v Perkins, 52 A.D.2d 753, 382 N.Y.S.2d 208, 1976 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 922, 386 N.Y.S.2d 407, 352 N.E.2d 594, 1976 N.Y. LEXIS 2868 (N.Y. 1976).

In a wrongful death action, the trial court abused its discretion in denying defendant's motion to dismiss the action for failure to serve a complaint, where there was no reasonable basis for plaintiff's belief that settlement negotiations were under way, in that defense counsel consistently refused to discuss the case with plaintiff's counsel and any discussions that might have taken place were brief and nearly six months prior to commencement of the action, where such an excuse amounted to law office failure, and where plaintiff's papers in support of his motion to compel acceptance of the complaint and in opposition to the motion to dismiss did not contain an affidavit of merit. Tonello v Carborundum Co., 91 A.D.2d 1169, 459 N.Y.S.2d 138, 1983 N.Y. App. Div. LEXIS 16510 (N.Y. App. Div. 4th Dep't), aff'd, 59 N.Y.2d 720, 463 N.Y.S.2d 425, 450 N.E.2d 231, 1983 N.Y. LEXIS 3083 (N.Y. 1983).

In an action to recover damages under an insurance policy for the destruction of plaintiff's building by fire, the reviewing court would exercise its discretion to reverse the dismissal of the complaint, notwithstanding that the statute of limitations had expired prior to the filing of the complaint, where plaintiff had filed a claim with the insurance company, when she had heard nothing subsequent to preliminary settlement negotiations she had rather inartfully drawn up a summons which her husband served upon the insurance company, a week later counsel for the insurance company served her with a notice of appearance in a demand for a complaint, two months later the statute of limitations expired and after seven more months the insurance company moved to dismiss the action for failure to serve a complaint; this was not a case of neglect and abandonment but rather a situation where a property owner in the midst of pursuing her claim administratively with the insurance company took the one action she thought would preserve her rights should direct negotiations fail and the good-faith effort of this property owner to handle her claim constituted a reasonable excuse for the delay. Temkin v New York Property Ins. Underwriters Asso., 92 A.D.2d 758, 459 N.Y.S.2d 595, 1983 N.Y. App. Div. LEXIS 17132 (N.Y. App. Div. 1st Dep't 1983).

Explanation that the complaint was not served in order not to inflame the situation while the parties were negotiating and settlement appeared imminent provided no excuse for failure to

serve a complaint until two and one-half months after those settlement negotiations broke down. Pilipshen v Pilipshen, 94 A.D.2d 699, 462 N.Y.S.2d 51, 1983 N.Y. App. Div. LEXIS 18127 (N.Y. App. Div. 2d Dep't 1983).

The trial court abused its discretion by not unconditionally granting defendant's motion to dismiss a personal injury action for failure to prosecute, pursuant to CPLR § 3012, where in opposition to the dismissal motion, plaintiff submitted an attorney's affirmation alleging that he did not intend to serve a complaint as long as settlement negotiations with defendant's insurance carrier were in progress and that plaintiff had a good and meritorious case, where settlement negotiations do not provide a reasonable excuse for delay in serving a complaint, and where an affidavit of merit must be made by a party with personal knowledge of the facts relating to the claim, and such facts must reach an evidentiary standard sufficient to defeat the motion for summary judgment. Luksic v Killmer, 100 A.D.2d 864, 474 N.Y.S.2d 119, 1984 N.Y. App. Div. LEXIS 17983 (N.Y. App. Div. 2d Dep't 1984).

Court abused its discretion in denying defendant's motion to compel acceptance of its answer where defendant demonstrated reasonable excuse for delay by showing that it served answer just 5 days after date within which plaintiff had extended time to answer, and following period when parties had been negotiating possible resolution of action. Beecher v State Farm Mut. Auto. Ins. Co., 186 A.D.2d 1012, 588 N.Y.S.2d 466, 1992 N.Y. App. Div. LEXIS 11559 (N.Y. App. Div. 4th Dep't 1992).

It was abuse of discretion to grant plaintiffs' motion to compel acceptance of their untimely reply to defendants' counterclaims where plaintiffs failed to establish reasonable excuse for 10-month default in service of reply; plaintiffs' counsel's occasional communication with his adversary and "hope" that matter might be amicably resolved did not excuse default. Iovine v Caldwell, 215 A.D.2d 977, 627 N.Y.S.2d 129, 1995 N.Y. App. Div. LEXIS 5602 (N.Y. App. Div. 3d Dep't), app. dismissed, 87 N.Y.2d 861, 639 N.Y.S.2d 313, 662 N.E.2d 794, 1995 N.Y. LEXIS 4903 (N.Y. 1995).

Mortgagor’s motion for leave to file a late answer, in a foreclosure case, two years after the case was commenced, was granted because (1) the mortgagor alleged valid affirmative defenses, including a possible defect in assignment, (2) the parties engaged in both private and court supervised negotiations, pursuant to N.Y. C.P.L.R. 3408 and N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12-a(b), (3) foreclosures were actions in equity, and (4) the mortgagee could not claim prejudice due to delay, since the mortgagee did not diligently prosecute the action. HSBC Bank USA, N.A. v Cayo, 934 N.Y.S.2d 792, 34 Misc. 3d 850, 2011 N.Y. Misc. LEXIS 5805 (N.Y. Sup. Ct. 2011).

37. —Waiver and estoppel

Defendant’s retention of a complaint was a waiver of the untimely service thereof and it deprived defendant of its right to relief under CPLR 3012. Lucenti v Buffalo, 29 A.D.2d 833, 287 N.Y.S.2d 612, 1968 N.Y. App. Div. LEXIS 4570 (N.Y. App. Div. 4th Dep't 1968).

Dismissal for failure to timely serve complaint in wrongful death action was excused where plaintiff’s attorney was lulled into a sense of security by defendant’s attorney pursuant to a course of conduct between the attorneys over a 10-year period and in over 150 cases not to take advantage of defaults. Hiatt v Gregg, 42 A.D.2d 921, 348 N.Y.S.2d 400, 1973 N.Y. App. Div. LEXIS 3513 (N.Y. App. Div. 4th Dep't 1973).

Special term erred in holding, in effect, that defendant waived untimely service of complaint where plaintiff failed to adequately excuse delay of approximately four and one-half years in serving complaint and plaintiff delayed for 15 months in making motion to compel acceptance of complaint, which had been rejected by defendant; action should have been dismissed for failure to serve a timely complaint. Dick v Ross, 49 A.D.2d 875, 373 N.Y.S.2d 363, 1975 N.Y. App. Div. LEXIS 11078 (N.Y. App. Div. 2d Dep't 1975).

In negligence action to recover damages for personal injuries, by acceptance and retention of complaint prior to motion to dismiss action for failure to timely serve complaint, defendants waived any rights they may have had under statute providing for timely service of complaint.

Myers v Empire State Bldg., 53 A.D.2d 662, 384 N.Y.S.2d 867, 1976 N.Y. App. Div. LEXIS 13402 (N.Y. App. Div. 2d Dep't 1976).

Where special term ordered acceptance of complaint by defendants over ten years after action was instituted, conditioned upon plaintiff's counsel paying $100 to each attorney for defendants appearing in opposition to motion, and certain defendants accepted the $100 while other defendants successfully appealed, acceptance by the nonappealing defendants of the costs awarded to them by special term operated as a waiver of right to appeal, and they were bound by order of special term directing them to accept service of the complaint. Witz v Renner Realty Corp., 55 A.D.2d 517, 389 N.Y.S.2d 11, 1976 N.Y. App. Div. LEXIS 15152 (N.Y. App. Div. 1st Dep't 1976).

In an action brought by a man who was injured when he fell in front of an oncoming train, the action would be dismissed where the complaint, which was rejected as untimely, had not been served for more than three years after its service was demanded, and where both the injured man and his attorney had believed that the case had been abandoned. Sostre v New York City Transit Authority, 91 A.D.2d 560, 457 N.Y.S.2d 42, 1982 N.Y. App. Div. LEXIS 19389 (N.Y. App. Div. 1st Dep't 1982).

Order which denied defendants' motion to dismiss action for failure to serve complaint affirmed–plaintiffs served bare summons with notice on October 26, 1987 and defendants responded by serving notice of appearance and demand for complaint on November 12, 1987; to aid in framing complaint, plaintiffs successfully moved to have one of defendants submit to examination before trial and produce certain documents; that deposition took place on February 11, 1988; 8 ½ months later, defendants made instant motion to dismiss action for failure to serve complaint within 20 days after service of their demand; while this motion was pending, plaintiffs served verified complaint; Supreme Court then denied defendants' motion; defendant's brief indicates that answer was interposed on December 15, 1988–as plaintiffs served their verified complaint prior to return date of defendants' motion to dismiss, and defendants never rejected it, defendants waived their right to object to timeliness of its service. Riesenberg v Bachrach, 160

A.D.2d 1190, 555 N.Y.S.2d 201, 1990 N.Y. App. Div. LEXIS 4716 (N.Y. App. Div. 3d Dep't 1990).

Retention of answer and counterclaim for 3 weeks while attorneys attempted to negotiate settlement constituted waiver of any objection to late service of answer. Ruppert v Ruppert, 192 A.D.2d 925, 597 N.Y.S.2d 196, 1993 N.Y. App. Div. LEXIS 4025 (N.Y. App. Div. 3d Dep't 1993).

Court properly denied defendant's motion to dismiss complaint under CLS CPLR § 3012(b), even though plaintiff did not serve complaint within 20 days of defendant's demand, where plaintiff showed that copy of complaint was mailed to defendant's attorney under CLS CPLR § 2103(b)(2) and that defendant did not move to dismiss complaint until 30 days later. Haygood v Rochester Gen. Hosp., 249 A.D.2d 943, 672 N.Y.S.2d 182, 1998 N.Y. App. Div. LEXIS 5044 (N.Y. App. Div. 4th Dep't 1998).

In a matrimonial action, the trial court correctly denied a wife's motion for leave to serve a late answer because she willfully failed to file an answer, and she did not establish a meritorious defense, but her subsequent default did not preclude her from fully participating in an inquest on ancillary matters, such as equitable distribution and maintenance. Rosen v Rosen, 308 A.D.2d 482, 764 N.Y.S.2d 634, 2003 N.Y. App. Div. LEXIS 9381 (N.Y. App. Div. 2d Dep't 2003).

38. —Failure to move for dismissal

Oral stipulation for such an extension from one of the secretaries in such office at a time when none of plaintiff's attorneys were in the office constituted a sufficient excuse for defendant's failure to serve its answer. Vargas v New York, 97 A.D.2d 379, 468 N.Y.S.2d 2, 1983 N.Y. App. Div. LEXIS 19935 (N.Y. App. Div. 1st Dep't 1983).

Where defendant in divorce action never moved to dismiss action for failure to timely serve complaint, action remained viable at time complaint was served. Berti v Berti, 150 A.D.2d 320, 543 N.Y.S.2d 315, 1989 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 2d Dep't 1989).

39. —Excuse or justification held sufficient

Where it appeared that action against insurance broker might be meritorious, that loss to the plaintiff was substantial, and that there would be no prejudice to the broker from permitting the action to continue, trial court did not abuse its discretion in denying motion to dismiss the action for failure to timely serve a complaint and in granting plaintiff's motion to be relieved of default. Van Ness v Aetna Casualty & Surety Co., 57 A.D.2d 832, 394 N.Y.S.2d 57, 1977 N.Y. App. Div. LEXIS 12035 (N.Y. App. Div. 2d Dep't 1977).

It was error to deny defendant's application to compel acceptance of answer in mortgage foreclosure action where (1) summons had been sent by Secretary of State to deceased attorney, (2) defendant asked for and received copy of summons and complaint immediately on learning of existence of lis pendens, and answer was thereupon promptly sent to plaintiff's counsel, and (3) defendant's allegation of plaintiff's bad faith in unreasonably refusing to make further advances on construction loan, in attempt to gain complete control of project, was sufficient to make out meritorious defense. Sackman Mortg. Corp. v 111 West 95th Street Realty Corp., 152 A.D.2d 463, 542 N.Y.S.2d 656, 1989 N.Y. App. Div. LEXIS 9359 (N.Y. App. Div. 1st Dep't 1989).

Order which denied defendant's motion to dismiss action due to plaintiff's failure to serve her complaint pursuant to CPLR 3012 (b) affirmed–plaintiff demonstrated reasonable excuse for delay in serving complaint in this divorce and custody action and meritorious claim against defendant; plaintiff adequately demonstrated she had not served complaint because parties' original attorneys agreed that service of complaint would be deferred to facilitate settlement negotiations; ongoing litigation throughout entire period in question indicates defendant was well aware that plaintiff had no intention of abandoning her divorce and custody action; plaintiff also provided proof of meritorious claim by serving verified complaint; detailed verified complaint sufficiently demonstrates meritorious claim for purposes of defeating this CPLR 3012 (b) dismissal motion. Stevens v Stevens, 165 A.D.2d 780, 564 N.Y.S.2d 47, 1990 N.Y. App. Div. LEXIS 11352 (N.Y. App. Div. 1st Dep't 1990).

Court should have directed plaintiffs to accept defendant's answer where (1) delay in answering complaint was not willful or overly lengthy, (2) proposed answer asserted conclusive defense, and (3) plaintiffs failed to establish that they were prejudiced by delay. Nuila v Manhattan Leasing Group, 204 A.D.2d 290, 611 N.Y.S.2d 274, 1994 N.Y. App. Div. LEXIS 4579 (N.Y. App. Div. 2d Dep't 1994).

Defendant in action for gasoline spill showed miscommunications as reasonable excuse for its failure to file timely answer where (1) it timely delivered complaint to its insurance agent, who then sent it to insurer, (2) defendant and agent believed that insurer intended to retain counsel to interpose answer, (3) although insurer had issued letter to defendant disclaiming coverage, it continued discussions regarding possible settlement for one year before default motion, and (4) insurer claimed to have been under mistaken belief that plaintiffs would not move for default before insurer received attorney's coverage opinion. De Nooyer Chevrolet, Inc. v Polsinello Fuels, Inc., 251 A.D.2d 871, 674 N.Y.S.2d 490, 1998 N.Y. App. Div. LEXIS 7329 (N.Y. App. Div. 2d Dep't 1998).

Trial court properly granted defendants' motion pursuant to N.Y. C.P.L.R. 3012(d) to compel plaintiffs to accept later service of an answer, because the answer was not served extremely late, and there was no real pattern of defaults by defendants' counsel, and defendants presented a meritorious defense to the action, and therefore plaintiffs' motion for summary judgment pursuant to N.Y. C.P.L.R. 3212, which was essentially a motion for a default judgment, was properly denied. Nason v Fisher, 309 A.D.2d 526, 765 N.Y.S.2d 32, 2003 N.Y. App. Div. LEXIS 10359 (N.Y. App. Div. 1st Dep't 2003).

In an action to recover an attorney's fee, the trial court improvidently exercised its discretion in denying defendants' N.Y. C.P.L.R. 3012(d) motion to vacate their default in appearing and answering and to compel a limited liability company (LLC) to accept their verified answer, which was served 10 days late. Considering defendants' explanations for the brief delay and the absence of prejudice to the LLC, the existence of a potentially meritorious defense, and the strong public policy in favor of resolving cases on the merits, defendants' motion have should

been granted. Jeffrey L. Rosenberg & Assoc., LLC v Lajaunie, 35 A.D.3d 668, 824 N.Y.S.2d 920, 2006 N.Y. App. Div. LEXIS 15314 (N.Y. App. Div. 2d Dep't 2006).

In light of the lack of any prejudice to a client resulting from a two-month delay, the lack of willfulness on the part of the attorney, the existence of potentially meritorious defenses, and the public policy favoring the resolution of cases on the merits, the attorney's default in appearing or answering the client's legal malpractice complaint should have been excused under N.Y. C.P.L.R. 2004 and leave to serve an answer should have been granted under N.Y. C.P.L.R. 3012(d). Stuart v Kushner, 39 A.D.3d 535, 833 N.Y.S.2d 187, 2007 N.Y. App. Div. LEXIS 4262 (N.Y. App. Div. 2d Dep't 2007).

Considering a defendant's explanation for its brief delay in appearing and answering, the existence of a potentially meritorious defense, and the lack of prejudice to the appellant, and in light of the strong public policy in favor of resolving cases on the merits, the defendant's delay in answering was properly excused under N.Y. C.P.L.R. 3012(b). Nickell v Pathmark Stores, Inc., 44 A.D.3d 631, 843 N.Y.S.2d 177, 2007 N.Y. App. Div. LEXIS 10422 (N.Y. App. Div. 2d Dep't 2007).

Defendant proffered a reasonable excuse for its default because the delay in serving the answer was due to the time it took for the Secretary of State to mail the summons and complaint to defendant after being served. Further, defendant alleged potentially meritorious defenses, including that the condition was "open, obvious and apparent" and thus not a trap-like condition as alleged in the slip and fall complaint. King v 105-02 Forest Hills, LLC, 233 A.D.3d 939, 225 N.Y.S.3d 267, 2024 N.Y. App. Div. LEXIS 6931 (N.Y. App. Div. 2d Dep't 2024).

Defendant's delay in answering was short, not willful, and plaintiff failed to show prejudice, so allowing a late answer was appropriate. Ellison v Schulte, 84 Misc. 3d 1243(A), 223 N.Y.S.3d 516, 2024 N.Y. Misc. LEXIS 24682 (N.Y. Sup. Ct. 2024).

40. —Excuse or justification held insufficient

Defendants' motion for an order pursuant to subdivision (b) of this section to dismiss the action because of plaintiff's failure to serve a complaint, should have been granted where the action was commenced by service of summons on February 27, 1964, and, although a complaint had been demanded on March 17, 1964, it was not served until March 7, 1966, and plaintiff's excuse for the delay was that he needed a written report from a building engineer in order to frame the complaint, which report was in fact prepared in November 1964 and was not available for use by the plaintiff before January 1966 solely because the engineer was continuously refused his fee and was paid only after he had sued plaintiff's attorney. The complaint itself also showed that an engineer's report was not necessary for the preparation of the complaint. Klein v Pompa, 26 A.D.2d 815, 274 N.Y.S.2d 387, 1966 N.Y. App. Div. LEXIS 3198 (N.Y. App. Div. 1st Dep't 1966), app. dismissed, 19 N.Y.2d 701, 278 N.Y.S.2d 889, 225 N.E.2d 574, 1967 N.Y. LEXIS 1713 (N.Y. 1967).

Plaintiff's failure to serve a complaint during an 18-month period between the demand therefor and defendants' motion to dismiss was an inordinate delay and where the excuse offered was patently insufficient, the action was dismissed. WADE v MIELE, 34 A.D.2d 655, 34 A.D.2d 656, 310 N.Y.S.2d 205, 1970 N.Y. App. Div. LEXIS 5210 (N.Y. App. Div. 2d Dep't 1970).

Where plaintiff's attorney served complaint almost 30 months after service of the summons and defendant promptly returned the complaint and then made a motion to dismiss for failure to timely serve a complaint, such motion should have been granted where the plaintiff's papers in opposition to the motion failed to present a reasonable excuse for the delay and there was no affidavit of merits. Wilkening v Fogarty, 40 A.D.2d 1031, 338 N.Y.S.2d 985, 1972 N.Y. App. Div. LEXIS 3036 (N.Y. App. Div. 2d Dep't 1972).

Fact there might have been some confusion in the mind of executrix as to whether proper person had been served with summons and possibility that defendant might object to jurisdiction of the court were not sufficient excuse for delay of almost 15 months in service of complaint, especially where immediate service of complaint would have cleared up confusion as to whether

proper party had been served. Ellis v Board of Education, 46 A.D.2d 840, 361 N.Y.S.2d 223, 1974 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 3d Dep't 1974).

In an action by a mortgagee against an insurer to recover under the provisions of a comprehensive policy covering the mortgagor's business interruption losses, the insurer's motion to dismiss should have been granted where the mortgagee had failed to provide a reasonable excuse for failure to timely serve its complaint and where it also had failed to demonstrate that its action had legal merit in light of the fact that it had no insurable interest in the mortgagor's business as required by Ins Law § 148 for the enforcement of a policy of insurance. Citizens Sav. & Loan Asso. v Proprietors Ins. Co., 78 A.D.2d 377, 435 N.Y.S.2d 303, 1981 N.Y. App. Div. LEXIS 9646 (N.Y. App. Div. 2d Dep't 1981).

Plaintiff's default for failure to timely file a complaint should not have been relieved where his only excuse was that it was " inadvertent and not deliberate" and where there had been no showing that his claim had legal merit. Steen v New Deal Delivery Service, Inc., 79 A.D.2d 963, 435 N.Y.S.2d 278, 1981 N.Y. App. Div. LEXIS 9833 (N.Y. App. Div. 1st Dep't), aff'd, 54 N.Y.2d 796, 443 N.Y.S.2d 611, 427 N.E.2d 770, 1981 N.Y. LEXIS 2714 (N.Y. 1981).

In an action predicated on a retail dealer contract, the trial court properly refused defendant's motion to compel acceptance of its untimely answer and properly adjudged defendant to be in default, where defendants were given a thirty-day extension of time to answer, where no answer was forthcoming and plaintiff made inquiries over several months as to whether defendant intended to answer, where the excuses given by defendant for the delay in answering amounted to nothing more than law office failure, where the motion to compel acceptance of the answer was nothing more than a motion seeking an extension of time in which to serve the answer, where the delay in serving the answer was lengthy with at least overtones of willfulness, and where the additional notice requirement of CPLR § 308 was not intended to extend the time to appear but only to give defendant notice that a default judgment was imminent so that he could take remedial action if he so desired. Mobil Oil Corp. v Christian Oil & Gas Distributors, Inc., 95

A.D.2d 772, 463 N.Y.S.2d 253, 1983 N.Y. App. Div. LEXIS 18683 (N.Y. App. Div. 2d Dep't 1983).

Plaintiff's action was properly dismissed pursuant to CPLR § 3012 for failure to serve a complaint, where the only affidavit submitted in opposition to the motion to dismiss was from plaintiff's attorneys, where an affidavit in opposition to such motion has to be submitted by one with personal knowledge of the facts, and where plaintiff's proffered excuse did not provide justification for the delay. Wurzburger v R.E. Smith Fuel Co., 101 A.D.2d 620, 474 N.Y.S.2d 878, 1984 N.Y. App. Div. LEXIS 18160 (N.Y. App. Div. 3d Dep't 1984).

Plaintiff's failure to provide either acceptable excuse for her default in serving defendant with complaint or affidavit of merit sworn to by individual having personal knowledge of facts warranted dismissal of plaintiff's action to recover damages for fraud and legal malpractice against defendant, as plaintiff's verified complaint contains no statements of fact upon which conclusion that plaintiff's action against defendant has merit could be reached, and any prejudice occasioned by defendant's delay in moving to dismiss plaintiff's action should be charged to plaintiff for plaintiff's failure to move to compel defendant to accept her complaint and to vacate her default at earliest possible time and instead waited to seek relief for period in excess of 2 years. Covello v Covello, 119 A.D.2d 792, 501 N.Y.S.2d 418, 1986 N.Y. App. Div. LEXIS 55734 (N.Y. App. Div. 2d Dep't 1986).

Decedent's administratrix did not offer reasonable excuse for delay in serving verified complaint in negligence action arising from decedent's fall in hospital, even though administratrix initially alleged that delay was caused by hospital's delay in furnishing autopsy report, coupled with time it took her expert to issue report that action had merit, and she later alleged law office failure, where (1) decedent died 3 months after surgery to treat hip injured in fall, (2) complaint contended that death proximately resulted from fall despite fact that death certificate showed long-standing coronary conditions as cause of death, and (3) administratrix did not serve complaint until 7 months after hospital's demand. Watson v New York City Health & Hosp.

Corp., 159 A.D.2d 288, 552 N.Y.S.2d 296, 1990 N.Y. App. Div. LEXIS 2634 (N.Y. App. Div. 1st Dep't 1990).

Court should have granted defense motion to dismiss complaint pursuant to CLS CPLR § 3012(b), as proffered excuse that plaintiff mistakenly believed that he could proceed pro se while represented by attorney did not constitute reasonable excuse for untimely service of complaint, nor did it excuse failure to submit affidavit of merit. Scott v George, 222 A.D.2d 1049, 635 N.Y.S.2d 864, 1995 N.Y. App. Div. LEXIS 14103 (N.Y. App. Div. 4th Dep't 1995).

Plaintiffs' motion for judgment on defendant's default in answering was properly granted where defendant's sole excuse for one-year delay in serving answer was that, due to oversight, counsel was not retained. Sobel v Village of Scarsdale, 255 A.D.2d 500, 680 N.Y.S.2d 173, 1998 N.Y. App. Div. LEXIS 12652 (N.Y. App. Div. 2d Dep't 1998).

Insurer was not entitled to vacatur of default judgment, in action to compel it to defend and indemnify insured in underlying personal injury action in accordance with automobile liability policy, where unsubstantiated "surmise" of insurer's counsel that insurer's failure to appear and answer might possibly have been caused by error of insurer's former employee in neglecting to transmit pleadings to insurer's attorneys was inadequate to excuse default. Elite Limousine Plus, Inc. v Allcity Ins. Co., 266 A.D.2d 259, 698 N.Y.S.2d 251, 1999 N.Y. App. Div. LEXIS 11338 (N.Y. App. Div. 2d Dep't 1999).

Where the appellate division reinstated plaintiff association's complaint that sought a declaratory judgment, and, pursuant to N.Y. C.P.L.R. 3211(f), defendants defaulted in answering since they failed to answer within 15 days after service of a copy of the appellate division's decision and order, the trial court erred in compelling the association to accept a late answer pursuant to N.Y. C.P.L.R. 3012(d) since defendants failed to show a reasonable excuse for the default and a meritorious defense. Rockland County Patrolmen's Benevolent Ass'n v Town of Clarkstown, 288 A.D.2d 456, 733 N.Y.S.2d 874, 2001 N.Y. App. Div. LEXIS 11391 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 613, 742 N.Y.S.2d 606, 769 N.E.2d 353, 2002 N.Y. LEXIS 875 (N.Y. 2002).

41. Motion practice

Where following the service of a summons and notice under CPLR § 302(a) but with no accompanying complaint, the defendant, instead of moving for dismissal of the action under CPLR § 3211(a) ¶ 8, should first proceed under subd (b) of this section to demand the complaint, for the question of jurisdiction must depend upon the nature of the plaintiff's cause of action. Fraley v Desilu Productions, Inc., 23 A.D.2d 79, 258 N.Y.S.2d 294, 1965 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 1st Dep't 1965).

CPLR 3216 has no application to a motion made under subd (b) of this section to dismiss for failure to serve a complaint. Francisco v Walgreen Eastern Co., 25 A.D.2d 681, 269 N.Y.S.2d 170, 1966 N.Y. App. Div. LEXIS 4671 (N.Y. App. Div. 2d Dep't 1966).

Defendant who did not appear in prior action and move to dismiss for failure to serve a complaint, which was dismissed on motion of other defendants, was not entitled to dismissal of complaint in subsequent action on same cause of action. Wright v Farlin, 42 A.D.2d 141, 346 N.Y.S.2d 11, 1973 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 3d Dep't), app. dismissed, 33 N.Y.2d 657, 348 N.Y.S.2d 980, 303 N.E.2d 705, 1973 N.Y. LEXIS 1064 (N.Y. 1973).

Where a defendant rejects what he considers to be an untimely service of the complaint, the service of the complaint alone will not render the motion to dismiss the action academic. McKay v Smithtown General Hospital, 42 A.D.2d 594, 345 N.Y.S.2d 78, 1973 N.Y. App. Div. LEXIS 4161 (N.Y. App. Div. 2d Dep't 1973).

In divorce action commenced by service of summons only, and absent "a responsive pleading", husband had the statutory right to voluntarily discontinue action under CPLR 3217, subd a (1) on date defendant wife moved for various relief pendente lite, particularly where no motion had been made pursuant to CPLR § 3012, subd b to compel service of complaint. Kamhi v Kamhi, 42 A.D.2d 966, 347 N.Y.S.2d 972, 1973 N.Y. App. Div. LEXIS 3458 (N.Y. App. Div. 2d Dep't 1973).

Rule which requires that defendants serve a 45-day notice before case may be dismissed for want of prosecution does not apply until issue has been joined. Witz v Renner Realty Corp., 47 A.D.2d 622, 364 N.Y.S.2d 529, 1975 N.Y. App. Div. LEXIS 8778 (N.Y. App. Div. 1st Dep't 1975), app. dismissed, 38 N.Y.2d 905, 382 N.Y.S.2d 754, 346 N.E.2d 555, 1976 N.Y. LEXIS 2347 (N.Y. 1976).

Defendant’s filing, on March 11, of a notice of appeal from February 14th order, which granted defendant’s motion to dismiss unless, within 60 days, plaintiff submitted a proper affidavit reciting facts demonstrating a meritorious cause of action, did not effect a stay of such order. Dworetzky v Ball, 50 A.D.2d 615, 374 N.Y.S.2d 430, 1975 N.Y. App. Div. LEXIS 12415 (N.Y. App. Div. 3d Dep't 1975).

It was error to deny defendant’s motion to dismiss civil action for failure to timely serve complaint, without first conducting hearing to determine whether original complaint had in fact been served, where (1) action was originally commenced by service of summons with notice, (2) defendant thereafter demanded complaint, (3) 2 years later, after statute of limitations had expired, plaintiff retained new counsel who served new complaint because neither he nor outgoing counsel could locate copy of original complaint, and (4) copy of complaint and affidavit of service were conveniently discovered after defendant’s dismissal motion was filed. Gildston v Travelers Ins. Co., 133 A.D.2d 261, 519 N.Y.S.2d 52, 1987 N.Y. App. Div. LEXIS 49750 (N.Y. App. Div. 2d Dep't 1987).

Court should have granted defendants’ motion to dismiss action, without condition, for failure to timely serve complaint where plaintiff appeared on motion but submitted no papers in opposition. Degen v Hills Stores Co., 221 A.D.2d 1022, 635 N.Y.S.2d 567, 1995 N.Y. App. Div. LEXIS 13579 (N.Y. App. Div. 4th Dep't 1995).

Court should have granted defendant’s motion to dismiss action under CLS CPLR § 3012(b) for failure to serve complaint within 20 days of defendant’s demand therefor where plaintiff neither showed reasonable excuse for his delay in serving complaint nor submitted proper affidavit of

merits. Brown v Rosenfeld, 228 A.D.2d 460, 643 N.Y.S.2d 1023, 1996 N.Y. App. Div. LEXIS 6606 (N.Y. App. Div. 2d Dep't 1996).

It was abuse of discretion to deny medical malpractice defendant's motion to dismiss under CLS CPLR § 3012(b), even though plaintiffs offered reasonable excuse for 2-month delay in serving complaint, since their medical expert's affidavit of merit was entirely conclusory, indicating only that expert had reviewed medical file and determined that valid cause of action existed. Webber v Patel, 232 A.D.2d 549, 648 N.Y.S.2d 951, 1996 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 2d Dep't 1996).

42. —Affidavit of merit

Absent showing of prejudice from two-day delay, Special Term properly exercised its discretion in compelling plaintiff to accept defendant's answer. Jemzura v Benanati, 55 A.D.2d 987, 390 N.Y.S.2d 493, 1977 N.Y. App. Div. LEXIS 10306 (N.Y. App. Div. 3d Dep't 1977).

In medical malpractice action, affidavit of merit executed by plaintiff personally was insufficient to establish prima facie case to defeat defendant's motion to dismiss for failure to serve complaint under CLS CPLR § 3012(b); plaintiff was required to provide affidavit of merit by medical expert. Estate of Ward v Hoffman, 139 A.D.2d 691, 527 N.Y.S.2d 447, 1988 N.Y. App. Div. LEXIS 4572 (N.Y. App. Div. 2d Dep't 1988).

In action for injuries sustained in assault and battery, plaintiff's affidavit of merit, in response to defendant's motion to dismiss pursuant to CLS CPLR § 3012(b), was not deficient because of lack of expert medical opinion, since action was predicated on matters within ordinary experience and knowledge of laymen. Gordineer v Gallagher, 160 A.D.2d 672, 553 N.Y.S.2d 449, 1990 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1990).

Pro se medical malpractice plaintiff's sworn affidavit of merit, in response to motion to dismiss for failure to timely serve complaint, was properly held inadequate where it merely contained statements of physician that she had "causative action" and that he would be willing to testify

that her injuries were due to malpractice, as well as attached notes from what she claimed were medical files, since physician's statements were hearsay and conclusory, and notes were unsworn and unsigned. Sabatino v Albany Medical Ctr. Hosp., 187 A.D.2d 777, 589 N.Y.S.2d 654, 1992 N.Y. App. Div. LEXIS 12624 (N.Y. App. Div. 3d Dep't 1992).

Court erred as matter of law by conditionally granting defendant's motion to dismiss action under CLS CPLR § 3012(b) where plaintiff failed to address merits of his case in opposition to defendant's motion. Caruso v International House of Pancakes, 228 A.D.2d 462, 643 N.Y.S.2d 1023, 1996 N.Y. App. Div. LEXIS 6595 (N.Y. App. Div. 2d Dep't 1996).

43. —Burden of proof

Burden is on a plaintiff, in proceeding on motion to dismiss an action for failure to prosecute, to show that plaintiff's delay was excusable and that claim is meritorious. Rabetoy v Atkinson, 49 A.D.2d 691, 370 N.Y.S.2d 755, 1975 N.Y. App. Div. LEXIS 10541 (N.Y. App. Div. 4th Dep't), app. dismissed, 37 N.Y.2d 708, 1975 N.Y. LEXIS 2855 (N.Y. 1975), app. dismissed, 37 N.Y.2d 803, 375 N.Y.S.2d 111, 337 N.E.2d 616, 1975 N.Y. LEXIS 2175 (N.Y. 1975).

Court should have granted defendant's motion to dismiss medical malpractice action under CLS CPLR § 3012(b) where plaintiff in opposition merely submitted affidavit of examining physician which did not indicate that defendant hospital departed in any way from accepted medical standards or that any such departure was proximate cause of injuries. Gibson v Victory Mem. Hosp., 221 A.D.2d 503, 633 N.Y.S.2d 398, 1995 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 2d Dep't 1995).

44. —Timeliness

In an action for breach of contract, plaintiff's motion for a default judgment was properly granted where defendants were personally served with a summons and complaint on July 29, and so were in default even prior to August 31, when they retained counsel, and on September 26,

when an answer was served upon, and rejected by, plaintiff, and where defendants failed to offer any excuse for their total disregard of the summons and complaints. Even assuming that two of the defendants were not served with process until August 20, and were not in default on August 31, inasmuch as counsel had received notice by letter dated September 6 of plaintiff's counsel's intention to obtain a default judgment, but took no steps to seek leave from the court to serve a late answer until plaintiff placed the case on the Inquest Calendar, the attorney's conduct constituted an intentional default and was not excusable. Perellie v Crimson's Restaurant, Ltd., 108 A.D.2d 903, 485 N.Y.S.2d 789, 1985 N.Y. App. Div. LEXIS 43237 (N.Y. App. Div. 2d Dep't 1985).

In a personal injury action, a city's motion to compel plaintiff to accept its late answer pursuant to N.Y. C.P.L.R. § 3012(d) was improperly granted because the city delayed nine to ten months in filing its motion and its excuse that it could not respond timely to plaintiff's complaint as it received thousands of summonses each month was inadequate; thus, plaintiff was entry of a default pursuant to N.Y. C.P.L.R. § 3215 against the city. Holloman v City of New York, 52 A.D.3d 568, 861 N.Y.S.2d 356, 2008 N.Y. App. Div. LEXIS 5351 (N.Y. App. Div. 2d Dep't 2008).

Since the homeowners failed to demonstrate a reasonable excuse for their default, it was unnecessary to determine whether they demonstrated a potentially meritorious defense to the action, and the Supreme Court providently exercised its discretion in denying that branch of the homeowners' cross motion which was to compel the acceptance of a late answer. Cumanet, LLC v Murad, 188 A.D.3d 1149, 137 N.Y.S.3d 412, 2020 N.Y. App. Div. LEXIS 7281 (N.Y. App. Div. 2d Dep't 2020).

A default judgment entered October 22, 1980 would be vacated where the summons which was served on October 1, 1980 stated that a judgment would be entered unless an answer was served within 21 days after service of summons and where, pursuant to Gen Const Law § 20, such a 21 day period would require service on or before October 22, 1980, notwithstanding CPLR § 3012(a), which provides that service of an answer or reply shall be made within 20 days

after service of the pleading to which it responds. Burke Supply, Inc. v Amanda's Frying' High, Inc., 106 Misc. 2d 911, 433 N.Y.S.2d 58, 1980 N.Y. Misc. LEXIS 2802 (N.Y. Sup. Ct. 1980).

In a legal malpractice action in which the attorney's motion to dismiss the complaint as untimely served was denied, the time in which to answer would be extended until 20 days after the reservice of the complaint, since, although CPLR § 3012 contains no express provision extending a defendant's time to answer in the event a motion to dismiss is denied, such an extension of time is implicit in the section. Mullen v Ackerman, 117 Misc. 2d 1022, 459 N.Y.S.2d 710, 1983 N.Y. Misc. LEXIS 3246 (N.Y. Sup. Ct. 1983).

45. Conditions of dismissal or reinstatement

An action in which defendant sought to vacate a default judgment entered against it due to its failure, as a result of defective law office procedure, to timely file an answer would be remanded to the Appellate Division for the exercise of its discretion under the new CPLR § 2005, which allows courts "to excuse delay or default resulting from law office failure," and which by its terms was made applicable to all pending actions and proceedings, since, though the issue of liability had previously been disposed of in the action, the issue of damages remained to be resolved at trial, so that the action was "still pending" so as to require the application of the new statute. Weissblum v Mostafzafan Foundation of New York, 60 N.Y.2d 637, 467 N.Y.S.2d 563, 454 N.E.2d 1306, 1983 N.Y. LEXIS 3336 (N.Y. 1983).

Twenty four-day delay in service of the complaint in response to the demand therefor was not such as to necessitate dismissal of the action, but the continued failure of plaintiff's attorney to comply with the rules of the court in the action immediately before the court and in a prior action brought while plaintiff was under the disability of infancy warranted the imposition of personal costs against the attorney as a precondition to reinstatement of action. Carr v Allied Aviation Service Corp., 40 A.D.2d 608, 335 N.Y.S.2d 914, 1972 N.Y. App. Div. LEXIS 3877 (N.Y. App. Div. 2d Dep't 1972).

Defendant's motion to dismiss personal injury action for failure to serve complaint should have been unconditionally granted where plaintiff made no effort to controvert the motion by an affidavit explaining plaintiff's default in serving the complaint and showing a meritorious complaint, and where plaintiff further failed to make any motion to open his default. Kennelly v Charleston Auto Sales, Inc., 40 A.D.2d 679, 336 N.Y.S.2d 192, 1972 N.Y. App. Div. LEXIS 3839 (N.Y. App. Div. 2d Dep't 1972).

Action was dismissed on condition that plaintiff serve complaint within 10 days where, even though plaintiff did not object to notice of appearance pursuant to valid summons, record disclosed a misunderstanding between the parties as to the nature and scope of the appearance. Queens Examination Center, Inc. v Ajax One Co., 42 A.D.2d 554, 345 N.Y.S.2d 61, 1973 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 1st Dep't 1973).

In view of indifferent attitude exhibited by plaintiffs with respect to defendants' notice of appearance and demand for plaintiffs' addresses and in view of plaintiffs' failure to respond to defendants' letter request for the complaint, denial of defendants' motion to dismiss action because of plaintiffs' failure to serve their complaint should have been expressly conditioned on plaintiffs' paying the motion costs. De Pasquale v H. Lewkowitz, Inc., 51 A.D.2d 919, 381 N.Y.S.2d 75, 1976 N.Y. App. Div. LEXIS 11593 (N.Y. App. Div. 1st Dep't 1976).

Attorneys' neglect or alleged inability to locate plaintiffs until defendant's motion papers were served should not deprive plaintiffs of their day in court and thus, since it is proper in such a case to save action for client while imposing upon attorneys, personally, penalty for their neglect, order which granted defendant's motion to dismiss defamation action for failure to serve complaint would be reversed on condition that plaintiffs' attorneys personally pay $100 to defendant. Bissaccia v Aknin, 54 A.D.2d 681, 387 N.Y.S.2d 264, 1976 N.Y. App. Div. LEXIS 14223 (N.Y. App. Div. 2d Dep't 1976).

Although two and one-half-year delay in service of complaint in action to recover for losses encountered by virtue of city police property clerk's retention of stolen property did not justify outright dismissal of action in view of fact that record contained sufficient indication of merit to

plaintiff's overall claim, such delay in service of complaint could not be fully condoned, and order denying motion to dismiss complaint would therefore be conditioned upon payment by plaintiff to defendant of costs in sum of $1,000. Kulukundis v 795 Fifth Ave. Corp., 59 A.D.2d 866, 399 N.Y.S.2d 234, 1977 N.Y. App. Div. LEXIS 14036 (N.Y. App. Div. 1st Dep't 1977).

Defendant was not entitled to dismissal of a malpractice action, arising out of the plaintiff's son's death, where the defendant failed to show prejudice resulting from the failure of plaintiff to serve the complaint within 20 days after service of a demand under CPLR 3012(b) and where defendant had received notice of the action within a year and a half of plaintiff's son's death and had received the complaint within two and a half years of the death; however, where plaintiff's attorney's excuse for failure to timely serve complaint was only minimally acceptable, the court would require imposition of costs. Santana v Prospect Hospital, 84 A.D.2d 714, 444 N.Y.S.2d 6, 1981 N.Y. App. Div. LEXIS 15868 (N.Y. App. Div. 1st Dep't 1981).

The trial court improperly denied defendant hospital's motion to dismiss a complaint as to it, where plaintiff failed to comply with a conditional order of preclusion, offering as an excuse that the hospital had not been prejudiced by such failure, where the trial court had granted the hospital's earlier motion to dismiss on the basis that plaintiff had defaulted upon the conditional order and had failed to offer a viable excuse for the default, and where plaintiff's motion for renewal or reargument, at which plaintiff's counsel asserted that the delay in serving the bill of particulars was occasioned by the failure to have hospital records promptly reviewed by plaintiff's medical experts, was not supported by a sufficient showing as to why no proper excuse had been offered or affidavit of merit submitted in opposition to the hospital's initial motion to dismiss the complaint. Brann v New York, 96 A.D.2d 923, 466 N.Y.S.2d 365, 1983 N.Y. App. Div. LEXIS 19561 (N.Y. App. Div. 2d Dep't 1983).

The trial court properly declined to enter a default judgment against defendant based on defendant's admitted failure to serve its answer on plaintiff within the time allowed by statute where defendant's assertion that it had telephoned the office of plaintiff's attorneys to request an extension of time to answer and that it had obtained an oral stipulation for such an extension

from one of the secretaries in such office at a time when none of plaintiff's attorneys were in the office constituted a sufficient excuse for defendant's default pursuant to CPLR §§ 2005, 3012(d), as amended. Vargas v New York, 97 A.D.2d 379, 468 N.Y.S.2d 2, 1983 N.Y. App. Div. LEXIS 19935 (N.Y. App. Div. 1st Dep't 1983).

Although the Appellate Division would reverse a denial of a defendant's motion to compel plaintiff to accept their late answer (defendant's insurer was guilty of law office failure, and the merit of the action was subject to serious question), the court would condition its reversal on defendant's paying to plaintiff the $2,000 cost of the motion, where the law office failure included the insurer's disregard of plaintiff's attorney's express statement that no further adjournment would be granted. Benson v Doherty Moving Corp., 99 A.D.2d 421, 470 N.Y.S.2d 384, 1984 N.Y. App. Div. LEXIS 16571 (N.Y. App. Div. 1st Dep't), app. dismissed, 62 N.Y.2d 804, 1984 N.Y. LEXIS 8310 (N.Y. 1984).

Special Term did not err in excusing plaintiff's default where plaintiff served verified complaint approximately 3 weeks after expiration of 2-week extension period and in response to defendants' motion to dismiss under CLS CPLR § 3012, since delay was minimal, verified complaint served as affidavit of merit, and public policy favors resolving cases on merits; nevertheless, plaintiff would be ordered to pay $250 to each defendant as sanction because nature of plaintiff's excuse evinced lack of diligence. Rait v Bauer, 121 A.D.2d 704, 504 N.Y.S.2d 144, 1986 N.Y. App. Div. LEXIS 58689 (N.Y. App. Div. 2d Dep't 1986).

Although court properly exercised its discretion in excusing plaintiff's late service of negligence complaint on condition that costs be paid, sanction would be increased from $500 to $1,500 in view of almost one-year delay in service. Peluso v Twenty-First Century Restaurant, Inc., 129 A.D.2d 782, 514 N.Y.S.2d 525, 1987 N.Y. App. Div. LEXIS 45474 (N.Y. App. Div. 2d Dep't 1987).

Appellate Division would require plaintiff's attorneys personally to pay defendant $500 as condition of reinstatement of action for their dilatoriness in failing to serve complaint for some 3 ½ months after denial of plaintiff's motion for summary judgment on ground that issue had not

been joined, and for failing to move under CLS CPLR § 3012(d) for extension of time in which to serve complaint. Joseph T. Ryerson & Son, Inc. v Petito, 133 A.D.2d 668, 519 N.Y.S.2d 947, 1987 N.Y. App. Div. LEXIS 51709 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 71 N.Y.2d 889, 527 N.Y.S.2d 770, 522 N.E.2d 1068, 1988 N.Y. LEXIS 224 (N.Y. 1988), app. dismissed, 72 N.Y.2d 909, 532 N.Y.S.2d 756, 528 N.E.2d 1229, 1988 N.Y. LEXIS 1793 (N.Y. 1988).

Defendant physician was entitled to vacatur of default judgment in medical malpractice action on condition that $150 be paid to plaintiff's counsel where (1) summons and complaint were received by physician and forwarded to his insurance carrier in expectation that matter would be defended, (2) as result of administrative error, carrier failed to inform counsel, (3) on receipt of notice of default, physician merely forwarded that document as well, without knowledge of content of notice, and (4) motion to vacate was filed promptly and defense attorney submitted personal affirmation which set forth both reasons for default and statement of merit. Nan Su Paek v In Chul Song, 158 A.D.2d 321, 551 N.Y.S.2d 8, 1990 N.Y. App. Div. LEXIS 1136 (N.Y. App. Div. 1st Dep't 1990).

46. —Abuse of discretion

Where plaintiff failed to serve complaint for more than one year, never moved to open his default, failed to show either a reasonable excuse for the default or a meritorious cause of action, it was an improvident exercise of discretion to withhold an unconditional dismissal of the action. Salinger v Hollander, 19 A.D.2d 559, 241 N.Y.S.2d 43, 1963 N.Y. App. Div. LEXIS 3696 (N.Y. App. Div. 2d Dep't 1963).

It was abuse of discretion to order defendant's insurance carrier to pay $2,500 as condition for permitting defendant to serve late answer, since failure to interpose answer was not result of neglect or ploy but was based on carrier's good-faith belief that case had been settled, and plaintiff failed to show prejudice from short delay or that defendant, his counsel, or carrier was attempting to harass plaintiff; additionally, carrier was not party to action and thus was not

subject to court's order. Dawley v Minier, 134 A.D.2d 955, 523 N.Y.S.2d 1, 1987 N.Y. App. Div. LEXIS 51164 (N.Y. App. Div. 4th Dep't 1987).

47. —Condition not appropriate

Motion to dismiss should have been granted unconditionally where plaintiff for six months failed to make an excuse for delay or show that his cause of action had merit after defendant requested that a complaint be filed. Fisher v Tier Oil Co., 40 A.D.2d 930, 338 N.Y.S.2d 223, 1972 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 3d Dep't 1972).

Where summons was served 2 days before the statute of limitations would have barred the action and the motion to dismiss was made about 10 months after the service of defendant's notice of appearance demanding service of a complaint, and no complaint was served until after the motion to dismiss was made, special terms should have granted motion to dismiss unconditionally in the absence of any showing to excuse the failure to serve a complaint within a reasonable time and in the absence of an affidavit showing that the action had merit. De Stefano v Nash, 40 A.D.2d 1010, 338 N.Y.S.2d 919, 1972 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 2d Dep't 1972).

Motion to dismiss action for failure to serve complaint should have been unconditionally granted and plaintiff not been allowed an additional 10 days in which to serve the complaint where defendant had moved to dismiss the action 15 months after its demand for service of the complaint, and where plaintiff had not appeared or submitted affidavits on the motion's return date setting forth a reasonable excuse for delay or showing that the complaint was meritorious, notwithstanding the fact that defendant was itself responsible for a 22 month delay prior to service of notice of appearance and demand for service of the complaint. George v Samson Floors, Inc., 78 A.D.2d 156, 435 N.Y.S.2d 122, 1980 N.Y. App. Div. LEXIS 13402 (N.Y. App. Div. 3d Dep't 1980).

It was error to grant defendant's motion to dismiss only on condition that plaintiff fail to serve complaint within 30 days, where plaintiff failed to demonstrate justifiable excuse for 2-month

delay or meritorious cause of action, and did not submit any papers in opposition to motion. Preferred Mut. Ins. Co. v Walter J. Socha Builders, Inc., 128 A.D.2d 923, 512 N.Y.S.2d 574, 1987 N.Y. App. Div. LEXIS 44600 (N.Y. App. Div. 3d Dep't 1987).

Court erred in conditionally granting defendants' motion to dismiss action under CLS CPLR § 3012(b), giving plaintiffs 10 days from order to serve complaint, even though plaintiffs' attorney stated in his affidavit that he had agreement with employee of defendants' insurance carrier that case would be held in abeyance until extent of plaintiffs' injuries could be ascertained, since carrier's employees submitted affidavits denying that any such agreement had been reached, and even if such agreement had been reached, it was unreasonable for plaintiff to do nothing in response to defendants' demand for complaint. Ward v Quick, 249 A.D.2d 943, 672 N.Y.S.2d 581, 1998 N.Y. App. Div. LEXIS 5045 (N.Y. App. Div. 4th Dep't 1998).

Plaintiff submitted no opposition to defendant's motion to dismiss pursuant to CPLR 3012 (b); in absence of affidavit of merit, it was error not to grant motion without condition. Knolls Coop. Section No. 2, Inc. v Evans Dev. Corp., 169 A.D.2d 690, 565 N.Y.S.2d 489, 1991 N.Y. App. Div. LEXIS 820 (N.Y. App. Div. 1st Dep't 1991).

48. Extension of time to appear or plead

It was within the trial court's power to grant an extension of time within which to serve a complaint, where it was established that the delay in service was not willful or lengthy and that it did not cause any prejudice to the parties. Courts enjoy a somewhat broader range of discretion when considering a motion for an extension of time under CPLR 2004 which precedes any motion to dismiss than when considering a motion to dismiss pursuant to CPLR 3012; moreover, it was not error for the Appellate Division to accept the verified complaint in this case in lieu of an affidavit of merit. A & J Concrete Corp. v Arker, 54 N.Y.2d 870, 444 N.Y.S.2d 905, 429 N.E.2d 412, 1981 N.Y. LEXIS 3085 (N.Y. 1981).

Supreme Court abused its discretion in denying defendant's motion for leave to serve late answer, based on defendant's failure to submit affidavit of merit, where defendant established

sufficient excuse for 2-day delay and plaintiff failed to show any prejudice; affidavit of merit is not precondition to relief under CLS CPLR § 3012(d). Ching v Ching, 125 A.D.2d 934, 510 N.Y.S.2d 332, 1986 N.Y. App. Div. LEXIS 63110 (N.Y. App. Div. 4th Dep't 1986).

It was abuse of discretion to deny plaintiff's motion for leave to enter default judgment and to grant defendants' motion to compel plaintiff to accept service of answer where (1) no affidavit of merit was included with defendants' cross-motion, (2) defense counsel offered extremely evasive excuse for default in answering, (3) defense counsel knew or should have known that defendants were in default for more than 8 months, yet no written stipulation extending time to answer was obtained, and (4) no explanation was offered for defendants' continued failure to serve answer, even after affidavits of service had concededly been received by defense counsel, nor for defense counsel's failure, until very last minute, to take necessary steps to protect defendants. Trapani v Imlug & Seven Corp., 140 A.D.2d 690, 528 N.Y.S.2d 886, 1988 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 2d Dep't 1988).

In proceeding to stay arbitration of insured's claim for uninsured motorist benefits, court properly granted insured's motion to vacate preliminary stay, directed parties to proceed to arbitration, and denied insurance company's cross motion to excuse its default, where (1) court had granted preliminary stay pending trial of preliminary issue and had ordered insurance company to file note of issue and to serve other insurance company with papers to add it to that proceeding, (2) insurance company did not comply with court's directives and was notified by court of its failure to appear on date specified, and (3) insurance company then delayed additional 24 days before cross moving to excuse default; insurance company's conduct demonstrated inordinate pattern of delay which was without reasonable explanation since it was apparent that insurance company had done nothing to prepare for trial and application to excuse default was made only in response to insured's motion to vacate preliminary stay. Insurance Co. of North America v James, 144 A.D.2d 559, 534 N.Y.S.2d 694, 1988 N.Y. App. Div. LEXIS 11924 (N.Y. App. Div. 2d Dep't 1988).

Defendants should be permitted to serve late answer conditioned on payment of $1,000 costs within 20 days, considering that 2 days after defendants' time had elapsed their counsel had unsuccessfully sought extension of time to answer, there was no prejudice to plaintiff, and affidavit of merit was submitted by one defendant. Cousins v Duane Street Assoc., 160 A.D.2d 169, 553 N.Y.S.2d 21, 1990 N.Y. App. Div. LEXIS 3661 (N.Y. App. Div. 1st Dep't 1990).

Court had discretion under CLS CPLR § 2005 to excuse law office failure in plaintiff's prosecution of action, and to deny defendants' second motion to dismiss for lack of prosecution on condition that plaintiff's counsel pay defendants' counsel $3,500, where (1) prior motion should have been deemed abandoned since defendants offered no reason for their failure to settle order to implement justice's memorandum, (2) merit of plaintiff's medical malpractice claim was established by affidavit of doctor who originally examined plaintiff, and (3) plaintiff's counsel had communication difficulties with plaintiff, whose employment caused him to relocate to Switzerland. Svendsen v Sherman, 181 A.D.2d 556, 581 N.Y.S.2d 53, 1992 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 1st Dep't 1992).

Parents were entitled to serve late answer to complaint of their homeowner's insurance company which sought declaration that it was not required to represent parents or their emotionally handicapped son in action by teacher against parents and their son arising from incident in which son assaulted teacher in school where (1) parents' affidavit indicated that they were under mistaken impression that law firm retained by insurance company to represent them in underlying action would also represent them in declaratory judgment action, and (2) insurance company would not be prejudiced thereby. Holyoke Mut. Ins. Co. v Jason B., 184 A.D.2d 550, 585 N.Y.S.2d 61, 1992 N.Y. App. Div. LEXIS 7820 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff's showing of merit was sufficient to require that he be granted leave to serve late complaint against physician in medical malpractice action where plaintiff's affidavit averred that physician told him that there was too much dye injected into plaintiff's kidneys and that dye had damaged kidneys; alleged statement by physician was party admission and was sufficient to

establish that action had merit. Adams v Agrawal, 187 A.D.2d 886, 590 N.Y.S.2d 545, 1992 N.Y. App. Div. LEXIS 13457 (N.Y. App. Div. 3d Dep't 1992).

In action to quiet title to property, court properly denied defense motion to compel acceptance of answer, asserting that defendants' failure to interpose timely answer was due to need for additional time to locate existing survey of their property, where (1) answer ultimately forwarded to plaintiffs was same one which had been prepared without benefit of survey, and (2) defense interposed in proffered answer—that defendants had acquired title to land in question by adverse possession—did not require reference to survey map. Ponemon v Van Loan, 188 A.D.2d 843, 591 N.Y.S.2d 586, 1992 N.Y. App. Div. LEXIS 14370 (N.Y. App. Div. 3d Dep't 1992).

Court did not err in granting defendant's motion to extend its time to answer where plaintiff stipulated to unconditional extension of time for defendant to answer up to and including September 9, 1990, defendant served answer on September 17, 1990, and plaintiff failed to explain how he was prejudiced by short delay, in that pertinent statute of limitations had already expired on August 23, 1990. DeCicco v Cobble Hill Nursing Home, 196 A.D.2d 476, 601 N.Y.S.2d 840, 1993 N.Y. App. Div. LEXIS 7703 (N.Y. App. Div. 2d Dep't 1993).

Court did not abuse its discretion in excusing plaintiff's noncompliance with CLS CPLR § 3012(b) where (1) delay in service of complaint was relatively short and attributable in part to miscommunication between parties' attorneys, and (2) plaintiff made strong showing on merits of claim. Jensen v Samuel Feldman Lumber Co., 203 A.D.2d 74, 612 N.Y.S.2d 835, 1994 N.Y. App. Div. LEXIS 3587 (N.Y. App. Div. 1st Dep't 1994).

In action for conversion, fraud and unjust enrichment, court properly vacated defendant's default in serving answer where he clearly intended to defend action on merits, plaintiff never entered default judgment against him, he demonstrated meritorious defense, he served answer within relatively short period of time after service of complaint (less than 3 months), and plaintiff demonstrated no prejudice as result of delay. Paradiso & Assocs. v Tamarin, 210 A.D.2d 386, 622 N.Y.S.2d 57, 1994 N.Y. App. Div. LEXIS 12965 (N.Y. App. Div. 2d Dep't 1994).

Court properly granted respondent's motion to compel acceptance of late pleading where petitioner suffered no significant prejudice from modest 3-week delay, which resulted from confusing telephone conversation that led Assistant Attorney General to believe that petitioner's counsel had agreed to brief extension of time. Russo v Jorling, 214 A.D.2d 863, 625 N.Y.S.2d 690, 1995 N.Y. App. Div. LEXIS 4388 (N.Y. App. Div. 3d Dep't), app. denied, 86 N.Y.2d 705, 632 N.Y.S.2d 498, 656 N.E.2d 597, 1995 N.Y. LEXIS 3412 (N.Y. 1995).

In personal injury action under supplementary uninsured motorist coverage of insurance policy, defendant's motion to compel plaintiff to accept untimely answer was properly granted where defendant's delay was relatively brief, and excuse for delay was reasonable. Ribowsky v Allstate Ins. Co., 251 A.D.2d 484, 673 N.Y.S.2d 919, 1998 N.Y. App. Div. LEXIS 6891 (N.Y. App. Div. 2d Dep't 1998).

In light of public policy favoring resolution of cases on merits, defendant in action for gasoline spill was properly granted extension of time to file answer to complaint, and plaintiffs' motion for default judgment, costs, and sanctions was properly denied, where delay was result of miscommunications rather than willful conduct, defendant showed meritorious defense, and plaintiffs were not prejudiced by short delay. De Nooyer Chevrolet, Inc. v Polsinello Fuels, Inc., 251 A.D.2d 871, 674 N.Y.S.2d 490, 1998 N.Y. App. Div. LEXIS 7329 (N.Y. App. Div. 2d Dep't 1998).

It was improper for referee to refuse defendant opportunity to participate in inquest when defense counsel arrived only few moments after proceeding had begun; thus, it was abuse of discretion for court to deny defendant's motion to vacate default. De Benedictis v Rahbar, 269 A.D.2d 134, 702 N.Y.S.2d 291, 2000 N.Y. App. Div. LEXIS 973 (N.Y. App. Div. 1st Dep't 2000).

Trial court properly allowed a town sued for negligence, arising from a traffic collision, to serve its answer late, under N.Y. C.P.L.R. 3012(d), as the town showed a reasonable excuse for its tardiness, and the injured party did not show that the town's default was willful or that it prejudiced the injured party. Aabel v Town of Poughkeepsie, 301 A.D.2d 739, 753 N.Y.S.2d 201, 2003 N.Y. App. Div. LEXIS 2 (N.Y. App. Div. 3d Dep't 2003).

Town sued for negligence arising from a traffic collision which did not timely answer the injured party's complaint was not required to submit an affidavit of merit, under N.Y. C.P.L.R. 3012(d), as a precondition to the late service of its answer, because the delay was of a relatively short duration. Aabel v Town of Poughkeepsie, 301 A.D.2d 739, 753 N.Y.S.2d 201, 2003 N.Y. App. Div. LEXIS 2 (N.Y. App. Div. 3d Dep't 2003).

Trial court properly granted a landscaping company's motion to vacate a default judgment entered in favor of plaintiff pursuant to N.Y. C.P.L.R. 3215(f), because plaintiff failed to provide proof indicating that the landscaping company was involved in the construction of an allegedly defective railing, and in light of the brief delay involved, the lack of prejudice to plaintiff from the delay, the existence of potentially meritorious defenses, and the public policy favoring the resolution of cases on the merits, the trial court providently exercised its discretion in granting the company's cross motion to compel plaintiff to accept service of the answer under N.Y. C.P.L.R. 2004, 3012(d). Crimmins v Sagona Landscaping, Ltd., 33 A.D.3d 580, 822 N.Y.S.2d 141, 2006 N.Y. App. Div. LEXIS 11967 (N.Y. App. Div. 2d Dep't 2006).

Denial of an insurer's motion for summary judgment in a city's case seeking coverage was proper because the insurer's assertion of a late notice defense, made 92 days after receiving the city's summons and complaint, was not timely as a matter of law, and N.Y. Ins. Law § 3420(d) protected an insured from an insurer's unreasonable delays in disclaiming coverage even where the underlying claim had been satisfied. City of New York v Welsbach Elec. Corp., 49 A.D.3d 322, 852 N.Y.S.2d 134, 2008 N.Y. App. Div. LEXIS 1988 (N.Y. App. Div. 1st Dep't 2008).

Trial court properly granted a contractor's cross motion to serve a late answer to worker's complaint; while the conclusory affidavit of the contractor's president was insufficient to demonstrate a potential meritorious defense to the action, a showing of a potential meritorious defense was not an essential component of a motion to serve a late answer under N.Y. C.P.L.R. 3012(d) where, as here, no default order or judgment had been entered. Jones v 414 Equities

LLC, 57 A.D.3d 65, 866 N.Y.S.2d 165, 2008 N.Y. App. Div. LEXIS 8024 (N.Y. App. Div. 1st Dep't 2008).

Motion court properly granted a father's motion to vacate his default issues of child custody and child support because, while the court erred in granting the motion as to the issues of child custody and child support, the father ignored the matrimonial action for more than two and one-half years, despite repeatedly receiving reminders that the action was proceeding and that the important issues attendant to it were being resolved without his participation, the only excuse he offered for his inaction was vague, conclusory, and unsupported by any evidence, issues of child custody and child support should, if possible, not be determined on a party's default. Genzone v Genzone, 146 A.D.3d 752, 45 N.Y.S.3d 140, 2017 N.Y. App. Div. LEXIS 147 (N.Y. App. Div. 2d Dep't 2017).

Supreme court properly denied a purchaser’s motions for leave to enter a default judgment against sellers and granted the sellers’ cross-motion to vacate their default in answering the complaint and for leave to serve a late answer to the extent of extending their time to appear and answer to 30 days from the date of entry of the order; the sellers’ delay in cross-moving was brief, and no prejudice resulting from the brief delay was alleged. BJ Integra Affordable, LLC v Vanmew Hous. Dev. Fund Corp., 2025 N.Y. App. Div. LEXIS 3102 (N.Y. App. Div. 2d Dep't 2025).

Court denied plaintiff’s motion for default judgment and immediate trial on issue of damages, excused defendants’ 20-day delay in serving their answer, and granted motion under CLS CPLR §§ 2004 and 3012(d) compelling plaintiffs to accept defendants’ answer as timely, where defendants moved to vacate default in answering less than 2 weeks after plaintiffs’ motion for default judgment, and no prejudice resulted from delay. Galante v County of Nassau, 186 Misc. 2d 733, 720 N.Y.S.2d 325, 2000 N.Y. Misc. LEXIS 542 (N.Y. Sup. Ct. 2000), aff'd in part,

modified, 293 A.D.2d 568, 740 N.Y.S.2d 225, 2002 N.Y. App. Div. LEXIS 3689 (N.Y. App. Div. 2d Dep't 2002).

Defendants were entitled under N.Y. C.P.L.R. 3012(d) to an extension to answer, move, or otherwise respond to plaintiffs' verified complaint in an action regarding ground leases because defendants had only made one request for an extension while granting several to plaintiffs and plaintiffs only sought money damages and failed to show any prejudice would result from an extension. Pac. Carlton Dev. Corp. v 752 Pac. LLC, 237 N.Y.L.J. 93, 2007 N.Y. Misc. LEXIS 3675 (N.Y. Sup. Ct. Apr. 25, 2007).

Where a passenger filed a personal injury suit against a bus company, the company was granted an extension of time to file an answer because it offered a reasonable excuse for its delay in answering the complaint: that the pleadings were served at the legal department of another bus company, a separate and distinct legal entity. Williams v MTA Bus Co., 989 N.Y.S.2d 806, 44 Misc. 3d 673, 2014 N.Y. Misc. LEXIS 2716 (N.Y. Sup. Ct. 2014), vacated in part, dismissed, 2017 N.Y. Misc. LEXIS 1354 (N.Y. Sup. Ct. Apr. 13, 2017).

Rather than merely opposing the husband's order to show cause seeking default judgment on the husband's counterclaim against the wife to vacate the parties' prenuptial agreement, procedurally the wife should have moved by cross-motion seeking relief for the court to extend the time for the filing of a late reply to the husband's counterclaim. J.M. v G.V., 225 N.Y.S.3d 859, 2025 N.Y. Misc. LEXIS 31 (N.Y. Sup. Ct. 2025).

Because the issue in dispute already had been presented for judicial determination by way of motion, for the court to require formal motion practice to file a late reply to a counterclaim which would have been in effect the same facts alleged in the wife's affidavit in opposition would have resulted in increased legal fees. Therefore, the court exercised the court's discretion to treat the wife's opposition as an application for relief, even absent a formal notice of cross-motion, for

leave to file a late reply to the husband's counterclaim. J.M. v G.V., 225 N.Y.S.3d 859, 2025 N.Y. Misc. LEXIS 31 (N.Y. Sup. Ct. 2025).

49. —Extension not appropriate

A motion by order to show cause to extend the time to answer was denied without prejudice to any later motion to open the default where there was no affidavit showing a meritorious defense. Citibank, N.A. v Cummings, 79 A.D.2d 1068, 435 N.Y.S.2d 391, 1981 N.Y. App. Div. LEXIS 9993 (N.Y. App. Div. 3d Dep't 1981).

Plaintiff was entitled to default judgment, and defendant was not entitled to extension of time to answer, where (1) 5-month delay in filing of answer was caused by inexcusable law office failure, (2) there were uncontradicted averments that defendant intended to prolong action in effort to hamper plaintiff's attempt to collect judgment from him, and (3) no meritorious defense was put forth by defendant. Special Products Mfg., Inc. v Douglass, 159 A.D.2d 847, 553 N.Y.S.2d 506, 1990 N.Y. App. Div. LEXIS 2905 (N.Y. App. Div. 3d Dep't 1990), modified, 169 A.D.2d 891, 564 N.Y.S.2d 615, 1991 N.Y. App. Div. LEXIS 136 (N.Y. App. Div. 3d Dep't 1991).

Order which denied plaintiffs' motion for default judgment affirmed–delay was relatively brief, attributable in part to refusal by defendant's insurer to defend and in part to defendant being unaware that no notice of appearance had been filed when it learned of insurer's refusal to defend; plaintiffs were not prejudiced by brief delay and there is no allegation of willful inaction by defendant; as to merits, CPLR 3012 (d) does not require affidavit of merit as precondition to obtaining relief where, as here, delay has been of reasonably short duration; in any event, there are affidavits in record which reveal that at least part of plaintiffs' damages may have been caused by another party. Better v Schodack, 169 A.D.2d 965, 564 N.Y.S.2d 860, 1991 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 3d Dep't 1991).

While court has broad discretion in granting applications for extensions of time to answer under CPLR 3012 (d) upon such terms as may be just and upon showing of reasonable excuse for delay, refusal to grant such relief in this case, despite fact defendant moved prior to plaintiffs' motion for default judgment, was not abuse of discretion; failure to answer was not inadvertent, but was result of defendant's attempt to obtain benefit of stipulation extending its time to answer, which was conditioned on defendant's waiver of its jurisdictional defense, without fulfilling that condition; delay can in no way be characterized as law office failure. Aloizos v Trinity Realty Corp., 171 A.D.2d 426, 567 N.Y.S.2d 7, 1991 N.Y. App. Div. LEXIS 2753 (N.Y. App. Div. 1st Dep't 1991).

It was not abuse of discretion to allow defendant to serve late answer and deny plaintiff's cross motion for default judgment, as defendant's actions in appearing in action and attempting to communicate with plaintiff's attorney in order to resolve matter indicated that he intended to participate in action, and plaintiff failed to show any prejudice attributable to delay. Bedard v Najim, 222 A.D.2d 979, 635 N.Y.S.2d 790, 1995 N.Y. App. Div. LEXIS 13768 (N.Y. App. Div. 3d Dep't 1995).

In proceeding under CLS Exec § 63(12) to permanently enjoin fraudulent business activities, appellants were not entitled to extension of time to serve answer where reasonable excuse for their 3-month delay was not shown by their vague references to lack of available documentation from their title insurer and "apparent" law office failure. People v BBC Props. Portfolio Corp., 281 A.D.2d 549, 721 N.Y.S.2d 825, 2001 N.Y. App. Div. LEXIS 2649 (N.Y. App. Div. 2d Dep't 2001).

Where defendant failed to appear or answer a personal injury complaint, and he had notice of an order from the trial court that granted plaintiffs' motion for leave to enter judgment on the issue of liability due to defendant's default, his motion two years later to vacate the default due to excusable neglect pursuant to N.Y. C.P.L.R. 5015(a)(1) should have been denied as untimely; he failed to show a reasonable excuse for the inordinate delay and accordingly, it was also error to have granted defendant's motion for an extension of time to file a late answer, and

to require plaintiffs to accept it pursuant to N.Y. C.P.L.R. 3012(d). Gainey v Anorzej, 25 A.D.3d 650, 811 N.Y.S.2d 679, 2006 N.Y. App. Div. LEXIS 712 (N.Y. App. Div. 2d Dep't 2006).

Defendant's motion under N.Y. C.P.L.R. 3012 to extend its time to serve an answer was improperly granted in plaintiffs' personal injury action as defendant failed to present any evidence of a meritorious defense. Lipp v Port Auth. of N. Y. & N. J., 34 A.D.3d 649, 824 N.Y.S.2d 671, 2006 N.Y. App. Div. LEXIS 13842 (N.Y. App. Div. 2d Dep't 2006).

Because a lessee neither made a proper motion to dismiss nor a motion to correct the pleadings so as to extend its time to answer, and also failed to establish the existence of a meritorious defense to the lessors' declaratory action, its N.Y. C.P.L.R. 3012(d) cross-motion for permission to file a late answer was properly denied. 333 Cherry LLC v Northern Resorts, Inc., 66 A.D.3d 1176, 887 N.Y.S.2d 341, 2009 N.Y. App. Div. LEXIS 7391 (N.Y. App. Div. 3d Dep't 2009).

Trial court properly denied defendants leave to serve and file a late answer, as defense counsel's unsubstantiated and conclusory claims were insufficient to establish a reasonable excuse for their failure to timely serve and file an answer or to move in a timely fashion to renew their prior motion for leave to serve and file a late answer. Neilson v 6D Farm Corp., 123 A.D.3d 676, 998 N.Y.S.2d 397, 2014 N.Y. App. Div. LEXIS 8338 (N.Y. App. Div. 2d Dep't 2014).

Homeowners were not permitted to file a late answer in a foreclosure action because the length of the delay in their response to the summons and complaint was approximately one year, the homeowners were aware of both the mortgage and its function of enabling their son to finance the purchase of a condominium unit using the equity in their home, and there was no merit in the homeowners' claim that the powers of attorney granted to their son were fraudulently obtained. Emigrant Bank v Rosabianca, 156 A.D.3d 468, 67 N.Y.S.3d 175, 2017 N.Y. App. Div. LEXIS 8806 (N.Y. App. Div. 1st Dep't 2017).

Defendant's motion to vacate his default and for leave to serve a late answer was properly denied because he failed to offer a reasonable excuse for his default. Wells Fargo Bank, N.A. v

Singh, 204 A.D.3d 732, 163 N.Y.S.3d 864, 2022 N.Y. App. Div. LEXIS 2127 (N.Y. App. Div. 2d Dep't 2022).

CLS CPLR § 3012 provision that “court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served” does not authorize judicial extension of time to plead beyond time prescribed by statute of limitations; accordingly, court could not excuse commencement of personal injury action one day after running of 3-year limitation period because of illness of plaintiff’s attorney. Peterson v Long, 136 Misc. 2d 725, 519 N.Y.S.2d 201, 1987 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1987).

When a motion to dismiss a landlord’s commercial holdover proceeding was denied, the trial court did not permit the tenant leave to serve and file an answer because the tenant’s motion to dismiss was untimely made after the time to answer the petition had elapsed, the tenant did not offer any reasonable excuse for failing to answer or a meritorious defense, and the tenant raised legal arguments in the motion to dismiss that were all lacking in merit. Gur Assoc. LLC v Convenience on Eight Corp., 82 Misc. 3d 754, 207 N.Y.S.3d 863, 2023 N.Y. Misc. LEXIS 23368 (N.Y. Civ. Ct. 2023).

Cross motion seeking an extension of time to appear or plead and an extension of time for filing the summons and complaint nunc pro tunc was untimely because the motion to dismiss contained a seven-day demand and the cross motion was plainly late; moreover, the complaint was untimely, law office failure did not excuse noncompliance with the statute of limitations, and there was no basis for applying equitable estoppel. C.L. v County of Oneida, 84 Misc. 3d 301, 212 N.Y.S.3d 533, 2024 N.Y. Misc. LEXIS 2220 (N.Y. Sup. Ct. 2024).

II. Under Former Civil Practice Laws

50. Complaint; generally

Service of answer bars defendant from questioning timeliness of service of complaint. McNamara v Penner, 123 N.Y.S.2d 576, 1953 N.Y. Misc. LEXIS 1998 (N.Y. Sup. Ct. 1953).

Default and failure of plaintiff for eight years constituted abandonment of the action. United States v Edison Electric Illuminating Co., 37 F.2d 926, 1930 U.S. Dist. LEXIS 1826 (E.D.N.Y. 1930).

51. —Appearances

In an action to register title to land, brought under article 12 of the Real Property Law, an abutting owner has an absolute right to appear and answer the complaint, and where he has not been named as a defendant by the plaintiff, the orderly practice is for him to enter his appearance, demand a copy of the complaint, and to answer it within the time allowed. Sundermann v People, 148 A.D. 124, 132 N.Y.S. 68, 1911 N.Y. App. Div. LEXIS 155 (N.Y. App. Div. 1911).

Where summons and complaint in foreclosure were served upon defendant husband who appeared by attorney who in turn appeared for defendant wife, and due notice of all proceedings was given to such attorney who had copy of complaint served on defendant husband, attorney's failure to demand service of second copy of complaint upon him barred his objection to such omission upon application to fix market value of premises. Home Life Ins. Co. v Horowitz, 51 N.Y.S.2d 657, 183 Misc. 809, 1944 N.Y. Misc. LEXIS 2587 (N.Y. Sup. Ct. 1944).

Where there is a substitution of attorneys for plaintiff, and the plaintiff is unable to discover the whereabouts of the former attorney or to furnish the substituted attorneys with information in relation to the status of the case, the court may require the defendant's attorney to permit an inspection and copy of the pleadings. Butterfield v Bennett, 8 N.Y.S. 910, 56 Hun 640, 1890 N.Y. Misc. LEXIS 1844 (N.Y. Sup. Ct. 1890).

52. —Demand for complaint

Where an action is begun by the service of the summons only, if the defendants desire a copy of the complaint, they should serve a written demand for the same upon the plaintiff's attorney within twenty days after the service of the summons upon them, and if the defendants neglect to serve such demand within the prescribed time, their remedy is to apply to the court to open the default and to be permitted to serve the demand; they have no standing, while the default continues, to make a motion to require the plaintiff's attorney to serve a copy of the complaint upon them, and for leave to plead thereto. Stokes v Schildknecht, 85 A.D. 602, 83 N.Y.S. 358, 1903 N.Y. App. Div. LEXIS 2153 (N.Y. App. Div. 1903).

Service of summons pursuant to CPA § 16 (§ 203(b) herein) was not affected by failure to serve complaint within 20 days after service of demand under CPA § 257. Epstein v Block, 80 N.Y.S.2d 279, 192 Misc. 279, 1948 N.Y. Misc. LEXIS 2538 (N.Y. Sup. Ct. 1948).

Under the provisions of CPA § 257, a nonresident defendant, to whom copies of the summons and of the complaint were personally delivered before the service by publication was complete, was not entitled, after completion of such service, to demand a copy of the complaint. Skinner v Skinner, 9 N.Y.S. 60, 1887 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1887).

53. —Sufficiency of service

Service upon foreign corporation as executor vacated. Hansen v American Sec. & Trust Co., 159 A.D. 801, 144 N.Y.S. 839, 1913 N.Y. App. Div. LEXIS 8208 (N.Y. App. Div. 1913).

Where defendants allege that they have impleaded distributees who make adverse claims to bank passbooks by service upon them of summons and complaint served upon them in action, such service complied with former CPA §§ 286, 287, by bringing other persons so served into action without necessity for court order to that end. O'Donnell v Vanecek, 3 Misc. 2d 20, 150 N.Y.S.2d 819, 1956 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1956).

Defendant returned a complaint as not received in time. Then, although no extension of time was granted, plaintiff again served the complaint. The defendant did not serve an answer and

judgment was thereafter entered by default. Held: defendant's motion to open the default was denied where there was no probability of success on his part. Roth v Perry, 158 N.Y.S.2d 122 (N.Y. County Ct. 1957).

Where copy of complaint served is not the same as original, remedy of defendant is either to strike from the records the original complaint on ground that no copy of that complaint has been served, or to set aside service of the complaint on ground that no copy of original has ever been served. Boston Nat'l Bank v Armour, 3 N.Y.S. 22, 50 Hun 176, 1888 N.Y. Misc. LEXIS 451 (N.Y. App. Term 1888).

Service of attachment papers, which included a copy of the complaint, was not a sufficient service of the complaint within CPA § 257. Crouse v Reichert, 15 N.Y.S. 369, 61 Hun 46, 1891 N.Y. Misc. LEXIS 3227 (N.Y. Sup. Ct. 1891).

Where copy of complaint was served on defendant two days after summons was served and before he had appeared, held, that plaintiff acquired no rights thereunder; and a motion by defendant to set aside the service was proper, and should be granted, notwithstanding he had returned the copy of complaint to plaintiff. Sweet v Sanderson Bros. Steel Co..

54. —Dismissal of complaint

A defendant who has appeared specially for purpose of obtaining copy of complaint is not in a position to move to dismiss complaint if no complaint is served. Muslusky v Lehigh Valley Coal Co., 225 N.Y. 584, 122 N.E. 461, 225 N.Y. (N.Y.S.) 584, 1919 N.Y. LEXIS 1159 (N.Y. 1919).

Defendant is entitled to an order dismissing plaintiffs' complaint for default in service in response to defendant's demand, where plaintiffs failed to present an affidavit of merits or to show a meritorious cause of action and not only did not submit a proposed pleading, but failed to produce an affidavit of anyone having knowledge of the facts explaining the delay. Blasser v Morrisania Milk Co., 243 A.D. 281, 276 N.Y.S. 883, 1935 N.Y. App. Div. LEXIS 7054 (N.Y. App. Div. 1935).

Denial of defendant's motion to dismiss complaint for failure to serve copy thereof for two years after timely demand therefor had been made, without any explanation for the delay, was an abuse of discretion. Wakschal v Century Estates, Inc., 10 A.D.2d 891, 201 N.Y.S.2d 236, 1960 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 2d Dep't), app. dismissed, 8 N.Y.2d 1125, 209 N.Y.S.2d 810, 171 N.E.2d 890, 1960 N.Y. LEXIS 929 (N.Y. 1960).

In action against sheriff for wrongful levy on property under execution pursuant to former CPA § 697, complaint was properly dismissed for failure to serve summons within three months after issuance. Shofi v Hoy, 117 N.Y.S.2d 214, 203 Misc. 402, 1952 N.Y. Misc. LEXIS 2011 (N.Y. Sup. Ct. 1952).

Court on its own motion vacated prior order denying defendant's motion to dismiss for lack of prosecution, when plaintiff had never served any pleading, without prejudice to motion by defendant to dismiss action for plaintiff's failure to serve complaint. Brody v Hampton Investors, Inc., 3 Misc. 2d 161, 147 N.Y.S.2d 608, 1955 N.Y. Misc. LEXIS 2198 (N.Y. Sup. Ct. 1955).

A verified complaint, stating a cause of action, may be accepted in lieu of a formal affidavit of merits, where default is clearly excusable. De Jose v Hempstead, 25 Misc. 2d 780, 208 N.Y.S.2d 6, 1960 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Ct. 1960).

Where demand is made for the service of a complaint and it is not served within twenty days, an application may be made for the dismissal of the action. Roth v Perry, 158 N.Y.S.2d 122 (N.Y. County Ct. 1957).

Where plaintiff's affidavits showed that she had a meritorious cause of action for injuries and that delay in preparing complaint was caused by her ill health and her attorney's inability to obtain access to town's records, even though her attorney's failure to seek an extension of time to serve complaint was not explained, defendant's motion to dismiss complaint was denied upon condition that plaintiff pay costs and expenses of motion. Homan v Ralph Jannotta, Inc., 195 N.Y.S.2d 950, 1959 N.Y. Misc. LEXIS 4624 (N.Y. Sup. Ct. 1959).

Action against an administrator to recover a deficiency of income taxes payable by the deceased for 1920 and 1921 was not dismissed where the government had delayed for over two and one-half years to prepare a complaint. United States v Fischer, 93 F.2d 488, 1937 U.S. App. LEXIS 2843 (2d Cir. N.Y. 1937).

If the copy of the complaint is not served within twenty days after demand, defendant may move to dismiss the complaint; and if thereafter a copy of the complaint is served, the defendant is not bound to return it immediately or be deemed to have waived the right to make his motion. Baker v Curtiss, 7 How Pr 478. And see Skinner v Noyes, 30 Super Ct (7 Robt) 228, and Luce v Trempert, 9 How. Pr. 212, 1850 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. Dec. 1, 1850).

55. —Leave to serve after lapse of time

A motion to be allowed to serve a complaint made nearly one year after the time for service had elapsed will not be granted where the reason assigned is that the party waited for the determination of another action involving the same question. Martin v McCurdy, 120 A.D. 665, 105 N.Y.S. 474, 1907 N.Y. App. Div. LEXIS 1283 (N.Y. App. Div. 1907).

Where a plaintiff whose complaint has been returned for lack of timely service delays over five years before moving for leave to serve a complaint and has taken no other proceedings during that time, she is under the burden of giving a reasonable excuse for the delay. Burns v Meister, 141 A.D. 674, 125 N.Y.S. 916, 1910 N.Y. App. Div. LEXIS 3932 (N.Y. App. Div. 1910).

A motion by the plaintiff to compel acceptance of service of a complaint, refused by the defendant on the ground of delay, was granted, where summons in the action, for money had and received, was served on defendant’s testator on August 17, 1935, testator, by his attorneys, served a notice of retainer about three weeks later together with a demand for a copy of the complaint, and no attempt was made to serve a complaint until about two years and three months later when, following the death of the testator, his executor was substituted as defendant and was served with such complaint which was promptly returned. In re Arnold's Will, 1 N.Y.S.2d 38, 165 Misc. 455, 1937 N.Y. Misc. LEXIS 1041 (N.Y. Sup. Ct. 1937).

Where plaintiff served complaint which was returned because served too late, plaintiff's remedy was to move to open default, but not to compel defendant to accept service under CPA § 257. Liberty Mut. Ins. Co. v New York, 24 Misc. 2d 1097, 205 N.Y.S.2d 414, 1960 N.Y. Misc. LEXIS 2957 (N.Y. Sup. Ct. 1960).

Where plaintiff's attorney states that his office file was mislaid, as excuse for delay in serving complaint, and it does not appear that defendant would be prejudiced by delay, plaintiff's motion to compel defendant to accept service of complaint was granted. Van Dyne v Sabo, 110 N.Y.S.2d 625, 1951 N.Y. Misc. LEXIS 2800 (N.Y. Sup. Ct. 1951).

56. —When service complete

Though service of summons without state without order does not become complete until ten days after proof of such service is filed, still action was commenced at time of service of summons. Cooley v Barney, 286 A.D. 1151, 145 N.Y.S.2d 887, 1955 N.Y. App. Div. LEXIS 5467 (N.Y. App. Div. 1955).

Service under CPA § 235 as it stood prior to the amendment of 1923 held complete upon actual service of the summons without the state. Sheafer v Vermont Hygeia Ice Co., 195 N.Y.S. 61, 118 Misc. 593, 1922 N.Y. Misc. LEXIS 1347 (N.Y. Sup. Ct. 1922).

Service under CPA § 233 was complete ten days after filing proof thereof, under RCP 51 (Rule 316(c) herein). Sheafer v Vermont Hygeia Ice Co., 195 N.Y.S. 61, 118 Misc. 593, 1922 N.Y. Misc. LEXIS 1347 (N.Y. Sup. Ct. 1922).

Ten days after proof of service of summons and complaint in action for divorce is filed, service is complete. Lambert v Lambert, 41 N.Y.S.2d 840, 180 Misc. 570, 1943 N.Y. Misc. LEXIS 1918 (N.Y. Sup. Ct. 1943).

Failure to file proof of service as required by this section within sixty days after service is not jurisdictional but may be cured by enlargement of time to file proof of service, and filing of an

amended affidavit of service. City Bank Farmers Trust Co. v Pleasonton, 51 N.Y.S.2d 672, 1944 N.Y. Misc. LEXIS 2595 (N.Y. Sup. Ct. 1944).

Filing of proof of personal service of summons outside state over 30 days after attachment of property does not warrant vacation of attachment. Burg v Winquist, 124 N.Y.S.2d 133, 1953 N.Y. Misc. LEXIS 2113 (N.Y. Sup. Ct. 1953).

Where personal service was made outside the state and former CPA §§ 232, 233 and 235 were satisfied, the service was valid and would not be set aside although an order of publication had been obtained and the service not made within sixty days, so that the order itself may have been vacated. Bastard v De Bausset, 129 N.Y.S.2d 627, 1954 N.Y. Misc. LEXIS 3200 (N.Y. Sup. Ct. 1954).

57. Answer or Appearance; generally

CPA § 228 construed with CPA § 263 in holding that word “appear,” as used in § 228 subd 9, extending time of defendant to “appear,” meant to “answer.” Olson v Jordan, 43 N.Y.S.2d 348, 181 Misc. 942, 1943 N.Y. Misc. LEXIS 2205 (N.Y. Sup. Ct. 1943).

58. —Appearance for another defendant

In an action against executors wherein the complaint was served upon one about two weeks after service of summons upon the other, and both defendants, through the same attorney, served a notice of appearance within twenty days after the service of such complaint, together with an order to show cause why certain portions of the complaint should not be stricken, defendants’ default, if any, was excused, and their motion to compel acceptance of their notice of appearance was granted. Gambold v MacLean, 197 N.Y.S. 43, 119 Misc. 432, 1922 N.Y. Misc. LEXIS 1593 (N.Y. Sup. Ct. 1922), aff'd, 204 A.D. 881, 197 N.Y.S. 914, 1922 N.Y. App. Div. LEXIS 9430 (N.Y. App. Div. 1922), aff'd, 208 A.D. 707, 202 N.Y.S. 926, 1923 N.Y. App. Div. LEXIS 4841 (N.Y. App. Div. 1923).

Where summons and complaint in foreclosure were served upon defendant husband who appeared by attorney who in turn appeared for defendant wife, and due notice of all proceedings were given to such attorney who had copy of complaint served on defendant husband, attorney's failure to demand service of second copy of complaint upon him barred his objection to application to fix market value of premises and such service. Home Life Ins. Co. v Horowitz, 51 N.Y.S.2d 657, 183 Misc. 809, 1944 N.Y. Misc. LEXIS 2587 (N.Y. Sup. Ct. 1944).

59. —Reply of impleaded defendants

CPA §§ 237, 263 (Rule 320(a) herein) and 271 imposed upon a defendant impleaded by the original defendant in setting up a counterclaim in his answer the duty to reply to the counterclaim within twenty days after service of the answer upon it. Gettinger v Glasser, 204 A.D. 828, 199 N.Y.S. 43, 1923 N.Y. App. Div. LEXIS 9582 (N.Y. App. Div. 1923).

60. —Effect of insurance provisions

In an action on an insurance policy where defendant's answer was timely under CPA § 263, but after the incontestable limitation of the policy, motion for summary judgment was granted on the ground that there was no contest until answer was served. Wolpin v Prudential Ins. Co., 223 A.D. 339, 228 N.Y.S. 78, 1928 N.Y. App. Div. LEXIS 6208 (N.Y. App. Div. 1928).

61. —Validity of premature judgment

Judgment entered after personal service within the state, but prior to the expiration of defendant's time to answer, is irregular and voidable, but not void. Winter v Winter, 256 N.Y. 113, 175 N.E. 533, 256 N.Y. (N.Y.S.) 113, 1931 N.Y. LEXIS 1031 (N.Y. 1931).

62. Time to Answer; generally

Time runs from time of mailing answer, and not time of its receipt. Jackson & Perkins Co. v Rose Fair, Inc., 278 A.D. 890, 104 N.Y.S.2d 892, 1951 N.Y. App. Div. LEXIS 5079 (N.Y. App. Div. 1951).

Where failure to put proper postage on envelope did not prevent actual receipt of the papers in time, it was an immaterial defect which did not invalidate the service and plaintiff's attorney was directed to accept answer. Jack London Products, Inc. v Edkiss, 17 Misc. 2d 453, 187 N.Y.S.2d 671, 1959 N.Y. Misc. LEXIS 3655 (N.Y. Sup. Ct. 1959).

63. —Service of complaint

The service of a summons and complaint on Sunday is absolutely void. Scott Shoe-Machinery Co. v Dancel, 63 A.D. 172, 71 N.Y.S. 263, 1901 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 1901).

Where a copy of the complaint in an action was served on the defendant two days after the summons was served and before he had appeared, held, that the plaintiff acquired no rights thereunder; that a motion by the defendant to set aside the service was proper, and should be granted, notwithstanding he had returned the copy of the complaint to the plaintiff. Sweet v Sanderson Bros. Steel Co..

64. — —Admission of service

Where the complaint in an action was served upon the defendant's attorney on January 15, 1904, and such attorney gave admission of service dated January 12, 1904, the defendant had twenty days from the date of actual service of the complaint within which to serve his answer and not simply twenty days from the date of the admission. Tolhurst v Howard, 94 A.D. 439, 88 N.Y.S. 235, 1904 N.Y. App. Div. LEXIS 1381 (N.Y. App. Div. 1904).

65. — —Nonresident

Where a nonresident defendant has been served with process by publication, without a warrant of attachment having been issued, and subsequently brings property into this state, its time to appear and answer does not begin to run until a warrant of attachment thereon is issued and a levy made. Haase v Michigan Steel Boat Co., 148 A.D. 298, 132 N.Y.S. 1046, 1911 N.Y. App. Div. LEXIS 200 (N.Y. App. Div. 1911), app. dismissed, 210 N.Y. 602, 104 N.E. 1131, 210 N.Y. (N.Y.S.) 602, 1914 N.Y. LEXIS 1351 (N.Y. 1914).

Where summons is served by publication upon a nonresident and later an attachment is levied on his property, the service, for purposes of acquiring jurisdiction, is not complete until the attachment has been levied, and his time to answer does not expire until twenty days after the levy. Cahill v Broadwell Productions, Inc., 190 N.Y.S. 225, 1921 N.Y. Misc. LEXIS 1679 (N.Y. Sup. Ct. 1921).

66. —As affected by amendment of complaint

Where plaintiff is permitted to amend and set up new matter, defendant should be at liberty to move or to plead as he might be advised and if an issue of fact be joined, the cause then being upon the general calendar should take the usual course. Tatum v Farson, 167 A.D. 581, 152 N.Y.S. 817, 1915 N.Y. App. Div. LEXIS 7443 (N.Y. App. Div. 1915).

Where complaint was substantially defective and defendant objected to the admission of evidence not warranted by it, and his objection was overruled, court erred prejudicially in later permitting plaintiff to amend his complaint without giving defendant twenty days within which to answer. Branower & Son v Waldes, 173 A.D. 676, 160 N.Y.S. 168, 1916 N.Y. App. Div. LEXIS 10393 (N.Y. App. Div. 1916).

The objection that the order required the defendants to answer within twenty days after service of amended complaint is not available on appeal. Second A. R. Co. v Metropolitan E. R. Co., 9 N.Y.S. 734, 58 N.Y. Super. Ct. 172, 1890 N.Y. Misc. LEXIS 355 (N.Y. Super. Ct. 1890).

An order cannot be made limiting the time to plead and serve an answer to an amended complaint. Fink v Manhattan R. Co., 8 N.Y.S. 327, 1890 N.Y. Misc. LEXIS 1574 (N.Y.C.P. 1890).

67. —As affected by security for costs

Time between the entry of an order to compel plaintiff to file security for costs, and compliance therewith was computed as part of the time within which to serve answer. Durland & Weston Shoe Co. v Bird, 229 A.D. 741, 241 N.Y.S. 631, 1930 N.Y. App. Div. LEXIS 10866 (N.Y. App. Div. 1930).

68. —As affected by stay

Effect of federal stay, see In re Public Industrials Corp., 53 F. Supp. 960, 1944 U.S. Dist. LEXIS 2694 (D. Del. 1944).

69. —Service of answer

A judgment, purporting to adjust differences between a defendant who has not been served with the answer of his codefendant, is binding, until modified by the court. Emmet v Runyon, 139 A.D. 310, 123 N.Y.S. 1026, 1910 N.Y. App. Div. LEXIS 2187 (N.Y. App. Div. 1910).

In action to foreclose mechanic's lien, defendant lienor could not claim priority over other defendants where he did not serve answer on them asking such priority. Dearstine v Carpenter, 173 N.Y.S. 875, 106 Misc. 102, 1919 N.Y. Misc. LEXIS 756 (N.Y. Sup. Ct. 1919).

Effect of the failure of a defendant to serve her answer on her codefendants in partition. Weston v Stoddard, 14 N.Y.S. 580, 60 Hun 290, 1891 N.Y. Misc. LEXIS 2411 (N.Y. Sup. Ct. 1891), aff'd, 137 N.Y. 119, 33 N.E. 62, 137 N.Y. (N.Y.S.) 119, 1893 N.Y. LEXIS 664 (N.Y. 1893).

A defendant who has made default is not concluded by a judgment in favor of his codefendant, where he was not served with a copy of his codefendant's answer. McGuckin v Milbank, 31

N.Y.S. 1049, 83 Hun 473 (1895), aff'd, 152 N.Y. 297, 46 N.E. 490, 152 N.Y. (N.Y.S.) 297, 1897 N.Y. LEXIS 973 (N.Y. 1897).

70. —Service of amended answer

One defendant may not serve upon another an answer to the latter's answer. Strauss v Hanover Realty & Constr. Co., 124 N.Y.S. 757, 67 Misc. 572, 1910 N.Y. Misc. LEXIS 311 (N.Y. Sup. Ct. 1910).

Where the answer of a defendant seeking affirmative relief against another defendant was indefinite, and none of the rules of court covered the situation, the court ordered service of an amended answer. Farrell v Malcom, 236 N.Y.S. 704, 135 Misc. 101, 1929 N.Y. Misc. LEXIS 916 (N.Y. City Ct. 1929).

Where defendant delayed for two years before amending its answer to demand determination of its ultimate right against third party, it was guilty of laches. Amitrano v Board of Education, 55 N.Y.S.2d 535, 1945 N.Y. Misc. LEXIS 1878 (N.Y. Sup. Ct. 1945).

71. —Notice and opportunity to defend

A judgment in favor of one defendant against another cannot be entered upon the default of the latter, unless he had notice and an opportunity to defend as against his codefendant. New Netherland Bank v Boucheron Co., 203 N.Y.S. 766, 122 Misc. 690, 1924 N.Y. Misc. LEXIS 751 (N.Y. Sup. Ct. 1924).

72. —Examination before trial

Examination before trial should be deferred until after service of answer of a codefendant, pursuant to this section. Mackay, Lovell & Co. v Dillon, 215 A.D. 842, 213 N.Y.S. 681, 1926 N.Y. App. Div. LEXIS 11461 (N.Y. App. Div. 1926).

73. —Judicial settlements

On application for judicial settlement of accounts of executors and testamentary trustees, surrogate has jurisdiction to pass upon validity of assignment by remaindermen claimed to be void for usury, but respondents who urged such usury should serve their pleadings with cross-notice upon the other parties who may be affected. In re Phraner, 178 N.Y.S. 768, 109 Misc. 287, 1919 N.Y. Misc. LEXIS 1206 (N.Y. Sur. Ct. 1919).

74. —Mechanics' liens

Service of answer demanding priority over other liens is necessary for determination of such priority as against another defendant in mechanic's lien foreclosure. Dearstine v Carpenter, 173 N.Y.S. 875, 106 Misc. 102, 1919 N.Y. Misc. LEXIS 756 (N.Y. Sup. Ct. 1919).

Where cross claim seeks indemnification from a municipality because of its primary and affirmative negligence, since liability for indemnity does not accrue until actual payment of the main claim, it is not necessary to allege service of notice of claim. Antonelli v Mt. Vernon, 20 Misc. 2d 331, 189 N.Y.S.2d 52, 1959 N.Y. Misc. LEXIS 3521 (N.Y. Sup. Ct. 1959).

Lienors who are defendants in action to foreclose a mechanic's lien are not required to serve their answers on the owner of the property in order to be entitled to continue the action after settlement of the plaintiff's claim. Wilson v Niagara City Land Co., 29 N.Y.S. 517, 79 Hun 162, 1894 N.Y. Misc. LEXIS 1100 (N.Y. Sup. Ct. 1894).

75. —Extension of time to appear or answer

An order extending the defendant's time to appear is necessary to prevent the plaintiff from proceeding as upon a default, and the order extending the time to answer may, by implication, be construed to extend also the time to appear. Littauer v Stern, 88 A.D. 274, 85 N.Y.S. 71, 1903 N.Y. App. Div. LEXIS 3138 (N.Y. App. Div. 1903), aff'd, 177 N.Y. 233, 69 N.E. 538, 177 N.Y. (N.Y.S.) 233, 1904 N.Y. LEXIS 924 (N.Y. 1904).

A provision extending defendant's time to answer contained in an order which also requires the plaintiff to file security for costs, founded on papers that do not comply with former RCP 87, 88, will be stricken out on motion. Kinley v American Hardware Mfg. Co., 99 N.Y.S. 199, 49 Misc. 334, 18 N.Y. Ann. Cas. 142, 1906 N.Y. Misc. LEXIS 563 (N.Y. Sup. Ct. 1906).

An order requiring a nonresident plaintiff to give an undertaking as security for costs, and staying his proceedings until it is filed and the sureties justify, does not operate as an extension of defendant's time to answer. Schwehm v Hinberg, 117 N.Y.S. 321, 63 Misc. 525, 1909 N.Y. Misc. LEXIS 171 (N.Y. Sup. Ct. 1909).

76. —Amended answer

Where plaintiff wrongfully refused to accept service of an amended answer until compelled by order of court, his time for serving an amended complaint as of course expired twenty days after such attempted service of the amended answer. Hubert v Apostoloff, 200 A.D. 641, 193 N.Y.S. 427, 1922 N.Y. App. Div. LEXIS 8242 (N.Y. App. Div. 1922).

An amended answer served within twenty days from the service of the first answer, returned the next day after due service had been admitted, on the ground that it was not served in time and that it was not the answer of the guardian ad litem and that the first was no answer, will on motion be required to be accepted. Howard v Curran.

77. Default by defendant; generally

Defendant's failure to plead admitted the cause of action and all traversable allegations of the complaint; allegation of damages is not traversable. McClelland v Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 252 N.Y. (N.Y.S.) 347, 1930 N.Y. LEXIS 631 (N.Y. 1930).

Default in failing to serve answer within 20 days barred removal of action to federal court for diversity of citizenship. Buffalo v Spann Realty Corp., 80 F. Supp. 171, 1948 U.S. Dist. LEXIS 2054 (D.N.Y. 1948), reh'g denied, 81 F. Supp. 507, 1949 U.S. Dist. LEXIS 1723 (D.N.Y. 1949).

78. —Service by mail

Where an answer was mailed on the evening of the last day to answer, which should have reached its destination by the morning mail the next day and did reach it after eleven o'clock of that day, an entry of judgment that day was premature. Yates v Guthrie, 119 N.Y. 420, 23 N.E. 741, 119 N.Y. (N.Y.S.) 420, 1890 N.Y. LEXIS 1101 (N.Y. 1890).

79. —Return of pleading

Where defendant served answer in foreclosure action 24 days after service of summons and complaint, and plaintiff's attorney, after retaining answer for two weeks, returned it as not timely served, and then defendant's attorney returned it, claiming timely service, and plaintiff's attorney finally retained it, defendant's default was not waived. Jamaica Sav. Bank v Spiro, 135 N.Y.S.2d 728, 206 Misc. 897, 1954 N.Y. Misc. LEXIS 3060 (N.Y. County Ct. 1954).

Although an answer not verified when it should be so, may be returned, it cannot be thought otherwise defective if served within proper time. Strout v Curran, 7 How. Pr. 36, 1851 N.Y. Misc. LEXIS 139 (N.Y. Sup. Ct. Dec. 1, 1851); Decker v Kitchen, 21 Hun 332 (N.Y.).

A motion to compel the acceptance of an answer returned for some slight technical error will not be defeated by affidavits tending to show the answer is false. .

80. —Opening default

When defendant is in default in serving answer, proper practice is to move to open the default, upon appropriate proof. Ornstein v Goldberg, 226 A.D. 746, 233 N.Y.S. 586, 1929 N.Y. App. Div. LEXIS 9719 (N.Y. App. Div. 1929).

81. New parties in counter-claim; generally

CPA § 271 could not be invoked to authorize service of an answer and counterclaims by defendant on a codefendant named in the title of the action, but who had not been served with the summons and complaint and had not voluntarily appeared. Bennett v Bird, 237 A.D. 542, 261 N.Y.S. 540, 1933 N.Y. App. Div. LEXIS 10662 (N.Y. App. Div.), reh'g denied, 238 A.D. 786, 262 N.Y.S. 907, 1933 N.Y. App. Div. LEXIS 9937 (N.Y. App. Div. 1933).

Counterclaim may be pleaded against third party who may be brought into action by serving on him answer containing counterclaim, though counterclaim does not assert claim against plaintiff, so long as it raises questions involving plaintiff as well as third party. Public Service Heat & Power Co. v Lipton, 94 N.Y.S.2d 664, 197 Misc. 384, 1950 N.Y. Misc. LEXIS 1352 (N.Y. Sup. Ct. 1950).

82. —Service of impleading answer

Where it was originally alleged that a party was principal and had assigned his claim to plaintiff, and amended complaint alleged that plaintiff was principal and the assignee his agent, defendant properly served his pleadings on both. Cramerton Mills, Inc. v Nathan & Cohen Co., 231 A.D. 28, 246 N.Y.S. 259, 1930 N.Y. App. Div. LEXIS 6991 (N.Y. App. Div. 1930).

In the Municipal Court a copy of the answer served by one defendant upon another is equivalent of the service of summons where a defendant is brought in by a plaintiff. Globe Indem. Co. v MacDougal, 231 N.Y.S. 643, 133 Misc. 263, 1928 N.Y. Misc. LEXIS 1157 (N.Y. Mun. Ct. 1928).

Service of copy of answer is the equivalent of service of summons in the ordinary manner. Clearing Realty Corp. v Pollaci, 233 N.Y.S. 136, 133 Misc. 626, 1929 N.Y. Misc. LEXIS 664 (N.Y. City Ct. 1929).

83. —Counterclaim by impleaded defendant against plaintiff

Counterclaim against plaintiff cannot be set up by impleaded defendant, who was directed by order to be served only with copy of impleading defendant’s supplemental answer. Beck

Chemical Equipment Corp. v Beattie Mfg. Co., 267 A.D. 506, 46 N.Y.S.2d 585, 1944 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 1944).

84. Service of reply

Judgment for defendant for failure of plaintiff to reply to counterclaim. Ironwood v Wickes, 93 A.D. 164, 87 N.Y.S. 554, 1904 N.Y. App. Div. LEXIS 943 (N.Y. App. Div. 1904).

Research References & Practice Aids

Cross References:

This section referred to in §§ 320., 2005., 2103.

Time of publication and when service is complete, Rule 316(c).

Interpleader, § 1006.

Third party practice, §§ 1007.– 1011.

Kinds of pleadings, § 3011.

Demand for relief, § 3017.

Changing grade of street or bridge CLS Vill § 6-616.

Prohibitions against encroachments upon certain powers of banks and trust companies, CLS Bank § 131.

Service of process, CLS Bus Corp § 306.

Authorization of foreign corporations, CLS Bus Corp § 1301.

Application for authority; contents, CLS Bus Corp § 1304.

Notice of claim, CLS Gen Mun § 50-e.

Service of answer on state or public corporation, CLS Lien § 63.

Liability of city in certain actions; commencement of actions, CLS Sec Cl Cities § 244.

Dissolution of delinquent business corporations, CLS Tax § 203-a.

Federal Aspects:

Service and filing of pleadings and other papers, Rule 5 of the Federal Rules of Civil Procedure, USCS Court Rules.

Pleadings, generally, Rules 7 to 16 of the Federal Rules of Civil Procedure, USCS Court Rules.

Jurisprudences:

42 Am Jur 2d, Injunctions §§ 250 et seq.

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Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3012, Service of Pleadings and Demand for Complaint.

6 Rohan, New York Civil Practice: EPTL ¶ 11-2.3.

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 33.04.

1 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 4.03, 15.02; 2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 33.01, 34.01, 36.09.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 14.05. Service of papers.

CPLR Manual § 19.05. Service of pleadings and demand for complaint; sanctions for delay.

CPLR Manual § 19.09-a. Certificates of merit in medical, dental or podiatric malpractice actions.

CPLR Manual § 19.09-b. Notice of medical, dental or podiatric malpractice actions.

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Matthew Bender's New York Practice Guides:

2 New York Practice Guide: Business and Commercial § 12.16.

1 New York Practice Guide: Domestic Relations §§ 1.01, 3.03, 3.04, 3.09, 4.07.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 1.09. Preparing Summons with Notice.

LexisNexis AnswerGuide New York Civil Litigation § 1.10. Preparing Summons and Complaint.

LexisNexis AnswerGuide New York Civil Litigation § 3.03. Determining Time for Response.

LexisNexis AnswerGuide New York Negligence § 2.17. Demanding and Moving for Change of Venue.

LexisNexis AnswerGuide New York Negligence § 2.18. Preparing Subsequent Filings.

LexisNexis AnswerGuide New York Negligence § 3.27. Commencing Action.

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LexisNexis Answer Guide New York Negligence § 6.26. Commencing Action.

LexisNexis Answer Guide New York Negligence § 7.28. Responding to Complaint.

Matthew Bender's New York Checklists:

Checklist for Preparing Initial Pleadings LexisNexis AnswerGuide New York Civil Litigation § 1.08.

Checklist for Effecting Service Upon Natural Person LexisNexis AnswerGuide New York Civil Litigation § 2.09.

Checklist for Responding to Initial Pleadings LexisNexis AnswerGuide New York Civil Litigation § 3.02.

Checklist for Answering Complaint LexisNexis AnswerGuide New York Civil Litigation § 3.04.

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

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 3012:1 et seq.

LexisNexis Forms FORM 75-CPLR 3012:1.— CPLR 3012(b) Demand for Complaint.

LexisNexis Forms FORM 75-CPLR 3012:10.— Order Denying Motion to Dismiss and Permitting Service of the Complaint.

LexisNexis Forms FORM 75-CPLR 3012:11.— Notice of Motion to Compel Plaintiff to Accept Late Answer Notice of Motion to Compel Plaintiff to Accept Late Answer.

LexisNexis Forms FORM 75-CPLR 3012:12.— Order to Show Cause on Motion to Compel Plaintiff to Accept Late Answer.

LexisNexis Forms FORM 75-CPLR 3012:13.— Affidavit in Support of Motion to Compel Plaintiff to Accept Late Answer.

LexisNexis Forms FORM 75-CPLR 3012:14.— Order Granting Motion to Compel Plaintiff to Accept Late Answer.

LexisNexis Forms FORM 75-CPLR 3012:15.— Notice of Motion to Extend Time for Defendant to Appear and Serve Answer.

LexisNexis Forms FORM 75-CPLR 3012:16.— Affidavit in Support of Motion to Extend Time for Defendant to Appear and Serve an Answer.

LexisNexis Forms FORM 75-CPLR 3012:17.— Order Granting Motion to Extend Time for Defendant to Appear and Serve Answer.

LexisNexis Forms FORM 75-CPLR 3012:18.— Order to Show Cause on Motion to Extend Time to Serve Answer and to Stay Signing of Default Order.

LexisNexis Forms FORM 75-CPLR 3012:19.— Affirmation in Support of Motion to Extend Time to Serve Answer and to Stay Signing of Default Order.

LexisNexis Forms FORM 75-CPLR 3012:2.— Notice of Motion to Dismiss for Failure to Serve Complaint.

LexisNexis Forms FORM 75-CPLR 3012:20.— Affidavit of Defendant in Support of Motion to Extend Time to Serve Answer and to Stay Signing of Default Order.

LexisNexis Forms FORM 75-CPLR 3012:21.— Affidavit of Insurance Claims Handler in Support of Motion to Extend Time to Serve Answer and to Stay Signing of Default Order.

LexisNexis Forms FORM 75-CPLR 3012:3.— Affidavit in Support of Motion to Dismiss for Failure to Serve Complaint.

LexisNexis Forms FORM 75-CPLR 3012:4.— Affidavit in Support of Motion to Dismiss Complaint on Grounds That Complaint Was Properly Rejected By Defendant.

LexisNexis Forms FORM 75-CPLR 3012:5.— Notice of Rejection of Complaint.

LexisNexis Forms FORM 75-CPLR 3012:6.— Affidavit in Opposition to Motion to Compel Acceptance of Complaint.

LexisNexis Forms FORM 75-CPLR 3012:7.— Affidavit in Support of Motion to Dismiss Action for Failure to Serve Complaint Where Extension Was Granted.

LexisNexis Forms FORM 75-CPLR 3012:8.— Affidavit in Opposition to Motion to Dismiss Complaint Served Three Weeks After Expiration of Two Week Extension Period.

LexisNexis Forms FORM 75-CPLR 3012:9.— Order Dismissing Action for Failure to Serve Complaint.

LexisNexis Forms FORM 521-35-4.— Certificate of Merit.

LexisNexis Forms FORM 1434-19340.— CPLR 3012: Demand for Complaint.

LexisNexis Forms FORM 521-9-35.— Demand for Complaint.

LexisNexis Forms FORM 521-9-38.— Notice of Rejection of Complaint.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 14:101 et seq. (remedies and pleadings).

Texts:

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) §§ 16.01., 16.04., 19.02., 19.07., 19.09.

1 Frumer & Biskind, Bender's New York Evidence—CPLR § 1.14.

1 New York Trial Guide (Matthew Bender) §§ 1.20., 1.30.

§ 3012. Service of pleadings and demand for complaint.

Hierarchy Notes:

NY CLS CPLR, Art. 30

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