NY CLS CPLR R 2215

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

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

R 2215. Relief demanded by other than moving party.

At least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers; provided, however, that:

(a) if such notice and any supporting papers are served by mailing, as provided in paragraph two of subdivision (b) of rule 2103, they shall be served three days earlier than as prescribed in this rule; and

(b) if served by overnight delivery, as provided in paragraph six of subdivision (b) of rule 2103, they shall be served one day earlier than as prescribed in this rule. Relief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party.

History

Add, L 1962, ch 308, § 1; amd, L 1980, ch 132, § 1, eff Jan 1, 1981; L 2007, ch 185, § 2, eff July 3, 2007.

Annotations

Notes

Editor's Notes

Laws 2007, ch 185, § 3, eff July 3, 2007, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that this act shall apply to a notice of motion served on or after the date on which this act shall have become a law.

Derivation Notes

Earlier statutes: CPA § 117; CCP § 768; Code Proc § 401.

2007 Recommendations of the Advisory Committee on Civil Practice:

The Committee recommends amendments to Rule 2214(b) and 2215 of the CPLR to improve practice relating to cross-motions. Currently, Rule 2215 provides that an attorney making a cross-motion shall serve notice of the cross-motion at leastt three days before the reeturn date of the original motion. When read with the time for service of motion papers and responses in Rule 2214(b), several problems are presented:

First, if the original moving party gives 12 days notice instead of eight days notice, the party can demand that the responsive papers be served seven days before the return date, giving sufficient time to reply. However, this demand does not apply to any cross-motion that the responding party may make, Thus, even if the moving party gives additional time, that party has no ability to require service of notice of a cross-motion any earlier than three days before the return date.

Second, three days is very little time for the original moving party to respond to a cross-motion.

Third, and worse yet, if the cross-motion is served by mail, it may not be received by the return date, and the original moving party may appear in court without any knowledge that a cross-motion has been made (While courts are split, a recent concurring opinion in the First Department noted that the additional five days that are added when papers are served by mail,

as provided by Rule 2103(b)(2), are not added when a cross-motion is served. (See Guzetti v. City of New York, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dept., August 10, 2006)).

To resolve these problems, the Committee is proposing several amendments to Rules 2214(b) and 2215. CPLR 2214(b) would be amended to provide that where the moving party gives additional time for service of the answering papers and demands that they be served seven days before the return date, that demand would also be applicable to any cross-motion that the responding party may wish to make. This would give the moving party adequate time to respond to the cross-motion. The Committee would also amend this subdivision to provide that in order to obtain papers seven days in advance, the original motion must be served at least 16 days, rather than 12 days, before the return date. This would give the responding party adequate time to prepare papers, not only in response to the motion but also in support of any cross-motion. Presumably, time is not critical when moving party chooses to give more time in order to receive the answering papers sooner, and the Committee believes that the timetable it proposes for motions and cross-motions give both sides a fair opportunity to prepare papers, making it more likely that all arguments will be ready to be heard on the return date.

The Committee also proposes amending Rule 2215 in several respects. The first is simply to conform to its amendment of 2214(b) with respect to situations in which the moving party demands the cross-motion seven days before the return date. The more significant changes deal with service of cross-motions. The Committee’s objective, as noted, is to allow both parties to have adequate time to prepare their papers. However, this objective might fail if the party making the cross-motion could serve by mail on the due date. Because a cross-motion is served much later than the original motion, even if 2214(b) is amended as proposed, the party against whom the cross-motion is made should receive it on the day it is due. Under the current rule, the party serving the cross-motion could mail, and the time between mailing and delivery is time lost to the party who must respond. Therefore, the Committee proposes that 2215 be amended to require that service be three days earlier when mailing is used. In addition, it proposes that when overnight mail is used, service be made one day before the due date.

The Committee recognizes that there are instances when time is critical. These amendments would not affect those motions where the moving party serves a motion eight days before the return date. In those instances, the current rules will continue to apply, and both parties will be under significant time pressure. However, where time is not critical, there is no reason to provide for unreasonably short timetables, Giving adequate time to both the moving party and the maker of a cross-motion will allow attorneys to thoroughly present their arguments to the court without all-too-common waste of time caused by requests for adjournments on the return day.

1979 Recommendations of the Advisory Committee on Civil Procedure:

The problem that has been brought to the Committee's attention is that sometimes, when X has made a motion against Y, Y will intermingle somewhere in his opposing papers, all presumably designed only to oppose X's motion, a demand for affirmative relief. This demand may crop up at some belated and unexpected point in the opposing papers, and thus take the moving party by surprise. It can also add unnecessary chores for the motion judge who meets the demand for cross-relief only in the middle of his reading of the opposing papers.

The Committee hopes that the brief amendment proposed above, merely adding the words "of cross-motion" to CPLR 2215, will encourage the practice, by a lawyer seeking cross-relief, of leading off his opposing papers with a formal "notice of cross-motion", thus enabling all readers to discern at the very outset that he is seeking affirmative relief and not merely opposing the movant's demand for relief. It would not be a bad practice for such a cross-movant to recite, in the notice of cross-motion, that the accompanying affidavits or other proof are intended to carry out the dual mission of opposing the main motion and also supporting the demand in the cross-motion. If there are several affidavits, some designed for opposition and others only for the cross-relief, the covering notice of cross-motion could identify the accompanying affidavits and their respective missions.

The main idea is to have the covering paper clue the reader in to the whole mission of the accompanying papers, and to avoid the situation in which a demand for cross-relief comes up as almost a hidden incident of affidavits opposing the main motion.

The inclusion of a general relief clause, with which a notice of motion ordinarily ends in New York practice, will still cover other items of relief reasonably supportable on the papers, and a general relief clause may also be used in the notice of cross-motion.

The proposal is intended to clarify the obligations of a cross-movant. It is not intended to place any restriction on the court's powers to grant affirmative relief.

Advisory Committee Notes

This rule is derived from CPA § 117. An opposing party cannot request affirmative relief in answering affidavits; he must service a notice. Helfand v Massachusetts Bonding & Ins. Co. 197 App Div 759, 189 NY Supp 246 (1st Dept 1921); Silvestro v City of New York, 49 NYS2d 217 (Sup Ct 1944), affd, 269 App Div 783, 55 NYS2d 583 (2d Dept 1945). In some instances, however, the law specifically authorizes the granting of cross-relief without a notice or even a demand. NY R Civ P 109, 112, 113; new CPLR rules 3211, 3212.

Where adequate papers have already been served in opposition to the motion, these may be read in support of the relief demanded by the opponent without the necessity of any separate supporting papers. Levine v Levine, 92 NYS2d 180 (Sup Ct 1949).

Amendment Notes

2007. Chapter 185, § 2 amended:

By redesignating part of entire rule as opening par and sub (b).

Opening par by adding the matter in italics.

By adding sub (a).

Sub (b) by adding the matter in italics.

Commentary

PRACTICE INSIGHTS:

RULES GOVERNING SERVICE OF MOTIONS AND CROSS MOTIONS

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INSIGHT

Prior to 2007, CPLR 2215 provided that cross-motions could be served at least three days before the original motion was noticed to be heard. This presented certain logistical and timing problems, which affected whether the original moving party had sufficient time to respond. A 2007 amendment attempted to cure those problems by permitting the original moving party to demand that cross-motions be served at least 7 days before the return date. While the new amendment served a laudatory purpose, it created a separate set of rules for the service of cross-motions (as opposed to the original motions), by mail or overnight delivery, which created unnecessary confusion among practitioners. Moreover, it failed to address the problems associated with the service of opposing and reply papers by mail. **Of course, many of these problems have been alleviated in electronically filed cases.**

ANALYSIS

Significant changes to timing in motion practice.

The 2007 amendment makes several significant changes in the timing of motion practice:

1. 12-7-1 motions are now 16-7-1; that is, the original movant has the option of serving the motion by hand at least 16 days in advance of the return date instead of the prior 12–day requirement under CPLR 2214(b). If served by overnight delivery, one business day is added. If

service is by regular mail within New York State 5 days is added, 6 days if the mailing is made from outside the State but within the geographic boundaries of the United States. *See* CPLR 2103(b) (2), (6).

2. A movant who serves a “16 day” motion, can demand not only that answering papers be served at least 7 days before the return date (in accordance with prior practice), but may also make the demand applicable to any cross-motion. *See* CPLR 2214(b) as amended.

3. To clear up a conflict in the law, the amendment required that if the cross-motion is served by regular or overnight mail, additional time must be provided. *Compare Perez v. Perez*, 131 A.D.2d 451, 451, 516 N.Y.S.2d 236, 237 (2d Dep't 1987) and concurring opinion in *Guzetti v. City of New York*, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dep't 2006). However, the amendment created its own set of timing: three extra days if served by regular mail and one day (not one business day), if served by overnight mail. CPLR 2215(b).

The 3-day cross motion remains alive and well.

Thus, the additional time required to serve a cross-motion (that is, seven days) is occasioned only if (i) the original motion is served at least 16 days before the return date and (ii) the notice of motion expressly demands service of cross-motions at least 7 days before the return date. Thus, if a demand is not made, or the motion is served less than 16 days and more than 8 days before the return date, the cross-motion can be served by hand up to three days before the return date; the “new” additional time for mailing (3-1) discussed above applies.

Amendment left no doubt that additional time must be added if cross-motion is served by mail.

Prior to the amendment, the generally accepted (better) practice was to serve cross motions by mail at least 8 days before the return date. *See Perez v. Perez*, 131 A.D.2d 451, 516 N.Y.S.2d 236 (2d Dep't 1987) (5 days added). However, a concurring opinion in a First Department case cast doubt on that position. *See Guzetti v. City of New York*, 32 A.D.3d 234, 237, 820

N.Y.S.2d 29, 32 (1st Dep't 2006) (no additional time). The amendment left no doubt that additional time must be added.

The timing of papers served by mail or overnight mail should have remained consistent.

The better avenue, however, may have been to make the 5/6 day — one business day requirements in CPLR 2103(b)(2) and (6) applicable to the service of cross-motions. This would have eliminated some of the confusion that arises by having two sets of timing rules applicable to service of motions and cross-motions by mail.

The legislation leaves the other timing problems for another day.

The amendment did not deal with the timing problems associated with the service of opposition and reply papers by mail. In such a circumstance, the additional time is not added under CPLR 2103. Thus, for example, if a briefing schedule is not agreed to by counsel, reply papers served one day before the return date may not be received until after the motion is submitted. As discussed below, this problem is no longer an issue in electronically filed cases.

When should the opposition to the cross-motion be served?

Although not entirely free of ambiguity, it appears that the amendment provided that on a 16-7-1 motion the original movant should serve his opposition to the cross-motion together with his reply on the original motion (that is, up to one day before the return date). The issue as to a response to a “three day” cross motion was not addressed.

Many service issues have been ameliorated by electronic filing.

22 NYCRR § 202.5-b provides that: “Where parties to an action have consented to e-filing, a party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically.” Thus, as electronic filing spreads throughout the state, many service issues will be avoided or rendered academic. However, one must still consult the local court or judge’s rules to determine whether the judge requires courtesy hard copies and there remain courts in New York where e-filing has not been implemented.

Summary Chart

A. 16-7-1 motion

1. If original motion served by hand: at least 16 days before return date. If original motion served by regular mail in New York:, add 5 days, that is, at least 21 days before return date,; if the mailing is outside of New York but within the U.S., add 6 days, that is, at least 22 days before return date. If original motion served by overnight mail: add one business day, that is, at least 16 days plus one business day.

2. If original motion demands that cross-motion be served at least 7 days before return date of original motion, cross-motion papers must be served:

If by hand, at least 7 days before return date.

If by regular mail, at least 10 days before return date.

If by overnight mail, at least 8 days before return date.

B. 8-2 motion

1. If original motion served by hand: at least 8 days before return date. If original motion served by regular mail in New York, at least 13 days before return date; if the mailing is outside of New York, but within the U.S., at least 14 days before return date.

If original motion served by overnight mail: at least 8 days plus one business day before return date.

2. If cross-motion served by hand: at least 3 days before return date.

If by regular mail: at least 6 days before return date.

If by overnight mail: at least 4 days before return date.

Counsel should also be aware of Uniform Rules governing motion practice.

Counsel also need to be aware generally of the Uniform Rules that impact practice, particularly with respect to the significant amendments effective February 1, 2021 (some of which were further amended effective July 1, 2022). *See, e.g.*, 22 NYCRR § 202.8-a (motions in general), Commercial Division Rule 16, 22 NYCRR 202.70 (g), Rule 16; § 202.8-c (no sur-reply), Commercial Division Rule 18; § 202.8-d (using orders to show cause only where it is a "genuine urgency," a stay is required or a statute requires it), Commercial Division Rule 19; § 202.8-f (oral argument), Commercial Division Rule 22; § 202.08-g (statement of material facts on summary judgment motion), Commercial Division Rule 19-a; § 202.23 (staggered court appearances), Commercial Division Rule 34. *See also* David L. Ferstendig, *Significant Amendments to Uniform Rules*, 723 N.Y.S.L.D. 1-3 (2021); David L. Ferstendig, *Amendments to Uniform Rules*, 724 N.Y.S.L.D. 1-4 (2021); David L. Ferstendig, *Significant Amendments to Uniform Rules*, 741 N.Y.S.L.D. 1-2 (2022).

Notes To Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

2.Generally

3.Applicability to Surrogate's Court

4.Necessity for notice

5.Relief obtainable

6.—Change of venue

7.Alternative relief

8.Proceedings on appeal

9.Cross-motion

10.Joinder of motions

11.“Other and further relief”

I. Under CPLR

1. Generally

CLS CPLR § 2215 does not effect extension of time provided in CLS CPLR § 5513 when leave to appeal is sought by cross motion. Soto v New York, 73 N.Y.2d 808, 537 N.Y.S.2d 478, 534 N.E.2d 316, 1988 N.Y. LEXIS 3457 (N.Y. 1988).

Although the court was vested with power to award costs as in a special proceeding, where the MVAIC did not oppose confirmation of the award of arbitrators or move to vacate or modify the award, it was an inequitable and improvident exercise of discretion to allow costs. Kavares v Motor Vehicle Acci. Indemnification Corp., 29 A.D.2d 68, 285 N.Y.S.2d 983, 1967 N.Y. App. Div. LEXIS 2666 (N.Y. App. Div. 1st Dep't 1967), aff'd, 28 N.Y.2d 939, 323 N.Y.S.2d 431, 271 N.E.2d 915, 1971 N.Y. LEXIS 1261 (N.Y. 1971).

In action to dissolve partnership, failure of defendants to formally cross-move did not preclude trial court from directing parties to proceed to arbitration pursuant to their partnership agreement, where defendants had demanded arbitration in their answer and in their counsel’s return date affidavit in opposition and the demand for arbitration was orally made at argument on return date, so that defect in defendants’ papers could not have prejudiced any substantial right of plaintiff. Plateis v Flax, 54 A.D.2d 813, 388 N.Y.S.2d 245, 1976 N.Y. App. Div. LEXIS 14510 (N.Y. App. Div. 3d Dep't 1976).

Although absence of separate notice of motion is not necessarily fatal where element of surprise is removed by clear recitation in answering affidavit of party’s intention to seek separate relief on return date, relief is inappropriate where no intention was set forth in filing papers; it is not

enough to request such relief orally on return date of movant's motion. Guggenheim v Guggenheim, 109 A.D.2d 1012, 486 N.Y.S.2d 489, 1985 N.Y. App. Div. LEXIS 47501 (N.Y. App. Div. 3d Dep't 1985).

Party was not entitled to reduction of claim against it pursuant to CLS Gen Oblig § 15-108 where it failed to serve notice of motion or notice of cross motion demanding such relief. J. A. Valenti Electric Co. v Power Line Constructors, Inc., 123 A.D.2d 604, 506 N.Y.S.2d 769, 1986 N.Y. App. Div. LEXIS 60754 (N.Y. App. Div. 2d Dep't 1986).

In medical malpractice action, Special Term erred in granting plaintiff's cross motion seeking summary judgment against defendant physician who was nonmoving party on co-defendant's motion for summary judgment since cross motion is improper vehicle for seeking affirmative relief from nonmoving party and physician was afforded neither proper notice of cross motion nor opportunity to be heard on issues raised by cross motion. Mango v Long Island Jewish-Hillside Medical Center, 123 A.D.2d 843, 507 N.Y.S.2d 456, 1986 N.Y. App. Div. LEXIS 60964 (N.Y. App. Div. 2d Dep't 1986).

It was error for court, sua sponte, to grant summary judgment where no summary judgment motion was served under CLS CPLR § 3212, and party did not seek such relief in its papers, as required under CLS CPLR §§ 2214 and 2215. Phoenix Enterprises Ltd. Partnership v Insurance Co. of North America, 130 A.D.2d 406, 515 N.Y.S.2d 443, 1987 N.Y. App. Div. LEXIS 46398 (N.Y. App. Div. 1st Dep't 1987).

On defendants' motion for summary judgment in medical malpractice action, court lacked jurisdiction to entertain plaintiff's cross motion to vacate conditional order of preclusion (for failure to serve bill of particulars) where plaintiff failed to comply with notice provisions of CLS CPLR §§ 2215 and 2103. Vanek v Mercy Hospital, 135 A.D.2d 707, 522 N.Y.S.2d 607, 1987 N.Y. App. Div. LEXIS 52645 (N.Y. App. Div. 2d Dep't 1987).

In action seeking permanent injunction barring defendants from interfering with plaintiff's antenna situated on roof of defendant's building, court erred in declaring that plaintiff was

trespasser and directing plaintiff to vacate premises, since court was only presented with application for preliminary relief pending final resolution of action and defendants had not yet interposed answer nor cross-moved for order directing removal of antenna; court's order exceeded scope of application by awarding permanent relief to nonmoving party, and court should have confined its ruling to preliminary injunction question. 123 Limousine, Inc. v Kennedy House, 136 A.D.2d 683, 524 N.Y.S.2d 98, 1988 N.Y. App. Div. LEXIS 662 (N.Y. App. Div. 2d Dep't 1988).

In action for invasion of privacy, negligence, and intentional infliction of emotional distress arising out of newspaper article, brought against journalist and 2 companies alleged to own newspaper, in which companies moved to dismiss on premise that one of them was not corporate entity and other did not own newspaper, and plaintiff cross moved to join additional defendant as proper owner, court's grant of motion to dismiss did not remove jurisdiction from court and prohibit it from granting cross motion; complaint was still extant because journalist remained as defendant who had answered, and relief sought in cross motion was granted simultaneously in same decision and order. Virelli v Goodson-Todman Enterprises, Ltd., 142 A.D.2d 479, 536 N.Y.S.2d 571, 1989 N.Y. App. Div. LEXIS 35 (N.Y. App. Div. 3d Dep't 1989).

Court erred in dismissing, for want of proof, plaintiff's causes of action to recover damages for tortious interference with contract where no party moved for summary judgment, plaintiff was not put on notice that it was required to lay bare its proof, and no cross motion was made complying with notice provisions of CLS CPLR §§ 2215 and 2103. Stanley Tulchin Assoc., Inc. v Vignola, 186 A.D.2d 183, 587 N.Y.S.2d 761, 1992 N.Y. App. Div. LEXIS 10734 (N.Y. App. Div. 2d Dep't 1992).

Court did not abuse its discretion when it accepted and considered opposition papers and cross motion of third party plaintiff because they were served one and 2 days late where third party defendant failed to show that it suffered any prejudice. Dinnocenzo v Jordache Enters., 213 A.D.2d 219, 624 N.Y.S.2d 6, 1995 N.Y. App. Div. LEXIS 2751 (N.Y. App. Div. 1st Dep't 1995).

Court erred in granting plaintiff affirmative relief which she requested in amended affidavit submitted in opposition to defendant’s motion, inter alia, to vacate amended judgment where plaintiff failed to serve defendant with notice of cross motion. Hergerton v Hergerton, 235 A.D.2d 395, 652 N.Y.S.2d 77, 1997 N.Y. App. Div. LEXIS 204 (N.Y. App. Div. 2d Dep't 1997).

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

Cross-motions for summary judgment dismissal of a personal injury action were deemed untimely where they were served by mail on August 8th and 9th, and set a return date of August 14th, because there was not a reasonable period of time to respond and also, it did not provide for the time periods as required by N.Y. C.P.L.R. 2103(b)(2) and 2215. D'Aniello v T.E.H. Slopes, Inc., 301 A.D.2d 556, 756 N.Y.S.2d 54, 2003 N.Y. App. Div. LEXIS 461 (N.Y. App. Div. 2d Dep't 2003).

Trial court erred in denying a motion for summary judgment by a concrete company and a cross motion for summary judgment pursuant to N.Y. C.P.L.R. 3212 by a construction company in a personal injury action, as the concrete company demonstrated that it did not perform any work on the sidewalk on which the injured party tripped and fell, and it would have been mere speculation to conclude that the allegedly dangerous condition which caused the accident was caused by any affirmative act of negligence by the construction company; the trial court properly considered the merits of the construction company’s motion even though a cross motion was an improper vehicle for seeking affirmative relief from a nonmoving party, N.Y. C.P.L.R. 2215, as there was no prejudice, and plaintiffs had ample opportunity to be heard on the merits of the relief sought. Kleeberg v City of New York, 305 A.D.2d 549, 759 N.Y.S.2d 760, 2003 N.Y. App. Div. LEXIS 5672 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly granted summary judgment pursuant to N.Y. C.P.L.R. 3212 to an agency in a property owner's declaratory judgment action concerning property under N.Y. Real Prop. Acts Law art. 15; there was no error or unfairness in the trial court's determination to entertain the agency's cross motion despite the absence of the required notice of cross-motion, under N.Y. C.P.L.R. 2215, as the cross motion provided actual notice to the owner that the agency was seeking summary judgment, and the owner did not have an express easement for the use of a road as sought under the terms of the deed, and the owner failed to establish a prescriptive easement. Wechsler v People, 13 A.D.3d 941, 787 N.Y.S.2d 433, 2004 N.Y. App. Div. LEXIS 15881 (N.Y. App. Div. 3d Dep't 2004).

Defendant's default should not have been excused, and the trial court, under N.Y. C.P.L.R. 2215, should not have extended defendant's time to serve the answer absent a cross motion for such relief, as defendant did not show that the injured parties agreed to extend the time to answer, and defendant did not show a reasonable excuse for default and a meritorious defense under N.Y. C.P.L.R. 5015(a)(1). Giovanelli v Rivera, 23 A.D.3d 616, 804 N.Y.S.2d 817, 2005 N.Y. App. Div. LEXIS 13458 (N.Y. App. Div. 2d Dep't 2005).

Because a defendant's motion for summary judgment in a medical malpractice action was filed more than 120 days after the filing of the note of issue and was not a cross-motion, as described by N.Y. C.P.L.R. 2215, the motion was properly denied in the absence of any showing of "good cause" under N.Y. C.P.L.R. 3212(a). Fuller v Westchester County Health Care Corp., 32 A.D.3d 896, 821 N.Y.S.2d 241, 2006 N.Y. App. Div. LEXIS 10941 (N.Y. App. Div. 2d Dep't 2006).

Although the plaintiff failed to demonstrate entitlement to a default judgment under N.Y. C.P.L.R. 3215(f), the trial court erred in deeming the defendant's answer timely filed and served in the absence of a cross-motion for relief and without the necessary showing of a reasonable excuse for the default and a meritorious defense under N.Y. C.P.L.R. 2215. Hosten v Oladapo, 44 A.D.3d 1006, 844 N.Y.S.2d 417, 2007 N.Y. App. Div. LEXIS 11110 (N.Y. App. Div. 2d Dep't 2007).

Trial court erred, in the course of denying a motion to intervene, in ruling on the merits of a limited liability company's cross claims relating to an easement because no party moved for summary judgment, and, absent an N.Y. C.P.L.R. 3212 motion for summary relief, a court was not permitted, sua sponte, to grant such relief; further, the trial court did not advise the parties that it was considering such summary relief. Even if a development's cross motion were construed as seeking relief against the limited liability company, which did not make a motion in the action, a cross motion was an improper vehicle for seeking affirmative relief from a nonmoving party. Barrett v Watkins, 52 A.D.3d 1000, 860 N.Y.S.2d 246, 2008 N.Y. App. Div. LEXIS 5320 (N.Y. App. Div. 3d Dep't 2008).

Denial of drivers' summary judgment on the ground that they were incorrectly labeled cross motions was error because a technical defect of this nature may have been disregarded where, as here, there was no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought. Daramboukas v Samlidis, 84 A.D.3d 719, 922 N.Y.S.2d 207, 2011 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 2d Dep't 2011).

Trial court properly considered a corporation's request for leave to file a late answer and to compel alleged injured parties to accept service of that answer, despite the corporation's failure to make the request pursuant to a formal notice of cross motion, after the alleged injured parties moved to enter a default judgment against the corporation, because (1) it was not an abuse of discretion to accept the corporation's explanation for the late answer, as the corporation's default was not willful, the delay was short, the alleged injured parties were not prejudiced, and (2) the corporation showed a potentially meritorious defense. Fried v Jacob Holding, Inc., 110 A.D.3d 56, 970 N.Y.S.2d 260, 2013 N.Y. App. Div. LEXIS 5512 (N.Y. App. Div. 2d Dep't 2013).

Trial court properly granted a corporation's request for leave to file a late answer and to compel alleged injured parties to accept service of that answer, despite the corporation's failure to make the request pursuant to a formal notice of cross motion, after the alleged injured parties moved to enter a default judgment against the corporation, because (1) courts had such discretion, (2) the corporation would have been entitled to relief in a proper cross motion, (3) the corporation

clearly stated the request in the corporation's opposition to the alleged injured parties' request for a default judgment, and (4) granting the request was in the interests of judicial economy. Fried v Jacob Holding, Inc., 110 A.D.3d 56, 970 N.Y.S.2d 260, 2013 N.Y. App. Div. LEXIS 5512 (N.Y. App. Div. 2d Dep't 2013).

In an action to recover damages for trespass and conversion, the trial court properly denied plaintiff's motion for a default judgment as untimely, but the trial court should have granted plaintiff's separate motion for leave to enter a default judgment against defendant because plaintiff met statutory requirements by submitting proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. Moran v BAC Field Servs. Corp., 164 A.D.3d 494, 83 N.Y.S.3d 111, 2018 N.Y. App. Div. LEXIS 5513 (N.Y. App. Div. 2d Dep't 2018).

Trial court erred in granting a law firm's motion for leave to enter a judgment against a client upon his failure to comply with an alleged stipulation of settlement, and denying, as untimely, the cross-motion of the other defendants to dismiss the complaint because the firm's submission of a stipulation, which was not executed by the firm, did not constitute a valid and binding settlement agreement, the cross-motion, which was served six days before the return date was timely, and the complaint failed to allege either compliance with the notice requirements or that the matter was not covered by the Fee Dispute Resolution Program. Zisholtz & Zisholtz, LLP v Mandel, 165 A.D.3d 1312, 86 N.Y.S.3d 221, 2018 N.Y. App. Div. LEXIS 7300 (N.Y. App. Div. 2d Dep't 2018).

Trial court had no authority to sanction the mother on the ground that she engaged in frivolous conduct because, even the court were to assume that a different rule applied to matters commenced under article 8 of the Family Court Act, the mother was not provided with an opportunity to be heard before sanctions were imposed. Ritchie v Ritchie, 184 A.D.3d 1113, 125 N.Y.S.3d 798, 2020 N.Y. App. Div. LEXIS 3452 (N.Y. App. Div. 4th Dep't 2020).

To the extent a trial court concluded that it lacked discretion to consider a driver's application pursuant to N.Y. C.P.L.R. 306-b to extend his time to serve the New York State Department of

Motor Vehicles, which was not presented in a proper cross motion pursuant to N.Y. C.P.L.R. 2215, it erred, because although, generally, a formal notice of motion or cross motion should be used to request such relief, courts retained discretion to entertain requests for affirmative relief that did not meet the requirements of N.Y. C.P.L.R. 2215. Matter of Nelson v New York State Dept. of Motor Vehs., 188 A.D.3d 692, 134 N.Y.S.3d 62, 2020 N.Y. App. Div. LEXIS 6485 (N.Y. App. Div. 2d Dep't 2020).

Cross-motion, returnable on February 17, 1972, would be denied without prejudice where service of motion papers was made by mail on February 15, 1972. State v Cortelle Corp., 73 Misc. 2d 352, 341 N.Y.S.2d 640, 1972 N.Y. Misc. LEXIS 1735 (N.Y. Sup. Ct. 1972), aff'd, 43 A.D.2d 668, 349 N.Y.S.2d 653, 1973 N.Y. App. Div. LEXIS 7002 (N.Y. App. Div. 2d Dep't 1973).

Defendant’s motion to vacate a default judgment entered against him would be denied, where defendant had failed to serve his answer to plaintiff’s motion for summary judgment within the time requirements of CPLR §§ 2214 and 2215, where due to that failure the answer could not be read in opposition to plaintiff’s motion absent excusable neglect, where defendant’s claim of law office failure was insufficient to establish that neglect or to vacate the default, and where the failure to timely serve the answer was not justified by defendant’s attorney’s belief, based on past experience with plaintiff’s counsel, that an extension of time would be granted. Ft. Tryon Nursing Home v Kavanagh, 118 Misc. 2d 320, 460 N.Y.S.2d 473, 1983 N.Y. Misc. LEXIS 3314 (N.Y. Sup. Ct. 1983).

Defendant was not entitled to direction to People to give defense counsel transcript of defendant’s testimony before separate grand jury in prior proceeding concerning unrelated charges where request for direction was made as cross motion to People’s motion to unseal testimony in order to impeach defendant in current prosecution, and court denied People’s motion to unseal, since CLS CPLR § 2215 (which applies to criminal proceedings by custom and practice) provides that cross motions may be made by serving notice 3 days before principal motion is to be heard, defendant failed to serve such notice, and court could not make such direction for testimony pursuant to CLS CPL § 240.20 given fact that People’s access to

minutes continued to be barred. People v Lester, 135 Misc. 2d 205, 514 N.Y.S.2d 861, 1987 N.Y. Misc. LEXIS 2199 (N.Y. Sup. Ct. 1987).

Trial court erred in granting the assignee's cross-motion for summary judgment and in denying the insurance company's summary judgment motion in a case where the assignee sought reimbursement on three bills for medical supplies provided to the assignor; the insurance company's denial as to two of those three bills was proper since the assignee did not timely file its opposition papers and cross-motion for summary judgment prior to the relevant hearing, as the assignee mailed those papers three days before that time but cross-motions served by mail had to be served an additional five days beyond the three days where mail was used to serve and the insurance company was prejudiced because it was not allowed to respond. I & B Surgical Supply v NY Cent. Mut. Fire Ins. Co., 838 N.Y.S.2d 849, 16 Misc. 3d 4, 2007 N.Y. Misc. LEXIS 2803 (N.Y. App. Term 2007).

Summary judgment could be granted to defendant utility company and to third-party defendant construction company, even if neither provided the court with a complete record of the pleadings required by N.Y. C.P.L.R. § 3212(b), because it was evident that neither party could be liable for plaintiffs' injuries when they did not do any work where the injury took place, and the records, viewed together, as in a cross-motion for summary judgment provided a complete record of the pleadings. Barca v City of New York, 819 N.Y.S.2d 631, 13 Misc. 3d 464, 2006 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct. 2006).

Plaintiffs' complaint alleging an advisory opinion (AO) issued by the New York City, N.Y., Campaign Finance Board (CFB) interpreting the New York City Campaign Finance Act (Act), Administrative Code of the City of NY § 3-701 et seq., in light of the subsequent passage of legislation extending term limits violated the Act was dismissed because the AO (1) was consistent with the Act, (2) was not irrational, (3) did not change the spending limits set forth in the Act or overrule or amend such statutory provisions, and (4) provided guidance to prospective candidates and a mechanism for rebutting presumptions in the CFB's Rules that contributions and expenditures were for the next election, which was consistent with the Act's purposes to

encourage candidate participation and provide a level playing field by limiting contributions and restricting expenditures, so plaintiffs did not show a likelihood of success on the merits, it could not be said that plaintiffs would suffer irreparable injury absent the injunctive relief plaintiffs sought, and the equities balanced in favor of the CFB. Kurland v New York City Campaign Fin. Bd., 873 N.Y.S.2d 440, 23 Misc. 3d 567, 241 N.Y.L.J. 19, 2009 N.Y. Misc. LEXIS 126 (N.Y. Sup. Ct. 2009).

Driver's cross-motion seeking summary judgment against the passenger was not procedurally proper; cross-motions were solely for seeking relief against the initial moving party, but here, the driver did not seek relief against defendants, instead seeking affirmative relief against the passenger, a non-moving party. Mathis v Evans, 2024 N.Y. Misc. LEXIS 4726 (N.Y. Sup. Ct. 2024).

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).

II. Under Former Civil Practice Laws

2. Generally

The provision of CPA § 117 as to the right to ask alternative relief was permissive, not mandatory. Fiorello v New York Protestant Episcopal City Mission Soc., 217 A.D. 510, 217 N.Y.S. 401, 1926 N.Y. App. Div. LEXIS 7845 (N.Y. App. Div. 1926).

3. Applicability to Surrogate's Court

In view of Surrogate's Court Act § 49, CPA § 117 was inapplicable to proceedings in Surrogate's Court, notwithstanding Surrogate's Court Act § 316. In re Sabin, 191 N.Y.S. 766, 117 Misc. 656, 1922 N.Y. Misc. LEXIS 938 (N.Y. Sur. Ct. 1922).

4. Necessity for notice

Adverse party is not entitled to relief where he has not served notice that he will move for specified relief upon the motion. Helfand v Massachusetts Bonding & Ins. Co., 197 A.D. 759, 189 N.Y.S. 246, 1921 N.Y. App. Div. LEXIS 7550 (N.Y. App. Div. 1921).

Where defendant's motion to change place of trial was brought on under notice of at least 8 days, plaintiffs had a right at least three days before defendant's motion was notice to be heard to serve on his attorneys a notice with affidavits in support thereof specifying any kind of relief to which they claimed to be entitled, whether responsive or not to the relief asked for by defendant. Bald v Kuhnert, 166 N.Y.S. 84 (N.Y. Sup. Ct. 1917), aff'd, 182 A.D. 912, 170 N.Y.S. 1067, 1918 N.Y. App. Div. LEXIS 5164 (N.Y. App. Div. 1918).

5. Relief obtainable

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

Where a plaintiff is concerned with two groups of facts, one of which can only be brought into the action through an amended complaint, and the other through a supplemental complaint, both may be authorized at the same time. Watson v Consolidated Laundries Corp., 235 A.D. 234, 256 N.Y.S. 891, 1932 N.Y. App. Div. LEXIS 7929 (N.Y. App. Div. 1932).

The provisions of an order denying a motion to strike from the record the appearance of attorneys purporting to represent the defendant and denying defendant's motion to vacate a warrant of attachment are independent of and disconnected from each other, permitting

acceptance of the favorable determination on the motion and refusing to abide by the determination with respect to the other separate motion brought on as a matter of convenience at the same time. Hiller v Russo-Asiatic Bank, 242 A.D. 688, 273 N.Y.S. 594, 1934 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div.), rev'd, 266 N.Y. 434, 195 N.E. 142, 266 N.Y. (N.Y.S.) 434, 1934 N.Y. LEXIS 933 (N.Y. 1934).

“General relief” granted must be pertinent to action. Spector v Rosman Metal Body Co., 268 A.D. 929, 51 N.Y.S.2d 468, 1944 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 1944).

Application to serve amended complaint and supplemental complaint may be made in one motion. Ponticello v Prudential Ins. Co., 281 A.D. 549, 121 N.Y.S.2d 305, 1953 N.Y. App. Div. LEXIS 3093 (N.Y. App. Div. 1953).

CPA § 117 authorized a plaintiff to move to vacate a notice for examination pursuant to CPA §§ 288, 289 and 290 (§§ 3101(a), 3102, Rule 3106(a), 3107, 3109, 3111 herein) on the ground that the answer was insufficient in law in respect of the defenses raising the issues upon which the examination is sought, and at the same time to move for summary judgment under RCP 113 (Rule 3212 herein). Continental Sec. Co. v Interborough Rapid Transit Co., 193 N.Y.S. 892, 118 Misc. 11, 1922 N.Y. Misc. LEXIS 1170 (N.Y. Sup. Ct.), aff'd, 200 A.D. 794, 193 N.Y.S. 903, 1922 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 1922), aff'd, 202 A.D. 804, 194 N.Y.S. 986, 1922 N.Y. App. Div. LEXIS 5812 (N.Y. App. Div. 1922).

A motion under CPA § 117 was proper for the purpose of directing the attention of the court to an improper joinder of causes of action and of parties defendant. 137 East 66th St. v Lawrence, 194 N.Y.S. 762, 118 Misc. 486, 1922 N.Y. Misc. LEXIS 1292 (N.Y. Sup. Ct. 1922).

In view of CPA § 117, a plaintiff moving for leave to serve an “amended and supplemental complaint” was permitted to serve an amended and a supplemental complaint, respectively, it not appearing that defendant will be prejudiced thereby. Markowitz v Markowitz, 196 N.Y.S. 828, 119 Misc. 609, 1922 N.Y. Misc. LEXIS 1578 (N.Y. Sup. Ct. 1922).

CPA § 117 did not prevent the combination in one motion of requests for leave to amend a complaint and for service of supplemental summons, if each kind of relief sought was separately permissible. Hernandez v Brookdale Mills, Inc., 198 N.Y.S. 277, 119 Misc. 824, 1922 N.Y. Misc. LEXIS 1799 (N.Y. Sup. Ct. 1922), aff'd, 205 A.D. 882, 198 N.Y.S. 920, 1923 N.Y. App. Div. LEXIS 5735 (N.Y. App. Div. 1923).

An amendment of answer so as to plead counterclaim was denied. 379 Madison Ave., Inc. v Stuyvesant Co., 267 N.Y.S. 755, 149 Misc. 523, 1933 N.Y. Misc. LEXIS 1711 (N.Y. City Ct. 1933).

On motion to vacate examination of plaintiff before trial, plaintiff may also move to dismiss defendant's affirmative defenses for insufficiency allegedly justifying such examination. Barrett v Matson, 32 N.Y.S.2d 59, 177 Misc. 863, 1942 N.Y. Misc. LEXIS 1261 (N.Y. Sup. Ct. 1942).

Relief may be given other than that specifically asked for. Kellogg v Commodore Hotel, Inc., 64 N.Y.S.2d 131, 187 Misc. 319, 1946 N.Y. Misc. LEXIS 2569 (N.Y. Sup. Ct. 1946).

Complaint in action against city for fraud and deceit allegedly sustained by plaintiff because of misrepresentations made to her by mayor that she would receive city job was dismissed since such agreement was void and illegal as against public policy. The motion to dismiss for insufficiency, made after service of the answer may be treated as a motion for judgment on the pleadings, though no supporting affidavits were submitted with the notice. Brill v Wagner, 5 Misc. 2d 768, 161 N.Y.S.2d 490, 1957 N.Y. Misc. LEXIS 3388 (N.Y. Sup. Ct. 1957).

Where a movant prays for general relief in addition to the specific relief requested, relief other than that specifically requested may be granted. Kesten v Cooper, 25 Misc. 2d 760, 206 N.Y.S.2d 424, 1960 N.Y. Misc. LEXIS 2489 (N.Y. Sup. Ct. 1960).

Under Code Civ Proc § 768 it was held that, although the plaintiff moved for judgment as of a default for refusal of defendant to accept an amended complaint, an order may be made under the demand for further or different relief, denying such motion, and compelling defendant to

accept the amended complaint. Mt. Morris v Pavilion Natural Gas Co., 190 N.Y.S. 38, 1921 N.Y. Misc. LEXIS 1646 (N.Y. Sup. Ct. 1921).

Where a former order of the court decided only that judgment could not be entered in an action against an executrix, after her death, on the ground that all her personal executors, her successors in interest, had not been served, and did not pass on the question whether judgment could be entered against the successors of such executrix, it was within the power of the court, in view of this section, on plaintiff's motion for leave to withdraw his former motion papers and make a new application for judgment against such successors, and a showing that by reason of a change in the fact situation since the former motion was decided no reason existed for denying an application for such judgment, to grant the same, without prejudice to the right of either party to argue the question whether judgment should be entered as prayed. Thorburn v Mitchell, 195 N.Y.S. 920, 1922 N.Y. Misc. LEXIS 1432 (N.Y. Sup. Ct. 1922).

In absence of cross motion an unpleaded defendant may not, in opposition to a cross motion against him by another defendant, demand a dismissal of the complaint for insufficiency. Silvestro v New York, 49 N.Y.S.2d 217, 1944 N.Y. Misc. LEXIS 2083 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 783, 55 N.Y.S.2d 583, 1945 N.Y. App. Div. LEXIS 3828 (N.Y. App. Div. 1945).

6. —Change of venue

While on motion under CPA § 183 (§ 507 herein), to change the place of trial of an action to the county in which the land involved is situated, it was improper to permit plaintiff to read affidavits tending to show that the greater convenience of witnesses would be served by retaining the cause in the county where instituted, especially where he has failed to serve the notice required by this section, after the venue had been changed on such motion the court might entertain his motion for a change of venue on account of the convenience of witnesses, under CPA § 187 (§§ 510, 602(b) herein). Johnson v Millard, 199 A.D. 73, 190 N.Y.S. 865, 1921 N.Y. App. Div. LEXIS 6606 (N.Y. App. Div. 1921).

Under CPA § 117, a cross-motion for the retention of the place of trial in the county where the action is brought, or to change it to some other county, on the ground of convenience of witnesses might be made by the adverse party in motions to change the venue to the county of the moving party's residence. Ackerman v Cummiskey, 236 A.D. 519, 259 N.Y.S. 489, 1932 N.Y. App. Div. LEXIS 6019 (N.Y. App. Div. 1932).

Order denying motion to change place of trial and order granting motion to retain place of trial affirmed. Flynn v Murphy, 240 A.D. 994, 268 N.Y.S. 946, 1933 N.Y. App. Div. LEXIS 7811 (N.Y. App. Div. 1933).

On motion by defendant to change venue, plaintiffs might, under this section, make a cross-motion to retain the venue in the county where the action was commenced on the ground of the convenience of witnesses. McDaniels v Doubleday, 241 A.D. 51, 270 N.Y.S. 306, 1934 N.Y. App. Div. LEXIS 8164 (N.Y. App. Div. 1934).

On a motion under former CPA § 187, subd 1, to change the place of trial to the proper county, the court might consider a cross-motion made under CPA § 117 of said action to change the place of trial for the convenience of witnesses. Waterworth v Franz, 262 N.Y.S. 660, 146 Misc. 668, 1933 N.Y. Misc. LEXIS 1527 (N.Y. Sup. Ct. 1933).

Under CPA § 117, a motion for change of place of trial and a cross-motion to retain place of trial in the county in which the action is brought should be considered on the merits at the same time. Reynders v Paterno, 268 N.Y.S. 263, 149 Misc. 819, 1933 N.Y. Misc. LEXIS 1384 (N.Y. Sup. Ct. 1933).

7. Alternative relief

This section authorizes moving at the same time for several kinds of relief, in the alternative or otherwise. Barrett Mfg. Co. v Sergeant, 149 A.D. 1, 133 N.Y.S. 526, 1912 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 1912).

Where plaintiff moved for alternative relief after main motion had been decided, application was entertainable as new motion, rather than as application for reargument. Tiber v Tiber, 282 A.D. 473, 124 N.Y.S.2d 420, 1953 N.Y. App. Div. LEXIS 4493 (N.Y. App. Div. 1953).

The provision permitting a notice of motion to demand one or more kinds of relief in the alternative or otherwise refers to a situation, where upon the same state of facts two different kinds of relief may be appropriate and not to motions based upon entirely different papers and upon matters wholly disconnected. Chapman v George R. Read & Co., 133 N.Y.S. 281, 73 Misc. 401, 1911 N.Y. Misc. LEXIS 530 (N.Y. City Ct. 1911), aff'd, 149 A.D. 52, 133 N.Y.S. 625, 1912 N.Y. App. Div. LEXIS 6351 (N.Y. App. Div. 1912).

8. Proceedings on appeal

Where affidavits filed by the defendant in connection with an application to vacate a notice for plaintiff’s examination suggested that the complaint be dismissed for insufficiency, and this was treated by the court as bringing on a motion to dismiss the complaint, which the court denied, held that, while a cross-notice of application to dismiss the complaint was essential, in view of the fact that the sufficiency of the complaint was considered and passed upon at Special Term, the Appellate Division would pass on that question. Willey v Cameron, Michel & Co., 217 A.D. 651, 217 N.Y.S. 248, 1926 N.Y. App. Div. LEXIS 7870 (N.Y. App. Div. 1926), limited, Bernard v Chase Nat'l Bank, 233 A.D. 384, 253 N.Y.S. 336, 1931 N.Y. App. Div. LEXIS 11304 (N.Y. App. Div. 1931).

9. Cross-motion

Where defendant moves for summary judgment pursuant to RCP 113 (Rule 3212 herein), plaintiff may cross-move for same relief. Maflo Holding Corp. v S. J. Blume, Inc., 308 N.Y. 570, 127 N.E.2d 558, 308 N.Y. (N.Y.S.) 570, 1955 N.Y. LEXIS 963 (N.Y. 1955).

On motion for change of place of trial from wrong county, plaintiff may file cross-motion to retain case there for convenience of witnesses. Behrman v Pioneer Pearl Button Co., 190 A.D. 843, 181 N.Y.S. 59, 1920 N.Y. App. Div. LEXIS 4267 (N.Y. App. Div. 1920).

A defendant's counter-motion to a plaintiff's motion for an order of judgment in his favor should be considered, and if it is not considered the order may be resettled to consider it although the order of resettlement is made after the time to appeal from the original order has expired. Jonas & Naumburg Corp. v Adu Tirdzniecibas, etc., 220 A.D. 653, 222 N.Y.S. 446, 1927 N.Y. App. Div. LEXIS 9381 (N.Y. App. Div. 1927).

On a motion for an order requiring defendants to submit to an examination before trial, they may move to dismiss the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. Moffat v Phoenix Brewery Corp., 247 A.D. 552, 288 N.Y.S. 281, 1936 N.Y. App. Div. LEXIS 8319 (N.Y. App. Div. 1936).

Where defendant husband moved to eliminate from annulment decree provision to pay daughter $30 weekly on ground she was self-supporting, in absence of cross-motion seeking increased payments for daughter's college education, and without taking testimony as to financial ability of both parents, court had no jurisdiction to increase payments to daughter. Bernstein v Bernstein, 282 A.D. 30, 121 N.Y.S.2d 818, 1953 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 1953).

Where case was marked off calendar and not restored and it was clerk's duty to make entry of dismissal without further order, and where plaintiff did not make cross-motion to restore case to calendar, nor did his affidavit opposing motion to dismiss offer any excuse for neglect to prosecute action or disclose any merit to his cause of action, denial of motion to dismiss was abuse of discretion. Walsh v Ben Riley's Arrowhead Inn, Inc., 2 A.D.2d 714, 153 N.Y.S.2d 651, 1956 N.Y. App. Div. LEXIS 4884 (N.Y. App. Div. 2d Dep't 1956).

Where on a motion by plaintiff for a summary judgment the defendant, in his opposing affidavit, sought denial of such motion and also requested summary judgment in his favor, no disposition with regard to such request would be made where there was no counter-motion under this

section. Lang v Dreyer, 9 N.Y.S.2d 970, 170 Misc. 207, 1939 N.Y. Misc. LEXIS 1537 (N.Y. Sup. Ct. 1939).

Absence of supporting affidavit is ordinarily not fatal on cross-motion, particularly when all papers on initial motion may be considered by court. Palmieri v Salsimo Realty Co., 115 N.Y.S.2d 88, 202 Misc. 251, 1952 N.Y. Misc. LEXIS 1615 (N.Y. Sup. Ct. 1952).

On motion for summary judgment under RCP 113 (Rule 3212 herein), as matter of discretion court may permit amendment of answer to allege defense omitted from answer, provided defendant has made cross-motion for such relief as required by CPA § 117. Platt v Rose, 142 N.Y.S.2d 916, 208 Misc. 1, 1955 N.Y. Misc. LEXIS 3584 (N.Y. Sup. Ct. 1955).

Where defendant moved to modify judgment, plaintiff was held entitled to cross-move on notice, pursuant to CPA § 117, to enter judgment for arrears of alimony over defendant's objection that such a cross-motion could only be initiated by an order to show cause. Levine v Levine, 16 Misc. 2d 75, 187 N.Y.S.2d 82, 1957 N.Y. Misc. LEXIS 2114 (N.Y. Sup. Ct. 1957).

Although cross-motion may be made with or without affidavits, when it is made on affidavit, such affidavit must be served simultaneously with the service of the notice of cross-motion and cannot merely be referred to in said notice and served on return date thereof. However, where motions were adjourned, and affidavit, though served after original return day, was served before adjourned date so that original movant had an opportunity to answer such affidavit, the court considered the cross-motion on its merits. Tomasello v Trump, 30 Misc. 2d 643, 217 N.Y.S.2d 304, 1961 N.Y. Misc. LEXIS 2744 (N.Y. Sup. Ct. 1961).

Objection to timeliness of notice of cross-motion is waived by submitting an answering affidavit on the merits. Samuels v Samuels, 33 Misc. 2d 248, 224 N.Y.S.2d 260, 1961 N.Y. Misc. LEXIS 1923 (N.Y. Sup. Ct. 1961).

Cross-motion may be considered though no supporting affidavits were submitted with notice of cross-motion. Levine v Levine, 92 N.Y.S.2d 180, 1949 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1949).

Cross-motion can only be made in action wherein original motion was brought, and does not permit cross-motion for relief in another and different action. Bramwell v Berger Serv. Cleaning & Dyeing Corp, 115 N.Y.S.2d 131, 1951 N.Y. Misc. LEXIS 2139 (N.Y. Sup. Ct. 1951).

Proceeding to punish for nonpayment of alimony and counsel fees cannot be initiated by a cross-motion. Dennis v Dennis, 191 N.Y.S.2d 729 (N.Y. Sup. Ct. 1959).

10. Joinder of motions

As to third-party complaint, if motion is made before answer, motions to correct and to dismiss for insufficiency may be combined. Van Pelt v New York, 69 N.Y.S.2d 116, 188 Misc. 995, 1947 N.Y. Misc. LEXIS 2194 (N.Y. Sup. Ct. 1947).

11. “Other and further relief”

On appeal, it was held that although the motion to vacate the order of interpleader had been properly denied, under the “other and further relief” clause, the motion should have been treated as one to resettle the recitals in the order so as to incorporate a list of all papers on which the order was based, and the appellate court modified the order to include the appropriate directions. Lanaris v Mutual Ben. Life Ins. Co., 9 A.D.2d 1015, 194 N.Y.S.2d 718, 1959 N.Y. App. Div. LEXIS 5424 (N.Y. App. Div. 4th Dep't 1959).

Research References & Practice Aids

Cross References:

This rule referred to in § 4406.

Jurisprudences:

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

24 NY Jur 2d Costs in Civil Actions § 88.

92 NY Jur 2d References § 45.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2215., Relief Demanded by Other Than Moving Party.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.01; 3 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 39.01, 40.10, 47.02.

Matthew Bender's New York CPLR Manual:

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

CPLR Manual § 15.04. Cross-motions.

Matthew Bender's New York AnswerGuides:

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

Warren's Weed: New York Real Property

Warren's Weed: New York Real Property § 3.48.

Annotations:

Who is "party in interest" entitled to request relief from automatic stay provision of bankruptcy code of 1978 (11 USCS § 362(d)). 73 ALR Fed 324.

Matthew Bender's New York Checklists:

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

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 2215:1 et seq.

LexisNexis Forms FORM 75-CPLR 2215:1.— Notice of Cross Motion Skeleton Form.

LexisNexis Forms FORM 75-CPLR 2215:2.— Notice of Cross-Motion; Another Form.

LexisNexis Forms FORM 75-CPLR 2215:3.— Affidavit in Support of Cross-Motion and Opposition to Motion.

LexisNexis Forms FORM 75-CPLR 2215:4.— Notice of Cross-Motion by Plaintiff for Summary Judgment in Action for Declaratory Judgment.

LexisNexis Forms FORM 1434-19317.— CPLR 2214, 2215: Notice of Cross-Motion - Skeleton Form.

LexisNexis Forms FORM 1434-22914.— Notice of Cross-Motion.

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

Hierarchy Notes:

NY CLS CPLR, Art. 22

Forms

Forms

Form 1

Skeleton Form for Notice of Cross-motion

SUPREME COURT, _____ COUNTY

Notice of Cross-Motion

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

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the annexed affidavit of _____, sworn to the _____ day of _____, 20_____ a motion will be made to this court, upon the argument of the motion for _____ made by the _____ herein and returnable on the _____ day of _____, 20_____ at a Motion Term to be held in and for the County of _____ at the County Court House in the City of _____, for an order _____ [state nature of motion] and for such other and further relief as to the court may seem just and proper.

Dated _____, 20_____

_____

Attorney for _____

Office and P. O. Address

Telephone No.

To:_____

Attorney for _____

Form 2

Request for Alternative Relief

a motion [or cross motion] will be made at _____ for an order that _____, or, in the alternative for an order that _____, and for such other, further, and different relief as to the court may seem just and proper.