NY CLS CPLR § 2211

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service ***>***

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

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

§ 2211. Application for order; when motion made

A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served.

History

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

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 113; CCP § 768; Code Proc § 401.

Advisory Committee Notes:

This section is derived from CPA § 113. The first sentence, defining motions, has been inverted, since in a sense any special proceeding is also an application for an order. Motions are applications for orders granting relief incidental to the main relief sought in the action or proceeding in which the motion is brought. See 1 Carmody-Wait, Cyclopedia of New York Practice 616 (1952); In re Argus Co. 138 NY 557, 34 NE 388 (1893); Application of Callahan,

262 App Div 398, 28 NYS2d 980 (3d Dept 1941), appeal dismissed, 287 NY 743 (1942); In re Dietz, 138 App Div 283, 122 NY Supp 1063 (1st Dept 1910).

The provision of the second sentence that motions are “made” when notice is served was first added to § 113 of the CPA in 1941. NY Laws 1941, c 266. Prior to that time it had been held that a motion was not “made” until the return date. Low v Bankers Trust Co. 265 NY 264, 192 NE 406 (1934); Clinton Trust Co. v Mahoney, 252 App Div 763, 299 NY Supp 32 (2d Dept 1937). Thus, where a party had served two notices of the same motion, the second returnable earlier than the first, the second court had jurisdiction. People ex rel. City of New York v Every, 231 App Div 576, 248 NY Supp 92 (3d Dept 1931). Cf. NY Civ Prac Act § 562; new CPLR § 5515 (appeal is “taken” when notice of appeal is served and filed). The typical notice of motion is still phrased in terms of this view.

Since the period between service of a notice of motion and the return date is unlimited by statute or rule, the RCP allows the hearing on a motion to be long after the period for making the motion has expired. While this may result in a violation of the spirit of some of the motion rules the unavailability of motion terms in some areas of the state makes it impracticable to change the rule.

The second sentence is expressly limited to motions on notice, a limitation implicit in the former section. Ex parte motions are made when the motion papers and proposed order are submitted to the court.

Notes to Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

A.In General

2.Generally

3.Nature of motion; what are motions

4.Purpose and scope

5.When deemed “made”

6.Grounds

7.Joinder of motions

8.Other remedies

9.—When improper

10.Successive applications

11.Place of motion

12.Parties

13.Protection of infants

14.Notice of motion

15.—Service of notice

16.Affidavits and other papers

17.Abandonment or withdrawal of motion

18.Submission

19.Hearing of motion

20.Grant of relief

21.Resettlement of orders

22.Costs

B.Propriety of Motion

23.Generally

24.Relief from order made out of court

25.To set aside summons and complaint

26.To stay foreclosure

27.To obtain opinion of court

28.Bankruptcy

29.Defects in pleading

30.Judgments

31.To vacate appointment of receiver

32.Correction of return upon execution

33.Eminent domain

34.Removal of trustee

I. Under CPLR

1. Generally

There was no right of appeal from an ex parte order, including a sua sponte order, and so there was no right of appeal from a trial court's sua sponte order sanctioning attorneys for misconduct during a jury trial, since the attorneys did not move to vacate the order; the order dismissing the

appeal was affirmed. Sholes v Meagher, 100 N.Y.2d 333, 763 N.Y.S.2d 522, 794 N.E.2d 664, 2003 N.Y. LEXIS 1416 (N.Y. 2003).

Where notice of plaintiff to remove the action from the deferred calendar to the ready calendar was served prior to the expiration of one year, the defendant having failed to move for default judgment or cross move for a dismissal for neglect to prosecute, defendant had no basis for an objection to the retransfer of the action so long as the plaintiff set forth that the original reason for the transfer was now removed. Nuness v International Harvester Co., 35 A.D.2d 1056, 316 N.Y.S.2d 468, 1970 N.Y. App. Div. LEXIS 3037 (N.Y. App. Div. 3d Dep't 1970).

The “law of the case” did not preclude a consideration of the merits of a motion to strike a note of issue and statement of readiness and remove the action from the calender where another justice, at a pretrial conference and without the benefit of motion papers before him, had denied an oral application to strike the cause from the calender. Further, the absence of any order determining the motion in the record invited the trial court’s consideration of the merits. Figueroa v Scharfberg, 79 A.D.2d 966, 435 N.Y.S.2d 281, 1981 N.Y. App. Div. LEXIS 9836 (N.Y. App. Div. 1st Dep't 1981).

Where a woman who was injured in a fall on a city street filed a notice of claim against the city and the county, and where the county, before any action was begun, moved for an order providing that should the County repair the sidewalk it would not constitute an admission of ownership and control of the premises, and the fact that the repairs were made would be inadmissible, at the trial, Special Term’s grant of the motion was error since, absent specific statutory authority for instituting a motion prior to commencement of an action, the court was without jurisdiction to entertain the motion; since there is no procedure in a civil action that would allow Special Term to suppress evidence or make rulings on evidentiary questions in advance of trial. Belmar v Syracuse, 100 A.D.2d 745, 473 N.Y.S.2d 624, 1984 N.Y. App. Div. LEXIS 17756 (N.Y. App. Div. 4th Dep't 1984).

Supreme Court lacked jurisdiction to entertain husband’s motion to direct wife to serve answer in his divorce action since action was no longer pending where parties’ prior stipulation expressly

provided for discontinuance of husband's action unless he placed matter on inquest calendar within 6 months thereof, and husband did not do so. Kurtz v Kurtz, 135 A.D.2d 615, 522 N.Y.S.2d 193, 1987 N.Y. App. Div. LEXIS 52551 (N.Y. App. Div. 2d Dep't 1987).

There was no authority for trial court's imposition of fine on attorney for initiating frivolous motion, and such fine would be vacated by Appellate Division. Formato v Dix, 140 A.D.2d 302, 528 N.Y.S.2d 80, 1988 N.Y. App. Div. LEXIS 4619 (N.Y. App. Div. 2d Dep't 1988).

Supreme Court Justice would be directed to rescind his motion calendar rules conditioning making of written motions on prior judicial consent, for although such rules might discourage filing of frivolous motions, they might also prevent party from exercising option to move for relief to which he might be entitled; moreover, denying party permission to engage in motion practice hinders performance of counsel, and any inclination to file frivolous motions can be discouraged by imposition of sanctions. Hochberg v Davis, 171 A.D.2d 192, 575 N.Y.S.2d 311, 1991 N.Y. App. Div. LEXIS 13396 (N.Y. App. Div. 1st Dep't 1991), amended, 179 A.D.2d 372, 1992 N.Y. App. Div. LEXIS 444 (N.Y. App. Div. 1st Dep't 1992).

Supreme Court was without jurisdiction to entertain motion made almost 2 years after final judgment in action was entered. Kenford Co. v County of Erie, 185 A.D.2d 658, 587 N.Y.S.2d 877, 1992 N.Y. App. Div. LEXIS 9192 (N.Y. App. Div. 4th Dep't), app. dismissed, 80 N.Y.2d 1021, 592 N.Y.S.2d 667, 607 N.E.2d 814, 1992 N.Y. LEXIS 3936 (N.Y. 1992).

Court erred in denying defendants' summary judgment motion as untimely under CLS CPLR § 3212(a), even though return date of defendants' motion was more than 120 days after filing of note of issue, since notice of motion was properly served on plaintiff under CLS CPLR § 2103(b) within 120-day period. Russo v Eveco Dev. Corp., 256 A.D.2d 566, 683 N.Y.S.2d 566, 1998 N.Y. App. Div. LEXIS 14027 (N.Y. App. Div. 2d Dep't 1998).

Husband's motion to stay settlement of judgment of divorce, made on same day that judgment was signed, was properly denied as academic without prejudice to motion to vacate his default

in appearing at child custody hearing. Skevis v Skevis, 258 A.D.2d 514, 683 N.Y.S.2d 887, 1999 N.Y. App. Div. LEXIS 982 (N.Y. App. Div. 2d Dep't 1999).

Where plaintiff had history of engaging in frivolous litigation, court properly enjoined him from making further motions in absence of prior approval by court. Duffy v Holt-Harris, 260 A.D.2d 595, 687 N.Y.S.2d 265, 1999 N.Y. App. Div. LEXIS 4310 (N.Y. App. Div. 2d Dep't), app. dismissed, 93 N.Y.2d 1033, 697 N.Y.S.2d 555, 719 N.E.2d 915, 1999 N.Y. LEXIS 2917 (N.Y. 1999).

In a medical malpractice action, where the patient failed to file a note of issue within the required time and did not move to extend this time until the day the note was due, which motion was denied, it was error for the trial court to dismiss the action where the patient explained that the delay was caused by problems at her attorney's office, attributable to the events of September 11, 2001, these problems were neither willful nor deliberate, and it appeared the patient had a meritorious cause of action. Storchevoy v Blinderman, 303 A.D.2d 672, 757 N.Y.S.2d 82, 2003 N.Y. App. Div. LEXIS 3211 (N.Y. App. Div. 2d Dep't 2003).

Because the mere fact that an owners' association, after having served its original notice of motion for summary judgment on the plaintiff's attorney in a timely fashion, filed new motion papers seeking the same relief, was not fatal to such motion under N.Y. C.P.L.R. § 2211, the trial court erred in denying the motion. Rivera v Glen Oaks Vil. Owners, Inc., 29 A.D.3d 560, 817 N.Y.S.2d 293, 2006 N.Y. App. Div. LEXIS 5927 (N.Y. App. Div. 2d Dep't 2006).

Because an electric company's initial motion for summary judgment was timely under N.Y. C.P.L.R. 2103(b)(2) when it was served on all opposing counsel by mail, the company's subsequent service of an amended notice of motion under N.Y. C.P.L.R. 2211, in order to schedule the return of the motion on a date permitted by the trial court's rules of practice, did not render the motion untimely. Kitkas v Windsor Place Corp., 49 A.D.3d 607, 852 N.Y.S.2d 809, 2008 N.Y. App. Div. LEXIS 2120 (N.Y. App. Div. 2d Dep't 2008).

Mortgagors' motion to, inter alia, vacate a foreclosure sale was not, in effect, one for leave to renew or reargue a prior motion brought on by order to show cause; that prior motion was properly denied upon the procedural ground that the mortgagors failed to effect service in accordance with the manner directed in the order to show cause. Inasmuch as the prior motion was never "made" pursuant to N.Y. C.P.L.R. 2211, the trial court properly considered anew the mortgagors' motion. U.S. Bank Natl. Assn. v Hickey, 53 A.D.3d 544, 862 N.Y.S.2d 87, 2008 N.Y. App. Div. LEXIS 6083 (N.Y. App. Div. 2d Dep't 2008).

First defendants' summary judgment motion was timely under N.Y. C.P.L.R. 2211 because it was served on plaintiff's counsel by mail four days before the deadline set by the trial court; since that motion was already properly before the court, the trial court erred in refusing to consider a separate motion of second defendants, made on identical grounds, on the ground that it was untimely. Lennard v Khan, 69 A.D.3d 812, 893 N.Y.S.2d 572, 2010 N.Y. App. Div. LEXIS 465 (N.Y. App. Div. 2d Dep't 2010).

Trial court had authority to decide a resident's petition for leave to serve a late notice of claim as the petition and show cause order were timely filed within one year and 90 days after the claim accrued under N.Y. C.P.L.R. 304(a), 304(c), and 306-a(a); even if the petition was not made until the Authority was served with the order to show cause under N.Y. C.P.L.R. 2211, the statute of limitations was tolled until the order was entered. Matter of Alvarez v New York City Hous. Auth., 97 A.D.3d 668, 948 N.Y.S.2d 648, 2012 N.Y. App. Div. LEXIS 5408 (N.Y. App. Div. 2d Dep't 2012).

Plaintiff's notices of discontinuance were not untimely because a motion to dismiss was not a responsive pleading for purposes of N.Y. C.P.L.R. 3217 as it did not fall within the meaning of a pleading under N.Y. C.P.L.R. 3011 since a motion was defined in N.Y. C.P.L.R. 2211 as an application for an order; the terms "responsive pleading" and "motion to dismiss pursuant to N.Y. C.P.L.R. 3211" were not used interchangeably in the New York State Civil Practice Law and Rules, but were treated as distinct, separate items. The legislative history of N.Y. C.P.L.R. 3217 supported this interpretation, and as plaintiff's notices of discontinuance were timely, the action

was discontinued and the sanctions award was a nullity. Harris v Ward Greenberg Heller & Reidy LLP, 151 A.D.3d 1808, 58 N.Y.S.3d 769, 2017 N.Y. App. Div. LEXIS 4909 (N.Y. App. Div. 4th Dep't), app. dismissed, 151 A.D.3d 1810, 54 N.Y.S.3d 347, 2017 N.Y. App. Div. LEXIS 4910 (N.Y. App. Div. 4th Dep't 2017).

A party may withdraw a motion at any time before submission; thereafter he can do so only on consent or by permission of the court. Wallace v Ford, 44 Misc. 2d 313, 253 N.Y.S.2d 608, 1964 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1964).

A motion is submitted when movant makes his oral argument, or, absent oral argument, when he presents his papers to the Clerk after the call of the motion on the return day. Wallace v Ford, 44 Misc. 2d 313, 253 N.Y.S.2d 608, 1964 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1964).

Claimant’s application for leave to file and serve a claim for damages after expiration of the 90-day statutory period, which was filed on the last day of the one-year period prescribed by General Municipal Law § 50-e(5) was sufficient, where the disability of infancy was the sole cause of the delay in filing the notice of claim and the only attorney consulted on behalf of the infant claimant proceeded with all possible speed, and the proposed defendants had not been prejudiced by the delay in filing. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

A motion is an application for an order, and generally seeks relief incidental to the primary relief sought in an action or special proceeding. Anderson v Anderson, 54 Misc. 2d 916, 283 N.Y.S.2d 679, 1967 N.Y. Misc. LEXIS 1219 (N.Y. Sup. Ct. 1967).

Since a motion by a surety for remission of forfeited bail (CPL 540.30) is “made” when the notice of motion is served and not on the return date (CPLR 2211), service of the surety’s notice of motion on the District Attorney two days before the expiration of the one-year Statute of Limitations applicable to applications for a remission of forfeited bail (CPL 540.30, subd 2) is timely. People v Midland Ins. Co., 97 Misc. 2d 341, 411 N.Y.S.2d 521, 1978 N.Y. Misc. LEXIS 2800 (N.Y. Sup. Ct. 1978).

An application for an order of seizure falls within CPLR § 2211, which defines a motion, and use of a notice of motion or an order to show cause is therefore mandated. Consolidated Edison Co. v Church of St. Cecilia, 125 Misc. 2d 744, 480 N.Y.S.2d 284, 1984 N.Y. Misc. LEXIS 3478 (N.Y. Civ. Ct. 1984).

Denial of application for order directing nursing home to remove gastric food tube from comatose patient would not preclude de novo application predicated upon change in circumstances. In re Vogel, 134 Misc. 2d 395, 512 N.Y.S.2d 622, 1986 N.Y. Misc. LEXIS 3113 (N.Y. Sup. Ct. 1986).

Motions for permission to file late claim under CLS Ct C Act § 10 need only comply with ordinary requirements for service of any motion; thus, motion served on Attorney General by regular mail would be heard. Wah v State, 137 Misc. 2d 751, 522 N.Y.S.2d 413, 1987 N.Y. Misc. LEXIS 2710 (N.Y. Ct. Cl. 1987).

Court would not dismiss defendant’s cross-motion for dismissal of plaintiff’s motion for summary judgment in lieu of complaint, on ground that cross-motion was served “short” under CLS CPLR § 2103(b)(2) because papers were mailed one day late, where plaintiff was not prejudiced by late receipt in that it obtained 2-week consent adjournment and responded; short service does not necessarily require denial of interlocutory motion as court must exercise its discretion according to circumstances. Plaza 400 Owners Corp. v Resnicoff, 168 Misc. 2d 837, 640 N.Y.S.2d 984, 1996 N.Y. Misc. LEXIS 81 (N.Y. Civ. Ct. 1996).

Defendant client, having served the motion for leave to reargue on September 12, 2005, satisfied the time requirements of CPLR 2221(d)(3), because a motion was made when it was served (service of papers in a pending action by mail was deemed complete upon mailing), and CPLR 2103(b)(2) permitted an additional five days from service by mail of the notice of entry of the underlying order. Schaeffer & Krongold LLP v Richter, 836 N.Y.S.2d 489, 14 Misc. 3d 1217A, 234 N.Y.L.J. 108 (Sup 2005).

Unpublished decision: Under N.Y. C.P.L.R. 5513(a), a motion to reargue had to be made within the time allowed for taking an appeal from the determination in question, and a notice of appeal had to be filed within 30 days of the service of the order with notice of entry. Under N.Y. C.P.L.R. 2211, the motion to reargue was made on the date upon which the motion papers were mailed to the principal's attorney, N.Y. C.P.L.R. 2103(b)(2), and since the motion to reargue was not made within the time for taking an appeal, it was denied as untimely. Armstrong v Forgione, 237 N.Y.L.J. 5, 2006 N.Y. Misc. LEXIS 4128 (N.Y. Sup. Ct. Dec. 5, 2006).

II. Under Former Civil Practice Laws

A. In General

2. Generally

Certiorari to review tax assessment is commenced by service of writ upon city tax commission, and not by filing petition and obtaining order allowing writ. People ex rel. Northchester Corp. v Miller, 288 N.Y. 163, 42 N.E.2d 469, 288 N.Y. (N.Y.S.) 163, 1942 N.Y. LEXIS 1022 (N.Y.), reh'g denied, 289 N.Y. 634, 44 N.E.2d 420, 289 N.Y. (N.Y.S.) 634, 1942 N.Y. LEXIS 1190 (N.Y. 1942).

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

Proceeding under Election L § 330 subd 1 to invalidated designating petition is instituted by service of process, and not its mere issuance or signing of order to show cause. In re Tombini, 30 N.Y.S.2d 79, 177 Misc. 148, 1941 N.Y. Misc. LEXIS 2221 (N.Y. Sup. Ct.), aff'd, 262 A.D. 956, 30 N.Y.S.2d 106, 1941 N.Y. App. Div. LEXIS 6617 (N.Y. App. Div. 1941).

Issuance of process does not institute special proceeding. Kaplan v Meisser, 91 N.Y.S.2d 363, 196 Misc. 6, 1949 N.Y. Misc. LEXIS 2591 (N.Y. Sup. Ct. 1949).

Conflict in findings of fact by the court without a jury is a judicial error, and cannot be corrected after judgment on a motion made after that term. Bohlen v Metropolitan E. R. Co., 9 N.Y.S. 424, 58 N.Y. Super. Ct. 558, 1890 N.Y. Misc. LEXIS 199 (N.Y. Super. Ct.), rev'd, 121 N.Y. 546, 24 N.E. 932, 121 N.Y. (N.Y.S.) 546, 1890 N.Y. LEXIS 1441 (N.Y. 1890).

Application to vacate decree settling intermediate account of executor is motion. In re Shea's Estate, 111 N.Y.S.2d 787, 1952 N.Y. Misc. LEXIS 2568 (N.Y. Sur. Ct. 1952).

3. Nature of motion; what are motions

An application for attachment is a motion. Allen v Meyer, 73 N.Y. 1, 73 N.Y. (N.Y.S.) 1, 1878 N.Y. LEXIS 575 (N.Y. 1878).

Application for an order on a receiver to pay trust money is a special proceeding and not a motion. People v City Bank of Rochester, 96 N.Y. 32, 96 N.Y. (N.Y.S.) 32, 1884 N.Y. LEXIS 464 (N.Y. 1884).

A motion relates to some incidental question collateral to the main object of the action. It is not a remedy, but is only connected with and dependent upon the principal remedy, and generally relates to matters of proceeding. In re Sabin, 191 N.Y.S. 766, 117 Misc. 656, 1922 N.Y. Misc. LEXIS 938 (N.Y. Sur. Ct. 1922).

A motion is merely a procedural device or step connected with and dependent upon the remedy invoked in the particular controversy. It is an application in a pending or proposed action or special proceeding which depends for its allowance upon its relevancy to the main litigation. Mapley v Board of Education, 13 Misc. 2d 88, 175 N.Y.S.2d 354, 1958 N.Y. Misc. LEXIS 3809 (N.Y. Sup. Ct. 1958).

A motion to amend a notice of claim so as to designate the proper names of persons against whom claim is made may be amended despite the fact that no action was pending since application for such relief is a motion properly made in a proposed action. Mapley v Board of Education, 13 Misc. 2d 88, 175 N.Y.S.2d 354, 1958 N.Y. Misc. LEXIS 3809 (N.Y. Sup. Ct. 1958).

Special notice of appearance interposed in order to move to set aside service of summons and complaint was a “motion,” and court could grant motion costs on granting it. Eichhorn v Negrin, 158 N.Y.S. 98 (N.Y. Mun. Ct.), modified, 159 N.Y.S. 836 (N.Y. App. Term 1916).

A motion is neither an action nor a special proceeding but is an application for an order and a procedural step connected with and dependent upon the remedy invoked in the particular controversy. Lyons Falls Farmers' Cooperative Ass'n v Moore, 158 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1956).

An application by a creditor for an order directing a citation to issue and compelling the assignee to account is a motion. In re Thorn (N.Y.C.P. Jan. 22, 1881).

4. Purpose and scope

If the practice is irregular the remedy should be by motion. Ingersoll v Bostwick, 22 N.Y. 425, 22 N.Y. (N.Y.S.) 425, 1860 N.Y. LEXIS 42 (N.Y. 1860).

The purpose of a motion is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy. In re Petition of Jetter, 78 N.Y. 601, 78 N.Y. (N.Y.S.) 601, 1879 N.Y. LEXIS 956 (N.Y. 1879).

The equitable powers of the Surrogate’s Court cannot be examined on a motion. In re Sabin, 191 N.Y.S. 766, 117 Misc. 656, 1922 N.Y. Misc. LEXIS 938 (N.Y. Sur. Ct. 1922).

A motion is an improper manner of raising a question in a proceeding which is not already pending. In re Kruger's Estate, 249 N.Y.S. 772, 139 Misc. 907, 1931 N.Y. Misc. LEXIS 1282 (N.Y. Sur. Ct. 1931).

See Beary v Queens County Bar Asso. (1960) 25 Misc 2d 794, 207 NYS2d 324, where an order to show cause to strike out improper matter in a petition in an Article 78 proceeding was used, not to shorten the notice of motion, but so as to have order to show cause also provide that respondent’s time to answer be extended in the event application were denied.

5. When deemed “made”

Motion under CPA § 1524 (§§ 2505, 8501(a), 8502, 8503 herein) for security for costs was held made when it was served. Kleinman v Metropolitan Life Ins. Co., 298 N.Y. 217, 81 N.E.2d 818, 298 N.Y. (N.Y.S.) 217, 1948 N.Y. LEXIS 799 (N.Y. 1948).

Motion for deficiency judgment under former CPA § 1083-a was held “made” when “notice thereof” was “duly served” and not when it was returnable. Bushwick Sav. Bank v Sohmer, 28 N.Y.S.2d 339, 176 Misc. 617, 1941 N.Y. Misc. LEXIS 1897 (N.Y. Sup. Ct. 1941).

A motion is made by service of process and not by its mere issuance. In re Walker, 50 N.Y.S.2d 277, 1944 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1944).

Motion under RCP 106 (Rule 3211 herein) was made when notice of motion was served. Wickowski v Montgomery Ward Co., 82 N.Y.S.2d 127, 1948 N.Y. Misc. LEXIS 3035 (N.Y. Sup. Ct. 1948).

6. Grounds

The moving papers must point out the irregularities upon which the motion is based and on a motion to set aside a contempt proceeding for irregularity, the moving party must state the grounds of his motion. Park v Park, 80 N.Y. 156, 80 N.Y. (N.Y.S.) 156, 1880 N.Y. LEXIS 78 (N.Y. 1880).

A new ground for relief cannot be injected into a motion by serving an affidavit setting forth the new ground a day before return day of the motion. Lambert v Perry, 1 N.Y.S. 152, 48 Hun 621, 1888 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1888).

7. Joinder of motions

A motion to strike out one of several defenses as sham may be united with an application for judgment on account of the frivolousness of the other defenses. People v McCumber, 18 N.Y. 315, 18 N.Y. (N.Y.S.) 315, 1858 N.Y. LEXIS 133 (N.Y. 1858).

Joinder of motions, in three separate actions, seeking preclusion in each action and using one set of motion papers setting forth consecutively respective titles as beginning thereof, is unauthorized, where such actions have not been consolidated nor joint trial been ordered. Alpert v Freeman, 134 N.Y.S.2d 387, 206 Misc. 419, 1954 N.Y. Misc. LEXIS 2764 (N.Y. County Ct. 1954).

8. Other remedies

Where material questions of fact arise as to the satisfaction of a judgment, and the evidence is conflicting, a party seeking relief will be left to an action if relief can be obtained in that form. Hill v Hermans, 59 N.Y. 396, 59 N.Y. (N.Y.S.) 396, 1874 N.Y. LEXIS 434 (N.Y. 1874).

A creditor is not limited to remedy by motion to set aside fraudulent sale by a receiver; he may have an action. Hackley v Draper, 60 N.Y. 88, 60 N.Y. (N.Y.S.) 88, 1875 N.Y. LEXIS 143 (N.Y. 1875).

Where the terms of a judgment, entered on a referee’s report as to an injunction, are broader than the findings of the report, the remedy is by motion to correct or set aside, not by appeal. Campbell v Seaman, 63 N.Y. 568, 63 N.Y. (N.Y.S.) 568, 1876 N.Y. LEXIS 11 (N.Y. 1876).

Relief from an inquest taken by default may not be obtained by motion to set aside the inquest; remedy in such case, see Greenleaf v Brooklyn, F. & C. I. R. Co., 102 N.Y. 96, 5 N.E. 786, 102 N.Y. (N.Y.S.) 96, 1886 N.Y. LEXIS 806 (N.Y. 1886).

Error of referee in computing amounts is to be corrected by motion and not by appeal. Monnet v Heller, 5 N.Y.S. 913, 56 N.Y. Super. Ct. 576, 1889 N.Y. Misc. LEXIS 2678 (N.Y. Super. Ct. 1889), modified, 127 N.Y. 151, 27 N.E. 827, 127 N.Y. (N.Y.S.) 151, 1891 N.Y. LEXIS 1766 (N.Y. 1891).

Where the judge has jurisdiction and power to appoint a receiver, all directions as to the bond and its character and other like matters are to be reviewed if erroneous by appeal, and if irregular by motion. Terry v Bange, 9 N.Y.S. 311, 57 N.Y. Super. Ct. 546, 1890 N.Y. Misc. LEXIS 143 (N.Y. Super. Ct.), app. dismissed, 121 N.Y. 695, 24 N.E. 1099, 121 N.Y. (N.Y.S.) 695, 1890 N.Y. LEXIS 1530 (N.Y. 1890).

Service of a copy of verified complaint which states a date different from that stated in the original—the court has no power to change the date. The remedy of the defendant is either to strike from the records the original complaint or to set aside the service. 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).

An error of a referee in awarding costs is not reviewable upon motion, but only on appeal. Bates v Norris (1888) 55 Super Ct (23 Jones & S) 269.

9. —When improper

The proper mode of correcting a judgment in a replevin suit, entered for the value of the property, instead of for its possession, and in case a delivery could not be had for its value, is by motion and not by appeal. Ingersoll v Bostwick, 22 N.Y. 425, 22 N.Y. (N.Y.S.) 425, 1860 N.Y. LEXIS 42 (N.Y. 1860).

Where a report of a referee in lien proceedings simply directs a sale and a personal judgment thereon is entered, the remedy is by motion to the supreme court, not by appeal. Moran v Chase, 52 N.Y. 346, 52 N.Y. (N.Y.S.) 346, 1873 N.Y. LEXIS 259 (N.Y. 1873).

Where a clause is inserted in a judgment without authority, the proper remedy is by motion in the court below to correct the judgment not by appeal. People ex rel. Oswald v Goff, 52 N.Y. 434, 52 N.Y. (N.Y.S.) 434, 1873 N.Y. LEXIS 275 (N.Y. 1873).

An objection to a deposition taken upon commission, that the witness failed to answer certain cross-interrogatories, should be raised before trial on motion to suppress the testimony. Vilmar v Schall, 61 N.Y. 564, 61 N.Y. (N.Y.S.) 564, 1875 N.Y. LEXIS 442 (N.Y. 1875).

Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal. Cagger v Lansing, 64 N.Y. 417, 64 N.Y. (N.Y.S.) 417, 1876 N.Y. LEXIS 86 (N.Y. 1876).

The definition of action as opposed to motion was held made clear by the language of CPA § 4 (§ 103 herein), § 113. Therefore, where a statute provided attack might be made on a tax deed only on sufficiency of notice in an action, such an action must be instituted and a motion to open default in foreclosure proceeding was not proper. Somers v Covey, 2 N.Y.2d 250, 159 N.Y.S.2d 196, 140 N.E.2d 277, 1957 N.Y. LEXIS 1274 (N.Y.), cert. denied, 354 U.S. 916, 77 S. Ct. 1378, 1 L. Ed. 2d 1432, 1957 U.S. LEXIS 663 (U.S. 1957).

Orders of reference upon the disposition of motions are not encouraged and should be made rarely and resorted to only in exceptional cases where the interests of justice require the unraveling of complicated facts which cannot be determined upon hopelessly conflicting affidavits. General Electric Co. v Golden Rule Appliance Co., 3 A.D.2d 436, 161 N.Y.S.2d 268, 1957 N.Y. App. Div. LEXIS 5728 (N.Y. App. Div. 1st Dep't), app. denied, 3 A.D.2d 906, 163 N.Y.S.2d 369, 1957 N.Y. App. Div. LEXIS 5403 (N.Y. App. Div. 1st Dep't 1957).

Where it is doubtful from its language whether the reply intends to deny all the allegations as to counterclaims, or only a part thereof, the remedy is by motion to make definite. Williams v Williams, 35 N.Y.S. 263, 14 Misc. 79, 1895 N.Y. Misc. LEXIS 787 (N.Y. Sup. Ct. 1895).

The remedy of parties having liens on surplus funds arising from sale of real estate is by motion and not by action. Delafield v White, 7 N.Y. St. 301.

It is too late to object at the trial to the reading of a deposition of a witness on the ground that sufficient notice had not been given to the opposing attorney, he should have moved the court promptly to suppress the testimony. Elverson v Vanderpoel (1876) 41 Super Ct (9 Jones & S).

When motion to vacate stay is proper remedy, a resort to the equity side of the court would be improper. Steffin v Lockwood, 30 Hun 312 (N.Y. 1883).

A final judgment cannot be entered until all the issues have been disposed of, and where there is such an irregular entry of judgment the remedy is by motion at special term and not by appeal. Robinson v Hall, 35 Hun 214 (N.Y.).

10. Successive applications

Where in a judgment the sum received was stated to be as damages for withholding possession where it should have been for use and occupation. Cagger v Lansing, 64 N.Y. 417, 64 N.Y. (N.Y.S.) 417, 1876 N.Y. LEXIS 86 (N.Y. 1876).

Where the judgment is entered for two survivors without its appearing that it was for them as survivors of themselves and the one who was deceased. Reeder v Sayre, 70 N.Y. 180, 70 N.Y. (N.Y.S.) 180, 1877 N.Y. LEXIS 606 (N.Y. 1877).

A failure to comply with the rule requiring a statement of any prior application for an order is an irregularity which, if not regarded in the court below, would not be regarded in the court of appeals. Mojarrieta v Saenz, 80 N.Y. 547, 80 N.Y. (N.Y.S.) 547, 1880 N.Y. LEXIS 125 (N.Y. 1880).

11. Place of motion

The provisions of subdivision 6 of former RCP 63 applied to all motions, ex parte as well as upon notice. Coleman v Coleman, 221 N.Y.S. 407, 129 Misc. 355, 1927 N.Y. Misc. LEXIS 733 (N.Y. Sup. Ct. 1927).

A motion on notice in an action triable in the eighth judicial district must be made in that district and cannot be made in an adjoining county which is in another district. Coleman v Coleman, 221 N.Y.S. 407, 129 Misc. 355, 1927 N.Y. Misc. LEXIS 733 (N.Y. Sup. Ct. 1927).

12. Parties

A motion by one not a party to the record to strike from the record an appeal to the court of appeals, and to restrain appellants from proceeding, will be denied. Thomson v Tracy, 60 N.Y. 31, 60 N.Y. (N.Y.S.) 31, 1875 N.Y. LEXIS 137 (N.Y. 1875).

Outside parties and persons not having any interest in the subject matter of the litigation cannot inaugurate or conduct a motion for the appointment of a receiver. O'Mahoney v Belmont, 62 N.Y. 133, 62 N.Y. (N.Y.S.) 133, 1875 N.Y. LEXIS 484 (N.Y. 1875).

A motion made by two of three defendants to dismiss a complaint for legal insufficiency will be denied without prejudice to such motions as the third defendant may himself make with reference to complaint, where he had not been served with the motion papers, nor been made a party to the motion. Eidelberg v Newman, 25 Misc. 2d 652, 206 N.Y.S.2d 205, 1960 N.Y. Misc. LEXIS 2596 (N.Y. Sup. Ct. 1960).

13. Protection of infants

An infant is entitled to the protection of the court upon a summary application to set aside a sale on the ground of collusion, etc., as well as in a formal action. Howell v Mills, 53 N.Y. 322, 53 N.Y. (N.Y.S.) 322, 1873 N.Y. LEXIS 402 (N.Y. 1873).

14. Notice of motion

Since there is a right of contribution between joint tortfeasors, a codefendant in a negligence action has been held to be an adverse party so as to be entitled to notice of motion to dismiss for failure to prosecute such action made by one of the defendants. Hehl v State Farm Mut. Auto Ins. Co., 25 Misc. 2d 34, 206 N.Y.S.2d 204, 1959 N.Y. Misc. LEXIS 2299 (N.Y. Sup. Ct. 1959).

Receiver is entitled to notice of motion for his removal and an opportunity to be heard. Bruns v Stewart Mfg. Co., 31 Hun 195 (N.Y.).

15. —Service of notice

Where notice of motion for deficiency on foreclosure under CPA § 1083 (now Real Prop. Actions & Proc. Law § 1371) was never served on defendant because served by mail at erroneous address, such service was void. City Bank Farmers Trust Co. v Cohen, 300 N.Y. 361, 91 N.E.2d 57, 300 N.Y. (N.Y.S.) 361, 1950 N.Y. LEXIS 856 (N.Y. 1950).

Where return date of order to show cause and signature of justice who signed such order were both blank in copy, and copy contained interim injunctive order which was not in original order signed, service by mail was insufficient. Snyder v Power, 133 N.Y.S.2d 845, 206 Misc. 581, 1954 N.Y. Misc. LEXIS 2457 (N.Y. Sup. Ct.), app. dismissed, 284 A.D. 878, 134 N.Y.S.2d 856, 1954 N.Y. App. Div. LEXIS 3919 (N.Y. App. Div. 1954).

An irregularity in the service of motion papers is waived by appearing and arguing the motion on its merits. Cronin v O'Reiley, 7 N.Y.S. 337, 1889 N.Y. Misc. LEXIS 1077 (N.Y. Super. Ct. 1889).

Mail service of motion papers within 10 days after jury was discharged was timely. Albert & Harrison, Inc. v Colonial Sand & Stone Co., 52 N.Y.S.2d 319, 1945 N.Y. Misc. LEXIS 2801 (N.Y. City Ct. 1945).

Proceeding by landlord to fix rent in excess of emergency rent was begun when petition was served on respondent. Champion Realty Corp. v Wapniak, 63 N.Y.S.2d 388, 1946 N.Y. Misc. LEXIS 2401 (N.Y. Sup. Ct. 1946).

Court will not hear a special motion upon papers served on a party out of the state. French v Kenworthy, 5 N.Y. St. 102.

16. Affidavits and other papers

Facts stated in the moving affidavit in a special proceeding, which are not denied in a counter affidavit, stand sufficiently proved for the purpose of the ultimate order. New York, L. & W. R. Co. v Union Steam-Boat Co., 99 N.Y. 12, 1 N.E. 27, 99 N.Y. (N.Y.S.) 12, 1885 N.Y. LEXIS 746 (N.Y. 1885).

Under § 249 of the Real Property Law, an affidavit, taken before a notary public in another state and authenticated as prescribed in § 260, may be used upon a motion in the courts of this state. Isman v Wayburn, 104 N.Y.S. 491, 54 Misc. 86, 1907 N.Y. Misc. LEXIS 362 (N.Y. City Ct. 1907).

Where an affidavit verified without the state and read upon a motion is not properly certified objection must be taken to its reading or it will be waived. Plympton v Bigelow, 11 Abb NC 180, revd 29 Hun 362.

A proceeding for vacating or correcting an award is a motion and a copy of the affidavits upon which it is based must accompany the notice of motion. Poole v Johnston, 32 Hun 215 (N.Y.).

17. Abandonment or withdrawal of motion

At any time before final submission of a motion it may be withdrawn upon tender of costs. Simers v Great Eastern Clay Products Co., 143 N.Y.S. 1020, 82 Misc. 422, 1913 N.Y. Misc. LEXIS 1003 (N.Y. App. Term 1913).

Prior to final submission, the movant has an absolute right to withdraw his motion. Cohen v Gordon, 21 Misc. 2d 1056, 196 N.Y.S.2d 165, 1959 N.Y. Misc. LEXIS 2580 (N.Y. Sup. Ct. 1959).

Where motion is withdrawn on return day in open court, there is no motion pending, and the omission to enter an order, if it be an irregularity, may be disregarded. Kesten v Cooper, 25 Misc. 2d 760, 206 N.Y.S.2d 424, 1960 N.Y. Misc. LEXIS 2489 (N.Y. Sup. Ct. 1960).

Moving party has absolute right at any time before final submission to withdraw motion. Oshrin v Celanese Corp. of America, 37 N.Y.S.2d 548, 1942 N.Y. Misc. LEXIS 2065 (N.Y. Sup. Ct.), aff'd, 265 A.D. 923, 39 N.Y.S.2d 984, 1942 N.Y. App. Div. LEXIS 6557 (N.Y. App. Div. 1942).

18. Submission

Submission means submission by movant of application in whole or part, for court's consideration, and does not mean formal presentation of all papers after complete argument. Marsh v Marsh, 63 N.Y.S.2d 42, 1946 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1946).

19. Hearing of motion

On a motion to set aside summons the only points to be considered will be the legality and regularity of the service. Atlantic & Pacific Tel. Co. v Baltimore & O. R. Co., 87 N.Y. 355, 87 N.Y. (N.Y.S.) 355, 1882 N.Y. LEXIS 10 (N.Y. 1882).

An objection that upon the complaint in an action for a receiver no relief can be granted, should not be disposed of on motion to restrain interference with the property in his hands by way of levy or by attachment or execution. Woerishoffer v North River Const. Co., 99 N.Y. 398, 2 N.E. 47, 99 N.Y. (N.Y.S.) 398, 1885 N.Y. LEXIS 800 (N.Y. 1885).

A motion may be heard although the moving party is in technical contempt, as the court may forgive such contempt if neither party is thereby injured. Whitman v Johnson, 31 N.Y.S. 805, 10

Misc. 730, 1895 N.Y. Misc. LEXIS 19 (N.Y.C.P.), modified, 33 N.Y.S. 60, 12 Misc. 23, 1 N.Y. Ann. Cas. 238, 1895 N.Y. Misc. LEXIS 307 (N.Y.C.P. 1895).

Special appearance by defendant, claiming that he had not been served with summons, required a hearing, and such hearing was one upon proceeding, and not hearing upon motion within Mun Ct Code § 125. Chelmo v Bravman, 33 N.Y.S.2d 363, 178 Misc. 148, 1942 N.Y. Misc. LEXIS 1364 (N.Y. Mun. Ct. 1942).

Where defendants moved for change of venue and thereafter plaintiffs moved to retain place of trial on the ground of convenience of witnesses, both motions could be heard at the same time. 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).

Surrogate will not remove trustees for lack of harmony, merely on pleadings and supporting affidavits, without trial, where such trustees allege their good conduct. In re Graves' Estate, 110 N.Y.S.2d 763, 1952 N.Y. Misc. LEXIS 2456 (N.Y. Sur. Ct. 1952).

Where an order of reference directed referee to proceed on two days’ notice it was ruled necessary in a case where a party attempted to embarrass and delay. Stubbs v Ripley, 39 Hun 620 (N.Y.), app. dismissed, 102 N.Y. 734, 102 N.Y. (N.Y.S.) 734, 1886 N.Y. LEXIS 1007 (N.Y. 1886).

Where facts are undisputed court may act upon proofs submitted. In re Petition of Bernheimer, 47 Hun 567, 15 N.Y. St. 40 (N.Y.).

Where the facts are undisputed, and it clearly appears that the court has no jurisdiction, a motion to vacate the summons and complaint upon that ground should be granted. Crowley v Royal Exchange Shipping Co. (N.Y.C.P. Apr. 3, 1882).

20. Grant of relief

Although a party moves for the wrong relief it is discretionary with the court to grant the appropriate relief under the general prayer, and such an order is not appealable to the court of appeals. Van Slyke v Hyatt, 46 N.Y. 259, 46 N.Y. (N.Y.S.) 259, 1871 N.Y. LEXIS 251 (N.Y. 1871).

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).

Relief granted may be on matters not specified in the order to show cause. King v Barnes, 4 N.Y.S. 247, 51 Hun 550, 1889 N.Y. Misc. LEXIS 267 (N.Y. Sup. Ct.), aff'd, 113 N.Y. 476, 21 N.E. 182, 113 N.Y. (N.Y.S.) 476, 1889 N.Y. LEXIS 967 (N.Y. 1889), app. dismissed, 113 N.Y. 655, 21 N.E. 184, 113 N.Y. (N.Y.S.) 655, 1889 N.Y. LEXIS 1035 (N.Y. 1889), aff'd, 113 N.Y. 655, 21 N.E. 184, 113 N.Y. (N.Y.S.) 655, 1889 N.Y. LEXIS 1034 (N.Y. 1889), aff'd, 113 N.Y. 656, 21 N.E. 184, 113 N.Y. (N.Y.S.) 656, 1889 N.Y. LEXIS 1036 (N.Y. 1889).

21. Resettlement of orders

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).

Party injured by an order allowing amendment should move for a resettlement. 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).

Where order does not contain the proper recitals the proper practice is to move for a resettlement. Mooney v Ryerson, 8 Civ Proc 435; and where it differs from the application, motion should be made to the same judge for resettlement. 7 N.Y. St. 403.

22. Costs

An order of discontinuance, and that plaintiff pay defendant's costs when taxed, is valid and effectual from the time it is served, and plaintiff is not in default until defendant has procured his costs to be adjusted and demanded. NEW YORK v TWEED, 63 N.Y. 202, 63 N.Y. (N.Y.S.) 202, 50 How. Pr. 26, 1875 N.Y. Misc. LEXIS 155 (N.Y. Sup. Ct. 1875).

Costs should not be allowed when not asked for in the moving papers. Chase v Chase, 29 Hun 527, 65 How. Pr. 306, 1883 N.Y. Misc. LEXIS 172 (N.Y. App. Term Apr. 1, 1883).

The court has no power to impose upon a petitioner who asks to be allowed to intervene in a divorce suit a specific sum in gross for disbursements and counsel fees. Simmons v Simmons, 32 Hun 551 (N.Y.).

Where the mistake is purely inadvertent, and technical costs of motion not allowed. .

B. Propriety of Motion

23. Generally

Where a question arises as to whether a pleading has been made and served according to law, the proper practice is to present the question for determination by motion to strike it out, if served, or to compel its acceptance in case of a refusal to receive it. Fredericks v Taylor, 52 N.Y. 596, 52 N.Y. (N.Y.S.) 596, 1873 N.Y. LEXIS 303 (N.Y. 1873).

A motion is the proper remedy for the failure or refusal of a judge or referee to find a fact, if it is conclusively proved. Smith v Glen's Falls Ins. Co., 62 N.Y. 85, 62 N.Y. (N.Y.S.) 85, 1875 N.Y. LEXIS 478 (N.Y. 1875).

24. Relief from order made out of court

A party aggrieved by an order made by a judge out of court is not confined to the remedy by appeal; he has the right to move to set it aside. West Side Bank v Pugsley, 47 N.Y. 368, 47 N.Y. (N.Y.S.) 368, 1872 N.Y. LEXIS 28 (N.Y. 1872).

25. To set aside summons and complaint

Where the facts are undisputed and the law certain a motion to set aside summons and complaint will be proper. Crowley v Royal Exchange Shipping Co. (N.Y.C.P. Apr. 3, 1882).

26. To stay foreclosure

A motion on behalf of bondholders to stay foreclosure proceedings is a proper remedy. Tillinghast v Troy & B. R. Co., 1 N.Y.S. 243, 48 Hun 420, 1888 N.Y. Misc. LEXIS 1276 (N.Y. Sup. Ct. 1888), aff'd, 121 N.Y. 649, 24 N.E. 1091, 121 N.Y. (N.Y.S.) 649, 1890 N.Y. LEXIS 1453 (N.Y. 1890).

27. To obtain opinion of court

A motion made for the purpose, simply, of obtaining the opinion of the court will not be entertained. McMichael v Kilmer, 20 Hun 176 (N.Y.), app. dismissed, 85 N.Y. 628, 85 N.Y. (N.Y.S.) 628, 1881 N.Y. LEXIS 145 (N.Y. 1881).

28. Bankruptcy

A judgment debtor may set up his discharge in bankruptcy on a motion to stay proceedings under an execution upon a judgment obtained before his discharge, as he had no opportunity to plead such discharge in the action in which the judgment was obtained and was guilty of no laches. Monroe v Upton, 50 N.Y. 593, 50 N.Y. (N.Y.S.) 593, 1872 N.Y. LEXIS 465 (N.Y. 1872).

29. Defects in pleading

A motion is proper to strike out matter in complaint for indefiniteness. Marie v Garrison, 83 N.Y. 14, 83 N.Y. (N.Y.S.) 14, 1880 N.Y. LEXIS 447 (N.Y. 1880).

Where there is a semblance of a cause of action or defense set up in a pleading, its sufficiency cannot be determined on motion to strike it out as redundant or irrelevant. Walter v Fowler, 85 N.Y. 621, 85 N.Y. (N.Y.S.) 621, 1881 N.Y. LEXIS 137 (N.Y. 1881).

Where the facts are pleaded according to their legal effect and the defendant is in doubt as to the identity of claim, his remedy is by motion to make more definite and certain or by demand for a bill of particulars. New York News Pub. Co. v National S.S. Co., 148 N.Y. 39, 42 N.E. 514, 148 N.Y. (N.Y.S.) 39, 1895 N.Y. LEXIS 737 (N.Y. 1895).

A motion of defendant for an order requiring complaint to be made more definite, by setting forth what act of negligence of defendant was claimed to have caused the injury, was denied. Jackman v Lord, 9 N.Y.S. 200, 56 Hun 192, 1890 N.Y. Misc. LEXIS 85 (N.Y. App. Term 1890).

The remedy for not separately stating causes of action in the complaint is by motion. .

30. Judgments

A mistake in the entry of judgment is remedied by motion to correct it. Union Nat'l Bank v Kupper, 63 N.Y. 617, 63 N.Y. (N.Y.S.) 617, 1875 N.Y. LEXIS 89 (N.Y. 1875).

Where objection to judgment was that it did not provide for wife’s dower, the remedy was by motion. Wright v Nostrand, 94 N.Y. 31, 94 N.Y. (N.Y.S.) 31, 1883 N.Y. LEXIS 393 (N.Y. 1883), modified, 98 N.Y. 669, 98 N.Y. (N.Y.S.) 669, 1885 N.Y. LEXIS 740 (N.Y. 1885).

As to correcting judgment for certain releases and letters patent in replevin, remedy is by motion. Hammond v Morgan, 101 N.Y. 179, 4 N.E. 328, 101 N.Y. (N.Y.S.) 179, 3 How. Pr. (n.s.) 438, 1886 N.Y. LEXIS 613 (N.Y. 1886).

Any informality in a judgment should be corrected by motion, and the refusal of the court to correct an informality will not be reviewed by the court of appeals merely upon an appeal from the judgment; the appeal should be from the order denying the motion to correct the informality. Syms v New York, 105 N.Y. 153, 11 N.E. 369, 105 N.Y. (N.Y.S.) 153, 6 N.Y. St. 830, 1887 N.Y. LEXIS 702 (N.Y. 1887).

Where judgment was entered by a surrogate against a legatee as having been overpaid, judgment could be set aside by motion. In re Underhill, 117 N.Y. 471, 22 N.E. 1120, 117 N.Y. (N.Y.S.) 471, 1889 N.Y. LEXIS 1455 (N.Y. 1889).

Where judgment entered is excessive in amount, it must be corrected by motion in trial court. Corn Exchange Bank v Blye, 119 N.Y. 414, 23 N.E. 805, 119 N.Y. (N.Y.S.) 414, 1890 N.Y. LEXIS 1100 (N.Y. 1890).

Where judgment is against one only when it should have been against two, remedy is by motion. Sternberger v Bernheimer, 4 N.Y.S. 546, 56 N.Y. Super. Ct. 323, 1889 N.Y. Misc. LEXIS 1586 (N.Y. Super. Ct. 1889), aff'd, 121 N.Y. 194, 24 N.E. 311, 121 N.Y. (N.Y.S.) 194, 1890 N.Y. LEXIS 1391 (N.Y. 1890).

An irregular judgment may be corrected on motion by the trial court. Olcott v Kohlsaat, 8 N.Y.S. 117, 55 Hun 607, 1889 N.Y. Misc. LEXIS 2199 (N.Y. Sup. Ct. 1889).

31. To vacate appointment of receiver

A motion to vacate the judgment alleged to be void is the appropriate way of vacating appointment of receiver. whitney v N.Y. & Atl. R.R., 32 Hun 164, 66 How. Pr. 436, 1884 N.Y. Misc. LEXIS 44 (N.Y. App. Term Mar. 1, 1884).

32. Correction of return upon execution

Where the debtor in an execution has paid the amount thereof to the sheriff, he is entitled to a statement of the truth upon the return of the execution, and a motion to require a return in accordance with the facts is his proper remedy. .

33. Eminent domain

The supreme court has power on motion to issue process to put a railroad company in possession of lands acquired under the general act. In re In re Application of New York C. & H. R. R. Co., 60 N.Y. 116, 60 N.Y. (N.Y.S.) 116, 1875 N.Y. LEXIS 148 (N.Y. 1875).

34. Removal of trustee

Real Property Law, § 112, and Code Civ Proc, § 768, were permissive and not exclusive and testamentary trustee could be removed on motion. Gould v Gould, 178 N.Y.S. 37, 108 Misc. 42, 1919 N.Y. Misc. LEXIS 746 (N.Y. Sup. Ct. 1919), aff'd, 203 A.D. 807, 197 N.Y.S. 515, 1922 N.Y. App. Div. LEXIS 7308 (N.Y. App. Div. 1922).

Research References & Practice Aids

Cross References:

Motions in insolvency proceedings, CLS Dr & Cr §§ 65., 67.

Federal Aspects:

Defenses and objections presented by motions in United States District Courts, Rule 12 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion to terminate or limit oral examination in United States District Courts, Rule 30(d) of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for order compelling discovery in United States District Courts, Rule 37(a) of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for judgment as a matter of law in United States District Courts, Rule 50 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for summary judgment in United States District Courts, Rule 56(c) of Federal Rules of Civil Procedure, USCS Court Rules.

Relief from judgment or order in United States District Courts, Rule 60 of Federal Rules of Civil Procedure, USCS Court Rules.

Application to United States court for making and hearing of motion relating to arbitration, 9 USCS § 6.

Jurisprudences:

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

24 NY Jur 2d Costs in Civil Actions § 31. .

37 NY Jur 2d Death § 468. .

73 NY Jur 2d Judgments § 9.

84 NY Jur 2d Pleading §§ 92., 93. .

84 NY Jur 2d Pleading §§ 87., 88. .

18 Am Jur Pl & Pr Forms (Rev), Motions, Rules, and Orders, Forms 1.– 7.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2211, Application for Order; When Motion Made.

3 Rohan, New York Civil Practice: EPTL ¶5-4.1.

Matthew Bender's New York CPLR Manual:

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

CPLR Manual § 15.03 .Motion procedure.

CPLR Manual § 26.10. Taking the appeal.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 7.01. Procedural Context-Motion Practice.

LexisNexis AnswerGuide New York Civil Litigation § 16.18. Converting Motion Into Special Proceeding.

LexisNexis AnswerGuide New York Negligence § 2.33. Moving for Summary Judgment.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 3.46.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 2211:1 et seq.

LexisNexis Forms FORM 75-CPLR 2211:1.—General Form of Notice of Motion.

LexisNexis Forms FORM 75-CPLR 2211:10.—General Form of Ex Parte Order.

LexisNexis Forms FORM 75-CPLR 2211:2.—Bender's Simplified Form of Notice of Motion.

LexisNexis Forms FORM 75-CPLR 2211:3.—Notice of Motion to Dismiss Complaint Official Form.

LexisNexis Forms FORM 75-CPLR 2211:4.—Short Notice of Motion (to Correct Complaint) Official Form 24.

LexisNexis Forms FORM 75-CPLR 2211:5.—Short Form of Notice of Motion to Dismiss.

LexisNexis Forms FORM 75-CPLR 2211:6.—Request for Judicial Intervention.

LexisNexis Forms FORM 75-CPLR 2211:7.—Order to Show Cause Skeleton Form.

LexisNexis Forms FORM 75-CPLR 2211:8.—Form of Order to Show Cause Granted Out of Court.

LexisNexis Forms FORM 75-CPLR 2211:9.—General Form of Affidavit Upon Ex Parte Motion.

LexisNexis Forms FORM 75-CPLR 2214:1.—Notice of Motion Skeleton Form.

LexisNexis Forms FORM 75-CPLR 2214:10.—General Form of Order to Show Cause.

LexisNexis Forms FORM 75-CPLR 2214:11.—General Form of Order to Show Cause in Article 78 Proceeding Against State Body or Officer.

LexisNexis Forms FORM 75-CPLR 2214:2.—Notice of Motion.

LexisNexis Forms FORM 75-CPLR 2214:3.—Alternate Form of Notice of Motion.

LexisNexis Forms FORM 75-CPLR 2214:4.—Affidavit in Support of, or in Opposition to, Motion Skeleton Form.

LexisNexis Forms FORM 75-CPLR 2214:5.—General Form of Affidavit in Support of Order to Show Cause.

LexisNexis Forms FORM 75-CPLR 2214:6.—General Form of Answering Affidavit on Motion.

LexisNexis Forms FORM 75-CPLR 2214:7.—General Form of Reply Affidavit on Motion.

LexisNexis Forms FORM 75-CPLR 2214:7A.—Affirmation in Opposition to Untimely Cross-Motion for Summary Judgment.

LexisNexis Forms FORM 75-CPLR 2214:7B.—Reply Affirmation in Support of Untimely Cross-Motion for Summary Judgment Alleging No Prejudice.

LexisNexis Forms FORM 75-CPLR 2214:8.—Notice to be Served With Motion Papers for Production of Papers in Possession of Adverse Party.

LexisNexis Forms FORM 75-CPLR 2214:9.—Order Granting Motion on Failure of Adverse Party to Furnish Papers Demanded on Due Notice.

LexisNexis Forms FORM 1434-19316.—CPLR 2214: Notice of Motion - Skeleton Form.

LexisNexis Forms FORM 1434-19318.—CPLR 2214: Order to Show Cause - Skeleton Form.

LexisNexis Forms FORM 1434-19319.—CPLR 2214: Affidavit in Support of, or in Opposition to, Motion - Skeleton Form.

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

End of Document