NY CLS CPLR R 4405

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New York

Consolidated Laws Service **>**

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

Article 44 Trial Motions (§§ 4401 — 4406)

R 4405. Time and judge before whom post-trial motion made

A motion under this article shall be made before the judge who presided at the trial within fifteen days after decision, verdict or discharge of the jury. The court shall have no power to grant relief after argument or submission of an appeal from the final judgment.

History

Formerly § 4405, add, L 1962, ch 308; amd, L 1962, ch 315, § 1; L 1965, ch 673, eff July 2, 1965.

Annotations

Notes

Prior Law:

Earlier statutes and rules: CPA § 447; RCP 60–a; CCP § 1001; Code Proc § 268.

Advisory Committee Notes:

The first sentence of this rule is a restatement of RCP 60-a. The second sentence provides that the trial court's jurisdiction over the motion is terminated when an appeal is argued or submitted. The provision of CPA § 573 that the trial court might have retained jurisdiction of a motion for new trial for twenty days after notice of appeal is analogous, but there does not appear to be

substantial justification for the specific period of time set forth nor for measuring it from the notice of appeal.

Notes to Decisions

I. Under CPLR

1. Generally

Defendants' rule 5015 motion for a new trial on the ground of newly discovered evidence should have been granted, where the evidence submitted in support of the motion, which could not have been discovered in time to move for a new trial under rule 4404, went directly to the heart of the fact issues raised at the trial and, if credited, would probably have produced a different result. Cesla v Frydman, 47 A.D.2d 742, 364 N.Y.S.2d 547, 1975 N.Y. App. Div. LEXIS 9016 (N.Y. App. Div. 2d Dep't), app. dismissed, 36 N.Y.2d 648, 1975 N.Y. LEXIS 2641 (N.Y. 1975), app. dismissed, 36 N.Y.2d 982, 374 N.Y.S.2d 602, 337 N.E.2d 119, 1975 N.Y. LEXIS 2066 (N.Y. 1975).

Where attack made on denial of motion for new trial specified alleged impropriety by hearing judge as basis for new trial, hearing judge should not have heard the motion. Arol Development Corp. v Goodie Brand Packing Corp., 55 A.D.2d 869, 390 N.Y.S.2d 120, 1977 N.Y. App. Div. LEXIS 10058 (N.Y. App. Div. 1st Dep't 1977).

A motion to resettle a judgment is not untimely under CPLR 4405 as a posttrial motion under CPLR 4404 (subd [b]) to make new findings of facts or render a new decision where the defect was not substantive since the motion is more properly characterized as a motion to correct an irregularity pursuant to CPLR 5019 (subd [a]). Kay-Fries, Inc. v Martino, 73 A.D.2d 342, 426 N.Y.S.2d 304, 1980 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 2d Dep't), app. dismissed, 50 N.Y.2d 1056, 431 N.Y.S.2d 817, 410 N.E.2d 750, 1980 N.Y. LEXIS 2570 (N.Y. 1980).

Court erred in applying time limits of CLS CPLR § 4405 to plaintiff’s motion to vacate order which dismissed her divorce action due to parties’ failure to forward trial minutes to court, since order dismissing complaint did not constitute determination under CLS CPLR § 4213 and thus motion to vacate order was not application under CLS CPLR § 4404(b) to which time limits of § 4405 applied; in effect, wife’s motion to vacate order of dismissal sought relief under CLS CPLR § 5015(a)(1). Kokalari v Kokalari, 166 A.D.2d 418, 560 N.Y.S.2d 484, 1990 N.Y. App. Div. LEXIS 11850 (N.Y. App. Div. 2d Dep't 1990).

Supreme Court order vacating judgment on motion and consent of parties during pendency of appeal could not be collaterally attacked in Supreme Court under CLS CPLR § 4405, which limits power of court to grant relief after argument or submission of appeal, since statute applies only to motions made under CLS CPLR Art 44, and motion by which judgment in question was vacated was not made pursuant thereto. Ruben v American & Foreign Ins. Co., 185 A.D.2d 63, 592 N.Y.S.2d 167, 1992 N.Y. App. Div. LEXIS 14856 (N.Y. App. Div. 4th Dep't 1992).

Contention that trial court improperly denied plaintiff’s application to set aside jury verdict in favor of defendants was not properly before Appellate Division where, after jury rendered its verdict, plaintiff made oral application to set aside verdict and was directed by trial court to submit written motion within 10 days, plaintiff did not object to court’s directive, and no written

motion was ever made. Plantation House & Garden Prods. v R-Three Investors, 285 A.D.2d 539, 728 N.Y.S.2d 181, 2001 N.Y. App. Div. LEXIS 7444 (N.Y. App. Div. 2d Dep't 2001).

Where Supreme Court set aside a verdict as against the weight of the evidence and ordered a new trial, which order was affirmed by the Appellate Division, such original order was the order of the Appellate Division and may not be changed or modified by the Supreme Court. Kowalak v Pappas, 60 Misc. 2d 791, 304 N.Y.S.2d 71, 1969 N.Y. Misc. LEXIS 1200 (N.Y. Sup. Ct. 1969).

The failure of the State to introduce at trial or before entry of judgment an “advance payment agreement” which provides for the suspension of interest on the award resulting from the appropriation of claimants’ property during certain periods of time pending the clearing of title does not warrant vacating the judgment and reopening the trial for the limited purpose of permitting the State to introduce the agreement into evidence to prove an interest suspension either on statutory grounds (CPLR 4405, 5015) or in the “furtherance of justice”; the statute requiring the Attorney-General, before entry of judgment, to notify the clerk of the court of the period of time during which interest on the award shall be suspended (Court of Claims Act, § 19, subd 4) only pertains to interest and penalizes a claimant who deliberately or negligently fails to clear title to the property appropriated and does not affect the validity of the rule of the Court of Claims providing for entry of judgment within 20 days after filing of a decision upon five days’ notice to the adverse party. Sydney Family Corp. v State, 99 Misc. 2d 731, 417 N.Y.S.2d 420, 1979 N.Y. Misc. LEXIS 2326 (N.Y. Ct. Cl. 1979).

2. Applicability to proceedings under Article 44

The time limitation of CPLR 4405 precludes granting a motion by a party directed to CPLR 4404, subd b. Hill v State, 29 A.D.2d 824, 287 N.Y.S.2d 533, 1968 N.Y. App. Div. LEXIS 4593 (N.Y. App. Div. 3d Dep't 1968).

Section 4405 of the CPLR applies specifically only to motions under Article 44 of the CPLR and a motion to amend a decision rather than a motion to set aside a judgment under subdivision b of CPLR 4404, was not a motion within Article 44. Dobert Constr. Corp. v Dan Holser

Excavating, Inc., 36 A.D.2d 1002, 321 N.Y.S.2d 198, 1971 N.Y. App. Div. LEXIS 4057 (N.Y. App. Div. 3d Dep't 1971).

A motion to dismiss a claim brought four months after the decision awarding damages in a condemnation action was not timely, since CPLR 4404 must be read in conjunction with CPLR 4405, and is binding upon the Court of Claims. Arlen of Nanuet, Inc. v State, 52 Misc. 2d 1009, 277 N.Y.S.2d 560, 1967 N.Y. Misc. LEXIS 1762 (N.Y. Ct. Cl. 1967).

3. Determinative date

Motion to modify decision must be made within 15 days after decision is filed. Bernstein v Swidunovich, 44 Misc. 2d 728, 254 N.Y.S.2d 863, 1964 N.Y. Misc. LEXIS 1196 (N.Y. Sup. Ct. 1964).

Under this section the determinative date has been deemed to be the date upon which the decision is filed. Arlen of Nanuet, Inc. v State, 52 Misc. 2d 1009, 277 N.Y.S.2d 560, 1967 N.Y. Misc. LEXIS 1762 (N.Y. Ct. Cl. 1967).

The filing of a written decision starts the time upon which the fifteen day limitation for making post trial motions, and a post trial motion made approximately a month after trial was untimely. Wierzbieniec v Przewlocki, 54 Misc. 2d 83, 281 N.Y.S.2d 447, 1967 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 1967).

A motion to set aside a court decision pursuant to CPLR § 4404(b) would be timely under CPLR § 4405 where it was made within 15 days after the order was signed, although that was more than 15 days after a written decision was rendered. Hamel v Hamel, 117 Misc. 2d 118, 457 N.Y.S.2d 729, 1982 N.Y. Misc. LEXIS 4031 (N.Y. Fam. Ct. 1982).

4. Untimely applications

A filiation order was set aside and the matter remitted to Family Court where the respondent offered proof that after the order was made, he underwent an operation by which he had

obtained medical proof of his contention raised during trial that a prior operation had rendered him sterile before the time of conception. It was held respondent should not be precluded on the ground of untimeliness when the operation had been performed shortly after the decision and its result could hardly have been obtained within a 15-day limit. Commissioner of Welfare v Wendtland, 25 A.D.2d 640, 268 N.Y.S.2d 547, 1966 N.Y. App. Div. LEXIS 4657 (N.Y. App. Div. 1st Dep't 1966).

A motion to set aside a decision and to reopen a hearing to take further testimony was properly denied when not made within 15 days after the decision nor before the judge who presided at trial in the absence of an adequate reason advanced for an untimely application. Gross v State, 32 A.D.2d 598, 299 N.Y.S.2d 699, 1969 N.Y. App. Div. LEXIS 4094 (N.Y. App. Div. 3d Dep't 1969).

Motion for a new trial is directed to the components of the trial and, when such motion did not refer to the trial itself but rather to the absence of notice or a defect of parties and was not made within 15 days after the verdict and the record revealed no persuasive reason for the failure in making a timely motion, order granting a new trial was error. In re Estate of De Lano, 34 A.D.2d 1031, 311 N.Y.S.2d 134, 1970 N.Y. App. Div. LEXIS 4623 (N.Y. App. Div. 3d Dep't 1970), aff'd, 28 N.Y.2d 587, 319 N.Y.S.2d 844, 268 N.E.2d 642, 1971 N.Y. LEXIS 1557 (N.Y. 1971).

Plaintiff’s motion for new trial based on newly discovered evidence was properly denied where it was not made within 15 days after verdict as required by CLS CPLR § 4405. Bertan v Richmond Memorial Hospital & Health Center, 131 A.D.2d 799, 517 N.Y.S.2d 165, 1987 N.Y. App. Div. LEXIS 48249 (N.Y. App. Div. 2d Dep't 1987).

Posttrial motion for judgment as matter of law was not untimely where no time limit on motion was set by court even when movant made such request, and no party suffered prejudice as result of delay in presenting written argument invited by court. Brown v Two Exchange Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889, 1989 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 1st Dep't 1989), app. dismissed, 74 N.Y.2d 793, 545 N.Y.S.2d 109, 543 N.E.2d 752, 1989 N.Y.

LEXIS 4998 (N.Y. 1989), aff'd, 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430, 1990 N.Y. LEXIS 1358 (N.Y. 1990).

Defendant’s motion to set aside verdict as against weight of evidence, proffered on same date that verdict was rendered, was timely; defendant’s failure to challenge verdict prior to discharge of jury did not result in waiver. Niles v Shue Roofing Co., 244 A.D.2d 820, 666 N.Y.S.2d 282, 1997 N.Y. App. Div. LEXIS 11969 (N.Y. App. Div. 3d Dep't 1997).

In action against police department and others for false arrest and battery, plaintiff’s motion under CLS CPLR § 4404(a) to set aside jury verdict for defendants on cause of action for battery was timely where plaintiff proved “good cause” for her 3-day delay in making motion. Johnson v Suffolk County Police Dep't, 245 A.D.2d 340, 665 N.Y.S.2d 440, 1997 N.Y. App. Div. LEXIS 12801 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff’s motion to set aside reinstated jury verdict was untimely where motion was made almost one year after verdict was rendered Gropper v St. Luke's Hosp. Ctr., 255 A.D.2d 123, 679 N.Y.S.2d 385, 1998 N.Y. App. Div. LEXIS 11632 (N.Y. App. Div. 1st Dep't 1998).

Trial court providently exercised its discretion in denying those branches of a former wife’s untimely motions, inter alia, to reopen the trial in her divorce action, filed approximately two years after the close of evidence in the divorce trial and the issuance of the court’s memorandum decision. Sieger v Sieger, 51 A.D.3d 1004, 859 N.Y.S.2d 240, 2008 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 2d Dep't 2008), app. denied, 14 N.Y.3d 711, 903 N.Y.S.2d 770, 929 N.E.2d 1005, 2010 N.Y. LEXIS 1104 (N.Y. 2010).

Trial court properly denied a wife’s second posttrial motion as improper pursuant to N.Y. C.P.L.R. 4406; in addition, the motion was improper because it was brought more than 15 days after the trial. Spathis v Dulimof-Spathis, 103 A.D.3d 599, 960 N.Y.S.2d 384, 2013 N.Y. App. Div. LEXIS 1269 (N.Y. App. Div. 1st Dep't 2013), app. denied, 22 N.Y.3d 913, 975 N.Y.S.2d 733, 998 N.E.2d 397, 2013 N.Y. LEXIS 2845 (N.Y. 2013), cert. denied, 574 U.S. 856, 135 S. Ct. 140, 190 L. Ed. 2d 105, 2014 U.S. LEXIS 6476 (U.S. 2014).

Client's motion in a legal malpractice suit to enlarge the time to make a posttrial motion was properly denied as untimely because (1) the client did not so move within 15 days after the law firm's directed verdict motion was granted, and (2) the client did not show good cause for the delay. Verdi v Jacoby & Meyers, LLP, 154 A.D.3d 901, 63 N.Y.S.3d 71, 2017 N.Y. App. Div. LEXIS 7317 (N.Y. App. Div. 2d Dep't 2017).

A motion to dismiss a claim brought four months after the decision awarding damages in a condemnation action was not timely, since CPLR 4404 must be read in conjunction with CPLR 4405, and is binding upon the Court of Claims. Arlen of Nanuet, Inc. v State, 52 Misc. 2d 1009, 277 N.Y.S.2d 560, 1967 N.Y. Misc. LEXIS 1762 (N.Y. Ct. Cl. 1967).

A motion to “reargue” a motion to set aside a jury verdict as contrary to the weight of evidence would be denied as untimely where it was made some nine months after the denial of plaintiff’s original motion which was made immediately after trial, in that CPLR § 4405 provides that such motions shall be made before the Judge who presided at the trial within 15 days after decision, verdict or discharge of the jury, and a party may not label an application as one for re-argument so as to avoid the 15-day requirement. De Blasio v Volkswagen of America, Inc., 124 Misc. 2d 726, 477 N.Y.S.2d 275, 1984 N.Y. Misc. LEXIS 3321 (N.Y. Sup. Ct. 1984).

After a judgment in favor of a tenant in the landlord’s holdover summary proceeding was entered, based upon a finding that the landlord had waived the “no pet” rider by not bringing an action within three months of knowledge that the tenant had two cats, pursuant to New York City, N.Y., Admin. Code § 27-2009.1(b), the landlord’s motion under N.Y. C.P.L.R. 2221(d) to “reargue” that was made seven months after the judgment was really one to set aside the verdict under N.Y. C.P.L.R. 4404(b); the motion should have been denied as untimely under N.Y. C.P.L.R. 4405, and the motion also lacked substantive merit where there was no basis offered to change the verdict. 184 W. 10th St. Corp. v Marvits, 852 N.Y.S.2d 557, 18 Misc. 3d 46, 238 N.Y.L.J. 103, 2007 N.Y. Misc. LEXIS 7672 (N.Y. App. Term 2007), aff'd, 59 A.D.3d 287, 874 N.Y.S.2d 403, 2009 N.Y. App. Div. LEXIS 1321 (N.Y. App. Div. 1st Dep't 2009).

5. Non-jury proceedings

Trial court has power to set aside its decision in nonjury case on its own initiative and, in doing so, may ignore 15-day time limit of CLS CPLR § 4405. In re Alison VV., 211 A.D.2d 988, 621 N.Y.S.2d 739, 1995 N.Y. App. Div. LEXIS 576 (N.Y. App. Div. 3d Dep't 1995).

The fifteen-day limitation on a motion for reconsideration applies only where there has been a trial, and does not apply where the proceeding was in the form of a motion to determine the validity of the exercise of a power of appointment and for settlement of an account of an inter vivos trust. In re Ball's Trust, 43 Misc. 2d 1032, 252 N.Y.S.2d 894, 1964 N.Y. Misc. LEXIS 1406 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 820, 259 N.Y.S.2d 1005, 1965 N.Y. App. Div. LEXIS 5589 (N.Y. App. Div. 1st Dep't 1965).

Power of court in a non-jury trial to set aside a decision on its own initiative is not controlled by the 15-day limitation set forth in this section. Moore v State, 45 Misc. 2d 1060, 258 N.Y.S.2d 655, 1965 N.Y. Misc. LEXIS 2032 (N.Y. Ct. Cl. 1965).

Claimant in action for damages against state was not precluded from asserting motion to vacate, set aside, or amend decision for state on its counterclaim, although claimant’s motion was not brought within 15-day period required by CLS CPLR § 4405, where motion was based on lack of jurisdiction and thus relief sought could be granted under CLS CPLR § 5015; moreover, 15-day limitation would not be applicable if court took initiative in making motion, and court would be inclined to take initiative if relief were not otherwise available in situation where claimant’s rights had been adversely affected. Gildea v State, 133 Misc. 2d 269, 507 N.Y.S.2d 127, 1986 N.Y. Misc. LEXIS 2862 (N.Y. Ct. Cl. 1986).

II. Under Former Civil Practice Laws

6. Generally

Where plaintiffs did not timely move to set aside dismissal of complaint as to one defendant, they did not lose their right to appeal from final judgment which parties consented should not be entered until jury trial as to damages. Grote v Jonbert Realty Corp., 1 A.D.2d 111, 148 N.Y.S.2d 97, 1955 N.Y. App. Div. LEXIS 3620 (N.Y. App. Div. 2d Dep't 1955).

Where action to cancel mortgage for fraud was dismissed when reached for trial for tender made by defendant and judgment was entered in his favor, and where plaintiff moved to vacate such judgment on ground that parties misapprehended making and acceptance of tender, such motion was not timely where not made within 15 days after decision to which it was addressed was rendered. Mazzeo v Gelb, 1 A.D.2d 916, 149 N.Y.S.2d 518, 1956 N.Y. App. Div. LEXIS 5965 (N.Y. App. Div. 3d Dep't 1956).

The court no longer has jurisdiction to set aside the dismissal of the complaint and to grant a new trial where more than fifteen days have elapsed after the jury has been discharged. Carlovich v Carlovich, 2 A.D.2d 974, 157 N.Y.S.2d 133, 1956 N.Y. App. Div. LEXIS 3695 (N.Y. App. Div. 2d Dep't 1956).

Where special referee was duly designated on consent of parties to hear and determine action, his determination, duly rendered after trial and with appropriate jurisdiction cannot be vacated by Special Term. Casiano v Dukas, 2 Misc. 2d 560, 152 N.Y.S.2d 512, 1956 N.Y. Misc. LEXIS 1877 (N.Y. Sup. Ct. 1956).

A motion made by the State to amend a decision within fifteen days from the date the decision was filed in the office of the clerk of the court was considered as a motion for a new trial which could be decided upon the merits. La Porte v State, 5 Misc. 2d 419, 159 N.Y.S.2d 596, 1957 N.Y. Misc. LEXIS 3510 (N.Y. Ct. Cl. 1957), modified in part and rev'd in part, 5 A.D.2d 362, 172 N.Y.S.2d 249, 1958 N.Y. App. Div. LEXIS 6435 (N.Y. App. Div. 3d Dep't 1958).

Where applicable to amend decision of Court of Claims containing findings of fact, conclusions of law and directing entry of judgment is made more than fifteen days after the decision is rendered, it must be denied. Cacciatore v State, 5 Misc. 2d 841, 159 N.Y.S.2d 881, 1957 N.Y.

Misc. LEXIS 3439 (N.Y. Ct. Cl.), modified, 4 A.D.2d 928, 167 N.Y.S.2d 454, 1957 N.Y. App. Div. LEXIS 4127 (N.Y. App. Div. 4th Dep't 1957).

After a judgment has been entered, judicial officer who directed the entry of the same retains jurisdiction for the purpose of making an order settling the case on appeal and determining motions which might be made with respect to such judgment. Strevell v Mink, 9 Misc. 2d 1090, 175 N.Y.S.2d 254, 1957 N.Y. Misc. LEXIS 2164 (N.Y. Sup. Ct. 1957).

CPA §§ 522 (§ 5015(a), herein) 549 (§ 4404(a), (b) herein) 573 (§ 4405 herein) and RCP 60-a were all binding on the Court of Claims. Mark v State, 21 Misc. 2d 63, 197 N.Y.S.2d 92, 1959 N.Y. Misc. LEXIS 2971 (N.Y. Ct. Cl. 1959); Trimpoli v State, 21 Misc. 2d 67, 197 N.Y.S.2d 97, 1959 N.Y. Misc. LEXIS 2863 (N.Y. Ct. Cl. 1959).

Where after trial of action for malicious prosecution court dismissed complaint on merits and denied all motions on which decision was reserved and rendered its decision on March 29, 1955, and where papers on which plaintiff’s motion for new trial were served 22 days later on April 20, 1955, such motion was not timely made. Traversara v Pinelli, 140 N.Y.S.2d 559, 1955 N.Y. Misc. LEXIS 3168 (N.Y. Sup. Ct. 1955).

Research References & Practice Aids

Federal Aspects:

Form of motions in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 7.

Time of motion for new trial in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 59(b).

Jurisprudences:

73 NY Jur 2d Judgments § 203. .

92 NY Jur 2d References § 33. .

105 NY Jur 2d Trial §§ 165., 280., 601., 602., 606., 607. .

15 Am Jur Pl & Pr Forms, Rev, Judgments, Form 325.

Law Reviews:

Motion practice under the CPLR. 9 NY L Forum 317.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4405, Time and Judge Before Whom Post-trial Motion Made.

1 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 2.01.

2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶502.16.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.06. Trial and post-trial motions.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Probate and Estate Administration § 11.23.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.28. Moving for Post-Trial Judgment or New Trial.

Matthew Bender's New York Evidence:

1 Bender's New York Evidence § 110.04. Motion for a New Trial.

Annotations:

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time. 69 ALR3d 845.

Motions for new trial: time limitations under Rule 59(b) of Federal Rules of Civil Procedure. 45 ALR Fed 104.

Matthew Bender's New York Checklists:

Checklist for Submitting Pre-Trial Memorandum of Law, Marked Pleadings, and Other Papers to Court LexisNexis AnswerGuide New York Civil Litigation § 9.02.

Checklist for Making Trial and Post-Trial Motions LexisNexis AnswerGuide New York Civil Litigation § 9.25.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4405:1.

LexisNexis Forms FORM 75-CPLR 4405:1.—Affidavit in Opposition to Post-Trial Motion to Set Aside Jury Verdict.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 21:101 et seq .(trial motions).

Hierarchy Notes:

NY CLS CPLR, Art. 44