NY CLS CPLR R 4016

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

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

Article 40 Trial Generally (§§ 4001 — 4019)

R 4016. Opening and closing statements

(a) Before any evidence is offered, an attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right, may make an opening statement. At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement in inverse order to opening statements.

(b) In any action to recover damages for personal injuries or wrongful death, the attorney for a party shall be permitted to make reference, during closing statement, to a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action. In the event that an attorney makes such a reference in an action being tried by a jury, the court shall, upon the request of any party, during the court's instructions to the jury at the conclusion of all closing statements, instruct the jury that:

(1) the attorney's reference to such specific dollar amount is permitted as argument;

(2) the attorney's reference to a specific dollar amount is not evidence and should not be considered by the jury as evidence; and

(3) the determination of damages is solely for the jury to decide.

History

Add, L 1962, ch 308; amd, L 1962, ch 318, eff Sept 1, 1963; L 2003, ch 694, § 2, eff Nov 27, 2003; L 2004, ch 372, § 1, eff Aug 17, 2004.

Annotations

Notes

Prior Law:

Earlier rules: RCP 161; Gen Rules Pr 29.

Advisory Committee Notes:

This rule replaces the first and third sentences of RCP 161, the latter of which specifically limited closing statements to one hour, unless otherwise ordered. The court retains whatever power it had to vary the order or limit the time for statements. See CPLR rule 4011. As a matter of practice co-parties with separate rights were permitted to make separate statements and this practice has been codified. It is contemplated that the courts will follow the former practice of permitting the party having the burden of proof to open first. 6 Carmody-Wait, Cyclopedia of New York Practice 425 (1953).

Amendment Notes:

2004. Chapter 372, § 1 amended:

Sub (b), by deleting “during opening statement and/or”.

Notes to Decisions

I.Under CPLR

1.Generally

2.Opening statements

3.Closing statements; summations

II.Under Former Civil Practice Laws

4.Generally

5.Plaintiff’s right to open and close

6.Defendant’s right to open and close

7.Denial of right to open and close as ground for review

I. Under CPLR

1. Generally

It is usual practice for a judge who directs consolidation, as distinguished from direction for joint trial, to also determine order of opening and closing statements. Rockaway Boulevard Wrecking & Lumber Co. v Raylite Electric Corp., 25 A.D.2d 842, 270 N.Y.S.2d 1, 1966 N.Y. App. Div. LEXIS 4195 (N.Y. App. Div. 1st Dep't 1966).

Order denying motion for reargument was not appealable. State ex rel. Williams v Windham Child Care, 55 A.D.2d 146, 389 N.Y.S.2d 860, 1976 N.Y. App. Div. LEXIS 14072 (N.Y. App. Div. 1st Dep't 1976).

In actions, jointly tried, arising out of automobile accident, in which a driver appeared as plaintiff in one action and as defendant in the other, driver was not denied substantial right in not being permitted to make opening and closing statements. Tomassi v Union, 58 A.D.2d 670, 395 N.Y.S.2d 747, 1977 N.Y. App. Div. LEXIS 12772 (N.Y. App. Div. 3d Dep't 1977), app. dismissed, 43 N.Y.2d 793, 402 N.Y.S.2d 393, 373 N.E.2d 288, 1977 N.Y. LEXIS 2579 (N.Y. 1977), modified, 46 N.Y.2d 91, 412 N.Y.S.2d 842, 385 N.E.2d 581, 1978 N.Y. LEXIS 2382 (N.Y. 1978).

In an action to recover the proceeds of a life insurance policy, wherein the insurance company disclaimed liability on the ground that the insured had committed suicide by taking an overdose of barbiturates, defendant was not so prejudiced as to require reversal of a judgment in favor of plaintiff by statements by plaintiff's counsel to the effect that the proceeds of a much larger insurance policy had been paid following the death of a well-known entertainer by reason of a drug overdose, that decedent's family needed the insurance money and that the insurer had been earning high interest on the proceeds to which the insured's widow was entitled during the two-year period between his death and the trial, where the insurance company did not formally object to the statements and where curative instructions were given. Schelberger v Eastern Sav. Bank, 93 A.D.2d 188, 461 N.Y.S.2d 785, 1983 N.Y. App. Div. LEXIS 17102 (N.Y. App. Div. 1st Dep't), aff'd, 60 N.Y.2d 506, 470 N.Y.S.2d 548, 458 N.E.2d 1225, 1983 N.Y. LEXIS 3540 (N.Y. 1983).

In action for personal injuries resulting from medical malpractice and battery, court did not err in failing to advise plaintiff's counsel regarding reasonable sum he could suggest to jury since record established that plaintiff's counsel refused to suggest reasonable figure to court and, under such circumstances, court was not obligated to provide plaintiff's counsel with reasonable figure. Smith v Catholic Medical Center, Inc., 155 A.D.2d 435, 547 N.Y.S.2d 96, 1989 N.Y. App. Div. LEXIS 14026 (N.Y. App. Div. 2d Dep't 1989).

It was prejudicial error to prevent plaintiffs' counsel from commenting on certain medical insurance records that were received into evidence at trial. Kasman v Flushing Hosp. & Medical Ctr., 224 A.D.2d 590, 638 N.Y.S.2d 687, 1996 N.Y. App. Div. LEXIS 1364 (N.Y. App. Div. 2d Dep't 1996).

2. Opening statements

Where there was nothing in the plaintiff's opening statement which indicated that as a matter of law they would not be able to establish a violation of the duty owed to a trespasser, the

dismissal of the complaint could not be sustained. Flynn v Long Island Railroad, 37 A.D.2d 595, 322 N.Y.S.2d 828, 1971 N.Y. App. Div. LEXIS 3848 (N.Y. App. Div. 2d Dep't 1971).

Court erred in denying plaintiff's motion for mistrial, on basis of defendant's opening statement in civil action for assault and battery in which defendant had counterclaimed for assault, battery, false arrest and malicious prosecution, where (1) defense counsel's remarks were concededly inaccurate in asserting that plaintiff had been responsible for defendant's arrest and incarceration, (2) defense counsel made his remarks with utter disregard for truth, since he should have known them to be inaccurate, and (3) prejudice was not eliminated by court's curative instruction, following defendant's voluntary discontinuance of counterclaims for false arrest and malicious prosecution, which implied that such counterclaims were being removed from jury's consideration on some technical point of law. Cohn v Meyers, 125 A.D.2d 524, 509 N.Y.S.2d 603, 1986 N.Y. App. Div. LEXIS 62829 (N.Y. App. Div. 2d Dep't 1986).

Dismissal of negligence complaint immediately after plaintiff's opening statement was appropriate, even though such dismissals are disfavored, where complaint, as amplified by bill of particulars and opening statement, did not demonstrate that defendants had breached duty owed to plaintiff. Perretti v New York, 132 A.D.2d 537, 517 N.Y.S.2d 272, 1987 N.Y. App. Div. LEXIS 49065 (N.Y. App. Div. 2d Dep't 1987).

Court properly dismissed complaint at completion of plaintiff's opening statement for failure to state cause of action where plaintiff's counsel, by admissions and statements, subverted plaintiff's alleged cause of action. Musso v St. Thomas Aquinas Church, 213 A.D.2d 529, 624 N.Y.S.2d 912, 1995 N.Y. App. Div. LEXIS 2921 (N.Y. App. Div. 2d Dep't 1995).

Mistrial was not warranted due to alleged reference in defendant's opening statement to plaintiff's prior lawsuits since statement that plaintiff "has been here before" was not sufficiently egregious. Stanton v Price Chopper Operating Co., 243 A.D.2d 934, 663 N.Y.S.2d 390, 1997 N.Y. App. Div. LEXIS 10352 (N.Y. App. Div. 3d Dep't 1997).

“Unit of time” measure of damages argument made by plaintiff’s counsel in his opening statement in personal injury action, whereby he told jury that he intended to ask them to award plaintiff specific dollar amount broken down by unit and multiples thereof, warranted declaration of mistrial in defendant’s favor because (1) jury’s mind was infected with respect to its essential task of using its own judgment, and (2) curative instruction would be rendered meaningless when plaintiff, on summation, would be entitled to renew his request for certain monetary damages. Miller v Owen, 184 Misc. 2d 570, 709 N.Y.S.2d 378, 2000 N.Y. Misc. LEXIS 217 (N.Y. Sup. Ct. 2000).

Mother and her infant’s motion in limine to bar a city and the city’s parks and recreation department from referring to the infant’s pretrial deposition during opening statements pursuant to N.Y. C.P.L.R. 3115(a), (d), and 4517(a)(1) lacked merit where the infant’s statements could properly be used to impeach her trial testimony in her personal injury action, arising from a fall at a playground; accordingly, the statements could be referred to during the city and parks department’s opening statements pursuant to N.Y. C.P.L.R. 4016(a). Carrasquillo v City of New York, 866 N.Y.S.2d 509, 22 Misc. 3d 171, 240 N.Y.L.J. 92, 2008 N.Y. Misc. LEXIS 6003 (N.Y. Sup. Ct. 2008).

To the extent that the pre-trial motion in limine sought to forbid plaintiff from mentioning a specific number in the opening statement, the pre-trial motion was denied under the Civil Practice Law and Rules because plaintiffs provided adequate record basis to conclude that plaintiffs’ counsel might mention a specific dollar figure of damages in the opening statement. Harnaraine v D. Lia Realty LLC, 78 Misc. 3d 952, 187 N.Y.S.3d 898, 2023 N.Y. Misc. LEXIS 815 (N.Y. Sup. Ct. 2023).

3. Closing statements; summations

Where summations of trial counsel so far emphasized the questions of credibility and the suggestions of collusion as to overshadow the basic issues of liability respecting the infant plaintiff’s cause of action, new trial, after verdict of no cause of action, would be ordered. Knapik

v Whitaker, 30 A.D.2d 915, 292 N.Y.S.2d 781, 1968 N.Y. App. Div. LEXIS 3316 (N.Y. App. Div. 3d Dep't 1968).

Trial court erred in permitting insured's counsel in summation, over insurer's objection, to comment on insurer's television advertising slogan so as to impugn insurer's business ethics and good faith, where neither propriety of advertising slogan nor insurer's good faith were relevant to issues in insured's action to recover under business interruption policy. Maple Leaf Motor Lodge, Inc. v Allstate Ins. Co., 53 A.D.2d 1045, 386 N.Y.S.2d 162, 1976 N.Y. App. Div. LEXIS 15858 (N.Y. App. Div. 4th Dep't 1976).

Plaintiffs in effect waived objection to remarks of defense attorney in summation by not moving for mistrial until after jury had returned verdict in defendant's favor. Dunne v Lemberg, 54 A.D.2d 955, 388 N.Y.S.2d 635, 1976 N.Y. App. Div. LEXIS 14862 (N.Y. App. Div. 2d Dep't 1976).

In a medical malpractice action, plaintiff's attorney's statement in summation to the jury that "simple justice requires for what he has been through and what he is going to have to go through because this is a permanent condition, $100,000? $200,000? $300,000?" was improper as it violated the purpose of CPLR § 3017 by indicating the value of the case to the jury. However, this impropriety was cured by counsel's implication that it was for the jury to decide the value of the case and by the court instruction that statements of counsel were not evidence and that the determination of damages was solely for the jury. Bechard v Eisinger, 105 A.D.2d 939, 481 N.Y.S.2d 906, 1984 N.Y. App. Div. LEXIS 21043 (N.Y. App. Div. 3d Dep't 1984).

In personal injury action, where jury award was so inadequate as to shock conscience of court, it was reversible error for trial court to refuse to allow plaintiff's attorney to place his opinion as to amount of plaintiff's damages before jury during summation. McFarland v Makowski, 112 A.D.2d 922, 492 N.Y.S.2d 439, 1985 N.Y. App. Div. LEXIS 52135 (N.Y. App. Div. 2d Dep't 1985).

Trial court issued erroneous instructions in automobile accident case when it told jury that plaintiff's request in closing argument for damages against town for negligence in maintaining highway "must not be considered" since plaintiff's request was proper legal argument by counsel

and could be considered by jury as such; however, error was harmless where (1) prior to plaintiff's request, court had correctly informed jury that they could consider summations so far "as they tend to explain the evidence to you," (2) jury did not impose liability upon town and thus never reached question of damages, and (3) it could not be shown that court's instructions so denigrated counsel as to destroy his credibility with jury. Sansone v Lake, 124 A.D.2d 990, 508 N.Y.S.2d 1021, 508 N.Y.S.2d 957, 1986 N.Y. App. Div. LEXIS 62310 (N.Y. App. Div. 4th Dep't 1986), app. denied, 69 N.Y.2d 611, 517 N.Y.S.2d 1025, 511 N.E.2d 84, 1987 N.Y. LEXIS 16848 (N.Y. 1987).

In action against dog owner for injuries from dog bite, it was not improper for defense counsel to refer in his summation to party who, jury could infer, would have been in position to confirm plaintiff's evidence as to viciousness of dog but who did not testify at trial, since counsel may comment on failure of adverse party to call witness who is under his control and whose testimony he could be expected to produce if it were favorable to him, although missing witness charge might not be warranted. De Vaul v Carvigo, Inc., 138 A.D.2d 669, 526 N.Y.S.2d 483, 1988 N.Y. App. Div. LEXIS 3250 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 914, 532 N.Y.S.2d 848, 529 N.E.2d 178, 1988 N.Y. LEXIS 2971 (N.Y. 1988), app. denied, 72 N.Y.2d 806, 532 N.Y.S.2d 847, 529 N.E.2d 177, 1988 N.Y. LEXIS 2457 (N.Y. 1988).

Medical malpractice plaintiffs were not entitled to new trial because defense counsel in summation compared their expert to television "gunman Palladin," stating that expert's hallmark was "Have opinion, will travel," since remark was isolated and was followed by court's prompt curative instructions. Abbott v New Rochelle Hospital Medical Center, 141 A.D.2d 589, 529 N.Y.S.2d 352, 1988 N.Y. App. Div. LEXIS 6587 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 808, 534 N.Y.S.2d 666, 531 N.E.2d 298, 1988 N.Y. LEXIS 3300 (N.Y. 1988).

New trial was not warranted in personal injury action on basis of comments by plaintiffs' counsel during summation regarding defendant's expert witness since, while comments were improper, offensive remarks were brief and did not have effect on jury's findings. Liebman v Otis Elevator

Co., 145 A.D.2d 546, 536 N.Y.S.2d 100, 1988 N.Y. App. Div. LEXIS 13612 (N.Y. App. Div. 2d Dep't 1988).

In action to recover for personal injuries allegedly sustained by pedestrian in accident with bus, defense counsel acted improperly, both during direct examination of her own witness and during summation, where counsel identified herself as co-employee of clerk testifying on behalf of defendant transportation authority, and counsel referred to transportation authority as “we” and “us” and referred to defense as “my side” of story; counsel improperly placed her own credibility on side of transportation authority and made herself unsworn witness. Sanchez v Manhattan & Bronx Surface Transit Operating Auth., 170 A.D.2d 402, 566 N.Y.S.2d 287, 1991 N.Y. App. Div. LEXIS 2466 (N.Y. App. Div. 1st Dep't 1991).

In personal injury action, defendant was prejudiced where plaintiffs’ counsel, in his summation, acted as unsworn witness, vouched for credibility of plaintiffs’ witnesses, accused defense witnesses of lying, and accused defendant’s medical expert of lying for pay; such conduct was not inadvertent or harmless, but was continual, calculated effort to influence jury by considerations which were not legitimately before it. Clarke v New York City Transit Authority, 174 A.D.2d 268, 580 N.Y.S.2d 221, 1992 N.Y. App. Div. LEXIS 874 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff’s counsel’s summation was highly prejudicial and inflammatory, and thus defendant was entitled to new trial where plaintiff’s counsel improperly intimated that defendant’s medical expert was unworthy of belief because he was compensated for his appearance at trial, she injected her own opinion in disagreement with defendant’s medical expert, and she disparaged another defense witness as “yahoo” and suggested that he was being coached. Rodriguez v New York City Hous. Auth., 209 A.D.2d 260, 618 N.Y.S.2d 352, 1994 N.Y. App. Div. LEXIS 11667 (N.Y. App. Div. 1st Dep't 1994).

Defense counsel’s summation comment that plaintiff had failed to advise defendants’ examining physician of plaintiff’s fall 3 years after accident was improper where physician did not testify, and counsel acted as unsworn witness as to facts not in evidence. It was improper for defense

counsel on summation to suggest that measure of damages should be based on jurors' work experience and financial status and that jurors should discount any future damages award to present value; it is not improper for defense counsel to suggest appropriate award, but it is extremely prejudicial to misrepresent method by which jury is to assess damages. Stangl v Compass Transp., 221 A.D.2d 909, 635 N.Y.S.2d 376, 1995 N.Y. App. Div. LEXIS 13388 (N.Y. App. Div. 4th Dep't 1995).

In malpractice case against certified public accounting firm and one of its employees, employee was entitled to new trial on basis of remarks by plaintiffs' attorney in summation erroneously stating that taxpayer-financed federal insurance was required to pay for accountant dishonesty, that employee's attorney had lied to jury, and that employee was "thief" and "crook"; prejudice was apparent despite absence of objection. Herbert H. Post & Co. v Sidney Bitterman, Inc., 219 A.D.2d 214, 639 N.Y.S.2d 329, 1996 N.Y. App. Div. LEXIS 2238 (N.Y. App. Div. 1st Dep't 1996).

Although summation delivered by plaintiffs' counsel in motor vehicle accident case was reprehensible in its irresponsible and unwarranted attacks on police witnesses, court's prompt and thorough curative instructions were sufficient to assure that defendants were not deprived of fair trial. Mena v New York City Transit Auth., 238 A.D.2d 159, 656 N.Y.S.2d 206, 1997 N.Y. App. Div. LEXIS 3208 (N.Y. App. Div. 1st Dep't 1997).

Court improperly had damages figures requested by plaintiff's counsel during summation, which were written on blackboard, transcribed onto piece of paper and submitted to jury, at its request, during deliberations; arguments made by counsel during summation are not evidence. Merenda v CONRAIL, 248 A.D.2d 684, 670 N.Y.S.2d 869, 1998 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 2d Dep't 1998).

II. Under Former Civil Practice Laws

4. Generally

There are exceptions to the right to open and close which are subject to the discretion of the judge. Fry v Bennett, 28 N.Y. 324, 28 N.Y. (N.Y.S.) 324, 1863 N.Y. LEXIS 74 (N.Y. 1863).

Generally the party opening is entitled to close. Elwell v Chamberlin, 31 N.Y. 611, 31 N.Y. (N.Y.S.) 611, 1864 N.Y. LEXIS 126 (N.Y. 1864).

A request for a ruling by the court as to the order in which counsel should address the jury could only properly be made after the whole evidence had been presented. Mead v Shea, 92 N.Y. 122, 92 N.Y. (N.Y.S.) 122, 1883 N.Y. LEXIS 127 (N.Y. 1883).

The right to open and close is determined by the pleadings at the time of the trial and cannot be altered by admissions made during its course; and where defendant denies in his answer the allegations of the complaint, the plaintiff has the right to open and close. Hollander v Farber, 102 N.Y.S. 506, 52 Misc. 507, 1907 N.Y. Misc. LEXIS 65 (N.Y. App. Term 1907).

The only limitation upon the right of a litigant to be represented by counsel at the trial is that stated in RCP 161. Bardar v Perrazzo, 157 N.Y.S. 886 (N.Y. App. Term 1916).

5. Plaintiff’s right to open and close

Where the making of a note is admitted, if the indorsement and delivery is denied, the plaintiff begins. Kenny v Lynch, 61 N.Y. 654, 1875 N.Y. LEXIS 458 (N.Y. 1875).

In an action upon a deed alleging a breach of covenant, where the answer admitted the conveyance but denied the other allegations, as the plaintiff had to prove the breach, he held the affirmative. Woolley v Newcombe, 87 N.Y. 605, 87 N.Y. (N.Y.S.) 605, 1882 N.Y. LEXIS 47 (N.Y. 1882).

The test of plaintiff’s right to open and close is, whether without any proof, and upon the pleadings, he is entitled to recover upon all the causes of action alleged in his complaint. Burke v National Liberty Ins. Co., 212 A.D. 738, 209 N.Y.S. 608, 1925 N.Y. App. Div. LEXIS 9543 (N.Y. App. Div. 1925).

In an action on a bond, given by a sheriff to indemnify him from damages and costs that might be incurred by reason of a levy and sale, the answer did not admit the delivery of the bond, and as the plaintiff was bound to prove that fact, he had the affirmative of the issue. Benedict v Penfield, 42 Hun 176 (N.Y. 1886).

The plaintiff has the affirmative where an answer sets up a counterclaim to the note sued on and admits all the allegations except the protest and notice thereof. Osgood v Wallack, 2 N.Y. St. 596.

6. Defendant's right to open and close

Where a complaint alleges a partnership and a sale of goods, and the answer denies the partnership but admits the sale and sets up an affirmative defense, the defendant has the opening and closing. Millerd v Thorn, 56 N.Y. 402, 56 N.Y. (N.Y.S.) 402, 1874 N.Y. LEXIS 138 (N.Y. 1874).

Where an answer admits all the allegations in the complaint necessary to the cause of action, and sets up an affirmative defense, the defendant has the affirmative of the issue. Murray v New York Life Ins. Co., 85 N.Y. 236, 85 N.Y. (N.Y.S.) 236, 1881 N.Y. LEXIS 75 (N.Y. 1881).

An unnecessary allegation in the complaint, though denied by the answer, does not affect the right of the defendant to the affirmative of the issue. Murray v New York Life Ins. Co., 85 N.Y. 236, 85 N.Y. (N.Y.S.) 236, 1881 N.Y. LEXIS 75 (N.Y. 1881).

A defendant sued as indorser of a promissory note, who denies none of the averments of the complaint but alleges that he was an accommodation indorser, that the note has been paid out of funds of the payee, that plaintiffs are not lawful holders of the note and that defendant is not indebted thereon, has the affirmative and reversal follows the denial of his right to open. Conselyea v Swift, 103 N.Y. 604, 9 N.E. 489, 103 N.Y. (N.Y.S.) 604, 4 N.Y. St. 278, 1886 N.Y. LEXIS 1098 (N.Y. 1886).

Where a material averment of a complaint is admitted by the answer and sought to be avoided by allegations of new matter, the affirmative of the issue is with defendant. Conner v Keese, 105 N.Y. 643, 11 N.E. 516, 105 N.Y. (N.Y.S.) 643, 7 N.Y. St. 200, 1887 N.Y. LEXIS 800 (N.Y. 1887).

Where in an action for services the only issue is the plea of payment, the defendant holds the affirmative. McElroy v Brooklyn U. G. R. Co., 120 N.Y. 640, 24 N.E. 1097, 120 N.Y. (N.Y.S.) 640, 1890 N.Y. LEXIS 1328 (N.Y. 1890).

A defendant who desires to take the right of opening and concluding must frame his pleadings with that view, and so as to present no issue upon any allegation of the complaint essential to the alleged cause of action, and unless this is done it is error to deny the right to plaintiff. Burke v National Liberty Ins. Co., 212 A.D. 738, 209 N.Y.S. 608, 1925 N.Y. App. Div. LEXIS 9543 (N.Y. App. Div. 1925).

Defendants given right to open and close where action in Municipal Court in City of New York in which plaintiff herein interposed counterclaim beyond jurisdiction of said court was consolidated with plaintiff’s subsequent action in the Supreme Court. Martin v Bull, 236 A.D. 637, 260 N.Y.S. 814, 1932 N.Y. App. Div. LEXIS 6058 (N.Y. App. Div. 1932), reh'g denied, 237 A.D. 873, 261 N.Y.S. 963, 1933 N.Y. App. Div. LEXIS 10772 (N.Y. App. Div. 1933).

In action upon a promissory note where sole defense is want or failure of consideration, defendant has right to open and close. James Conforti Const. Co. v Neek Realty Corp., 212 N.Y.S. 393, 125 Misc. 876, 1925 N.Y. Misc. LEXIS 1124 (N.Y. App. Term 1925).

The affirmative is with the plaintiff not the defendant, where the complaint averred a note and payment thereon within six years, and the answer denied each allegation. Redfield v Stitt, 10 N.Y. St. 366.

When the defendant insists that he holds the affirmative he must make it appear that he has admitted all of the plaintiff’s essential allegations, and he cannot call upon the court to make a critical examination of the pleadings to determine the matter. Claflin v Baere, 28 Hun 204 (N.Y.).

Where plaintiff sues on a promissory note as evidence of an existing debt, and in his opening states that he relies solely upon the note, the making of which is not denied, facts being alleged to show nothing is due thereon, the defendant should be allowed to open and close the case. Plenty v Rendle, 43 Hun 568, 7 N.Y. St. 268 (N.Y.).

7. Denial of right to open and close as ground for review

The right of the party who has the affirmative of the issues to open and close is a legal one and ground of exception and review. Millerd v Thorn, 56 N.Y. 402, 56 N.Y. (N.Y.S.) 402, 1874 N.Y. LEXIS 138 (N.Y. 1874); Heaton v Tracy, 3 N.Y.S. 824, 56 N.Y. Super. Ct. 327, 1889 N.Y. Misc. LEXIS 101 (N.Y. Super. Ct. 1889).

Where the burden of proof is on the defendant it is error to deny him the right of opening and closing to the jury. Plenty v Rendle, 43 Hun 568, 7 N.Y. St. 268 (N.Y.); Heaton v Tracy, 3 N.Y.S. 824, 56 N.Y. Super. Ct. 327, 1889 N.Y. Misc. LEXIS 101 (N.Y. Super. Ct. 1889).

Research References & Practice Aids

Jurisprudences:

105 NY Jur 2d Trial §§ 337., 340., 376. .

75A Am Jur 2d, Trial §§ 689.– 707.

5 Am Jur Trials 695., Courtroom Semantics.

6 Am Jur Trials 771., Nonjury Summations.

5 Am Jur Trials 305., Opening Statements—Defense View.

5 Am Jur Trials 285., Opening Statements—Plaintiff’s View.

5 Am Jur Trials 611., Presenting Plaintiff’s Case.

6 Am Jur Trials 807., Sample Summations in Personal Injury and Death Cases.

6 Am Jur Trials 731., Summations for the Defense.

6 Am Jur Trials 641., Summations for the Plaintiff.

Law Reviews:

The CPLR and the trial lawyer. 9 N.Y.L. Sch. L. Rev. 269.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4016, Opening and Closing Statements.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.02. Trials; general rules.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.07. Delivering Opening and Closing Statements.

Annotations:

Propriety of court's limitation of time allowed counsel for summation or argument in civil trial. 3 ALR3d 1341.

Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action. 5 ALR3d 1405.

Propriety and prejudicial effect of reference by plaintiff's counsel, in jury trial of personal injuries or death action, to amount of damages claimed or expected by his client. 14 ALR3d 541.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 ALR4th 840.

Matthew Bender's New York Checklists:

Checklist for Delivering Opening and Closing Statements and Objecting to Court Orders LexisNexis AnswerGuide New York Civil Litigation § 9.06.

Forms:

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 18:101 et seq .(trial generally).

Texts:

NY Pattern Jury Instructions 3d, PJI 2:277A.

2 New York Trial Guide (Matthew Bender) § 11.01.; 4 New York Trial Guide (Matthew Bender) §§ 90.10., 90.20., 90.21., 90.22.

Hierarchy Notes:

NY CLS CPLR, Art. 40