NY CLS CPLR R 3024

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Consolidated Laws Service **>**

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

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

R 3024. Motion to correct pleadings

(a) Vague or Ambiguous Pleadings. If a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response he may move for a more definite statement.

(b) Scandalous or Prejudicial Matter. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.

(c) Time Limits; Pleading After Disposition. A notice of motion under this rule shall be served within twenty days after service of the challenged pleading. If the motion is denied, the responsive pleading shall be served within ten days after service of notice of entry of the order and, if it is granted, an amended pleading complying with the order shall be served within that time.

History

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

Annotations

Notes

Prior Law:

Earlier statutes and rules: CPA § 283; RCP 102, 103, 105; CCP §§ 497, 537, 538, 546, 548; Code Proc §§ 160, 172; Gen Rules Pr 22.

Advisory Committee Notes:

This rule reflects a basic judgment that nothing is gained in the way of speedy and accurate disposition of a case by disputes over the formal propriety of the allegations. This is the same judgment that underlies the requirement in CPLR § 3026 that nonprejudicial defects are to be ignored in construing pleadings. Of course, shoddy pleading should be discouraged. There are certain corrective motions which are necessary. These are contained in this rule.

A pleading must inform the opponent of the case against him with sufficient clarity to enable him to answer. To that end subd (a) of this rule adopts, with minor language changes, the grounds for a motion for more definite statement as formulated in Federal rule 12(e). The subject was formerly covered by RCP 102.

Of the many types of matter that may be stricken according to the traditional formulation of the codes, only scandalous or prejudicial allegations do any serious harm, and even such matters should not be removed from the case if they are relevant. Subd (b) of this rule departs from former RCP 103 requiring that allegations must be “unnecessarily inserted” as well as scandalous or prejudicial to warrant striking, and in omitting any provision for striking allegations that are sham, frivolous, irrelevant, redundant, repetitious, unnecessary or impertinent. The latter defects alone do not appear to warrant a separate motion.

The time limitations of subd (c) of this rule are based upon CPA § 283 and RCP 105.

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I. Under CPLR

A. In General

1. Generally

Where defendant moved for a dismissal of a complaint for insufficiency and affidavits were properly submitted upon the motion to dismiss, the court could treat the motion as one for partial summary judgment and could order dismissed that part of plaintiff’s claim represented by allegations for which there could be no recovery. Amaducci v Metro. Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322, 1969 N.Y. App. Div. LEXIS 3138 (N.Y. App. Div. 1st Dep't 1969).

In an action by a former tenant of a rent controlled apartment against a city and the owner of a nursing home business, in which the tenant alleged that she was harassed in order to force her

to vacate a premises to make room for a proposed extension of the nursing home business, the city's motion to dismiss the complaint would be granted where the complaint failed to allege what the city did or threatened to do that was a violation of the tenant's rights; the motion of defendants other than the city to dismiss the complaint for failure to comply with the statutory requirements of pleadings would be granted where the complaint contained many obviously irrelevant and prejudicial allegations as well as much trivia and where, after 19 pages of allegations, the complaint for the first time referred to 11 separate causes of action without any indication of which allegations of the 19 preceding pages related to any particular cause of action. Barsella v New York, 82 A.D.2d 747, 440 N.Y.S.2d 12, 1981 N.Y. App. Div. LEXIS 14378 (N.Y. App. Div. 1st Dep't 1981).

Order which refuses to strike scandalous or prejudicial matter from pleading is not appealable as of right. Drapkin v Zingale, 148 A.D.2d 660, 540 N.Y.S.2d 202, 1989 N.Y. App. Div. LEXIS 4216 (N.Y. App. Div. 2d Dep't 1989).

CLS CPLR § 3024 applies to motion to correct pleadings and contemplates order for more definite statement; statute is not basis for dismissal of complaint. Timothy v Peterson, 202 A.D.2d 232, 608 N.Y.S.2d 450, 1994 N.Y. App. Div. LEXIS 1995 (N.Y. App. Div. 1st Dep't 1994).

Complaint, although long and somewhat inartfully drawn, should not have been dismissed since it complied with requirements of CLS CPLR §§ 3013 and 3014, 8 of 12 defendants answered complaint, and none of defendants moved under CLS CPLR § 3024 to correct pleadings. Estate of Unterweiser v Town of Hempstead, 235 A.D.2d 453, 652 N.Y.S.2d 1007, 1997 N.Y. App. Div. LEXIS 410 (N.Y. App. Div. 2d Dep't 1997).

In law firm's action for determination and enforcement of charging lien, firm was not entitled to amend caption to delete individual's name from firm's title on ground that individual was not partner of firm where firm had included that name in title of action; person who has represented himself to be partner in existing partnership is agent of persons consenting to such representation and binds them to same extent and in same manner as partner in fact with respect to persons relying on representation. Grutman Katz Greene & Humphrey v Goldman,

251 A.D.2d 7, 673 N.Y.S.2d 649, 1998 N.Y. App. Div. LEXIS 6377 (N.Y. App. Div. 1st Dep't 1998).

Indefinite and irrelevant material in complaint will be disregarded by the court on a corrective motion, absent a showing of prejudice to a substantial right. Hewitt v Maass, 41 Misc. 2d 894, 246 N.Y.S.2d 670, 1964 N.Y. Misc. LEXIS 2096 (N.Y. Sup. Ct. 1964).

An allegation as to prior existing judgments contained in the old § 174 but not in the new § 211 was unnecessary but was harmless, however, neither a judgment dismissing the wife's complaint in a separation action brought by her nor the order of the Family Court denying the wife's petition for a "means" allowance is a "judgment . . . in favor of the defendant for a divorce". Shulsky v Shulsky, 63 Misc. 2d 642, 312 N.Y.S.2d 944, 1970 N.Y. Misc. LEXIS 1491 (N.Y. Sup. Ct. 1970).

Fact that defendant had unsuccessfully moved for an order requiring plaintiff to serve an amended complaint separately stating and numbering each cause of action did not preclude defendant from subsequently maintaining a motion to dismiss for failure to state cause of action. Drago v Buonagurio, 89 Misc. 2d 171, 391 N.Y.S.2d 61, 1977 N.Y. Misc. LEXIS 1855 (N.Y. Sup. Ct. 1977), rev'd, 61 A.D.2d 282, 402 N.Y.S.2d 250, 1978 N.Y. App. Div. LEXIS 9735 (N.Y. App. Div. 3d Dep't 1978).

2. Motion for more definite statement

While § 3014 requires causes of action to be separately stated and numbered, motions thereunder are not specifically authorized, but in a proper case the CPLR permits motions to be made under subd (a) of this section for a more definite statement "which would have the same practical effect as a motion to state and number separately." Weicker v Weicker, 26 A.D.2d 39, 270 N.Y.S.2d 640, 1966 N.Y. App. Div. LEXIS 4031 (N.Y. App. Div. 1st Dep't 1966).

A complaint which merely averred that plot owners were adversely affected by an arbitration agreement which prevented a cemetery corporation from engaging in certain prohibited activities

and provided that the agreement was to remain in effect until the cemetery corporation could demonstrate that without engaging in those activities it could not maintain itself and that plot owners were adversely affected was clearly insufficient, and plaintiff was given an opportunity to replead. Cypress Hills Cemetery v Werner & Acker Cypress Hills Florists, Inc., 27 A.D.2d 732, 277 N.Y.S.2d 27, 1967 N.Y. App. Div. LEXIS 4914 (N.Y. App. Div. 2d Dep't 1967).

An order was modified compelling plaintiff to separately state and number all causes of action alleged in three causes of action to the extent that plaintiffs were directed to serve a further amended complaint making the third cause of action more definite and certain by stating the amount of loans made to plaintiff by defendants which he claims were usurious, when loans were made, the respect in which the loans were usurious and the amount of principal and interest repaid on the loans. Lence v Sheldon, 34 A.D.2d 966, 312 N.Y.S.2d 725, 1970 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 2d Dep't 1970).

Where complaint reciting alleged fraudulent acts resembled a proceeding under the Debtor and Creditor Law to set aside transfer of assets, but was not clear as to what theory was basis for claim, plaintiff was given an opportunity to replead where it was not possible to ascertain from complaint as drawn whether defendant’s motion to dismiss for failure to state a cause of action could have been granted. Untermeyer v Myriad Investors Corp., 43 A.D.2d 525, 348 N.Y.S.2d 779, 1973 N.Y. App. Div. LEXIS 3181 (N.Y. App. Div. 1st Dep't 1973).

In action pursuant to General Business Law Article 25, defendant was not required to move for dismissal (CPLR § 3211, subd a), or for a more definite complaint (CPLR § 3024, subd a), where plaintiff failed to allege a libel cause of action (CPLR § 3016, subd a). Randaccio v Retail Credit Co., 43 A.D.2d 798, 350 N.Y.S.2d 255, 1973 N.Y. App. Div. LEXIS 2905 (N.Y. App. Div. 4th Dep't 1973).

Complaint of an insurance company, as assignee and subrogee, against defendant to recover losses suffered by insured might satisfactorily set forth the causes of action and, if so, defendant was given leave to withdraw its motion to compel insurer to state separately and more definitely the allegations in complaint in which event defendant would be given further leave to answer

complaint, and Special Term order granting motion of defendant with leave to plaintiff to obtain discovery in order to prepare such complaint would have no further effect. National Surety Corp. v Coopers & Lybrand, 60 A.D.2d 522, 399 N.Y.S.2d 685, 1977 N.Y. App. Div. LEXIS 14418 (N.Y. App. Div. 1st Dep't 1977).

In action charging town supervisor and zoning officer with series of malicious and wrongful acts in furtherance of conspiracy to cause plaintiffs financial harm, initial complaint was not specific enough to allow defendants to frame reasonable response where it contained rambling narrative of defendants' wrongdoing dating back to 1982, without indicating what portion of $1.7 million in asserted damages resulted from each of allegedly tortious acts or extent to which each of 10 plaintiffs was harmed thereby. Della Villa v Constantino, 246 A.D.2d 867, 668 N.Y.S.2d 724, 1998 N.Y. App. Div. LEXIS 513 (N.Y. App. Div. 3d Dep't 1998).

Court erred in granting plaintiff's motion to amend complaint to add breach of contract action, based on his claim that defendant breached its contract of sale with him by failing to terminate existing proprietary lease on subject apartment, since plaintiff was party to sale agreement only and was neither party to nor intended third-party beneficiary of existing proprietary lease, and thus he was not entitled to premise claim on its termination provisions, which were not incorporated into contract of sale; however, leave would be granted for plaintiff to replead action, if any, seeking return of his down payment to defendant. Leonard v Kanner, 248 A.D.2d 260, 670 N.Y.S.2d 433, 1998 N.Y. App. Div. LEXIS 2658 (N.Y. App. Div. 1st Dep't), app. dismissed, 92 N.Y.2d 947, 681 N.Y.S.2d 477, 704 N.E.2d 230, 1998 N.Y. LEXIS 3992 (N.Y. 1998).

Where defendants are entitled to more definite statements of allegations contained in the complaint, a motion under subd (a) of CPLR Rule 3024 will lie. Huntington Utilities Fuel Corp. v McLoughlin, 45 Misc. 2d 79, 255 N.Y.S.2d 679, 1965 N.Y. Misc. LEXIS 2370 (N.Y. Sup. Ct. 1965).

Where the plaintiff asserts that the defendant's answer is unclear or incomplete in some respects, its remedy is to correct the answer under subd (a) of this section rather than to demand a bill of particulars for items not even alleged. General Precision, Inc. v Ametek, Inc., 45

Misc. 2d 451, 257 N.Y.S.2d 120, 1965 N.Y. Misc. LEXIS 2280 (N.Y. Sup. Ct.), aff'd, 24 A.D.2d 757, 263 N.Y.S.2d 470, 1965 N.Y. App. Div. LEXIS 3338 (N.Y. App. Div. 2d Dep't 1965).

Although there were 64 defendants and the time period covered by the allegations of plaintiff's complaint was 27 years, where the complaint charged that defendants were guilty of a conspiracy in violation of the state anti-trust laws, and sufficiently alleged the formation of the conspiracy and overt acts in furtherance thereof, the complaint was sufficient; and defendants' motion to compel plaintiff to serve an amended complaint was denied. State v New York Movers Tariff Bureau, Inc., 48 Misc. 2d 225, 264 N.Y.S.2d 931, 1965 N.Y. Misc. LEXIS 1442 (N.Y. Sup. Ct. 1965).

The plaintiff's motion to dismiss a defense entered in his action to foreclose a mechanic's lien that before notice of the lien was filed and without knowledge of it, the defendant contractor paid in full for the foundation for which plaintiff was alleged to have supplied materials was denied, where although the defense of payment was stated in general terms, it was sufficient to give notice of the transaction intended to be proved. The court noted that plaintiff could obtain further specification by use of appropriate disclosure devices or by a motion for a more definite statement. Admiral Transit Mix Corp. v Sagg-Bridgehampton Corp., 56 Misc. 2d 47, 287 N.Y.S.2d 751, 1968 N.Y. Misc. LEXIS 1727 (N.Y. Sup. Ct. 1968).

Where the complaint in a proceeding pursuant to Article 3-A of the Lien Law in which the plaintiff sought an accounting of funds alleged that between certain dates the plaintiff had supplied steel to one of the defendant corporations to be used by it in the construction and improvement of real property and that there remained a certain amount due and owing to it for such steel, such allegation, although general, sufficiently stated a single cause of action for the cost of the goods sold and delivered to such defendant, and the plaintiff was not required, as contended by the defendant-assignee of such corporation's assets, to set forth the separate parcels of real property for which the plaintiff allegedly was a materialman, especially since such information could be obtained in a bill of particulars or any other of the existing pre-trial devices available to

amplify pleadings. Seneca Steel Service, Inc. v Northern Financial Corp., 63 Misc. 2d 1086, 314 N.Y.S.2d 304, 1970 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1970).

Plaintiff State of New York, which served a lengthy complaint on defendants primarily alleging that defendants, in connection with the operation of a nursing home, participated in a "consipiracy to defraud" the State by making certain unnecessary or excessive disbursements and payments and then making claims for reimbursement of such improper expenditures from the Medicaid program, is directed to serve an amended complaint (CPLR 3024, subd [a]) separately stating and numbering its causes of action against each separately named defendant. State v Estate of Frankel, 94 Misc. 2d 105, 404 N.Y.S.2d 954, 1978 N.Y. Misc. LEXIS 2205 (N.Y. Sup. Ct.), rev'd, 65 A.D.2d 788, 410 N.Y.S.2d 321, 1978 N.Y. App. Div. LEXIS 13651 (N.Y. App. Div. 2d Dep't 1978).

3. Timeliness

Since the paramount intendment of the CPLR is that defendant should have priority of examination, the ten-day extension granted by subdivision (c) of this section should be equated with any extension granted by stipulation, and where the time for defendants to answer or move against the complaint was extended by stipulation, and prior to such expiration defendants moved to make the complaint more definite, plaintiffs' notice to examine the respective defendants, made during the pendency of defendants' motion for a more definite complaint, should have been vacated upon defendants' motion therefor. A motion to make a pleading more definite does not automatically stay disclosure proceedings as is the case as to those motions specified in CPLR 3214(b). Fund of Funds, Ltd. v Waddell & Reed, Inc., 26 A.D.2d 809, 274 N.Y.S.2d 177, 1966 N.Y. App. Div. LEXIS 3322 (N.Y. App. Div. 1st Dep't 1966).

Defendant who failed to move to have plaintiff's causes of action separately stated and numbered or otherwise clarified waived the right to so move, and eight years later when the case was about to be reached for trial, plaintiff could not be required to amend the complaint.

Albemarle Theatre, Inc. v Bayberry Realty Corp., 27 A.D.2d 172, 277 N.Y.S.2d 505, 1967 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 1st Dep't 1967).

In tenant's action against landlord for fall on landlord's premises, landlord's "supplemental" bill of particulars, which actually was amended bill of particulars, alleging for first time that tenant was intoxicated at time of accident, was nullity where it was served without leave of court and after filing of note of issue. Boland v Koppelman, 251 A.D.2d 176, 674 N.Y.S.2d 349, 1998 N.Y. App. Div. LEXIS 7305 (N.Y. App. Div. 1st Dep't 1998).

Although plaintiff properly demonstrated that defendant's motion to strike certain allegations of the complaint as prejudicial was untimely, where the continuation of the complaint without a paring of the specified allegations would be prejudicial to the defendant and acceptance and approval of the corrective motion would not correspondingly operate to the prejudice of the plaintiff, the motion to strike was granted. Szolosi v Long Island R. R. Co., 52 Misc. 2d 1081, 277 N.Y.S.2d 587, 1967 N.Y. Misc. LEXIS 1748 (N.Y. Sup. Ct. 1967).

B. Motion To Strike

4. Generally

Where the allegations of plaintiff's complaint consisted of a recital of events that were unnecessary and possibly prejudicial to the defendant, those averments were stricken under CPLR 3024(b). Pearlberg v Lacks, 23 A.D.2d 834, 259 N.Y.S.2d 659, 1965 N.Y. App. Div. LEXIS 4152 (N.Y. App. Div. 1st Dep't 1965).

The prior disposition of a motion to strike prejudicial matter is not the law of the case as to the sufficiency of a claim for injunctive relief. Weicker v Weicker, 28 A.D.2d 138, 283 N.Y.S.2d 385, 1967 N.Y. App. Div. LEXIS 3336 (N.Y. App. Div. 1st Dep't 1967), aff'd, 22 N.Y.2d 8, 290 N.Y.S.2d 732, 237 N.E.2d 876, 1968 N.Y. LEXIS 1415 (N.Y. 1968).

Decision to strike allegations of employer's milk adulteration in action against employer for breach of employment contract did not preclude plaintiff employee from raising such issue at trial, and there was thus no prejudice to plaintiff as result of order striking such allegations, and trial court did not abuse its discretion in entering such order. Wegman v Dairylea Cooperative, Inc., 50 A.D.2d 108, 376 N.Y.S.2d 728, 1975 N.Y. App. Div. LEXIS 11450 (N.Y. App. Div. 4th Dep't 1975), app. dismissed, 38 N.Y.2d 918, 382 N.Y.S.2d 979, 346 N.E.2d 817, 1976 N.Y. LEXIS 2359 (N.Y. 1976).

Ordinarily the only issue presented on a motion to strike an affirmative defense is whether there is any legal or factual basis for the assertion of the defense. People v Zachary, 51 A.D.2d 1011, 381 N.Y.S.2d 112, 1976 N.Y. App. Div. LEXIS 11774 (N.Y. App. Div. 2d Dep't 1976).

In a medical malpractice action for the wrongful death and conscious pain and suffering of a decedent, Special Term erred in denying defendant's motion to strike a portion of the plaintiff's bill of particulars, where the complaint clearly sought recovery for loss of consortium in the wrongful death action on behalf of persons who are not distributees of the estate of the decedent and no such recovery on behalf of such nondistributees is permissible, as a matter of law, pursuant to EPTL § 5-4.1. Close v Nathan Littauer Hospital, 90 A.D.2d 580, 456 N.Y.S.2d 134, 1982 N.Y. App. Div. LEXIS 18644 (N.Y. App. Div. 3d Dep't 1982).

In a personal-injury action arising from an automobile accident that allegedly occurred when a utility company truck caused a cab to veer into another car, which crossed a city street divider and hit plaintiff, a new trial would be ordered on the issue of apportionment of liability between the city and the utility company, since the trial court erred in denying the city's motion to conform its pleadings to evidence, adduced for the first time at trial, that the driver of the utility truck was guilty of vehicular negligence, where in denying the motion and accepting the utility company's claim of prejudice, the court prevented the city from attempting to diminish its liability by putting more of the blame on the utility company, where the utility company was not prejudiced, in that, even though the city's cross-claim against the company did not explicitly spell out a claim of vehicular negligence on the company's part, the city's general allegations of negligence would

encompass such a claim and thus gave the company notice of the issue. Moreover, even if the city's cross-claim did not support a claim of vehicular negligence, the court should have granted the city's motion to conform the pleadings to the proof, so that the vehicular negligence theory could have gone to the jury. La Rocca v New York, 91 A.D.2d 940, 458 N.Y.S.2d 550, 1983 N.Y. App. Div. LEXIS 16229 (N.Y. App. Div. 1st Dep't 1983).

In libel action, university coach's allegation that newspaper had "engaged in an intentional, callous, malicious and unjustified vendetta" against coach in falsely reporting non-existent incident of coach's intoxication had potential for prejudicing jury and thus should be stricken, despite purpose of "vendetta" allegation to establish intentional misconduct so as to justify punitive damages, since proof of vendetta was not required to demonstrate intent on newspaper's part and such allegation extended beyond scope of allegedly libelous articles. Talbot v Johnson Newspaper Corp., 124 A.D.2d 284, 508 N.Y.S.2d 80, 1986 N.Y. App. Div. LEXIS 61325 (N.Y. App. Div. 3d Dep't 1986).

Court should have granted defendant's motion to strike demand for punitive damages in defamation action where there was nothing to indicate that defendant engaged in any conduct warranting such award. Death v Salem, 143 A.D.2d 253, 532 N.Y.S.2d 285, 1988 N.Y. App. Div. LEXIS 8916 (N.Y. App. Div. 2d Dep't 1988).

It was abuse of discretion to mark plaintiffs' motion to strike affirmative defense off-calendar, and to grant defendants' cross-motion to dismiss, where (1) at scheduled hearing, court noted that matter had previously been adjourned twice and marked it "final" for second calendar call ½ hour later, (2) unable to reach courtroom in time, plaintiffs' counsel called defendants' counsel and asked that he appear and request adjournment on consent, (3) defendants' counsel complied, but was unsuccessful in obtaining adjournment, and (4) after motion was marked off calendar, defendants' counsel requested that cross-motion to dismiss be granted; although court was not bound by parties' consent to adjourn, plaintiff's counsel was entitled to reasonable time to travel from office to courthouse before imposition of such drastic sanction since 2 prior adjournments had been at defendants' request and there was no indication of dilatory tactics or

abandonment by plaintiffs. Bauer v Claridge at Park Place, Inc., 181 A.D.2d 566, 581 N.Y.S.2d 55, 1992 N.Y. App. Div. LEXIS 3923 (N.Y. App. Div. 1st Dep't 1992).

In action for injuries sustained by 16-year-old boy in motor vehicle accident, defendant was entitled to have allegation stricken from bill of particulars which stated that driver of vehicle in which boy was passenger was negligent in failing to ensure that boy wore safety belt, since CLS Veh & Tr § 1229-c(3) does not impose duty on driver to require passenger who is 16 or older to wear safety belt or to ensure that passenger is restrained by safety belt before operating vehicle. Stewart v Taylor, 193 A.D.2d 1078, 598 N.Y.S.2d 627, 1993 N.Y. App. Div. LEXIS 5702 (N.Y. App. Div. 4th Dep't 1993).

Evidence that plaintiff driver in negligence action had been charged with driving while intoxicated was properly stricken from the record where that criminal charge had since been dismissed. 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).

In action under CLS Gen Mun § 205-e(1) by police officer whose patrol car, parked on shoulder of thruway, was struck by car that skidded off thruway in severe snow storm, officer was entitled to have stricken affirmative defenses of assumption of risk, contributory negligence, and culpable conduct, because § 205-e imposes strict liability. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

In action charging town supervisor and zoning officer with having engaged in series of malicious and wrongful acts in furtherance of conspiracy to cause plaintiffs financial harm, allegations in original complaint regarding nature of defendants' personal relationship were properly ordered to be omitted from amended complaint where those allegations were irrelevant to purported abuses of power and process that formed basis for charges of conspiracy and prima facie tort. Della Villa v Constantino, 246 A.D.2d 867, 668 N.Y.S.2d 724, 1998 N.Y. App. Div. LEXIS 513 (N.Y. App. Div. 3d Dep't 1998).

Although plaintiffs never sought leave to amend complaint by written notice of motion, amended complaint was not nullity, and thus IAS Court properly granted their motion to strike affirmative defense of lack of subject matter jurisdiction, where defendants' counsel were present when court granted plaintiffs' oral request to add additional claims and parties, counsel had full and fair opportunity to object to relief requested, court's explicit grant of request on record was binding on parties even though not reduced to formal written order, and defendants could have appealed grant by having relevant portions of conference transcript ordered. Domansky v Berkovitch, 251 A.D.2d 3, 673 N.Y.S.2d 646, 1998 N.Y. App. Div. LEXIS 6369 (N.Y. App. Div. 1st Dep't 1998).

Defendant's motion to strike complaint was properly denied, absent evidence that plaintiff's late filing of note of issue was willful or contumacious. New v Scores Entertainment, Inc., 255 A.D.2d 108, 679 N.Y.S.2d 382, 1998 N.Y. App. Div. LEXIS 11652 (N.Y. App. Div. 1st Dep't 1998).

City transit authority was entitled to summary judgment dismissing personal injury action, and plaintiffs' motion to strike answer was properly denied, where woman fell or was pushed from elevated subway platform and landed on infant plaintiff, 43-inch-high platform railing should have afforded reasonable protection against accidental fall, and evidence was at least equally compelling that woman fell despite, not because of, railing, by reason of volitional conduct for which authority could not be held accountable. People v Velez, 255 A.D.2d 146, 679 N.Y.S.2d 579, 1998 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 858, 688 N.Y.S.2d 506, 710 N.E.2d 1105, 1999 N.Y. LEXIS 664 (N.Y. 1999).

Parts of medical malpractice plaintiff's bill of particulars referring to fraudulent conduct were properly stricken where they described physician's concealment or failure to disclose his own malpractice, and plaintiff did not allege available, efficacious, medical remedy or cure for injuries allegedly caused by diversion from treatment as result of concealment. Congero v Sider, 255 A.D.2d 415, 680 N.Y.S.2d 563, 1998 N.Y. App. Div. LEXIS 12018 (N.Y. App. Div. 2d Dep't 1998).

In light of CLS Dr & Cr § 279(d), defendants were not entitled to have plaintiff's demand for constructive trust as remedy stricken from complaint alleging fraudulent conveyances. Marine Midland Bank v Zurich Ins. Co., 263 A.D.2d 382, 693 N.Y.S.2d 552, 1999 N.Y. App. Div. LEXIS 7806 (N.Y. App. Div. 1st Dep't 1999).

In tax certiorari proceeding alleging overassessment of taxpayers' motel, restaurant, and parking lot properties, court properly refused to strike taxpayers' appraisal reports on ground that they did not separately analyze and set forth fair market value of land component of disputed parcels where both expert appraiser and certified public accountant testified that calculations supporting their income capitalization approach to valuation reflected income from both land and improvements thereon, thus precluding need for separate valuation when using that methodology, which is preferred method when reviewing income-producing properties. Schachenmayr v Board of Assessors, 263 A.D.2d 731, 693 N.Y.S.2d 701, 1999 N.Y. App. Div. LEXIS 8023 (N.Y. App. Div. 3d Dep't 1999).

Personal injury plaintiff was not entitled to have stricken defendant corporation's affirmative defense based on exclusive remedy provisions of Workers' Compensation Law where there was triable issue of fact as to whether defendant was alter ego of plaintiff's employer. Roche v T.G. Realty, Inc., 266 A.D.2d 367, 697 N.Y.S.2d 520, 1999 N.Y. App. Div. LEXIS 11530 (N.Y. App. Div. 2d Dep't 1999).

Plaintiffs' request for punitive damages would be reinstated in connection with their tort claims, without prejudice to later motion to strike or dismiss, where requirement, for award of punitive damages, that defendant's conduct be directed at public generally applies only in breach of contract cases, not in tort actions for breach of fiduciary duty. Sherry Assocs. v Sherry-Netherland, Inc., 273 A.D.2d 14, 708 N.Y.S.2d 105, 2000 N.Y. App. Div. LEXIS 6105 (N.Y. App. Div. 1st Dep't 2000).

In medical malpractice action, plaintiff's "supplemental" bill of particulars was properly characterized as "amended" bill and was properly stricken as prejudicial to defendants where plaintiff sought to extend period of liability from 3-month period in 1987-1988 corresponding to

his first hospital admission to 5 years following into 1993, and amended bill was not served until eve of trial more than 4 years after original bill was served. Court properly struck, as prejudicial to defendants, part of plaintiff's supplemental bill of particulars alleging injuries related to his social withdrawal, depression, and anxiety where any such injuries were not sequela of original injury involving orthopedic surgery and, if alleged to be "mental anguish," were not amplified until over 10 years after acts of malpractice alleged therein and in original bill of particulars. Watson v City of New York, 273 A.D.2d 115, 709 N.Y.S.2d 546, 2000 N.Y. App. Div. LEXIS 7130 (N.Y. App. Div. 1st Dep't 2000).

Proper sanction for defendants' failure to produce particular defendant for examination before trial within period set by motion court was preclusion of use of that defendant's testimony at trial, not striking of defendants' answer, in light of policy favoring resolution of disputes on their merits, lack of prejudice to plaintiffs, relatively short delay in bringing underlying motion to vacate conditional order of dismissal, and absence of willful or contumacious conduct by defendants. Green v Mohamed, 275 A.D.2d 599, 712 N.Y.S.2d 861, 2000 N.Y. App. Div. LEXIS 9031 (N.Y. App. Div. 1st Dep't 2000).

In an action asserting defendant's negligence in permitting an unskilled chiropractic student to manipulate plaintiff's spine in such a manner as to cause her injury, plaintiff's additional allegations charging that defendants invited persons to study the practice of chiropractic, permitted students to practice chiropractic techniques upon clinic patients, allowed students without comprehensive knowledge or experience and without proper supervision to manipulate the spine of clinic applicants, and failed to require of the students a comprehensive examination of their proficiency were stricken pursuant to CPLR 3024(b). Guiliana v Chiropractic Institute of New York, 45 Misc. 2d 429, 256 N.Y.S.2d 967, 1965 N.Y. Misc. LEXIS 2219 (N.Y. Sup. Ct. 1965).

Pleadings shall contain a plain and concise statement of facts sufficiently particular to give the court and parties notice of the transactions and occurrences intended to be proved and the material elements of each cause of action, but a photograph of the sidewalk upon which plaintiff

allegedly fell may not be included as part of the complaint. English v Genovese, 49 Misc. 2d 321, 267 N.Y.S.2d 283, 1966 N.Y. Misc. LEXIS 2168 (N.Y. Sup. Ct. 1966).

Affirmative defense alleging defective service which was raised in answer interposed exclusively in response to process served pursuant to CLS CPLR § 308(1) would be ordered stricken where defendant did not object to affidavit of service, since affidavit of service regular on its face is prima facie proof of service which cannot be overcome by silence, and failure to raise issue of fact with respect thereto is dispositive. Messina v County of Nassau, 147 Misc. 2d 889, 557 N.Y.S.2d 837, 1990 N.Y. Misc. LEXIS 288 (N.Y. Sup. Ct. 1990).

5. Admission

CPLR does not provide for striking of improper denials in answer; however, improper denials may be deemed admissions. Gilberg v Lennon, 193 A.D.2d 646, 597 N.Y.S.2d 462, 1993 N.Y. App. Div. LEXIS 4701 (N.Y. App. Div. 2d Dep't 1993).

6. Appealability of as right

In an action to recover on contracts of fire insurance, plaintiff’s appeal from a trial court order to strike a certain paragraph of the complaint would be dismissed since the order was not appealable as of right. Ocean-Clear, Inc. v Continental Casualty Co., 91 A.D.2d 680, 457 N.Y.S.2d 431, 1982 N.Y. App. Div. LEXIS 19557 (N.Y. App. Div. 2d Dep't 1982).

College’s appeal from an order entered in its action arising out of a boiler accident that granted a construction manager’s motion to strike certain prejudicial matter from the college’s fourth amended complaint, made effectively under N.Y. C.P.L.R. 3024(b), was properly dismissed because no appeal lay of right under N.Y. C.P.L.R. 5701(b)(3) and leave to appeal had not been granted. Manhattanville Coll. v James John Romeo Consulting Engr., P.C., 28 A.D.3d 613, 813 N.Y.S.2d 767, 2006 N.Y. App. Div. LEXIS 4552 (N.Y. App. Div. 2d Dep't 2006), app. dismissed, 8 N.Y.3d 852, 830 N.Y.S.2d 695, 862 N.E.2d 787, 2007 N.Y. LEXIS 239 (N.Y. 2007).

7. Article 78 proceeding

In Article 78 proceeding to review village board of zoning appeals' grant of application for Freshwater Wetlands Permit, Supreme Court properly denied petitioners' motion to strike certain affidavits submitted on behalf of board where those affidavits contained no new factual assertions, and one affidavit merely informed Supreme Court that, based on revisions of applicant's plans, several of petitioners' claims were moot. Kam Hampton I Realty Corp. v Board of Zoning Appeals, 273 A.D.2d 387, 710 N.Y.S.2d 915, 2000 N.Y. App. Div. LEXIS 7041 (N.Y. App. Div. 2d Dep't 2000).

8. Class action

Although plaintiffs were barred by CLS CPLR § 901(b) from maintaining class action for minimum and treble damages imposed by CLS Gen Bus § 349(h), CLS CPLR § 901(b) was no longer applicable where plaintiffs had consented to strike cause of action seeking that relief and to limit their demand to actual damages, and that cause of action could be maintained as class action. After class plaintiffs consented to strike cause of action for minimum and treble damages imposed by CLS Gen Bus § 349(h) and to limit their demand to actual damages, any class member wishing to pursue statutory minimum and treble damages would be allowed to opt out of class and bring individual action. Ridge Meadows Homeowners' Ass'n v Tara Dev. Co., 242 A.D.2d 947, 665 N.Y.S.2d 361, 1997 N.Y. App. Div. LEXIS 10548 (N.Y. App. Div. 4th Dep't 1997).

9. Conclusory allegation

In action for breach of health insurance contract, court properly granted insurer's motion to strike insured's demand for punitive damages where demand was premised on mere conclusory allegation that insurer's failure to pay certain claims under policy was "arbitrary, capricious, in bad faith, and in violation of law." Aldrich v Aetna Life & Casualty Ins. Co., 140 A.D.2d 574, 528 N.Y.S.2d 639, 1988 N.Y. App. Div. LEXIS 5633 (N.Y. App. Div. 2d Dep't 1988).

10. Discovery availability

Defendant’s answer in personal injury action was properly stricken where he disappeared or made himself unavailable for scheduled examinations before trial. Aliano v Lamaina, 255 A.D.2d 276, 679 N.Y.S.2d 319, 679 N.Y.S.2d 320, 1998 N.Y. App. Div. LEXIS 11565 (N.Y. App. Div. 2d Dep't 1998).

Motion by defendant, in personal injury action, to strike note of issue on ground that discovery had not been completed was properly denied where motion was made in 1997, defendant failed to request vacatur of note of issue in 1995 when it moved to vacate default judgment, and defendant had reasonable time to conduct discovery proceedings. Cornelius v Friends of Crown Heights Day Care Ctr. No. 2, 246 A.D.2d 621, 667 N.Y.S.2d 314, 1998 N.Y. App. Div. LEXIS 608 (N.Y. App. Div. 2d Dep't 1998).

Plaintiffs were not entitled to have defendants’ answer stricken for failure of one defendant to appear for court-ordered examination before trial in 1994 where plaintiffs waived their right to depose defendant by failing to notify court of outstanding deposition until 1999, and plaintiffs did not show that defendants deliberately refused to disclose. Andrade v Orsini, 273 A.D.2d 422, 710 N.Y.S.2d 103, 2000 N.Y. App. Div. LEXIS 7389 (N.Y. App. Div. 2d Dep't 2000).

11. Harmless surplusage

Court properly denied plaintiff’s motion to strike affirmative defense of failure to state cause of action since such pleaded defense is harmless surplusage and motion to strike it is unnecessary. Pump v Anchor Motor Freight, Inc., 138 A.D.2d 849, 525 N.Y.S.2d 959, 1988 N.Y. App. Div. LEXIS 2906 (N.Y. App. Div. 3d Dep't 1988).

In action under CLS Gen Mun § 205-e(1) by police officer whose patrol car, parked on shoulder of thruway, was struck by car that skidded off thruway in severe snow storm, court properly refused to strike defense of failure to state cause of action where defendants had moved for

summary judgment, and defense of failure to state cause of action was at most harmless surplusage that did not need to be stricken in order to protect officer's interests. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

Plaintiffs' cross motion to dismiss affirmative defense alleging that complaint failed to state cause of action would be denied where Appellate Division, Third Department, has taken position that such defense is harmless surplusage and that motion to strike it should be denied as unnecessary. Cardona v County of Albany, 188 Misc. 2d 440, 728 N.Y.S.2d 355, 2001 N.Y. Misc. LEXIS 188 (N.Y. Sup. Ct. 2001).

Defendant's motion to strike the scandalous, prejudicial, and unnecessary portions of a complaint failed as they did not identify any scandalous or prejudicial material, nor did they contend that any of the matter was not relevant to plaintiffs' causes of action; prolixity alone was not a basis for striking material from a pleading. Cassissi v Yee, 995 N.Y.S.2d 443, 46 Misc. 3d 552, 2014 N.Y. Misc. LEXIS 4692 (N.Y. Sup. Ct. 2014).

12. Intervenor's motion

In personal injury action, court erred in denying motion by intervenor Motor Vehicle Accident Indemnification Corporation (MVAIC) to strike and vacate notice of claim filed by plaintiff against it, since notice of claim was not filed within 90-day period under CLS Ins § 5208(a), and plaintiff's opposing motion papers, which in effect constituted cross motion to compel MVAIC to accept late notice of claim, were not submitted within one year of accrual of underlying cause of action as required by § 5208(c). Carty v Davis, 140 A.D.2d 661, 529 N.Y.S.2d 103, 1988 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 2d Dep't 1988).

13. Jurisdictional matter

It was not improper for defendant to raise defense of lack of personal jurisdiction in his answer, thus delaying resolution of issue until trial; plaintiffs had option of moving to strike defense, and by failing to do so, risked unfavorable ruling after statute of limitations had expired. Bleier v Heschel, 128 A.D.2d 662, 512 N.Y.S.2d 902, 1987 N.Y. App. Div. LEXIS 44353 (N.Y. App. Div. 2d Dep't 1987).

Court properly granted plaintiff’s motion to strike defendant’s affirmative defense of lack of jurisdiction where (1) process server with 15 years’ experience stated that he left summons and complaint with defendant’s managing agent, and his testimony in that regard was uncontested, (2) even assuming that agent was employed by defendant’s parent corporation, circumstances of employment, whereby defendant and its parent corporation had same president and shared same office, made it reasonable for process server to accept that agent was not outsider and was in fact authorized to receive process on defendant’s behalf, and (3) defendant had in fact received process, as evidenced by its interposition of answer, and summons and complaint that defendant received were those served on agent, who in turn handed them to officer of defendant’s parent corporation. Seda v Armory Estates, Ltd., 138 A.D.2d 362, 525 N.Y.S.2d 651, 1988 N.Y. App. Div. LEXIS 2141 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs’ motion to strike affirmative defense of lack of personal jurisdiction was properly granted, even though plaintiffs filed their summons and complaint with court clerk after serving them on defendants, where added defendants’ reliance on defect in proper sequence of filing and service was waived by their failure to raise issue of personal jurisdiction in their responsive pleading and by their appearance in action. Domansky v Berkovitch, 251 A.D.2d 3, 673 N.Y.S.2d 646, 1998 N.Y. App. Div. LEXIS 6369 (N.Y. App. Div. 1st Dep't 1998).

In wife’s action for annulment, there was no merit in husband’s appeal from July 18, 1997, order striking his affirmative defense of lack of personal jurisdiction where husband signed, in Syria on April 1, 1997, affidavit in which he admitted service of process and stated that he did not intend to answer or interpose defense. Sabbagh v Copti, 251 A.D.2d 149, 674 N.Y.S.2d 329, 1998 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 1st Dep't 1998).

Where defendant had taken no appeal from denial of its motion to dismiss for lack of personal jurisdiction, it was precluded from reasserting such claim as affirmative defense, and thus plaintiffs' motion to strike defense was properly granted and defendant's motion for summary judgment was properly denied. Health-Loom Corp. v Sixty-Six Crosby Assocs., 260 A.D.2d 158, 685 N.Y.S.2d 616, 1999 N.Y. App. Div. LEXIS 3222 (N.Y. App. Div. 1st Dep't 1999).

Affirmative defense predicated on pendency of prior action, which was raised in response to process served by plaintiff pursuant to CLS CPLR § 308(1) in order to cure alleged jurisdictional defect earlier raised by defendant based on improper service, would be ordered stricken since defendant may not assert that action has not been properly commenced due to defective service and at same time allege pendency of action to defeat re-service designed to cure such defective service. Messina v County of Nassau, 147 Misc. 2d 889, 557 N.Y.S.2d 837, 1990 N.Y. Misc. LEXIS 288 (N.Y. Sup. Ct. 1990).

14. Limitations defense

In a medical malpractice action, plaintiffs' motion to strike an affirmative defense of the statute of limitations was improperly granted where there existed a number of unresolved factual questions relating to the limitations defense, including the applicability of the continuous treatment doctrine and plaintiffs' claim that process was delivered to the county sheriff on a specified date, thereby tolling the statute for 60 days (CPLR § 203). Horowitz v North Shore University Hospital, 102 A.D.2d 843, 476 N.Y.S.2d 611, 1984 N.Y. App. Div. LEXIS 19027 (N.Y. App. Div. 2d Dep't 1984).

It was not improper for defendant to raise defense of lack of personal jurisdiction in his answer, thus delaying resolution of issue until trial; plaintiffs had option of moving to strike defense, and by failing to do so, risked unfavorable ruling after statute of limitations had expired. Bleier v Heschel, 128 A.D.2d 662, 512 N.Y.S.2d 902, 1987 N.Y. App. Div. LEXIS 44353 (N.Y. App. Div. 2d Dep't 1987).

Since no appeal was taken from order allowing plaintiff to amend negligence complaint to add claims based on Labor Law violations, and since amendment simply permitted interposition of new theory of recovery based on same occurrence relied on in original complaint, new claims related back to original complaint, and thus court properly granted plaintiff's motion to strike defendant's statute of limitations defense. Seda v Armory Estates, Ltd., 138 A.D.2d 362, 525 N.Y.S.2d 651, 1988 N.Y. App. Div. LEXIS 2141 (N.Y. App. Div. 2d Dep't 1988).

15. Meritless defense

In action under CLS Gen Mun § 205-e(1) by police officer whose patrol car, parked on shoulder of thruway, was struck by car that skidded off thruway in severe snow storm, officer was entitled to have stricken affirmative defense based on "firefighters rule" where that defense was rendered meritless by enactment of CLS Gen Oblig § 11-106. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

In wife's action for annulment, there was no merit in husband's appeal from July 18, 1997, order striking his affirmative defense of lack of personal jurisdiction where husband signed, in Syria on April 1, 1997, affidavit in which he admitted service of process and stated that he did not intend to answer or interpose defense. Sabbagh v Copti, 251 A.D.2d 149, 674 N.Y.S.2d 329, 1998 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 1st Dep't 1998).

16. Relevancy

A motion does not lie to strike out parts of a pleading for mere irrelevancy, and now the only ground for a motion to strike is that there is "scandalous or prejudicial matter unnecessarily inserted in a pleading." In re Estate of Emberger, 24 A.D.2d 864, 264 N.Y.S.2d 277, 1965 N.Y. App. Div. LEXIS 3088 (N.Y. App. Div. 2d Dep't 1965).

Allegations which were (a) unnecessary for the complainant's sufficiency, (b) prejudicial, and (c) irrelevant and incompetent predicates for any determination of the primary question whether plaintiff was totally disabled, within the meaning of insurance policy, for the period for which payments are claimed, would be ordered stricken. Schachter v Massachusetts Protective Ass'n, 30 A.D.2d 540, 291 N.Y.S.2d 128, 1968 N.Y. App. Div. LEXIS 4091 (N.Y. App. Div. 2d Dep't 1968).

In proceeding for dissolution of corporation brought under CLS Bus Corp § 1104, those paragraphs of petition specifically addressing claims relating to corporate deadlock should not have been stricken since they were clearly relevant to such proceeding. Del Bueno v Barrionuevo, 147 A.D.2d 392, 537 N.Y.S.2d 813, 1989 N.Y. App. Div. LEXIS 1551 (N.Y. App. Div. 1st Dep't 1989).

An allegation in a neglect petition that respondent father has been previously convicted of carnal abuse of a child is relevant, "admissible evidence on the issue of the abuse or neglect" of respondent's children (Family Ct Act, § 1046, subd [a], par [i]), in light of the legislative intent of protecting a child before it is abused, and does not constitute "scandalous or prejudicial matter unnecessarily inserted" in the petition subject to a motion to strike (CPLR 3024, subd [b]); such allegation is neither scandalous nor prejudicial, scandalous matter being that which is immaterial and reproachful, or which is capable of producing harm without justification, while an alleged prejudicial matter will not be stricken if it has any bearing on the subject matter of the litigation. In re Stevens, 101 Misc. 2d 1013, 422 N.Y.S.2d 596, 1979 N.Y. Misc. LEXIS 2802 (N.Y. Fam. Ct. 1979).

In plaintiff former municipal employee's action for hostile work environment/sexual harassment under the New York Human Rights Law against defendant former municipal employer, all of the allegations involving the conduct of the two individuals in the two incidents of forcible sexual contact was sufficiently related to the revived assault allegations to pass the relevance threshold, and thus, there was no basis to strike them from the complaint. However, pre-2009 acts were not sufficiently related to the potentially timely allegations, and, thus, those allegations

had to be stricken. J.S.M. v City of Albany Dept. of Gen. Servs., 83 Misc. 3d 1082, 211 N.Y.S.3d 859, 2024 N.Y. Misc. LEXIS 1871 (N.Y. Sup. Ct. 2024).

17. Res judicata

A finding by the Family Court that the wife abandoned her husband is not controlling in an action for divorce and neither the doctrines of res judicata nor equitable estoppel apply to a determination where the court making the determination is one of limited jurisdiction and the question of abandonment at issue was incidentally involved and the matter regarding the Family Court judgment should be stricken as prejudicial and unnecessarily inserted within the meaning of CPLR 3024(b). Shulsky v Shulsky, 63 Misc. 2d 642, 312 N.Y.S.2d 944, 1970 N.Y. Misc. LEXIS 1491 (N.Y. Sup. Ct. 1970).

18. Scandalous matter

The CPLR contains no provision for attacking and striking out particular allegations of a single cause of action, unless they are scandalous or prejudicial. Koos v Ludwig, 22 A.D.2d 666, 253 N.Y.S.2d 380, 1964 N.Y. App. Div. LEXIS 3015 (N.Y. App. Div. 1st Dep't 1964).

A motion does not lie to strike out parts of a pleading for mere irrelevancy, and now the only ground for a motion to strike is that there is “scandalous or prejudicial matter unnecessarily inserted in a pleading.” In re Estate of Emberger, 24 A.D.2d 864, 264 N.Y.S.2d 277, 1965 N.Y. App. Div. LEXIS 3088 (N.Y. App. Div. 2d Dep't 1965).

Upon defendant’s motion to strike out allegations of a complaint as scandalous and prejudicial matter unnecessarily inserted therein, the averments could be stricken as “unnecessarily inserted” only if they are “scandalous or prejudicial”. Card v Budini, 29 A.D.2d 35, 285 N.Y.S.2d 734, 1967 N.Y. App. Div. LEXIS 2741 (N.Y. App. Div. 3d Dep't 1967).

Test under statute providing for striking of any scandalous or prejudicial matter unnecessarily inserted in pleading is whether allegation is relevant, in evidentiary sense, to the controversy

and, therefore, admissible at trial. Wegman v Dairylea Cooperative, Inc., 50 A.D.2d 108, 376 N.Y.S.2d 728, 1975 N.Y. App. Div. LEXIS 11450 (N.Y. App. Div. 4th Dep't 1975), app. dismissed, 38 N.Y.2d 918, 382 N.Y.S.2d 979, 346 N.E.2d 817, 1976 N.Y. LEXIS 2359 (N.Y. 1976).

Appropriate remedy for pleading so defective that defendant cannot reasonably be required to respond is motion for more definite statement or to strike scandalous or prejudicial matter, to be made within 20 days after service of the challenged pleading. Cooper v Van Cortlandt Associates, 54 A.D.2d 545, 387 N.Y.S.2d 127, 1976 N.Y. App. Div. LEXIS 13841 (N.Y. App. Div. 1st Dep't 1976).

In action where defendants moved to strike allegedly scandalous material from complaint pursuant to CLS CPLR § 3024(b), court erred in granting plaintiff’s motion for default judgment based on defendants’ failure to serve answer after court marked motion to strike off calendar for failure of both sides to appear, since it was not clear that marking motion to strike off calendar was intended to operate as denial of defendants’ application for purposes of CLS CPLR § 2216; in any case, defendants’ time to answer could not be said to have expired since § 3024(c) provides that any responsive pleading shall be served within 10 days after service of notice of entry of order, and plaintiff did not refute defendants’ claim that order entered on motion to strike was never served. Juliette Shulof Furs, Inc. v S & M Bauman Fur Trading Corp., 149 A.D.2d 352, 539 N.Y.S.2d 932, 1989 N.Y. App. Div. LEXIS 4831 (N.Y. App. Div. 1st Dep't 1989).

Court properly struck certain paragraphs from plaintiff’s complaint as scandalous and prejudicial, notwithstanding that matter contained in paragraphs might be admissible at trial, since matter was not necessary for sufficiency of complaint and would cause undue prejudice. JC Mfg., Inc. v NPI Electric, Inc., 178 A.D.2d 505, 577 N.Y.S.2d 145, 1991 N.Y. App. Div. LEXIS 16544 (N.Y. App. Div. 2d Dep't 1991).

In action to recover legal fees, court did not abuse its discretion in refusing to strike, as scandalous and prejudicial, allegations of negligence, legal malpractice, and financial wrongdoing pleaded in answer, even though such allegations were unfounded, where they were

relevant and related to action. Kaufman & Kaufman v Hoff, 213 A.D.2d 197, 624 N.Y.S.2d 107, 1995 N.Y. App. Div. LEXIS 2848 (N.Y. App. Div. 1st Dep't 1995).

Defendants' motion to strike parts of fraud complaint as scandalous or prejudicial was properly denied, even though allegations of various incidents of improper conduct by defendants during their long-term representation of plaintiffs were directed primarily to dismissed causes of action, those allegations were also relevant to fraud cause of action left standing in prior order, and other allegations that were irrelevant to fraud cause of action could not possibly be considered scandalous or prejudicial. Sandcham Realty Corp. v Taub, 266 A.D.2d 117, 698 N.Y.S.2d 146, 1999 N.Y. App. Div. LEXIS 12079 (N.Y. App. Div. 1st Dep't 1999).

Because New York did not recognize an independent cause of action for punitive damages, and because a patient's allegations amounted to nothing more than allegations of mere negligence that did not rise to the level of moral culpability necessary to support a claim for punitive damages, the trial court should have granted the respective motions filed by an individual and two vision companies for summary judgment and to strike the prejudicial and inflammatory language in the patient's bills of particulars under N.Y. C.P.L.R. 3024(b). Aronis v TLC Vision Ctrs., Inc., 49 A.D.3d 576, 853 N.Y.S.2d 621, 2008 N.Y. App. Div. LEXIS 2104 (N.Y. App. Div. 2d Dep't 2008).

In an action for sex abuse claims, the trial court properly declined to strike as scandalous or prejudicial an admission by a codefendant that he molested plaintiff, as this was not unnecessary to the amended complaint in that it concerned conduct central to plaintiff's causes of action. Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

In an action for sex abuse claims, the trial court properly declined to strike as scandalous or prejudicial allegations that a codefendant sexually abused a boy from 1959 through 1961, before the period when plaintiff was allegedly abused, as they bore direct relevance to what defendants knew or should have known about the codefendant's acts or propensities at later times. Pisula v

Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

In an action for sex abuse claims, an allegation that a recipient of a letter was another survivor of sexual molestation should have been stricken as scandalous or prejudicial, as it concerned conduct occurring a decade or two after the alleged abuse of plaintiff from 1965 through 1967. Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

In an action for sex abuse claims, the trial court properly declined to strike as scandalous or prejudicial an admission by a codefendant that he molested a person other than plaintiff, as there was some overlap of time and place with the alleged abuse of plaintiff. Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

Factual allegations about a defendant’s prior sexually-abusive conduct will not be stricken from the complaint under N.Y. C.P.L.R. 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff’s own abuse. Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

Factual allegations about a defendant’s subsequent relevant statements or conduct that specifically relate back to the sexual abuse of the plaintiff will not be stricken from the complaint under N.Y. C.P.L.R. 3024(b). Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

Factual allegations about a defendant’s statements or conduct involving a subsequent sexual abuse survivor, other than the plaintiff, may be stricken from a complaint under N.Y. C.P.L.R. 3024(b) on the ground that they are scandalous or prejudicial and not necessary to the elements

of the plaintiff’s specific cause(s) of action. Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

Factual allegations about a plaintiff’s own alleged sexual abuse will not be stricken from the complaint under N.Y. C.P.L.R. 3024(b) as they are central and necessary to giving notice of the transaction or occurrence or series of transactions and occurrences, and the material elements of the cause(s) of action asserted. Pisula v Roman Catholic Archdiocese of N.Y., 201 A.D.3d 88, 159 N.Y.S.3d 458, 2021 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2021).

Although binder agreement was referable only to $33,000 of claimant’s total alleged damages of $116,000 and there were no allegations revealing special nature of other $83,000 of damages in action for money damages arising from alleged defamatory statement, it would not be proper to dismiss part of cause of action where such relief was not requested and where instant application was addressed to entire claim; furthermore, affidavits sufficient for conversion of dismissal motion to summary judgment motion were not submitted, and motion to strike scandalous or prejudicial matter from pleading or motion for partial summary judgment would permit fair and more complete determination of issue. Mink Hollow Dev. Corp. v State, 87 Misc. 2d 61, 384 N.Y.S.2d 373, 1976 N.Y. Misc. LEXIS 2155 (N.Y. Ct. Cl. 1976).

An allegation in a neglect petition that respondent father has been previously convicted of carnal abuse of a child is relevant, “admissible evidence on the issue of the abuse or neglect” of respondent’s children (Family Ct Act, § 1046, subd [a], par [i]), in light of the legislative intent of protecting a child before it is abused, and does not constitute “scandalous or prejudicial matter unnecessarily inserted” in the petition subject to a motion to strike (CPLR 3024, subd [b]); such allegation is neither scandalous nor prejudicial, scandalous matter being that which is immaterial and reproachful, or which is capable of producing harm without justification, while an alleged prejudicial matter will not be stricken if it has any bearing on the subject matter of the litigation. In re Stevens, 101 Misc. 2d 1013, 422 N.Y.S.2d 596, 1979 N.Y. Misc. LEXIS 2802 (N.Y. Fam. Ct. 1979).

In a summary holdover proceeding to terminate a tenancy, allegations that respondent tenant was an outpatient from a mental hospital and that the “landlord has kept you in your apartment and the Department of Social Services has agreed to relocate you but has failed to do so,” would be stricken from the petition, where such allegations were scandalous and constituted prejudicial material not relevant to the controversy. 177 East 90th Street Co. v Niemela, 115 Misc. 2d 189, 453 N.Y.S.2d 567, 1982 N.Y. Misc. LEXIS 3657 (N.Y. Civ. Ct. 1982).

In action by corporate plaintiff to recover immediate possession of single-room occupancy apartment in which defendant resided, newspaper articles stating that counterclaim defendants (who were plaintiff’s officers and sole shareholders) were among 10 worst landlords in New York City that year constituted scandalous or prejudicial material unnecessarily inserted in answer, and were stricken under CLS CPLR § 3024(b), where newspaper articles did not mention defendant or counterclaim defendants’ alleged treatment of him and those that had dates were dated before defendant moved into his room. Baychester Shopping Ctr. v Llorente, 175 Misc. 2d 739, 669 N.Y.S.2d 460, 1997 N.Y. Misc. LEXIS 665 (N.Y. Sup. Ct. 1997).

Motion to strike certain provisions from a civil tort complaint against an alleged assailant as being scandalous and unnecessary was granted, as the statements were not relevant to determining whether the assailant committed the torts of assault and wilful misconduct against the alleged victims, the only two causes of action which survived the assailant’s motion, and what damages the victims suffered as a result. Shenandoah v Hill, 799 N.Y.S.2d 892, 9 Misc. 3d 548, 2005 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. 2005), aff'd in part, modified, 28 A.D.3d 919, 815 N.Y.S.2d 290, 2006 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 3d Dep't 2006).

Because an attorney timely sought de novo review of a fee dispute following arbitration, the nonfinal and nonbinding arbitration award was inadmissible as evidence at the trial de novo; therefore, pursuant to N.Y. C.P.L.R. 3024(b), the relative portions of the client’s answer should have been stricken and the affirmative defenses should have been dismissed as prejudicial and unnecessary. Landa v Dratch, 45 A.D.3d 646, 846 N.Y.S.2d 256, 2007 N.Y. App. Div. LEXIS 11858 (N.Y. App. Div. 2d Dep't 2007).

As a petition’s paragraphs discussing the death of an individual in the care of the New York State Office of Mental Retardation and Developmental Disabilities were not relevant to petitioners’ claims, but could serve to prejudice the Office, the trial court properly struck them under N.Y. C.P.L.R. 3024(b). Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 81 A.D.3d 145, 915 N.Y.S.2d 747, 2011 N.Y. App. Div. LEXIS 473 (N.Y. App. Div. 3d Dep't 2011), aff'd in part, modified, 19 N.Y.3d 106, 945 N.Y.S.2d 613, 968 N.E.2d 967, 2012 N.Y. LEXIS 840 (N.Y. 2012).

Family court did not err in denying the mother’s motion to strike the father’s objections and rebuttal to the mother’s objections to the support magistrate’s order, as the father’s statements were not scandalous or particularly prejudicial and the court was capable of reviewing the record to determine whether those statements were supported by the evidence. Matter of Ryan v Ryan, 110 A.D.3d 1176, 973 N.Y.S.2d 377, 2013 N.Y. App. Div. LEXIS 6726 (N.Y. App. Div. 3d Dep't 2013).

Competitors’ CPLR 3024(b) motion to strike certain allegations in the trademark holders’ complaint that related to dismissed trade infringement and unfair competition claims was denied where the material was not scandalous and there was no showing that the allegations’ inclusion impaired any of the competitors’ substantial rights or caused them harm. Beverage Mktg. USA Inc. v S. Beach Bev. Co., 233 N.Y.L.J. 30, 2006 N.Y. Misc. LEXIS 3868 (N.Y. Sup. Ct. Feb. 15, 2006).

19. Sham defense

Under CPLR there is no motion to strike as sham. Chicago Dressed Beef Co. v Gold Medal Packing Corp., 22 A.D.2d 1010, 254 N.Y.S.2d 717, 1964 N.Y. App. Div. LEXIS 2599 (N.Y. App. Div. 4th Dep't 1964).

20. Sufficiency of claim

Allegations which were (a) unnecessary for the complainant’s sufficiency, (b) prejudicial, and (c) irrelevant and incompetent predicates for any determination of the primary question whether plaintiff was totally disabled, within the meaning of insurance policy, for the period for which payments are claimed, would be ordered stricken. Schachter v Massachusetts Protective Ass'n, 30 A.D.2d 540, 291 N.Y.S.2d 128, 1968 N.Y. App. Div. LEXIS 4091 (N.Y. App. Div. 2d Dep't 1968).

Where the complaint was dismissed for insufficiency of allegations, the defendant was not aggrieved by the court’s failure to pass on its motion for alternative relief pursuant to CPLR 3024(b). It was not necessary for the court to pass on alternative relief sought by the defendant pursuant to CPLR 3024(b). Roebuck v Roebuck, 35 A.D.2d 714, 314 N.Y.S.2d 954, 1970 N.Y. App. Div. LEXIS 3674 (N.Y. App. Div. 1st Dep't 1970).

Allegations that doctor intentionally, willfully, and wantonly withheld medical records and information from patient in order to avoid malpractice claim were insufficient to support claim for punitive damages, which was properly stricken. Abraham v Kosinski, 251 A.D.2d 967, 674 N.Y.S.2d 557, 1998 N.Y. App. Div. LEXIS 6975 (N.Y. App. Div. 4th Dep't 1998).

21. Waiver

In an action by a landlord to recover rent allegedly due against tenant-restaurant, in which defendant interposed affirmative defense that plaintiff-landlord, upon being advised that certain of the defendant’s employees, contractors and suppliers were required to be paid in cash, consented to having the defendant’s books reflect reduced sales to the extent of those cash payments, the trial court erred in striking said affirmative defense since the defense was a germaine response to plaintiff’s charge that it was deceived by defendant’s style of bookkeeping, and if defendant’s gross receipts were in fact reduced with plaintiff’s consent, to that extent any claim for additional rents due based upon the actual net profits may have been waived. 308 East 39th Street Corp. v Tres Carabelas, Inc., 79 A.D.2d 952, 435 N.Y.S.2d 13, 1981 N.Y. App. Div. LEXIS 9823 (N.Y. App. Div. 1st Dep't 1981).

Insured was not entitled to strike affirmative defenses set forth in insurer's answer, on ground that they had not been raised in insurer's letter of disclaimer and were therefore waived, where one letter from insurer stated that it was not addressing any question other than scope of coverage, and insurer's disclaimer letter reserved right to reevaluate as new facts became available, and thus there were questions of fact as to whether challenged affirmative defenses had been waived. Powers Chemco, Inc. v Federal Ins. Co., 122 A.D.2d 203, 504 N.Y.S.2d 738, 1986 N.Y. App. Div. LEXIS 59533 (N.Y. App. Div. 2d Dep't 1986).

II. Under Former Civil Practice Laws

A. Vague or Ambiguous Pleadings

i. In General

22. Generally

This remedy applies to a counterclaim. Fettretch v McKay, 47 N.Y. 426, 47 N.Y. (N.Y.S.) 426, 1872 N.Y. LEXIS 38 (N.Y. 1872).

Remedy of defendant seeking information as to foreign statute under CPA § 344-a (§ 4511 herein) upon which complaint was based, was by corrective motion under subd. 1 of RCP 102. Pfleuger v Pfleuger, 304 N.Y. 148, 106 N.E.2d 495, 304 N.Y. (N.Y.S.) 148, 1952 N.Y. LEXIS 764 (N.Y. 1952).

Motion to separately state and number causes of action in a complaint was not made under RCP 102, but under RCP 90 (Rule 3014 herein). Brown-Duffy Goatskin Corp. v Henkel, 211 A.D. 342, 207 N.Y.S. 357, 1925 N.Y. App. Div. LEXIS 10627 (N.Y. App. Div. 1925).

Motion to strike out one paragraph of the complaint and substitute another was granted. Rothenberg v Metzger, 227 A.D. 444, 238 N.Y.S. 139, 1929 N.Y. App. Div. LEXIS 6457 (N.Y. App. Div. 1929).

RCP 102 related to motions to make a pleading more definite and certain. Rothenberg v Metzger, 227 A.D. 444, 238 N.Y.S. 139, 1929 N.Y. App. Div. LEXIS 6457 (N.Y. App. Div. 1929).

Discretion of court in denying motion to strike out matter will not be disturbed unless it appears defendant was aggrieved. Muller v McCormick, 272 A.D. 1027, 74 N.Y.S.2d 261, 1947 N.Y. App. Div. LEXIS 4774 (N.Y. App. Div. 1947).

RCP 102 applied to answers as well as to complaints. Hooper v New York, 160 N.Y.S. 14, 96 Misc. 47, 1916 N.Y. Misc. LEXIS 751 (N.Y. Sup. Ct. 1916).

RCP 102 was derived from the Code of Civil Procedure and a motion under it was addressed to the pleadings within the meaning of CPA § 244 (§ 3025 herein). Security Finance Co. v Stuart, 224 N.Y.S. 257, 130 Misc. 538, 1927 N.Y. Misc. LEXIS 1086 (N.Y. Sup. Ct. 1927), aff'd, 226 A.D. 725, 233 N.Y.S. 890, 1929 N.Y. App. Div. LEXIS 9468 (N.Y. App. Div. 1929).

Rule is available only to a party who is required to serve an answer or reply to a pleading. Farrell v Malcom, 236 N.Y.S. 704, 135 Misc. 101, 1929 N.Y. Misc. LEXIS 916 (N.Y. City Ct. 1929).

The question whether plaintiffs made a binding election of remedies could not be determined on an application for an order to direct the service of an amended complaint under RCP 102. Epp v Title Guarantee & Trust Co., 289 N.Y.S. 896, 160 Misc. 554, 1935 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1935).

Third-party complaint, if defective may be corrected. Van Pelt v New York, 69 N.Y.S.2d 116, 188 Misc. 995, 1947 N.Y. Misc. LEXIS 2194 (N.Y. Sup. Ct. 1947).

Applicability of RCP 102-110 to summary proceedings questioned. Hanover Estates, Inc. v Finkelstein, 86 N.Y.S.2d 316, 194 Misc. 755, 1949 N.Y. Misc. LEXIS 1760 (N.Y. Mun. Ct. 1949).

In action in equity to enjoin breach of agreement requiring plaintiff to pay expenses of developing patented telephonic device with right to manufacture 25% of all instruments, plaintiff was required to amend complaint to set forth approximate dates when and state where general agreement and several amendments thereto were made, and whether they were oral or written. Connecticut Tel. & Electric Corp. v Telephone Answering & Recording Corp., 4 Misc. 2d 510, 137 N.Y.S.2d 330, 1955 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct.), aff'd, 286 A.D. 839, 143 N.Y.S.2d 826, 1955 N.Y. App. Div. LEXIS 4285 (N.Y. App. Div. 1955).

RCP 102 was not appropriate procedural vehicle to obtain copies of alleged agreement if written, or to ascertain substance thereof if oral, or to learn names of participating representatives of respective parties; that was function of demand for bill of particulars. Connecticut Tel. & Electric Corp. v Telephone Answering & Recording Corp., 4 Misc. 2d 510, 137 N.Y.S.2d 330, 1955 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct.), aff'd, 286 A.D. 839, 143 N.Y.S.2d 826, 1955 N.Y. App. Div. LEXIS 4285 (N.Y. App. Div. 1955).

The remedy of a defendant aggrieved by lack of definiteness or precision in a complaint is not to move for a dismissal on ground of insufficiency but to demand a bill of particulars or to move for an order requiring the service of an amended pleading which will remove indefiniteness, uncertainty or obscurity. Katz v Grand Union Co., 4 Misc. 2d 288, 155 N.Y.S.2d 811, 1956 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct. 1956).

A complaint is sufficiently clear and concise where acts are all properly alleged as one cause of action sounding in unfair competition and allegations which have a reasonable or probable bearing on the controversy will not be stricken as harmful or prejudicial. Dior v Milton, 9 Misc. 2d 425, 155 N.Y.S.2d 443, 1956 N.Y. Misc. LEXIS 1678 (N.Y. Sup. Ct.), aff'd, 2 A.D.2d 878, 156 N.Y.S.2d 996, 1956 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 1st Dep't 1956).

Even though an amended complaint is in many respects unduly repetitious and prolix, where the defendants would not seem to be disabled from answering or prejudiced thereby, corrective relief is denied. Taller & Cooper, Inc. v Neptune Meter Co., 8 Misc. 2d 107, 166 N.Y.S.2d 693, 1957 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct. 1957).

Bare and conclusory allegations are subject to motion to make more definite and certain. Lipin v Salkin, 10 Misc. 2d 243, 171 N.Y.S.2d 578, 1957 N.Y. Misc. LEXIS 2667 (N.Y. Sup. Ct. 1957).

Motion under RCP 102 would be denied where the clarification sought did not pertain to the cause of action pleaded in the complaint. Sheppard v Coopers' Inc., 14 Misc. 2d 180, 181 N.Y.S.2d 709, 1957 N.Y. Misc. LEXIS 1881 (N.Y. Sup. Ct. 1957), app. dismissed, 7 A.D.2d 971, 186 N.Y.S.2d 214, 1959 N.Y. App. Div. LEXIS 9609 (N.Y. App. Div. 1st Dep't 1959).

Unnecessary, irrelevant and immaterial allegations must be omitted. Mordkowitz v Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328, 1958 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 1958).

Where allegations are not sufficiently clear so as to permit defendant to make his denials with certainty and to otherwise prepare for trial, plaintiff will be ordered to make the complaint more definite and certain. North American Iron & Steel Co. v Lefkowitz, 17 Misc. 2d 284, 184 N.Y.S.2d 707, 1959 N.Y. Misc. LEXIS 4120 (N.Y. Sup. Ct. 1959).

Although defendant could plead absence of malice in mitigation of damages in action for false arrest, but not in action for malicious prosecution, where plaintiff joined both causes in a single cause of action, defendant was not required to allege as to which of the causes his defense was applicable. Versosa v New York, 22 Misc. 2d 597, 194 N.Y.S.2d 5, 1959 N.Y. Misc. LEXIS 2474 (N.Y. Sup. Ct. 1959).

Supplemental summons cannot be served without order. Kadrisky v Reilly, 90 N.Y.S.2d 715, 1949 N.Y. Misc. LEXIS 2467 (N.Y. Sup. Ct. 1949).

23. What constitutes remedial indefiniteness, obscurity or uncertainty

If the pleader desires to show a different conclusion from that which the law would imply, he must state the facts which rebut it. If he states his conclusion without the facts, the remedy is by motion to make certain. Eno v Woodworth, 4 N.Y. 249, 4 N.Y. (N.Y.S.) 249, 1850 N.Y. LEXIS 89 (N.Y. 1850).

An allegation that defendant had made repeated acknowledgment so as to avoid the statute of limitations is not sufficient. 8 N.Y. 362.

When an answer is in any respect vague or uncertain a plaintiff has the right to compel a correction thereof by proper preliminary motion, and if he fails to do so the answer is to be construed most strongly against him. Electrical Accessories Co. v Mittenthal, 194 N.Y. 473, 87 N.E. 684, 194 N.Y. (N.Y.S.) 473, 1909 N.Y. LEXIS 1304 (N.Y. 1909).

A new trial will not be granted upon the ground that the defendant was surprised by the introduction of evidence when it did not demand a bill of particulars, nor that the complaint be made more definite and certain, nor the withdrawal of a juror, and did not claim surprise in any manner other than by objection to the evidence. Roenbeck v Brooklyn H. R. Co., 123 A.D. 606, 108 N.Y.S. 80, 1908 N.Y. App. Div. LEXIS 128 (N.Y. App. Div. 1908).

Whether a pleading is indefinite and uncertain so as to require an amendment must be determined by an inspection of it, and not upon the affidavits of the moving party. Deubert v New York, 126 A.D. 359, 110 N.Y.S. 403, 1908 N.Y. App. Div. LEXIS 3352 (N.Y. App. Div. 1908).

A plaintiff may plead conclusions of fact subject to defendant’s right to move to make the allegations more specific. Ranken v Probey, 131 A.D. 328, 115 N.Y.S. 832, 1909 N.Y. App. Div. LEXIS 807 (N.Y. App. Div. 1909).

It is only when allegations are so indefinite and uncertain that the precise meaning or application thereof is not apparent that motion will lie to require complaint to state whether contract was in writing, and if in writing to set forth a copy. Swartmore Textile Co. v Morris Bernhard Co., 184 A.D. 572, 172 N.Y.S. 15, 1918 N.Y. App. Div. LEXIS 6577 (N.Y. App. Div. 1918).

Where the document in question provided that the bearer should be treated as absolute owner, plaintiff’s allegation that he was the lawful holder and owner was not subject to a motion to have the allegations made more definite and certain. Manhattan Co. v Morgan, 199 A.D. 767, 192 N.Y.S. 239, 1922 N.Y. App. Div. LEXIS 8086 (N.Y. App. Div. 1922).

Plaintiff may disjunctively allege facts in his complaint to justify equitable intervention. Kass v Garment Center Realty Co., 209 A.D. 647, 205 N.Y.S. 94, 1924 N.Y. App. Div. LEXIS 8703 (N.Y. App. Div. 1924).

The plaintiff must appear to have some legal title or equitable interest in a demand for goods sold and delivered before he will be entitled to maintain an action therefor. Klein-Messner Co. v Fair Waist & Dress Co., 221 A.D. 725, 224 N.Y.S. 511, 1927 N.Y. App. Div. LEXIS 6553 (N.Y. App. Div. 1927).

Plaintiff might have answer made more definite and certain under RCP 102. Dodge v Campbell, 229 A.D. 534, 242 N.Y.S. 534, 1930 N.Y. App. Div. LEXIS 10436 (N.Y. App. Div. 1930), aff'd, 255 N.Y. 622, 175 N.E. 340, 255 N.Y. (N.Y.S.) 622, 1931 N.Y. LEXIS 758 (N.Y. 1931).

Where a complaint is unnecessarily obscure, repetitious and redundant it may be stricken out. Virdone v Globe Bank & Trust Co., 235 A.D. 125, 256 N.Y.S. 421, 1932 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 1932).

If a plaintiff is in doubt as to what is intended to be denied, his remedy is by motion to make more definite and certain. Gellens v Continental Bank & Trust Co., 241 A.D. 591, 272 N.Y.S. 900, 1934 N.Y. App. Div. LEXIS 8315 (N.Y. App. Div. 1934).

Where it was impossible to determine from loose allegations exactly what pleader had in mind in preparing his pleading, such allegations were ordered struck out. Manufacturers Trust Co. v Weitemeyer, 261 A.D. 281, 24 N.Y.S.2d 794, 1941 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1941).

A pleading is not indefinite if the court can see the meaning of its allegations with ordinary certainty. Madden v Underwriting Printing & Pub. Co., 30 N.Y.S. 1052, 10 Misc. 27, 1894 N.Y. Misc. LEXIS 867 (N.Y. Super. Ct. 1894).

Motion granted requiring plaintiffs to make complaint more definite and certain. Van Schaick v Stevens, 273 N.Y.S. 748, 152 Misc. 163, 1934 N.Y. Misc. LEXIS 1541 (N.Y. Sup. Ct. 1934).

Where defense lacked necessary precision, by reason of a reference to “foregoing facts,” it was ordered to be made more certain. Foerster v Flynn, 84 N.Y.S.2d 297, 193 Misc. 373, 1948 N.Y. Misc. LEXIS 3559 (N.Y. Sup. Ct. 1948).

Allegation that plaintiff was liar was not ordered amended. Rosette v Wertheim, 91 N.Y.S.2d 429, 195 Misc. 994, 1949 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1949).

Where defendant in pleading counterclaim for fraud inducing her to surrender rights in invention has joined plaintiff and others in such fashion that it cannot be readily ascertained whether she is charging plaintiff individually, to establish personal liability, or as representative of concerns involved, counterclaim should be made more definite and certain. Ippisch v Moricz-Smith, 1 Misc. 2d 120, 144 N.Y.S.2d 505, 1955 N.Y. Misc. LEXIS 2328 (N.Y. Sup. Ct. 1955), modified, 1 A.D.2d 968, 150 N.Y.S.2d 419, 1956 N.Y. App. Div. LEXIS 5765 (N.Y. App. Div. 2d Dep't 1956).

Where insufficient allegations are commingled with legally sufficient allegations, the plaintiff may be directed to serve an amended complaint omitting such insufficient allegations. Taller & Cooper, Inc. v Neptune Meter Co., 8 Misc. 2d 107, 166 N.Y.S.2d 693, 1957 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct. 1957).

Where plaintiff used the words “and/or,” the plaintiff was guilty of equivocal pleading and defendant’s motion under RCP 102 granted. Meinhardt v Britting, 10 Misc. 2d 757, 169 N.Y.S.2d 925, 1958 N.Y. Misc. LEXIS 4082 (N.Y. Sup. Ct. 1958).

Statement in narrative form of facts, containing evidence and conclusions, subjected complaint to correction under RCP 102. Cordo v Mazza, 20 Misc. 2d 611, 190 N.Y.S.2d 115, 1959 N.Y. Misc. LEXIS 3325 (N.Y. Sup. Ct. 1959).

Motion under RCP 102 was available where the pleading is long, rambling, obscure, disarranged and confusing and the precise meaning is impossible to determine. Pearson v Pearson, 29 Misc. 2d 677, 212 N.Y.S.2d 281, 1961 N.Y. Misc. LEXIS 3502 (N.Y. Sup. Ct.), rev'd, 15 A.D.2d 554, 222 N.Y.S.2d 862, 1961 N.Y. App. Div. LEXIS 6966 (N.Y. App. Div. 2d Dep't 1961).

Theory of liability, asserted in complaint, must be clear. Rispoli v Manufacturers Casualty Ins. Co., 99 N.Y.S.2d 22, 1950 N.Y. Misc. LEXIS 1872 (N.Y. Sup. Ct. 1950).

Where plaintiff states in affidavit that he used “etc.” solely in interest of conciseness and that he referred to four other names by which defendant is known, complaint was deemed amended so as to eliminate abbreviation “etc.”, substituting instead four other names of defendant. Paliotto v Hartman, 148 N.Y.S.2d 164, 1956 N.Y. Misc. LEXIS 2283 (N.Y. Sup. Ct.), modified, 2 A.D.2d 866, 156 N.Y.S.2d 220, 1956 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 2d Dep't 1956).

Complaint couched in vague language which did not clearly apprise defendant of charges made against him was ordered to be made more definite and certain. Castanon v 620-62nd Street Realty Corp., 198 N.Y.S.2d 588 (N.Y. Sup. Ct. 1960).

The terms of pertinent agreements should not have been set forth in a complaint down to the minutest detail, but only the substance thereof, reserving for the trial the complete presentation of such documents, and a motion to strike under RCP 102 would be granted. Garfield v Equitable Life Assurance Soc., 205 N.Y.S.2d 758 (N.Y. Sup. Ct. 1960).

Matters of evidence or argument do not belong in a pleading. Garfield v Equitable Life Assurance Soc., 205 N.Y.S.2d 758 (N.Y. Sup. Ct. 1960).

Indefiniteness or uncertainty as contemplated by RCP 102 occurred when the allegations in question were so indefinite that the precise nature of the defense was not apparent, Pacific Mail S.S. Co. v Irwin, 4 Hun 671 (N.Y. 1875).

The indefiniteness and uncertainty contemplated are only such as appear on the face of the pleading, Brown v Southern M. S. R. Co. 6 Abb Pr 237; and by examination thereof. Hopkins v Hopkins, 28 Hun 436 (N.Y. 1882).

A general statement if comprehensive and complete, although it may in the proof involve details, cannot be arraigned as indefinite or uncertain. Williams v Folsom, 10 N.Y.S. 895, 57 Hun 128, 1890 N.Y. Misc. LEXIS 1051 (N.Y. App. Term 1890).

This remedy exists where a defendant has a right to be informed by the complaint of particular facts with regard to matters mentioned therein. Smith v Greenin, 4 Super Ct (2 Sandf) 702; Spies v Accessory Transit Co. 12 Super Ct (5 Duer) 662.

A motion to make more definite and certain averments which in themselves may be treated as surplusage, is properly denied. Davidson v Seligman, 51 Super Ct (19 Jones & S) 47.

Facts anticipating and avoiding the defense of the statute of limitations are uncertain and indefinite allegations. Butler v Mason, 5 Abb. Pr. 40, 1857 N.Y. Misc. LEXIS 254 (N.Y. Sup. Ct. June 1, 1857).

24. Joinder of causes of action

A plaintiff may be ordered to make more definite and certain a complaint which fails to disclose whether he founds his action on contract or tort. Neftel v Lightstone, 77 N.Y. 96, 77 N.Y. (N.Y.S.) 96, 1879 N.Y. LEXIS 744 (N.Y. 1879).

In interpleader, if the conflicting claims upon the fraud were not clearly set forth and it was desired that the complaint be made more definite and certain, the remedy was by motion under RCP 102. Crane v McDonald, 118 N.Y. 648, 23 N.E. 991, 118 N.Y. (N.Y.S.) 648, 1890 N.Y. LEXIS 1014 (N.Y. 1890).

Prior to the amendment of RCP 102 in 1936 to strike out the condition “or if causes of action be improperly united” as a ground of correction under RCP 102, there were many decisions as to the correction of pleadings for misjoinder of causes. See Turner v Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423, 248 N.Y. (N.Y.S.) 73, 1928 N.Y. LEXIS 1225 (N.Y. 1928).

Even under former practice motions to make more definite and certain were denied where the purpose was to compel an election between contract and quantum meruit. Seymour v Warren, 71 A.D. 421, 75 N.Y.S. 903, 1902 N.Y. App. Div. LEXIS 974 (N.Y. App. Div. 1902).

The fact that two causes of action were inconsistent and mutually exclusive was not a ground for correction under RCP 102. Ikle v Ikle, 257 A.D. 635, 14 N.Y.S.2d 928, 1939 N.Y. App. Div. LEXIS 7836 (N.Y. App. Div. 1939).

In action to recover proportionate shares of one or more joint ventures, where it is impossible to determine from complaint whether parties entered into any joint venture and, if so, whether one or more, or what rights and obligations of parties were pursuant to their agreement, plaintiff was required to serve amended complaint separately and more definitely stating plaintiff's causes of action. Miller v Liebman, 285 A.D. 957, 138 N.Y.S.2d 137, 1955 N.Y. App. Div. LEXIS 6290 (N.Y. App. Div. 1955).

Since the amendments of RCP 102 and CPA § 278 (omitted in CPLR) in 1936 and of CPA § 258 (§§ 601, 603 & Rule 3014 herein) in 1935, a misjoinder of causes of action is not such a defect as will subject a pleading to attack generally, or to correction under RCP 102. Metropolitan Life Ins. Co. v Union Trust Co., 5 N.Y.S.2d 99, 167 Misc. 262, 1938 N.Y. Misc. LEXIS 1660 (N.Y. Sup. Ct. 1938).

Where it is not certain whether paragraphs are intended as a partial or complete defense it must be made so. Simmons v Simmons, 4 N.Y.S. 221, 1888 N.Y. Misc. LEXIS 1104 (N.Y. Sup. Ct. 1888).

The complaint must show how much is due on each of its two separate causes of action, or it may be ordered made more definite and certain. Clark v Farley, 10 Super Ct (3 Duer) 645.

Or whether defendant is sued as receiver or individually will be made to appear by motion to make more definite, Jones v Norwood, 37 Super Ct (5 Jones & S) 276, affd Reed v Keese, 60 N.Y. 616, 60 N.Y. (N.Y.S.) 616, 1875 N.Y. LEXIS 229 (N.Y. 1875); and so whether defendant is sued as a promisor or guarantor. Partridge v Haley, 20 NY Week Dig 320.

An allegation of title from one or other of several persons or from the owner of the fee under a lease, deed or contract, is indefinite and uncertain. Corbin v George, 2 Abb. Pr. 465, 1856 N.Y. Misc. LEXIS 118 (N.Y. Sup. Ct. 1856).

25. Several causes of action

So also the remedy is to make definite where two separate defenses are not distinctly stated. Kerr v Hays, 35 N.Y. 331, 35 N.Y. (N.Y.S.) 331, 1866 N.Y. LEXIS 100 (N.Y. 1866).

The remedy is to move to make more definite, where the complaint does not state its causes of action separately, Bass v Comstock, 38 N.Y. 21, 38 N.Y. (N.Y.S.) 21, 1868 N.Y. LEXIS 40 (N.Y. 1868).

When ordering the plaintiff to state and number his causes of action separately, it is unnecessary to direct him to make his complaint more definite and certain. Brown v Thompson-Starrett Co., 139 A.D. 632, 124 N.Y.S. 396, 1910 N.Y. App. Div. LEXIS 2255 (N.Y. App. Div. 1910).

Causes of action on agreements were ordered separately stated and numbered in a complaint. Supreme Specialty Mfg. Co. v De Muth, 220 A.D. 812, 222 N.Y.S. 334, 1927 N.Y. App. Div. LEXIS 10512 (N.Y. App. Div. 1927).

In action for false arrest, false imprisonment, malicious prosecution and assault and battery, complaint was ordered to be made more definite and certain. Saunders v New York, 1 A.D.2d 983, 151 N.Y.S.2d 400, 1956 N.Y. App. Div. LEXIS 5646 (N.Y. App. Div. 2d Dep't), app. denied, 2 A.D.2d 693, 153 N.Y.S.2d 590, 1956 N.Y. App. Div. LEXIS 4960 (N.Y. App. Div. 2d Dep't 1956), app. dismissed, 2 N.Y.2d 731, 157 N.Y.S.2d 370, 138 N.E.2d 733, 1956 N.Y. LEXIS 718 (N.Y. 1956), app. dismissed, 2 N.Y.2d 707, 1956 N.Y. LEXIS 1238 (N.Y. 1956).

In libel action if plaintiff is sued upon several publications, plaintiff required to separately state the number or if intending to sue on one publication to make complaint more definite and certain. Brown v Reed, 10 Misc. 2d 8, 167 N.Y.S.2d 41, 1957 N.Y. Misc. LEXIS 2593 (N.Y. Sup. Ct. 1957).

Complaint which interweaves causes of action for breach of contract, conversion, and fraud in one cause of action will be ordered amended so as to separate and number causes of action; attorney and not court must draft pleading. Cordo v Mazza, 20 Misc. 2d 611, 190 N.Y.S.2d 115, 1959 N.Y. Misc. LEXIS 3325 (N.Y. Sup. Ct. 1959).

ii. Particular Allegations and Actions

26. Accounting and account stated

In stockholders' derivative action for accounting and damages, allegations that directors ratified conspiracy to defraud corporation, without allegations of time, place or manner, held mere conclusions. Lifshutz v Adams, 285 N.Y. 180, 33 N.E.2d 83, 285 N.Y. (N.Y.S.) 180, 1941 N.Y. LEXIS 1515 (N.Y. 1941).

In an action at law in equity for an accounting against a president of an insurance company, the defendant held and exercised the functions of his office continuously, and any matters for which he was accountable to the company are properly included in a single count, and a motion for separate actions will be denied. Mutual L. Ins. Co. v McCurdy, 118 A.D. 822, 103 N.Y.S. 840, 1907 N.Y. App. Div. LEXIS 761 (N.Y. App. Div. 1907).

In an action to recover a balance due on an account stated, a defense and a counterclaim will be stricken out, where it appears that it is almost impossible to determine exactly what the pleader had in mind in preparing said defense and counterclaim. Manufacturers Trust Co. v Weitemeyer, 261 A.D. 281, 24 N.Y.S.2d 794, 1941 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1941).

In action for accounting of affairs of two successive law partnerships, complaint ordered made more definite as to which partnership was required to account. Jones v Gogolick, 262 A.D. 960, 29 N.Y.S.2d 961, 1941 N.Y. App. Div. LEXIS 6632 (N.Y. App. Div. 1941).

In action for accounting under agreement requiring defendant to obtain licenses for use of plaintiff’s musical works, complaint should be clarified to state whether plaintiff is suing solely for sums owing under present contracts with defendant or also for sums owing under previous contracts with it. Von Roebel v Sesac, Inc., 145 N.Y.S.2d 679, 1955 N.Y. Misc. LEXIS 3826 (N.Y. Sup. Ct. 1955), aff'd, 1 A.D.2d 822, 150 N.Y.S.2d 152, 1956 N.Y. App. Div. LEXIS 6240 (N.Y. App. Div. 1st Dep't 1956).

27. Assignments

In order to make complaint more definite and certain, plaintiff was required to allege ultimate facts to support claimed invalidity and unenforceability of instruments purporting to assign property rights in dispute. Vidor v Serlin, 1 A.D.2d 666, 146 N.Y.S.2d 542, 1955 N.Y. App. Div. LEXIS 3798 (N.Y. App. Div. 1st Dep't 1955).

That plaintiff by sale and assignment became sole owner of a certain formula and trade secret, is sufficiently definite, as it may be inferred the assignment and sale was in writing. Magnolia Anti-Friction Co. v Singley, 8 N.Y.S. 463, 55 Hun 608, 1890 N.Y. Misc. LEXIS 1619 (N.Y. Sup. Ct. 1890).

And it is sufficiently definite to state that an assignment for the benefit of creditors is fraudulent and void, and made to defraud creditors. Durnat v Pierson, 8 N.Y.S. 904, 1890 N.Y. Misc. LEXIS 1841 (N.Y. Sup. Ct. 1890).

It is not necessary to state how the opposite party, alleged to be the assignee of a lease, became such. Norton v Vultee, 1 Super Ct) 427.

28. Compromise and release

In an action to recover damages for personal injuries when the answer alleges a compromise and general release of plaintiff’s claim, the defendant should be required to make such allegation more definite and certain by stating the dates of the alleged compromise and release.

Pigone v Lauria, 115 A.D. 286, 100 N.Y.S. 976, 1906 N.Y. App. Div. LEXIS 3675 (N.Y. App. Div. 1906).

In action against a notary public for damages for taking acknowledgment of a forged mortgage, motion to strike defense of release of a joint tortfeasor, as indefinite, uncertain and obscure, erroneously granted. Kainz v Goldsmith, 231 A.D. 171, 246 N.Y.S. 582, 1930 N.Y. App. Div. LEXIS 7030 (N.Y. App. Div. 1930).

29. Conspiracy

Complaint for conspiracy to discharge plaintiff from employment, alleging overt acts clearly and precisely, held sufficiently definite. Ledwith v Ignatius, 39 N.Y.S.2d 133, 179 Misc. 394, 1942 N.Y. Misc. LEXIS 2305 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 987, 39 N.Y.S.2d 988, 1943 N.Y. App. Div. LEXIS 6421 (N.Y. App. Div. 1943).

Complaint charging all defendants with personal responsibility for acts of conspiracy of each defendant was sufficient. Levine v Schaffzin, 99 N.Y.S.2d 251, 1950 N.Y. Misc. LEXIS 1915 (N.Y. Sup. Ct. 1950).

30. Contract

It is proper to move to make a complaint more definite and certain by specifying whether the contract was oral or in writing and whether authorized by resolution of trustees. First Presbyterian Church v Kennedy, 72 A.D. 82, 76 N.Y.S. 284, 1902 N.Y. App. Div. LEXIS 1194 (N.Y. App. Div. 1902).

When a complaint in an action alleges that the defendants, for the purpose of paying for certain stock, borrowed the amount through the defendant F, which amount they agreed to repay upon demand, etc., it is definite and certain and a motion to make more definite and certain should be denied. Citizens' Cent. Nat'l Bank v Munn, 115 A.D. 471, 101 N.Y.S. 435, 1906 N.Y. App. Div. LEXIS 3715 (N.Y. App. Div. 1906).

When a complaint embodies three distinct contracts, the defendant is entitled to have it made more definite and certain so as to show upon which plaintiff relies; if he relies upon three separate causes of action, they must be separately stated and numbered. Frank Seaman, Inc. v Stirn, 137 A.D. 659, 122 N.Y.S. 406, 1910 N.Y. App. Div. LEXIS 754 (N.Y. App. Div. 1910).

In an action to recover damages for breach of a written contract by which defendant agreed to build three machines for plaintiff, the complaint stated facts sufficient to constitute a cause of action, but did not contain a plain and concise statement of the material facts upon which plaintiff relied, as required by CPA § 241 (Rule 3014 herein) and RCP 102. Drydock Knitting Mills, Inc. v Queens Mach. Corp., 254 A.D. 568, 2 N.Y.S.2d 717, 1938 N.Y. App. Div. LEXIS 6598 (N.Y. App. Div. 1938).

Where the allegations in a complaint as to a contract and the breach thereof by the defendants are so indefinite that their precise meaning is not apparent, the defendants are entitled to an order directing the plaintiff to make the complaint more definite and certain. Rodger v Emigrant Industrial Sav. Bank, 258 A.D. 614, 17 N.Y.S.2d 530, 1940 N.Y. App. Div. LEXIS 8251 (N.Y. App. Div. 1940).

Allegation setting up an agreement to agree was ordered made definite and certain. See Di Giovanna v Garfunkel, 266 A.D. 779, 42 N.Y.S.2d 414, 1943 N.Y. App. Div. LEXIS 4450 (N.Y. App. Div. 1943).

In action against a carrier for damages to goods in transit, motion to compel statement of cause of damaged condition, was granted, information being necessary for defendant to plead. Winslow Bros. & Smith Co. v Grace S.S. Co., 233 N.Y.S. 448, 133 Misc. 902, 1929 N.Y. Misc. LEXIS 709 (N.Y. City Ct. 1929).

Motion to make complaint alleging a gift more definite, denied. Keuka College v Citizens' Nat'l Bank, 248 N.Y.S. 750, 139 Misc. 324, 1931 N.Y. Misc. LEXIS 1173 (N.Y. Sup. Ct. 1931).

In action for money due under agreement, motion to make complaint more definite by stating whether agreement was oral or written is proper, but motion is improper to require complaint to

set forth copy of agreement (if written) or its substance (if oral). Hanson v Hanson, 119 N.Y.S.2d 11, 203 Misc. 396, 1953 N.Y. Misc. LEXIS 1492 (N.Y. Sup. Ct. 1953).

Complaint alleging contract creating trust relation whose breach entitled plaintiff to equitable relief, intending to furnish reason for joinder of other defendants, was not indefinite. High v Trade Union Courier Pub. Corp., 31 Misc. 2d 7, 69 N.Y.S.2d 526, 1946 N.Y. Misc. LEXIS 1744 (N.Y. Sup. Ct. 1946), aff'd, 275 A.D. 803, 89 N.Y.S.2d 527, 1949 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 1949).

A complaint which mingles in a single count a cause of action on contract and one in conversion will be required to be made definite and certain either by reducing the complaint to a single cause of action or by separately stating and numbering each cause of action. Curtis v Wilson, 165 N.Y.S. 427 (N.Y. Sup. Ct. 1917).

In action by salesman for commissions, indefiniteness of agreement as to commencement and termination thereof and rate of compensation were correctable by motion under RCP 102. Jacobs v Joseph Freeman & Co., 123 N.Y.S.2d 439, 1953 N.Y. Misc. LEXIS 1983 (N.Y. Sup. Ct. 1953).

Matters of evidence or argument do not belong in a pleading. Garfield v Equitable Life Assurance Soc., 205 N.Y.S.2d 758 (N.Y. Sup. Ct. 1960).

The terms of pertinent agreements should not have been set forth in a complaint down to the minutest detail, but only the substance thereof, reserving for the trial the complete presentation of such documents, and a motion to strike under RCP 102 would be granted. Garfield v Equitable Life Assurance Soc., 205 N.Y.S.2d 758 (N.Y. Sup. Ct. 1960).

A denial of each and every allegation in a complaint for breach of promise to marry, except such as are admitted, and admitting an acquaintance with plaintiff but denying all other facts of the fourth allegation alleging seduction, will not be ordered made more definite and certain. Mingst v Bleck, 38 Hun 358 (N.Y.).

Allegation that services and materials were done and supplied at the times and about the matter and at the prices specified in an account already delivered. See Farct v Lee, 10 Abb. Pr. 143, 1860 N.Y. Misc. LEXIS 95 (N.Y.C.P. Feb. 1, 1860).

31. Damages

A defendant desiring to be further informed as to the specific claims of a plaintiff, where the complaint sets up a general allegation of damage, may move to make more definite and certain. Keefe v Lee, 197 N.Y. 68, 90 N.E. 344, 197 N.Y. (N.Y.S.) 68, 1909 N.Y. LEXIS 745 (N.Y. 1909).

The complaint in an action against a buyer for failing to accept and pay for goods ordered at stated prices should not be required to be made more definite by stating whether the damages were based on the difference between the market and contract price or upon the difference between the contract price and the amount realized on a resale. Friedman v Denousky, 122 A.D. 258, 106 N.Y.S. 780, 1907 N.Y. App. Div. LEXIS 2410 (N.Y. App. Div. 1907).

A defendant who is ignorant of plaintiff's theory of estimating damages may secure relief under RCP 102. Inman v Smythe, 232 N.Y.S. 554, 133 Misc. 494, 1929 N.Y. Misc. LEXIS 641 (N.Y. Sup. Ct. 1929).

Special damage not being sufficiently specifically alleged, the remedy is by motion therefor. Hewit v Mason, 24 How. Pr. 366, 1876 N.Y. Misc. LEXIS 127 (N.Y. Sup. Ct. 1876).

32. Demand

In an action to recover moneys deposited with defendant for investment, which he failed to make, where the complaint alleged a demand for its return, defendant was entitled to have the complaint made more definite and certain by alleging the date and place of the demand. Rosenthal v Rosenthal, 10 N.Y.S. 455, 57 Hun 587, 1890 N.Y. Misc. LEXIS 2167 (N.Y. Sup. Ct. 1890).

33. Description

In an action to enjoin the obstruction of a right of way appurtenant to lands, a complaint which describes the lands to which the way was appurtenant as “Palmer one hundred acre lot,” is sufficient on a motion to dismiss at trial; indefiniteness in the description should have been cured by a motion to make the complaint more definite and certain. Palmer v Van Deusen, 122 A.D. 282, 106 N.Y.S. 707, 1907 N.Y. App. Div. LEXIS 2415 (N.Y. App. Div. 1907).

Where complaint states definitely cause of action in trespass upon realty, more definite description of premises trespassed upon was denied, bill of particulars being proper remedy. Waters of White Lake, Inc. v Birschell, 270 A.D. 973, 62 N.Y.S.2d 77, 1946 N.Y. App. Div. LEXIS 4902 (N.Y. App. Div. 1946).

34. Divorce and separation

Complaint for separation should allege facts, instead of merely stating conclusions of law. Paper v Paper, 263 A.D. 831, 31 N.Y.S.2d 589, 1941 N.Y. App. Div. LEXIS 5180 (N.Y. App. Div. 1941).

Where, in an action for divorce, the complaint alleged that from a time named up to the time of the verification of the complaint the defendant visited various assignation houses in New York, which times and places the plaintiff could not particularize, and committed adultery with a person named, held, that it should be rendered more definite and certain as to the place. Cardwell v Cardwell, 12 Hun 92 (N.Y.).

Where the plaintiff states that more precision as to dates is not within his ability, that is sufficient for not stating them. Cardwell v Cardwell, 12 Hun 92 (N.Y.).

A count in a complaint for divorce, upon information and belief, that at diverse times between July 1, 1879, and this action, at various places in Saratoga Springs, defendant committed adultery with unknown women is not sufficiently definite and certain. Gridley v Gridley.

Where a wife alleges that her husband had at various times become diseased and infected her, the complaint will be required to be made more definite, by stating at what times and places the diseases were communicated to her, but not when they were contracted. Klein v Klein, 34 Super Ct (2 Jones & S) 48.

35. Dower

In an action based on fraudulent representations inducing plaintiff to purchase property, order granted directing that complaint be made more definite and certain. Silvestri v Associated Gas & Electric Corp., 240 A.D. 179, 268 N.Y.S. 763, 1934 N.Y. App. Div. LEXIS 10606 (N.Y. App. Div. 1934).

In action by the assignee of four assignors to recover for fraud in the sale of bonds, defendants' motion for an order requiring that the complaint be made more definite and certain should be granted, so that specific defenses, if any, may be pleaded in an orderly manner. McCaffrey v Halsey Stuart & Co., 250 A.D. 429, 294 N.Y.S. 335, 1937 N.Y. App. Div. LEXIS 8360 (N.Y. App. Div. 1937).

Complaint fails to set forth clear and concise statement of facts in action for breaches of contract and for fraud arising from purchase of real property. Leffingwell v Daily Mirror, Inc., 257 A.D. 311, 12 N.Y.S.2d 890, 1939 N.Y. App. Div. LEXIS 7746 (N.Y. App. Div. 1939).

Complaint in action for fraud for return of consideration and for damages on theory of prior rescission, or for damages on theory of affirmance of contract, was indefinite. Campel v Carrier, 277 A.D. 772, 97 N.Y.S.2d 1, 1950 N.Y. App. Div. LEXIS 3262 (N.Y. App. Div. 1950).

In action for rescission of contract for fraud, defendant properly invoked RCP 102 rule to require plaintiff to show when the fraud was discovered. Peters v United Holding Corp., 253 N.Y.S. 223, 141 Misc. 762, 1931 N.Y. Misc. LEXIS 1485 (N.Y. Sup. Ct. 1931).

Where, in an action for dower, it is alleged that two lots of real estate were devised by the husband, and in another clause that they descended to the heirs at law, the conflicting

allegations must be made more definite and certain. Peart v Peart, 2 N.Y.S. 322, 50 Hun 600, 1888 N.Y. Misc. LEXIS 161 (N.Y. Sup. Ct. 1888).

36. Employment

Court dismissed amended complaint where it failed to cure defects of original complaint. Allegation that defendants caused plaintiff to be discharged was so intermingled with the allegations of defamation as to make the pleading improper. Kaplan v K. Ginsburg, Inc., 7 Misc. 2d 278, 164 N.Y.S.2d 591, 1957 N.Y. Misc. LEXIS 2979 (N.Y. Sup. Ct. 1957).

37. Fraud

If the meaning or application of an allegation contained in a complaint in an action for fraud is reasonably apparent and the party is informed of the nature of the charge, an amendment will not be directed on motion to make the complaint definite and certain. Smith v Irvin, 92 N.Y.S. 170, 45 Misc. 262, 1904 N.Y. Misc. LEXIS 450 (N.Y. Sup. Ct. 1904), aff'd, 102 A.D. 614, 92 N.Y.S. 1146, 1905 N.Y. App. Div. LEXIS 712 (N.Y. App. Div. 1905).

38. Insurance

An insurance policy, being in the possession of the opposite party, is described with sufficient certainty by stating its amount, that it covered furniture in defendant’s tavern, and the names of the insurer and insured. Nellis v De Forest, 16 Barb. 61, 1852 N.Y. App. Div. LEXIS 193 (N.Y. Sup. Ct. Jan. 5, 1852).

In an action brought by a corporation to recover upon a policy of insurance against fire, the answer alleged that an agreement, mentioned in the complaint, fixing the amount of the loss, was entered into by the defendant on the strength of and in reliance on false and fraudulent representations upon the part of the plaintiff as to the amount of the loss, and the false and fraudulent statements had been made by the plaintiff and its authorized agent to the defendant

and its authorized agents. Held, that the plaintiff was entitled to an order to have the answer made more definite and certain. Texas Standard Cotton Oil Co. v Mutual Fire Ins. Co., 12 N.Y.S. 900, 58 Hun 560, 1890 N.Y. Misc. LEXIS 2702 (N.Y. App. Term 1890).

39. Judgment

Where the plaintiffs sue in a representative capacity, founding their title to sue upon the determination of a tribunal in a foreign country, the complaint must fully and definitely set forth the nature of the proceedings and of the determination; where it was made; the title of the court, etc., otherwise a motion lies to make the complaint more definite and certain. De Nobele v Lee, 47 Super Ct (15 Jones & S) 372.

An answer is sufficiently certain which alleges that a judgment relied upon was obtained by fraud between parties named. Culver v Hollister, 29 How. Pr. 479, 1864 N.Y. Misc. LEXIS 241 (N.Y. Sup. Ct. Feb. 1, 1864).

An allegation that a judgment obtained in the name of another belongs to plaintiff is not sufficiently definite and certain. Martin v Kanouse, 11 How. Pr. 567, 2 Abb. Pr. 327.

40. Lease

A complaint which alleges that defendant at certain times occupied certain premises belonging to plaintiff under an agreement between the parties, whereby defendant agreed to pay a certain sum, but only paid a lesser sum is “so indefinite or uncertain, etc.,” as to bring it within the provisions of this requirement. Post v Blasewitz, 13 A.D. 124, 43 N.Y.S. 59, 1897 N.Y. App. Div. LEXIS 37 (N.Y. App. Div. 1897).

Order denying motion to require plaintiff to correct complaint reversed upon the law, because defendant could not be liable as lessee under one lease and as an assignee of another at the same time, for the same term of the same premises. Proper manner of pleading indicated.

Lauterstein v Nathan Strauss, 228 A.D. 708, 239 N.Y.S. 224, 1930 N.Y. App. Div. LEXIS 12593 (N.Y. App. Div. 1930).

Where in an action to recover a chattel, the answer set forth a lease dated on a certain day whereby certain premises were leased to defendant together with certain machinery therein and possession of the chattels sued for thereunder, the averment is sufficiently definite. Durant v East River Electric Light Co., 2 N.Y.S. 389, 1888 N.Y. Misc. LEXIS 196 (N.Y. City Ct. 1888).

Lessees sued for breach of covenant to pay additional taxes by reason of additions or improvements, have a right to have the complaint made definite and certain as to the amount of the taxes and the portions of the premises, consisting of lots, on which the improvements have been made. Dudley v Grissler, 37 Super Ct (5 Jones & S) 412.

So it is not sufficient to simply allege that defendant is bound to repair. Corey v Mann, 38 Super Ct (6 Duer) 679.

41. Libel

Defense of justification or fair comment was ordered to be made more definite by stating what assertions were claimed to be truthful statements of fact and which ones claimed to be fair comment. National Concert & Artists Corp. v Crowell-Collier Pub. Co., 277 A.D. 980, 100 N.Y.S.2d 368, 1950 N.Y. App. Div. LEXIS 4146 (N.Y. App. Div. 1950).

Motion to make defense of fair comment more definite and certain by separately identifying the facts and the comments thereon was denied where editorial in suit was based solely on recorded court and administrative proceedings making the facts and comments easily identifiable. J. Radley Metzger Co. v New York Times Publishing Co., 15 Misc. 2d 1037, 183 N.Y.S.2d 131, 1958 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1958).

In an action for libel the allegation that a certain handbill or poster “containing” the libelous matter, etc., was not subject to a motion to make more definite and certain as to what or how much of the publication was claimed libelous, since the allegation was construed to cover the

whole contents. Adirondack Record, Inc. v Lawrence, 193 N.Y.S. 122, 1922 N.Y. Misc. LEXIS 1065 (N.Y. Sup. Ct.), rev'd, 202 A.D. 251, 195 N.Y.S. 627, 1922 N.Y. App. Div. LEXIS 4889 (N.Y. App. Div. 1922).

Motion to make allegations of complaint more definite and certain was denied without prejudice to defendant's rights to demand particularization of allegations of pleading. Kassner v Robbins, 122 N.Y.S.2d 523, 1953 N.Y. Misc. LEXIS 1858 (N.Y. Sup. Ct. 1953).

42. Mechanic's lien

The complaint of a subcontractor to enforce a mechanic's lien is indefinite if it does not show his contract with the contractor to be in conformity with that between the owner and contractor. Broderick v Boyle, 1 Abb. Pr. 319, 1855 N.Y. Misc. LEXIS 301 (N.Y.C.P. Feb. 1, 1855).

43. Names

Where a person claims part of a fund which has been paid to defendant and distributed, the latter is entitled to information as to the names of the alleged distributees. Hassa v Cutting, 11 N.Y. St. 891.

A complaint will be ordered and made more definite by stating the names of the officers where it alleges that a corporation by its officers made false representations. Schellens v Equitable Life Assurance Soc., 32 Hun 235 (N.Y. 1884).

The names of persons to whom liquor was sold illegally must be added for certainty. Kee v McSweeney, 66 How. Pr. 447, 1883 N.Y. Misc. LEXIS 257 (N.Y. Sup. Ct. Aug. 1, 1883).

44. Negligence

Where the complaint in a negligence action alleges facts which would permit plaintiff to invoke either the common law, the Federal Employers' Liability Act, or the New Jersey Employers' Liability Act, he will not be compelled, on a motion to make the complaint more definite and

certain, to separate and number causes of action. Payne v New York, S. & W. R. Co., 201 N.Y. 436, 95 N.E. 19, 201 N.Y. (N.Y.S.) 436, 1911 N.Y. LEXIS 1261 (N.Y. 1911).

An order requiring a pleading to be made more definite and certain should not require the disclosure of matters which are more properly the subject of a bill of particulars; in an action for negligence in operating an automobile, allegations in a complaint that the defendant operated his automobile negligently by not giving proper signals and by running at a dangerous speed, should not be required to be made more definite and certain; further information should be procured by a bill of particulars. Harrington v Stillman, 120 A.D. 659, 105 N.Y.S. 75, 1907 N.Y. App. Div. LEXIS 1281 (N.Y. App. Div. 1907).

Where complaint for negligence fails to allege the cause and nature of injuries the remedy is by motion to make the complaint more definite and certain, not by demurrer. Yarslowitz v Bienenstock, 141 A.D. 64, 125 N.Y.S. 649, 1910 N.Y. App. Div. LEXIS 3806 (N.Y. App. Div. 1910).

Where plaintiff intended to plead cause of action for negligence, complaint, while inartistically drawn, need not state whether action was based in negligence or upon warranty. Swiderski v Ascioti, 259 A.D. 969, 19 N.Y.S.2d 1010, 1940 N.Y. App. Div. LEXIS 7461 (N.Y. App. Div. 1940).

It is improper in an action of negligence for the defendant to move that the complaint be made more definite and certain in respect to certain allegations of the defendant's negligence; the proper remedy is for a bill of particulars. Mullen v Hall, 99 N.Y.S. 841, 51 Misc. 59, 1906 N.Y. Misc. LEXIS 226 (N.Y. App. Term 1906).

Prayer for relief for "such sums of money as facts will justify," in complaints for negligent injuries, required to specify sum of money so that defendant may pay such sum if so advised. Geisler v Rutkowski, 29 N.Y.S.2d 1001, 177 Misc. 284, 1941 N.Y. Misc. LEXIS 2201 (N.Y. Sup. Ct. 1941).

Allegation that plaintiff was "lawfully" on defendant's premises and had been "invited thereto by defendant" was required to be made more definite and certain as to the nature of the invitation.

Appel v Lippe, 20 Misc. 2d 849, 194 N.Y.S.2d 650, 1959 N.Y. Misc. LEXIS 2822 (N.Y. Sup. Ct. 1959).

But that a railway company carelessly and negligently ran and propelled one of its cars upon and against plaintiff whereby he was injured is sufficiently definite. McCarthy v New York C. & H. R. R. Co., 6 N.Y.S. 560, 1889 N.Y. Misc. LEXIS 683 (N.Y. Super. Ct. 1889).

Particulars of the defects of a stepladder provided, with which to perform plaintiff's duties, cannot be procured upon motion to make definite and certain. Schmidtkunst v Sutro, 2 N.Y.S. 706, 1888 N.Y. Misc. LEXIS 749 (N.Y.C.P. 1888).

That defendant so negligently and carelessly misbehaved itself in transporting said goods that the same were damaged, is indefinite and uncertain. Rubens v Ludgate Hill S.S. Co., 2 N.Y.S. 30, 49 Hun 608, 1888 N.Y. Misc. LEXIS 15 (N.Y. App. Term 1888).

A complaint alleging that defendant was the owner of certain premises, that plaintiff while walking on the street was injured by some substance thrown from said premises by an explosion of gas thereon, and that such explosion was caused by the negligence of the defendant is sufficiently certain without stating the acts of negligence. Jackman v Lord, 9 N.Y.S. 200, 56 Hun 192, 1890 N.Y. Misc. LEXIS 85 (N.Y. App. Term 1890).

A complaint in an action against a physician and a druggist which merely alleges that defendant negligently prescribed, prepared and compounded a medicine so as to mix with it a deadly poison which caused death should be required to be made definite and certain by separating the causes of action against the defendants so as to enable them to object on the ground of misjoinder or insufficiency. Cohen v Jarecky, 35 N.Y.S. 935, 90 Hun 266 (1895).

45. Place

So it must be stated where the contract was made and that by the law of the place it was valid, where it is void by the laws of this state. Thatcher v Morris, 11 N.Y. 437, 11 N.Y. (N.Y.S.) 437, 1854 N.Y. LEXIS 89 (N.Y. 1854).

Defendant setting up in answer loans and advances may be compelled to make it more definite and certain by giving the times and places of the loans and advances. Schubach v Moyses, 207 A.D. 424, 202 N.Y.S. 102, 1923 N.Y. App. Div. LEXIS 5973 (N.Y. App. Div. 1923).

Allegation of place is material whenever the matters pleaded are local in their nature, and if omitted the pleading is indefinite. Vermilya v Beatty, 6 Barb. 429, 1849 N.Y. App. Div. LEXIS 159 (N.Y. Sup. Ct. May 1, 1849). See Beach v Bay State Steamboat Co., 30 Barb. 433, 1859 N.Y. App. Div. LEXIS 61 (N.Y. Sup. Ct. Nov. 7, 1859).

46. Quo warranto

A complaint, in an action in the nature of a quo warranto, which states that the relator was, by the greatest number of legal votes cast at a specified election, elected to the office in controversy, is sufficiently definite and certain. People ex rel. Swinburne v Nolan, 10 Abb NC 471, 62 How. Pr. 271.

47. Sales

In simple action on contract for sale of goods, motion to make complaint more definite and certain by stating whether contract was in writing, and if so to set forth a copy, was properly denied. Swartmore Textile Co. v Morris Bernhard Co., 184 A.D. 572, 172 N.Y.S. 15, 1918 N.Y. App. Div. LEXIS 6577 (N.Y. App. Div. 1918).

Complaint in action for price alleging that plaintiff “heretofore” delivered goods, was not sufficiently definite and certain. Royle v McLaughlin, 195 A.D. 413, 186 N.Y.S. 356, 1921 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 1921).

In action for damages due to breach of warranty, motion to make complaint more definite and certain was granted to the extent of requiring plaintiffs to set the approximate date of the warranty, and, if more than one warranty is relied upon, to allege each in a separate cause of

action. Cohen v Japan Cotton & Silk Trading Co., 250 A.D. 770, 294 N.Y.S. 28, 1937 N.Y. App. Div. LEXIS 8924 (N.Y. App. Div. 1937).

48. Slander

Where allegations as to slander are indefinite and uncertain and each utterance would be a separate publication, it should be pleaded as a separate cause of action. Kaplan v K. Ginsburg, Inc., 8 Misc. 2d 724, 168 N.Y.S.2d 192, 1957 N.Y. Misc. LEXIS 2381 (N.Y. Sup. Ct. 1957).

In action for slander where plaintiff contended that defendant made false and defamatory statements, motion by plaintiff to add newspaper reporter and owners and publishers of newspaper wherein alleged defamatory remarks published as defendants granted. Albano v Michaelsen, 14 Misc. 2d 76, 175 N.Y.S.2d 949, 1958 N.Y. Misc. LEXIS 3310 (N.Y. Sup. Ct. 1958).

On motion to make complaint for slander more definite and certain, plaintiff was directed to include precise slanderous words allegedly uttered and to indicate precisely where the quoted matter contained in the paragraphs of the complaint began and ended. Caruso v Madeo, 201 N.Y.S.2d 69 (N.Y. Sup. Ct. 1960).

49. Statute

That certain acts are in violation of a certain statute and the acts amendatory thereof is sufficiently certain. Kee v McSweeney, 66 How. Pr. 447, 1883 N.Y. Misc. LEXIS 257 (N.Y. Sup. Ct. Aug. 1, 1883). But see Smith v Lockwood, 13 Barb. 209, 1852 N.Y. App. Div. LEXIS 69 (N.Y. Sup. Ct. June 7, 1852).

A motion to make more definite is proper when further information is wanted of a foreign statute relied on in the pleading. Robarge v Central Vermont R. Co. 18 Abb NC 363.

50. Stockholders' suits

See also Lifshutz v Adams, 285 N.Y. 180, 33 N.E.2d 83, 285 N.Y. (N.Y.S.) 180, 1941 N.Y. LEXIS 1515 (N.Y. 1941).

Complaint in stockholders' derivative action against corporate directors for their misconduct to detriment of dissolved corporation, should not be dismissed on plaintiff's concession that corporation could not be served with summons in New York, since plaintiff should have opportunity to bring in corporation as party defendant or have adjudication that it was not indispensable party to action. Cohen v Dana, 287 N.Y. 405, 40 N.E.2d 227, 287 N.Y. (N.Y.S.) 405, 1942 N.Y. LEXIS 1073 (N.Y. 1942).

A cause of action was dismissed for insufficiency where it was alleged that at various times certain defendants, without notice to the stockholders and to the damage of the corporation, transferred for their benefit various assets of the corporation without any resultant benefit to the corporation. To sustain this cause of action plaintiffs should have set forth not mere conclusions but facts constituting the misconduct of which complaint was made. Davis v Cohn, 260 A.D. 624, 23 N.Y.S.2d 104, 1940 N.Y. App. Div. LEXIS 4672 (N.Y. App. Div. 1940), reh'g denied, 261 A.D. 890, 25 N.Y.S.2d 800, 1941 N.Y. App. Div. LEXIS 7940 (N.Y. App. Div. 1941), app. dismissed, 286 N.Y. 622, 36 N.E.2d 458, 286 N.Y. (N.Y.S.) 622, 1941 N.Y. LEXIS 2170 (N.Y. 1941).

In stockholders' derivative action, complaint was ordered to be made more definite by showing dates when numerous acts were committed, to enable defendants to plead statute of limitations. Marco v Sachs, 270 A.D. 948, 62 N.Y.S.2d 543, 1946 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 1946).

In stockholder's representative action motions to state separately and number causes of action, to make complaint more definite and certain, and to strike out unnecessary allegations, will be denied, where the allegations comprehend but one cause of action, designed to restore to the corporation stock and property of which the corporation has been deprived through the alleged wrongful acts of one or more of the defendants. Baker v Baker, 204 N.Y.S. 11, 122 Misc. 757, 1924 N.Y. Misc. LEXIS 773 (N.Y. Sup. Ct. 1924), aff'd, 212 A.D. 850, 207 N.Y.S. 809, 1925 N.Y. App. Div. LEXIS 10054 (N.Y. App. Div. 4th Dep't 1925).

In stockholders' derivative action complaint alleging that named defendants were directors from specified dates to commencement of action was ordered made more definite by defining meaning of "now", "to date" and "present", and by stating whether they referred to verification or original or amended complaint or to what other date. Kramer v Metropolitan Commercial Corp., 135 N.Y.S.2d 165, 206 Misc. 842, 1954 N.Y. Misc. LEXIS 2901 (N.Y. Sup. Ct. 1954).

Complaint in derivative stockholders' action for waste and to compel declaration of dividend was not indefinite or uncertain because plaintiff failed to allege the date or time of the commission of the wrongs charged therein, since such information was within the province of a bill of particulars. Tomasello v Trump, 30 Misc. 2d 643, 217 N.Y.S.2d 304, 1961 N.Y. Misc. LEXIS 2744 (N.Y. Sup. Ct. 1961).

Complaint in action by stockholders for damages for individual injury, in consequence of series of wilful torts committed by voting trustee in conspiracy with codefendants to injure plaintiffs, was definite. Eisner v Davis, 109 N.Y.S.2d 504, 1951 N.Y. Misc. LEXIS 2890 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 1003, 112 N.Y.S.2d 672, 1952 N.Y. App. Div. LEXIS 5598 (N.Y. App. Div. 1952).

Allegations such as "improvident and excessive salary, excessive and unreasonable compensation", "inadequate distress prices", "improper expense accounts" and "for reasons personal to the individual defendants" are wholly conclusory and require an amended and more definite complaint. Steinberg v Altschuler, 158 N.Y.S.2d 411 (N.Y. Sup. Ct. 1956).

51. Time

The allegation of the time of uttering a slander is immaterial, Potter v Thompson, 22 Barb 87; so usually the day upon which an act is alleged under a videlicet to be done is immaterial and a different day may be proved without making the pleading more definite. 8 N.Y. 148.

If it is material when a fact happened it should be stated, and if not the remedy is by motion to make definite and certain. People ex rel. Crane v Ryder, 12 N.Y. 433, 12 N.Y. (N.Y.S.) 433, 1855 N.Y. LEXIS 27 (N.Y. 1855).

See also Schubach v Moyses, 207 A.D. 424, 202 N.Y.S. 102, 1923 N.Y. App. Div. LEXIS 5973 (N.Y. App. Div. 1923).

Where dates of alleged wrongs would, if set forth in complaint, enable defendant to move under statute of limitations to dismiss such portions of complaint as may be barred by lapse of time, complaint was deficient for failure to allege dates, though normally it is function of bill of particulars to furnish such type of information. Manacher v Central Coal Co., 2 A.D.2d 667, 152 N.Y.S.2d 983, 1956 N.Y. App. Div. LEXIS 4893 (N.Y. App. Div. 1st Dep't 1956).

In action to impress trust on real property and bank accounts, defendant was entitled to have complaint made more definite and certain with respect to dates of purchases and sales of realty and of setting up of bank accounts so that she might determine whether to plead statute of limitations. Pearlson v Javitz, 10 A.D.2d 879, 201 N.Y.S.2d 50, 1960 N.Y. App. Div. LEXIS 10601 (N.Y. App. Div. 2d Dep't 1960).

In an action upon a promissory note the plaintiff should be required to state whether the note was transferred to the plaintiff before or after its maturity. McGehee v Cooke, 105 N.Y.S. 60, 55 Misc. 40, 1907 N.Y. Misc. LEXIS 529 (N.Y. City Ct. 1907).

In an action to recover money alleged to have been deposited with the defendant for investment or to be returned to her upon demand, where the complaint alleges failure to make an investment and that the return is demanded, a motion that the complaint be made more definite and certain by setting forth the date of the demand is properly granted. Rosenthal v Rosenthal, 10 N.Y.S. 455, 57 Hun 587, 1890 N.Y. Misc. LEXIS 2167 (N.Y. Sup. Ct. 1890).

And in an action for rent the time the premises were occupied is material, and an allegation of occupation for “some time” is indefinite. Lynch v Walsh, 9 N.Y. St. 520.

If the happening of one event after another is important, it is sufficient to allege that it occurred after that other event. Martin v Kanouse, 2 Abb. Pr. 330, 1855 N.Y. Misc. LEXIS 108 (N.Y. Sup. Ct. Dec. 1, 1855); Kellogg v Baker, 15 Abb. Pr. 286, 1862 N.Y. Misc. LEXIS 137 (N.Y. Super. Ct.

Aug. 1, 1862). See Brown v Harmon, 21 Barb. 508, 1856 N.Y. App. Div. LEXIS 14 (N.Y. Sup. Ct. Apr. 8, 1856).

52. Torts, generally

A complaint against the president of an insurance corporation and others which alleges that the defendants, acting jointly, wrongfully and without authority, took certain money belonging to the corporation, consisting of checks, bank bills, United States notes, treasury notes and gold and silver coins of a specified aggregate value, and wrongfully converted the same, should be made more definite and certain when the transactions covered a period of thirteen years, for it is improbable that the conversion was a single transaction. Mutual Life Ins. Co. v Raymond, 118 A.D. 828, 103 N.Y.S. 839, 1907 N.Y. App. Div. LEXIS 763 (N.Y. App. Div. 1907).

Allegation in complaint for abuse of process that plaintiff attorney was compelled to reveal privileged communications by client was conclusion of law. Miller v Stern, 262 A.D. 5, 27 N.Y.S.2d 374, 1941 N.Y. App. Div. LEXIS 5268 (N.Y. App. Div. 1941).

In action for damages caused by defendant’s false oral statements urging others not to buy goods from plaintiff, complaint should set forth such statements more definitely, but not evidentiary matters as to such statements. Hallrud v Swedish American Line, 286 A.D. 1010, 145 N.Y.S.2d 532, 1955 N.Y. App. Div. LEXIS 4982 (N.Y. App. Div. 1955).

In action for damages for malicious destruction of television show, plaintiff was required to clarify allegations of complaint and to give definite information as to contracts or negotiations alleged to have been interfered with, as well as specific details of special damage claimed. Raeder v New York Times, 1 A.D.2d 1017, 151 N.Y.S.2d 579, 1956 N.Y. App. Div. LEXIS 5572 (N.Y. App. Div. 2d Dep't 1956).

Complaint alleging that defendant knowingly maintained nuisance near its factory and that plaintiff was employed in vicinity was subject to motion to make more definite. Savage v Mathieson Alkali Works, Inc., 22 N.Y.S.2d 692, 174 Misc. 1022, 1940 N.Y. Misc. LEXIS 2198

(N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1053, 27 N.Y.S.2d 454, 1941 N.Y. App. Div. LEXIS 8705 (N.Y. App. Div. 1941).

53. Value

Allegations of value are not traversable and only go to the quantum of damages, Hackett v Richards, 3 E.D. Smith 13.

An allegation that at a specified time defendants received as agents of plaintiff from a specified party certain sums of money, amounting to a certain sum, stating a demand therefor and refusal, is not indefinite nor uncertain. Sloman v Schmidt, 8 Abb. Pr. 5, 1858 N.Y. Misc. LEXIS 187 (N.Y.C.P. Dec. 1, 1858).

A statement that plaintiff was the owner of property insured and destroyed subject to a mortgage to defendant to secure $2,509, is sufficiently definite and certain. Velie v Newark City Ins. Co., 65 How. Pr. 1, 1883 N.Y. Misc. LEXIS 85 (N.Y. Sup. Ct. Feb. 1, 1883).

B. Scandalous or Prejudicial Matter

i. In General

54. Generally

For violation of RCP 103, an answer setting up several defenses was stricken out with leave to amend. Merchants' Nat'l Bank v R. Prescott & Son, Inc., 223 A.D. 194, 228 N.Y.S. 483, 1928 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 1928).

Burden to determine what is good and what bad in pleadings should not be imposed upon court. Plaintiffs required to serve amended complaint omitting all objectionable matter. Isaacs v Washougal Clothing Co., 233 A.D. 568, 253 N.Y.S. 387, 1931 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 1931).

Original answer was superseded by amended answer and thereafter had no existence as pleading. Volpe v Manhattan Sav. Bank, 276 A.D. 782, 92 N.Y.S.2d 797, 1949 N.Y. App. Div. LEXIS 3303 (N.Y. App. Div. 1949).

RCP 103 was derived from the Code of Civil Procedure and a motion under it was addressed to the pleadings within the meaning of CPA § 244 (§ 3025 herein). Security Finance Co. v Stuart, 224 N.Y.S. 257, 130 Misc. 538, 1927 N.Y. Misc. LEXIS 1086 (N.Y. Sup. Ct. 1927), aff'd, 226 A.D. 725, 233 N.Y.S. 890, 1929 N.Y. App. Div. LEXIS 9468 (N.Y. App. Div. 1929).

Applicability of RCP 102–110 to summary proceedings questioned. Hanover Estates, Inc. v Finkelstein, 86 N.Y.S.2d 316, 194 Misc. 755, 1949 N.Y. Misc. LEXIS 1760 (N.Y. Mun. Ct. 1949).

Defendant’s notice of intention to amend his answer upon trial of action for separation, by changing one paragraph and adding two affirmative defenses, was struck out, where there was ample time to move at Special Term. Bookbinder v Bookbinder, 133 N.Y.S.2d 834, 206 Misc. 715, 1954 N.Y. Misc. LEXIS 2453 (N.Y. Sup. Ct. 1954).

Affidavit was not pleading within RCP 103, and so no part of affidavit might be struck out. Hillman v Hillman, 69 N.Y.S.2d 134, 1947 N.Y. Misc. LEXIS 2199 (N.Y. Sup. Ct. 1947), aff'd, 273 A.D. 960, 79 N.Y.S.2d 325, 1948 N.Y. App. Div. LEXIS 5466 (N.Y. App. Div. 1948).

RCP 103 was intended to give relief against palpably irrelevant, redundant or scandalous matter. Robbins v Palmer, 5 NY Week Dig 537; 5 How. Pr. 476, 1850 N.Y. Misc. LEXIS 123; LITTLEJOHN v GREELEY, 22 How. Pr. 345, 13 Abb. Pr. 311, 1861 N.Y. Misc. LEXIS 203 (N.Y. Sup. Ct. Apr. 1, 1861); STRUVER v OCEAN INS. CO., 9 Abb. Pr. 23, 1859 N.Y. Misc. LEXIS 70 (N.Y.C.P. June 1, 1859). But see Lee Bank v Kitching, 20 Super Ct (7 Bosw) 664.

55. Discretion of court

Motions to strike from a pleading irrelevant matter are in one direction addressed, in no small degree, to the discretion of the supreme court, and if it should be of the opinion that the matter complained of could in no way prejudice the adverse party, it might well refuse to strike it out,

although the court deemed the allegations irrelevant and unnecessary. Kavanaugh v Commonwealth Trust Co., 181 N.Y. 121, 73 N.E. 562, 181 N.Y. (N.Y.S.) 121, 1905 N.Y. LEXIS 716 (N.Y. 1905).

Motions to strike under RCP 103 were addressed to the sound discretion of the court and would be denied unless the court could clearly see that the allegations had no possible bearing upon the subject matter of the litigation. Howard v Mobile Co. of America, 75 A.D. 23, 77 N.Y.S. 957, 1902 N.Y. App. Div. LEXIS 2072 (N.Y. App. Div. 1902).

Motions to strike out parts of a pleading as unnecessary and improper are not favored and will be denied unless the court can clearly see that the allegations sought to be stricken out have no possible bearing on the subject matter of the litigation. However, where it was conceded on the argument that the matter sought to be stricken out would be a proper subject of proof, the presence of such matters in the complaint involved no prejudice and would not tend to embarrass or delay the fair trial of the action. Such motions are addressed to the sound discretion of the court which is to be exercised with caution. Solomon v La Guardia, 267 A.D. 435, 46 N.Y.S.2d 701, 1944 N.Y. App. Div. LEXIS 4744 (N.Y. App. Div. 1944).

Abuse of discretion must be shown. Muller v McCormick, 272 A.D. 1027, 74 N.Y.S.2d 261, 1947 N.Y. App. Div. LEXIS 4774 (N.Y. App. Div. 1947).

Granting motion is discretionary. In re Nachman's Estate, 17 Misc. 2d 363, 182 N.Y.S.2d 873, 1959 N.Y. Misc. LEXIS 4215 (N.Y. Sur. Ct. 1959).

Motion under Rule 103 is addressed to the discretion of the court and is not favored. Mark v Prentice, 19 Misc. 2d 907, 193 N.Y.S.2d 891, 1959 N.Y. Misc. LEXIS 2844 (N.Y. Sup. Ct. 1959).

56. Use not favored

Motions to strike were not favored. Rockwell v Day, 84 A.D. 437, 82 N.Y.S. 993, 1903 N.Y. App. Div. LEXIS 1791 (N.Y. App. Div. 1903).

Motions to strike out portions of a pleading as irrelevant and redundant were not favored, and would be denied unless the court could see clearly that they had no possible bearing on the subject matter of the litigation; such motion was addressed to the sound discretion of the court. Indelli v Lesster, 130 A.D. 548, 115 N.Y.S. 46, 1909 N.Y. App. Div. LEXIS 252 (N.Y. App. Div. 1909).

Motions under RCP 103 to strike part of a complaint as sham or irrelevant were not favored and would not be granted in absence of clear showing of immateriality and substantial prejudice. Manco Distributors, Inc. v Bigelow-Sanford Carpet Co., 11 A.D.2d 1088, 206 N.Y.S.2d 743, 1960 N.Y. App. Div. LEXIS 7440 (N.Y. App. Div. 4th Dep't 1960).

A motion to strike pursuant to Rule 103 is addressed to the court’s discretion and such motion is not favored and must be denied unless the allegations have no possible bearing on the subject matter of the litigation, involve prejudice or are irrelevant to the cause pleaded. Friedland v Friedland, 12 Misc. 2d 349, 175 N.Y.S.2d 264, 1958 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1958).

Motion to strike is not favored, and where allegations attacked as irrelevant are not prejudicial, will be denied. Mark v Prentice, 19 Misc. 2d 907, 193 N.Y.S.2d 891, 1959 N.Y. Misc. LEXIS 2844 (N.Y. Sup. Ct. 1959).

Motions under RCP 103 were not favored, and were granted only where allegations were prejudicial and had no bearing on subject matter of litigation. Musacchio v Maida, 137 N.Y.S.2d 131, 1954 N.Y. Misc. LEXIS 3593 (N.Y. Sup. Ct. 1954).

57. Where prejudice might result

Motions to strike out allegations of a pleading should not be granted unless it is apparent that the moving party will be prejudiced by allowing the allegations to stand. Kavanaugh v Commonwealth Trust Co., 181 N.Y. 121, 73 N.E. 562, 181 N.Y. (N.Y.S.) 121, 1905 N.Y. LEXIS 716 (N.Y. 1905).

Motions to strike will be denied unless the court can see that the moving party is or will be prejudiced by the retention of the part sought to be stricken out and that the granting of the motion will not harm the adverse party. Dinkelspiel v New York Evening Journal Pub. Co., 91 A.D. 96, 86 N.Y.S. 375, 1904 N.Y. App. Div. LEXIS 340 (N.Y. App. Div. 1904).

Clause “which are presently in custody of district attorney” was prejudicial and stricken from complaint. Stella Flour & Feed Corp. v National City Bank, 283 A.D. 709, 127 N.Y.S.2d 926, 1954 N.Y. App. Div. LEXIS 5028 (N.Y. App. Div. 1954).

In action for professional services, it was improper to incorporate therein cause of action for accounting. Baliba v Michael, 1 A.D.2d 847, 149 N.Y.S.2d 96, 1956 N.Y. App. Div. LEXIS 6188 (N.Y. App. Div. 2d Dep't 1956).

The remote possibility that certain statements in the complaint might result in prejudice to one of the defendants was held insufficient ground for striking it out, since should occasion arise during the trial the court could, in exercise of its discretion, sever the actions or adopt other remedial means to avoid the objection. 137 East 66th St. v Lawrence, 194 N.Y.S. 762, 118 Misc. 486, 1922 N.Y. Misc. LEXIS 1292 (N.Y. Sup. Ct. 1922).

All intendments should be resolved in favor of the complaint in passing on a motion directed against it, and if allegations therein are necessary or proper to set forth plaintiff’s cause and do not prejudice the defendant, they should not be stricken. Dyer v Broadway Cent. Bank, 225 N.Y.S. 525, 130 Misc. 842, 1927 N.Y. Misc. LEXIS 1227 (N.Y. Sup. Ct. 1927), rev'd, 225 A.D. 366, 233 N.Y.S. 96, 1929 N.Y. App. Div. LEXIS 11639 (N.Y. App. Div. 1929).

Motions hereunder are not favored and are granted only where the allegations are prejudicial and have no bearing on the subject-matter of the litigation. Steinberg v Levy, 248 N.Y.S. 642, 139 Misc. 453, 1931 N.Y. Misc. LEXIS 1157 (N.Y. App. Term 1931).

Defendant’s motion, to strike out various allegations as irrelevant, unnecessary and scandalous, will be denied, since the action is in equity and the court will permit matter to remain in a pleading where no substantial prejudice to the defendant will result and the matter may prove

material or relevant at the trial of the action. Van Schaick v Stevens, 273 N.Y.S. 748, 152 Misc. 163, 1934 N.Y. Misc. LEXIS 1541 (N.Y. Sup. Ct. 1934).

Statements of assessed value of land condemned were not stricken from petition in condemnation as tending to prejudice fair trial. In re Port of New York Authority, 118 N.Y.S.2d 11, 202 Misc. 1104, 1952 N.Y. Misc. LEXIS 2101 (N.Y. Sup. Ct. 1952), aff'd, 281 A.D. 818, 118 N.Y.S.2d 921, 1953 N.Y. App. Div. LEXIS 3419 (N.Y. App. Div. 1953).

Where allegation of complaint is clearly improper and forms no part of plaintiff’s cause of action, and it would tend to prejudice and embarrass fair trial, such allegation was struck out. Werking v Amity Estates, Inc., 1 Misc. 2d 639, 150 N.Y.S.2d 280, 1954 N.Y. Misc. LEXIS 1875 (N.Y. Sup. Ct. 1954).

Test of prejudice is fundamental one in determining motion. In re Nachman's Estate, 17 Misc. 2d 363, 182 N.Y.S.2d 873, 1959 N.Y. Misc. LEXIS 4215 (N.Y. Sur. Ct. 1959).

In action for injuries sustained on defendant’s premises, allegations that cement walk constituted “a nuisance and a hazard and a trap to persons traversing said stairway”, though surplusage, were not stricken since they were not prejudicial to defendant. Appel v Lippe, 20 Misc. 2d 849, 194 N.Y.S.2d 650, 1959 N.Y. Misc. LEXIS 2822 (N.Y. Sup. Ct. 1959).

Mere presence of irrelevant or redundant matter does not justify motion to strike unless moving party is aggrieved thereby, but a party is “aggrieved” where such matter requires an answer or reply. Conner v Bryce, 170 N.Y.S. 94 (N.Y. Sup. Ct. 1918).

If court cannot see that party is aggrieved or that striking out will not harm him, motion to strike will be denied. Katz v Gevirtz, 83 N.Y.S.2d 52, 1948 N.Y. Misc. LEXIS 3280 (N.Y. Sup. Ct. 1948).

Motion to strike third-party complaint will be denied where no party will be aggrieved by permitting pleading to stand. Acco Products, Inc. v Cooperative G. L. F. Holding Corp., 96

N.Y.S.2d 541, 1950 N.Y. Misc. LEXIS 1567 (N.Y. Sup. Ct.), aff'd, 277 A.D. 954, 99 N.Y.S.2d 725, 1950 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 1950).

On motion to strike redundant or repetitious allegations from complaint, court will only strike those allegations which have no possible bearing on subject matter and then only where prejudice will result. Weinstein v Schwartz, 107 N.Y.S.2d 337, 1951 N.Y. Misc. LEXIS 2352 (N.Y. Sup. Ct. 1951).

Fact that matter may be irrelevant or redundant is not sufficient; it must appear on face of pleading that if allowed to remain, it will harm movant. 532 Fulton Street, Inc. v Crown Drug Stores, Inc., 113 N.Y.S.2d 748 (N.Y. App. Div.), dismissed, 113 N.Y.S.2d 925 (N.Y. App. Div. 1952).

In action for money lent and advances, allegations which are entirely unnecessary to cause of action and may be prejudicial to defendant were struck from complaint. Angileri v Vivanco, 139 N.Y.S.2d 728, 1955 N.Y. Misc. LEXIS 3485 (N.Y. Sup. Ct. 1955).

In action for wrongful death of plaintiff’s intestate while passenger in defendant’s automobile, allegations that defendant driver’s license had been revoked for gross negligence were stricken as irrelevant and prejudicial since evidence in support of such allegations would not be admissible. Sheinbaum v Murphy, 200 N.Y.S.2d 114 (N.Y. Sup. Ct.), aff'd, 11 A.D.2d 712, 204 N.Y.S.2d 579, 1960 N.Y. App. Div. LEXIS 9317 (N.Y. App. Div. 2d Dep't 1960).

Matter will not be stricken out if not encumbering the record, or seriously prejudicing the opposite party, though clearly redundant. Pacific Mail S.S. Co. v Irwin, 4 Hun 671 (N.Y. 1875).

The power can only properly be exercised in favor of a party aggrieved, since it is not the duty of the court to strike irrelevant matter out of a pleading in all cases. Homan v Byrne, 26 Hun 532 (N.Y. 1882).

A motion to strike out on the ground of irrelevancy should be granted only where there is evidence that retention would embarrass the opposite party in his prosecution or defense.

Williams v Folsom, 10 N.Y.S. 895, 57 Hun 128, 1890 N.Y. Misc. LEXIS 1051 (N.Y. App. Term 1890).

A party has been held aggrieved by every unnecessary allegation. Carpenter v West, 5 How. Pr. 53, 1850 N.Y. Misc. LEXIS 167 (N.Y. Sup. Ct. Aug. 1, 1850); Isaac v Velloman, 3 Abb. Pr. 464.

58. Motion to strike as testing sufficiency of pleading

The sufficiency of a cause of action or defense cannot be determined on motion to strike out if there is a semblance of validity. Walter v Fowler, 85 N.Y. 621, 85 N.Y. (N.Y.S.) 621, 1881 N.Y. LEXIS 137 (N.Y. 1881).

Legal sufficiency of pleading was not determinable under RCP 103. Rankin v Bush-Brown, 108 A.D. 294, 95 N.Y.S. 719, 1905 N.Y. App. Div. LEXIS 3169 (N.Y. App. Div. 1905).

On motion to strike matter from complaint as irrelevant, court does not pass upon sufficiency of complaint or any part thereof, but only upon relevancy of matter challenged to purported cause of action. Petrus v Spector, 280 A.D. 928, 116 N.Y.S.2d 145, 1952 N.Y. App. Div. LEXIS 4244 (N.Y. App. Div. 1952).

Where complaint contained allegations stating cause of action and other allegations not stating causes of action, latter were struck out and former were allowed to stand. Terminal Musical Supply, Inc. v Musical Instruments Exchange, Inc., 283 A.D. 869, 130 N.Y.S.2d 164, 1954 N.Y. App. Div. LEXIS 5591 (N.Y. App. Div.), app. denied, 283 A.D. 1030, 131 N.Y.S.2d 866, 1954 N.Y. App. Div. LEXIS 6172 (N.Y. App. Div. 1954).

Allegation of pleading is not adjudication as to its materiality, and does not constitute decision that evidence under it would be competent or have effect upon trial. Riesenberger v Sullivan, 1 A.D.2d 1050, 152 N.Y.S.2d 785, 1956 N.Y. App. Div. LEXIS 5189 (N.Y. App. Div. 2d Dep't 1956).

A defense complete in itself cannot be stricken out as irrelevant, even though it be insufficient. Noval v Haug, 96 N.Y.S. 708, 48 Misc. 198, 1905 N.Y. Misc. LEXIS 386 (N.Y. Sup. Ct. 1905).

There is no authority for stating in one cause of action facts alleging fraud in settling claim and facts for recovery on original liability, and former will be struck out. McPeck v McCarthy, 81 N.Y.S.2d 317, 192 Misc. 767, 1948 N.Y. Misc. LEXIS 2769 (N.Y. Sup. Ct. 1948).

Where the true ground of plaintiff's motion made under this rule was the asserted insufficiency of the law of the defenses, plaintiff's motion would be treated as one addressed to the legal sufficiency of the defenses and the affidavits submitted by the parties would be disregarded. Kevork Allalemdjian, Ltd. v Trotta, 6 Misc. 2d 976, 163 N.Y.S.2d 85, 1957 N.Y. Misc. LEXIS 3109 (N.Y. Sup. Ct. 1957).

Motion made under RCP 103 could not be used to strike out the entire cause of action and might not be used as substitute for any motion attacking complaint's sufficiency unless pleading was hopelessly defective. Bess v Ghana Philatelic Agency, Ltd., 22 Misc. 2d 175, 199 N.Y.S.2d 90, 1960 N.Y. Misc. LEXIS 3451 (N.Y. Sup. Ct. 1960).

Legal sufficiency of defense may not be determined on motion to strike as sham. Gonzalez v New York City Housing Authority, 23 Misc. 2d 36, 198 N.Y.S.2d 857, 1960 N.Y. Misc. LEXIS 3428 (N.Y. Sup. Ct. 1960).

Counterclaim cannot be adjudged irrelevant and struck out, Collins v Suau, 7 94; Fettretch v McKay, 47 N.Y. 426, 47 N.Y. (N.Y.S.) 426, 1872 N.Y. LEXIS 38 (N.Y. 1872); for whether it is a valid defense cannot be determined upon motion to strike out. Whitehall Lumber Co. v Edmans, 4 N.Y.S. 721, 52 Hun 610, 1889 N.Y. Misc. LEXIS 1685 (N.Y. Sup. Ct. 1889).

It was not intended that general sufficiency of pleading or part of pleading be tested under RCP 103 and RCP 104 (omitted in CPLR) as substitute or alternative remedy to that granted under RCP 113 (Rule 3212 herein). In re Leavitt's Will, 32 N.Y.S.2d 586, 1941 N.Y. Misc. LEXIS 2563 (N.Y. Sup. Ct. 1941).

59. Scandalous matter

When matter will be stricken as scandalous, see Hilton v Carr, 40 A.D. 490, 58 N.Y.S. 134, 1899 N.Y. App. Div. LEXIS 1153 (N.Y. App. Div. 1899).

Facts alleged in an action which constitute a complete defense may not be stricken out as scandalous, but facts alleged as a complete defense which constitute only a partial defense or are available only in mitigation of damages may be stricken out as scandalous. Persch v Wideman, 106 A.D. 553, 94 N.Y.S. 800, 1905 N.Y. App. Div. LEXIS 2626 (N.Y. App. Div. 1905).

RCP 103 did not authorize the striking out of an entire cause of action, or an entire defense, upon the ground that it was irrelevant, redundant or scandalous, but only the matter thereof which might be so characterized. Crotty v Erie R. Co., 153 A.D. 902, 137 N.Y.S. 1102, 1912 N.Y. App. Div. LEXIS 10501, 1912 N.Y. App. Div. LEXIS 9581 (N.Y. App. Div. 1912).

In action for alienation of wife’s affections irrelevant and scandalous matter stricken out under RCP 103. Modica v Martino, 211 A.D. 516, 207 N.Y.S. 479, 1925 N.Y. App. Div. LEXIS 10651 (N.Y. App. Div. 1925).

Part of answer stricken since it imported insolvency and so was libelous per se. Whitton Automotive Parts Co. v Yale Electric Corp., 227 A.D. 611, 234 N.Y.S. 918, 1929 N.Y. App. Div. LEXIS 6542 (N.Y. App. Div. 2d Dep't 1929).

In action by husband against wife to declare void deed by him to her as fraudulently induced by her misrepresentations that she would be good wife, allegations charging her misconduct as to their marital life, were not scandalous. Hurley v Hurley, 266 A.D. 701, 40 N.Y.S.2d 671, 1943 N.Y. App. Div. LEXIS 3946 (N.Y. App. Div. 1943).

In an action upon an accident policy issued by defendant insuring plaintiff against suits for personal injuries, allegations charging such gross neglect and misconduct on the part of the defendant in conducting a suit against plaintiff that judgment was taken against him should not be stricken out as scandalous, for plaintiff, to sustain an action under the policy, must prove the

defendant negligently defended the personal injury action. Appel v People's Surety Co., 121 N.Y.S. 1116, 66 Misc. 562, 1910 N.Y. Misc. LEXIS 155 (N.Y. City Ct. 1910).

In action to foreclose mortgage on property owned by husband of defendant, certain allegations in answer relating to relations between plaintiff and defendant's husband stricken out as scandalous and improper. McClean v Denwood Realty Co., 207 N.Y.S. 226, 124 Misc. 283, 1924 N.Y. Misc. LEXIS 1060 (N.Y. Sup. Ct. 1924).

Complaint for conspiracy to discharge plaintiff from employment held not scandalous, though allegations smart, or otherwise irritate defendants. Ledwith v Ignatius, 39 N.Y.S.2d 133, 179 Misc. 394, 1942 N.Y. Misc. LEXIS 2305 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 987, 39 N.Y.S.2d 988, 1943 N.Y. App. Div. LEXIS 6421 (N.Y. App. Div. 1943).

Where complaint in tort against Communist Party, its officials and newspaper, alleged that Party has its principal office in New York to guide its communizing conspiracy and that defendant newspaper and its personnel were under iron discipline, such allegations are not scandalous. Crouch v Publishers New Press, Inc., 137 N.Y.S.2d 867, 207 Misc. 253, 1955 N.Y. Misc. LEXIS 2581 (N.Y. Sup. Ct. 1955).

Where allegations were required for statement of a cause of action they were not impertinent and scandalous and not subject to motion under RCP 103. Meinhardt v Britting, 10 Misc. 2d 757, 169 N.Y.S.2d 925, 1958 N.Y. Misc. LEXIS 4082 (N.Y. Sup. Ct. 1958).

That allegations are scandalous is of no moment if they are material. Shtafman v I. Rokeach & Sons, Inc., 16 Misc. 2d 888, 181 N.Y.S.2d 531, 1958 N.Y. Misc. LEXIS 2298 (N.Y. Sup. Ct. 1958).

The court will strike scandalous matter out of a pleading, affidavits or other papers, used on a motion, of its own motion. People ex rel. Allen v Murray, 22 N.Y.S. 1051 (N.Y. Super. Ct. 1892).

Words in complaint, "strong, intimate personal relationship between defendants", were held scandalous and unnecessary, and struck out. Schierenbeck v John Krauss, Inc., 104 N.Y.S.2d

180, 1951 N.Y. Misc. LEXIS 1723 (N.Y. Sup. Ct.), aff'd, 278 A.D. 856, 105 N.Y.S.2d 360, 1951 N.Y. App. Div. LEXIS 4984 (N.Y. App. Div. 1951).

The court has inherent power to strike out scandalous matter. McVey v Cantrell, 8 Hun 522 (N.Y.), aff'd, Taddiken v Cantrell, 69 N.Y. 597, 69 N.Y. (N.Y.S.) 597, 1877 N.Y. LEXIS 884 (N.Y. 1877).

60. Striking out entire pleading, plea, or defense

On a motion to strike out irrelevant, redundant and scandalous matter contained in a pleading the entire cause of action or defense cannot be stricken out, but only the irrelevant matter. Tierney v Helvetia Swiss Fire Ins. Co., 129 A.D. 694, 114 N.Y.S. 139, 1908 N.Y. App. Div. LEXIS 1404 (N.Y. App. Div. 1908).

An entire defense, even though insufficient in law, cannot be stricken out as irrelevant, redundant or scandalous. Gibson v McDonald, 139 A.D. 51, 123 N.Y.S. 504, 1910 N.Y. App. Div. LEXIS 2120 (N.Y. App. Div. 1910).

RCP 103 did not authorize the striking out of an entire cause of action or defense. Crotty v Erie R. Co., 153 A.D. 902, 137 N.Y.S. 1102, 1912 N.Y. App. Div. LEXIS 10501, 1912 N.Y. App. Div. LEXIS 9581 (N.Y. App. Div. 1912).

RCP 103 did not authorize the striking out of an entire plea or defense, even though insufficient in law. Burnside v Indra Line, Ltd., 141 N.Y.S. 238, 80 Misc. 414, 1913 N.Y. Misc. LEXIS 1056 (N.Y. App. Term 1913).

Plea of justification as defense to action for unlawful interference with lease, even if provable under general denial, will not be stricken where no prejudice will result. Burr v Carvel Dari-Freeze Stores, Inc., 21 Misc. 2d 877, 191 N.Y.S.2d 235, 1959 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 1959).

ii. Particular Actions and Allegations

61. Assault and battery

In action for assault and battery allegations of defendant as to justification not tending to prejudice the plaintiff should not be stricken out. Fisk v Hobern, 204 A.D. 588, 198 N.Y.S. 654, 1923 N.Y. App. Div. LEXIS 9529 (N.Y. App. Div. 1923).

62. Conspiracy

Complaint for conspiracy to discharge plaintiff from employment held not scandalous, though allegations smart, or otherwise irritate defendants. Ledwith v Ignatius, 39 N.Y.S.2d 133, 179 Misc. 394, 1942 N.Y. Misc. LEXIS 2305 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 987, 39 N.Y.S.2d 988, 1943 N.Y. App. Div. LEXIS 6421 (N.Y. App. Div. 1943).

63. Contracts

In action for specific performance, it was error to strike out allegations of complaint as irrelevant and prejudicial, where they were not inconsistent and possibly might have established a supplemental agreement. Park River Holding Corp. v Hertzig Corp., 226 A.D. 746, 233 N.Y.S. 849, 1929 N.Y. App. Div. LEXIS 9720 (N.Y. App. Div. 1929).

Allegations of illegal and tortious acts on the part of defendant depreciating the market value of certain certificates which might be paid upon the contract instead of money will be stricken out. Sage v Van Alst, 24 Hun 232 (N.Y. 1881).

64. Damages

In action for employer’s breach of contract of employment, complaint allegations seeking to recover damages in amount in excess of difference between contract price and reasonable earnings outside contract, are irrelevant and prejudicial. Goldman v City Specialty Stores, Inc., 285 A.D. 880, 137 N.Y.S.2d 693, 1955 N.Y. App. Div. LEXIS 5968 (N.Y. App. Div. 1955).

65. Foreclosure

In action to foreclose mortgage on property owned by husband of defendant, certain allegations in answer relating to relations between plaintiff and defendant's husband stricken out as scandalous and improper. McClean v Denwood Realty Co., 207 N.Y.S. 226, 124 Misc. 283, 1924 N.Y. Misc. LEXIS 1060 (N.Y. Sup. Ct. 1924).

66. Fraud, deceit, and misrepresentation

In action for fraud, allegation that corporate defendants are interlocked and controlled by individual defendants who have mingled corporate and individual assets, was prejudicial. Auletta v Whitestone Acres, Inc., 77 N.Y.S.2d 358, 1947 N.Y. Misc. LEXIS 3700 (N.Y. Sup. Ct. 1947).

67. Fraudulent conveyance

Where complaint alleged fraudulent transfer of assets to defendant corporation of which plaintiff was creditor, showing he was aided and not injured thereby, was struck as scandalous and irrelevant. Gruenebaum v Lissauer, 57 N.Y.S.2d 137, 185 Misc. 718, 1945 N.Y. Misc. LEXIS 2184 (N.Y. Sup. Ct. 1945), aff'd, 270 A.D. 836, 61 N.Y.S.2d 372, 1946 N.Y. App. Div. LEXIS 4197 (N.Y. App. Div. 1946).

68. Insurance

In an action upon an accident policy issued by defendant insuring plaintiff against suits for personal injuries, allegations charging such gross neglect and misconduct on the part of the defendant in conducting a suit against plaintiff that judgment was taken against him should not be stricken out as scandalous, for plaintiff, to sustain an action under the policy, must prove the defendant negligently defended the personal injury action. Appel v People's Surety Co., 121 N.Y.S. 1116, 66 Misc. 562, 1910 N.Y. Misc. LEXIS 155 (N.Y. City Ct. 1910).

69. Libel and slander

In action for slander, irrelevant allegations which may prejudice defendant at trial ordered struck out. Van Zanary v Diamond, 259 A.D. 912, 20 N.Y.S.2d 160, 1940 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 1940).

Where paragraph of complaint for libel is inextricable mixture of inferences and conclusions not supported by libelous article, together with some statements that, if proven, might sustain libelous character, such paragraph was properly struck out. Lasky v Kempton, 285 A.D. 1121, 140 N.Y.S.2d 526, 1955 N.Y. App. Div. LEXIS 6855 (N.Y. App. Div. 1955).

In action by physician for slander, allegations in complaint charging plaintiff with mental disorders, liability to arrest and desertion of wife and children, were proper and not prejudicial to defendant. Musacchio v Maida, 137 N.Y.S.2d 131, 1954 N.Y. Misc. LEXIS 3593 (N.Y. Sup. Ct. 1954).

In action for libel, allegations as to published articles in another magazine which are unnecessary to statement of cause of action based upon defendant's publications, were struck out as unnecessary, immaterial and prejudicial. Green v Time, Inc., 147 N.Y.S.2d 828, 1955 N.Y. Misc. LEXIS 3213 (N.Y. Sup. Ct.), aff'd, 1 A.D.2d 665, 146 N.Y.S.2d 812, 1955 N.Y. App. Div. LEXIS 3793 (N.Y. App. Div. 1st Dep't 1955).

70. —Defenses

Where the plaintiff bases his action solely upon that portion of a publication inferring that he has been guilty of adultery, but the defendant sets up the entire article in justification and in mitigation of damages, it is error to strike out portions relating to cruelty and inhuman treatment, etc., upon the ground that they are scandalous and irrelevant. Osterheld v Star Co., 146 A.D. 388, 131 N.Y.S. 247, 1911 N.Y. App. Div. LEXIS 1899 (N.Y. App. Div. 1911).

In physician's action for publication of libelous article defense of fair comment and criticism stricken out where the article in question attacked the professional and personal character of the

plaintiff. Sherman v International Publications, Inc., 214 A.D. 437, 212 N.Y.S. 478, 1925 N.Y. App. Div. LEXIS 10544 (N.Y. App. Div. 1925).

In libel, defenses of justification, in whole or in part, privileges, fair comment and in mitigation of damages were not subject to motion to strike because irrelevant, redundant, scandalous and evidentiary. Davis v News Syndicate Co., 253 N.Y.S. 25, 141 Misc. 673, 1931 N.Y. Misc. LEXIS 1753 (N.Y. Sup. Ct. 1931).

71. Matrimonial actions

In action by husband against wife to declare void deed by him to her as fraudulently induced by her misrepresentations that she would be good wife, allegations charging her misconduct as to their marital life, were not scandalous. Hurley v Hurley, 266 A.D. 701, 40 N.Y.S.2d 671, 1943 N.Y. App. Div. LEXIS 3946 (N.Y. App. Div. 1943).

In an action for limited divorce, allegations of frequent intoxication and filthy habits, and that defendant had appropriated plaintiff’s property are relevant, but those of adultery are not. Allen v Allen, 32 Hun 241, 19 (N.Y. 1884).

Scandalous, indecent, and licentious acts not averred as leading to personal injury or apprehension thereof are not relevant. Klein v Klein, 34 Super Ct (2 Jones & S) 48.

72. Negligence

In action by guest against host for injuries in collision between two automobiles, his allegations that consolidated action between such motorists resulted in judgment against host, and that other motorist was not contributorily negligent, was struck as prejudicial to fair trial. Goodman v Kirshberg, 261 A.D. 257, 25 N.Y.S.2d 13, 1941 N.Y. App. Div. LEXIS 7302 (N.Y. App. Div.), reh'g denied, 262 A.D. 711, 27 N.Y.S.2d 992, 1941 N.Y. App. Div. LEXIS 5500 (N.Y. App. Div. 1941).

In action for personal injury, allegation that defendant violated statute by leaving scene of accident without reporting, was struck from complaint. Damelio v Machi, 81 N.Y.S.2d 704, 192 Misc. 298, 1948 N.Y. Misc. LEXIS 2923 (N.Y. Sup. Ct. 1948).

In action for damages for negligence of gravestone cutter in placing stone memorial on wrong grave, allegations as to mental anguish and physical upset were struck from complaint. Trott v Barre Memorials, Inc., 85 N.Y.S.2d 341, 195 Misc. 975, 1948 N.Y. Misc. LEXIS 3768 (N.Y. City Ct. 1948).

In action for injuries sustained on defendant's premises, allegations that cement walk constituted "a nuisance and a hazard and a trap to persons traversing said stairway", though surplusage, were not stricken since they were not prejudicial to defendant. Appel v Lippe, 20 Misc. 2d 849, 194 N.Y.S.2d 650, 1959 N.Y. Misc. LEXIS 2822 (N.Y. Sup. Ct. 1959).

In action against railroad, defense that at time of injury infant plaintiff was not connected with or employed upon railroad and that he was walking along tracks at place other than where they cross highway in violation of Railroad Law was not irrelevant or prejudicial. Oppenheim v Long Island R. Co., 21 Misc. 2d 938, 197 N.Y.S.2d 816, 1960 N.Y. Misc. LEXIS 3863 (N.Y. Sup. Ct. 1960).

In action against railroad, defense that at time of injury fourteen-year-old infant plaintiff was not employed upon railroad and was walking along tracks at place other than where they cross highway in violation of Penal Law, was stricken since offense charged is not a crime when committed by infant under sixteen. Oppenheim v Long Island R. Co., 21 Misc. 2d 938, 197 N.Y.S.2d 816, 1960 N.Y. Misc. LEXIS 3863 (N.Y. Sup. Ct. 1960).

73. —Wrongful death action

In action for wrongful death of plaintiff's intestate while passenger in defendant's automobile, allegations that defendant driver's license had been revoked for gross negligence were stricken as irrelevant and prejudicial since evidence in support of such allegations would not be

admissible. Sheinbaum v Murphy, 200 N.Y.S.2d 114 (N.Y. Sup. Ct.), aff'd, 11 A.D.2d 712, 204 N.Y.S.2d 579, 1960 N.Y. App. Div. LEXIS 9317 (N.Y. App. Div. 2d Dep't 1960).

C. Procedure

i. In General

74. Generally

Applicability of RCP 102–110 (§§ 3024, 3211 herein) to summary proceedings questioned. Hanover Estates, Inc. v Finkelstein, 86 N.Y.S.2d 316, 194 Misc. 755, 1949 N.Y. Misc. LEXIS 1760 (N.Y. Mun. Ct. 1949).

75. Necessity of notice

Motions directed against misjoinder, irrelevant matter, and the like, arising under RCP 102, 103 and former 104 should be noticed in accordance with RCP 105. 137 East 66th St. v Lawrence, 194 N.Y.S. 762, 118 Misc. 486, 1922 N.Y. Misc. LEXIS 1292 (N.Y. Sup. Ct. 1922).

In view of RCP 102, 105 an order bringing in new parties under former CPA § 193 had to be upon notice. Testing Laboratories of New York, Inc. v Krainin, 208 N.Y.S. 801, 124 Misc. 667, 1925 N.Y. Misc. LEXIS 720 (N.Y. App. Term 1925).

76. Time for motion

The motion to strike out or dismiss on account of irrelevant matter could not be made at the trial. Smith v Countryman, 30 N.Y. 655, 30 N.Y. (N.Y.S.) 655, 1864 N.Y. LEXIS 113 (N.Y. 1864).

Under Code of Civil Procedure, § 798, a party was entitled to notice a motion to compel his opponent to make his pleading more definite and certain at any time within forty days after

service of the pleading by mail. Borsuk v Blauner, 93 A.D. 306, 87 N.Y.S. 851, 1904 N.Y. App. Div. LEXIS 969 (N.Y. App. Div. 1904).

A motion under former RCP 104 to strike out as irrelevant certain portions of answers served more than a year before the motion is made, was untimely and would be denied; where there are six defendants, whose answers are identical, it is idle to strike from one answer that which is contained in five others. Barber v General Asphalt Co., 125 A.D. 412, 109 N.Y.S. 1023, 1908 N.Y. App. Div. LEXIS 2798 (N.Y. App. Div. 1908).

While a motion under RCP 102, 103 or former 104 not noticed within twenty days from the service of the pleading to which it was addressed was improper in form, where the moving party was also in a position to move for judgment on the pleadings under RCP 112 (Rule 3212 herein) and the relief sought in either case was practically the same, the motion would be treated on appeal as made under RCP 112 (Rule 3212 herein). Sutton v Duntley, 205 A.D. 660, 199 N.Y.S. 588, 1923 N.Y. App. Div. LEXIS 5112 (N.Y. App. Div. 1923).

The time limitation fixed by RCP 105 did not apply to a motion under RCP 90 (Rule 3014 herein) to separately state and number causes of action in a complaint. Brown-Duffy Goatskin Corp. v Henkel, 211 A.D. 342, 207 N.Y.S. 357, 1925 N.Y. App. Div. LEXIS 10627 (N.Y. App. Div. 1925).

A motion to strike an answer will be denied when made more than 20 days after service of the answer which raises issues of fact that should be presented to a jury. Goldberg v National City Bank, 220 A.D. 715, 221 N.Y.S. 827, 1927 N.Y. App. Div. LEXIS 9540 (N.Y. App. Div. 1927).

Motion to strike out answer must be made within time prescribed by RCP 105. Balsam v Young, 236 A.D. 854, 260 N.Y.S. 488, 1932 N.Y. App. Div. LEXIS 7560 (N.Y. App. Div. 1932).

A motion made pursuant to RCP 103 to strike out as sham and frivolous will be denied where it is not made within the time prescribed by Rule 105. Central Nat'l Bank v Board of Education, 3 A.D.2d 258, 160 N.Y.S.2d 664, 1957 N.Y. App. Div. LEXIS 6144 (N.Y. App. Div. 3d Dep't 1957).

In view of this rule, where a motion for summary judgment under RCP 113 (Rule 3212 herein) was not made within 20 days after service of the answer, the court might not consider whether under any other rule the court had power to strike out an affirmative answer. Rogan v Consolidated Coppermines Co., 193 N.Y.S. 163, 117 Misc. 718, 1922 N.Y. Misc. LEXIS 1068 (N.Y. Sup. Ct. 1922).

Under RCP 105 it was held that the effect of a failure to object on the ground of misjoinder or nonjoinder of parties within the time limited by this rule was merely to deprive the party so failing of his right to have the application for correction entertained as a matter of right. Under CPA § 192 (§ 3215 herein) the court could, in its discretion, order the joinder or substitution of other parties notwithstanding the application therefor was made after the expiration of the period indicated in RCP 105. United States Trust Co. v Greiner, 209 N.Y.S. 105, 124 Misc. 458, 1925 N.Y. Misc. LEXIS 730 (N.Y. Sup. Ct.), aff'd, 215 A.D. 659, 212 N.Y.S. 931, 1925 N.Y. App. Div. LEXIS 5421 (N.Y. App. Div. 1925).

Motion to correct pleading may be made before or after answer to third-party complaint has been served. Van Pelt v New York, 69 N.Y.S.2d 116, 188 Misc. 995, 1947 N.Y. Misc. LEXIS 2194 (N.Y. Sup. Ct. 1947).

A motion to make a paragraph of an answer more definite and certain should have been denied where it was made after the period described in RCP 105. Di Mino v Old Town Corp., 4 Misc. 2d 962, 157 N.Y.S.2d 649, 1956 N.Y. Misc. LEXIS 1424 (N.Y. Sup. Ct. 1956).

The time for making motions which must be made within twenty days after service of the complaint is not extended by the making of a motion to dismiss the complaint for lack of jurisdiction of the person. Robinson v Robinson, 9 Misc. 2d 198, 169 N.Y.S.2d 786, 1957 N.Y. Misc. LEXIS 1948 (N.Y. Sup. Ct. 1957).

Motion to strike matter from pleading, made over 20 days after service of answer, is not timely. Svatba v Prudential Ins. Co., 66 N.Y.S.2d 492, 1946 N.Y. Misc. LEXIS 3091 (N.Y. Sup. Ct. 1946).

Motion under former Rule 104, made over 20 days after service of amended answer, was not timely. Vilter Mfg. Co. v Dairymen's League Co-op. Ass'n, 84 N.Y.S.2d 445, 1948 N.Y. Misc. LEXIS 3599 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 706, 88 N.Y.S.2d 248, 1949 N.Y. App. Div. LEXIS 4105 (N.Y. App. Div. 1949).

Motion by plaintiff to strike defendant’s affirmative defense under RCP 103 must be made within 20 days after service of answer, else motion would be denied. Callegari v Guatelli, 154 N.Y.S.2d 148 (N.Y. Sup. Ct. 1956).

Motion by plaintiff to strike defendant’s affirmative defense under RCP 104 (omitted in CPLR) had to be made within 20 days after service of answer, else motion would have been denied. Callegari v Guatelli, 154 N.Y.S.2d 148 (N.Y. Sup. Ct. 1956).

Where defendant served his answer by mail plaintiff was entitled to twenty-three days (CPA § 164) within which to move against the answer. Benn v Lucks, 201 N.Y.S.2d 18 (N.Y. Sup. Ct. 1960).

A motion to make a pleading more definite and certain must be made within twenty days from the service of the complaint. Brooks v Hanchett, 36 Hun 70 (N.Y.).

The time within which to move to compel amendment of answer runs from the filing thereof. Walker v Granite Bank, 1 Abb. Pr. (n.s.) 406, 1865 N.Y. Misc. LEXIS 26 (N.Y. Sup. Ct. Oct. 1, 1865).

77. Extension of time

The fact that a party had received an extension of time within which to answer a complaint did not extend the time within which he must move to correct its form under RCP 105. Post v Blasewitz, 13 A.D. 124, 43 N.Y.S. 59, 1897 N.Y. App. Div. LEXIS 37 (N.Y. App. Div. 1897).

Unless a party in procuring a stipulation or order extending his time to answer or demur reserved his right to move in respect to objections to the form of the complaint, he was deemed

to have waived the same. Sherman v McCarthy, 90 A.D. 542, 85 N.Y.S. 727, 1904 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 1904).

Where a defendant has procured an extension of time in which to answer or otherwise move, the time within which he must notice a motion to strike out matter in a pleading alleged to be irrelevant, redundant or scandalous is extended a like period. Landmesser v Hayward, 157 A.D. 74, 141 N.Y.S. 730, 1913 N.Y. App. Div. LEXIS 5860 (N.Y. App. Div. 1913).

A motion to extend the time to move to strike out portions of an answer denied for laches, and because the questions raised by the motion to strike out could be appropriately raised on the trial in connection with the production of evidence. Security Trust Co. v Pritchard, 205 N.Y.S. 725, 123 Misc. 493, 1924 N.Y. Misc. LEXIS 991 (N.Y. Sup. Ct. 1924).

78. Effect of answer or reply

The fact that a plaintiff replied to a counterclaim did not preclude him to move thereafter to strike out irrelevant and scandalous matter contained in the answer which was in no way connected with the counterclaim. Sheridan v Tucker, 138 A.D. 436, 122 N.Y.S. 800, 1910 N.Y. App. Div. LEXIS 1549 (N.Y. App. Div. 1910).

79. Effect of notice of trial

A motion to compel defendants to strike certain allegations or to state them as separate defenses is not waived by noticing the case for trial where the motion was noticed within time required by RCP 105. Morron v Bryce, 162 A.D. 466, 147 N.Y.S. 931, 1914 N.Y. App. Div. LEXIS 6078 (N.Y. App. Div. 1914).

80. Showing as to compliance

It was not necessary for the moving party to show affirmatively that his motion was made within the time required by RCP 105. If the notice was not given within the twenty days the adverse

party must show that fact in the same way that he establishes any matter of defense not apparent on the moving papers. Barber v Bennett, 6 Super Ct (4 Sandf) 705.

It was not necessary that the party making a motion under RCP 105 should show by affidavit that he has given the notice within time prescribed. Roosa v Saugerties & Woodstock Turnpike Road Co., 8 How. Pr. 237, 1853 N.Y. Misc. LEXIS 133 (N.Y. Sup. Ct. Feb. 1, 1853).

ii. Vague or Ambiguous Pleadings

81. Generally

The remedy is by motion where a pleading is not sufficiently definite and certain. Seeley v Engell, 13 N.Y. 542, 13 N.Y. (N.Y.S.) 542, 1856 N.Y. LEXIS 67 (N.Y. 1856).

The remedy is not by excluding evidence at the trial but by motion. Greenfield v Massachusetts Mut. Life Ins. Co., 47 N.Y. 430, 47 N.Y. (N.Y.S.) 430, 1872 N.Y. LEXIS 40 (N.Y. 1872).

A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not a good pleading; it should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by motion to have the answer made more specific and certain. Thompson v Wittkop, 184 N.Y. 117, 76 N.E. 1081, 184 N.Y. (N.Y.S.) 117, 1906 N.Y. LEXIS 1344 (N.Y. 1906).

Where a complaint is inartificial in that it sets out the breach of an undertaking by negativing the language of its condition the remedy for the defect is by motion to make the complaint more definite and certain. Hadley v Garner, 116 A.D. 68, 101 N.Y.S. 777, 1906 N.Y. App. Div. LEXIS 2601 (N.Y. App. Div. 1906).

Motion for judgment on the pleadings is not a substitute for a motion under RCP 102. Baird v Grace Church of Millbrook, 197 A.D. 272, 189 N.Y.S. 583, 1921 N.Y. App. Div. LEXIS 7450 (N.Y. App. Div. 1921).

Where a defendant objects to a complaint in an action for services performed because it is vague and indefinite he should either demand a bill of particulars or move to make the complaint more definite and certain. Fleck v Friedman, 97 N.Y.S. 231, 49 Misc. 220, 1906 N.Y. Misc. LEXIS 526 (N.Y. App. Term 1906).

Motion does not lie before answer to compel plaintiff to elect between alleged inconsistent and mutually exclusive causes of action. Antun v Masholie--Salvator Co., 40 N.Y.S.2d 952, 180 Misc. 106, 1943 N.Y. Misc. LEXIS 1772 (N.Y. Sup. Ct.), aff'd, 266 A.D. 852, 43 N.Y.S.2d 517, 1943 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 1943).

Where motion granted under RCP 102 requiring plaintiff to make his complaint more definite and certain as to stated paragraphs, motion made under RCP 103 as to such paragraphs before plaintiff complied was premature. Friedland v Friedland, 12 Misc. 2d 349, 175 N.Y.S.2d 264, 1958 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1958).

A party cannot obtain his opponent’s evidence by a motion to make his complaint more definite and certain. Durant v East River Electric Light Co., 2 N.Y.S. 389, 1888 N.Y. Misc. LEXIS 196 (N.Y. City Ct. 1888).

Specification of particular parts of pleading objected to must be made. Molinaro v Mintz, 70 N.Y.S.2d 518, 1947 N.Y. Misc. LEXIS 2433 (N.Y. Sup. Ct. 1947).

Dismissal of complaint for insufficiency barred motion under RCP 102 as to correct complaint, as academic. Schumann v Loew's, Inc., 135 N.Y.S.2d 361, 1954 N.Y. Misc. LEXIS 2939 (N.Y. Sup. Ct. 1954).

Notice of motion which fails to specify precise parts of complaint sought to be made more definite and certain is fatally defective. Sussman v Goldberg, 215 N.Y.S.2d 650 (N.Y. Sup. Ct. 1961).

The order directing an answer to be made more definite and certain should not give plaintiff the right to apply for judgment if it is not complied with, for the uncertain allegations can be stricken

out only. Hughes v Chicago, M. & St. P. R. Co. 45 Super Ct (13 Jones & S) 114; and the court may refuse to take evidence concerning the allegations in question. Lynch v Walsh, 9 N.Y. St. 520.

Indefinite allegations may be rendered more definite although there are other allegations sufficient to warrant the dissolution of the corporation as prayed. People v New York Juvenile Guardian Soc. 6 NY Week Dig 136.

82. Remedy as affected by availability of bill of particulars

RCP 102 was not designed to enable a party to obtain a statement of particulars or circumstances of time and place. Tilton v Beecher, 59 N.Y. 176, 59 N.Y. (N.Y.S.) 176, 48 How. Pr. 175, 1874 N.Y. LEXIS 401, 1874 N.Y. Misc. LEXIS 127 (N.Y. 1874).

A motion to make a pleading more definite and certain is proper only where the precise meaning and application of an allegation of the pleading is indefinite or uncertain; if the purpose of the party is to obtain a more particular statement of his opponent’s claim, for the purpose of narrowing the issue at the trial or to prevent surprise, his remedy is by application for bill of particulars. Dumar v Witherbee, Sherman & Co., 88 A.D. 181, 84 N.Y.S. 669, 1903 N.Y. App. Div. LEXIS 3119 (N.Y. App. Div. 1903).

Motions to make a complaint more definite and certain or for a bill of particulars in the alternative cannot be united, because the first may only be made before and the latter ordinarily after answer unless necessary to enable the defendant to plead. Mutual Life Ins. Co. v Granniss, 118 A.D. 830, 103 N.Y.S. 835, 1907 N.Y. App. Div. LEXIS 764 (N.Y. App. Div. 1907).

A bill of particulars is not the remedy to correct indefiniteness and uncertainty in the answer. M. J. Kraus & Co. v Mayer, 150 A.D. 122, 134 N.Y.S. 694, 1912 N.Y. App. Div. LEXIS 7067 (N.Y. App. Div. 1912).

Where defenses and counterclaims are the vaguest generalities and no issue could be raised by a reply, plaintiff is entitled to an order to make the answer more definite and certain, as against

contention that the proper remedy was to require a bill of particulars. P. J. Harney Shoe Co. v A. H. Ginzberg-Gordon Co., 182 A.D. 496, 169 N.Y.S. 848, 1918 N.Y. App. Div. LEXIS 4429 (N.Y. App. Div. 1918).

A motion to make more definite and certain is primarily to aid the applicant in pleading and should not seek details which are properly set out in response to a demand for a bill of particulars. In re Mechler's Estate, 221 N.Y.S. 606, 129 Misc. 549, 1927 N.Y. Misc. LEXIS 763 (N.Y. Sur. Ct. 1927).

Bill of particulars is proper remedy to obtain any necessary details of cause of action. Schwartz v Schwartz, 133 N.Y.S.2d 813, 206 Misc. 548, 1954 N.Y. Misc. LEXIS 2448 (N.Y. Sup. Ct. 1954).

Details as to time, place and circumstances are obtainable through a bill of particulars not through a motion to make more definite and certain. Kasen v Morrell, 18 Misc. 2d 158, 183 N.Y.S.2d 928, 1959 N.Y. Misc. LEXIS 4334 (N.Y. Sup. Ct. 1959).

Motion to strike denied where appropriate relief is obtainable through bill of particulars. Diamond v Russeks, Fifth Ave., Inc., 44 N.Y.S.2d 129, 1939 N.Y. Misc. LEXIS 2834 (N.Y. Sup. Ct.), aff'd, 258 A.D. 789, 16 N.Y.S.2d 99, 1939 N.Y. App. Div. LEXIS 6924 (N.Y. App. Div. 1939).

Where facts were ascertainable through bill of particulars, relief under RCP 102 would not be granted. Sedgwick Lumber Co. v Matso, 116 N.Y.S.2d 819, 1952 N.Y. Misc. LEXIS 1960 (N.Y. Sup. Ct. 1952).

To compel more definite and certain statement of pleading, under RCP 102, or alternatively, pursuant to RCP 115 (§ 3041, Rule 3042 herein) to compel service of bill of particulars, it was better practice to invoke RCP 102 where permissible and expedient. Roach v Welles, 127 N.Y.S.2d 138, 1954 N.Y. Misc. LEXIS 1937 (N.Y. Sup. Ct. 1954).

After a bill of particulars demanded and furnished and another demanded, this remedy cannot be had. M'Kinney v M'Kinney, 12 How. Pr. 22, 1855 N.Y. Misc. LEXIS 242 (N.Y. Sup. Ct. Aug. 1, 1855).

83. —Specific cases

An order requiring a pleading to be made more definite and certain should not require the disclosure of matters which are more properly the subject of a bill of particulars; in an action for negligence in operating an automobile, allegations in a complaint that the defendant operated his automobile negligently by not giving proper signals and by running at a dangerous speed, should not be required to be made more definite and certain; further information should be procured by a bill of particulars. Harrington v Stillman, 120 A.D. 659, 105 N.Y.S. 75, 1907 N.Y. App. Div. LEXIS 1281 (N.Y. App. Div. 1907).

It is improper in an action for negligence for the defendant to move that the complaint be made more definite and certain in respect of certain allegations of the defendant’s negligence; the proper remedy is for a bill of particulars. Mullen v Hall, 99 N.Y.S. 841, 51 Misc. 59, 1906 N.Y. Misc. LEXIS 226 (N.Y. App. Term 1906).

In an action for fraud and conspiracy, a motion to require that the alleged overt acts referred to by the phrase “among others,” be set forth with definiteness and certainty was denied since a bill of particulars would serve adequately to obtain such information. Rubinstein v Rubinstein, 61 N.Y.S.2d 44, 1946 N.Y. Misc. LEXIS 1967 (N.Y. Sup. Ct. 1946).

Where nature of noxious substance in hair dye causing plaintiff’s injuries was obtainable through bill of particulars, motion to make complaint more certain was dismissed. Briley v Parham, 101 N.Y.S.2d 456, 1949 N.Y. Misc. LEXIS 3241 (N.Y. Sup. Ct. 1949), aff'd, 277 A.D. 1054, 101 N.Y.S.2d 240, 1950 N.Y. App. Div. LEXIS 4477 (N.Y. App. Div. 1950).

In action for specific performance of oral agreement to convey realty, where nature and basis of plaintiff’s claim is reasonably clear and objectionable matters are all items which defendant may

obtain in bill of particulars, motion to make more definite will be denied. Hannigan v Diamond, 125 N.Y.S.2d 423, 1953 N.Y. Misc. LEXIS 2332 (N.Y. Sup. Ct. 1953).

In an action brought to compel the return of money and expenses under a contract to purchase real property, the remedy for a lack of information as to what defects the plaintiff asserts in the title is not by motion to make the pleading more definite and certain but for a bill of particulars. Lahey v Kortright, 55 Super Ct (23 Jones & S) 156.

84. Requirement of notice of motion

In view of RCP 102 and RCP 105, an order under CPA § 193 (§§ 1001, 1003 herein) had to be made upon notice. Testing Laboratories of New York, Inc. v Krainin, 208 N.Y.S. 801, 124 Misc. 667, 1925 N.Y. Misc. LEXIS 720 (N.Y. App. Term 1925).

Notice of motion which fails to specify precise parts of complaint sought to be made more definite and certain is fatally defective. Sussman v Goldberg, 215 N.Y.S.2d 650 (N.Y. Sup. Ct. 1961).

85. Time for noticing motion

The objection of uncertainty and indefiniteness cannot be made at the trial. Farmers' & Citizens' Bank v Sherman, 19 Super Ct (6 Bosw) 181, affd 33 N.Y. 69 (1865).

A motion before answer is unauthorized to require plaintiff to elect between inconsistent and mutually exclusive causes of action. Ikle v Ikle, 257 A.D. 635, 14 N.Y.S.2d 928, 1939 N.Y. App. Div. LEXIS 7836 (N.Y. App. Div. 1939).

Where the complaint alleged various causes of action and the matter contained therein was indefinite, the court could require the service of an amended pleading where the motion addressed to the pleading was made within 20 days of the service of the complaint. Bradford v 27 East 38th Street Realty Corp., 4 A.D.2d 830, 166 N.Y.S.2d 432, 1957 N.Y. App. Div. LEXIS 4488 (N.Y. App. Div. 1st Dep't 1957).

Motion under RCP 102 should have been noticed within 20 days from the service of the pleading, although the time might be extended. 137 East 66th St. v Lawrence, 194 N.Y.S. 762, 118 Misc. 486, 1922 N.Y. Misc. LEXIS 1292 (N.Y. Sup. Ct. 1922).

Motion by intervenors to require named defendant to serve amended counterclaim came too late after intervenors served their answer. City Bank Farmers Trust Co. v National Cuba Hotel Corp., 133 N.Y.S.2d 334, 1954 N.Y. Misc. LEXIS 2191 (N.Y. Sup. Ct.), aff'd, 283 A.D. 868, 129 N.Y.S.2d 916, 1954 N.Y. App. Div. LEXIS 5580 (N.Y. App. Div. 1954).

The motion to make a complaint more definite and certain must be made within twenty days of the service of the complaint, Brooks v Hanchett, 36 Hun 70 (N.Y.).

It is a waiver of objections as to uncertainty to procure an extension of time to answer. Brooks v Hanchett, 36 Hun 70 (N.Y.).

Twenty days from an amended answer are allowed in which to move to make it more definite and certain. Walker v Granite Bank, 1 Abb. Pr. (n.s.) 406, 1865 N.Y. Misc. LEXIS 26 (N.Y. Sup. Ct. Oct. 1, 1865).

A motion to make a pleading more definite and certain need not be made at the earliest possible moment, but where time “to plead or otherwise move” has been granted, it may be made during such extension. Hammond v Earle, 5 Abb NC 105.

86. Sufficiency of compliance with order

When leave to replead and correct pleading is granted the party may put his pleadings in such shape as will enable him to raise and have determined every question affecting his interest involved in the subject matter of the litigation. The party is not limited to correcting only those defects specified upon the motion. Rubinraut v Federico Causo Consignataria Sociedad Anonima, 4 Misc. 2d 761, 158 N.Y.S.2d 421, 1957 N.Y. Misc. LEXIS 3727 (N.Y. Sup. Ct.), modified, 4 A.D.2d 856, 167 N.Y.S.2d 409, 1957 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 1st Dep't 1957).

To a motion to make more definite and certain it is no answer that the mover became acquainted in another action with all the facts. Ottomann v Fletcher, 10 N.Y.S. 128, 1889 N.Y. Misc. LEXIS 2458 (N.Y. Super. Ct. 1889).

An order requiring plaintiff to make his complaint more definite and certain by stating the particulars of an agreement as to the purchase and sale of goods on a joint venture was held complied with by the amended complaint and defendant will be compelled to receive such complaint. Ross v Willett, 14 N.Y.S. 192, 60 Hun 577, 1891 N.Y. Misc. LEXIS 1907 (N.Y. Sup. Ct. 1891).

87. Review of order

Where Appellate Division in affirming order of Special Term, deferring decision on merits of motion under RCP 102, and granting leave to appeal to Court of Appeals, failed to state that its decision was based solely on questions of law and not in exercise of discretion conferred by RCP 102, CPA § 603 (§§ 5612, 5713 herein) required Court of Appeals to presume that Appellate Division did in fact deny defendant's motion in exercise of permissible discretion, and so questions of law certified were not decisive of correctness of decision of Appellate Division, requiring dismissal of appeal. Bradick v Deetjen, 307 N.Y. 863, 122 N.E.2d 749, 307 N.Y. (N.Y.S.) 863, 1954 N.Y. LEXIS 1559 (N.Y. 1954).

Where the court, on appeal, reversed an order denying a motion for judgment on the pleadings to the the extent of directing dismissal of the complaint with leave to serve an amended complaint, it would dismiss an appeal from an order denying a motion under RCP 102. Bankert v Sleyman, 202 A.D. 817, 195 N.Y.S. 67, 1922 N.Y. App. Div. LEXIS 5927 (N.Y. App. Div. 1922).

Where, upon the appeal from an order directing that an amended answer be made more definite and certain, it appeared that a notice had been given of a motion to amend an answer, but before its hearing an amended answer had been served, and that the parties then appeared by consent and argued a motion to make the amended answer more definite, held, that the court must treat the case as though the motion was to correct the amended answer, as that was the

only pleading to which the motion could be applicable and effectual at the time it was heard. Cook v Matteson, 11 N.Y.S. 572, 1890 N.Y. Misc. LEXIS 2238 (N.Y. Super. Ct. 1890).

An order to make a complaint more definite and certain was appealable to the general term. Brinkerhoff v Perry, 59 How. Pr. 155, 1880 N.Y. Misc. LEXIS 179 (N.Y. Sup. Ct. May 1, 1880).

An order to make a pleading more definite and certain is not in general appealable; but where the parts of the answer objected to consisted of denials, and the general term thought not only that they were clear, but that no amendment was possible which would make them clearer, it sustained an appeal and reversed the order. Hughes v Chicago, M. & St. P. R. Co. 45 Super Ct (13 Jones & S) 114. See Dudley v Grissler, 37 Super Ct (5 Jones & S) 412.

88. Abandonment of motion

Defendants' motion to compel the plaintiff to serve a second amended complaint making her amended complaint more definite and certain, pursuant to this rule, which motion was made within the prescribed time under RCP 105, was not abandoned by the service of the defendants' answer. Levin v Levin, 283 N.Y.S. 720, 157 Misc. 156, 1935 N.Y. Misc. LEXIS 1582 (N.Y. Sup. Ct. 1935).

Under RCP 102 and 103 a reply served after a motion to correct the pleading by striking therefrom objectional matter did not effectuate an abandonment of the motion under RCP 109 (Rule 3211 herein). Mordkowitz v Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328, 1958 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 1958).

89. Extension of time to answer

CPA § 283 (Rules 3024, 3211 herein) provided for pleading after disposition of a corrective or regulatory motion. Under former CPA § 283 it was held that corrective and regulative motions under this rule and RCP 103 were not within the scope of such section of the Civil Practice Act.

255 Fifth Ave. Corp. v Freeman, 199 N.Y.S. 519, 120 Misc. 472, 1923 N.Y. Misc. LEXIS 979 (N.Y. Sup. Ct. 1923).

An extension of time to plead without the reservation of any right to make a motion in respect to the complaint was fatal to applications pursuant to RCP 102, 103 and 104 (Rule 3024 herein). Copperman v Labansky, 13 Misc. 2d 827, 178 N.Y.S.2d 451, 1958 N.Y. Misc. LEXIS 3195 (N.Y. Sup. Ct. 1958).

90. Effect on right of removal of cause

Defendant’s motion to make complaint more definite and certain did not abridge right to remove cause to federal court. Segal v Enamel Products Co., 245 N.Y.S. 317, 138 Misc. 280, 1930 N.Y. Misc. LEXIS 1597 (N.Y. Sup. Ct. 1930).

iii. Scandalous or Prejudicial Matter

91. Generally

Motion for judgment on the pleadings was not a substitute for a motion under RCP 103. Baird v Grace Church of Millbrook, 197 A.D. 272, 189 N.Y.S. 583, 1921 N.Y. App. Div. LEXIS 7450 (N.Y. App. Div. 1921).

A notice of motion which referred to no particular parts of the complaint was insufficient to bring before the court a motion to strike out allegations under RCP 103. Schwartz v Marjolet, Inc., 214 A.D. 530, 212 N.Y.S. 464, 1925 N.Y. App. Div. LEXIS 10561 (N.Y. App. Div. 1925).

Specification of particular parts of paragraphs claimed to be defective must be made. Molinaro v Mintz, 70 N.Y.S.2d 518, 1947 N.Y. Misc. LEXIS 2433 (N.Y. Sup. Ct. 1947).

Dismissal of complaint for insufficiency barred motion under RCP 103 to strike matter from complaint, as academic. Schumann v Loew's, Inc., 135 N.Y.S.2d 361, 1954 N.Y. Misc. LEXIS 2939 (N.Y. Sup. Ct. 1954).

Notice of motion which fails to specify precise parts of complaint sought to be stricken is fatally defective. Sussman v Goldberg, 215 N.Y.S.2d 650 (N.Y. Sup. Ct. 1961).

92. Motion unnecessary as to each repetition

Where a defense was attacked under RCP 103 no motion was necessary to strike out denials, in a separate defense, repeating or incorporating those already set up in the answer, in violation of RCP 90 (Rule 3014 herein).276 Spring Street Corp. v Forbes, 235 N.Y.S. 257, 134 Misc. 537, 1929 N.Y. Misc. LEXIS 854 (N.Y. Sup. Ct.), modified, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

93. Time for noticing motion

Where a motion was made pursuant to RCP 103 to strike out as sham and frivolous but it was not made within the time prescribed by RCP 105 it was properly denied. Central Nat'l Bank v Board of Education, 3 A.D.2d 258, 160 N.Y.S.2d 664, 1957 N.Y. App. Div. LEXIS 6144 (N.Y. App. Div. 3d Dep't 1957).

Motion under RCP 103 should be noticed within 20 days from the service of the pleading, although the time might be extended. 137 East 66th St. v Lawrence, 194 N.Y.S. 762, 118 Misc. 486, 1922 N.Y. Misc. LEXIS 1292 (N.Y. Sup. Ct. 1922).

Time for motion, see RCP 105. Callegari v Guatelli, 154 N.Y.S.2d 148 (N.Y. Sup. Ct. 1956).

Motion under RCP 103 to strike out allegations denied, where motion not made within 20 days from the service of the complaint and it was not discerned how the defendant would be prejudiced by the allegations it sought to strike out. Ebsary v Raymond & Whitcomb Co., 300 F. 686, 1924 U.S. Dist. LEXIS 1500 (D.N.Y. 1924).

94. —Extension of time

Formerly, it was held that corrective and regulatory motions under RCP 102, 103 were not within the scope of CPA § 283 (Rules 3024, 3211), providing for an extension of time for answering until a period after the decision of the court on such motions. 255 Fifth Ave. Corp. v Freeman, 199 N.Y.S. 519, 120 Misc. 472, 1923 N.Y. Misc. LEXIS 979 (N.Y. Sup. Ct. 1923).

A motion to extend the time to move to strike out portions of an answer will be denied for laches, where the questions raised by the motion to strike out can be appropriately raised on the trial in connection with the production of evidence. Security Trust Co. v Pritchard, 205 N.Y.S. 725, 123 Misc. 493, 1924 N.Y. Misc. LEXIS 991 (N.Y. Sup. Ct. 1924).

The time for making motions which must be made within twenty days after service of the complaint is not extended by the making of a motion to dismiss the complaint for lack of jurisdiction of the person. Robinson v Robinson, 9 Misc. 2d 198, 169 N.Y.S.2d 786, 1957 N.Y. Misc. LEXIS 1948 (N.Y. Sup. Ct. 1957).

An extension of time to plead without the reservation of any right to make a motion in respect to the complaint was fatal to applications pursuant to RCP 102, 103 and former 104. Copperman v Labansky, 13 Misc. 2d 827, 178 N.Y.S.2d 451, 1958 N.Y. Misc. LEXIS 3195 (N.Y. Sup. Ct. 1958).

Motion under RCP 103 would be denied when not timely made as required by RCP 105. Gross v Price, 127 N.Y.S.2d 729, 1953 N.Y. Misc. LEXIS 2596 (N.Y. Sup. Ct. 1953).

95. Matters determined on motion

Motion made to strike certain separate and distinct defenses and to make another more definite and certain with privilege of renewing when litigation involving similar questions was determined; the special term should have considered and decided the motion on the merits, though the court might have withheld final decision pending determination of test cases involving similar questions. Rudkowsky v Equitable Life Assurance Soc., 232 A.D. 472, 252 N.Y.S. 111, 1931 N.Y. App. Div. LEXIS 13852 (N.Y. App. Div. 1931).

Factual questions could not be determined on motion to strike matter as sham. Rosenthal-Block China Corp. v Johann Haviland China Corp., 12 A.D.2d 915, 210 N.Y.S.2d 598, 1961 N.Y. App. Div. LEXIS 12530 (N.Y. App. Div. 1st Dep't 1961).

Ordinarily court will not strike from complaint in equity action evidentiary allegations which may possibly be received at trial, but where court has struck out paragraphs from second amended complaint substance thereof cannot be realleged in third amended complaint. Warthmann v Manufacturers Trust Co., 36 N.Y.S.2d 298, 1942 N.Y. Misc. LEXIS 1785 (N.Y. Sup. Ct.), aff'd, 264 A.D. 849, 36 N.Y.S.2d 421, 1942 N.Y. App. Div. LEXIS 5037 (N.Y. App. Div. 1942).

Fact issues cannot be disposed of under this rule. Olshin v Allied Freightways, Inc., 65 N.Y.S.2d 872, 1946 N.Y. Misc. LEXIS 2948 (N.Y. Sup. Ct. 1946).

96. Withdrawal or abandonment of motion; waiver of right to relief

A motion to strike scandalous allegations from an affidavit may not be withdrawn to prevent a decision by the reviewing court of important questions involved in the litigation. In re People by Beha, 225 A.D. 92, 232 N.Y.S. 282, 1928 N.Y. App. Div. LEXIS 8751 (N.Y. App. Div. 1928), rev'd, 250 N.Y. 449, 166 N.E. 163, 250 N.Y. (N.Y.S.) 449, 1929 N.Y. LEXIS 899 (N.Y. 1929).

Motion to strike out a paragraph of the complaint as irrelevant, redundant, etc., was not abandoned by service of an answer, or appeal from the order denying the motion. Rothenberg v Metzger, 227 A.D. 444, 238 N.Y.S. 139, 1929 N.Y. App. Div. LEXIS 6457 (N.Y. App. Div. 1929).

Abandonment of motion under RCP 103 was not effected by service of answer after making of motion. Russo v Signode Steel Strapping Co., 37 N.Y.S.2d 166, 1942 N.Y. Misc. LEXIS 1986 (N.Y. Sup. Ct. 1942).

Noticing for trial, Kellogg v Baker, 15 Abb Pr 286; Esmond v Van Benschoten, 5 How Pr 44; obtaining time to answer, Marry v James, 34 How Pr 238; Bowman v Sheldon, 7 Super Ct (5 Sandf) 657; or omitting to move to strike out, Quintard v Newton, 30 Super Ct (5 Robt) 72, waived the rights given by RCP 103.

97. Provision for service of reformed pleading

An order which effects a radical reformation of a pleading by striking out certain parts thereof should provide for the service of the reformed pleading. Waltham Mfg. Co. v Brady, 67 A.D. 102, 73 N.Y.S. 540, 1901 N.Y. App. Div. LEXIS 2650 (N.Y. App. Div. 1901).

Mass of verbiage and superfluous matter was ordered stricken from complaint, and plaintiff was required to serve amended complaint omitting all objectionable matter. Joseph v Ervolina, 285 A.D. 1218, 141 N.Y.S.2d 96, 1955 N.Y. App. Div. LEXIS 7209 (N.Y. App. Div. 1955).

98. Review of order

Where a counterclaim improperly contains a reiteration of the denials set forth in the answer, these, on appeal, may be disregarded. Levine v Hogan-Levine Co., 200 A.D. 487, 193 N.Y.S. 226, 1922 N.Y. App. Div. LEXIS 8208 (N.Y. App. Div. 1922).

Where the court, on appeal, reversed an order denying a motion for judgment on the pleadings to the extent of directing dismissal of the complaint with leave to serve an amended complaint, it would dismiss appeals from orders denying motions to correct the complaint under RCP 102, 103. Bankert v Sleyman, 202 A.D. 817, 195 N.Y.S. 67, 1922 N.Y. App. Div. LEXIS 5927 (N.Y. App. Div. 1922).

Where order striking out defenses as insufficient is reversed on appeal and plaintiff’s motion denied, plaintiff may renew its motion for alternative relief demanded on original motion. In re Hoffmann's Will, 264 A.D. 881, 35 N.Y.S.2d 856 (N.Y. App. Div. 1942).

As the granting of an order striking out irrelevant matter rested in the discretion of the court under RCP 103, an appeal could not be taken from the city court to the appellate term of the supreme court from an order denying such a motion. Emmens v Macmillan Co., 47 N.Y.S. 1099, 21 Misc. 638, 1897 N.Y. Misc. LEXIS 683 (N.Y. App. Term 1897).

An order denying the motion to strike out will not be reversed on appeal though it might properly have been granted, if it does not appear that the retention of the allegations will work harm or injustice to the mover. Lugar v Byrnes, 1 N.Y.S. 262, 48 Hun 621, 1888 N.Y. Misc. LEXIS 1285 (N.Y. Sup. Ct. 1888), aff'd, 120 N.Y. 647, 24 N.E. 1102, 120 N.Y. (N.Y.S.) 647, 1890 N.Y. LEXIS 1339 (N.Y. 1890).

An order granting or denying a motion under RCP 103 was appealable, the motion not resting absolutely in the discretion of the court, but affecting a material right of the defendant. Neresheimer v Bowe (N.Y.C.P. Dec. 4, 1882).

99. Stay as suspending order

A stay of proceedings pending an appeal, but not an extension of time for amendment, will suspend the operation of the order to strike out. Culver v Hollister, 29 How. Pr. 479, 1864 N.Y. Misc. LEXIS 241 (N.Y. Sup. Ct. Feb. 1, 1864).

Research References & Practice Aids

Cross References:

This rule referred to in CLS NYC Civil Ct Act § 1003.; CLS UCCA § 1003.; CLS UDCA § 1003; CLS UJCA § 1003.

Time for service of motion, CLS CPLR § 207.

Motions, generally, CLS CPLR §§ 2211 et seq.

Application in certain courts, CLS NYC Civ Ct Act § 1003.; UCCA § 1003.; UDCA § 1003.; UJCA § 1003.

Federal Aspects:

Motion for a more definite statement, USCS Court Rules, Federal Rules of Civil Procedure, Rule 12(e).

Motion to strike, USCS Court Rules, Federal Rules of Civil Procedure, Rule 12(f).

Amendment of pleading to show jurisdiction, 28 USCS § 1653.

Jurisprudences:

1 NY Jur 2d Actions § 86. .

15 NY Jur 2d Business Relationships § 1043. .

44A NY Jur 2d Disclosure § 187. .

48 NY Jur 2d Domestic Relations § 2149. .

61A Am Jur 2d, Pleading §§ 431.– 473.

Law Reviews:

Legislation: pre-trial motion practice. 29 Brook. L. Rev. 300.

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. 3024, Motion to Correct Pleadings.

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 30.09.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 34.01, 34.02.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶302.01, 302.05, 303.03; 2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶401.10.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 3.14-a. Service by mail.

CPLR Manual § 3.16. Appearance.

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

CPLR Manual § 19.07. Rules governing drafting of pleadings.

CPLR Manual § 19.09. Particular pleading requirements in certain actions.

CPLR Manual § 19.16. Motion to correct pleadings.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 3.01. Procedural Context-Responding to Initial Pleadings.

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

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

LexisNexis AnswerGuide New York Negligence § 3.27. Commencing Action.

LexisNexis AnswerGuide New York Negligence § 4.27. Commencing Action.

LexisNexis AnswerGuide New York Negligence § 6.26. Commencing Action.

LexisNexis AnswerGuide New York Negligence § 7.28. Responding to Complaint.

Annotations:

Dismissal of action for failure or refusal of plaintiff to obey court order. 4 ALR2d 356.

Necessity of leave of court to add or drop parties by amended pleading filed before responsive pleading is served, under Rules 15(a) and 21 of the Federal Rules of Civil Procedure. 31 ALR Fed 752.

Matthew Bender's New York Checklists:

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

Checklist for Determining Where and When to File Appeal LexisNexis AnswerGuide New York Civil Litigation § 13.06.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 3024:1 et seq.

LexisNexis Forms FORM 75-CPLR 3024:1.—Notice of Motion for More Definite Statement Vague or Ambiguous Statements.

LexisNexis Forms FORM 75-CPLR 3024:10.—Notice of Motion to Strike Scandalous or Prejudicial Matter.

LexisNexis Forms FORM 75-CPLR 3024:11.—Order Striking Out Scandalous or Prejudicial Matter.

LexisNexis Forms FORM 75-CPLR 3024:2.—Notice of Motion to Correct Complaint; Official Form 24.

LexisNexis Forms FORM 75-CPLR 3024:3.—Notice of Motion to Correct Complaint; Proposed Official Form 28.

LexisNexis Forms FORM 75-CPLR 3024:4.—Notice of Motion for More Definite Statement Plain and Concise Statements; Separate Statements and Numbering of Causes of Action.

LexisNexis Forms FORM 75-CPLR 3024:5.—Order for More Definite Statement.

LexisNexis Forms FORM 75-CPLR 3024:6.—Order on Motion Made Under CPLR 3024 (Long Form); Official Form 25.

LexisNexis Forms FORM 75-CPLR 3024:7.—Order on Motion Made Under CPLR 3024 (Long Form); Proposed Official Form 29.

LexisNexis Forms FORM 75-CPLR 3024:8.—Order Under CPLR 3024 (Long Form);.

LexisNexis Forms FORM 75-CPLR 3024:9.—Order Under CPLR 3024 (Long Form); Proposed Official Form 30.

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

Texts:

New Appleman New York Insurance Law § 7.03.

Hierarchy Notes:

NY CLS CPLR, Art. 30

Forms

Forms

Form 1

Body of Notice of Motion for More Definite Statement

PLEASE TAKE NOTICE, that a motion will be made at a motion term [Part _____] of this court, to be held in and for the County of _____ at the county court house in the City of _____, on the _____ day of _____, 20_____, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 3024(a) of the Civil Practice Law and Rules requiring a more definite statement of the complaint herein in the following respects:

a. With respect to paragraph _____, to set forth _____.

b. b. With respect to paragraph _____, to set forth _____ and for such other, further and different relief as may be proper, with the costs of this motion.

Form 2

Body of Order Requiring More Definite Statement in Pleading

The defendant having duly moved this court for an order directing the plaintiff to serve an amended complaint in which certain allegations of the complaint shall be more definitely stated, and such motion having duly come on to be heard, now, upon reading the complaint [duly verified the _____ day of _____, 20_____] heretofore filed in the office of the Clerk in the County of _____ and after reading and filing the notice of motion herein, dated the _____ day of _____, 20_____ with proof of due service thereof, and after hearing _____, attorney for the defendant in support of said motion and _____, the attorney for the plaintiff in opposition thereto, and due deliberation having been had,

NOW, on motion of _____, attorney for the defendant [and on the decision of the court filed herein] it is

ORDERED that the motion be and the same hereby is granted, and it is further

ORDERED that the plaintiff, within 10 days [as required by CPLR 3024, subd c] from the service of a copy of this order, with notice of the entry thereof, serve upon the attorney for the defendant an amended complaint in which there shall be in the paragraph numbered _____ , a definite statement of _____ [state the particulars as to what the definite statement is to be about], and it is further

ORDERED that in default of the service of an amended complaint as aforesaid, the clauses in the paragraph numbered _____, namely, _____ be and the same hereby are stricken out of the said complaint.

Form 3

Notice of Motion to Correct Complaint [Official Form 24]

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

A.B., Plaintiff,

against

C.D., Defendant — Notice of Motion to Correct Complaint

Motion by: — Index No. _____

Date, Time and Place of Hearing:

Defendant.

December 1, 1966, at 9:30 A.M., Special Term, Part I, Room 130, County Court House, 60 Centre Street, New York City.

Supporting Papers: [Identify papers] Relief Demanded:

A) An order pursuant to CPLR 3024:

1. Requiring plaintiff to state verbatim or in substance or annex to his complaint copies of the agreements referred to in paragraphs 2, 5 and 6 of the complaint, on the ground that the allegations of those paragraphs are so vague and ambiguous that defendant cannot reasonably be required to frame a response. 2. Striking the allegations of paragraph 9 of the complaint on the ground that they are scandalous, prejudicial and unnecessarily inserted.

B) Such other and further relief as the court deems proper, plus costs of this motion.

Dated:

[Print name] _____ Attorney for Defendant

Address: Telephone Number:

Form 4

Order on Motion Made Under CPLR 3024 (Long Form) [Official Form 25]

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

A.B., Plaintiff,	Order
against	Index No._____
C.D., Defendant	

Upon defendant's notice of motion, dated December 1, 1966, for a more definite statement of certain allegations of the complaint and to strike certain allegations as scandalous, prejudicial and unnecessarily inserted, and upon the complaint, and [plaintiff having appeared in opposition] [or] [there being no appearance in opposition], it is ordered that:

1. The motion is granted.

2. The plaintiff within ten days from the service of a copy of this order, with notice of entry, shall serve an amended complaint setting forth verbatim or in substance, or with copies annexed to the amended complaint, the agreements referred to in paragraphs 2, 5 and 6 of the complaint.

3. Paragraph 9 is struck from the complaint.

4. Defendant recover of plaintiff _____ dollars costs of this motion. New York, New York, December 12, 1966.

_____

Justice, Supreme Court

County of New York

Form 5

Order Under CPLR 3024 (Long Form) [Official Form 26]

At a Special Term, Part I, of the Supreme Court of the State of New York, County of New York, held at the County Court House, New York County on the 12th day of December, 1966.

[For remainder of order see Form 4 through paragraph 4.]

[Print name to be signed or initialed]

Justice, Supreme Court County of New York

Form 6

Body of Notice of Motion to Strike Out Scandalous or Prejudicial Matter in a Pleading

PLEASE TAKE NOTICE that on the complaint herein [and the annexed affidavit of _____, duly sworn to the _____ day of _____, 20_____] a motion will be made at a Motion Term [Part _____] of this Court to be held in and for the County of _____, at the County Court House in the City of _____, on the _____ day of _____, 20_____ at the opening of court on that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 3024(b) of the Civil Practice Law and Rules striking out paragraph _____ of the complaint and the allegations contained in said paragraph, on the ground that the same are scandalous and prejudicial and that the same are unnecessarily inserted in said complaint, and for such other and further relief as may appear proper together with the costs of this motion.

Form 7

Body of Order Striking Matter From Pleading

A motion having been regularly made by the defendant herein to strike from the complaint paragraph numbered _____ and the words "_____" from paragraph numbered _____ as scandalous and unnecessarily inserted therein [or as the case may be] and said motion having come on regularly to be heard,

NOW, upon reading the complaint [duly verified the _____ day of _____, 20_____] heretofore filed in the office of the clerk of the County of _____, and after reading and filing the notice of motion dated the _____ day of _____, 20_____ [and the affidavit of _____, sworn to the _____ day of _____, 20_____], in support of said motion, and the affidavit of _____, sworn to the _____ day of _____, 20_____ in opposition thereto and after hearing _____, attorney for the defendant in support of said motion and _____, attorney for the plaintiff in opposition thereto, and due deliberation having been had, it is

ORDERED that paragraph numbered _____ of the complaint herein and the words "_____" in paragraph numbered _____ of the complaint herein be struck out as scandalous and unnecessarily inserted therein [or as the case may be], and it is further

ORDERED that the defendant recover of the plaintiff $10.00 costs of this motion.

Form 8

Body of Notice of Motion for Extension of Time to Make Corrective Motion

PLEASE TAKE NOTICE that upon the complaint in this action [duly verified the _____ day of _____, 20_____] and the annexed affidavit of _____, sworn to the _____ day of _____, 20_____, a motion will be made at a Motion Term [Part _____] of this Court, to be held in and for the County of _____ at the County Court House in the City of _____, on the _____ day of _____, 20_____ at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel can be heard for an order extending defendant's time to make a motion pursuant to the Civil Practice Law and

Rules or to answer or otherwise move in relation to the complaint to the _____ day of _____, 20_____ together with such other and further relief as to the court may seem just and proper.

Form 9

Affidavit to Secure Extension of Time to Make Corrective Motion

[Caption and introductory paragraph]

1. He is the defendant in the above-entitled action.

2. The summons and complaint herein were served on deponent on the _____ day of _____, 20_____.

3. Deponent's time to answer or to make a motion addressed to the complaint expires on the _____ day of _____, 20_____ and no previous extension of time has been heretofore granted by stipulation, order or otherwise.

4. [State facts showing reasonable cause for requiring the extension of time, as—the summons and complaint were served in this action on the _____ day of _____, 20_____ just as deponent was starting on an extended business trip covering a period of more than two weeks. Deponent only arrived home on the _____ day of _____, 20_____ and was not able to arrange a consultation with his attorney _____ until the _____ day of _____, 20_____.]

5. Deponent desires to make a motion under Rule 3024 of the Civil Practice Law and Rules to more definitely state paragraph _____ of the complaint on the ground that the said allegations are vague and ambiguous. Deponent is advised by his attorney _____ that such a motion is necessary in order to properly present deponent's defense to the cause of action alleged in the complaint.

6. No previous application has been made for the relief sought herein or for any similar relief.

_____

Address

[Jurat]

Form 10

Affidavit of Attorney in Support of Motion to Extend Time to Make Corrective Motion

[Caption and introductory paragraph]

1. He is an attorney and counsellor at law duly admitted to practice as such in the courts of this state.

2. On or about the _____ day of _____, 20_____, he was retained by the defendant in the above entitled action to defend the said action in behalf of said defendant.

3. From the statement of the case made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint.

4. Deponent is unable to properly answer the said complaint for the reason that the complaint contains vague and ambiguous material. Deponent desires, before answering the said complaint, to make a motion under Rule 3024 of the Civil Practice Law and Rules to state more definitely in the said complaint the following allegations _____.

5. The complaint was served upon the defendant herein on the _____ day of _____, 20_____ and defendant's time to make a motion under Rule 3024 of the Civil Practice Law and Rules will expire on or about the _____ day of _____, 20_____ and has not been extended by stipulation, order or otherwise.

_____

[Print name to be signed]

[Jurat]

Form 11

Body of Order Granting Extension of Time to Make Corrective Motion

The defendant having duly moved this court for an order extending his time to make a motion addressed to the complaint herein under Rule 3024 of the Civil Practice Law and Rules or to answer or otherwise make a motion addressed to the complaint and such motion having duly come on to be heard,

NOW, on reading the complaint herein and on reading and filing the notice of motion dated the _____ day of _____, 20_____, and the affidavit of _____, duly sworn to the _____ day of _____, 20_____, with due proof of service thereof, in support of said motion and the affidavit of _____, duly sworn to the _____ day of _____, 20_____ in opposition thereto and after hearing _____, attorney for the defendant, in support of said motion and _____, attorney for the plaintiff, in opposition thereto, it is, on motion of _____, attorney for the defendant,

ORDERED, that the defendant's time to make a motion pursuant to Rule 3024 of the Civil Practice Law and Rules or to answer the complaint herein or make a motion addressed to the complaint be and the same is hereby extended to and including the _____ day of _____, 20_____.

End of Document