

**MOTION PRACTICE IN NEW YORK COURTS**  
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**AUGUST 17, 2018**

**I. Sources of Law**

- a. CPLR § 2214 Notice of Motion
- b. CPLR §2215 Cross Motions
- c. CPLR § 2103 Service of papers
- d. 22 NYCRR 202.8 Motion procedure
- e. 22 NYCRR 202.7 Calendaring of Motions, uniform motion form, affirmations of good faith

All of the above are included in your materials.

**II. Requirements for Notice of Motion CPLR § 2214(a)**

- a. Time and Place of hearing: In *Harrington v. Brunson*, 129 A.D.3d 1581, 12 N.Y.S.3d 696 (4th Dep't 2015), the court ruled that the fact that the movant did not specify a return date on the notice of motion did not require that the motion be dismissed. BUT don't try this at home!! Have some else in your office review your papers before they are served and filed.
- b. The supporting papers on which it will be based: typically a motion will be supported by affidavits/affirmations by the attorney and the client, relevant documents, portions of transcripts of depositions, etc. Legal briefs may also be submitted. Affidavits should include the relevant facts. Legal arguments should be put in the brief.

- c. The relief demanded and grounds for the requested relief: do not file a motion if you have not thought through and identified the specific authority for the relief you are requesting. You are not required to cite “chapter and verse” but you should.
- d. Relief in the alternative or several different types of relief may be demanded. Always include a “catch all” phrase as part of the relief sought such as “and such other relief as the court may find just and proper.” *Tirado v. Miller*, 75 A.D.3d 153, 901 N.Y.S.2d 358 (2d Dep't 2010), “The presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced.”

### **III. Furnishing papers to the Court CPLR §2214(c)**

- a. Each party must furnish to the court all papers served by that party on or before the return date. BUT: make sure the court receives your papers in time for the judge and/or law clerk to review them.
- b. You must also furnish the court with all other papers not already in possession of the court necessary to consideration of the issues raised in the motion. In the case of *1501 Corp. v. Leilenok Realty Corp.*, 2015 WL 2344489 (Sup. Ct., Queens County 2015), the court cited to CPLR 2214(c) in denying a CPLR 3211(a)(7) motion to dismiss because the moving party did not attach a copy of the amended complaint it sought to dismiss.

In *Thompson v. Iannucci*, 2015 WL 10437745 (Sup. Ct., Ulster County 2015), the movant did not attach the complaint to a motion to dismiss the

complaint. The court the court denied defendants' CPLR 3211(a)(7) motion to dismiss as “procedurally deficient” under CPLR 2214(c) even though the party opposing the motion did attach a copy of the complaint to the responding papers. NOTE that CPLR § 3212 governing motions for summary judgment requires that the complaint be attached to the motion.

With regard to cases in which electronic filing is utilized the rule states that a party need not file copies of papers that were previously e-filed with the court but may instead refer to those documents by their docketing numbers on the e-filing system. CAVEAT: The rule states that this is true “except when the rules of court provide otherwise.” Many judges require in their individual rules that parties provide hard or “working copies of all pleadings filed electronically.”

Alternate forms of attachment: In the case of *Garrison v. Quick*, 120 A.D.3d 753 (2<sup>nd</sup> Dept. 2014) a party moving for summary judgment submitted supporting documents to the court on a CD. The motion was denied because there was no showing that the records were certified or that the court could open the documents and read them, and the denial of the motion was upheld by the Second Department.

- c. When providing the motion papers to the court you should include an affidavit of service on the other side.

#### **IV. Time for Service of Motion Papers CPLR §2214(b)**

- a. The rule provides two choices with regard to service:

- i. The 8-2 rule: Motions papers must be served at least eight days before the time the motion is noticed to be served. Answering papers must be served two days before the motion is noticed to be served.
  - ii. The 16-7-1 rule: If the moving party wishes to file reply papers they must serve the motion papers at least sixteen days beforehand and demand in the notice of motion that responding papers and any cross motion be served at least seven days before hand, and then reply papers may be served one day before the return date.
- b. As will be discussed next this scheme for filing often results in both the parties and the court not receiving either the answering papers and/or the reply papers before the return date because most of the time the papers are served by mail. As a professional courtesy and to cut off the other side's ability to complain to the court that they have not seen all of the papers you should always, in addition to serving the papers by mail, immediately fax or e-mail your papers to the other side and ask them to do the same for you. You should also make sure that you get your papers to the court before the return date if you want them to be reviewed and considered.
- c. CPLR § 2214(c) states that "only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion unless the court for good cause shall otherwise direct." This means you should NOT count on the use of "supplemental" submissions to buttress your motion papers. In *Ostrov v. Rozbruch*, 91 A.D.3d 147, 936 N.Y.S.2d 31 (1st Dep't 2012) the court reversed the trial court's decision granting summary judgment to the defendant based upon multiple supplemental submissions the trial court had allowed. The First

Department stated that supplemental submission should be allowed only sparingly and not relied upon to correct deficiencies the party's original motion papers.

- d. Beware of raising new facts or legal arguments in reply papers that were not covered in the original moving papers. In *Enjoy Realty Corp. v. Van Wagner Communications, LLC*, 22 N.Y.3d 413, 981 N.Y.S.2d 326, 4 N.E.3d 336 (2013), the Court of Appeals ruled that it is permissible, though NOT required, for a court to consider legal arguments that are raised for the first time in a reply brief.

The Court distinguished this situation from ones where new facts are alleged for the first time in a reply affidavit which it indicated would be prejudicial to the non-moving party.

#### **V. Computation of Time and Method of Service CPLR § 2013**

- a. A motion is “made” the moment it is placed in the mail box. However, pursuant to CPLR § 2013 when service is made by mail the receiving party has an additional five days added to the time to respond. Thus if you are serving by mail you must mail the papers thirteen days before the return date, or twenty-one days before if you want the right to file a reply.
- b. If using overnight service you must add one additional day to the time to respond.
- c. In e-filing cases the motion is deemed served as soon as it is filed with no need to add additional days. 22 NYCRR 202.5-b(f)(2)(ii) & 22 NYCRR 202.5-bb(a)(1).
- d. Picking a return date: the movant normally picks the return date after making sure it is far enough in advance to allow proper time for service and after determining that the date is one on which the judge hears motions.
- e. Adjournment of a return date is covered in 22 NYCRR 202.8(e)(1). It provides that parties may submit written stipulations of adjournment to the assigned judge

which will be effective unless the court directs otherwise. If the other side will not stipulate to an adjournment you may request an adjournment in writing to judge on notice to the other side on or before the return date.

**VI. Cross Motions CPLR §2215**

- a. At least three days before the time the motion is noticed to be heard, or seven days prior if such time demand has been made by the movant per §2214(b) a party may serve upon the moving party a notice of cross-motion.
- b. If the cross-motion is served by mail it must be served three days earlier than described above.
- c. The party making the cross-motion may demand relief in the alternative, may demand several different types of relief and the relief does not need to be responsive to the relief demanded by the moving party.

**VII. Oral Argument: is governed by 22 NYCRR 202.8(d)**, a moving party requesting oral argument must set forth the request in the notice of motion. A responding party desiring oral argument must request it on the first page of the answering papers. The judge has discretion on whether or not to hear oral argument on a motion. As a best practice it is always wise to request oral argument as it gives you a chance to convince the judge you should be granted the relief sought and to answer any questions the judge may have about the motion or the case.

**VIII. Filing Motions in Unassigned Cases 22 NYCRR 202.8(b)**

- a. In cases where no judge has been assigned yet the motion should be made returnable to the court and an RJI should be furnished to the court along with

moving papers, with proof of service upon the other parties within five days of service upon the other parties.

- b. The moving party must give written notice of the index number to the other parties immediately after filing the papers. Copies of the responding papers with proof of service and the index number must be supplied to the court.
- c. A judge will be assigned to the case as soon as practicable but in no event later than the return date.

**IX. Orders to Show Cause CPLR § 2214**

- a. The rule states that “the court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein.” There is little guidance in case law defining what constitutes a “proper case” and the judge has wide latitude in deciding whether or not to sign an OSC.
- b. OSC are generally used in cases where a movant cannot give the usual amount of notice due to a need for immediate relief. OSC often contain a request for a stay or a TRO.
- c. OSC are brought directly to the judge who reviews it on an ex parte basis. If the judge signs the OSC it must be served in the manner specified by the judge.
- d. Do not show up announced to chambers with an OSC. You should call chambers and give them notice that the OSC is coming. Supporting papers are the same as with a notice on motion. The applicant must submit an affidavit stating whether such an application was ever made before, and its result.
- e. 22 NYCRR 202.7 imposes requirements on any application for temporary injunctive relief as is often sought in an OSC. They include a requirement that the

applicant submit an affirmation demonstrating there will be significant prejudice to the moving party by the giving of notice to the other side. Alternatively the affirmation must describe the good faith effort that was made to notify the other side of the time date and place of that the application will be made so that they may appear in response to the application.

- f. The requirement of 22 NYCRR 202.7(f) do NOT apply to OSC brought in eviction actions under Article 7 of the RPAPL or to Orders of Protection sought under section 240 of the Domestic Relations Law, unless otherwise ordered by the court.

**X. Fee to File a Motion**

- a. There is a \$45.00 fee to file a motion. CPLR § 8020(a).
- b. Pursuant to CPLR § 1101(c) however a party represented by a legal services attorney will be granted a fee waiver if the lawyer representing them files an attorney certification that their office has determined that the party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action. A model 110(c) certification is included in your materials.