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Drafting NY Civil-Litigation Documents: Part 15—Motions to Dismiss

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Drafting New York Civil-Litigation Documents: Part XV — Motions to Dismiss

In the last issue, the *Legal Writer* continued its discussion on motion practice. In this issue, the *Legal Writer* discusses drafting motions to dismiss.

Questions to ask yourself before you consider moving to dismiss include these: Who may move to dismiss? When may you move to dismiss? Why should you move to dismiss? On what grounds can you move to dismiss? How do you move to dismiss?

Who May Move to Dismiss, Generally

If you're a defendant (or respondent),¹ you may move to dismiss a cause of action or the entire complaint (or petition).

As the plaintiff, you may also move to dismiss, or strike, defensive pleadings — the answer. Once you've received the defendant's answer, you may assert that the defendant has failed to state a defense or that a defense is meritless.

If you're a plaintiff, you may move to dismiss the defendant's counterclaim.

If you're a plaintiff, you may also move to dismiss your co-plaintiff's cross-claim.

If you're a defendant, you may move to dismiss your co-defendant's cross-claim.

If you're a third-party defendant, you may move to dismiss the third-party claim.²

When to Move to Dismiss

As the defendant, you may move to dismiss before you interpose an answer (pre-answer motion to dismiss) or, in limited circumstances, after you

interpose an answer. The modern view is that you may move to dismiss even after interposing an answer as long as you've preserved your right to move to dismiss by raising the ground as a defense in the answer.³

If a court denies your motion to dismiss, that doesn't mean you lose the case. If you've moved to dismiss before you've interposed an answer and you lose the motion, you may still interpose your answer in certain circumstances. If you win the motion in its entirety and the court dismisses the complaint, you don't need to interpose an answer. If you've moved to dismiss after you've interposed an answer and you lose the motion, the case continues.

If you as the plaintiff lose your motion to dismiss, or strike, the defendant's defense(s), the defendant may pursue the defense at trial. If you win, the defendant won't be able to pursue the defense.

Why Move to Dismiss

In deciding whether to move to dismiss, you'll need to determine the advantages and disadvantages.

Think about your strategy before moving to dismiss. Also think about the ramifications of winning or losing the motion. Think several steps ahead of your adversary. Think about the time, money, and consequences for your client. It's usually more expensive to prepare a motion to dismiss than, say, to prepare an answer. Also consider how the court will perceive your motion. You don't want the court to think that you're bringing a frivolous motion. Just be ethical.

If you're the defendant and the court grants your pre-answer motion to dismiss, you won't need to file an answer. Even if the court doesn't dismiss the entire complaint, it might still dismiss one or more of the plaintiff's causes of action. Interpose an answer with respect to the remaining portions of the plaintiff's complaint. The

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worst that'll happen is that you'll incur expenses for preparing and filing the motion and the answer.

If, after receiving the defendant's answer, you, the plaintiff, move to dismiss, or strike, one or more of the defendant's defenses under CPLR 3211(b) and the court grants your motion, you might have saved valuable time and money instead of conducting disclosure and preparing for trial. You'll also save time and money if the court grants your motion to dismiss the defendant's counterclaim or the co-plaintiff's cross-claim.

If you're the defendant and the court grants your motion to dismiss your co-defendant's cross-claim, you'll have more time and money to focus on your defense of the plaintiff's claims against you.

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Sometimes it's too soon to tell whether to move to dismiss. You might need more information about the case — information that might be available only during disclosure. If you're the defendant and you need more information to prepare a defense, it

You may move to dismiss under CPLR 3126 when a party has failed to submit to disclosure.

You may also move to dismiss under CPLR 3216 if one party neglects or delays in prosecuting the action.

Practitioners often move to dismiss under CPLR 3211, a focus of this *Legal Writer* column and the next.

these jurisdictional defenses in your answer. Otherwise, you've waived them.⁷

If you've already moved to dismiss pre-answer, you may raise non-jurisdictional grounds as affirmative defenses in your answer. You may later raise non-jurisdictional grounds as a basis for a summary-judgment motion.

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might be better to plead the defense in the answer without moving to dismiss. If you're the plaintiff, you might need to hold off on the motion to dismiss the defendant's defense(s) until you've completed disclosure. Consider the amount of time and money it'll cost your client to prosecute the claim. Consider the time and money it'll cost your client if you eliminate the defense once you've won your motion to dismiss.

All isn't lost if you don't move to dismiss. You can later move for summary judgment or partial summary judgment.

If you move to dismiss on the basis of a deficiency in the pleadings, a court might, depending on the type and severity of the deficiency, grant your adversary leave to amend — that is, to correct, or cure, the deficiency. If you move to dismiss for improper service and prevail, your adversary may re-effectuate service, subject to whether the statute of limitations has run. A dismissal for failure to serve properly is not on the merits.

What Ground(s) Do You Have to Move to Dismiss

You may move for dismissal under CPLR 327 if the forum is inconvenient.

You may move to dismiss under CPLR 3012(b) when the plaintiff failed to serve the complaint within 20 days after you've made a demand for the complaint.

CPLR 3211

CPLR 3211(a) contains the grounds for dismissing a cause of action. Any party against whom a cause of action has been asserted may move under CPLR 3211(a).⁴ CPLR 3211(b) contains the grounds for dismissing a defense.

You may raise the grounds provided in CPLR 3211(a) in a motion or assert them in your answer as defense. The motion is optional. You may raise some grounds in your dismissal motion and, if the court denies your motion, you may assert the remaining grounds in your answer.⁵ Eleven grounds are provided in CPLR 3211(a). Some are discussed below.

Under CPLR 3211(e), you may move to dismiss only once for the grounds specified in CPLR 3211(a) against any one pleading.

Raise all the grounds for dismissal in your motion. You waive a dismissal ground under CPLR 3211(a) in your motion to dismiss or as an affirmative defense in your answer if you don't assert it.

If you fail to raise jurisdictional grounds in your pre-answer motion to dismiss under CPLR 3211(a)(8) or CPLR 3211(a)(9), you won't be permitted to raise those jurisdictional grounds in your answer.⁶ CPLR 3211(a)(8) provides for dismissal on the basis of personal jurisdiction; CPLR 3211(a)(9) provides for dismissal on the basis of in-rem or *quasi-in-rem* jurisdiction. If you choose not to move to dismiss, you must assert

(The *Legal Writer* will discuss summary judgment motions in upcoming columns.)

Some grounds for dismissal are never waived. You may assert the following grounds until the trial: failure to state a cause of action (CPLR 3211(a)(7)) or absence of a necessary party (CPLR 3211(a)(10)). You may raise lack of subject-matter jurisdiction (CPLR 3211(a)(2)) as a basis for dismissal for the first time on appeal. If you move to dismiss late in the proceedings, a court might become displeased.⁸ After all, moving to dismiss under CPLR 3211 is meant to dispose of issues early in the litigation. Don't wait until the last possible minute to move to dismiss.

You may not move under CPLR 3211 to dismiss an action commenced by summons with notice. If you're the defendant, wait to move to dismiss until after you've been served with the complaint. If you haven't been served with a complaint, you may prepare a demand for the complaint. If you're not served with a complaint within 20 days of your demand, you may move to dismiss at that point under CPLR 3012(b).⁹

If you're the defendant and you've moved to dismiss pre-answer, your time to answer the complaint will be delayed until 10 days after the court serves its order for your motion to dismiss. You'd answer only if you've lost the motion and the court doesn't dismiss the complaint.

How to Write the Component Parts of a Motion to Dismiss

Bring your motion to dismiss either by notice of motion or by order to show cause. Whichever method you use will depend on your time constraints. The faster you need the court to intervene, the better to bring your motion to dismiss by order to show cause.

If you bring your motion by notice of motion, your notice of motion must

truth of the factual allegations in the pleading, extrinsic proof is unnecessary for the court to dismiss the complaint. If you're contending that the pleading is adequate on its face but that the pleading lacks merit or requires dismissal, you'll need extrinsic proof.¹³

Attach a copy of the complaint, or relevant pleading, if you're moving to dismiss.

All isn't lost if you don't move to dismiss. You can later move for summary judgment or partial summary judgment.

contain the following: (1) the time and place of the hearing on the motion; (2) the supporting papers on which you rely for the motion; (3) the relief you're seeking from the court; and (4) the grounds for the relief you're seeking.¹⁰ The relief you're seeking from the court could be to dismiss the action, to dismiss one or more causes of action, to dismiss one or more affirmative defenses, or to dismiss one or more counterclaims or cross-claims.

Begin your notice of motion with a caption identifying the name of the court, the venue, the title of the action, the nature of the paper ("Notice of Motion"), the index number, and the assigned judge or justice.¹¹ (The *Legal Writer* discussed notices of motion in Part XIII of writing civil-litigation documents.)

Regardless on which ground(s) you move to dismiss under CPLR 3211(a), the court may consider affidavits, minutes (transcripts) from an examination before trial (EBT), documentary proof, admissions, letters, and any other "papers or proof having an evidentiary impact in the particular situation."¹² An exception exists for motions under CPLR 3211(a)(1), discussed below. If you're contending that the pleading is facially defective as a matter of law and concede the

The CPLR 3211(a) Grounds: Defense Founded on Documentary Evidence Under CPLR 3211(a)(1)

Moving to dismiss under CPLR 3211(a)(1) is available when the defense is based on documentary evidence. Courts have defined "documentary evidence" narrowly. A paper qualifies as "documentary evidence" only if (1) it's unambiguous; (2) it's of undeniable authenticity; and (3) its contents are essentially undeniable.¹⁴

New York state courts have found that mortgages, deeds, leases, contracts, judgments, stipulations of settlement, and judicial records and the like are acceptable documentary evidence that CPLR 3211(a)(1) contemplates.¹⁵ Also, "the paper must, standing alone, warrant dismissal."¹⁶

Affidavits in support of your motion to dismiss are not acceptable "documentary evidence." Nor are EBT minutes permissible "documentary evidence."¹⁷ Unacceptable as well are "medical records, letters, newspaper articles, printouts of Internet web pages, and transcripts of radio and television interviews."¹⁸ In the event that all your evidence for dismissal is contained in your affidavits and EBT minutes, you'll have to forgo your dismissal motion and, instead, answer the complaint. You may move for

summary judgment under CPLR 3212; the court will consider your affidavits and EBT minutes, for example, in determining whether to dismiss the case.

In opposing a motion under CPLR 3211(a)(1), a plaintiff may submit evidence demonstrating that the defendant's evidence doesn't conclusively resolve the action. A plaintiff may also "invoke CPLR 3211(d) to forestall a decision on the merits of the motion pending the plaintiff's receipt of evidentiary materials necessary to frame its opposition."¹⁹

Subject Matter Jurisdiction Under CPLR 3211(a)(2)

A motion to dismiss under CPLR 3211(a)(2) is appropriate when federal law preempts the subject matter of a state court action. The areas of law where federal preemption exists include employee retirement income under ERISA, tort claims against the federal government, securities regulation, and patent infringement.²⁰ If no specific preemption provision exists, a court has subject-matter jurisdiction to hear state law claims.

Sometimes a federal law may preempt state law, but the law may authorize federal and state courts to exercise concurrent jurisdiction. If concurrent jurisdiction exists, the state court has subject-matter jurisdiction to hear a claim based on federal law.

A dismissal motion under CPLR 3211(a)(2) is also appropriate when a claimant seeks damages in state court against state agencies or state officials acting in their official capacities. These cases must be brought in the Court of Claims. Actions against state employees brought in Supreme Court, however, are appropriate even if the state may ultimately be liable under respondeat superior.²¹

A court also lacks subject-matter jurisdiction when a claim violates the state's sovereign immunity. The court would have subject-matter jurisdiction if the claim is properly brought as a declaratory judgment action or an Article 78 proceeding.²²

A dismissal motion under CPLR 3211(a)(2) is further appropriate when a claim is nonjusticiable: The judicial branch may not usurp powers best left to other branches of government. Examples of nonjusticiable claims are political questions, claims not ripe for review, academic matters, and cases that seek an advisory opinion.²³

Lack of Capacity to Sue Under CPLR 3211(a)(3)

Move to dismiss under CPLR 3211(a)(3) if the party asserting the claim lacks the legal capacity to sue. Invoke this ground if, for example, an infant sues pro se or purports to retain an attorney. Only someone listed in CPLR 1201 may represent an infant. Also invoke this ground for a claimant who's mentally incompetent.

When a representative is appointed for a person or entity, the representative has no capacity to bring or maintain an action. Move to dismiss under CPLR 3211(a)(3). If a representative has not yet been appointed, the representative has no capacity to bring an action. Even if the appointment of a representative is completed after the action is commenced, a court will dismiss the action.²⁴

Capacity-to-sue issues arise in post-bankruptcy situations. If a plaintiff's claim isn't listed in the bankruptcy proceeding but should have been, the plaintiff cannot sue because of lack of capacity.²⁵ That claim would belong to the trustee in bankruptcy, not the plaintiff. A bankrupt claimant, however, may bring an action in a representative capacity. This situation would arise when the action is in the name of a corporation in which the bankrupt is the sole shareholder.²⁶

No clear definition exists for "legal capacity to sue" under CPLR 3211(a)(3). Practitioners are sometimes confused about whether to move under CPLR 3211(a)(3) or (a)(7), failure to state a cause of action. If you have any doubt, move for dismissal on both grounds. If, for example, a plaintiff who has no title or right as a trustee sues on behalf of the trust, the plaintiff lacks capacity to sue. Because the complaint is

interposed by an "irrelevant person," moving to dismiss under CPLR 3211(a)(7) would be appropriate as well: the complaint would fail to state a cause of action. In this scenario, invoke both grounds under CPLR 3211(a): CPLR 3211(a)(3) and (a)(7). (The *Legal Writer* will discuss CPLR 3211(a)(7) in upcoming columns.)

Legal capacity issues also arise with foreign corporations or limited liability companies doing business in New York. Under Business Corporation Law § 1312, an out-of-state corporation doing business in New York may not maintain an action in New York until the business becomes licensed and pays fees, taxes, and penalties.²⁷ Section 1312 doesn't forbid the corporation to commence the action; § 1312 bars the corporation from maintaining the action. An out-of-state corporation may defeat a dismissal motion under CPLR 3211(a)(3) once it gets licensed and pays fees, taxes, and penalties. A similar provision exists under Limited Liability Company Law § 802(a) for limited liability companies doing business in New York.

Unlicensed foreign corporations or limited liability companies not doing business in New York may maintain an action.²⁸ Whether the plaintiff is doing business in New York might be a factual dispute. A court may conduct a hearing on the issue. The court may also deny the motion to dismiss but allow the defendant to plead it in the answer as an affirmative defense.

Use a motion to dismiss under CPLR 3211(a)(3) when you're challenging whether an entity (a county, municipality, or public authority) has appropriate authorization before commencing the action.

Move to dismiss under CPLR 3211(a)(3) when challenging the state Attorney General's powers under Executive Law § 63.²⁹ Under Executive Law § 63, the Attorney General may seek an injunction, restitution, or damages if a defendant is engaged in illegal activity. Other statutes, like § 112(a)(1) of the Not-for-Profit Corporation Law, may give the Attorney General the power to commence an action.³⁰

In upcoming issues of the *Journal*, the *Legal Writer* will continue with motions to dismiss under CPLR 3211.

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1. The rules are the same for summary proceedings and plenary actions.
2. David D. Siegel, New York Practice § 257, at 438 (4th ed. 2005).
3. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 36:61, at 36-15 (2006; Dec. 2009 Supp.).
4. Siegel, *supra* note 2, at § 257, at 438.
5. *Id.* at § 258, at 439.
6. Barr et al., *supra* note 3, at § 36:03, at 36-11.
7. CPLR 3211(e).
8. Barr et al., *supra* note 3, at § 36:54, at 36-14.
9. *Id.* at § 36:04, at 36-11.
10. CPLR 2214(a).
11. CPLR 2101(c); 22 N.Y.C.R.R. 202(b).
12. Siegel, *supra* note 2, at § 257, at 438.
13. *Id.* at § 257, at 438.
14. John R. Higgitt, CPLR 3211(a)(1) and (a)(7) Dismissal Motions — Pitfalls and Pointers, 83 N.Y. St. B. J. 32, 32-33 (Nov./Dec. 2011) (citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C3211:10 at 22).
15. *Id.* at 33.
16. *Id.*
17. Siegel, *supra* note 2, at § 259, at 441.
18. Higgitt, *supra* note 14, at 33.
19. *Id.*
20. Barr et al., *supra* note 3, at § 36:101, at 36-18.
21. *Id.* at § 36:110, at 36-18.
22. *Id.* at § 36:111, at 36-18.
23. *Id.* at § 36:120, at 36-18.
24. *Id.* at § 36:231, at 36-23 (citing *Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 434 N.Y.S.2d 130 (1980)).
25. Siegel, *supra* note 2, at § 261, at 441.
26. Barr et al., *supra* note 3, at § 36:221, at 23.
27. *Id.* at § 36:200, at 36-22.
28. *Id.* at § 36:201, at 36-22.
29. *Id.* at § 36:210, at 36-22.
30. *Id.*