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Drafting NY Civil-Litigation Documents: Part 19—Motions to Dismiss Cont'd

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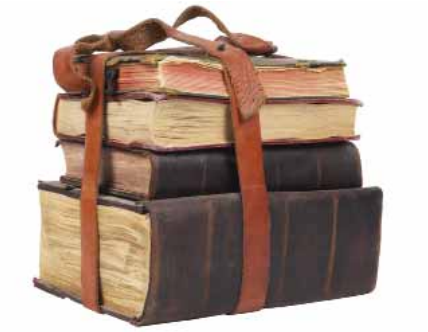

Drafting New York Civil-Litigation Documents: Part XIX — Motions to Dismiss Continued

In the last issue, Part XVIII of this series, the *Legal Writer* discussed motions to dismiss, specifically motions made under CPLR 3211(a)(8) through (a)(11). We continue with motions to dismiss.

Plaintiff's Motion to Dismiss a Defense Under CPLR 3211(b)

As the plaintiff, you may move to dismiss the defendant's defense(s) — also called moving to strike a defense — under CPLR 3211(b).[1] You may move to dismiss, or strike, one or more defenses, or all the defenses. Moving under CPLR 3211(b) obviates the need for a plaintiff to wait until trial to challenge a defendant's affirmative defenses.

Under CPLR 3211(b), you may move to dismiss on the ground that a defense "is not stated or has no merit." You may challenge a defense on its face on the basis "that it fails even to verbalize a defense — or go behind a perfectly pleaded defense to test its merit."[2] You may argue that the defendant's defense isn't stated and therefore that it fails as a matter of law. Or you may argue that the defendant's defense has no merit as a matter of fact — no factual basis for the defense. Along with your motion papers, you should submit an affidavit or other evidence to show that the defense has no merit. Once you challenge a defense on a factual basis, the defendant will have the burden in its opposition papers to raise an issue to warrant a trial.

If you attack a defense on its face and argue it isn't stated, a court will assume the truth of the allegations of the defense.[3] A court will presume as true the facts that the defendant pleaded in its answer.[4]

If you attack the merits of a defense, you must present admissible evidence such as affidavits or other extrinsic proof that the defense doesn't apply or is improper. The defendant will have to show facts that support its defense; the defendant will have to show that a factual dispute exists.[5] The court will draw all reasonable inferences in favor of the defendant's defense.[6] The court will give a defendant's answer "the benefit of every reasonable [interpretation]."[7] The assumptions and inferences a court makes on a CPLR 3211(b) motion are similar to how a court disposes of a motion under CPLR 3211(a)(7) for failing to state a cause of action. (For more information on CPLR 3211(a)(7), see Part XVII of this series.)

When you're moving to dismiss a defense under CPLR 3211(b), the court has the power to search the record to dismiss any cause of action.[8] Even though your motion seeks to dismiss a defense in the defendant's answer, the court may examine the complaint and dismiss it if you've failed to state a cause of action.[9] The court may dismiss the complaint even if your adversary didn't cross-move to dismiss your complaint.[10]

Some controversy existed on whether the defense of failing to state a cause of action may be included in an answer as a defense or in a motion to dismiss.[11] The Second Department has now adopted the First Department's standard: Including the defense of failing to state a cause of action in an answer is "surplusage at worst and that it therefore isn't necessary for the plaintiff to move to strike it."[12]

Right to Replead

On a CPLR 3211(b) motion to dismiss a defense for insufficiency, the party whose defense is attacked will likely want a chance to replead if the court grants the motion. If you're opposing a motion under CPLR 3211(b), specifically request in your opposition papers that the court allow you to replead if the court grants the motion. (See Part XVI of this series for information on motions for leave to replead,[13] in which the *Legal Writer* discussed the right to replead when moving under CPLR 3211(a)(7).) The same information applies when you're opposing a motion under CPLR 3211(b).

> A court will presume as true the facts that the defendant pleaded in its answer.

Converting a Motion to Dismiss to a Motion for Summary Judgment Under CPLR 3211(c)

Under CPLR 3211(c), a court may convert a motion to dismiss into a summary-judgment motion. This conversion often occurs when a party moves to dismiss under CPLR 3211(a)(7) for the plaintiff's failure to state a cause of action or when a party moves under CPLR 3211(b) to dismiss a defense. But the court may convert a motion to dismiss to a motion for summary

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judgment regardless which CPLR 3211 ground you've moved under.

Joinder of issue isn't a prerequisite for a court to treat a motion to dismiss as a motion for summary judgment.[14] Thus, a court may convert a pre-answer motion to dismiss into a motion for summary judgment; it may grant summary judgment before joinder of issue.[15]

Issue must be joined, however, before a party moves for summary judgment.[16] (The *Legal Writer* will discuss summary-judgment motions in the next issue.) If a party moves for summary judgment before issue is joined, the court may treat the motion as a motion to dismiss and then convert it to a summary-judgment motion.[17]

The court may also convert an untimely motion to dismiss to a motion for summary judgment.

If a party moves to dismiss under CPLR 3211 and another party cross-moves for summary judgment, the court shouldn't "consider [the summary-judgment motion] unless it is premised on grounds related to the motion to dismiss."[18]

Once the court treats the motion as a summary-judgment motion, the court's judgment is a judgment on the merits.[19] The judgment has res judicata effect.

Converting a motion to dismiss to a motion for summary judgment is "drastic."[20] The court must give the parties notice that it's treating the motion to dismiss as a motion for summary judgment. When the court has determined that it's treating the motion as a motion for summary judgment, the court will inform the parties by mail or any other method the court chooses to ensure that the parties have been notified. The court might give the parties a specific date to submit any additional evidence or additional argument. The parties may then submit additional proof or a supplemental brief for the court to consider.

The court, however, need not give notice to the parties that it's converting the motion to a summary judgment motion[21] when the motion presents only questions of law.[22] Also, the court need not give notice to the parties that it's converting the motion to a summary-judgment motion when the parties requested that the court convert the motion to a summary-judgment motion.[23] Further, the court need not give notice to the parties when the parties have "'charted the course' for summary judgment by fully revealing their proof on the issues presented"[24] — providing evidence in the motion to dismiss (and opposition papers) in the form of affidavits and documentary proof.[25]

Immediate Hearing Under CPLR 3211(c)

A court may order an immediate trial on an issue of fact raised in a CPLR 3211 motion "when appropriate for the expeditious disposition of the controversy."[26] The court's power is "broad, but is exercised when the immediate trial has some potential for ending the litigation."[27] It's appropriate for the court, for example, to order a trial on a CPLR 3211(a)(8) motion for lack of jurisdiction. It would be a waste of judicial resources to "preserve a case and put it through pretrial processing only [for the court] to dismiss it for want of jurisdiction later."[28] A trial would also be appropriate on a CPLR 3211(b) motion to strike a defense if doing so has the potential to end the case on the merits. What governs a court's discretion to order an immediate trial is "this case-ending prospect, though of course not its certainty."[29]

The immediacy of a trial will depend on a judge's calendar and other court rules and considerations.

If the court orders an immediate hearing or trial, it may also allow some limited disclosure on the issue the court will decide at trial.[30]

Will the trial be a bench trial or a jury trial? If the claim would have been tried by a jury and a court's granting the motion will put an end to the case, the issue in dispute "must be tried by jury if either party requests it."[31] If a court's granting a motion will not prevent a party from starting a new action for the same relief, the issue must be resolved by a judge, not a jury, "even though the main claim itself, were its merits reached, would be."[32] A traverse hearing is an example. Even if the court finds that service was improper, the plaintiff may begin another case seeking the same relief.

The court may convert a motion to dismiss to a motion for summary judgment regardless which CPLR 3211 ground you've moved under.

Affidavits, Exhibits, and Briefs

Unlike a summary-judgment motion, nothing compels a party to submit an affidavit in support of a motion to dismiss. CPLR 3211(c) permits a party to submit any evidence that a court would consider on a summary-judgment motion. To support a motion to dismiss under CPLR 3211(a)(1) through (a)(11), you as the moving party have the burden of coming forward with evidence. You can do this by attaching an affidavit. If you're also attaching documentary evidence, explain the documents and lay a proper foundation for them in the affidavit(s). In the affidavit(s), refer to all the evidence you attach to your motion.

The affidavit must comply with CPLR 2101. Among other things, it must contain a caption. It must have the affiant's signature with the affiant's

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printed name under the signature. Consult CPLR 2106 if you're submitting an affirmation from an attorney, physician, osteopath, or dentist.

The contents of the affidavit must be based on the affiant's personal knowledge. The affiant must have firsthand knowledge of the information contained in the affidavit. The affiant cannot speak of facts that are based on hearsay. Affiants must also state in their affidavits that they have personal knowledge of the information contained in the affidavit.

You may submit a brief, or memorandum of law, in support of your motion to dismiss. Instead of a brief, many practitioners use an attorney's affirmation to discuss issues of law and how the law applies to the facts in the case. Using an attorney's affirmation to argue law isn't the preferred practice, however. Lawyers shouldn't swear to the truth of their legal arguments.

As a practitioner, be careful what you include in your affirmation. Many of the facts that attorneys include in their affirmation aren't based on personal knowledge. You'll need an affidavit from an individual with personal knowledge who can attest to the facts you need to support your motion.

Affirmations, affidavits, and exhibits are considered motion papers. Briefs or memorandums of law aren't. Thus, affirmations, affidavits, and exhibits are included in the record on appeal, whereas briefs and memorandums of law are not.[33]

In the next issue of the *Journal*, the *Legal Writer* will discuss how to draft summary-judgment motions. ■

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1. 1 Byer's Civil Motions at § 27:03 (Howard G. Leventhal 2d rev ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Aug. 28, 2012).
2. David D. Siegel, New York Practice § 269, at 465 (5th ed. 2011).
3. *Id.* § 269, at 465.
4. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 36:531, at 36-40 (2006; Dec. 2009 Supp.).
5. *Id.* § 36:534, at 36-40.1.
6. Siegel, *supra* note 2, at § 269, at 465.
7. Barr et al., *supra* note 4, § 36:531, at 36-40 (citing *Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965, 966, 533 N.Y.S.2d 605, 606 (2d Dep't 1988)).
8. Siegel, *supra* note 2, at § 269, at 466.
9. Barr et al., *supra* note 4, § 36:54, at 36-40.1 (citing *Mojica v. New York City Transit Auth.*, 117 A.D.2d 722, 723–24, 498 N.Y.S.2d 448, 449 (2d Dep't 1986)).
10. Byer's Civil Motions, *supra* note 1, at § 27:03.
11. Siegel, *supra* note 2, at § 269, at 466.
12. *Id.* § 269, at 466 (citing *Riland v. Todman & Co.*, 56 A.D.2d 350, 352, 393 N.Y.S.2d 4, 5 (1st Dep't 1977); *Butler v. Catinella*, 58 A.D.3d 145, 150, 868 N.Y.S.2d 101, 105 (2d Dep't 2008).
13. Gerald Lebovits, The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XVI — Motions to Dismiss Continued*, 84 N.Y. St. B.J. 64, 64 (June 2012).
14. Siegel, *supra* note 2, at § 270, at 467.
15. Barr et al., *supra* note 4, § 36:680, at 36-48.
16. CPLR 3212.
17. Barr et al., *supra* note 4, § 36:680, at 36-48 (citing *Historic Albany Found. v. Breslin*, 282 A.D.2d 981, 984, 724 N.Y.S.2d 113, 116 (3d Dep't 2001)).
18. *Id.* § 36:680, at 36-48 (citing *Primedia Inc. v. SBI USA LLC*, 43 A.D.3d 685, 686, 841 N.Y.S.2d 528, 529 (1st Dep't 2007)).
19. Siegel, *supra* note 2, at § 270, at 467.
20. *Id.* § 270, at 467.
21. Barr et al., *supra* note 4, at § 36:672, at 36-48 (citing *Wiesen v. New York Univ.*, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 (1st Dep't 2003) ("There are, however, three exceptions to the notice requirement: (1) where the action in question involves no issue of fact, but only issues of law which are fully acknowledged and argued by the parties; (2) where the parties specifically request the motion be treated as one for summary judgment; and (3) where the parties deliberately lay bare their proof and make it clear they are charting a summary judgment course.").
22. *Id.* § 36:671, at 36-47 (citing *Tops Market, Inc. v. S & R Co. of W. Seneca*, 275 A.D.2d 988, 988, 713 N.Y.S.2d 796, 797 (4th Dep't 2000)).
23. *Id.* § 36:671, at 36-47 (citing *Shah v. Shah*, 215 A.D.2d 287, 290, 626 N.Y.S.2d 786, 789 (1st Dep't 1995)).
24. *Id.* § 36:681, at 36-48 (quoting *Huggins v. Whitney*, 239 A.D.2d 174, 174, 657 N.Y.S.2d 50, 51 (1st Dep't 1997)).
25. *Id.* § 36:671, at 36-47 (citing *Kavoukian v. Kaletta*, 294 A.D.2d 646, 647, 742 N.Y.S.2d 157, 158 (3d Dep't 2002)).
26. CPLR 3211(c); *see* CPLR 2218 ("The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried.").
27. Siegel, *supra* note 2, at § 271, at 468.
28. *Id.* § 271, at 468.
29. *Id.*
30. Barr et al., *supra* note 4, § 36:703, at 36-49.
31. Siegel, *supra* note 2, at § 271, at 468.
32. *Id.* § 271, at 469.
33. Barr et al., *supra* note 4, § 36:591, at 36-43.