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Motion Practice in Suffolk County: Avoiding the Pitfalls

Gerald Lebovits

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ABA gathers in Dallas for 2013 Midyear Meeting

By Scott M. Karson

The 75th Midyear Meeting of the American Bar Association was held Feb. 7-11, 2013, at the Hilton Anatole Hotel, in Dallas, Texas. I attended the meeting as the Suffolk County Bar Association delegate to the ABA.

The ABA's policy-making body, the 550-member House of Delegates, met on Monday, Feb. 11, 2013, with Robert M. Carlson of Montana presiding as Chair of the House.

Welcoming remarks to the House were delivered by United States Senator Kay Bailey Hutchison of Texas, who welcomed the House to Dallas and thanked the House for its leadership in maintaining the integrity of the profession and ensuring the quality of judges. She reflected on her travels abroad and stated that there is no democracy without the rule of law and an independent judiciary.

Scott M. Karson

Following Senator Hutchison, Mr. Carlson, as Chair of the House, spoke about Law Day 2013. This year's theme *Realizing the Dream: Equality for All*, connects Law Day to the 150th Anniversary of Abraham Lincoln's issuance of the Emancipation Proclamation and the 50th Anniversary of Martin Luther King's *I Have a Dream* speech. Mr. Carlson encouraged state and local bars across the country to participate in Law Day activities and hopes that all members of the House will encourage this important participation.

The Honorable Myron T. Steele, President of the Conference of Chief Justices, began his remarks by acknowledging the victims of the courthouse shooting that had occurred in his State of

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Photo by Art Shulman

The Surrogates Court Committee held a meeting with Academy of Law program credit on March 12 on "Tips for allocating a fiduciary's' legal fees against a distribute beneficiary in a contested matter" led by speaker John P. Graffeo, Esq.

PRESIDENT'S MESSAGE

SCBA President's reminders and a roundup

Arthur Shulman

By Art Shulman

As this column was being edited for submission, the sad news was delivered that Steve Ceparano, beloved husband of Dorothy Ceparano, our Academy of Law Executive Director, had died. During the past few weeks, with Dorothy ever at his side, Steve had endured great pain, underwent surgery and struggled to recover. To Dorothy, their daughter Donna, grandchildren Samantha, Mandy and Alana, Dorothy's supportive and caring brother-in-law and sister-in-law, and your extended family, my deepest sympathy.

During the course of my term as president in addition to attending numerous New York State Bar and other local bar association functions and meetings with other bar association leaders, I have attended many of the SCBA's committee meetings to learn firsthand the needs of our membership and have worked closely with my Executive Committee and Board of Directors in addressing the concerns of our membership. As increased competition and new regulations imposed upon attorneys are constantly making it harder to practice law, the Executive Committee, Board of Directors and I welcome suggestions from our membership. The leadership of the SCBA is committed to making the lives of our membership easier and more productive.

We owe our gratitude to our colleagues in the Criminal Bar Association for their joint participation with the SCBA regarding the establishment of the new Traffic and Parking Violations Agency (TPVA) and in sponsoring a joint CLE lunch and learn with our Academy of Law on March 20 at the SCBA prior to the scheduled April 1 implementation of the TPVA. This CLE will be extremely helpful in preparing our members for dealing with the new procedures being

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BAR EVENTS

Academy Happenings

2013 Matrimonial Law Series
Cross Examination: A primer for the Family Lawyer
Monday, April 1
Bar Center

Ethical Practice Management
Lunch 'n Learn
Monday, April 8, noon
Bar Center

East End Bridgehampton National Bank
Elder Law Program by George Roach
Wednesday, April 17, 6 to 9 p.m.
Bar Center

Mockery of a Real Estate Closing
Lunch 'n Learn
Wednesday, April 24, noon
Bar Center

Call the Academy for further information on these programs.

Annual Meeting
May 6, at 6 p.m.
Bar Center

Installation Dinner Dance
Friday, June 7, at 6 p.m.
Cold Spring Country Club, Huntington
The dinner will be an occasion to honor and install the new SCBA President Dennis R. Chase, Officers, and Directors. $135 pp.

FOCUS ON
TRUSTS & ESTATES
SPECIAL EDITION

LEGAL RESEARCH AND WRITING

Motion practice in Suffolk County - avoiding the pitfalls

By Diane K. Farrell and Gerald Lebovits

This article is a brief overview of some of the most common motions encountered in civil practice in State Supreme Court, Suffolk County, with tips on how to avoid some oft-repeated pitfalls.

To draft effective motion papers, practitioners must be familiar with Uniform Rules for the New York State Trial Courts and CPLR 2211 through 2222. Practitioners must also consult the individual rules that many IAS judges have enacted.

Movants who bring an order to show cause need shorter notice than the minimum eight days provided under CPLR 2214(b) for bringing a motion on notice. In Supreme Court, Suffolk County, an order to show cause movant should call the assigned IAS judge's part before attempting to have the order signed. Under 22 NYCRR 202.7(f), the nonmoving party must be given notice of the movant's intention to present the order to show cause if the prayer for relief includes a request for temporary injunctive relief, such as a stay. Notice is not necessary if the movant can demonstrate that there will be significant prejudice to the party seeking the restraining order by giving notice.

Some types of motions do not require notice to be given when they are made. Among these are ex parte motions, which are made to a judge without notice to the adversary. The CPLR authorizes ex parte motions only in limited situations, such as attachment (CPLR 6211), temporary restraining orders (CPLR 6313), and orders specifying the manner of effecting service of process (CPLR 308(5)).

Other motions must be made on notice. These include a CPLR 3211 motion to dismiss a complaint, a defense, or a counterclaim; a motion to compel discovery or to strike a pleading for failure to provide discovery or appear for an examination before trial under CPLR 3126; a motion for summary judgment under CPLR 3212; and a motion to renew or reargue under CPLR 2221. These common motions are discussed below.

Defendants may move to dismiss a complaint before they interpose an answer or, in limited circumstances, after they interpose an answer. For defendants to be able to move after they have answered, they must preserve the right to move to dismiss by raising the ground as a defense in the answer.[1] Because of this requirement, the issue of the plaintiff's standing to commence the action is forfeited altogether in many foreclosure actions by the defendant-borrower's failure to interpose the defense of lack of standing in an answer or in a timely motion to dismiss the complaint.[2] It is too late to raise the defense of lack of standing for the first time in a motion to vacate the borrower's default under CPLR 5015(a).[3]

Under CPLR 3211(e), you may make only one motion to dismiss for the grounds specified in CPLR 3211(a) against any one pleading. Movants waive any potential ground for dismissal under CPLR 3211(a) if that ground is not asserted in the dismissal motion. Some grounds to dismiss under CPLR 3211 can be raised at any time, such as a failure to state a cause of action (CPLR 3211(a)(7)), absence of a necessary party (CPLR 3211(a)(10)), and lack of subject matter jurisdiction (CPLR 3211(a)(2)).

A plaintiff who faces a motion to dismiss should consider cross-moving to replead or to amend the deficient complaint. A proposed amended complaint should always accompany such a cross-motion. CPLR 3025(b) was amended effective January 1, 2012, to require that any motion to amend or supplement pleadings be accompanied by the amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

A cross-motion to amend under CPLR 3025 requires a showing that the other side will not be unduly prejudiced if the court grants leave to amend. On January 1, 2006, the legislature amended CPLR 3211(e) to allow a party to replead without having to seek leave to replead in writing. Before the amendment, the nonmoving party had to submit evidence in admissible form to support the cause of action or defense. The new legislation does not include any time limit on a motion for leave to replead.[4]

A motion to strike a pleading for a party's failure to comply with disclosure demands or appear for an examination before trial, or both, is one of the most common motions. When making such a motion, the moving party is required to demonstrate a good-faith attempt to resolve the disclosure issues before seeking the court's help.[5] Failure to make that showing, or evidence that the movant's attempt was perfunctory, will invite a denial of the motion without consideration on the merits.[6] Some Suffolk County judges will order a compliance conference when faced with a discovery motion as an alternative means to resolve discovery disputes.

Striking a pleading is a last resort. Practitioners in the Second Department should read *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, [7] to get a sense of the high threshold of willful and contumacious conduct required before a court may strike a pleading.

All too often motions to strike a pleading are filled with ad hominem attacks on the adversary. Gratuitous attacks that permeate motion papers distract courts trying to assist the parties in resolving their disclosure differences. Rather than persuading the court that the other party has been unreasonable, frivolous, or contemptuous, these attacks call into question the credibility of the attorney making them and obscure the merits of the attorney's argument. The New York State Standards of Civility for the legal profession require counsel for the parties to be courteous and civil in all professional dealings.[8] In accordance with those standards, counsel should refrain from personal attacks on opposing counsel in all submissions and proceedings. Counsel should also be aware that they are vulnerable to sanctions for frivolous conduct, which can including making a frivolous motion for costs or sanctions.[9]

Gerald Lebovits

Diane K. Farrell

Motions for summary judgment are one of the most dangerous weapons in a civil litigator's arsenal. Any party may move for summary judgment in any type of action after issue has been joined.[10] The one exception is found in CPLR 3212(e), which prohibits summary judgment in matrimonial actions. Practitioners should be careful when moving for summary judgment to provide all supporting proof. Many judges will deny a summary-judgment motion outright if the movant fails to attach a copy of the pleadings.[11]

A significant amount of case law has developed in the Second Department and in Suffolk County about the effect of relying on unexecuted deposition transcripts in support of summary judgment. Although the issue may be waived if not raised by the court or a party,[12] the movant should strive to attach executed copies of all deposition transcripts or, alternatively, demonstrate that the party seeking to rely on the transcript has complied with CPLR 3116.[13]

In addition, the moving affirmation should always contain a list of exhibits to which the court can refer. The exhibits should be divided into volumes no larger than a single ream of paper if unwieldy exhibits make the motion awkward or difficult to handle. Each volume should have a cover page listing the exhibits within that volume. If the papers are difficult to navigate for the lawyer who prepared them, they are going to be unwieldy, and annoying, for the court. Supporting affidavits should be placed in the motion package, not hidden in the documentary exhibits.

Legal arguments should be contained in a memorandum of law rather than in an attorney affirmation. The Uniform Rules of the New York State Trial Courts do not contain page limitations. But page limitations would be a beneficial addition to the rules. Limits force the writer to organize and prioritize the facts and arguments succinctly and prevent repetition and digression from important issues. When crafting reply papers, the movant should avoid rehashing arguments and points made in the original moving papers. If the reply simply restates the initial moving papers rather than offering a focused response to the opposition papers, the movant is inviting the court to give the reply short shrift or, worse, skip reading the reply altogether.

Affidavits in support of and in opposition to summary judgment must be made by a person with knowledge. Attorney affirmations not based on personal knowledge lack probative value and are insufficient to support or preclude summary judgment.[14] This is true even if the motion is for a default judgment.[15] An affidavit setting forth the facts on which the relief is sought must be made by a person with knowledge. A verified complaint may do the job unless the complaint is verified by the attorney who lacks personal knowledge.[16]

Motions to renew and motions to reargue are separate and distinct requests for relief with significant differences.[17] Most important, the denial of a motion to reargue is not appealable.[18] Litigants dissatisfied with an order should file both a motion to reargue and a notice of appeal. The time to take both actions is the same: within thirty days of service of the order with written notice of its entry, plus five days for mailing under CPLR 2103(b)(2).[19]

Whether or not the court adheres to its original decision, if the motion to reargue is granted an appeal lies from the order that grants reargument, not from the original order. If the court denies the reargument, the appeal lies from the original order.[20]

There is no time limitation on a motion to renew. Both the granting and the denial of a motion to renew are appealable orders.[21] The motion to renew must be based on new information rather than simply a reargument of fact and law submitted on the original motion.[22]

Litigants almost always describe their motion as one to renew and reargue. The court is required to differentiate between

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the two.[23] Whether the motion is one to reargue or renew, or both, the original moving papers, the opposition, and any reply, in addition to the order being reargued or renewed, should be included as exhibits. The reader is invited to join Judge Lebovits at the Suffolk Academy of Law on May 15 for an in-depth discussion on persuasive and effective legal writing and oral argument techniques and tips.

Note: Diane K. Farrell is the Principal Law Clerk to the Honorable John J.J. Jones, Jr.

Note: Gerald Lebovits is a New York City Civil Court judge and an adjunct professor of law at Columbia, Fordham, and NYU.

The authors thank Elizabeth Sandercock, a student at City University of New York Law School, for her research help. On May 15, at 6 p.m., the Suffolk Academy of Law will welcome Judge Gerald Lebovits back for a CLE-Persuasive Writing for Litigators.

1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon Gerstman, *New York Civil Practice Before Trial* § 36:61, at 36-15 (2006; Dec. 2009 Supp.).
2 *Wells Fargo Bank Minn. N.A. v. Mastropaolo*, 42 A.D.3d 239, 241, 837 N.Y.S.2d 247, 249 (2d Dep't 2007).
3 *Deutsche Bank Nat. Ass'n v. Hussain*, 78 A.D.3d 989, 990, 912 N.Y.S.2d 595, 596 (2d Dep't 2010).
4 *Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15, 28, 869 N.Y.S.2d 572, 582 (2d Dep't 2008).
5 N.Y. Comp. Codes R. & Regs. Tit. 22, § 202.7(a) (2013).
6 *Hernandez v. City of New York*, 100 A.D. 3d 433, 434, 953 N.Y.S.2d 199, 201 (2d Dep't 2012), (citing *Molyneaux v. City of New York*, 64 A.D. 3d 406, 882 N.Y.S.2d 109 (1st Dep't 2009)).
7 102 A.D.3d 201, 959 N.Y.S.2d 74, 79 (2d Dep't 2012).
8 22 NYCRR Part 1200, App. A.
9 Rules of the Chief Admin. 130-1.1(c)(3).
10 CPLR 3212(a).
11 CPLR 3212(b); *Mieles v. Tarar*, 100 A.D.3d 719, 720, 955 N.Y.S.2d 86, 87 (2d Dep't 2012).
12 *Ross v. Gidwani*, 47 A.D.3d 912, 913, 850 N.Y.S.2d 567, 568 (2d Dep't 2008).
13 *See generally*, *Rodriguez v. Ryder Truck Rental, Inc.*, 91 A.D.3d 935, 936, 937 N.Y.S.2d 602, 603 (2d Dep't 2012).
14 *Currie v. Wilhouski*, 93 A.D.3d 816, 817, 941 N.Y.S.2d 218, 219 (2d Dep't 2012).
15 *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 733 (2003).
16 *See Beaton v. Transit Facility Corp.*, 14 A.D.3d 637, 789 N.Y.S.2d 314, 315 (2d Dep't 2005).
17 *See* CPLR 2221.
18 *Poulard v. Judkins*, 102 A.D.3d 665, 666, 965 N.Y.S.2d 916, 917 (2d Dep't 2013).
19 CPLR 2221(d)(3); *Dinallo v. DAL Elec.*, 60 A.D.3d 620, 874 N.Y.S.2d 246 (2d Dep't 2009).
20 David D. Siegel, *New York Practice* § 254, at 434 (4th ed. 2005).
21 *Id.*
22 CPLR 2221(e).
23 CPLR 2221(d)(1), (e)(1); *In re Will of Nigro*, 14 Misc. 3d 1239(A), 836 N.Y.S.2d 501 (N.Y. Sur. 2007).