

HOW TO RESPOND TO A COMPLAINT/MOTION FOR DISMISSAL

[NOTE: Persons without counsel are advised to consult with an attorney. Court staff MAY NOT give legal advice, prepare your papers or act as your attorney.]

Once a summons and complaint or a summons with notice have/has been served, the Defendant (*person being sued*) must respond within 20 or 30 days, depending on how the papers were served. If Defendant fails to do so, the Plaintiff (*person bringing the lawsuit*) may quickly be able to obtain the relief (*e.g. money, divorce*) he or she is seeking by what is called a judgment by default (*also known as a default judgment*).

HOW A DEFAULT JUDGMENT IS OBTAINED

A Plaintiff may take one of two routes to obtain a default judgment, depending on the circumstances. Once the deadline for action by the Defendant has passed without action being taken, the Plaintiff, in certain cases, may apply to the County Clerk's Office for such judgment. This can only be done where the relief sought is purely money damages and the amount sought is either a sum certain or one that, by calculation, can be made certain (*e.g., suit upon a promissory note*). The Plaintiff must present a statement for judgment including an affidavit explaining the nature of the case, showing that a summons with notice or a summons and complaint were served properly, establishing the fact that Defendant has defaulted (*failed to properly answer*) and explaining how the sum sought in the complaint is calculated.

In the alternative, the Plaintiff may make an application to the court for a default judgment. This is done by making a motion for default judgment. This motion must be accompanied by an affidavit, which is merely a written statement sworn to in the presence of a notary public. The affidavit shall provide proof of the facts constituting the claim, the default and the amount due, see Civil Practice Law and Rules (CPLR for short) §3215. If Plaintiff's papers are in proper form and if there is no opposition from the Defendant, or if the opposition is unconvincing, the court is likely to grant the motion. A judgment for the relief sought is likely to be entered shortly thereafter.

HOW TO AVOID A DEFAULT

In order to avoid a default, the Defendant must respond upon being served with either the summons with notice or the summons and complaint within the applicable time frame. These deadlines are found in CPLR §320(a) and are 20 or 30 days depending on how service was made. The action to be taken differs depending on whether the case started with a summons with notice or a summons and complaint.

Where the Plaintiff has served a summons with notice, the Defendant may serve a document called a notice of appearance. This document formally announces that the Defendant is appearing in the case in order to defend him/her/itself and indicates who the Defendant's attorney is or that the Defendant is appearing on his or her own behalf. A corporation **must** appear through an attorney.

There is no such thing as a corporation appearing in a self-represented capacity. A corporation that attempts to do so may lose the case for this reason. If the Defendant serves and files a notice of appearance, then he or she has formally appeared in the case but is generally not aware, beyond the brief description on the summons with notice, what the Plaintiff is claiming the case is about. The notice of appearance is therefore usually accompanied by a demand for a complaint, that is a demand that the Plaintiff serve a formal complaint. The service of this demand puts the ball back in the Plaintiff's court, requiring him or her to serve a complaint within 20 days from the service of the demand. If the Plaintiff fails to do so, the Defendant may make a motion to dismiss the case.

Once a complaint has been served, either at the start of the case or in response to the service of a notice of appearance and a demand for a complaint, the Defendant must address the lawsuit started by the Plaintiff by either serving an answer or making and serving a motion to dismiss. The answer and motion to dismiss are discussed in the following sections.

THE ANSWER

An answer, like a complaint, is a formal statement of a party's position regarding the case, in particular, the Defendant's and in response to the Plaintiff's accusations. The answer and any other statements or allegations make up the framework of the case.

The format of the answer resembles the complaint. The body of the answer consists of a series of numbered paragraphs, each corresponding to a paragraph of the complaint and responding to all allegations therein contained. As to each separately numbered allegation in the Plaintiff's complaint, the Defendant must respond by admitting its truth, denying its truth, or denying possession of knowledge or information sufficient to permit an admission or denial. Each allegation of a complaint that is not responded to is deemed to have been admitted.

The answer may and sometimes must contain affirmative defenses (CPLR §3018[b]). Certain defenses, such as lack of proper service of the summons and complaint, are waived if the Defendant does not assert them in an answer or in a motion to dismiss made prior to service of an answer (CPLR §3211). The answer may also contain, if there is a factual and legal basis therefore, a counter suit by the Defendant against the Plaintiff. In other words, claims for relief (*e.g., money damages*) sought by the Defendant against the Plaintiff and are known as counterclaims. These follow the portion of the answer already described and take the form of allegations such as those contained in a complaint. In regard to these claims, Defendant is also sort of a Plaintiff. Similarly, in a case with multiple Defendants, one Defendant may assert his or her own claims against a fellow Defendant or Defendants and are known as cross-claims.

Generally, if the complaint has been sworn to (*verified*), then the answer must be verified as well (CPLR §3020). The answer must be served upon the Plaintiff and all other parties (*every Plaintiff and Defendant*). In contrast to service when initiating a lawsuit, service by mail is sufficient.

THE MOTION TO DISMISS

Instead of answering, if the Defendant believes that the complaint is legally insufficient or that other

appropriate grounds (*reasons*) exist, he or she may make a motion to dismiss the complaint. This motion must be made in a timely fashion (*within the same time frame for service of an answer*) or the Defendant will be in default. A motion is an application to the court for a specific court order within the confines of an existing case. The CPLR defines the kinds of motions that a party may make.

Generally speaking, a motion to dismiss challenges the legal adequacy of a complaint.¹ A motion to dismiss may also be used when it is claimed that dismissal is required because the court never acquired power over the Defendant as a result of some defect in the service of process, because the action was not commenced on time, or for other reasons. In this context process means either a summons with notice or a summons and complaint, however, in general it means any papers used to initiate (*start*) a lawsuit.

As to timeliness, every Plaintiff's case must be brought within one of the various deadlines spelled out in the law, which are known as statutes of limitations. For example, an action for breach of contract must be brought within six years of the breach (CPLR §213). Most personal injury actions must be brought within three years of the injury complained of (CPLR §214). For other limitations, see CPLR Article 2.

If a motion to dismiss is to be made, the party bringing the motion (*movant or moving party*) must prepare a notice of motion or, in certain urgent circumstances, an Order to Show Cause, which advises all the other parties in the action that the motion is being brought, the nature of the motion, what the supporting papers are, what the reasons for the motion are, and when and where the motion will be heard. The date of formal presentation to the judge is called the return date (CPLR §2214[a]).

The moving party must submit with the notice of motion an affidavit or other proof that explains the nature of the motion and the reasons therefor and which has attached copies of the complaint and any other papers that are necessary to the motion. The complaint and other papers will be called exhibits. If, for example, it is contended that the action was not timely commenced, the affidavit must set forth the facts that show that the action is untimely. To present an argument about a point of law, the moving party may submit a separate document called a memorandum of law (*brief*). Legal argumentation and citations to cases and/or statutes (*laws*) should be limited to factual statements and documentary evidence.

For all motions, at least eight (8) days advance notice must be given to all parties if the papers are served by hand (*personal service*) and at least thirteen (13) days notice must be given if the papers are mailed. Five (5) days are added when service is by mail. Answering papers to the motion, that is, papers in opposition to the motion, must be served at least two (2) days before the return date. However, if the notice of motion is served at least sixteen (16) days prior to the date it is to be heard, it may demand that answering papers and any notice of cross-motion be served at least seven (7) days

¹ A Plaintiff may also use such a motion to strike an affirmative defense contained in an answer.

before such date and any reply or responding affidavits shall be served at least one (1) day before the motion is to be heard (CPLR §2214[b]).

Provision is also made in the rules for reply papers, which are papers presented by the moving party in which the moving party responds to the argument of his or her adversary in the answering papers, but does not present new matter. No other papers, such as a response to reply papers, are permitted by the CPLR on a motion.² A movant is permitted to submit reply papers only where the motion papers have been served at least twelve (12) days before the return date and the movant has properly requested that answering papers be served at least seven (7) days before the return date.

A Defendant needs to be careful that he or she does not inadvertently waive any defense depending upon how he or she makes a motion or otherwise responds to the complaint (CPLR §3211[e]).

A timely motion to dismiss pursuant to CPLR §3211(a) extends the Defendant's time to serve the answer until ten (10) days after an order issued by the court in regard to the motion has been entered and notice of entry has been provided. Entry means that the court's order on the motion has been signed and filed with the County Clerk.

All motion papers must be served by mail or by hand upon all parties who have not defaulted in appearing, even if the motion does not seek relief against some of them. An affidavit of service must be prepared; one original should be retained by the moving party and a duplicate original should be attached to the papers submitted to the court so that the court can be certain that timely notice was given to all parties to the case.

The original moving papers must be filed with the Court Clerk's Office at least five (5) business days prior to the return date so that the motion may be put into the court's computer system and placed on the calendar. In the first instance, the place where the motion will be returnable is the assigned Justice's courtroom. Oral (*spoken*) argument may take place there, but usually oral argument takes place only when, where and if the assigned Justice directs. This is so for all motions brought in our court by notice of motion. The parties may agree to adjourn motions (within limits) and with the court's permission so as to accommodate their schedules. Answering and reply papers are to be served upon all parties to the case within the deadlines applicable. The original answering and reply papers, with proof attached that the papers were served on all parties, must be delivered to the courtroom at the call of the calendar on the return date.

Once the motion is marked submitted, it is either sent to the Justice assigned to the case for decision on the papers or is scheduled for oral argument in front of that Justice. This depends upon the procedures adopted by the Justice in question. Some Justices require oral argument on all motions. Others will direct argument on a case-by-case basis and notice thereof will be provided. Still others (*most*) take motions on submission and decide them on the papers.

² However, the CPLR does provide that when a motion is made, another party may make a motion of his or her own in response, known as a cross-motion (CPLR §2215).