Citywide Association of Law Assistants

2017 Legal Update: Civil Law

Best Practices for Deciding Motions

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I. General Considerations

a. What is a “motion”?

1. “A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served” (CPLR 2211).

2. A motion can be made on standard notice with a notice of motion or by notice set by the court in an order to show cause (*see* CPLR 2214[a], [d]).

b. Determination of a motion

1. CPLR 2219: “An order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after the motion is submitted for decision. The order shall be in writing and shall be the same in form whether made by a court or a judge out of court. An order determining a motion made upon supporting papers shall be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper. Except in a town or village court or where otherwise provided by law, upon the request of any party, an order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or otherwise recorded.”

2. Timing

A. An order determining a motion “shall be” made within 60 after the motion is “submitted,” unless the motion relates to a provisional remedy, in which case the order must be made within 20 days.

B. The 60-day (20-day in the case of a motion relating to a provisional remedy) period within which to render a decision is precatory; an order rendered outside the time allotted by the statute is still valid (*see Goffredo v City of New York*, 33 AD3d 346 [1st Dept 2006]; Siegel, New York Practice § 250 [Connors 5th ed]).

3. Form of order

A. All orders must be in writing and signed by the judge.

B. An order determining a motion made upon supporting papers shall be signed by the judge, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper.

C. On the request of any party, an order or ruling (other than a trial ruling) made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or otherwise recorded.

D. In determining a motion – particularly one that is opposed – the court should provide the reasoning for its determination (*see Hartford Fire Ins. Co. v Cheever Development Corp.*, 289 AD2d 292 [2d Dept 2001]; *Nadle v L.O. Realty Corp.*, 286 AD2d 130 [1st Dept 2001]).

c. General motion practice requirements

1. A notice of motion must "specify the time and place of the hearing of the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefore" (CPLR 2214[a]; *see* Siegel, New York Practice § 246).

• The court may overlook a movant's failure to specify a return date, provided that the other party is not prejudiced by the absence of a return date (*Harrington v Brunson*, 129 AD3d 1581 [4th Dept 2015]; *see* CPLR 2001).

2. A motion must be served so as to comply with the notice requirements of CPLR 2214(b), and a cross motion must be served so as to comply with the notice requirements of CPLR 2215 (s*ee* Siegel, New York Practice §§ 247, 249).

3. The parties must furnish the court with all papers necessary to the court's consideration of the motion (*see* CPLR 2214[c]; Siegel, New York Practice § 246).

4. In an e-filed action, the parties must provide the court with "working copies" of the documents that were e-filed in connection with the motion (if required to do so by the court). *See* 22 NYCRR 202.5-b(d)(4); 22 NYCRR 202.5-bb(a)(1); Siegel, New York Practice § 246.

d. Evidence issues

1. Admissible form

A. Affidavits. All affidavits should be executed and properly notarized (*see John Harris P.C. v Krauss*, 87 AD3d 469 [1st Dept 2011]), and any affidavit executed outside New York should be accompanied by the required certification "flag" (*see* CPLR 2309[c]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2309, C2309:3). CPLR 2309(c) states that "[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed

acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation." There are two types of certifications, i.e., "flags," implicated by CPLR 2309(c), and, by reference, the Real Property Law: certificates of authentication, evincing the authority of the oath-taker, and certificates of conformity, demonstrating that the oath was taken in accordance with the laws of the state or country in which it occurred (*see* Connors, Practice Commentaries, *supra*, CPLR 2309, C2309:3).

B. CPLR 2106 allows certain New York State-licensed professionals to use an affirmation in place of an affidavit (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2106). The affirmation spares the professional the need to appear before a notary public.

i. Only those professionals listed in CPLR 2106 may use an affirmation (*see Casas v Montero*, 48 AD3d 728 [2d Dept 2008]). The following professionals (who frequently provide statements in litigation) **cannot** use an affirmation: architects (*see Laventure v McKay*, 266 AD2d 516 [2d Dept 1999]), chiropractors (*see Gibbs v Reid*, 94 AD3d 636 [1st Dept 2012]), and engineers (*see Mazzola v City of New York*, 32 AD3d 906 [2d Dept 2006]).

ii. Critically, too, a professional authorized to use an affirmation cannot do so if he or she is a party to the action in which the affirmation will be used (*see Slavenburg Corp. v Opus Apparel, Inc.*, 53 NY2d 799 [1981]).

iii. Some appellate courts might overlook the failure to honor the distinction between an affirmation and affidavit (*see Warshaw Burstein Cohen Schlesinger*

& Kuh, LLP v Longmire, 82 AD3d 586 [1st Dept 2011]), but others will not (*see LaRusso v Katz*, 30 AD3d 240 [1st Dept 2006]).

• Note that the statute was amended in 2014 to include a new provision (subdivision b) authorizing an individual physically outside of the United States and its territories to use an affirmation (s*ee* Siegel, New York Practice § 205 [January 2017 supplement]).

C. Deposition transcripts.

i. All deposition transcripts should be certified by the court reporters and signed by the deponents (*see* CPLR 3116[a], [b]).

ii. An unsigned deposition transcript that was certified by the court reporter may be considered if (1) the transcript was forwarded to the deponent but he or she did not sign and return it within 60 days (*see* Connors, Practice Commentaries, *supra*, CPLR 3116, C3116:1, 2011 Pocket Part); (2) the unsigned transcript is being used against a party-deponent as an admission (*see Morchik v Trinity School*, 257 AD2d 534 [1st Dept 1999]; *see also Delishi v Property Owner (USA) LLC*, 31 Misc 3d 661 [Sup Ct, Kings County 2011]); or (3) the accuracy of the unsigned transcript is not challenged (*see Willis v Galileo Cortlandt, LLC,* 106 AD3d 730 [2d Dept 2013]).

2. Hearsay

<u>Hearsay; Generally</u>

A. Hearsay defined: Hearsay is “a statement made out of court offered for the truth of the fact asserted in the statement” (*People v Goldstein*, 6 NY3d 119, 127 [2005]

[internal ellipses omitted]; *see Roldan v New York University*, 81 AD3d 625 [2011]).

i. A "statement" is an oral or written assertion.

ii. The rule prohibiting hearsay exists to ensure that the witness who perceived an event is subject to cross-examination.

B. If a statement is hearsay it is not admissible unless an exception to the hearsay rule applies.

C. Identifying hearsay

i. Is it a "statement"?

ii. Is the statement being offered for its truth?

D. Examples of non-hearsay statements:

i. a statement offered to prove that a party had notice of a condition (*see Wynn v Little Flower Children's Services*, 106 AD3d 64 [1st Dept 2013]).

ii. a statement offered to show the state of mind of a person who heard a statement.

iii. a statement that constituted a "verbal act" -- the utterance of certain words have legal significance regardless of the truth of their content, e.g., an allegedly defamatory statement, words manifesting an agreement among parties.

iv. a prior inconsistent statement of a witness used for the purpose of impeaching the witness' testimony.

E. Common exceptions to the rule prohibiting hearsay

i. The admission of a party (*Reed v McCord*, 160 NY 330, 341 [1899] ["In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him [or her], wherever, whenever, or to whomsoever made"]).

ii. A present sense impression (*see Balzola v Giese,* 107 AD3d 587 [1st Dept 2013]; *Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590 [1st Dept 2012]).

iii. An excited utterance (*see Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590 [1st Dept 2012]).

iv. A statement reflecting the declarant's state of mind.

v. A past recollection recorded.

vi. A record that constitutes a "business record" under CPLR 4518 (*see* below).

F. The hearsay rule applies to trials, hearings and <u>motions</u>

i. Generally, hearsay is inadmissible to support or oppose a motion – a party seeking relief by way of motion or a party seeking to successfully oppose a motion cannot rely on hearsay.

ii. Big exception: A party opposing summary judgment may rely on hearsay to defeat summary judgment, provided hearsay is not the only evidence submitted in opposition to the motion (*see Weinstein v Nicolosi*, 117 AD3d 1036 [1st Dept 2014]; *see also* Vincent Alexander, *Opposing*

Summary Judgment With Hearsay, March 14, 2004 NYLJ).

G. Burdens and procedural considerations relating to hearsay issues

i. Hearsay is inadmissible, but it is the obligation of a party to raise a hearsay objection (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [2013]).

ii. Generally, un-objected to hearsay comes in and will be considered by the court (*Brooklyn Union Gas Co. v Arrao*, 100 AD2d 949, 950 [2d Dept 1984] ["hearsay admitted without objection may be considered in a civil action"]).

iii. If a party raises an objection to a statement as being hearsay, the burden shifts to the party offering the statement to demonstrate that it is not hearsay or that an exception to the hearsay rule applies (*see Tyrrell v Wal-Mart Stores, Inc.*, 97 NY2d 650 [2001]; *Scherer v Golub Corporation*, 101 AD3d 1286 [3d Dept 2012]).

Specific Hearsay Issues in Motion Practice

A. Qualifying a document as a "business record"

i. CPLR 4518 provides New York's business records exception to the hearsay rule. Subdivision "a" of the statute states that "[a]ny writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds

that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (*see Viviane Etienne Medical Care, P.C.*, 25 NY3d 498 [2015]).[1] Additionally, each participant in producing the record, from the initial declarant to the final entrant, must be acting within the regular course of business (i.e., under a business duty) or the declaration must meet some other exception to the hearsay rule (*Matter of Leon RR*, 48 NY2d 117 [1979]; *see Harrison v Bailey*, 79 AD3d 811 [2d Dept 2010]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461 [1st Dept 2007]).

• When attempting to lay a proper foundation for the admission of a record as a business record on a motion, the party proffering the record must submit evidence (an affidavit or deposition testimony) from one with *personal knowledge* of the record maker's business practices and procedures (*see Aurora*

[1]As a result of CPLR 4518(a), the proponent of a business record must satisfy the following foundational requirements:

" *first,* that the record be made in the regular course of business--essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second,* that it be the regular course of such business to make the record (a double requirement of regularity)--essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third,* that the record be made at or about the time of the event being recorded--essentially, that recollection be fairly accurate and the habit or routine of making the entries assured" (*People v Kennedy*, 68 NY2d 569, 579-580 [1986]).

Loan Services, LLC v Mercius, 138 AD3d 650 [2d Dept 2016]; *Citibank, N.A. v Cabrera*, 130 AD3d 861 [2d Dept 2015]; *Unifund CCR Partners v Youngman*, 89 AD3d 1377 [4th Dept 2011]; *JP Morgan Chase Bank, N.A. v RADS Group, Inc.*, 88 AD3d 766 [2d Dept 2011]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329 [4th Dept 2009]). And that evidence must establish the elements above - the record was made in the ordinary course of business, it was the ordinary course of business to make the record, and the record was made at or about the time of the event (*see JP Morgan Chase Bank, N.A. v Clancy*, 117 AD3d 472 [1st Dept 2014]; *KG2, LLC v Weller*, 105 AD3d 1414 [4th Dept 2013]; *Zuluaga v P.P.C. Construction, LLC*, 45 AD3d 479 [1st Dept 2007]; *see also Vaccariello v Meineke Car Care Center, Inc.*, 136 AD3d 890 [2d Dept 2016]).

B. "Admissions" in medical records

Often times medical records contain statements by parties that are contrary to the positions taken by those parties during litigation. A party would very much like to get a statement inconsistent with the other party's litigation position into evidence for its truth, i.e., as evidence in chief. To lay a business records foundation for a medical record, the proponent of the record must establish that any statement by the adverse party was provided to the health care professional for the purpose of diagnosis or treatment. If a statement of a party was necessary to further diagnosis or treatment, then the health care professional was under a business duty to record it, providing a critical link in the hearsay chain. What if the statement of a party was not necessary to further diagnosis or treatment, but the statement is

inconsistent with the party's position in litigation? Is that statement admissible as a party admission?

Appellate Division case law supports the proposition that a party's statement in a medical record that did not relate to diagnosis or treatment but is inconsistent with the party's position in litigation *is admissible as an admission*, provided there is evidence connecting the party to the admission (*see, e.g., Berkovitz v Chaaya*, 138 AD3d 1050 [2d Dept 2016]; *Robles v Polytemp, Inc.*, 127 AD3d 1052 [2d Dept 2015]; *Barris v One Beard Street, LLC*, 126 AD3d 831 [2d Dept 2015]; *Benavides v City of New York*, 115 AD3d 518 [2d Dept 2014]; Smolinski v Smolinski, 78 AD3d 1642, 912 NYS2d 820 (4th Dept 2010); *cf. Service v McCoy*, 131 AD3d 1038 [2d Dept 2015] [purported admission of plaintiff in medical chart not admissible because entry was not inconsistent with her position at trial]).

C. Contents of police reports

A police report may qualify as a business record. Police reports frequently contain inadmissible hearsay. In *Memenza v Cole*, 131 AD3d 1020 (2d Dept 2015), the Court provided the following framework for analyzing hearsay issues with police reports:

> "Facts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule. Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties. If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record if the person giving the police officer the information contained in the report was under a

business duty to relate the facts to him or her. If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information may be proved by a business record only if the statement qualifies under some other hearsay exception, such as an admission. In other words, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" (131 AD3d at 1021-1022 [internal citations, quotation marks and brackets omitted]; *see Brown v URS Midwest, Inc.*, 132 AD3d 936 [2d Dept 2015]; *Caldara v Utica Mutual Insurance Company*, 130 AD3d 665 [2d Dept 2015]).

*****Important question: who was the source of the information in the report? *Siemucha v Garrison*, 111 AD3d 1398 (4th Dept 2013); *Bailey v Reid*, 82 AD3d 809 (2d Dept 2011).

D. "Speaking agent"

The hearsay statement of an agent is admissible against his or her employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his or her authority (*Loschiavo v Port Auth. of New York & New Jersey*, 58 NY2d 1040, 1041 [1983]). This oft-criticized principle results in many statements being rendered inadmissible (*see Rodriguez v New York City transit Authority*, 118 AD3d 618 [1st Dept 2014]; *Hyde v Transcontinent Record Sales, Inc.*, 111 AD3d 1339 [4th Dept 2013]; *Boyce v Gumley-Haft, Inc.*, 82 AD3d 491 [1st Dept 2011]).

3. Expert evidence

A. The expert's qualifications to render an opinion

i. Qualifications to render an opinion on a matter that is beyond the understanding of the ordinary juror. That's what separates an "expert" from other witnesses. Without the appropriate qualifications, an individual cannot provide an expert opinion on the subject of a litigation.

ii. The "expert" need not be *the* authority in the appropriate profession or field. Rather, the "expert" needs to demonstrate that she possesses the requisite skill, training, education, knowledge or experience from which it can be assured that the opinion is reliable (*e.g.*, *Matott v Ward*, 48 NY2d 455, 459 [1979]).

iii. A lack of formal training or education doesn't preclude an individual from demonstrating that her opinion is reliable; long observation and actual experience in a field can render an individual competent to provide an expert opinion (*e.g.*, *Price v New York City Housing Authority*, 92 NY2d 553, 559 [1998]).

iv. Once the witness demonstrates, prima facie, that he or she possesses the requisite background to provide a reliable opinion, the question of the weight to be accorded the witness' skill, training, education, knowledge and experience is for a jury (*see*, *e.g.*, *Miele v American Tobacco Company*, 2 AD3d 799, 802 [2d Dept 2003]).

v. The mere recitation of a person's processional title -- "M.D.," "P.E.," chiropractor -- does not necessarily demonstrate that the person is qualified to render an opinion.

vi. A witness must have sufficient qualifications in the specific field that is the subject of the litigation (*see, e.g., Flanger v 2461 Elm Realty Corp.*, 123 AD3d 1196 [3d Dept 2014]; *Dalder v Incorporated Village of Rockville Centre*, 116 AD3d 908 [2d Dept 2014]; *Shank v. Mehling*, 84 AD3d 776 [2d Dept 2011]; *Stever v HSBC Bank USA*, 82 AD3d 1680 [4th Dept 2011]). This issue is particularly sensitive when a physician seeks to render an expert opinion on a matter outside of her area of specialization (*see*, *e.g.*, *Shashi v South Nassau Communities Hospital*, 104 AD3d 838 [2d Dept. 2013]).

B. The facts underlying the opinion

i. The expert needs to detail the historical and empirical facts on which she will base her opinion; the expert must recite the specific facts relevant to the opinion. Assuming facts is not permissible -- an opinion must be based on facts in the record on the motion, facts personally known to the expert, or out-of-court material satisfying the "professional reliability" doctrine (*see, e.g.*, *Hambsch v New York City Transit Authority*, 63 NY2d 723 [1984]).

ii. If the expert is relying on any out-of-court materials in rendering her opinion, the expert must identify those materials, and demonstrate that they

satisfy the “professional reliability” doctrine. To accomplish the latter, the expert must persuade the court that the material is “of a kind accepted in [the expert’s] profession as reliable in forming a professional opinion” (*Hambsch v New York City Transit Authority*, 63 NY2d at 726). The expert must demonstrate in her affidavit (or through other evidence in the record on the motion) that the material is considered by members of her profession in forming opinions and that the material is reliable for that purpose (*see, e.g., Matter of Kaitlyn X*., 122 AD3d 1170 [3d Dept 2014]; *Caleb v Sevenson Environmental Services, Inc.*, 117 AD3d 1421 [4th Dept 2014]; *Greene v Robarge*, 104 AD3d 1073 [3d Dept 2013]; *D’Andaia v Pesce*, 103 AD3d 770 [2d Dept 2013]; *see also People v Goldstein*, 6 NY3d 119 [2005]).

C. The authority supporting the opinion

i. The expert must identify the "authority" for the opinion, i.e., the scientific or technical basis for the opinion. Without such a basis, a court cannot infer that the opinion is valid (*see Romano v Stanley*, 90 NY2d 444 [1997]).

ii. The expert should cite to a law, regulation, rule, ordinance, treatise, text, industry or professional practice or standard, or published article that supports the opinion (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 3d 1 [2005]; *Diaz v New York Downtown Hospital*, 99 NY2d 542 [2002]; *Neville v Chautauqua Lake School Dist.*, 124 AD3d 1385 [4th Dept 2015]; *Honua Fifth Ave. LLC v. 400 Fifth Realty LLC*, 122 AD3d 434 [1st Dept 2014]; *Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353 [2d Dept 2014]; *Toes v National Amuesments, Inc*., 94 AD3d 742 [2d Dept. 2014]). The expert must establish that the cited authority is in fact authoritative or mandatory (*see, e.g., Diaz,*

supra; *Dyer v City of Albany*, 121 AD3d 1238 [3d Dept 2014]), and that the authority is applicable to the particular facts of the case (*see*, *e.g.*, *Buchholz*, *supra*).

iii. Sometimes the expert's experience -- what she observed, heard, and read about a particular subject -- can provide the scientific or technical basis of the opinion (*see People v Oddone*, 22 NY3d 369 [2013]; *Romano v Stanley*, *supra*). If the expert is relying on her experience to establish the authority for the opinion, she must describe her experience in the field that is the subject of the litigation, and explain why that experience permits the court to infer that her opinion is valid (*see generally Romano v Stanley*, *supra*).

D. The opinion itself

i. The "opinion" portion of the expert's affidavit must be meaningful. "Meaningful" in this context means clear and detailed.

ii. The opinion must be clear; it must be stated expressly and unambiguously. The court should be left with no doubt as to the expert's view on the subject of the litigation.

iii. The opinion must be detailed. To provide a detailed opinion, the expert should complete the following equation: apply the authority for the opinion to the particular facts in the litigation and yield a conclusion. By completing that equation, the expert will provide the reasoning supporting her opinion (*see*, *e.g.*, *Buckner v St. Luke's Roosevelt Hospital Center*, 103 AD3d 535 [1st Dept 2013]; *see also Dann v Family Sports Complex, Inc*., 123 AD3d 1177 [3d Dept 2014]; *Longtemps v Oliva*, 110 AD3d 1316 [3d Dept 2013]).

e. Can a court consider an issue that was not raised by the parties on a motion?

1. In adjudicating a motion, a court is generally limited to considering and determining the particular arguments raised by the parties.

2. This rule has particular force when the court is adjudicating a dispositive motion (e.g., motion to dismiss under CPLR 3211, summary judgment under CPLR 3212) (*see Mew Equity, LLC v Sutton Land Services, LLC*, 144 AD3d 874 [2d Dept 2016]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45 [2d Dept 2014]; *80th Inc. v Witter*, 48 Misc3d 142[A] [App Term, 1st Dept 2015]). Deciding a dispositive motion on a ground or issue that was not litigated by the parties on the motion may offend due process: the parties are deprived of both notice that an unraised ground or issue may be determinative of the motion and the opportunity to address the ground or issue (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, *supra; see generally Misicki v Caradonna*, 12 NY3d 511 [2009]).

   • If a court adjudicating a dispositive motion examines, sua sponte, the admissibility of a "key" motion submission and determines that it may be inadmissible, "the court should alert the parties to the apparent defect, and give the movant an opportunity to correct it" (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d at 55). In the event the defect in the evidence presents a mere irregularity, the defect should be overlooked (*Hartman v Milbel Enterprises, Inc.*, 130 AD3d 978 [2d Dept 2015]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, *supra*; see CPLR 2001).

3. In adjudicating a nondispositive motion, a court may, under certain circumstances, decide the motion on a ground that was not raised by the parties, provided the relief granted or denied is confined to the specific type of relief sought in the motion (*Tirado v Miller*, 75 AD3d 153, 154 [2d Dept 2010]). "[T]rial courts, in determining whether to grant or deny relief requested in a motion, are not restricted by the reasoning employed by counsel, especially where … the notice of motion contains a general prayer for relief" (75 AD3d at 160).

f. Can a court grant relief to a movant that was not requested by that party?

1. A court generally lacks the jurisdiction to grant relief that is not requested in the moving papers (*Tirado v Miller*, 75 AD3d at 158; *see Marine Bulkheading, Inc. v Mannino*, ___AD3d___, 2017 WL 2260916 [2d Dept 2017]).

2. However, "[t]he presence of a general relief clause [a/k/a a broadly-worded wherefore 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" (*Tirado v Miller*, 75 AD3d at 158).

3. A mistake or omission in a notice of motion regarding the relief sought by the motion may constitute an irregularity that may be overlooked or disregarded by the court under CPLR 2001 (*see Capital One Bank (USA) v Koralik*, 51 Misc 3d 74 [App Term, 1st Dept 2016]).

II. Commonly-Made Motions; Leave to Amend Pleadings

a. CPLR 3025:

"(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

"(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or

supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

"(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances."

b. Leave to amend

1. Timing – A motion seeking leave to amend a pleading may be made at any time (*see* CPLR 3025[b]); "however, [where] the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discreet, circumspect, prudent, and cautious, [and] when leave is sought on the eve of trial, judicial discretion should be exercised sparingly" (*Tabak v Shaw Indus., Inc.*, 149 AD3d 1132, 1133 [2d Dept 2017] [internal citations, quotation marks and ellipses omitted]; *see Jacobson v Croman*, 107 AD3d 644 [1st Dept 2013]).

2. Number of motions permitted – There is no limit on the number of times a pleading may be amended by leave of court (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025, C3025:5).

3. Standards for determining motion

A. Leave is to be freely given; absent substantial prejudice or surprise, a motion seeking leave to amend should be granted (*see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403 [2014]).

B. What constitutes prejudice? "Prejudice is more than 'the mere exposure of the [party] to greater liability' (*Loomis v Civetta Corinno Constr. Corp.*, 54

NY2d 18, 23 [1981]). Rather, 'there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position' (*id*.). The burden of establishing prejudice is on the party opposing the amendment" (*Kimso Apartments, LLC v Gandhi*, 24 NY3d at 411; *see Williams v Tompkins*, 132 AD3d 532 [1st Dept 2015]; *Jacobson v Croman*, 107 AD3d 644 [1st Dept 2013]).

C. Are the merits of the proposed amendment relevant? Generally, no evidentiary showing of merit is required on a motion for leave to amend a pleading. However, a proposed amendment should not be permitted if it is palpably insufficient or patently devoid of merit (*MBIA Insurance Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]). To deny a motion for leave to amend a pleading on the basis that the proposed amendment is palpably insufficient or patently devoid of merit, the insufficiency or lack or merit must be clear and free from doubt (*Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836 [2d Dept 2014]).

D. Additional factors the court may consider are how long the amending party was aware of the facts upon which the motion to amend is predicated, and whether a reasonable excuse for the delay is offered (*see Brooks v Robinson*, 56 AD3d 406, 407 [2d Dept 2008]).

4. "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025[b] [effective Jan. 1, 2012]; *see Drice v Queens County*

District Attorney, 136 AD3d 665 [2d Dept 2016]; *Fermas v AMPCO Sys. Parking*, 2016 NY Slip Op 30294[U], 2016 WL 743777 [Sup Ct, Queens County 2016]; *see also Putelo Construction Co. v Town of Marcy*, 137 AD3d 1591 [4th Dept 2016]).

5. The court may condition leave to amend a pleading on such terms as the court concludes are just, including affording the non-moving party further discovery (*see, e.g., Cherebin v Empress Ambulance Service, Inc.*, 43 AD3d 364 [1st Dept 2007]).

<u>Commonly-Made Motions; Summary Judgment</u>

a. What is summary judgment?

1. Summary judgment is a motion made by a party seeking judgment as a matter of law resolving a case (or a portion thereof). It's the procedural equivalent of a trial.

2. Summary judgment is appropriate when no material issue of fact is presented by the motion papers. Why? Because if no material issue of fact is present, there is nothing to try (*see e.g. Brill v City of New York*, 2 NY3d 648, 651 [2004] ["Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay."]).

3. Summary judgment can be sought on all claims in an action, or on less than all of them. Thus, partial summary judgment is permissible (*see* CPLR 3212[e]; Siegel, New York Practice § 285).

b. Is summary judgment available in all types of civil actions?

1. YES. Summary judgment is available in all civil actions (*see* Siegel, New York Practice § 280).

2. HOWEVER, some types of cases present issues that are often (but not invariably) for a jury, such as negligence actions.

c. Timing issues on motions for summary judgment

1. Summary judgment is available after issue has been joined, i.e., once an answer has been served (*see* CPLR 3212[a]).

• If a party moves for summary judgment before issue is joined, the motion may be denied without prejudice to a new motion. Alternatively, the court could treat the motion as one to dismiss under CPLR 3211, provided no prior CPLR 3211 motion has been made in the action (*see* CPLR 3211[e]).

2. Deadlines for summary judgment (*see* Siegel, New York Practice § 279)

A. CPLR 3212(a) provides, in relevant part, "that the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

***** So, the deadline for summary judgment motions is 120 days after the filing of the note of issue, unless a court rule or order sets a shorter deadline, which cannot be less than 30 days after the filing of the note of issue.[1]

B. Determining whether a motion for summary judgment is timely.

[1]Because the deadline is measured from the filing of the note of issue -- as opposed to its service -- the five-day additional allowance of CPLR 2103(b) is not applicable (*see Group IX, Inc. v Next Print. & Design Inc.*, 77 AD3d 530 [1st Dept 2010]).

i. What is the deadline, e.g., 60 days, 120 days?

ii. When was the note of issue filed?

iii. When was the motion made, i.e., served?

Note: Some courts require (by rule or court order) that summary judgment motions be filed by the deadline (*see Connolly v 129 E. 69th Street Corp*., 127 AD3d 617 [1st Dept 2015]).

C. "Good cause" for a late motion

i. Old rule - Prior to 1996, there was no statutory deadline for summary judgment motions, so eve-of-trial summary judgment motions were common.

ii. 1996 amendment - In 1996, CPLR 3212(a) was amended to provide for the 120-day deadline (unless the court sets a shorter one), with "good cause" available to excuse a late motion.

iii. In *Brill v City of New York* (2 NY3d 648, 652 [2004]), the Court of Appeals interpreted "good cause" to mean "a satisfactory explanation for the untimeliness [of the summary judgment motion] – rather than simply permitting meritorious, nonprejudicial filings, however tardy." Neither the merits of the summary judgment motion nor the absence of prejudice to the other party is relevant in determining whether "good cause" exists to consider a late motion (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]). A late motion, even one late by one day, can only be considered if "good cause" is demonstrated by the movant (*see Milano v George*, 17 AD3d 644 [2d Dept 2005]).

iv. Does CPLR 3212(a)'s deadline provision and *Brill* apply to trial courts other than the Supreme and

County Courts? It appears as though they do (*see Exceptional Medical Care, P.C. v Fiduciary Ins. Co.*, 43 Misc 3d 75, 76 [App Term, 2d Dept 2014]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212, C3212:12 [2016 Cumulative Supp. Pamp.).

v. For a comprehensive discussion of the timing issues related to a summary judgment motion (including "good cause"), *see* Connors, CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions, 71 Brooklyn L. Rev. 1529 (Summer 2006).

D. Untimely cross motions. An untimely cross motion may be considered, even in the absence of good cause, where it relates to a timely motion for summary judgment seeking relief that is identical or nearly so to the relief sought in the cross motion (*see Wernicki v Knipper*, 119 AD3d 775 [2d Dept 2014]; *Perfito v Einhorn*, 62 AD3d 846 [2d Dept 2009]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [1st Dept 2006]).

• The "cross motion" must be a true cross motion – an application by a party against the party who made the underlying motion – in order for the above principle to apply (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2014]).

d. Proof on summary judgment motion

1. There are no restrictions on the type of evidence that may be submitted in support of or opposition to a motion for summary judgment (*see* CPLR 3212[b] ["A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions"]).

2. Pleadings - The party moving for summary judgment must submit a complete set of the pleadings in the action (*see* CPLR 3212[b]). The court may deny the motion based on the movant's failure to submit a complete set of the pleadings (*see e.g. Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 AD3d 675 [1st Dept 2013]; *Wider v Heller*, 24 AD3d 433 [2d Dept 2005]), but the court may, in its discretion, overlook that failure if the pleadings are submitted by the party opposing the motion or are otherwise available to the court (*see e.g. Washington Realty Owners, LLC*, *supra*).

3. The most common form of evidence submitted on a summary judgment motion is the affidavit.

A. Certain individuals may utilize an affirmation instead of an affidavit (CPLR 2106); an individual using an affirmation does not need to appear before a notary public.

B. A verified pleading serves as the equivalent of an affidavit (*see* CPLR 105[u]; *see also Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890 [2013]).

C. An affidavit executed outside of New York State must be accompanied by a certificate of conformity (*see* CPLR 2309[c]; *see also Midfirst Bank v Agho*, 121 AD3d 343 [2d Dept 2013]).

D. CPLR 3101(d)(1)(i) expert disclosure

i. CPLR 3101(d)(1)(i) provides for expert disclosure, of sorts. That provision requires a party, upon the demand of another, to furnish a statement identifying an expert witness, listing his or her qualifications, and summarizing his or her anticipated expert opinions and the bases therefor. The statute doesn't provide a time period within which a

party is to respond to a demand. The absence of a timing component invites questions as to the timeliness of CPLR 3101(d)(1)(i) responses (*see* Siegel, New York Practice § 348A).

ii. One of those questions was whether a party had to provide a CPLR 3101(d)(1)(i) statement disclosing an expert before the party could rely on the affidavit of the expert in connection with a summary judgment motion. A rule (maybe more of a firm guideline) emerged that, absent good cause, a party's failure to provide a CPLR 3101(d)(1)(i) statement prior to the filing of the note of issue precluded the party from relying on the opinion of an undisclosed expert at the summary judgment stage (*see* Connors, Practice Commentary, McKinney's Cons Laws of NY, CPLR 3101, C3101:29A).

iii. That rule was modified, at least in the Second Department, to provide a motion court with discretion to consider the affidavit of an expert even though the party offering the expert evidence failed, prior to the filing of the note of issue, to furnish a CPLR 3101(d)(1)(i) statement (*see* Higgitt, Practice Commentary, McKinney's Cons Laws of NY, CPLR 3212, C3212:15 ("Failure to Identify Expert Doesn't Necessarily Bar Use of Expert's Affidavit on Summary Judgment Motion") (Cumulative Supplemental Pamphlet, 2015 entry). The state of the law left the practitioner in a tough spot: disclose the expert before the note of issue was filed (a choice that ensured that the expert evidence wouldn't be precluded, but entailed having to select and pay an expert earlier in the life of the litigation) or disclose the expert "post-note" (a tactic that would

spare the client, at least temporarily, the expense of retaining an expert, but would fail--miserably--if the court, in the exercise of its discretion, declined to consider the expert evidence).

iv. The Legislature intervenes by way of an amendment to CPLR 3212(b), the subdivision governing, among other things, evidence on summary judgment motions. Added to subdivision (b) is the following sentence: "Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101(d)(1)(i)] was not furnished prior to the submission of the affidavit." L. 2015, ch. 529. The new-and-improved CPLR 3212(b) eliminates any question regarding whether a CPLR 3101(d)(1)(i) statement is timely for summary judgment purposes and the need for courts to determine, on a case-by-case basis, whether to consider the affidavits of experts who weren't disclosed prior to the filings of notes of issue.

v. The amendment to CPLR 3212(b) was effective December 11, 2015, and applies "to all pending cases for which a summary judgment motion is made on or after [that date] and all cases filed on or after [that date]." A summary judgment motion made prior to December 11, 2015 is subject to the pre-amendment law.

4. Documents - All forms of documents, e.g., contracts, business records, photographs, etc., may be used on a motion for summary judgment, provided they are authenticated and, if

necessary, satisfy a relevant hearsay exception. A photograph may be used on a summary judgment motion, provided it is authenticated.

5. Deposition transcripts - Another common form of evidence on a summary judgment motion is the deposition transcript. To be admissible, a deposition transcript must be prepared, signed and certified in accordance with CPLR 3116 (*see e.g. Rosenblatt v St. George Health & Racquetball Assoc., LLC,* 119 AD3d 45 [2d Dept 2014]).

6. Considerations relevant to affidavits and affirmations

A. Is the expert qualified to render an opinion on the matter that is the subject of the motion? (*see e.g. Matott v Ward*, 48 NY2d 455 [1979])

B. Is there a factual basis for the expert's opinion?

C. Does the expert provide authority for his or her opinion, i.e., a scientific or technical basis? (*see e.g. Romano v Stanley*, 90 NY2d 444 [1997])

D. Does the expert address the issues in the case in a meaningful way?

E. Does the expert's opinion relate to a novel scientific principle or conclusion? (*see e.g. Frye v United States*, 293 F 1013 [DC Cir 1923]).

7. A party seeking summary judgment must submit evidence in admissible form. But "[t]he rule with respect to defeating a motion for summary judgment ... is more flexible, [because] the opposing party ... may be permitted to demonstrate [an] acceptable excuse for [the] failure to meet the strict requirement of tender in admissible form" (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1068 [1979]). Thus, a party opposing summary judgment may defeat the motion if the party can provide the court with a *reasonable* excuse for the failure to submit evidence in admissible form. Additionally, a

party opposing summary judgment may rely on hearsay, provided it is not the only evidence submitted by the party (*see, e.g., Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561 [1st Dept 2011]).

8. What if a party opposing summary judgment wants the motion denied without prejudice (or adjourned) to permit that party to obtain further disclosure relevant to the motion? *See* CPLR 3212(f) ("Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.").

e. Burdens of proof

1. The party seeking summary judgment must demonstrate the absence of any triable issues of fact (*see, e.g., Vega v Restani Const. Corp.*, 18 NY3d 499 [2013]). In order to do that the party seeking summary judgment must make an affirmative showing, through evidence in admissible form, of the merits of his or her cause of action or defense (*see, e.g., Chow v Reckitt & Coleman, Inc.*, 17 NY3d 29 [2011]; *Small v All Industries, Inc.*, 10 NY3d 733 [2008]). The moving party cannot meet its burden of proof merely by pointing to gaps in the other party's case (*see, e.g., Schillaci v Sarris*, 122 AD3d 1085 [3d Dept 2014]; *Val Tech Holdings, Inc. v Wilson Manifords, Inc.*, 119 AD3d 1327 [4th Dept 2014]).

• A reply cannot be used to introduce new arguments, new grounds or new evidence in support of a motion for summary judgment (*see Dannasch v Bifulso*, 184 AD2d 415 [1st Dept 1992]). This rule serves to prevent a movant from remedying basic deficiencies in its prima facie showing in reply, the effect of which would be to shift to the non-moving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond (*see Kennelly v Mobius Realty Holdings LLC*, 33 AD3d

380 [1st Dept 2006]). Note, too, that the practice of using "supplemental submissions," i.e. papers that parties attempt to submit beyond reply, has fallen into disrepute (*see Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012]).

2. If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the party opposing summary judgment must raise a triable issue of fact (*see, e.g., Vega v Restani Const. Corp.*, *supra*).

3. The party opposing summary judgment has no burden unless the moving party makes a prima facie showing (*see, e.g., Vega v Restani Const. Corp.*, *supra*).

4. The court should not grant summary judgment on "default" (*see AMEC Construction Mgt., Inc. v City of New York,* 132 AD3d 547 [1st Dept 2015]; *Liberty Taxi Management v Gincherman*, 32 AD3d 276 [1st Dept 2006]).

f. Credibility

1. A court deciding a summary judgment motion cannot make credibility determinations (*e.g., Vega v Restani Construction Corp.*, 18 NY3d 499 [2012]). Stated differently, a court cannot assess credibility on a CPLR 3212 motion (*Ferrante v America lung Association*, 90 NY2d 623 [1997]).

2. Where, however, deposition testimony or a statement in an affidavit asserts a fact or conclusion that is physically impossible or contrary to common experience, the court can determine that the subject deposition testimony or statement in the affidavit has no evidentiary value (*Moorhouse v Standard, New York*, 124 AD3d 1 [1st Dep't 2014]). A court does not violate the rules forbidding credibility determinations or the assessment of credibility when it concludes that deposition testimony or a statement in an affidavit has no evidentiary value. A determination that evidence purports to demonstrate a fact or conclusion that is physically impossible or contrary to common experience is a

finding that the evidence is incredible as a matter of law (*see Espinal v Trezechahn 1065 Avenue of Americas, LLC*, 94 AD3d 611 [1st Dep't 2012]; *see also Zapata v Buitriago*, 107 AD3d 977 [2d Dep't 2013]). Such a determination entails neither the resolution of questions of credibility nor the weighing of credibility. Rather, it is a determination that credibility is not an issue; a witness' view (at least as to a particular point or subject) is not worthy of any belief, and therefore there is no question of credibility for a jury (or other fact-finder) to consider.

3. The feigned-issue doctrine allows a court to disregard the affidavit of a party submitted in opposition to a motion for summary judgment where the affidavit clearly contradicts, in some material respect, the party's deposition testimony (see Mann v Autozone Northeast, Inc., 148 AD3d 1646 [4th Dept 2017]; *Estate of Mirjani v DeVito*, 135 AD3d 616, 617 [1st Dept 2016] ["statements made by a party in an affidavit, a police report, or a deposition that are not denied by the party constitute an admission, and that later, conflicting statements containing a different version of the facts are insufficient to defeat summary judgment, as the later version presents only a feigned issue of fact"]

g. Miscellaneous issues

1. The making of a summary judgment motion stays all disclosure unless the court orders otherwise (*see* CPLR 3214[b]).

2. Generally, successive summary judgment motions are not permitted, absent sufficient cause, e.g., newly obtained evidence (*see e.g. Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570 [2d Dept 2014]; *Foster v Kelly*, 119 AD3d 1250 [3d Dept 2014]).

3. A motion for summary judgment allows the court to "search the record" and grant summary judgment to a nonmoving party (*see Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425, 429 [1996] ["a court may search the record and grant summary judgment in

favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court"]; Siegel, New York Practice § 282). *Dunham* imposes an important restriction on a court's ability to search the record. The Court "cautioned that the issue with respect to which the [motion] court propose[s] to grant summary judgment must be an issue that is properly before the court on the motion; that if the particular issue is not, it can't support summary judgment for any party because the court can't just inject the issue on its own" (Siegel, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 3212, C3212:23, at 33 [main volume]).

4. Under the right circumstances, unpleaded causes of action or defenses may be considered on a motion for summary judgment.

A. "Modern principles of procedure do not permit an unconditional grant of summary judgment against a plaintiff who, despite defects in pleading, has in [it]s submissions made out a cause of action" (*Alvord & Swit v Stewart M. Muller Construction Co., Inc*., 46 NY2d 276, 279 [1978]). The Court also observed that, "[w]ith the advent of the modern principles underlying the CPLR, application of the archaic rule [allowing a court to grant summary judgment for a defendant when a plaintiff's submissions, but not its pleadings, made out a cause of action] is no longer merited" (*id*. at 281). Therefore, a party opposing summary judgment may attempt to defeat the motion by asserting an unpleaded cause of action or defense, provided the claim finds evidentiary support in the party's papers (*see Nassau Trust Co. v Montrose Concrete Products Corp.,* 56 NY2d 175 [1982]; *Preferred Capital, Inc. v PBK, Inc.*, 309 Ad2d 1168 [4th Dept 2003]).

B. Moreover, a party may seek summary judgment on an unpleaded cause of action or defense if the party's evidence establishes its entitlement to judgment as a matter of law on the unpleaded claim and the party opposing the motion will not be surprised or prejudiced

by the assertion of the unpleaded claim (*see Herbert F. Darling, Inc. v City of Niagara Falls*, 69 AD2d 989 [4th Dep't 1979], *aff'd* 49 NY2d 855 [1980]; *Rosario v City of N.Y.*, 261 AD2d 380 [2d Dep't 1999]; *Weinstock v. Handler*, 254 AD2d 165 [1st Dep't 1998]).

5. CPLR 3212(g) provides that "[i]f a motion for summary judgment is denied or is granted in part, the court ... shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action." Under this provision, facts that have been established in the motion papers may be identified, listed and deemed resolved for all purposes in the action, thereby streamlining the litigation (*see Oluwatayo v. Dulinayan*, 142 AD3d 113 [1st Dep't 2016]; *Phillip v. D & D Carting Co., Inc*., 136 AD3d 18 [2d Dept 2015]).