New York Practice: A Defendant's Litigation Guide

By: Warren S. Koster, Esq.
Callan, Koster, Brady & Brennan

INTRODUCTION

This memorandum will explain the basic tenets of New York Practice from the initiation of the lawsuit through the completion of discovery and ultimate disposition by way of trial or settlement.

The highest court in New York is the New York Court of Appeals. The intermediate appellate court in New York is known as the Appellate Division. There is one in each of the four Judicial Departments located throughout New York. The Supreme Court is New York's court of general jurisdiction. A majority of the serious civil cases are brought in the Supreme Court. Civil suits in which the demand is $25,000 or less can also be brought in the Civil Courts of the various cities located throughout New York or in the District Courts of the suburban and rural areas of the state.

JURISDICTION

A lawsuit is initiated in New York through the filing of the summons and complaint. The plaintiff has 120 days from the filing in which to serve the papers on the defendant and file proof of service with the clerk. If service is not made within the time provided, the court, upon motion, shall dismiss the action without prejudice, or upon good cause shown or in the interest of justice, extend the time of service.

If the service is affected within the allotted time in a Supreme Court or County Court action, the action is timely as long as the papers were filed within the statute of limitations. It is important to remember that the filing system adapted for Supreme Court and County Court actions does not apply to actions in the lower courts such as the New York City Civil Court and the various District Courts located throughout the State. Service of the summons continues to mark the commencement of actions in these lower courts. There is a filing requirement but such filing may take place beyond the Statute of Limitations. It is therefore important not to confuse the different "commencement" procedures that govern in the Supreme Courts and County Courts on the one hand (the "filing" courts) and the lower courts on the other hand (which remain "service" courts).

In order to determine if an action is brought in a timely manner, New York has a statute of limitations. At common law there was no fixed time for the bringing of an action. The statute of limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action. The following are the relevant statutes of limitation as they affect the claims being handled by your company:

1. Actions to be commenced within 6 years: breach of contract for services; actions based on fraud; and any other action not specifically provided for by statute;

2. Action to be commenced within 4 years: breach of contract for goods; breach of warranty; and residential rent overcharge

3. Actions to be commenced within 3 years: personal injury actions; property damage actions; professional malpractice actions other than medical, dental, or pediatric

4. Actions to be commenced within 2.5 years: medical malpractice;

5. Actions to be commenced within 2 years: wrongful death causes of action and the period runs from the moment of death; and

6. Actions to be commenced within 1 year: intentional torts, including actions for assault, battery, false imprisonment, malicious prosecution, libel, or slander.

The statute of limitations can be extended in certain situations. A provision which extends a statute of limitations is known as a "tolling" provision and can take various forms. If the defendant is outside New York when a claim against him accrues, the statute of limitations does not start until he comes back to New York. If he is in New York when it accrues but leaves afterward, he must remain out for at least four months in order for his absence to be a toll, in which even the whole of his absence is a tolling period.

Infancy and insanity are disabilities resulting in tolls as well. If the applicable statute of limitations is less than three years, the entire period of disability is a tolling period, i.e., the statute of limitations does not run during it. If the applicable period is three years or longer, the plaintiff will have at least three years from suit from the time the disability ceases, but only if he needs it. In other words if the time left on the original statute exceeds three years when the disability ends, the extension is not needed and the tolling provision does not apply. The statute of limitations cannot be tolled for over ten years if it is being tolled because of a plaintiff's insanity. If the plaintiff is an infant, there is no ten year cap on tolling provisions except for actions in medical malpractice.

The death of a potential party after the statute of limitations expires has not effect on it – the claim is barred – but death before expiration does. The effect depends on who died. If the prospective plaintiff dies, his personal representative has at least a year from death in which to sue. This is an alternative period, not an extension, and it is used only if needed. If, at the moment of death, more than a year remains on the original period, this provision offers nothing and whatever remains is useable; the time left is not cut back to a year.

When the prospective defendant dies before suit, there is an 18 month toll. In other words, 18 months are tacked on to whatever period remains. This is an addition and not, as where the potential plaintiff dies, a mere alternative.

In order to acquire jurisdiction over a prospective defendant, the plaintiff must deliver the summons and/or complaint to the defendant. New York Civil Practice and Rules (CPLR) provides for the various methods of service upon a natural person, a partnership, and a corporation. In substance, a natural person can be served in the following ways:

1. Personal deliver of the summons within the state;

2. Delivery of the summons to a person of suitable age and discretion at the actual place of business, dwelling, or place of abode and by mailing the summons to the person to be served at his or her last known residence;

3. Delivery of the summons within the state to an agent or service of the person to be served;

4. Where service cannot be made by personal service of by service to a person of suitable age and discretion with due diligence, the summons may be affixed to the door of either the actual place of business, dwelling place or place of abode within the state and by mailing the summons to the person at his or her last known address; and

5. In such manner as directed by the court.

In New York, a partnership can be a plaintiff or a defendant in its own name without all the partners being named. When the partnership is the defendant it should be named as such; then, to get jurisdiction of it, service need only be made on one of the general partners.

Service upon a corporation may be made by serving an officer, director, managing or general agent, cashier or assistant cashier, or "any other agent authorized by appointment or by law to receive service." When the defendant is a domestic corporation, or a licensed foreign one, it will have designated the Secretary of State as its agent for service on any claim. Service on the Secretary of State in such an instance is always available as an alternative to the CPLR service discussed earlier. The method of service in that is governed by § 306(b) of the Business Corporation Law, which consists of delivering to the Secretary or to his deputy or designee in Albany two (2) copies of the summons.

In an action against an insurance company doing business in New York, an alternative is to serve the Superintendent of Insurance, whom all such insurers must designate as an agent for service.

Once service of the summons and complaint has been made it is incumbent upon the defendant to interpose a timely answer. If service of the pleadings has been persona l in nature, then an answer is due within twenty (20) days of receipt

of the summons and complaint. In all other cases involving alternative methods of service, the answer must be served within thirty (30) days of receipt of the pleadings. It is common practice in New York for plaintiffs to grant extensions of time to answer to defendants. In exchange for granting an extension of time to answer, many plaintiffs' attorneys will require that the defendant waive the affirmative defense of lack of jurisdiction and, on occasion, the affirmative defense of the statute of limitations. These waivers should not be consented to if they will bar a successful litigation of the action on the part of the plaintiff.

VENUE

Venue means the geographical subdivision in which an action may be brought. The Supreme Court, for example, has statewide jurisdiction, but a lawsuit cannot be brought anywhere merely because the plaintiff desires a particular court in which to try his action. For venue purposes, the Supreme Court is subdivided into counties and the venue rules of Article 5 of the CPLR determine which of the counties is proper for the particular Supreme Court action.

The general New York rule is that the plaintiff may bring the action in any county in which any one of the parties, on the plaintiff's or defendant's side, resides. The choice is the plaintiff's, at least initially. The plaintiff makes the choice based on a number of considerations, including calendar congestion, convenience of witnesses, convenience the plaintiff and his attorney, and inconvenience to the defendant.

If a defendant is not satisfied with the plaintiff's choice of venue he may take several steps to change venue from an improper to a proper county. When the defendant contends that the plaintiff has laid venue in an improper county, he has the right to serve a "demand" upon the plaintiff that the venue be changed to a county specified by the defendant. The plaintiff then has five (5) days to consent to the change. If the plaintiff does not consent to the change, the defendant is allowed to make a motion in the county in which he seeks transfer.

In addition to the method of changing venue based on an improper county selected by the plaintiff, the CPLR also provides for discretionary grounds to change venue. The two discretionary grounds offered by the statute are the following: (1) that there is reason to believe that an impartial trial cannot be had in a proper county; or (2) that the convenience of material witnesses and the ends of justice will be promoted by a change.

The most dangerous venues in New York for a defendant, and therefore the defendant's insurance carrier, are the following counties: Bronx, Kings, Queens, and New York. Where it is possible, we will always attempt to remove cases improperly venued in these counties.

ANSWER BY DEFENDANT

The answer interposed on behalf of the defendant will deny the allegations of negligence in the complaint and assert the appropriate affirmative defenses on behalf of the defendant. Any affirmative defenses that are not asserted in the answer are deemed waived by the defendant.

AFFIRMATIVE DEFENSES

In an answer the defendant can deny the allegations of the complaint and, thus, disprove anything the plaintiff is required to prove. But a number of matters are not the plaintiff's burden to prove, but rather the defendant's burden to plead and prove. These are known as affirmative defenses.

In addition to the well-known affirmative defenses of jurisdiction and the statute of limitations, there are several others that are critical to a defendant. These are the affirmative defenses of joint and several liability, comparative negligence, and the collateral source rule.

Joint and Several Liability:

In many actions pending in New York, there is more than one defendant who will be present for the trial. It is therefore critical to understand the rule of "joint and several" liability.

The rule of "joint and several" liability has long been the rule in tort cases, meaning that each tortfeasor is responsible not only for the share of plaintiff's damages that he caused ("several liability"), but also for the shares attributable to the other culpable tortfeasors ("joint" liability). The practical impact of this rule is that as long as any of the tortfeasors is solvent, that is, able to pay the whole judgment though, in point of fault, accountable for just a small portion of it, the plaintiff can collect all of the judgment from the solvent tortfeasor. This tortfeasor can then turn around and seek compensation from the other tortfeasors based on their shares.

The injustice of this rule is that a tortfeasor guilty of only the smallest share of wrongdoing sometimes ends up having to pay all or most of the damages in the case and cannot seek compensation from another tortfeasor who may be insolvent. In 1986, the New York legislature enacted Article 16 of the CPLR to deal with this inequity. Article 16 makes an adjustment in "joint" liability, but only in part and with many exceptions. First, it is only for "non-economic damages" that the rule is changed. There was no change in the rule of "joint and several" liability with respect to economic damages: loss of earnings, hospital and medical expenses, etc. Pain and suffering, mental anguish and loss of consortium are examples of the "non-economic" elements that the rule works on.

Second, Article 16 affects only personal injury claims. Tortfeasor liability on property damage and wrongful death claims remains "joint and several" with respect to all damages. Article 16 operates only on the personal injury claim and only on the non-economic damages segment.

To earn the benefit of Article 16 and be rid of "joint" liability, a tortfeasor must be found to have "50% or less of the total liability assigned to all persons liable." If he is found 51% or more at fault, his liability remains joint.

There are a number of qualifications and exception in Article 16 that benefit plaintiffs. CPLR § 1601(1) concludes with the statement that in determining tiers of fault, "the culpable conduct of any person not a party to the action shall not be considered . . . if the claimant proves that with due diligence he was unable to obtain jurisdiction over such person." This means that if the plaintiff can get jurisdiction over one tortfeasor but not the other tortfeasor, the first tortfeasor must carry the second tortfeasor's share. Some other exceptions of Article 16 are the "non-delegable" exception and intentional torts. The most common examples of the non-delegable duty exception under New York law are in construction cases under Article 10 of the Labor Law, which includes Labor Law § 240 and § 241. These sections impose absolute liabilities upon owners and contractors at construction sites. A tortfeasor violating one of these provisions is not entitled to the benefit of Article 16. Finally, the most common exception is the one involving motor vehicle accidents.

A tortfeasor seeking to obtain several-only status under Article 16 has the burden of proving he was 50% or less at fault. That amounts to a defense that should be pleaded as such in the answer.

Comparative Negligence

It is appropriate at this point to discuss New York's comparative negligence rule. Prior to 1975, New York applied a rule of "contributory negligence" in tort cases. Under it, a plaintiff guilty of contributing in any measure at all to his own injuries would recover nothing. In 1975, New York adapted a rule of "pure" comparative negligence, which enables a plaintiff to recover even if responsible for more than 50% of his own damages. The damages are reduced by whatever percentage the fact-finder, usually a jury, finds to be the plaintiff's own fault. The burden of pleading and proving the plaintiff's comparative culpability is on the defendant. It has been made an affirmative defense, and a defendant should make sure to plead it as such in the answer.

Collateral Source Rule

It is appropriate at this point to discuss the collateral source rule as it applies to tort actions in New York. The common law rule in New York, as in most jurisdictions, is that a plaintiff's damages are not reduced by the amount plaintiff has received from collateral sources, such as insurance. The theory underlying the collateral source rule is simply that a negligent defendant should not in fairness be permitted to reduce his liability in damages by showing that the plaintiff is already entitled, by contract or employment, the right to reimbursement for such items as medical expenses and lost wages. The rule has been the subject of much criticism because it permits double recovery for the same injury. CPLR § 4545 partially abolishes the collateral source rule in most tort cases.

Under CPLR § 4545, the collateral source offset applies only to economic losses, i.e., out-of-pocket damages for medical care, custodial care, rehabilitation services, loss of earnings, or "other economic loss." To the extent that the plaintiff has received reimbursement of some kind for intangible losses, such as pain and suffering, CPLR § 4545 is inapplicable.

The collateral source payment can come from any source. Several exceptions apply: the damage award is not to be diminished by life insurance, Medicare, or voluntary charitable contributions. In addition, no offset is to be made where the collateral source is entitled by law to a lien against any recovery by the plaintiff. Another exception relates to premiums paid or to be paid for the collateral source benefits. The amounts paid by the plaintiff for premiums for the two-year period immediately prior to the accrual of such action are to be excluded from the deduction. The projected future cost of premiums to maintain the benefits is also to be excluded.

Determining the amount, if any, that should be deducted from plaintiff's damage award is strictly for the court. If the action is tried by a jury, no evidence of collateral source payments should be taken in the presence of a jury. The jury's task is to determine the plaintiff's losses without reference to any reimbursement that the plaintiff may have received. The issue of collateral source payments

usually is reserved for a post-trial hearing before the court, assuming plaintiff received an award of damages for economic losses. In a bench trial, the court could properly take evidence of collateral source payments during the trial because of a presumed lack of prejudice.

Most courts have properly concluded that the defendant bears the burden of proving the extent of deductions for collateral source payments. The statue, which authorizes deduction with respect to future costs or expenses, requires a showing "with reasonable certainty" that costs or expenses have been or will be reimbursed or indemnified. This standard of proof is higher than a preponderance but less than the reasonable doubt standard of criminal cases. "Reasonable certainty" implies a standard akin to that of "clear and convincing evidence," which has been explained as meaning "highly probable." Although collateral source payments usually will not become relevant, if at all, until after a trial that ends in plaintiff's favor. Pre-trial discovery on the issue is appropriate.

Workers' Compensation

In September 1996, the legislature amended Section 11 of the Workers' Compensation Statute. The amendment shields the employer from tort liability by precluding the impleader of the employer by third persons sued by the employee. New York previously precluded a direct action by the injured employee against his employer as long as Workers' Compensation insurance was available.

There are two exceptions provided in Section 11. A third-party action can be maintained if it is based on a claim of contractual indemnification or if the plaintiff has sustained a "grave injury."

The statute defines "grave injury" to include the following:

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of noes, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting permanent and total disability.

Also amended by this legislation are CPLR Article 14, which governs contributions among tortfeasors, and CPLR Article 16, which adjusts the joint

liability concept to spare those with fault of 50% or less the burden of liability to the plaintiff for the shares of the other tortfeasors.

DISCOVERY

It is customary in New York to serve discovery demands and a demand for a verified bill of particulars with the answer. Notices for examinations before trial (depositions) are also served on behalf of the defendant at this time.

A bill of particulars is an amplification of a pleading such as the complaint. It supplies more detail and therefore afford the defendant a more specific picture of the claim. It is designed to limit the proof and prevent surprise at trial.

In a personal injury action, the items to be particularized are enumerated in a statutory list. The list is contained in CPLR § 3043(a). It provides that in actions for personal injury, the following particulars may be required:

1. The date and approximate time of day of the occurrence;

2. The approximate location;

3. A general statement of the acts or omissions constituting the negligence claimed;

4. Where notice of condition is a prerequisite, whether actual or constructive notice is claimed;

5. If actual notice is claimed, a statement of when and to whom it was given;

6. A statement of the injuries and description of those claimed to be permanent;

7. Length of time confined to be and to house;

8. Length of time incapacitated from employment; and

9. Total amounts claimed as special damages for physicians, services and medical supplies; loss of earnings, with name and address of the employer; hospital expenses; and nurses' services.

The procedure to secure a bill of particulars is to serve a demand on the part from whom the particulars are sought. If the recipient has any objection to the demand, whether because it is untimely or imprecise or too broad, he has ten (10) days from service of the demand in which to move to vacate or modify it. If the recipient of the demand makes not such motion, he has twenty (20) days from service of the demand in which to serve the bill.

It is rare for counsel for a plaintiff to respond to a demand for a bill of particulars within twenty days of service. It is our experience that the plaintiff who voluntarily responds to a demand for a bill of particulars will do so in approximately four (4) months after service of the demand. It is often necessary to file a motion seeking to preclude the plaintiff from offering any testimony at a trial of the action for failure to provide a bill of particulars. Such a motion generally stimulates the attorney for the plaintiff to provide the required discovery material.

Once a summons and complaint has initiated a lawsuit and issue has been joined through the service of an answer on behalf of the defendant, access to the Court is available through the filing of a Request for Judicial Intervention. The filing of the "RJI" form and a fee of $75.00 causes the court to assign a judge to the lawsuit. This is only required in actions pending in the Supreme Court. The Supreme Court has what is known as an Individual Assignment System known as "IAS." The filing of the RJI activates the IAS machinery and gets the case assigned to a judge, who is designated the "Assigned Judge" and who handles the case until the case is placed on the trial calendar.

Discovery proceedings in New York are often contentious. Very often, plaintiff's counsel will not voluntarily respond to demands for discovery. Motion practice is often necessary to compel such compliance with outstanding discovery demands. Even if counsel for the plaintiff voluntarily supplies a bill of particulars, responses to discovery demands, and authorizations for the release of the plaintiff's medical records, it is often difficult to agree on a convenient date for the completion of examinations before trial. These are depositions held of the parties to the lawsuit. In order to require parties to appear for such examinations before trial and to compel compliance with outstanding discovery demands, it is often necessary to seek court intervention through the holding of what is known as a preliminary conference. At the preliminary conference the attorneys for the parties appear before the Court and advise the Court of the outstanding discovery. The Court will then require the parties to enter into a stipulated discovery schedule in order to complete discovery. The preliminary conference order requires the defendants to provide information pertaining to insurance coverage. It requires the plaintiff to submit a satisfactory bill of particulars and authorizations for medical reports and hospital records, to submit to a physical examination, to submit to an examination before trial, and requires all parties to exchange names of witnesses, addresses of witnesses, party statements and photographs. Additional discovery requests are permitted depending on the nature of the lawsuit.

TRIAL

Upon the completion of discovery proceedings, the plaintiff places the case on the trial calendar by the filing of a Note of Issue. Once a Note of Issue has been filed, the case is transferred from the Individual Assignment part to the Trial Assignment Part (known as TAP). The trial judge assigns the case to an available jury part for jury selection. Once a jury has been selected, the TAP judge then

assigns the parties to the trial judge who is responsible for the trial of the action. Prior to the assignment of the case to a Jury Room for jury selection, several pre-trial conferences are held with the TAP judge to determine if the case can be settled without the necessity of jury selection. It is only after it becomes clear to the TAP judge that settlement is not possible at that particular time that the matter is sent to a Jury Room for jury selection. The selection and questioning of a jury is known as a "*voir dire*" and is the first contact the lawyers have with the jurors. A sufficient number of jurors to constitute at least a petit jury (the jury of the six that will try the case) are called for the *voir dire*. The lawyers themselves usually conduct the questioning in New York civil practice, without a judge being present. Following a recent jury study performed for the Court of Appeals, most counties require a judge (or a judicial hearing officer) to be available to begin the proceeding. With increasing frequency, this judge may sit in for the entire selection process. During selection, the lawyers will often agree on which jurors are to be excused. If they cannot so agree, or if any dispute in need of judicial resolution arises, it can be taken to the judge monitoring the selection.

Once a jury has been selected, the attorneys report back to the TAP judge. Very often, the TAP judge will once again attempt settlement discussions with the parties. If a settlement is still not possible, the case is assigned to the trial judge. The trial judge will also determine if the matter can be settled prior to the opening of the trial. If the matter cannot be settled, then the parties appear with the jury for the trial of the action. Due to the congestion in the court system and the fact that the great majority of jurors are selected without the assistance of a judge, jury selection and trial, even in a simple case, can take upwards of three to four weeks.