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## Advocate's VIEW

### New York practice deadlines you can't miss

Adjournments and extensions are routine in New York litigation. Return dates are postponed, scheduling orders are amended, and discovery deadlines are forgiven. But deadlines can only be extended if the parties or the court have the authority to change them. The most important deadlines for a litigator to know are the ones that courts can't extend, even if they want to. This article addresses some of these unmissable deadlines.

#### The Statute of Limitations

At his Civil Practice Update CLE, Burt Lipshie identified two kinds of litigation mistakes: letting the statute of limitations lapse, and everything else. CPLR 201 forbids courts from extending statutory limitations periods, and only allows parties to shorten limitations periods. As a result, agreements between parties to extend the statute of limitations are not always valid, and courts usually cannot help parties who miscalculate the limitations period. Unless a plaintiff can invoke statutory tolling (due to infancy or insanity, *see* CPLR 208), equitable tolling (based on a defendant's fraudulent conduct), or the relation back doctrine (applicable to some amended pleadings, *see* CPLR 203[f]), missing the statute of limitations is most likely fatal to a case.

#### Assignment to the Commercial Division

Under the revised Commercial Division Rules, a request for assignment to the Commercial Division must be made within 90 days following service of the complaint. 22 NYCRR § 202.70(d). Failure to meet this deadline "precludes a party from seeking assignment of the case to the Commercial Division," *id.*, unless the requesting party makes a showing of



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good cause in a letter to the Administrative Judge, or the assigned judge asks the Administrative Judge to transfer the case, *id.* § 202.70(e). If a party files an RJJ but does not request assignment to the Commercial Division, an opposing party seeking such assignment must write to the Administrative Judge within 10 days of receipt of the RJJ. *Id.* § 202.70(e). The Administrative Judge's decision on all Commercial Division transfer requests "shall be final and subject to no further administrative review or appeal." *Id.*

Because of these new rules, filing a Commercial Division RJJ is no longer a matter of waiting until motion practice begins. Instead, parties should file a Commercial Division RJJ as early as possible, even if only to request a preliminary conference.

#### Motions to Strike the Note of Issue and Requests for a Jury Trial

Serving the note of issue (including the certificate of readiness) triggers two of the shortest and most important deadlines in New York practice: the time to move to strike the note of issue, and the time to demand a jury trial if the note of issue does not request one.

Once the note of issue is filed, the parties are not allowed to conduct additional discovery. If discovery is still pending or needed when a party files the note of issue, the aggrieved party should move to strike the note of issue. However, this motion must be made within 20 days of service of

the note of issue. 22 NYCRR § 202.21(e). This motion only requires a showing "that a material fact in the certificate of readiness is incorrect," such as that discovery is incomplete. *Id.*

However, if the 20-day deadline passes and no motion to strike is made, the court cannot permit any discovery unless a party brings a motion establishing that "unusual or unanticipated circumstances develop[ed] subsequent to the filing of [the] note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice." *Id.* § 202.21(d).

If a party files a note of issue that does not request a jury trial, and the opposing party wants a jury, it must serve and file a jury demand within fifteen days of service of the note of issue. CPLR 4102(a). Failure to make this demand by the fifteen-day deadline waives the right to a jury trial. *Id.*; 22 NYCRR § 202.21(c).

#### Motions for Summary Judgment

Filing the note of issue also triggers the deadline to move for summary judgment. The default deadline is 120 days from the filing of the note of issue, but courts may set earlier deadlines that are at least thirty days from the filing. CPLR 3212(a).

CPLR 3212(a) only allows a party to bring a late motion for summary judgment "with leave of court on good cause shown." To end the tactic of bringing summary judgment motions on the eve of trial, the Court of Appeals defined "good cause" to mean "a satisfactory explanation for the untimeliness," as opposed to a showing that the motion is "meritorious" or "non-prejudicial." *Brill v. City of New York*, 2

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NY3d 648, 652 (2004). If the movant cannot establish “good cause,” the court lacks discretion to hear the motion. The First Department has held that this “good cause” requirement also applies when the court sets its own summary judgment motion deadline that is shorter than 120 days. *Connolly v. 129 E. 69th St. Corp.*, 127 AD3d 617, 618 (1st Dept. 2015).

The Fourth Department recently held that a court may consider an untimely motion for summary judgment if the parties expressly consent “to the timing of the motion before it [is] made.” *Bennett v. St. John’s Home*, 128 AD3d 1428, 1428-29 (4th Dept. 2015). However, even if the parties consent, the court still has discretion to deny the motion as untimely. *Id.*

at 1429.

### **Taking an Appeal to the Appellate Division**

A party has 30 days to take an appeal after service of a copy of the order or judgment with notice of entry. CPLR 5513(a). “Taking an appeal” means filing and serving a notice of appeal. CPLR 5515(1). While the Appellate Division may forgive a party that timely files the notice of appeal but fails to serve it, or vice versa, CPLR 5520(a), it must reject an appeal if both the filing and service are late unless one of a few statutory exceptions applies, CPLR 5514(c).

The deadlines in this article impose harsh results if ignored, but require little effort to observe. A party facing the imminent lapse of the statute of limitations can

file a bare-bones summons and complaint and amend the complaint afterward, or file a summons with notice. A party seeking assignment to the Commercial Division just has to file an appropriate RJI.

A motion to strike the note of issue only requires a showing that discovery is incomplete, and a jury demand or notice of appeal is one of the simplest documents a litigator can draft. Knowing what the deadlines are can be the hard part. Complying with them is relatively easy.

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