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Free With Registration: Key Amendments to the N.Y. CPLR on Motion Practice

Howard S. Shafer

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The New York State Legislature passed an act amending New York Civil Practice Law and Rules R. 2214(b) and 2215.¹ These recent amendments to the New York CPLR, effective July 3, 2007, make significant changes to the notice requirements for making and responding to motions cross-motions.

The sections, as amended, now read as follows:

Rule 2214. Motion papers; service; time [. . .]²

(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before

such time. Answering affidavits and *any notice of cross-motion, with supporting papers, if any*,³ shall be served at least seven days before such time if a notice of motion served at least *sixteen*⁴ days before such time so demands; whereupon any *reply or responding* affidavits shall be served at least one day before such time.

Rule 2215. Relief demanded by other than moving party

At least three days prior to the time at which the motion is noticed to be heard, *or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214*, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers; *provided, however, that:*

(a) if such notice and any supporting papers are served by mailing, as provided in paragraph two of subdivision (b) of rule 2103, they shall be served three days earlier than as prescribed in this rule; and

(b) if served by overnight delivery, as provided in paragraph six of subdivision (b) of rule 2103, they shall be served one day earlier than as prescribed in this rule.

Relief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party.

The new rules became effective on July 3, 2007 and do not apply retroactively.

They only apply to notices of motion served on or after July 3, 2007.

Amendment to Rule 2214

Notices of motion are usually served by mail. In the case of ordinary mail, five days are tacked onto CPLR R. 2214(b)'s requirement that the movant must give at least

eight days notice of the motion, thus making the notice period 13 days.⁵ One day is tacked on where overnight mail service is used, making the notice period nine days.⁶

For example, if today is Aug. 1 and the motion papers are to be mailed today, the earliest day for which the hearing can be set if service is to be via ordinary mail is Aug. 14. If service is to be via overnight mail, the earliest day for which the hearing can be set is Aug. 10.

CPLR R. 2214(b) further requires that answering affidavits be served at least two days before the motion is noticed to be heard. Using the previous example, the other side must now serve its answering papers by placing it in the mail on Aug. 12. CPLR 2103(b)'s tacking-on of days does not apply to answering papers.⁷

However, if the answering papers are mailed on Aug. 12, that means that the movant likely will not get them in time to even look at them before the motion is argued.⁸ Thus, the pre-amendment version of CPLR R. 2214(b) provided for the "12-7-1" notice of motion.⁹ If ordinary mail is being used, 12-7-1 became 17-7-1 because CPLR 2103(b)(2) tacked on five days. If overnight mail is utilized, it became 13-7-1. Note that in order to use this option, the movant must explicitly note in the papers that the adverse party is required to serve the answering papers no later than seven days before the motion is to be argued.¹⁰

The amendment to CPLR R. 2214(b) essentially changes 12-7-1 to 16-7-1 and includes cross-motions in response in addition to answering affidavits. With the tacking-on of days provided by CPLR R. 2103(b)(2) and R. 2103(b)(6), it becomes 21-7-1 with regular mail and 17-7-1 with overnight mail, respectively.

To reiterate and summarize the effect of the amended version of CPLR R. 2214(b) - if the movant serves the motion at least 16 days before the motion is to be argued (plus five days for ordinary mail or plus one day for overnight mail), then the adverse party's answering papers or notice of cross-motion shall be served at least seven days before the motion is to be argued and the movant's subsequent reply to the opposition or notice of cross-motion shall be served at least one day before the motion is to be argued.

Amendment to Rule 2215

The new CPLR R. 2215 incorporates the changes made to CPLR R. 2214(b) and the attendant provisions of CPLR R. 2103(b) regarding service by ordinary mail and overnight mail and extends the additional notice period to cross motions where the extended notice of motion is given. It reduces, however, the time added for mailing from the five days required by CPLR R. 2103(b) to three days. Whether a notice of cross-motion is served by hand or by mail, the amendments provide for longer notice periods, meaning that the party serving the cross-motion must serve it further in advance. Since most motions are served by mail, it is understandable that a large part of the amendment to CPLR R. 2215 regards notice periods for overnight mail and regular mail.

For example, if a motion is scheduled to be heard on Aug. 15 and the 16-7-1 notice of motion of CPLR R. 2214(b) is not used, then the party shall serve the cross-motion on or before Aug. 9 if regular mail is being used. This is six days earlier than Aug. 15 because of the general three-day requirement of R. 2215 plus the additional three-day requirement of 2215(a). If overnight mail is being used in this same situation, then the party shall serve the cross-motion upon the movant on or

before Aug. 11. This date is four days before Aug. 15 - three days plus the addition one-day requirement of 2215(b).

Predictably, if CPLR R. 2214(b)'s 16-7-1 notice of motion is used, four additional days are tacked on. Using the previous example, this means the party shall serve upon the movant the cross-motion on or before Aug. 5 via regular mail (at least 10 days before the hearing date) and Aug. 7 via overnight mail (at least eight days before the hearing date).

Conclusion

The amendments to CPLR R. 2214(b) and 2215 are aimed at giving both parties adequate time to prepare and receive their papers.¹¹ Under the old versions, even if the cross-movant served the papers in compliance with CPLR R. 2214(b)'s and 2215's guidelines, the papers often did not reach the movant in time or at least with adequate time to review them and for the formulation of a response. The amendment to CPLR R. 2214(b) is designed to remedy this, and 2215 is accordingly amended to accommodate 2214(b).

However, there seems to be an ambiguity concerning the service of cross-motions under CPLR R. 2214(b) and R. 2215. R. 2214(b) provides that where 16-7-1 notice of a motion is given, cross-motions must be served seven days in advance. A review of David Siegel's 1993 CPLR R. 2103 commentary suggests that the five days additional notice for mailing is not required.

However, he cites *Perez v. Perez*,¹² an Appellate Division, Second Department case, which finds that the five days additional notice is required for mailing of cross-motions. A plain reading of the new CPLR R. 2214(b) provision seems to suggest

that the additional time is not required, since notice of cross-motions is contained within the same sentence as answering affidavits and the time stated is seven days. CPLR R. 2215 appears to allow cross motions on six or 10 days notice depending upon whether the original notice of motion was made on eight or 16 days notice. Until this ambiguity is resolved either by the courts or the Legislature, counselors are well-advised to err on the side of caution and to give the maximum required notice for cross-motions.

It is worth noting that the amendments do not affect the first clause of 2214(b).¹³ Parties who serve motions subject to that clause will be under time pressure and the amendments do not change that. What the amendments do aim to change is the waste of time and resources caused by requests for adjournments on hearing dates because a party has not received notice of a cross-motion. With adequate time for preparation, both parties should be able to arrive at court ready to proceed with the motions.

Howard S. Shafer *is a partner at Shafer Glazer, which focuses on businesses and individuals in negligence, employment and insurance coverage.* **Melissa Y. Wu**, *a summer associate, assisted in the preparation of this article.*

Endnotes:

1. New York Civil Practice Law and Rules, Art. 22, R. 2214; R. 2215.
2. Subsections (a), (c), and (d) were not amended and are omitted from this discussion.
3. New language provided by the amendment is italicized.

4. Formerly "twelve" before the amendment.
5. David D. Siegel, Practice Commentary to CPLR R. 2214, available at Westlaw (citing CPLR R. 2103(b)(2)).
6. Id. (citing CPLR R. 2103(b)(6)).
7. Id.
8. Id.
9. Id.
10. David D. Siegel, Practice Commentary to CPLR R. 2214, available at Westlaw.
11. 2007 Legis. Bill Hist. NY A.B. 8186 (May 10, 2007).
12. 131 AD2d 451, 516 NYS2d 236 (2d Dept., 1987)
13. "A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time."