

Lawyer Insights

From A to B to C: Timeline of Litigation in the New York Commercial Division

This is part three in a series of articles explaining the fundamentals of Commercial Division practice. The article addresses key dates and deadlines that arise when litigating in the Commercial Division.

By Kevin Small, Joseph Saltarelli and Charlotte Leszinske
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This is part three in a series of articles explaining the fundamentals of Commercial Division practice. The article addresses key dates and deadlines that arise when litigating in the Commercial Division. Part one in the series, addressing the first steps taken when litigating in the Commercial Division, can be found [here](#); part two, addressing initial steps such as filing and pleading, can be found [here](#).

Responding to the Complaint

Following service of the complaint, the defendant's time to respond depends on the method of service, but ranges from 20 to 30 days to file an answer or a pre-answer motion (if served by in-state agent and unless an extension is granted) (CPLR 3012 [a], [c]-[d]). With its first filing, the defendant also needs to file a corporate disclosure statement (Comm'l Div. Rule 35). If the defendant files a pre-answer motion, no answer is due until 10 days after the motion is resolved (CPLR 3211 [f]). Moreover, a motion to dismiss directed at fewer than all of the asserted claims extends the defendant's time to serve an answer responding to the remaining claims (*Levine v. Singal*, 172 AD2d 402, 403 (1st Dep't 2019) ["CPLR 3211(a) motion to dismiss made against any part of a pleading extends the time to serve a responsive pleading to all of it"]).

Under CPLR 3214[b], the default rule is that a motion to dismiss (or motion for summary judgment pursuant to CPLR 3212, or summary judgment in lieu of complaint pursuant to CPLR 3213) stays discovery "unless the court orders otherwise." The Commercial Division Rules, however, provide that discovery is not automatically stayed and that "[t]he court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion" (22 NYCRR 202.70 [g], Rules of the Commercial Division [Comm'l Div.] rule 11(g)).

Many of the Commercial Division judges' individual rules explicitly provide that discovery is not stayed pending a determination of a motion to dismiss. Practitioners in the Commercial Division should never assume that discovery is stayed solely because of the filing of a potentially dispositive motion pursuant to CPLR 3211, 3212 or 3213.

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Pleadings can be amended by right within 20 days after it is served, or at any time before the period for responding to it expires, or within 20 days after a responsive pleading is served (CPLR 3025 [a]). Parties must respond to amended pleadings within 20 days of service (CPLR 3025 [d]). Thereafter, amending pleadings requires a stipulation or court order (CPLR 3025 [b]).

For assignment to the Commercial Division, a request for judicial intervention (“RJI”) and Commercial Addendum must be filed within 90 days of service of the complaint (22 NYCRR 202.70 [d] [1]). If the RJI did not request assignment to the Commercial Division, other parties can request assignment 10 days after the RJI is filed, or later for good cause (22 NYCRR 202.70 [e]). (The court has discretion to grant transfer applications if they are late by a few days. (See [Curtis v. Merrill Lynch, Pierce, Fenner & Smith](#), No. 655921/2016, Order Granting Transfer (Aug. 3, 2017)).

The inverse is also true: Parties can request transfer out of the Commercial Division within 10 days of the RJI’s filing (22 NYCRR 202.70 [f]).

At any time, but presumably before discovery is underway, parties can stipulate to accelerated adjudication, which requires all proceedings to be completed within nine months of the RJI’s filing (Comm’l Div. Rule 9).

Discovery

A preliminary conference must be held within 45 days after the case is assigned to a justice; it can be adjourned once for up to 30 days (Comm’l Div. Rule 7). If a dispositive motion is filed with the RJI, the preliminary conference will instead be held within 30 days after the motion is decided. The court will give five days’ notice of the preliminary conference and parties must meet and confer in advance (Comm’l Div. Rule 8, Rules 10-11, Appendix A). If the court does not schedule one, either party can file a request for a preliminary conference.

At the preliminary conference, the court will typically enter a case scheduling order (preliminary conference order) (Comm’l Div. Rule 11[d]-[f]). The preliminary conference may also be an appropriate occasion to raise with the court any request that discovery be stayed if an early, potentially dispositive motion is being contemplated and has not yet been made (Comm’l Div. Rule 11[g]).

Finally, in its preliminary conference order, the court will typically schedule a compliance conference to check in on the parties’ progress in discovery and allow for resolution of any disputes that may arise.

PRACTICE TIP: The preliminary conference, as well as many other administrative tasks, is often conducted by the judge’s law secretary. The law secretaries often have long experience with their judge and are skilled at handling the many scheduling and other issues that arise during preliminary conferences; the judge will rarely second guess their recommendation.

Under the Commercial Division Rules, there are some special requirements triggered 30 days prior to the completion of fact discovery: Contention interrogatories can be served (Comm’l Div. Rule 11-a [d]) and the parties must meet and confer about expert disclosure (Comm’l Div. Rule 13 [c]). If needed as part of a case, a schedule for expert discovery is also set forth in the preliminary conference order. Discovery disputes are resolved as specified in Rules 14 and 14-a (Comm’l Div. Rules 14, 14 [a]).

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PRACTICE TIP: At any point, parties can request, or the court can require, a settlement conference (Comm'l Div. Rule 3 [b], Rule 30 [a]). Courts often refer the parties to mediation early in the case, and a date by which mediation must take place is often set forth in the preliminary conference order. Proceedings are not stayed unless otherwise ordered. The Commercial Division has its own roster of highly qualified neutrals who can assist parties to resolve their disputes, although only a percentage of cases are referred out to volunteer mediators. But the parties are certainly free to request mediation through the Commercial Division's ADR office.

Note of Issue

After discovery is complete, by a date likely specified in the preliminary conference order, the plaintiff is required to file a note of issue with a certificate of readiness (22 NYCRR 202.21 [a]). The note of issue certifies that all discovery is complete and that the matter is ready for trial. A party can move to vacate the note of issue within 20 days of service (22 NYCRR 202.21 [e]).

After the note of issue is filed, the parties must file a request for a mandatory-settlement conference (Comm'l Div. Rule 30 [b] [1]). If the note of issue did not include a jury demand, any party served with it can, within 15 days of service, file its own demand for a jury (CPLR 4102 [a]; *see also* CPLR 4102 [b]).

PRACTICE TIP: For certain motions—not including discovery or dispositive motions, *i.e.*, summary judgment—parties must give advance notice (Comm'l Div. Rule 24 [b]). If notice is required, the court will schedule a conference and issue a briefing schedule (Comm'l Div. Rule 24 [c]-[d]).

Motions

Summary judgment motions may be filed any time after issue has been joined, and must be filed within 120 days of the filing of the note of issue. The court may set a date after which no such motion may be made, such date being no earlier than 30 days after the filing of the note of issue (22 NYC RR 3212 [a]). The preliminary conference order may specify a specific date that such motions need to be made, but if no such date is set, always consult the judge's individual practice rules, which may alter the last day to file under CPLR 3213.

Some Commercial Division individual judge's rules will specify that motions for summary judgment must be made within 60 days of the filing of the note of issue, for example. Summary judgment motions in the Commercial Division usually require filing a Rule 19-a statement, which is similar to the Federal Rule 56 Statement of Material Facts. In certain cases, upon receiving a summary judgment motion, the court can order immediate trial of issues raised in the motion (22 NYCRR 3212 [c]).

Should the judge want to hold oral argument, parties will be assigned a specific date and time (Comm'l Div. Rule 34 [a]); upon receipt of the date and time, each attorney is responsible for informing the other parties of that date and time (Comm'l Div. Rule 34 [c]). Requests to appear telephonically must be e-filed 48 hours before the hearing (Comm'l Div. Rule 34 [d]).

Parties are encouraged to move for a pretrial evidentiary hearing or immediate trial on factual issues that could resolve material parts of the case (*see* Comm'l Div. Rule 9 [a]).

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Pre- and Post-Trial Matters

The court will typically schedule a final pre-trial conference for a date several weeks prior to the trial date (Comm'l Div. Rule 11 [e], Rule 30 [c]). Ten days before the final pre-trial conference, parties must make all motions in limine, to be heard at the final pre-trial conference; oppositions are due two days before the conference (Comm'l Div. Rule 27). Before the final pre-trial conference, parties must meet and confer to pre-mark exhibits and identify deposition testimony for trial (Comm'l Div. Rule 28, Rule 29). The court may also require pretrial memoranda (Comm'l Div. Rule 31 [a]).

At the conference, the parties must (1) submit trial exhibits, jury instructions and jury interrogatories, which must be provided on a flash drive if mandatory e-filing applies (Comm'l Div. Rule 31 [d]) and (2) identify witnesses (Comm'l Div. Rule 32). Here again, all of these pre-trial submission dates may vary depending on the particular judge assigned, their schedule and the needs of the parties upon application.

Ten days before trial, parties must submit an estimate of the length of trial (Comm'l Div. Rule 26) and a final list of deposition testimony (Comm'l Div. Rule 29). The court will then rule on the number of hours permitted for trial (Comm'l Div. Rule 26).

Parties must be prepared to proceed to trial on the assigned trial date; if not, they must give 10 days' notice (Comm'l Div. Rule 25). If the trial date is set more than 60 days in advance, counsel who cannot proceed on the trial date because of unavailability must produce substitute counsel (22 NYCRR 125.1 [g]).

Trial, Judgment and Appeal

No later than the start of trial but usually much earlier, counsel will be required to identify in writing the witnesses they will call and the order and length of their testimony (22 NYCRR 202.37). In a jury trial, jury selection begins as soon as the jurors are gathered (22 NYCRR 202.33 Appendix E, A-1). Once trial begins, parties can move for judgment as a matter of law at any time (CPLR 4401), including as to specific issues at the close of evidence on the issue. A continuance or new trial may also be requested at any time (CPLR 4402).

In a bench trial, the parties may submit proposed findings of fact before the case is submitted for decision (CPLR 4213 [a]). The court must deliver its decision within 60 days (CPLR 4213 [c]).

Unlike many states, New York allows appeals of interlocutory orders. A notice of appeal must be filed within 30 days of service of notice of entry of the order being appealed (CPLR 5513(a)) and must perfect the appeal (i.e., opening briefs filed) within six months (Rules App Div, All Depts [22 NYCRR] §1250.9 [a]). Extensions of the perfection deadline can be granted, for up to 90 days ([22 NYCRR] §1509 [b]). Respondent's brief is due 30 days from service of the appellant brief [22 NYCRR] § 1250.9 [c] and appellant's reply 10 days later ([22 NYCRR] §1250.9 [d]). Additionally, parties can move for relief from judgment within one year (for excusable default) or at any time (other specified reasons) (see CPLR 5015 [a]).

PRACTICE TIP: Interlocutory appeals from the New York County and Bronx County Commercial Divisions that relate exclusively to discovery issues must be perfected in four months ([Interlocutory Appeals from the Commercial Division of the Supreme Court Relating to Discovery Matters](#), N.Y. St. Unified Ct. Sys.). Note that the First Department does not follow the standard appellate briefing schedule;

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its schedule is published annually and available on its website (See First Judicial Department, [Calendars](#)).

Up Next

Part IV of our series will address discovery in the Commercial Division, including important differences from other New York state and federal courts.

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