

THE FUNDAMENTALS OF **A CIVIL LAWSUIT**

The Defendant's Perspective

Affirmative Defenses, Discovery and Motion Practice

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Introduction

This chapter will explain the ground rules of asserting affirmative defenses when answering a complaint, the usefulness of discovery practices that ensue after a complaint has been answered and the benefits and pitfalls of motion practice throughout the duration of a civil suit in New York State.

AFFIRMATIVE DEFENSES

In a civil action, a plaintiff sets forth a claim by making statements in a complaint. The statements made by the plaintiff in the complaint must be sufficient to warrant relief from the court. Once the complaint is filed with the court and served on the defendant, the defendant must respond by way of serving an answer in which the defendant may deny the truth of the plaintiff's allegations or assert that there are additional facts that constitute a defense to the plaintiff's action. For example, a plaintiff may demand compensation for damage done to his or her vehicle in an automobile accident. Without denying responsibility for the accident, the defendant may claim to have an affirmative defense, such as the plaintiff's Contributory Negligence or expiration of the Statute of Limitations.

The rules that govern pleadings in New York courts require a defendant to raise all affirmative defenses when first responding to the civil claim against him or her. Many affirmative defenses can be classified as justification defenses, or excuse defenses. Affirmative defenses operate to limit, excuse or avoid a defendant's civil liability, even if the facts of the plaintiff's claim are admitted or proven. In fact, the defendant usually must affirmatively come

forward with some evidence that the defense exists; hence, "affirmative" defenses. Most affirmative defenses must be pled in a timely manner by a defendant in order for the court to consider them, or else they are considered waived by the defendant's failure to assert them. The classic unwaivable affirmative defense is lack of subject-matter jurisdiction. What constitutes timely assertion is often itself the subject of contentious litigation.

It is also of import to note that if a pre-answer motion to dismiss is made, a careful review of CPLR §3211(e) must be done as there are numerous affirmative defenses which will be deemed waived if not addressed in the pre-answer motion.

a. Personal Jurisdiction vs. Subject-Matter Jurisdiction

For a court to have authority to adjudicate a dispute, it must have jurisdiction over the parties and over the type of legal issues in dispute. The first type of jurisdiction is called personal jurisdiction; the other is subject matter jurisdiction.

Personal jurisdiction will be found if the persons involved in the litigation are present in the state or are legal residents of the state in which the lawsuit has been filed, or if the transaction/incident in question has a substantial connection to the state. In order for a court to properly have personal jurisdiction over a defendant the plaintiff must also have effectuated good service of the complaint on that defendant. In New York, the defense of lack of personal jurisdiction is waived if it is not the basis of a pre-answer motion to dismiss or alleged as an affirmative defense in the answer. If you assert the affirmative defense of lack of personal jurisdiction you must move to dismiss the cause of action within 60 days after serving the answer or the defense is deemed waived.

Subject matter jurisdiction refers to the nature of the claim or controversy. The subject matter may be breach of a contract, negligence, medical malpractice, or the probating of an estate, among other things. Subject matter jurisdiction is the power of a court to hear particular types of cases. In addition to the legal issue in dispute, the subject matter jurisdiction of a court may be determined by the monetary value of the dispute, the dollar amount in controversy. Small claims courts are limited by state statutes to small amounts of money in controversy, in New York the amount in controversy cannot exceed \$5,000. Therefore, if a plaintiff sues a defendant in small claims court for \$50,000, the court will reject the lawsuit because it lacks subject matter jurisdiction based on the amount in controversy. The amount in controversy limitations are designed to regulate the flow of litigation in the various courts of the state, ensuring that complicated disputes over large sums of money will be heard in courts that have the time and resources to hear such cases.

It is important to note that defects in subject matter jurisdiction **cannot be waived** and may be raised at any time during the proceedings.

Federal courts have what is called diversity jurisdiction, which gives the courts authority to hear cases involving disputes among citizens of different states provided the amount in controversy is greater than \$10,000. Although a lawsuit may involve disputes between citizens of different states, a plaintiff may start the lawsuit in state court. A defendant, however, may seek to have the case moved to the federal court in that state by filing a removal action. As was stated above, an assertion of lack of subject matter jurisdiction is always timely. CPLR 3211(e).

b. Primary Assumption of Risk vs. Comparative Negligence

The primary assumption of risk doctrine provides that those who engage in sporting or recreational activities consent to the commonly appreciated risks which are inherent in and arise out of the nature of that sport or activity. It thus acts as a bar to a defendant's liability based on that defendant's alleged negligence.

Deciding precisely which activities the assumption of risk doctrine applies to sometimes presents problems for the courts. Usually this defense is used in cases involving injuries during risky activities such as skiing, paragliding and scuba diving. In 2009 the Third Department surprisingly failed to allow the doctrine to be applied in a situation which seemed to call for its natural application in the case of Trupia v Lake George Cent. School Dist., 2009 NY Slip Op 01571. In that case, the plaintiff was participating in a summer school program administered by the defendant School District. During a break in classes, he attempted to slide down a banister in stairway. In doing so, he fell and sustained a skull fracture and brain injury. The plaintiff's parent commenced an action against the School District, and the School District sought to amend their answer to include the affirmative defense of primary assumption of risk.

The Third Department found that the proposed defense was "devoid of merit," as a matter of law and thus did not allow the School District to assert the defense. The Court did concede that Second and Fourth Departments have expanded application of primary assumption of risk beyond sporting and recreational activities and that the Fourth Department even applied it in a situation similar to the case before it [infant plaintiff injured while attempting to slide down handrail (Lamandia-Cochi v Tulloch, 305 AD2d 1062 [4th Dept 2003])]. Nevertheless, the Court refused to allow the doctrine to be asserted. As you can see the decision as to what activities fall

under the primary assumption of risk doctrine varies by department. Primary assumption of risk is not an available defense to strict product liability claims.

Comparative negligence, unlike primary assumption of risk, is not a complete bar to recovery. In 1975 New York adopted a rule of “pure” comparative negligence, which enables a plaintiff to recover even if responsible for more than 50% of his or her own damages. When the defense is asserted, the fact-finder, usually a jury, must decide the degree to which the plaintiff’s negligence, versus the combined negligence of all other relevant actors, contributed to cause the plaintiff’s damages. It is a modification of the doctrine of contributory negligence which disallows any recovery by a plaintiff whose negligence contributed, even minimally, to causing the 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. This could explain why a plaintiff who faces the defense of comparative negligence names all potentially culpable defendants in his action, even insolvent defendants. The plaintiff’s negligence will be balanced against the combined negligence of all defendants in apportioning damages, even though the plaintiff may not be able actually to get compensation from some of them.

Basically, comparative negligence is a rule of law applied in accident cases to determine responsibility and damages based on the negligence of every party directly involved in the accident. For a simple example, Fast Eddie, the driver of one automobile is speeding and Anna Airhead, the driver of an oncoming car has failed to signal and starts to turn left, incorrectly judging Fast Eddie’s speed. A crash ensues in which Anna Airhead is hurt. Anna Airhead’s damage recovery will be reduced by the percentage her failure to judge Fast Eddie’s speed contributed to or caused the accident. Most cases are not as simple, and the formulas to figure

out, attribute, and compare negligence often make assessment of damages problematical and difficult, if not downright subjective.

Both the primary assumption of risk and the comparative negligence defenses are not deemed waived if not plead initially in the answer and amendment of the answer can be sought during discovery if appropriate. Generally, where the proposed amendment is not plainly lacking in merit, leave to amend a pleading should be freely granted, in the absence of prejudice to the non-moving party (*McFarland v. Michel*, 2 AD3d 1297, 1300; see CPLR 3025[b]). If through discovery it becomes apparent that a previously unplead comparative negligence defense or assumption of risk defense is appropriate and evidence has been produced to support the defense, a motion to amend the answer is appropriate.

c. Joint and Several Liability – The Article 16 Defense

Joint and several liability is a form of liability that is used in civil cases where two or more people are found liable for damages. In New York, the winning plaintiff in such a case may collect the entire economic portion of the judgment from any one of the parties, or from any and all of the parties in various amounts until the judgment is paid in full. In other words, if any of the defendants do not have enough money or assets to pay an equal share of the award, the other defendants must make up the difference.

Joint and several liability applies to economic damages only. When two or more tortfeasors are jointly liable, the liability for non-economic damages of a defendant who is found to be less than 50% liable shall not exceed that defendant's equitable share, determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic losses. If plaintiff can demonstrate that he cannot demonstrate

jurisdiction over a culpable non-party, that non-party's culpable conduct shall not be considered in determining the equitable share of culpability. General Obligations Law §15-108.

Defendants in a civil suit can be held jointly and severally liable only if their concurrent acts brought about the harm to the plaintiff. The acts of the defendants do not have to be simultaneous, they must simply contribute to the same event. For example, assume that an electrician negligently installs an electrical line. Years later, another electrician inspects the line and approves it. When the plaintiff is subsequently injured by a short circuit in the line, the plaintiff may sue both electricians and hold them jointly and severally liable. In a contractual situation, where two or more persons are responsible for the same performance and default on their obligations, a non-defaulting party may hold any and all parties liable for economic damages resulting from the breach of performance.

It is important to note here is the "non-delegable" duty and intentional tort exceptions to the Article 16 defense. In New York, cases brought under Article 10 of the Labor Law, which includes Labor Law §240 and §241, are exempt from the defense of Article 16, the reason being that these sections impose absolute liabilities upon owners and contractors at construction sites. A tortfeasor who violates one of these provisions will not benefit from Article 16. This defense is also inapplicable to auto accident cases and cases brought under worker's compensation law or those involving a 'grave injury' per the worker's compensation law. CPLR §1602 lists all 13 exceptions to this defense. This defense must also be plead in the answer and proven by the defendant.

d. CPLR §4545 Defense

CPLR §4545(c) authorizes the court in a personal injury action to reduce the amount of the plaintiff's award if it finds that any element of the economic loss encompassed in the award was or will be replaced, in whole or in part, from a collateral source. It is important that this affirmative defense is plead in the answer in any case that could potentially involve a claim for economic loss.

A 1995 New York State Court of Appeals case, *Oden v. Chemung County*, 621 N.Y.S.2d 744, opined that “[T]he reduction is authorized only when the collateral source payment represents reimbursement for a particular category of loss for which damages were awarded.”

Under CPLR §4545, the collateral source offset applies to economic losses only. These losses include out of pocket damages for medical care, custodial care or rehabilitation services. It also applies to loss of earnings claims and other economic losses. This defense is not applicable for non-economic damages (pain and suffering awards). When looking at whether or not the plaintiff has been or will be reimbursed for any portion of the economic losses, a defendant can consider insurance payments, social security, worker's compensation, employee benefit programs among other collateral sources. Payments received from Medicare and/or life insurance do not diminish an economic award under this defense. Further, any collateral source payments received by plaintiff from an entity that is entitled by law to a lien against a recovery are not considered for purposes of an offset.

The issue of determining what constitutes a collateral source offset is usually reserved for a post-trial hearing with the court and is only addressed when a plaintiff has been awarded economic damages. Evidence of collateral source payments is inappropriate evidence to put before a jury, however pre-trial discovery on the issue is not only appropriate but necessary if

you are asserting this defense. It is the defendant burden to prove this defense 'with reasonable certainty' that costs or expenses have been or will be reimbursed or indemnified.

e. Other Affirmative Defenses

The above only explains a handful of the available affirmative defenses. Other important affirmative defenses to consider when drafting an answer or a pre-answer motion are Statute of Limitations, Laches, Failure to State a Cause of Action, Lack of Capacity to Sue, Estoppel, Failure to Mitigate Damages, Failure to Include Necessary Party, Improper Monetary Demand, Pending Suit for Same Cause of Action.

DISCOVERY

If a pre-answer motion to dismiss is not applicable in your case, you will then Answer the complaint on behalf of your client. The next stage of litigation is discovery. Discovery is the process by which parties to litigation seek to obtain evidence from the opposing side or third parties relevant to the claims and defenses raised in the lawsuit. In New York broad pre-trial discovery is permitted. This includes written discovery and depositions.

It is customary in New York to serve discovery demands and a demand for a verified bill of particulars with your answer. A demand for a bill of particulars is a list of written questions from one party to another asking for details about a claim or defense. Although a bill of particulars technically is not discovery, it can be used to get information about a claim or defense. What can be demanded in the bill of particulars is dependent on the facts of each case. However, in personal injury cases, there is a statutory list of items which may be demanded. CPLR §3043(a) lists items that may be demanded in a bill of particulars demand, but do not limit

yourself solely to the items listed in this section. Any demand you make can always be objected to by your adversary, but determining whether or not that objection has merit is often something that is discussed with the court at the preliminary conference. If the recipient of the demand for a bill of particulars has an objection to the demand, whether it be that it is untimely or overly broad, that party has ten (10) days from the date of service of the demand in which to move to vacate it or modify it. If no such motion is made, then the recipient has twenty (20) days to respond and serve the bill of particulars, although it is rare that a plaintiff meets this deadline. Within the bill of particulars, the recipient can make individual objections to your demands. These are the objections which, if improper, can be discussed with the court at the preliminary conference. If you feel that there is information that you require in order to properly and fully develop a defense to the case against your client, do not be shy, this is your opportunity to try to obtain it, provided it is not a palpably improper inquiry. If you fail at this level you may be able to obtain the information through the depositions of the parties.

In addition to a demand for a bill of particulars, written discovery includes interrogatories (written questions that a party is required to answer), requests for admissions (written requests to admit or deny certain facts relevant to the claims and defenses raised in the lawsuit), and requests for production of documents (written request to produce documents relevant to the claims and defenses raised in the lawsuit). Documents can also be obtained from third parties who are not involved in the litigation through a document subpoena.

It is important to note that when you serve your answer and initial demand package you should ALWAYS include a notice for examination before trial. The reason that you should serve this notice with your answer is this notice decides the order of the depositions. If the plaintiff is the first party to notice a deposition, they will arguably have the right to depose the defendants

prior to being deposed themselves. This could potentially be devastating to defendants as it prevents you, as their attorney, from being able to properly prepare them for their depositions.

Once the answer has been served on behalf of the defendant, access to the court is available through the filing of a Request for Judicial Intervention (“RJI”). The filing of the RJI gives the court notice that a request to have a judge assigned to this specific matter has been made. Without the filing of an RJI, the matter will not be scheduled for court conferences or assigned a judge. RJI’s are only used in state court. Once the RJI is filed you will receive notification from the court that the preliminary conference has been scheduled, this could be as quickly as two to three weeks. The judge that is assigned to the matter will handle the case throughout the discovery phase until the Note of Issue is filed. The Note of Issue indicates that discovery has been completed.

Discovery proceedings here in New York are often contentious. In order to require parties to comply with outstanding discovery demands and to compel parties to appear for their depositions, preliminary conferences are necessary. At the preliminary conference the attorneys for the parties will appear before the court and advise the court of the outstanding discovery. The court will then require that a stipulated discovery order is entered into by the parties in order to complete discovery. A preliminary conference order generally requires that the defendants provide insurance coverage information to the plaintiff. It further requires that the plaintiff provide a bill of particulars and authorizations to obtain plaintiff’s medical records and employment records (if applicable) to the defendants. This order also sets forth the deposition schedule for all parties as well as preserves the defendant’s right to have the plaintiff undergo a physical examination.

When the parties sign a court order it becomes a “stipulated” court order, meaning that all of the parties that executed it have agreed to the terms of the order. On occasion the Judge and/or law secretary will place a directive in the order that you do not agree with. In these instances, DO NOT SIGN the order. Once you sign the order you have, in essence, waived your ability to move to strike that order and everything contained in that order. If you refuse to sign the order, the Judge will so-order it anyway but you will have preserved your right to contest the appropriateness of the directives of that order.

Preliminary conference orders will almost always contain a compliance conference date, at which time the parties will again have to return to court to advise the Judge of the status of discovery. Once a preliminary conference is held, discovery should, in theory, move forward.

A deposition is the questioning of a witness under oath in the presence of a stenographer who records the questions and answers and then prepares a written transcript. Parties to a lawsuit can be compelled to participate in a deposition and third party witnesses can be subpoenaed to testify in a deposition. Provided you served your notice of examination before trial along with your answer, the plaintiff will be the first party to be deposed. This will be the first opportunity you have not only to hear the plaintiff’s full story, but also to assess the credibility of the plaintiff and their alleged injuries. In order to take a complete deposition of the plaintiff it is always beneficial to have obtained as many of the medical records, employment records, worker’s compensation records and/or police records as possible. Prior to trial, this will be your only opportunity to question the plaintiff regarding the alleged incident and their resulting injuries. The more thorough the plaintiff’s deposition is, the less likely you will be surprised at trial.

Your client’s deposition is the only opportunity they will have to present their story prior to trial. It is imperative that you properly prepare your client for experience as they will be

bound to whatever they testify to during their deposition. Deposition testimony should be almost exactly what your client would testify to at trial. If the trial testimony varies significantly from the deposition testimony, then your client will be subject to damaging and potentially fatal cross-examination. Nothing bodes worse at trial for a defendant than being impeached over and over during the cross-examination.

Throughout the duration of the discovery phase of a matter, the parties are able to serve additional discovery requests. Often times collateral source records, worker's compensation records and deposition testimony will lead to numerous additional discovery requests. It is important to make these additional requests promptly for two reasons, first you do not want to forget about them and secondly, you do not want to be prevented by the plaintiff's filing of the Note of Issue.

MOTION PRACTICE

From the service of the summons and complaint through trial there is always opportunity for motion practice. As we discussed above, when you receive a summons and complaint it is important to assess whether or not the case is ripe for a pre-answer motion to dismiss. You must fully research this issue because if you answer without moving to dismiss you have waived your right to assert certain defenses.

Once you have answered and the discovery phase of the case has begun, there will likely be numerous chances for the parties to make discovery motions. Discovery motions are made when a party has not complied with outstanding discovery demands. These types of motions are often made pursuant to CPLR §3126 and §3042 and seek the court's intervention to compel the party in violation of discovery to comply and provide the outstanding discovery. In most cases,

once this motion is filed the party who it is made against will provide the outstanding discovery in their opposition papers and the motion will be deemed moot. However, there are the occasions when complete disclosure is not made and court involvement is required. Motions for protective orders are also made during the discovery phase of cases. These motions are made pursuant to CPLR §3122 and seek to prevent the disclosure of specific documents. Motions to strike the note of issue are appropriate when the plaintiff files the note of issue prior to the conclusion of discovery. It is important to review your file once you receive the note of issue to assess the status of discovery as the filing of the note of issue starts the clock ticking in regards to your time to file a motion for summary judgment. In order to properly make a motion for summary judgment you will want to have all discovery you have requested available so that you can use it to support your arguments. If you do not have all requested discovery, you must move to strike the note of issue AND seek an extension of time to file your summary judgment motion (especially in Queens County).

Once the Note of Issue has been filed and you have determined that there is no outstanding discovery you must then decide whether or not the case is appropriate for a summary judgment motion. From a defense standpoint, if it is seemingly possible to have any portion of the plaintiff's claims dismissed, regardless of how ancillary or unimportant they may seem, a summary judgment motion is appropriate. If successful, this will allow you to focus on the significant causes of action at the time of trial. Each venue has a different time frame for making summary judgment motions. For example, in Kings County the parties have 60 days from the date of the Note of Issue to serve a Motion for Summary Judgment.

A summary judgment is a decision made on the basis of statements and evidence presented in the legal pleadings and documents filed, without a trial. It is used when there is no

dispute as to the facts of the case, and one party is entitled to judgment as a matter of law. Summary judgment is properly granted when the evidence in support of the moving party establishes that there is no genuine issue of material fact to be tried. A material fact is one which tends to prove or disprove an element of the claim. A motion for summary judgment may be brought by any party to the case and supported by declarations under oath (clients, experts, non-parties), excerpts from depositions, admissions of fact and other discovery, as well as case law and other legal authority. In summary judgment motions, the moving party argues that there are no triable issues of fact and that the settled facts require a summary judgment in their favor. If summary judgment is not appropriate in your case, the matter will then be placed on the trial calendar.