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CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions

ONA BRILL'S STROLL THROUGH BROOKLYN AND THE DRAMATIC EFFECT IT HAS HAD ON NEW YORK STATE'S CIVIL PRACTICE

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I. INTRODUCTION

In 1997, the CPLR added another star to its galaxy of deadlines. CPLR 3212(a) was amended to require that motions for summary judgment be made no later than 120 days after the filing of the note of issue, unless the movant can establish "good cause." As devoted followers of New York civil procedure have observed, a certain segment of the bar apparently enjoys living dangerously, and several reported cases began to test the limits of CPLR 3212(a)'s timeliness provisions. One particular case, however, has placed this timing requirement at the forefront of civil procedure in the New York State courts.

On a cold February day in New York City, during the winter of 1998, a woman named Ona Brill was walking on a public sidewalk in Brooklyn when she tripped and fell. Although she did not realize it at the time, her name would gain a form of celebrity status with the bench and bar in New York State's civil courts. Ms. Brill and her husband ultimately sued New York City, among other defendants, seeking compensation for her injuries. The City, which handles hundreds of slip-and-fall cases on an annual basis, apparently did not believe that the case required any heightened level of attention. It contended that Ms. Brill could not establish that the City had prior written notice of the defect, a necessary requirement in the lawsuit, and moved for summary judgment to dismiss the case before trial.

Ms. Brill's case ultimately came before the New York Court of Appeals, which issued a ruling addressing the importance of CPLR 3212(a)'s timing requirements, and the adherence to statutory time periods and court orders in general. This article will address the impact of the decision in Ms. Brill's suit, which has spawned a healthy body of caselaw on the timing of summary judgment motions. We will identify the various factors that courts have considered in determining whether good cause has been established to allow a party to move for summary judgment beyond CPLR 3212(a)'s deadline. The cases have also issued several express and implied warnings to the bar regarding compliance with the statute's language, which will be discussed below. In addition, the article will address several problems applying the statute that have yet to be resolved by the courts. We will also make recommendations to lawyers who wish to avoid jeopardizing

their use of the important tool of the summary judgment motion.

Finally, the article will examine the effect of CPLR 3212(a)'s amendment on civil practice from a broader perspective. There will be occasions, for example, when a defendant's meritorious summary judgment motion is denied as untimely. As a result, the defendant's attorney faces several problems, including the prospect of malpractice liability for failing to have disposed of the case with a timely motion for summary judgment. The plaintiff's lawyer also faces several dilemmas, and may not be enthusiastic about advancing the case in light of the impending doom awaiting at trial. In fact, proceeding to trial in these circumstances may result in sanctions for frivolous conduct.

II. HISTORICAL BACKGROUND AND THE 1997 AMENDMENT TO CPLR 3212(a)

The legal system has always struggled to become more efficient and to reduce unnecessary delay without abridging litigants' rights. To a substantial degree, the old common law lost this struggle. Common-law pleading sacrificed efficiency and even fairness to technicality and prolonged delay.[1] In response to these problems, New York State pioneered a system of summary judgment that expedited the resolution of lawsuits while preserving the valid claims of parties. As early as 1808, the New York State Supreme Court adopted one of the first forerunners of the modern summary judgment procedure.[2] In 1921, New York adopted a new summary judgment rule,[3] which influenced the adoption of the same device by the Federal Rules of Civil Procedure almost twenty years later.[4]

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[1] ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 237 (photo reprint 2005) (1952).

[2] General Rule, 3 Johns. 542 (N.Y. Sup. Ct. 1808) (requiring defendants to submit an affidavit of "good and substantial defence"). For a further discussion of the history of the summary judgment motion in New York State, see N.Y. ST. B. ASS'N COM. & FED. LITIG. SEC., REPORT ON REFORM OF SUMMARY JUDGMENT PROCEDURES IN NEW YORK COURTS (1993), *available at* http://www.nysba.org/Content/ContentGroups/Commercial_and_Federal_Litigation_Sec/SummaryJudgmenProcedurest.pdf [hereinafter, REPORT ON REFORM].

[3] N.Y. CIV. PRAC. R. 113 (replaced by CPLR 3212 in 1963).

[4] FED. R. CIV. P. 56. *See* Paul H. Aloe & Joan Morgan McGivern, *Rethinking New York's Summary Judgment Procedures: Proposed Reform to Facilitate Disposition of Commercial Cases*, N.Y. ST. B.J., May/June 1993, at 32.

The summary judgment device remains a source of constant controversy, however, on both the federal[5] and state level.[6]

New York's CPLR 3212(a),[7] which governs the timing of a summary judgment motion, continues New York's tradition of innovation with respect to this important procedural device. It is an example of how one jurisdiction, in response to the realities of modern litigation, has tried to balance procedural efficiency with justice.

Prior to 1997, summary judgment motions in New York State courts on the eve of trial were not uncommon. Courts had long recognized the problem, observing that "[t]he timing of a summary judgment motion so as to make it returnable on the eve of the trial of an action has a tendency to frustrate rather than to further the primary purpose of the remedy, which is to obviate delay in litigation."[8] In 1980, however, the New York Court of Appeals held that the mere fact that a motion for summary judgment was made at this late date was not, standing alone, grounds for denying the motion.[9] Courts had the authority to deny such a motion, however, "when its merit [was] not evident and it appear[ed] to be made as a dilatory tactic."[10] The Court reasoned that if a motion made on the eve of trial was "clearly meritorious," its denial based on untimeliness grounds was error.[11] A denial of the motion in

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[5] *See, e.g.*, CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 99, at 714-15 (6th ed. 2002).

[6] *See, e.g.*, Aloe & McGivern, *supra* note 4, at 32-35 (discussing New York); Paul D. Fogel & Valerie Mark, *Summary Adjudication in the 90s: Problems and Proposals*, L.A. DAILY J., June 1, 2003, at 7 (discussing California).

[7] N.Y. C.P.L.R. 3212(a) (McKinney 2005).

[8] Jordan v. Levy, 16 A.D.2d 64, 65, 225 N.Y.S.2d 399, 400 (App. Div. 1st Dep't 1962) (per curiam). *Jordan* observed that when a case "has progressed to the point of imminent trial in the usual course, the disposal of the litigation will not then be accelerated by a motion for summary judgment." *Id.*

[9] Kule Res., Ltd. v. Reliance Group, Inc., 49 N.Y.2d 587, 591, 404 N.E.2d 734, 735, 427 N.Y.S.2d 612, 613 (1980) (per curiam). In *Kule*, the trial court ruled that "the timing of the motion so as to make it returnable 'on the eve of trial' frustrated the purpose of summary judgment, and denied the motion." Kule Res., Ltd. v. Reliance Group, Inc., 69 A.D.2d 753, 753, 415 N.Y.S.2d 13, 14 (App. Div. 1st Dep't 1979), *aff'd*, 49 N.Y.2d 587, 404 N.E.2d 734, 427 N.Y.S.2d 612 (1980) (per curiam). The Appellate Division, in an order affirmed by the Court of Appeals, reversed, noting that the summary judgment motion was made as soon as the deposition transcripts were available. *Id.* "Inasmuch as the motion depends largely on evidence adduced at the depositions it could not have been made sooner. Accordingly, timeliness should not have been made the basis for denial." *Id.*

[10] *Kule*, 427 N.Y.S.2d at 613.

[11] *Id. Accord* Guzman v. Estate of Fluker, 226 A.D.2d 676, 677, 641 N.Y.S.2d 721, 723 (App. Div. 2d Dep't 1996) ("A motion for summary judgment should not be denied solely on the ground that it is made on the eve of trial, particularly where the

these circumstances, the Court observed, "wastes judicial resources which, through ever increasing demands, daily become more precious."[12]

During the next two decades, the practice of allowing late motions for summary judgment placed a significant burden on the court system and litigants. If a successful "eleventh hour" motion established that defendant was entitled to judgment as a matter of law, a substantial portion of the time and money spent in preparation for trial was rendered worthless. These motions also significantly taxed the resources of the judiciary, often leaving inadequate time for proper consideration of the arguments and disrupting court calendars.[13]

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motion is meritorious." (citations omitted)); Latimer v. City of New York, 219 A.D.2d 622, 623, 631 N.Y.S.2d 395, 395 (App. Div. 2d Dep't 1995) ("[T]he mere fact that a summary judgment motion is made on the eve of trial is not in and of itself sufficient reason for denying the motion, especially in a case such as this where the motion is so clearly meritorious." (citations omitted)).

[12] *Kule*, 427 N.Y.S.2d at 613.

[13] The Office of Court Administration summarized the problem in 1996 by observing that if a motion for summary judgment is delayed until the eve of trial, "there is no adequate time for an adversary to reply or for the court to consider the motion, thereby occasioning either a determination on the merits of the motion without adequate consideration or the delay of the trial, especially when the motion papers are voluminous." OFFICE OF COURT ADMIN., MEMORANDUM ON SUMMARY JUDGMENT MOTIONS - TIMELINESS, 219th sess. (N.Y. 1996), *reprinted in* 1996 N.Y. Sess. Laws page 2685 (McKinney). The Memorandum notes that, "[a]t times, such belated motions may be filed in an attempt to delay a case or to secure transfer of the case to a different judge for trial." *Id. See also* REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE, 219th sess. (N.Y. 1996), *reprinted in* 1996 N.Y. Sess. Laws page 2699, 2724 (McKinney). The 1993 Report on Reform previously identified the problem of summary judgment motions being made "on the eve of trial for purposes of delay." REPORT ON REFORM, *supra* note 2, at 4. The Report on Reform quoted from the October 1992 Report on the IAS System, which stated:

> Judges throughout the state expressed concern about the number of motions for summary judgment that are made on the eve of trial. It has been the universal experience of the bench that the vast majority of these motions are made primarily for delay or other tactical advantage.

Id. at 4.

The Report on Reform proposed an amendment to CPLR 3212(a)(4) that would have forbidden

> a party from making a motion for summary judgment within sixty days of a trial date where the trial had been set for a date certain, except by order to show cause which can only be granted where good cause is shown and the opponent consents to the making of the motion or has been given an opportunity to be heard in opposition to the granting of the summary judgment motion.

Id. at 9.

Effective January 1, 1997, CPLR 3212(a) was amended to discourage parties from moving for summary judgment on the eve of trial.[14] The amendment allows trial courts to set a date after which no summary judgment motions can be made, but requires the court to allow the parties at least thirty days from the filing of the note of issue[15] to make such a motion.[16] Many courts exercise this authority in various places, including individual court rules, Uniform Rules for the Supreme Court,[17] preliminary conference orders,[18] or certification orders.[19] If no date is set by the particular court, CPLR 3212(a) mandates that the motion be made "no later than one hundred twenty

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[14] Act of Aug. 8, 1996, ch. 492, § 1, 1996 N.Y. Laws 2972.

[15] *See* N.Y. C.P.L.R. 3402 (McKinney 2005). The filing of the note of issue places the case on the trial calendar. N.Y. C.P.L.R. 3402(a). The note of issue must ordinarily be accompanied by the certificate of readiness. *See infra* notes 83-84 and accompanying text.

[16] N.Y. C.P.L.R. 3212(a) (McKinney 2005). The note of issue is utilized in the supreme and county courts. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21 (2005). In the New York City Civil Court, the district courts and the city courts, the notice of trial is the equivalent of the note of issue. *See* N.Y. CITY CIV. CT. ACT §§ 1301, 1303 (McKinney 2005); N.Y. UNIFORM DIST. CT. ACT §§ 1301, 1303 (McKinney 2005); N.Y. UNIFORM CITY CT. ACT §§ 1301, 1303 (McKinney 2005).

There is no outside limit on a court-imposed deadline. CPLR 3212(a) appears to permit a court-imposed rule that would allow summary judgment motions to be made, for example, 150 days after the filing of the note of issue. *See* N.Y. C.P.L.R. 3212(a) (McKinney 2005).

Approximately three years prior to the passage of the amendment to CPLR 3212(a), the Report on Reform observed that a proposal barring summary judgment motions a certain number of days after the filing of the note of issue "appears too harsh given that cases sometimes are tried years after a note of issue has been filed." REPORT ON REFORM, *supra* note 2, at 9 & n.12.

[17] *See*, *e.g.*, N.Y. COUNTY SUPREME COURT CIVIL BRANCH, R. 17, *available at* http://www.courts.state.ny.us/supctmanh/uniform_rules.htm (last visited Jan. 25, 2006) (sixty days from filing note of issue); UNIFORM CIVIL TERM RULES OF THE SUPREME COURT, KINGS COUNTY, R. 13, *available at* http://www.courts.state.ny.us/courts/2jd/kings/civil/civilrules.pdf (last visited Mar. 8, 2006) (sixty days from filing a note of issue).

[18] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c) & (d) (2005) (allowing court to consider and determine time frames for various matters at preliminary conference); *see also* Smith v. Nameth, 25 A.D.3d 599, 600, 807 N.Y.S.2d 411, 412 (App. Div. 2d Dep't 2006) (holding that court providently exercised its discretion in entertaining defendant's motion for summary judgment, made shortly after deadline established in preliminary conference order); Milano v. George, 17 A.D.3d 644, 645, 792 N.Y.S.2d 906, 907 (App. Div. 2d Dep't 2005) (mem.) (affirming denial of defendant's motion for summary judgment, made one day beyond the court-imposed deadline of 90 days after the filing of the note of issue).

[19] *See, e.g.*, DiMetteo v. County of Nassau, No. 12089-02, 2005 WL 1644921 (N.Y. Sup. Ct. Nassau County May 9, 2005) (although certification order required service of summary judgment motions within 60 days of filing of note of issue, court still considered motion on its merits).

days after the filing of the note of issue, except with leave of court on good cause shown."[20]

III. THE COURT OF APPEALS INTERPRETS CPLR 3212(a)'S TIMELINESS REQUIREMENTS

The Court of Appeals' 2004 decision in *Brill v. City of New York*[21] provided a strict interpretation of the 1997 amendment, which has had a substantial impact in many subsequent cases.[22] In *Brill*, the City moved for summary judgment well after CPLR 3212(a)'s 120-day period had expired, asserting that it had no prior written notice of the alleged defect that caused plaintiff's fall.[23] Despite the fact that the City failed to establish good cause for the delay, both the supreme court and the Appellate Division considered the motion in the interests of judicial economy, noting that plaintiff could not demonstrate prejudice in the face of this meritorious defense.[24] The Court of Appeals reversed, holding that a motion for summary judgment can only be entertained after 120 days from the filing of the note of issue if the movant can show "good cause," i.e., "a satisfactory explanation for the untimeliness."[25] The merits of the motion and the lack of prejudice to the respondent, which had supported good cause determinations in prior lower court cases, were deemed irrelevant to a determination of good cause under CPLR 3212(a).[26]

Brill's holding became further entrenched just five months later in *Miceli v. State Farm Mutual Automobile Insurance Company*, in which the Court specifically noted that the merits of a summary judgment motion cannot constitute good cause to extend CPLR 3212(a)'s 120-day period.[27] In the aftermath of *Brill* and *Miceli*, it is now clear that courts lack the power to extend the legislative time period to move for summary judgment on the basis of "the interests of justice" or

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[20] N.Y. C.P.L.R. 3212(a) (McKinney 2005).

[21] 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004).

[22] As of this writing, in a period of twenty-two months, *Brill* has been cited in over ninety-three reported decisions and by over sixty secondary sources.

[23] *Brill*, 781 N.Y.S.2d at 266.

[24] *Id.*

[25] *Id*. at 264.

[26] *Id.*

[27] 3 N.Y.3d 725, 726-27, 819 N.E.2d 995, 996, 786 N.Y.S.2d 379, 380 (2004) (mem).

"judicial economy," regardless of the merits of the motion and the absence of prejudice to the opponent.[28]

IV. CALCULATING CPLR 3212(a)'S TIME PERIOD

The Court of Appeals' strict interpretation of CPLR 3212(a) necessitates that lawyers carefully calculate the deadline for making a summary judgment motion.[29] This requires a prospective movant to: (1) ascertain the period of time for making a summary judgment motion, (2) ascertain the date on which CPLR 3212(a)'s time period begins to run, and (3) perform the steps required to "make" the motion within the period.

A. Various Time Periods for Making Motion for Summary Judgment and Their Accrual

At the outset, a lawyer planning to move for summary judgment must determine if the court has set a deadline pursuant to CPLR 3212(a).[30] If a court has not set its own date within which a motion for summary judgment must be made, CPLR 3212(a) generally provides that the "motion shall be made no later than one hundred twenty days after the filing of the note of issue."[31] The 120-day period runs from the "filing" of a paper, not its service, and should not be the beneficiary of CPLR 2103(b)(2)'s five-day extension.[32] This has already caused

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[28] *See, e.g.*, Perini Corp. v. City of New York, 16 A.D.3d 37, 39-40, 789 N.Y.S.2d 29, 31 (App. Div. 1st Dep't 2005). In *Rivera v. Toruno*, 19 A.D.3d 473, 796 N.Y.S.2d 708 (App. Div. 2d Dep't 2005), defendant advanced an argument similar to the City's contentions in *Brill* in an attempt to establish good cause. Rather than emphasizing the merits of the motion for summary judgment, defendant sought to establish good cause based on "the obvious lack of merit of the plaintiff's case." *Id.* at 709. The court rejected the argument, relying on *Brill*, because defendant failed to provide a satisfactory explanation for the delay. *Id.*

[29] *See, e.g.*, Milano v. George, 792 N.Y.S.2d 906, 907 (App. Div. 2d Dep't 2005) (mem.) (affirming order denying motion for summary judgment made one day past CPLR 3212(a)'s deadline); Dibella v. Long Island Jewish Med. Ctr., No. 18591/02, N.Y.L.J., March 1, 2005, at 21 (N.Y. Sup. Ct. Nassau County) (denying motion for summary judgment served three days after time period authorized by CPLR 3212(a)). The *Dibella* court improperly added five days to the period within which motions could be made. *See infra* notes 32-33, and accompanying text.

[30] *See supra* notes 16-19 and accompanying text.

[31] N.Y. C.P.L.R. 3212(a) (McKinney 2005). This discussion assumes that there is no good cause to allow the filing of the motion beyond CPLR 3212(a)'s time frame. A prudent lawyer will make this assumption at the outset of virtually every case.

[32] CPLR 2103(b)(2) only grants a five-day extension "where a period of time prescribed by law is measured from the service of a paper and service is by mail . . . ." N.Y. C.P.L.R. 2103(b)(2) (McKinney 2005). The five-day extension may, however, apply

some confusion in the cases, which have recognized a five-day extension in this context.[33] Although the party filing the note of issue must also serve it,[34] and can accomplish service by mail,[35] the moment of service is irrelevant for computing CPLR 3212(a)'s 120-day period.

B. "Making" the Motion for Summary Judgment in a Timely Fashion

Once a party moving for summary judgment has ascertained the relevant time period under CPLR 3212(a) and the moment at which it begins to run, she must ensure that she "makes" the motion before the deadline expires. A motion on notice is deemed "made when a notice of the motion or an order to show cause is served," not the date when the motion is filed or made returnable.[36] CPLR 2103(b) offers many options for

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if the court sets a time period for the making of summary judgment motions, and the period runs from the service of a paper. *Id*.

[33] Krasnow v. JRBG Mgt. Corp., 25 A.D.3d 479, 480, 808 N.Y.S.2d 75, 76 (App. Div. 1st Dep't 2006); Szabo v. XYZ, Two Way Radio Taxi Ass'n, 267 A.D.2d 134, 135, 161, 700 N.Y.S.2d 179, 180 (App. Div. 1st Dep't 1999); Connolly v. City of New York, N.Y.L.J., Mar. 7, 2005, at 19 (N.Y. Sup. Ct. Bronx County); *Dibella*, N.Y.L.J., Mar. 1, 2005, at 21. *Connolly* based its holding on the First Department's ruling in *Szabo*, 700 N.Y.S.2d at 180, which held that a party moving for summary judgment cannot be charged with knowledge of the running of CPLR 3212(a)'s time period until service of the note of issue by mail is completed. *Szabo*, in turn, relied on *Levy v. Schaefer*, 160 A.D.2d 1182, 1183, 555 N.Y.S.2d 192, 194 (App. Div. 3d Dep't 1990) in support of this conclusion. *Levy* addressed the twenty-day period in which a party must move to vacate a note of issue if a case is not ready for trial. *See also* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(e) (2005). This time period, unlike the one in CPLR 3212(a), is measured from the service of a paper. *Id*. Therefore, *Levy* properly concluded that CPLR 2103(b)(2)'s five-day period can extend the time within which a party must move to vacate the note of issue. *Levy*'s reasoning is not, however, applicable to the 120-day period in CPLR 3212(a), which does not begin to run upon the mailing of a paper.

[34] CPLR 3402(a) allows a party to "place a case upon the calendar by filing, within ten days after service, with proof of such service two copies of a note of issue with the clerk . . . ." N.Y. C.P.L.R. 3402(a) (McKinney 2005). *See also* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(a) (2005) (requiring filing of note of issue accompanied by certificate of readiness, with proof of service on all parties, to place case on trial calendar).

[35] *See* N.Y. C.P.L.R. 2103(b) (McKinney 2005) (authorizing several methods for service of interlocutory papers).

[36] N.Y. C.P.L.R. 2211 (McKinney 2005). *See, e.g.*, Russo v. Eveco Dev. Corp., 256 A.D.2d 566, 566, 683 N.Y.S.2d 566, 567 (App. Div. 2d Dep't 1998); LaSorsa v. Corrigan, 256 A.D.2d 313, 314, 681 N.Y.S.2d 300, 301 (App. Div. 2d Dep't 1998); Greenfield v. Philles Records, Inc., 160 A.D.2d 458, 459, 553 N.Y.S.2d 771, 772 (App. Div. 1st Dep't 1990); Ghumman v. Abdelshahid, No. 2002-1301 K C., 2003 WL 21696982, at *1 (N.Y. App. Term 2d & 11th Jud. Dists. June 24, 2003); Bouilland v. Angulo, 5 Misc. 3d 1031(A), No. 114116-01, 2004 WL 2941569, at *1 (N.Y. Sup. Ct. New York County Sept. 27, 2004); Dugas v. Bernstein, 5 Misc. 3d 818, 825, 786 N.Y.S.2d 708, 713-14 (Sup. Ct. New York County 2004); Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2211:4 (1991); DAVID D. SIEGEL, NEW YORK PRACTICE § 243 (4th ed. 2005); *see also* Thompson v. Leben Home for Adults, 17

serving motions,[37] but service by mail is the most common method.[38] Service of a motion by mail is "complete upon mailing,"[39] not when the papers are received.

If a motion is made by order to show cause, rather than with a notice of motion,[40] the motion is deemed made when the papers are served, not on the date that the order to show cause is signed by the judge.[41] An order to show cause will typically

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A.D.3d 347, 348, 792 N.Y.S.2d 597, 598 (App. Div. 2d Dep't 2005) ("The defendants' untimely cross motion for summary judgment should not have been considered in view of their failure to offer a satisfactory explanation for not serving it within 120 days of the filing of the note of issue . . . .").

Cases incorrectly indicating that summary judgment motions are made either when filed, dated or returnable are legion. *See, e.g.*, Balcerzak v. DNA Contracting, LLC, 9 Misc. 3d 524, 531, 802 N.Y.S.2d 324, 329 (Sup. Ct. Kings County 2005); Buckner v. City of New York, 9 Misc. 3d 510, 514, 800 N.Y.S.2d 333, 336 (Sup. Ct. New York County 2005); Singh v. Deopaul, 8 Misc. 3d 1019(A), No. 46334-01, 2005 WL 1774139 (N.Y. Sup. Ct. Kings County July 12, 2005); Newsday, Inc. v. Nelkenbaum, 8 Misc. 3d 1005(A), 801 N.Y.S.2d 779 (N.Y. Civ. Ct. Kings County 2005); Hernandez v. 620 W. 189th Ltd. P'ship, 7 Misc. 3d 198, 792 N.Y.S.2d 822, 823 (Sup. Ct. New York County 2005); Florczyc v. Stahal, No. 25129-99, 2005 WL 119739, at *1 (N.Y. Sup. Ct. Kings County Jan. 3, 2005). In *Smith v. Nameth*, 807 N.Y.S.2d at 412, the court's deadline, established in a preliminary conference order, apparently required that the motion be made returnable by a certain date.

[37] N.Y. C.P.L.R. 2103(b) (McKinney 2005). A motion is an interlocutory paper "served upon a party in a pending action." *Id.* Interlocutory papers must be served upon a party's attorney. *Id*. CPLR 2103(b) lists seven methods for serving an interlocutory paper upon a party's attorney. N.Y. C.P.L.R. 2103(b)(1)-(7). Each paper served on any party must be served on any other party who has appeared in the action. N.Y. C.P.L.R. 2103(e). Therefore, a motion must be served on all parties who have appeared in an action, even if the relief is not sought from them. *See* SIEGEL, *supra* note 36, § 203.

[38] *See* SIEGEL, *supra* note 36, § 202.

[39] N.Y. C.P.L.R. 2103(b)(2) (McKinney 2005). *See* N.Y. C.P.L.R. 2103(f)(1) (McKinney 2005) ("mailing" means depositing paper in a properly addressed "first class postpaid wrapper" in a post office or official depository of the United States Postal Service "within the state"); *Dugas*, 786 N.Y.S.2d at 713-14. If the motion is mailed from outside New York State, it will not be deemed "made" on the date it is mailed but rather the date it was received. *See* Nat'l Org. for Women v. Metro. Life Ins. Co., 70 N.Y.2d 939, 519 N.E.2d 618, 524 N.Y.S.2d 672 (1988) (service was not "complete" within meaning of CPLR 2103(b)(2) when papers were mailed in Washington, D.C.).

[40] N.Y. C.P.L.R. 2214(d) (McKinney 2005) ("The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein.").

[41] N.Y. C.P.L.R. 2211 (McKinney 2005) ("A motion on notice is made when a notice of the motion *or an order to show cause is served*.") (emphasis added). *See* Mortgage Affiliates Corp. v. Jerder Realty Serv., Inc., 62 A.D.2d 591, 593, 406 N.Y.S.2d 326, 327 (App. Div. 2d Dep't 1978), *aff'd* 47 N.Y.2d 796, 391 N.E.2d 1011, 417 N.Y.S.2d 930 (1979) (motion to enter a deficiency judgment pursuant to Real Property Actions & Proceedings Law §1371 brought on by order to show cause is made when served and not when signed by judge); Slane v. Kalache, 7 Misc. 3d 717, 721, 794 N.Y.S.2d 835, 838 (Sup. Ct. Bronx County 2005) (motion for summary judgment deemed made when order to show cause served, not when papers presented to court for signing); Property Clerk, N.Y.C. Police Dept. v. Chevers, N.Y.L.J., Mar. 26, 1991, at 22 (N.Y. Sup. Ct. New York County) (where court signed order to show cause on last day for bringing motion, but movant did not serve motion until later date, motion was untimely).

require more than one form of service, and the movant must be careful to carry out all service steps ordered by the judge prior to the expiration of the relevant period in CPLR 3212(a).

C. Timeliness of Cross-Motion for Summary Judgment

Timeliness issues frequently occur in the context of cross-motions for summary judgment. CPLR 2215 authorizes a party to make a cross-motion three days prior to the time a motion is noticed to be heard, but is silent on what act constitutes the making of the cross-motion.[42] A party making a cross-motion for summary judgment should assume that the motion is "made" when the cross-motion is served, not when the original motion was served.[43] In *Bressingham v. Jamaica Hospital Medical Center*,[44] the court concluded that defendant's cross-motion for summary judgment was untimely and should not have been entertained without a showing of good cause for the delay. The court noted that the codefendant's original motion for summary judgment could have provided good cause to consider the untimely motion "had the motion and cross-motion been nearly identical."[45] This is a slim reed on which to

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[42] N.Y. C.P.L.R. 2215 (McKinney 2005). Regardless of whether a party makes a motion or cross-motion for summary judgment, the party must pay a fee of $45 if the action is pending in supreme or county court. N.Y. C.P.L.R. 8020(a) (McKinney Supp. 2006) ("[T]he county clerk shall be entitled to a fee of forty-five dollars upon the filing of each motion or cross-motion."). *See also* N.Y. C.P.L.R. 8022(b) (McKinney Supp. 2006) ("[T]he clerks of the appellate divisions of the supreme court and the clerk of the court of appeals are entitled, upon the filing of each motion or cross-motion with respect to a civil appeal or special proceeding, to a fee of forty-five dollars."). As to issues related to the fee imposed on the making of a motion or cross-motion, see generally 142 Siegel's Practice Review, *Logistics of Collecting Fees for Motions Impose Expense in Time on Courts as well as Lawyers, to the Point Even of Offsetting the Fees Collected*, at 1 (Nov. 2003); 137 Siegel's Practice Review, *As of July 14, 2003, Administrative Problems for Courts and Procedural Pitfalls for Parties Abound as Fees are Imposed for Making Motions and Cross-Motions, and Filing of Settlements is Made Mandatory (Part II)*, at 1 (July 2003); 136 Siegel's Practice Review, *Administrative Problems for Courts and Procedural Pitfalls for Parties Abound as Fees are Imposed for Making Motions and Cross-Motions, and Filing of Settlements is Made Mandatory (Part I)*, at 1 (June 2003).

[43] *Dugas,* 786 N.Y.S.2d at 713-14.

[44] 17 A.D.3d 496, 496-97, 793 N.Y.S.2d 176, 176 (App. Div. 2d Dep't 2005).

[45] *Id.* at 176. *Bressingham*'s conclusion that a court can consider a late cross-motion if it is "nearly identical" to a timely motion is based on caselaw that pre-dates *Brill*. *See* Boehme v. A Program Planned for Life Enrichment, Inc., 298 A.D.2d 540, 542, 749 N.Y.S.2d 49, 51 (App. Div. 2d Dep't 2002); Miranda v. Devlin, 260 A.D.2d 451, 452, 688 N.Y.S.2d 578, 579 (App. Div. 2d Dep't 1999). *See also* James v. Jamie Towers Hous. Co., 294 A.D.2d 268, 272, 743 N.Y.S.2d 85, 89 (App. Div. 1st Dep't 2002), *aff'd* 99 N.Y.2d 639, 640, 790 N.E.2d 1147, 1148, 760 N.Y.S.2d 718, 720 (2003); Rosa v. RH Macy Co., 272 A.D.2d 87, 87, 707 N.Y.S.2d 407, 409 (App. Div. 1st Dep't 2000). *Boehme* and *Miranda* also relied on the fact that the late cross-motions for summary judgment were meritorious and did not prejudice the respondent. *Boehme*, 749 N.Y.S.2d at 51;

establish good cause and, until the Court of Appeals approves of this linkage, the careful lawyer desiring to make a summary judgment motion should ensure that she independently satisfies CPLR 3212(a)'s time period.[46]

There is still hope for a party who can no longer cross-move for summary judgment because of a failure to comply with CPLR 3212(a)'s timing requirements. In the event that another party in the action has made a timely motion for

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Miranda, 688 N.Y.S.2d at 579. These factors can no longer be considered after *Brill* and *Miceli*. *See supra* notes 25-28 and accompanying text.

Nonetheless, in *DiMetteo v. County of Nassau*, 8 Misc. 3d at 1013(A), No. 12089-02, 2005 WL 1644921, at *1 (N.Y. Sup. Ct. Nassau County May 9, 2005), the court considered a cross-motion seeking dismissal of plaintiff's complaint, which was served 16 days after the period set by the court for making summary judgment motions had expired. The cross-motion sought dismissal of the plaintiff's complaint on the same grounds as a timely motion made by a codefendant. *Id.* at *1. The court in *DiMetteo*, while applying the rule propounded in *Bressingham*, 793 N.Y.S.2d at 176, noted that the "nearly identical" test "appears to contradict *Brill*'s core holding – that the Court has no discretion to excuse the late service of any motion for summary judgment unless there is a satisfactory explanation for the untimely motion." *DiMetteo*, 2005 WL 1644921, at *1.

That portion of Nassau County's cross-motion which sought dismissal of plaintiff's complaint was not, technically, a cross-motion. CPLR 2215's language allows a party to demand relief from a "moving party" with a cross-motion served three days prior to the return date of the main motion. N.Y. C.P.L.R. 2215 (McKinney 2005). Although the "relief need not be responsive to that demanded by the moving party," the statute contemplates that the relief be sought from the moving party. *Id*. *See* Mango v. Long Island Jewish-Hillside Med. Ctr., 123 A.D.2d 843, 844, 507 N.Y.S.2d 456, 458 (App. Div. 2d Dep't 1986) ("A cross-motion is an improper vehicle for seeking affirmative relief from a nonmoving party."). Courts will frequently forgive this technical defect if it does not result in prejudice and the nonmoving party is afforded ample opportunity to be heard on the merits of the relief sought. *See, e.g.*, Sheehan v. Marshall, 780 N.Y.S.2d 34 (App. Div. 2d Dep't 2004); *Dugas*, 786 N.Y.S.2d at 713 n.2. These factors are not, however, appropriate considerations in determining "good cause" under CPLR 3212(a). *See supra* notes 21-28 and accompanying text.

For example, in *Gaines v. Shell-Mar Foods, Inc.*, 21 A.D.3d 986, 801 N.Y.S.2d 376 (App. Div. 2d Dep't 2005), a codefendant moved for summary judgment 142 days after the note of issue was filed. Although it denominated its motion a "cross-motion," the court concluded that "its effort to 'piggyback' on its codefendant's timely motion for summary judgment is unavailing since a cross-motion can only be made for relief against a 'moving party' and the plaintiff was not a 'moving party.'" *Id*. at 377 (citations omitted). The court held that the codefendant's contentions that no prejudice resulted from delay and that its motion was meritorious were insufficient grounds to establish good cause. *Id*.

[46] Bejarano v. City of New York, 18 A.D.3d 681, 795 N.Y.S.2d 732 (App. Div. 2d Dep't 2005) (late cross-motion denied in its entirety for failure to offer satisfactory explanation; no discussion of relation of cross-motion to main motion); Thompson v. Leben Home for Adults, 792 N.Y.S.2d 597, 598 (App. Div. 2d Dep't 2005) (same); Colon v. City of New York, 15 A.D.3d 173, 173, 788 N.Y.S.2d 606, 606 (App. Div. 1st Dep't 2005) (same); Gonzalez v. ZAM Apartment Corp., 11 A.D.3d 657, 658, 782 N.Y.S.2d 922, 922-23 (App. Div. 2d Dep't 2004) (same). *But see* Osario v. BRF Constr. Co., 23 A.D.3d 202, 203, 803 N.Y.S.2d 525, 526 (App. Div. 1st Dep't 2005) (holding that motion court properly considered plaintiff's cross-motion for partial summary judgment, which, although untimely, was made in response to defendant's timely summary judgment motion).

summary judgment, the dilatory movant may obtain relief if the court "searches the record" on the underlying motion.[47] A court searches the record when, in the course of its consideration of a pending summary judgment motion, it grants summary judgment to a non-moving party.[48] This procedure is expressly authorized by CPLR 3212(b).[49] While a potent weapon, the court's search of the record is confined to those causes of action or issues which are the subject of the underlying motion.[50] Since any relief awarded to a non-moving party under a search of the record is strictly limited by the relief sought by the movant, the procedure may prove fruitless for the non-movant. The decision to search the record is the court's to make, and no request by a non-moving party is required. A party seeking relief on the back of another party's summary judgment motion should, however, ask the court to search the record, marshal the evidence favorable to her position, and highlight in her answering papers why judgment as a matter of law should be awarded in her favor.

D. Effect of Mistrial on CPLR 3212(a)'s Timing Requirements

If a mistrial occurs and a new trial is required, it will not extend the period in CPLR 3212(a). In *Hesse v. Rockland County Legislature*,[51] the trial court improperly exercised its discretion by entertaining a late motion for summary judgment, without good cause, following a mistrial. There may

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[47] N.Y. C.P.L.R. 3212(b) (McKinney 2005).

[48] *See* SIEGEL, *supra* note 36, § 282.

[49] CPLR 3212(b) provides, in pertinent part, that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." N.Y. C.P.L.R. 3212(b) (McKinney 2005).

[50] *See, e.g.*, Dunham v. Hilco Constr. Co., 89 N.Y.2d 425, 429-30, 676 N.E.2d 1178, 1180, 654 N.Y.S.2d 335, 337 (1996); Cortez v. Countrywide Ins. Co., 17 A.D.3d 508, 509, 793 N.Y.S.2d 189, 189-90 (App. Div. 2d Dep't 2005); Sullivan v. Troser Mgmt., Inc., 15 A.D.3d 1011, 1012, 791 N.Y.S.2d 231, 232 (App. Div. 4th Dep't 2005); WFR Assoc. v. Mem'l Hosp., 14 A.D.3d 840, 841, 788 N.Y.S.2d 459, 460 (App. Div. 3d Dep't 2005); Baseball Office of the Comm'r v. Marsh & McLennan, Inc., 295 A.D.2d 73, 82, 742 N.Y.S.2d 40, 48 (App. Div. 1st Dep't 2002); *see also* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3212:23 (2005); SIEGEL, *supra* note 36, § 282.

[51] 18 A.D.3d 614, 614, 795 N.Y.S.2d 339, 340 (App. Div. 2d Dep't 2005). *Cf.* Noble v. Cole, 267 A.D.2d 702, 702-03, 699 N.Y.S.2d 527, 527 (App. Div. 3d Dep't 1999) (expert testimony barred at retrial because prior order precluding it during first trial was now law of the case); Hothan v. The Metro. Suburban Bus Auth., N.Y.L.J., Nov. 21, 2002, at 24 (N.Y. Sup. Ct., Nassau County) (defendant allowed to call expert witness barred from use at first trial); *see generally* Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:29A (2005).

be circumstances, however, in which the evidence submitted at the first trial forms the basis for a subsequent summary judgment motion.[52] If this evidence was not previously available, and it forms the basis for the motion, it could form the basis of a good-cause determination.[53]

E. Cases Stricken from the Trial Calendar

If a case is stricken from the trial calendar, however, and a subsequent note of issue is filed, a new period under CPLR 3212(a) may be available for moving for summary judgment. In *Slane v. Kalache*, plaintiff served and filed a note of issue and certificate of readiness and maintained that the case was ready for trial.[54] Approximately eighteen months later, the case was stricken from the trial calendar because plaintiff's illness prevented her from proceeding to trial.[55] After the expiration of another eighteen months, the court granted plaintiff's motion to restore the case to the trial calendar, contingent upon plaintiff filing a new note of issue.[56] The *Slane* court held that "the service and filing of the second note of issue in the case, pursuant to a restoration order, constitutes a new note of issue, restarting the 120-day period within which to move for summary judgment."[57]

The result in *Slane* could lead to mischief, by awarding a dilatory party a new opportunity to move for summary judgment. For example, a case may be stricken from the trial calendar if a party fails to attend a calendar call or appears without being ready to proceed.[58] In some circumstances, this

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[52] *See* 161 Siegel's Practice Review, *Even After Mistrial, No Summary Judgment May Be Allowed*, at 2 (May 2005).

[53] *Id*.

[54] 794 N.Y.S.2d 835, 836 (Sup. Ct. Bronx County 2005). No summary judgment motion was made by any of the defendants during the pendency of the first note of issue.

[55] *Id.* The plaintiff's illness was apparently disclosed at the pretrial conference. *Id. See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.26 (2005) (requiring judge to order pretrial conference within 15 to 45 days before anticipated trial date to discuss various issues with the aim of narrowing the issues for trial).

[56] Slane v. Kalache, 794 N.Y.S.2d 835, 836 (Sup. Ct. Bronx County 2005).

[57] *Id.* at 837.

[58] N.Y. C.P.L.R. 3404 (McKinney 2005) (requiring party to restore case to trial calendar within one year from when case was "marked 'off' or struck from the calendar"; failure to restore case within one year required that it "be deemed abandoned and shall be dismissed"). *See* N.Y. COMP. CODES R. REGS., tit. 22, § 202.27 (2005) (where parties do not appear and proceed or announce their readiness to proceed, judge may, among other things, note default and dismiss action); *see generally* SIEGEL, *supra* note 36, § 376; *infra* notes 217-53 and accompanying text.

will require the filing and service of a new note of issue.[59] Courts should be circumspect in allowing a party who has caused the delay any additional time to move for summary judgment.[60] To avoid an extension of the period in CPLR 3212(a), the court could order a subsequent note of issue to be filed "nunc pro tunc," which would simply amend the original note of issue without affecting its filing date.[61] On the other hand, if a note of issue is stricken based on outstanding disclosure,[62] CPLR 3212(a)'s time period should run from the filing of the subsequent note of issue.[63]

Cases are frequently transferred from supreme court to the New York City Civil Court, either on consent[64] or without

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[59] "A case marked off pursuant to CPLR 3404 does not automatically result in the vacatur of the note of issue." Basetti v. Nour, 287 A.D.2d 126, 133, 731 N.Y.S.2d 35, 40-41 (App. Div. 2d Dep't 2001) (analyzing four possible options for court where party fails to appear or is unable to proceed after filing of note of issue). *Basetti* holds that "[i]f the court chooses to vacate the note of issue, the certificate of readiness must be incorrect in some material way. The basis for vacatur cannot be that the plaintiff failed to appear or for some other reason is unable to proceed." *Id.* at 41. *See infra* notes 231-53 and accompanying text (discussing four options for court in context of *Brill* problem).

[60] Courts have inherent authority to condition the restoration under CPLR 3404. *See, e.g.*, Indrunas v. Escher Constr. Corp., 277 A.D.2d 28, 28, 716 N.Y.S.2d 10, 11 (App. Div. 1st Dep't 2000) (plaintiffs' motion to vacate order dismissing complaint pursuant to CPLR 3404 granted, upon condition that plaintiffs' counsel pay to each separately appearing defendant $1,250); Sanchez v. Javind Apartment Corp., 246 A.D.2d 353, 353, 667 N.Y.S.2d 708, 709 (App. Div. 1st Dep't 1998) (plaintiff's motion to restore case to trial calendar granted, upon condition that plaintiff's counsel pay $5,000 to defendant); Barrada v. Target Constr. Corp., 31 A.D.2d 810, 810, 299 N.Y.S.2d 708, 708-09 (App. Div. 2d Dep't 1969) (plaintiff's motion to restore case to trial calendar granted, upon condition that costs be paid); Hood v. City of New York, 4 Misc. 3d 627, 632-33, 781 N.Y.S.2d 431, 435 (Sup. Ct. Bronx County 2004) (plaintiff's motion to restore case to trial calendar granted, upon condition that plaintiff's counsel pay $500 to municipal defendant). Therefore, courts appear to have the power to condition an order requiring the refiling of a note of issue to limit the ability to make any subsequent motions for summary judgment. *See Basetti*, 731 N.Y.S.2d at 41 ("[T]he trial court's discretion is paramount and it alone has the ability to appropriately dispose of cases appearing on the trial calendar."). Regardless of whether the court exercises this authority, a party should still be permitted to move for summary judgment "on good cause shown." N.Y. C.P.L.R. 3212(a) (McKinney 2005). *See infra* Section V.C.1 & 2 and accompanying text. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(e) (2005) also allows the vacatur of the note of issue in several circumstances. Section 202.21(f) outlines the standards for reinstating the note of issue after vacatur.

[61] In *Weitzner v. Elazarov*, 189 Misc. 2d 646, 647, 735 N.Y.S.2d 362, 363 (Sup. Ct. Kings County 2001) the court permitted the first note of issue to be amended and refiled "nunc pro tunc" to add a demand for a jury trial. "Treating the new filing 'now for then,' the new filing merely amended the prior note of issue and had the same effect as if originally filed." *Id.* Therefore, the court held that the refiling of the note of issue did not extend the time in which to make a motion for summary judgment. *Id.*

[62] *See infra* notes 83-84 and accompanying text.

[63] This will allow a party to obtain necessary disclosure for a summary judgment motion, without facing an untimeliness problem under CPLR 3212(a).

[64] N.Y. C.P.L.R. 325(c) (McKinney 2005).

it.[65] If a case is transferred to a New York City Civil Court after a note of issue has been filed, questions may arise as to whether a party may move for summary judgment in the lower court after the transfer. In *Istrefovic v. Santos*,[66] the case was transferred by supreme court to the civil court pursuant to CPLR 325(d).[67] Apparently unaware of the transfer, defendant mistakenly made an otherwise timely motion for summary judgment in the supreme court, which was returned.[68] To the moving party's chagrin, the court relied on the uniform rules of the New York City Civil Court, which generally require that transferred actions be placed on the trial calendar so they are reached for trial as if the note of issue had been originally filed in the civil court.[69] Thus, the court concluded that the motion for summary judgment subsequently served in civil court was untimely.[70] In addition, defendant failed to provide any good cause for the delay.[71]

V. WHAT CONSTITUTES "GOOD CAUSE" UNDER CPLR 3212(a)?

Demonstrating good cause is now the key to the door that CPLR 3212(a) has closed in the face of a dilatory movant. This section will first explore the matter of presenting the issue

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[65] N.Y. C.P.L.R 325(d) (McKinney 2005). *See* 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 202.13 (2005). *See generally* SIEGEL, *supra* note 36, § 27.

[66] No. 554-2002, 2004 WL 3245351 (N.Y. Civ. Ct. Bronx County Oct. 4, 2004).

[67] *Id.* at *1. A transfer under CPLR 325(d) does not require consent. N.Y. C.P.L.R. 325(d) (McKinney 2005). CPLR 3212(a)'s time period applies in the New York City Civil Courts. *See* N.Y. C.P.L.R. 101 (McKinney 2005); N.Y. CITY CIV. CT. ACT § 2102 (McKinney 2005).

[68] *Istrefovic*, 2004 WL 3245351, at *1. The motion was served and filed in the New York Supreme Court within 120 days of the filing of the note of issue in that court. The motion was "returned by the court because the motion was incorrectly served in Supreme Court." *Id.*

[69] N.Y. COMP. CODES R. & REGS. tit. 22 § 208.15 (2005) ("Actions transferred from the Supreme Court to the Civil Court of the City of New York shall be placed in such order and relative position on the appropriate calendars that they will be reached for trial insofar as practicable as if a notice of trial had been filed in the Civil Court of the City of New York for the same date as that for which the note of issue was filed in the Supreme Court.").

[70] *Istrefovic*, 2004 WL 3245351 at *1. The court observed that no new "Notice of Trial" was required to be filed in Civil Court. *Id.*; *see* 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 208.17 (2005) (governing procedure applicable to filing Notice of Trial and Certificate of Readiness in the New York City Civil Court).

[71] *Istrefovic*, 2004 WL 3245351 at *2. The defendant requested the court to entertain the delayed motion "in the interests of justice and in the absence of prejudice to the plaintiff." *Id*. The court held that these grounds do not constitute good cause under *Brill*'s holding. *See supra* notes 25-28 and accompanying text.

of good cause to the court, and will then examine recognized and potential excuses constituting good cause.

A. Adjudication of Good Cause

The issue of the timeliness of a summary judgment motion will principally arrive before a court in an affirmation of counsel, submitted in support of or in opposition to a pending motion.[72] In light of the language employed by the courts regarding the necessity of the showing of good cause to consider a belated summary judgment motion, counsel for the movant should raise this issue in her affirmation in support of the motion, and proffer good cause for the delay in making the motion.[73]

In the event that the dilatory movant fails to address the issue of good cause, the party opposing the motion should raise the issue of the timeliness of the motion in her papers opposing the motion.[74] Counsel for the party opposing the

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[72] *See, e.g.*, Dettmann v. Page, 18 A.D.3d 422, 422, 794 N.Y.S.2d 406, 406 (App. Div. 2d Dep't 2005); Koloski v. Metro. Life Ins. Co., 5 Misc. 3d 1028(A), 799 N.Y.S.2d 161, No. 600231-02, 2004 WL 2903626 (N.Y. Sup. Ct. New York County Nov. 3, 2004); Lawrence v. Kuo, 5 Misc. 3d 1019(A), No. 265971-01, 2004 WL 2683632 (N.Y. Sup. Ct. Queens County Aug. 16, 2004).

[73] *See, e.g.*, McNeill v. Menter, 19 A.D.3d 1161, 1162, 797 N.Y.S.2d 230, 231 (App. Div. 4th Dep't 2005) ("Because defendant offered no explanation for her failure to move during the 120 days after the filing of the note of issue, the court erred in excusing its untimeliness.") (citation omitted); Rivera v. Toruno, 796 N.Y.S.2d 708, 709 (App. Div. 2d Dep't 2005) ("[I]n the absence of a satisfactory explanation for the delay in filing the summary judgment motion, the motion should not have been considered, even if it appeared to be meritorious.") (citation omitted); Nobile v. Town of Hempstead, 17 A.D.3d 647, 647, 792 N.Y.S.2d 910, 910 (App. Div. 2d Dep't 2005) ("The Supreme Court improvidently exercised its discretion in considering the defendant's untimely motion for summary judgment, since the defendant failed to show good cause for the delay.") (citation omitted); Bressingham v. Jamaica Hosp. Med. Ctr., 793 N.Y.S.2d 176, 176 (App. Div. 2d Dep't 2005) ("The branch of the cross-motion of defendant Jamaica Hospital Medical Center which was for summary judgment dismissing the complaint insofar as asserted against it, made more than 120 days after the filing of the note of issue, was untimely and should not have been entertained without a showing of good cause for the delay.") (citation omitted); Kone v. Ritter Sysco Food Serv., Inc., 15 A.D.3d 627, 627-28, 789 N.Y.S.2d 902, 902 (App. Div. 2d Dep't 2005) (stating that "[t]he Supreme Court improvidently exercised its discretion in considering the untimely motion of the defendant Ritter Sysco Food Service, Inc., for summary judgment in view of its failure to offer a satisfactory explanation for not serving the motion within 120 days of the filing of the note of issue"); Thompson v. N.Y. City Bd. of Educ., 10 A.D.3d 650, 651, 781 N.Y.S.2d 617, 617 (App. Div. 2d Dep't 2004) ("The Supreme Court improvidently exercised its discretion in considering the defendant's untimely motion for summary judgment in view of the defendant's failure to offer a satisfactory explanation for not serving the motion within 120 days of the filing of the note of issue . . . .").

[74] *See, e.g.*, Barracks v. Metro North Commuter R.R., 8 Misc. 3d 1024(A), No. 122591-02, 2005 WL 1919100 (N.Y. Sup. Ct. New York County Mar. 18, 2005); Slane v. Kalache, 794 N.Y.S.2d 835, 836-37 (Sup. Ct. Bronx County 2005).

motion should highlight the amount of time the parties had to make summary judgment motions following the filing of the note of issue, and demonstrate that the subject motion was made after the allotted time. The burden will then lie with the dilatory movant to demonstrate the existence of good cause for the late motion in a reply.[75]

The issue of good cause may also be litigated through a motion for leave to make a belated summary judgment motion. Here, the dilatory movant does not move for summary judgment, but seeks permission to make a belated motion. Such a tactic was employed by the movant in *Cooper v. Hodge,*[76] in which the defendant, without seeking summary judgment, sought an extension of the period within which to make the motion. The Fourth Department reversed the order of the trial court denying the defendant's motion, but did not entertain the merits of a summary judgment motion. Rather, the court simply issued an order granting defendant leave to file the motion with the supreme court.

The procedural path illustrated in *Cooper* offers an efficient and economical alternative to the making of a late motion for summary judgment. By merely moving for permission to make a belated summary judgment motion, the movant need only submit the proof necessary to establish good cause for the motion, a quantum of proof which should pale in comparison to the proof necessary to support the summary judgment motion itself. Concomitantly, the movant, while testing the quality of its excuse for the late motion, will save time and financial resources. If the court grants permission to make a late motion for summary judgment, it should require that the motion be served promptly to avoid further delay.

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[75] *See* Singh v. Deopaul, No. 46334-01, 2005 WL 1774139, at *1-2 (N.Y. Sup. Ct. Kings County July 12, 2005). *Cf.* Home Ins. Co. v. Leprino Foods Co., 7 A.D.3d 471, 472, 777 N.Y.S.2d 472, 472-73 (App. Div. 1st Dep't 2004) ("Plaintiff's no-oral-modification argument, although raised for the first time on reply, was directly responsive to defendant's opposition to the summary judgment motion.") (citation omitted); Davison v. Order Ecumenical, 281 A.D.2d 383, 383, 721 N.Y.S.2d 282, 283 (App. Div. 2d Dep't 2001) ("The Supreme Court properly considered the arguments raised in the defendants' reply affirmation, since they were made in direct response to the plaintiffs' opposition papers.") (citation omitted).

[76] 13 A.D.3d 1111, 1112, 787 N.Y.S.2d 551, 552 (App. Div. 4th Dep't 2004); *see also* Brooks v. Ross, 24 A.D.3d 589, 808 N.Y.S.2d 358 (App. Div. 2d Dep't 2005) (supreme court properly granted defendant leave to file a late motion for summary judgment); Stimson v. E.M. Cahill Co., 8 A.D.3d 1004, 1005, 778 N.Y.S.2d 585, 585 (App. Div. 4th Dep't 2004) (holding that supreme court erred in denying defendant's motion seeking leave to serve a late motion for summary judgment).

B. Stipulation to Extend CPLR 3212(a)'s Time Period

What is a court to do if there has been a violation of CPLR 3212(a)'s timing requirements, but the parties consent or stipulate to have the untimely motion heard? Several courts, without dedicating substantial discussion to the matter, have held or indicated that the untimely motion may be entertained.[77] More recently, however, in *Balcerzak v. DNA Contracting, LLC*, the court held to the contrary.[78]

In *Balcerzak*, the parties entered into a written stipulation extending the period of time they had to move for summary judgment.[79] The stipulation was signed by counsel for each of the parties to the action prior to the filing of the note of issue.[80] Subsequently, two of the parties made summary judgment motions within the stipulated time frame, but after the court-imposed deadline.[81] While acknowledging that parties generally have the right to chart their own procedural course in litigation, the court held that the stipulation extending the time to move for summary judgment contravened the public policy of the state codified in CPLR 3212(a) and was, therefore, unenforceable.[82]

Given the legislative history of CPLR 3212(a), and the important concerns expressed by the Court of Appeals in interpreting the 1997 amendment to the statute, *Balcerak*'s

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[77] *See* Gonzalez v. Zam Apartment Corp., 11 A.D.3d 657, 782 N.Y.S.2d 922, 922 (App. Div. 2d Dep't 2004); Mignott v. Kreidman, 7 Misc. 3d 1021(A), No. 100173-2001, 2005 WL 1118074, at *1 (N.Y. Sup. Ct. New York County Mar. 15, 2005); Carvajal v. City of New York, 7 Misc. 3d 509, 511, 794 N.Y.S.2d 574, 575-76 (Sup. Ct. Kings County 2005); *see also* Buckner v. City of N.Y., 800 N.Y.S.2d 333, 336 (Sup. Ct. New York County 2005) (stating that parties could have entered into a stipulation extending the time to make summary judgment motions).

[78] 9 Misc. 3d 524, 802 N.Y.S.2d 324, 325 (Sup. Ct. Kings County 2005).

[79] *Id*.

[80] *Id.*

[81] *Id*. at 329. The action, pending in Supreme Court, Kings County, was subject to the Uniform Civil Term Rules of the Supreme Court, Kings County, Rule 13, which requires all summary judgment motions to be made within 60 days of the filing of the note of issue. *See supra* note 17 and accompanying text**.**

[82] *Balcerzak*, 802 N.Y.S.2d at 329. The parties, having failed to obtain a judicially sanctioned extension of time (e.g., "so-ordered" stipulation), had their motions denied as untimely. *Id*. *See* Powers v. Solomon, 4 Misc. 3d 1007(A), 791 N.Y.S.2d 872, No. 01-0222, 2004 WL 1586886, at *1 (Sup. Ct. Greene County July 13, 2004) (motions timely made under agreement between parties, but outside time frame established by court, denied in absence of good cause); Eighteen Assocs., LLC v. Nanjim Leasing Corp., 4 Misc. 3d 1004(A), 791 N.Y.S.2d 869, No. 12554-97, 2004 WL 1488393, at *3 (Sup. Ct. Kings County June 29, 2004) ("While it is understandable that the parties herein do not want to relitigate this matter, and as alleged, the granting of summary judgment may 'streamline' the issues and reduce the litigation, that fact alone does not form the basis for 'good cause shown.'").

conclusion more closely comports with the purpose of the rule limiting the time within which to make a motion for summary judgment.

C. Demonstrating Good Cause

Broadly stated, good cause is established under CPLR 3212(a) if the movant proffers a reasonable explanation for the delay in moving for summary judgment. The ingredients constituting good cause under the facts of a particular case will vary, but certain trends are emerging.

1. Outstanding Disclosure

This heading, at first glance, might lead to confusion. The general period within which to obtain pretrial disclosure terminates with the filing of the note of issue and its loyal companion, the certificate of readiness.[83] Therefore, under the design of the CPLR and the Uniform Rules, all parties will have completed disclosure by the date on which the note of issue has been filed and will have sufficient time to move for summary judgment within the confines of CPLR 3212(a). If a party is served with a note of issue and certificate of readiness prior to the completion of disclosure, the proper remedy is to promptly move to vacate the note of issue and identify any outstanding disclosure.[84] The caselaw in this area

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[83] N.Y. C.P.L.R. 3402(a) (McKinney 2005) (service and filing of note of issue places case on trial calendar); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(a) (2005) (note of issue must be accompanied by certificate of readiness in the form prescribed by this section). The certificate of readiness form requires, among other things, that the party filing the document verify that disclosure is completed. N.Y. COMP. CODE R. & REGS. tit. 22, § 202.21(b) (2005). A party is only entitled to disclosure after the filing of the note if she can establish that "unusual or unanticipated circumstances" warrant it. N.Y. COMP. CODE R. & REGS. tit. 22, § 202.21(d) (2005).

[84] N.Y. COMP. CODE R. & REGS. tit. 22, § 202.21(e) (2005) (party must move to vacate note of issue and certificate of readiness within 20 days after service; however, a party may belatedly move upon a showing of good cause, and court may vacate note if it appears that material fact in certificate of readiness is incorrect). *See, e.g.*, Blamer v. Singh, 20 A.D.3d 440, 441, 797 N.Y.S.2d 777, 777 (App. Div. 2d Dep't 2005) (Supreme Court properly vacated note of issue, sua sponte, based on misrepresentation contained in certificate of readiness); Simon v. City of Syracuse Police Dept., 13 A.D.3d 1228, 1229, 787 N.Y.S.2d 577, 578 (App. Div. 4th Dep't 2004) (In light of "the patent untruth of plaintiff's certification that discovery had been waived, was unnecessary, or had been completed. . . . [T]he court should have exercised its power to treat the note of issue as a nullity and to vacate it sua sponte." (citation omitted)); Costanza v. Skyline Towers 5, 8 A.D.3d 524, 525, 778 N.Y.S.2d 720, 721 (App. Div. 2d Dep't 2004) ("Supreme Court improvidently exercised its discretion in denying that branch of the appellant's motion which was to vacate the note of issue in order to permit it to conduct discovery proceedings." (citation omitted)); Lynch v. Vollono, 6 A.D.3d 505, 505, 774 N.Y.S.2d 433, 433 (App. Div. 2d Dep't 2004) ("A note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts, such as that

demonstrates, however, that disclosure frequently takes place after the filing of the note of issue with the consent of the parties and/or the court's blessing.

There are many circumstances in which a party, usually the plaintiff, files a note of issue prematurely to secure a place on the trial calendar or to comply with a preliminary conference order. In *Gonzalez v. 98 Mag Leasing Corp.*,[85] for example, defendants moved to vacate the note of issue filed by plaintiff because two fact witnesses had not yet been produced pursuant to a court order. The court declined to vacate the note of issue, but granted defendants' motion to the extent of allowing disclosure to continue.[86] The fact witnesses ultimately provided favorable testimony for the defendants, which was used in support of their motion for summary judgment. Although the motion was made long after the 120-day period in CPLR 3212(a) had expired, the Court of Appeals held that the supreme court properly exercised its discretion in concluding that there was good cause to entertain it. The Court emphasized that defendants promptly moved to vacate the note of issue due to the outstanding disclosure and moved for summary judgment "shortly" after the depositions were concluded.[87] The procedural history in *Gonzalez* is somewhat

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discovery has been completed."); Munoz v. 147 Corp., 309 A.D.2d 647, 648, 767 N.Y.S.2d 1, 2 (App. Div. 1st Dep't 2003) ("The recital in the certificate of readiness that discovery is complete is obviously incorrect since defendants have not yet been able to identify and depose essential firefighter witnesses and, thus, the motion to strike the note of issue should have been granted." (citation omitted)); *see generally* Vasquez v. Gomez, 7 Misc. 3d 958, 796 N.Y.S.2d 869 (Sup. Ct. Bronx County 2005); Bouilland v. Angulo, No. 114116-01, 2004 WL 2941569, at *1 (N.Y. Sup. Ct. New York County Sept. 27, 2004); 160 Siegel's Practice Review, *Late Summary Judgment Motion*, at 4 (Apr. 2005).

[85] 95 N.Y.2d 124, 126-27, 733 N.E.2d 203, 204-05, 711 N.Y.S.2d 131, 132-133 (2000).

[86] *Cf.* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(d) (2005) (where party is prevented from filing note of issue and certificate of readiness because of reasons beyond her control, court, upon motion supported by affidavit, may permit party to file note of issue upon such conditions as court deems appropriate); *see also* Certified Elec. Contracting Corp. v. City of New York, 23 A.D.3d 596, 598, 804 N.Y.S.2d 794, 796 (App. Div. 2d Dep't 2005) (order of court stayed parties from moving for summary judgment pending completion of disclosure after filing of note of issue).

[87] *Gonzalez*, 711 N.Y.S.2d at 134. In *Espejo v. Hiro Real Estate Co.*, 19 A.D.3d 360, 361, 796 N.Y.S.2d 162, 163 (App. Div. 2d Dep't 2005), the court determined that, although defendant established good cause for its failure to move for summary judgment during the initial 120-day period following the filing of the note of issue, good cause for a late motion was lacking because defendant offered no excuse for the ensuing five-month delay between obtaining the necessary disclosure and moving for summary judgment. *Espejo* relied on *Gonzalez*, in which the motion was made "shortly" after the essential disclosure was complete. *Id*. *See* Perini Corp. v. City of N.Y., 789 N.Y.S.2d 29, 31 (App. Div. 1st Dep't 2005). In light of *Espejo* and *Perini* it is clear that a dilatory

atypical, but its facts established grounds for good cause in a case involving the common problem of delayed disclosure.[88]

In *Kunz v. Gleeson*, which also involved disclosure obtained after the filing of the note of issue, the defendant moved for summary judgment approximately two weeks after the deadline set by the court.[89] The Second Department determined that defendant established good cause for the "slight delay" because the independent medical exams of the plaintiff were not conducted until after the note of issue had been filed.[90] This delayed disclosure, coupled with the fact that the results of the exams provided the evidentiary basis for the motion for summary judgment, established good cause to entertain the late motion.[91] Similarly, in *Cooper v. Hodge*, disclosure was not yet completed at the time of the filing of the note of issue.[92] Rather than moving to vacate the note of issue, defendant sought an extension of the 120-day period in CPLR 3212(a) until after disclosure was complete.[93] Defendant labored under the belief that he had obtained the extension, but the trial court ultimately rejected the motion as untimely.[94] The Fourth Department reversed, noting that the attorneys for both sides believed the court had granted an extension of time to move for summary judgment and concluding that defendant established good cause to entertain the motion.[95]

Despite this Appellate Division caselaw, parties planning to move for summary judgment on the basis of delayed disclosure after CPLR 3212(a)'s limitation period has expired are asking for trouble on several fronts if they have not attempted to vacate the note of issue. In *Gonzalez*, the defendant promptly moved to vacate the note of issue and identified the significance of the outstanding disclosure. Although the trial court did not grant the requested relief, it expressly permitted the outstanding disclosure to be completed,

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movant must account for the entire period of delay (i.e., demonstrate good cause) when making a belated summary judgment motion.

[88] *Cf.* Orenstein v. Brum, __ A.D.3d __, 811 N.Y.S.2d 644, 2006 WL 722167 (App. Div. 1st Dep't 2006) (finding good cause for delayed motion because defendants could not know precisely what claims they would be moving against until the motion to amend plaintiff's complaint was decided).

[89] 9 A.D.3d 480, 481, 781 N.Y.S.2d 50, 51 (App. Div. 2d Dep't 2004).

[90] *Id.*

[91] *Id.*

[92] 787 N.Y.S.2d 551, 552 (App. Div. 4th Dep't 2004).

[93] *Id.*

[94] *Id.*

[95] *Id.*

thereby laying the groundwork for establishing good cause to extend CPLR 3212(a)'s time frame.[96]

Conversely, a party who fails to timely move to vacate the note of issue faces substantial difficulties on at least two fronts. If an adversary will not cooperate and provide disclosure after the filing of the note of issue, the party may be required to establish that "unusual or unanticipated circumstances" have developed since the filing to secure a court order requiring the disclosure.[97] Finally, and most significantly, if the party seeks to move for summary judgment after obtaining the materials through delayed disclosure, CPLR 3212(a)'s time periods will likely have expired, requiring a showing of good cause. In this regard, *Kunz*[98] and other cases have held that delayed disclosure can only constitute good cause where the evidence forming the basis for the motion for summary judgment was acquired after the filing of the note of issue.[99]

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[96] *Cf.* Certified Elec. Contracting Corp. v. City of New York, 18 A.D.3d 596, 597, 795 N.Y.S.2d 325, 326-27 (App. Div. 2d Dep't 2005) (good cause existed for late motion and cross-motion for summary judgment where court stayed all parties from moving for summary judgment pending the completion of discovery, and note of issue was conditioned upon completion of discovery); Quizhpi v. Lochinvar Corp., 12 A.D.3d 252, 252, 785 N.Y.S.2d 431, 431 (App. Div. 1st Dep't 2004) (good cause existed for allowing late motion for summary judgment "where the court acquiesced in, and had actual knowledge of, ongoing discovery subsequent to the filing of the note of issue"); Ramirez v. Wyeth Laboratories, Inc., 179 Misc. 2d 764, 768, 686 N.Y.S.2d 602, 605 (Sup. Ct. New York County 1999) (stating that "because the note of issue was filed prematurely largely due to the directions of the court, it cannot be said that [defendant] has failed to establish good cause for the late filing of the summary judgment motion").

[97] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(d) (2005). *See, e.g.*, Gomez v. N.Y. City Trans. Auth., 19 A.D.3d 366, 366, 795 N.Y.S.2d 909, 910 (App. Div. 2d Dep't 2005); Candray v. Eicher, 19 A.D.3d 352, 352, 795 N.Y.S.2d 908, 908 (App. Div. 2d Dep't 2005); Esteva v. Catsimatidis, 4 A.D.3d 210, 210-11, 772 N.Y.S.2d 267, 268 (App. Div. 1st Dep't 2004); Karakostas v. Avis Rent A Car Systems, 306 A.D.2d 381, 382, 761 N.Y.S.2d 283, 283 (App. Div. 2d Dep't 2003); Rodriguez v. Sau Wo Lau, 298 A.D.2d 376, 377, 751 N.Y.S.2d 231, 231 (App. Div. 2d Dep't 2002); Rinker v. Oberoi, 288 A.D.2d 873, 874, 732 N.Y.S.2d 787, 788 (App. Div. 4th Dep't 2001); Di Matteo v. Grey, 280 A.D.2d 929, 930, 721 N.Y.S.2d 182, 183 (App. Div. 4th Dep't 2001); Francis v. Board of Educ. of the City of Mount Vernon, 278 A.D.2d 449, 449, 717 N.Y.S.2d 660, 661 (App. Div. 2d Dep't 2000); Philpott v. Bernales, 196 Misc. 2d 117, 118, 762 N.Y.S.2d 771, 772 (App. Div. 2d Dep't 2003).

[98] Kunz v. Gleeson, 781 N.Y.S.2d 50, 51 (App. Div. 2d Dep't 2004).

[99] Brown v. City of New York, 6 Misc. 3d 1017(A), No. 20673-2001, 2005 WL 263964, at *2 (N.Y. Sup. Ct. Bronx County Jan. 12, 2005); *see* Smith v. Nameth, 807 N.Y.S.2d 411, 412 (App. Div. 2d Dep't 2006) (affidavit obtained from defendant bus driver constituted "good cause" for delayed motion where it was not wholly duplicative of his deposition testimony and was "necessary for motion"); LoGrasso v. Myer, 16 A.D.3d 1089, 1089, 790 N.Y.S.2d 919, 919 (App. Div. 4th Dep't 2005); Gonzalez v. Zam Apartment Corp., 782 N.Y.S.2d 922, 922 (App. Div. 2d Dep't 2004); Caiola v. Allcity Ins. Co., 277 A.D.2d 273, 273-74, 715 N.Y.S.2d 736, 737 (App. Div. 2d Dep't 2000); *see*

This required linkage between the disclosure obtained after the filing of the note of issue and the grounds for the summary judgment motion presents dilemmas for the dilatory movant, which should be avoided at all costs. Even if the movant believes the disclosure will strengthen the motion, there is a significant chance that it will prove fruitless. If so, the movant may now be unable to establish good cause to allow for a late motion. Therefore, lawyers in these circumstances may prefer to forego further disclosure, make a timely motion, and simply rely on the proof already obtained. This also avoids the risk of a court determining that the disclosure should have been obtained earlier, foreclosing any finding of good cause.[100]

2. Other Potential Excuses Constituting "Good Cause"

While issues related to outstanding disclosure have dominated the attention of the courts in addressing good cause under CPLR 3212(a), several other excuses for belated summary judgment motions have also been considered.

CPLR 3116(a), governing the procedure for signing a deposition, provides the deponent sixty days, running from submission of the transcript to the deponent, in which to make changes to the transcript.[101] Therefore, occasions will arise where a movant cannot satisfy CPLR 3212(a)'s time frame because she is required to wait for the return of a corrected, signed deposition transcript that will provide the evidentiary basis for the summary judgment motion.[102] The courts have

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also Espejo v. Hiro Real Estate Co., 796 N.Y.S.2d, 162, 163 (App. Div. 2d Dep't 2005) (witness's testimony was not essential to making motion); First Union Auto Fin., Inc. v. Donat, 16 A.D.3d 372, 373-74, 791 N.Y.S.2d 596, 597 (App. Div. 2d Dep't 2005); Buckner v. City of New York, 800 N.Y.S.2d 333, 337 (Sup. Ct. New York County 2005).

[100] *See* Czernicki v. Lawniczak, 25 A.D.3d 581, 582, 806 N.Y.S.2d 876, 877 (App. Div. 2d Dep't 2006) (noting that no excuse was offered as to why it took plaintiff more than two and one-half years to complete whatever disclosure remained after the filing of the note of issue); Dettmann v. Page, 794 N.Y.S.2d 406, 406-07 (App. Div. 2d Dep't 2005); *Espejo*, 796 N.Y.S.2d at 163 (late movant, who had access to witness's testimony at any time, could not establish good cause for delay).

[101] N.Y. C.P.L.R. 3116(a) (McKinney 2005). *See* Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3116:1 (2005) (discussing caselaw precluding the use of unsigned transcripts in situations where CPLR 3116(a)'s requirements have not been met). "If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed." N.Y. C.P.L.R. 3116(a) (McKinney 2005). *See, e.g.*, Ireland v. Geico Corp., 2 A.D.3d 917, 918, 768 N.Y.S.2d 508, 510 (App. Div. 3d Dep't 2003); Zabari v. City of New York, 242 A.D.2d 15, 17, 672 N.Y.S.2d 332, 333 (App. Div. 1st Dep't 1998); Thomas v. Hampton Express, Inc., 208 A.D.2d 824, 825, 617 N.Y.S.2d 831, 832 (App. Div. 2d Dep't 1994).

[102] This circumstance has been recognized as a valid basis for making a motion on the eve of trial, even before the amendment of CPLR 3212(a). *See* Kule Res., Ltd. v. Reliance Group, Inc., 427 N.Y.S.2d 612, 613 (N.Y. 1980) (per curiam) ("When

been sympathetic to movants in this situation, and have found good cause to entertain belated summary judgment motions.[103]

Attorneys facing trying personal situations may also find refuge in the arms of CPLR 3212(a)'s good cause provision. In *Stimson v. E.M. Cahill Company, Inc.*,[104] both the movants' attorney and the attorney's secretary had family emergencies occur on the last day on which to make the summary judgment motion, which prevented them from coming to the office. Resultantly, the motion, which had already been prepared, was not served until two days later.[105] The movants sought leave to serve a late motion based upon the circumstances which befell counsel and her secretary. The Fourth Department reversed the order of supreme court, which denied the movants' motion seeking leave to serve a summary judgment motion, and granted the motion, concluding that the movants had demonstrated "an adequate explanation . . . for the *de minimis* delay . . . ."[106]

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the reason for delay is to complete depositions, which as the Appellate Division found was essential to the making of the motion, denial of the motion as untimely is error." (citation omitted)). If the deposition transcript will not provide the evidentiary basis for the motion for summary judgment, the movant will be unable to establish good cause. *See Kunz*, 781 N.Y.S.2d at 51; *supra* notes 90-91 and accompanying text.

[103] *See* Burnell v. Huneau, 1 A.D.3d 758, 760, 767 N.Y.S.2d 163, 164 (App. Div. 3d Dep't 2003); Fainberg v. Dalton Kent Sec. Group, Inc., 268 A.D.2d 247, 248, 701 N.Y.S.2d 41, 42 (App. Div. 1st Dep't 2000). *See also* Gaffney v. BFP 300 Madison II, LLC, 18 A.D.3d 403, 403, 795 N.Y.S.2d 579, 579 (App. Div. 1st Dep't 2005). The party moving for summary judgment should do so promptly after the expiration of the sixty-day period. Any significant delay beyond the expiration of the sixty-day period in CPLR 3116(a) will likely foreclose a party from establishing good cause under CPLR 3212(a). *Espejo*, 796 N.Y.S.2d at 163 (court determined good cause under CPLR 3212(a) was lacking because defendant did not move for summary judgment "shortly" after obtaining necessary disclosure).

[104] 8 A.D.3d 1004, 1004, 778 N.Y.S.2d 585, 585 (App. Div. 4th Dep't 2004).

[105] *Id.* at 585. Service, not filing, marks the point at which a motion is made. N.Y. C.P.L.R. 2211 (McKinney 2005). *See* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2211:4 (1991); SIEGEL, *supra* note 36, § 243; *supra* notes 36-43 and accompanying text.

[106] *Stimson*, 778 N.Y.S.2d at 585 (quoting Luciano v. Apple Maintenance & Servs., Inc., 289 A.D.2d 90, 91, 734 N.Y.S.2d 153, 154 (App. Div. 1st Dep't 2001) (emphasis added)). *See* Centeno v. Metro. Transp. Auth. Long Island Bus, 193 Misc.2d 617, 619, 749 N.Y.S.2d 704, 706-07 (Sup. Ct. Nassau County 2002) (illness and hospitalization of movant's attorney's mother constituted good cause for late summary judgment motion); *see also* Newsday, Inc. v. Nelkenbaum, 8 Misc. 3d 1005(A), No. 303823-03, 2005 WL 1490263, at *1 (N.Y. Civ. Ct. Kings County June 23, 2005) ("Defendant's motion for summary judgment was timely filed [the Notice of Trial is dated September 21, 2004, and the motion was made on January 4, 2005]. Defendant's counsel's illness constitutes good cause for not having his motion heard on its original return date, and because of the circumstances, this Court is considering the instant motion, with all the same papers, *nunc pro tunc*.").

Another example of good cause is found in *Trump Village Section 3, Inc. v. New York Housing Finance Agency*.[107] In *Trump*, the First Department excused a belated motion for summary judgment, made on renewal,[108] which was premised on a subsequent appellate determination in the case that could not have been timely raised in the original moving papers.[109] Moreover, the appellate decision addressed a potentially determinative issue in the case. *Trump* presents a compelling example of good cause, but it is not one that a lawyer can rely on in advance.

Can a movant's efforts at attempting to secure a discontinuance of the action excuse her delay in making a timely summary judgment motion? Maybe,[110] maybe not.[111] Regardless of support in the caselaw for this excuse, the safest practice would be to promptly make the motion, as it can be withdrawn if efforts to obtain a discontinuance later prove successful.[112] Similarly, litigation strategy should not constitute good cause, as demonstrated by *McNeill v. Menter*.[113] In *McNeill*, defendant moved for summary judgment more than four months after the expiration of CPLR 3212(a)'s time period.[114] Defendant argued that there was good cause for the delay because she was waiting for the expiration of plaintiff's

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[107] 307 A.D.2d 891, 893-94, 764 N.Y.S.2d 17, 20 (App. Div. 1st Dep't 2003), *leave to appeal denied*, 1 N.Y.3d 504, 775 N.Y.S.2d 780, 807 N.E.2d 893 (2003); *see also* Bullard v. St. Barnabas Hosp., __ A.D.3d __, 810 N.Y.S.2d 78 (App. Div. 1st Dep't 2006) (finding good cause to entertain late summary judgment motion where arguments of issue preclusion and law of the case could not have been raised until after order dismissing action against codefendants).

[108] A motion for renewal, or for leave to renew, is the procedural device whereby a party seeks to alter a prior order disposing of a motion by injecting additional proof not submitted on the initial motion. N.Y. C.P.L.R. 2221(e) (McKinney 2005). *See* SIEGEL, *supra* note 36, § 254.

[109] *Trump*, 764 N.Y.S.2d at 20-21. *Trump* also concluded that because the motion addressed a "threshold, potentially determinative issue, its consideration in advance of trial was in the interest of judicial economy." *Id.* at 21 (citation omitted). This ground can no longer establish good cause in light of the Court of Appeals' subsequent holding in *Brill*. *See supra* notes 25-28 and accompanying text.

[110] Lawrence v. Kuo, No. 26597-01, 2004 WL 2683632, at *1 (N.Y. Sup. Ct. Queens County Aug. 16, 2004).

[111] Bouilland v. Angulo, No. 114116-01, 2004 WL 2941569, at *2 (N.Y. Sup. Ct. New York County Sept. 27, 2004).

[112] *Cf.* SIEGEL, *supra* note 36, § 56 (where parties are engaged in pre-action settlement talks, plaintiff should commence action as precautionary measure to avoid running afoul of statute of limitations). The party could also seek leave to serve a late motion for summary judgment in advance of the expiration of the time period in CPLR 3212(a). *See supra* note 76 and accompanying text.

[113] 797 N.Y.S.2d 230, 231 (App. Div. 4th Dep't 2005).

[114] *Id.* at 230-31.

time to appeal from an order that had already granted summary judgment to two other defendants.[115] This tactic, better known under the rubric of letting sleeping dogs lie until it is too late, did not support a late motion.[116]

Even ignorance has formed the basis of a good cause determination under CPLR 3212(a). In *Koloski v. Metropolitan Life Ins. Co.*,[117] the preliminary conference order required summary judgment motions to be made within sixty days of the filing of the note of issue. The movants' attorney, who was substituted as counsel after the preliminary conference, was unaware of this requirement.[118] Operating under the assumption that she had one hundred and twenty days from the filing of the note of issue to make the motion, she made the motion on the one hundred and twentieth day.[119] The court concluded that this error was sufficient to constitute good cause because the delay was "minimal."[120] The holding in *Koloski* should be contrasted with the rather harsh and somewhat more prevalent approach in *Greenfield v. Gluck,*[121] where the court determined that ignorance of CPLR 3212(a)'s deadline was insufficient to establish good cause, despite the fact that the movants were pro se litigants.

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[115] *Id.*

[116] *Id.* at 231. The court noted that the motion of the other two defendants was argued approximately one month after the expiration of CPLR 3212(a)'s time frame.

[117] 5 Misc.3d at 1028(A), 799 N.Y.S.2d 161, No. 600231-02, 2004 WL 2903626, at *1 (N.Y. Sup. Ct. New York County Nov. 3, 2004).

[118] *Id.*

[119] *Id.* at *2.

[120] *Id. See* Neuberger v. Barron, N.Y.L.J., Mar. 30, 2005 at 22 (Sup. Ct. New York County) (current counsel's unawareness of 60-day deadline for making of summary judgment motions constituted "law office failure," and, under the circumstances, good cause for belated motion).

Similarly, "good cause" has been established in cases predating *Brill* where the movant was never served with the note of issue. Cibener v. City of New York, 268 A.D.2d 334, 701 N.Y.S.2d 405 (App. Div. 1st Dep't 2000). *See also* Brunetti v. City of New York, 286 A.D.2d 253, 728 N.Y.S.2d 665 (App. Div. 1st Dep't 2001) (holding that plaintiff's claimed violation of CPLR 3212(a) was not supported with satisfactory proof of dates of filing and service of note of issue).

[121] No. 2002-1092 K C, 2003 WL 1961333, at *1 (N.Y. App. Term. 2d & 11th Jud. Dists. 2003); *see* Singh v. Deopaul, No. 46334-01, 2005 WL 1774139, at *2 (N.Y. Sup. Ct. Kings County July 12, 2005) (law office failure, consisting of counsel's erroneous diary entry for the summary judgment deadline, insufficient excuse to constitute good cause); Istrefovic v. Santos, No. 554-2002, 2004 WL 3245351, at *1-2 (N.Y. Civ. Ct. Bronx County Oct. 4, 2004) (after action was transferred to New York City Civil Court pursuant to CPLR 325[d], attorney mistakenly moved for summary judgment in supreme court; court found absence of good cause for late motion in New York City Civil Court).

3. "Good Cause" – CPLR 3212(a) vs. CPLR 2004

The ignorance excuse proffered by movants' counsel and accepted by the court in *Koloski*[122] resembles "law office failure," a ubiquitous phrase in New York caselaw discussing time extensions. CPLR 2005, which directly addresses law office failure, allows a court to excuse delay or default resulting from law office failure when relief is sought to extend the time to appear or plead, to compel acceptance of an untimely pleading,[123] or to vacate a judgment or order on the ground of excusable default.[124]

Law office failure may also constitute "good cause" under CPLR 2004, which allows a court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."[125] Although CPLR 3212(a) and CPLR 2004 both employ the phrase "good cause," the caselaw interpreting CPLR 2004 instructs courts to consider factors such as length of delay, the reason given for the delay, any prejudice to opposing parties caused by the delay, whether the moving party was in default before seeking the extension, and whether an affidavit of merit was proffered.[126] Therefore, in light of *Brill*'s creed that the absence of prejudice and the merits of an untimely motion for summary judgment are not part of the equation in calculating good cause under CPLR 3212(a),[127]

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[122] *Koloski,* 2004 WL 2903626 at *1-2; *see Neuberger*, N.Y.L.J., Mar. 30, 2005, at 22.

[123] N.Y. C.P.L.R. 3012(d) (McKinney 2005) ("Service of pleadings and demand for complaint, Extension of time to appear or plead.").

[124] N.Y. C.P.L.R. 5015(a) (McKinney 2005) ("Relief from judgment or order, On motion."). *See* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2005, at 703 (1992).

[125] N.Y. C.P.L.R. 2004 (McKinney 2005); Tewari v. Tsoutsouras, 75 N.Y.2d 1, 12-13, 550 N.Y.S.2d 572, 577, 549 N.E.2d 1143, 1148 (1989); *In re* Estate of Burkich, 12 A.D.3d 755, 755, 785 N.Y.S.2d 137, 138 (App. Div. 3d Dep't 2004); Brusco v. Davis-Klages, 302 A.D.2d 674, 674-75, 754 N.Y.S.2d 725, 735 (App. Div. 3d Dep't 2003); Scritchfield v. Perry, 245 A.D.2d 1054, 1054, 667 N.Y.S.2d 584, 585 (App. Div. 4th Dep't 1997). CPLR 2004, one of the most commonly cited provisions in civil practice, is employed to extend the time fixed to perform a myriad of acts, including, among other things, the making of a motion pursuant to CPLR 4404 to set aside a verdict. *See, e.g.*, Johnson v. Suffolk County Police Dep't, 245 A.D.2d 340, 341, 665 N.Y.S.2d 440, 440-41 (App. Div. 2d Dep't 1997); Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2004, at 692 (1997).

[126] *See, e.g.*, *Tewari*, 550 N.Y.S.2d at 577; *In re* Estate of Burkich, 785 N.Y.S.2d at 138; Saha v. Record, 762 N.Y.S.2d 693, 695-96 (App. Div. 3d Dep't 2003). *See also* Grant v. City of New York, 793 N.Y.S.2d 35 (App. Div. 1st Dep't 2005).

[127] Brill v. City of New York, 781 N.Y.S.2d 261 (N.Y. 2004).

lawyers must be cautious when applying decisions interpreting good cause under CPLR 2004 and other provisions to timeliness issues arising under CPLR 3212(a). The elements for establishing good cause under CPLR 2004 are distinct from the factors considered in determining good cause under CPLR 3212(a). In any event, the courts have expressed reluctance to accept perfunctory claims of law office failure as good cause under CPLR 3212(a).[128]

VI. EXTENSION OF TIME PERIODS ESTABLISHED BY COURT RULE OR ORDER

All three of the cases decided by the Court of Appeals concerning CPLR 3212(a)'s deadlines have involved the 120-day period for making summary judgment motions.[129] Courts are now struggling with the related issue of whether *Brill*'s constraints also apply when they have set their own deadlines for moving for summary judgment.

In a somewhat anomalous decision, one court has held that court imposed deadlines can be extended absent good

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[128] *See* Breiding v. Giladi, 15 A.D.3d 435, 435, 789 N.Y.S.2d 449, 449-50 (App. Div. 2d Dep't 2005) ("defendants' perfunctory claims of unspecified clerical inadvertence and reassignment of counsel were insufficient to constitute good cause for the delay" in making their summary judgment motion); DiFusco v. Wal-Mart Discount Cities, 255 A.D.2d 937, 937, 680 N.Y.S.2d 377, 378 (App. Div. 4th Dep't 1998) (movant's attorney's excuse that he was too busy to make timely motion was inadequate); Barracks v. Metro North Commuter R.R., No. 122591-2, 2005 WL 1919100, at *1 (N.Y. Sup. Ct. New York County Mar. 18, 2005) (movant's attorney's excuse that case became "unwieldy" due to the number of defendants involved and that record was voluminous was insufficient to demonstrate good cause); Gutierrez v. State of New York, No. 107946, (Ct. Cl. Sept. 22, 2004), *available at* http://court.acmenet.net/lpBin21/lpext.dll/Claims_2004/b8a9 (last visited Feb. 3, 2006) (claimant's perfunctory excuse for failure to move for summary judgment within time frame ordered by court does not establish good cause); *cf.* Hosp. for Joint Diseases v. Elrac, Inc., 11 A.D.3d 432, 433, 783 N.Y.S.2d 612, 614 (App. Div. 2d Dep't 2004) (defendant's motion to vacate default judgment entered against it granted where plaintiff, among other things, established reasonable excuse for the default; defendant submitted the affirmation of counsel which provided detailed explanation of the affirming counsel's oversights that led to the default); Goldman v. Cotter, 10 A.D.3d 289, 291, 781 N.Y.S.2d 28, 31 (App. Div. 1st Dep't 2004) (plaintiff's motion to vacate order entered on default granted where plaintiff, among other things, established reasonable excuse for default; affidavit of plaintiff's counsel specified occurrences of law office failure that led to default); Leader v. Maroney, Ponzini & Spencer, 276 A.D.2d 194, 195, 718 N.Y.S.2d 374, 378 (App. Div. 2d Dep't 2000), *aff'd* 97 N.Y.2d 95, 761 N.E.2d 1018, 736 N.Y.S.2d 291 (2001) (plaintiff's counsel's error in concluding that original version of CPLR 306-b applied to action did not constitute "good cause" to extend time for service under CPLR 306-b). *But see* Neuberger v. Barron, N.Y.L.J., Mar. 30, 2005, at 22; Koloski v. Metro. Life Ins. Co., No. 600231-02, at *2, 2004 WL 2903626 (N.Y. Sup. Ct. New York County Nov. 3, 2004).

[129] Brill v. City of New York, 781 N.Y.S.2d 261, 263-64 (N.Y. 2004); Miceli v. State Farm Mut. Auto. Ins., 786 N.Y.S.2d 379, 380 (N.Y. 2004); Gonzalez v. 98 Mag Leasing Corp., 711 N.Y.S.2d 131, 132-34 (N.Y. 2000).

cause. In *Hernandez v. 620 West 189th Ltd. Partnership*, the local uniform rules imposed a 60-day deadline for making summary judgment motions pursuant to the authority vested in CPLR 3212(a).[130] The court in *Hernandez* concluded that it had discretion to extend its own court-imposed deadline, even in the absence of good cause.[131] The legislative policy supporting the enactment of the 120-day maximum in CPLR 3212(a) is, the court reasoned, not applicable with respect to court-imposed deadlines for making summary judgment motions.[132] Thus, *Hernandez* held that courts have the discretion to disregard a self-imposed deadline for making a summary judgment motion to "accommodate a genuine need,"[133] and could extend their own deadlines in the absence of good cause so long as they do not exceed the 120-day ceiling.[134]

Where, as in *Hernandez*, the court has imposed its own deadline for moving for summary judgment, CPLR 3212(a)'s language is somewhat awkward. A literal reading of the statute indicates that the ability to extend the time for making a summary judgment motion for good cause only pertains to the 120-day period imposed in the absence of a court rule. The sentence authorizing the court to set its own deadline for making summary judgment motions does not contain a clause authorizing the extension of such a period.[135]

This problem appears to be a drafting oversight. The legislative history supporting the 1997 amendment to CPLR 3212(a) refers to both a court-imposed deadline and the 120-day period, concluding that "[e]ither date could be extended by

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[130] Hernandez v. 620 W. 189th Ltd. P'ship, 792 N.Y.S.2d 822, 823 (Sup. Ct. New York County 2005). *See* N.Y. COUNTY SUPREME COURT CIVIL BRANCH, R. 17, *available at* http://www.courts.state.ny.us/supctmanh/uniform_rules.htm (last visited Jan. 25, 2006).

[131] *Hernandez*, 792 N.Y.S.2d at 823. *But see* Bouilland v. Angulo, No. 114116-01, 2004 WL 2941569, at *1-2 (N.Y. Sup. Ct. New York County Sept. 27, 2004) (applying *Brill*'s good cause constraint to 60-day deadline set by court).

[132] *Hernandez*, 792 N.Y.S.2d at 824.

[133] *Id.*

[134] *Id.* Ultimately, the court refused to exercise its discretion to extend the sixty day limitation. *Id*. *See also* Keskeny v. 409 E. 87, LLC, 10 Misc. 3d 1057(A), No. 116755-03, 2005 WL 3369351 (Sup. Ct. New York County 2005) (rejecting strict interpretation of sixty day court rule).

[135] N.Y. C.P.L.R. 3212(a) (McKinney 2005). The sentence authorizing a court to set its own time frame for making summary judgment motions requires that the parties be allowed at least thirty days from the filing of the note of issue for the making of the motion, but no maximum. *Id.* Apparently a court could, if it so desired, set a date outside 120 days from the filing of the note of issue. *Id.*

the court upon a showing of good cause."[136] Additionally, as noted above, courts have the express authority under CPLR 2004 to extend the time fixed by any court rule or order.[137] This authority can be exercised before or after the time period has expired, "upon such terms as may be just and upon good cause shown."[138] Although the statutory history of CPLR 3212(a) and CPLR 2004 support *Hernandez*'s conclusion that a court can extend its own deadline for making summary judgment motions, this authority does not allow for extensions absent good cause, as *Hernandez* held.[139]

Hernandez's holding is also difficult to reconcile with language in several Court of Appeals cases emphasizing the importance placed on adhering to court-imposed deadlines. As

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[136] Memorandum in Support of Amendment from Chief Administrative Judge Jonathan Lippman 1 (June 25, 1996) (on file with author); REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE, *supra* note 13.

[137] *See supra* notes 125-26 and accompanying text.

[138] N.Y. C.P.L.R. 2004 (McKinney 2005). *See*, *e.g.*, Tewari v. Tsoutsouras, 550 N.Y.S.2d 572, 576-77, (N.Y. 1989) (CPLR 2004 extension may be granted only upon showing of "good cause"); Zamir v. Hilton Hotels Corp., 304 A.D.2d 493, 494, 758 N.Y.S.2d 645, 646-47 (App. Div. 1st Dep't 2003) (court erred in denying defendants' cross-motions to strike "corrections" to plaintiff's deposition transcript as untimely; plaintiff failed to establish "good cause" to extend time to return deposition); Aretakis v. Tarantino, 300 A.D.2d 160, 160, 751 N.Y.S.2d 481, 482 (App. Div. 1st Dep't 2002) (no extension of time to move for dismissal of complaint pursuant to CPLR 3211(e) absent showing of "good cause"); Horn v. Boyle, 260 A.D.2d 76, 78, 699 N.Y.S.2d 572, 575 (App. Div. 3d Dep't 1999) (highlighting necessity that "good cause" support application to extend time limit); Conch Assocs. Inc. v. Mercury, Inc., 245 A.D.2d 538, 539, 666 N.Y.S.2d 499, 500 (App. Div. 2d Dep't 1997) (defendant not entitled to extension of time to post bond given its failure to demonstrate "good cause"); Coutrier v. Haraden Motorcar Corp., 237 A.D.2d 774, 777, 655 N.Y.S.2d 660, 663-64 (App. Div. 3d Dep't 1997) (plaintiff's belated CPLR 4404 motion properly denied absent "good cause"); Casey v. Slattery, 213 A.D.2d 890, 841, 623 N.Y.S.2d 942, 943 (App. Div. 3d Dep't 1995) (same); De Cuyper v. Gonzales, 214 A.D.2d 764, 765, 624 N.Y.S.2d 653, 654 (App. Div. 3d Dep't 1995) (plaintiffs' request for extension of time to answer defendants' summary judgment motion properly denied given plaintiffs' "failure to allege a sufficient basis for the extension"); Thermo Spas Inc. v. Red Ball Spas & Baths Inc., 199 A.D.2d 605, 606, 604 N.Y.S.2d 337, 338 (App. Div. 3d Dep't 1993) (trial court did not err in failing to consider defendants' tardy papers in opposition to plaintiff's motion pursuant to CPLR 3126 to strike defendants' answer given defendants' failure to offer "valid excuse for [their] delay"); Tesciuba v. Cataldo, 189 A.D.2d 655, 655, 592 N.Y.S.2d 326, 326 (App. Div. 1st Dep't 1993) (trial court did not abuse its discretion in denying plaintiff additional time within which to make a post-trial motion for a new trial pursuant to CPLR 4404, there being no explanation from plaintiff showing "good cause" for his lengthy delay of more than two years in seeking such an extension); Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 2004, at 692 (1991); *see also*, McCoy v. Feinman, 99 N.Y.2d 295, 300, 785 N.E.2d 714, 718, 755 N.Y.S.2d 693, 696-97 (2002) (noting that courts have discretion to waive certain time limits under CPLR 2004 for good cause); Grandinetti v. Metro. Transp. Auth., 74 N.Y.2d 785, 787, 543 N.E.2d 737, 738, 545 N.Y.S.2d 94, 95 (1989) (same).

[139] Hernandez v. 620 W. 189th Ltd. P'ship, 792 N.Y.S.2d 822, 824 (Sup. Ct New York County 2005).

the Court stated in *Kihl v. Pfeffer*, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[140] Although *Brill* and *Miceli* involved violations of the legislatively imposed 120-day rule, the Court equated them with violations of "court-ordered time frames."[141] The Court has also cautioned that both legislative and judicial deadlines "are not options, [but] are requirements, to be taken seriously by the parties."[142] In light of these statements, it is difficult to justify the different standard outlined in *Hernandez* for extending court-imposed deadlines for making motions for summary judgment. The Court of Appeals is likely to impose the same good cause standard enunciated in *Brill* and *Miceli* on parties moving for summary judgment after a court-imposed deadline has expired.[143]

Several Second Department decisions have implicitly rejected *Hernandez*'s holding and concluded that good cause must support a motion made after the expiration of a court's deadline for making motions for summary judgment. In *Milano v. George*, the supreme court set a 90-day deadline for moving for summary judgment, running from the filing of the note of issue.[144] A defendant's motion for summary judgment, made on the ninety-first day, was deemed untimely because of the failure to establish good cause for the delay.[145] In *First Union Auto Finance, Inc. v. Donat*, plaintiff's motion and defendant's cross-motion failed to comply with Rule 13 of the Uniform Civil Trial Rules of the Supreme Court, Kings County, which

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[140] 94 N.Y.2d 118, 123 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999). *See* Andrea v. Arnone, Hedlin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C., 5 N.Y.3d 514, 521, 806 N.Y.S.2d 453, 457, 840 N.E.2d 565, 569 (2005) (stressing importance of adherence to court deadlines).

[141] Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 726, 726, 819 N.E.2d 995, 996, 786 N.Y.S.2d 379, 380 (2004).

[142] *Id.*

[143] *See generally* 158 Siegel's Practice Review, *More on Time to Move for Summary Judgment: Court Can Allow Motion Made After Court-Set Time Expires, as Long as Motion is Made Within the Statutory 120 Days*, at 1 (Feb. 2005).

> Without predicting how the Court of Appeals would go on this point – predictions here are perilous in view of what appears to be shaping up as a Court of Appeals crusade against dilatory conduct in litigation – the *Hernandez* case seems a fair compromise. It's pretty clear that it doesn't offend the statute, but it's an open question whether it would offend the Court of Appeals.

Id.

[144] 792 N.Y.S.2d 906, 907 (App. Div. 2d Dep't 2005).

[145] *Id.*

requires summary judgment motions to be made within sixty days of the filing of the note of issue.[146] The Second Department held that the supreme court erred in considering the merits of the motions because "no good cause for the delay was shown."[147] Additionally, a Supreme Court Justice sitting in New York County, the same court that decided *Hernandez*, has expressly declined to follow the "rule" enunciated in *Hernandez*.[148]

VII. THE AFTERMATH OF *BRILL*

In *Brill*, the Court of Appeals also gave direction to lower courts regarding the disposition of a case in which a meritorious motion for summary judgment could not satisfy the timeliness requirements in CPLR 3212(a).[149] The Court reversed the order granting summary judgment in *Brill* and returned the case to the trial calendar.[150] The Court observed that the defendant, now deprived of the remedy of summary judgment, could make a motion to dismiss after plaintiff rests, or make a request for a directed verdict during the trial.[151]

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[146] 791 N.Y.S.2d 596, 597 (App. Div. 2d Dep't 2005). *See also* Bevilacqua v. City of New York, 21 A.D.3d 340, 798 N.Y.S.2d 909 (App. Div. 2d Dep't 2005).

[147] *First Union*, 791 N.Y.S.2d at 597. Prior to the holdings in *Milano* and *First Union*, a trial court in Kings County concluded that *Brill* did not apply where the motion was made within 120 days from the filing of the note of issue, but after the expiration of Rule 13's sixty-day period. *See* Florczyc v. Stahal, No. 25129-99, 2005 WL 119739, at *2 (N.Y. Sup. Ct. Kings County Jan. 3, 2005). In *Florczyc*, the court expressly declined to determine whether the movant had established good cause. *Id.* *Milano* and *First Union* appear to reject *Florczyc*'s rationale. *See* Kunz v. Gleeson, 781 N.Y.S.2d 50, 51 (App. Div. 2d Dep't 2004) (implicitly recognizing applicability of *Brill*, court holds that merits of motion made approximately two weeks beyond date set by court order were properly considered upon showing of good cause). Additionally, a Supreme Court Justice sitting in New York County, which has an identical local rule requiring all summary judgment motions to be made within sixty days of the filing of the note of issue, has expressly declined to follow *Florczyc*. *See* Buckner v. City of New York, 800 N.Y.S.2d 333, 337 (Sup. Ct. New York County 2005).

[148] *Buckner*, 800 N.Y.S.2d at 337. *See* Clermont-Lundy *ex rel.* Lundy v. Zimbalist, 10 Misc. 3d 1056(A), No. 4950-03, 2005 WL 3309753, at *7 (N.Y. Sup. Ct. Kings County Oct. 5, 2005) (holding that *Brill*'s "good cause" requirement "applies whether the moving party is untimely pursuant to either a statutory time frame or one that has been ordered by the court").

[149] Brill v. City of New York, 781 N.Y.S.2d 261 (N.Y. 2004). The Court was apparently prompted by Professor David Siegel, who observed, "we'd think better of judicial decisions that absolutely refuse to extend the time for meritorious summary judgment motions if they would tell us what is to happen in the case." 79 Siegel's Practice Review, *Time Limit on Summary Judgment*, at 2 (Jan. 1999). *See* 51 Siegel's Practice Review, *Strict Time Limit Placed on Motion for Summary Judgment*, at 1 (Nov. 1996); SIEGEL, *supra* note 36, § 279.

[150] *Brill*, 781 N.Y.S.2d at 265.

[151] *Id.* CPLR 4401 permits any party to move for judgment "after the close of the evidence presented by an opposing party with respect to [a] cause of action or issue,

The dissent in *Brill* criticized this result, noting that "the time of the litigants, jurors, lawyers, the judge, and other court personnel should not be wasted in going through the motions of a trial which has no merit and must be dismissed. . . ."[152] The dissent surmised that the trial ordered by the majority will provide "futile hope to the litigants" and that the case will ultimately be dismissed "[o]nce the parties make an opening statement or plaintiffs put in their case indicating that the appropriate notice was not given."[153] The majority in *Brill* answered the dissent's concerns with the following observation:

> Hopefully, as a result of the courts' refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future, both because it is now clear that "good cause" means good cause for the delay, and because movants will develop a habit of compliance with the statutory deadlines for summary judgment motions rather than delay until trial looms.[154]

Despite the majority's hope in *Brill*, and, given the adventuresome nature of a healthy segment of the bar, it appears that the problem of late summary judgment motions will persist in the foreseeable future. *Brill* continues to be cited in reported trial court and appellate decisions on a frequent basis.[155] One can also safely assume that there is an equal

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or at any time on the basis of admissions." N.Y. C.P.L.R. 4401 (McKinney 2005). This issue is explored *infra* notes 200-04 and accompanying text.

[152] *Brill*, 781 N.Y.S.2d at 266 (G.B. Smith, J., dissenting).

[153] *Id.* Although the dissent appears to contemplate that a motion for a directed verdict could be made immediately after opening statements, this is not likely. CPLR 4401 generally permits the motion for a directed verdict only "after the close of the evidence presented by an opposing party with respect to [the] cause of action or issue" moved upon. N.Y. C.P.L.R. 4401 (McKinney 2005). This issue is explored *infra* notes 201-203 and accompanying text.

[154] *Brill*, 781 N.Y.S.2d at 265. In response to the dissent's suggestion that monetary sanctions and preclusion may offer effective remedies against a tardy movant, the majority noted that "[p]reclusion on the merits may, as a rule for the future, be wholly disproportionate to the violation. Without considering whether we may impose sanctions against a municipality for violating a statute, six of us conclude that denying summary judgment—simply not considering the merits of an unexcused, untimely motion—is not only the correct remedy under the law but also will most effectively bring an undesirable practice to an end." *Id.* at 265 n.4.

[155] *See supra* note 22 and accompanying text. A substantial number of the reported decisions from the appellate courts involve cases that were decided by a trial level court before *Brill* was handed down. Many of these decisions warranted reversal because they were based on the law prior to *Brill*, which allowed the merits of the motion to be considered in analyzing good cause under CPLR 3212(a). *See, e.g.*, Dettmann v. Page, 794 N.Y.S.2d 406, 406-07 (App. Div. 2d Dep't 2005); Hayes v. New York City Trans. Auth., 16 A.D.3d 551, 551, 790 N.Y.S.2d 886, 887 (App. Div. 2d Dep't 2005); First Union Auto Finance, Inc. v. Donat, 791 N.Y.S.2d 596, 597 (App. Div. 2d

number of unreported instances in which courts are confronted with a timeliness problem under CPLR 3212(a).

As of this writing, there is not yet a reported decision addressing how a case was handled after it was sent back for trial pursuant to *Brill*'s command. Although the majority in *Brill* provided some direction to courts and litigants as to how a case should proceed after it is determined that a summary judgment motion is untimely, many unresolved questions remain.

This section of the article will identify several problems that judges and lawyers will confront in cases in which a summary judgment motion is denied as untimely. We'll address the issues from two separate perspectives: (A) "What Does the Plaintiff Do Now?," and (B) "What Does the Defendant Do Now?"

A. What Does the Plaintiff Do Now?

In *Brill*, the Kings County Supreme Court and the Appellate Division, Second Department reached the merits of defendant's summary judgment motion.[156] Both of these courts determined that the City of New York established its prima facie entitlement to judgment as a matter of law by demonstrating it did not receive written notice of the defect in the sidewalk at the location where plaintiff fell.[157] Plaintiffs produced a "Big Apple" map to establish prior written notice, but it only contained descriptions of defects in the sidewalk adjacent to the area of the accident and did not provide notice of the defect where plaintiff fell.[158] Therefore, both lower courts dismissed plaintiff's lawsuit based on the prior written notice requirement in section 7-201 of the Administrative Code of the City of New York.[159] In ruling that these courts should not have

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Dep't 2005); Breiding v. Guladi, 789 N.Y.S.2d 449, 449-50 (App. Div. 2d Dep't 2005). Many cases decided after *Brill* continue to pose timeliness issues, however.

[156] Brill v. City of New York, 781 N.Y.S.2d 261, 263 (N.Y. 2004) (noting that the Kings County Supreme Court "decide[d] the summary judgment motion on the merits"); Brill v. City of New York, 305 A.D.2d 525, 526, 759 N.Y.S.2d 346, 346 (App. Div. 2d Dep't 2003).

[157] *Brill*, 759 N.Y.S.2d at 346; *Brill*, 781 N.Y.S. 2d at 263. The Appellate Division also concluded that the City demonstrated it did not create the allegedly defective condition. *Brill*, 759 N.Y.S.2d at 346.

[158] *Id.*

[159] Section 7-201(c)(2) of the Administrative Code of the City of New York states that no civil action shall be maintained against the City of New York for personal injuries sustained as a result of a sidewalk defect unless it appears that written notice of the defective condition was actually given to the New York City Commissioner of Transportation or any person or department authorized by the

considered the merits of defendant's motion because of a failure to establish compliance with the timeliness provision in CPLR 3212(a), the Court of Appeals expressly stated it was not "consider[ing] the merits of the City's motion."[160] Despite the Court's deference, there is certainly a dark cloud hanging over the merits of plaintiffs' claims. This poses several problems for the plaintiffs in moving forward with the case, which this article will explore below.

1. Search for Additional Proof

In the countless number of personal injury cases similar to *Brill* in which prior written notice of a defect is required, an untimely summary judgment motion may place plaintiff on notice of a specific defect in the proof necessary to establish all of the elements of the claim. *Brill*'s direction that these cases proceed to trial provides the plaintiff with additional time to gather the proof necessary to satisfy all elements of the claim. Although the period in which to obtain disclosure on notice through CPLR Article 31's machinery expires with the filing of the note of issue,[161] the plaintiff facing a dilemma similar to the one met in *Brill* could attempt to seek disclosure through a court order or informally gather information without using the disclosure devices.[162] Similarly, in cases where a belated

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Commissioner to receive notice. N.Y. ADMIN. CODE § 7-201(c)(2) (McKinney 2005). Similar provisions in several statutes and municipal codes also require written notice of a defect to maintain a suit. *See, e.g.*, N.Y. GEN. MUN. §§ 50-g, 71-b (McKinney 2005); N.Y. HIGH. § 139 (McKinney 2005); N.Y. TOWN § 65-a (McKinney 2005); N.Y. VILLAGE § 6-628 (McKinney 2005). *See also*, 1B NEW YORK PATTERN JURY INSTRUCTIONS – CIVIL § 2:225(I) (3d ed. 2005) ("Duty and Notice"). Where a prior written notice requirement is applicable, the plaintiff must plead and prove compliance with the requirement as a condition precedent to suit. Katz v. City of New York, 87 N.Y.2d 241, 243, 638 N.Y.S.2d 593, 661 N.E.2d 1374 (1995); Vargas v. City of New York, 4 A.D.3d 524, 772 N.Y.S.2d 381 (App. Div. 2d Dep't 2004); Farnsworth v. Village of Potsdam, 228 A.D.2d 79, 651 N.Y.S.2d 748 (App. Div. 3d Dep't 1997).

The prior written notice requirement is separate and distinct from the obligation to serve a notice of claim on the municipal entity within ninety days after the claim arises. N.Y. GEN. MUN. § 50-e(1)(a) (McKinney 2005). A court may extend the time to serve a notice of claim, upon motion. *Id*. § 50-e(5). For a discussion of the pitfalls encountered by lawyers commencing actions against municipal entities, see Harris v. Niagara Falls Bd. Of Educ., 6 N.Y.3d 155, 844 N.E.2d 753, 811 N.Y.S.2d 299 (2006) (plaintiff failed to properly commence action against municipal entity when he used same index number from prior special proceeding, which granted order to serve a late notice of claim); *see also* Connors and Gleason, *Problems at the Starting Gate*, N.Y.L.J., Jan. 12, 2006, at 3.

[160] *Brill*, 781 N.Y.S.2d at 263 n.2.

[161] *See* Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3102:3, at 493-94 (2005); *supra* notes 83-84 and accompanying text.

[162] *See* Niesig v. Team I, 76 N.Y.2d 363, 372, 558 N.E.2d 1030, 1034, 559 N.Y.S.2d 493, 497 (1990) (recognizing value of "avenues of informal discovery of

summary judgment motion exposes a lack of medical proof to establish a "serious injury"[163] or "grave injury,"[164] the plaintiff or third-party plaintiff will have additional time to obtain it for trial.[165]

2. The Prospect of Sanctions

If Ona Brill and her counsel search for proof that the City of New York had prior written notice of the defect, but cannot uncover it, the possibility of sanctions looms. CPLR 8303-a and Part 130 of the Rules of the Chief Administrator of the Courts are both relevant in this context.

CPLR 8303-a has limited application,[166] but would govern in *Brill* and the many other personal injury cases in which timeliness issues under CPLR 3212(a) have arisen. CPLR 8303-a(a) applies in cases seeking damages for personal injury,[167] property damage[168] or wrongful death.[169] It provides that if "such an action or claim is commenced or continued by a plaintiff . . . and is found, at any time during the proceedings or

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information that may serve both the litigants and the entire justice system by uncovering relevant facts")*; see also* Federal Freedom of Information Act, 5 U.S.C. § 552 *et seq*. (2000) (providing for public access to governmental records of the federal government and its administrative agencies); Freedom of Information Law, N.Y. PUB. OFF., art. 6 (McKinney 2005) (statutory scheme providing for public access to governmental records of State of New York and localities, and their administrative agencies); M. Farbman & Sons, Inc. v. New York City Health and Hosps. Corp., 62 N.Y.2d 75, 78, 464 N.E.2d 437, 438, 476 N.Y.S.2d 69, 70 (1984) (party to litigation may pursue governmental records of adverse party through CPLR Article 31 disclosure devices or FOIL methods).

[163] N.Y. INS. § 5102(d) (McKinney 2005) (defining several categories of "serious injury").

[164] N.Y. WORKERS' COMP. § 11 (McKinney 2005) (requiring third-party plaintiff to plead and prove "grave injury" in common-law indemnification or contribution action against plaintiff's employer).

[165] If the additional proof requires the plaintiff to call an expert witness at trial, the plaintiff will also have to satisfy the disclosure requirements in CPLR 3101(d)(1)(i). The courts have been inconsistent, and rather lax, in imposing these obligations, especially with respect to the timing of the disclosure. *See* Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C3101:29A, at 59-79 (2005).

[166] *See* SIEGEL, *supra* note 36, § 414A; Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C8303-a, 77-78 (Supp. 2005).

[167] *See* N.Y. GEN. CONSTR. § 37-a (McKinney 2005) ("'Personal injury' includes libel, slander and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.").

[168] *See* N.Y. GEN. CONSTR. § 25-b (McKinney 2005) ("'Injury to property' is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract.").

[169] CPLR 8303-a(a) also applies to "an action brought by the individual who committed a crime against the victim of the crime." *See* N.Y. EST. POWERS & TRUSTS § 5-4.1 (McKinney 2005) ("Action by personal representative for wrongful act, neglect or default causing death of decedent").

upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees."[170] Accordingly, CPLR 8303-a authorizes a court to award costs and reasonable attorney's fees against a party who has commenced or continued to prosecute a frivolous personal injury, injury to property, or wrongful death action.

In contrast to CPLR 8303-a, Part 130 is not limited to any particular category of action and applies in virtually all civil litigation in New York State.[171] It authorizes a court to award "costs in the form of reimbursement for actual expenses" and sanctions against a party who has engaged in frivolous conduct.[172] Conduct is defined as frivolous if, among other things, it is "completely without merit in law"[173] or it "asserts material factual statements that are false."[174] In determining whether conduct is frivolous, the court must consider, among other things, "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."[175] A court has far broader power under Part 130 than

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[170] *Id.* CPLR 8303-a(a) additionally applies to a frivolous counterclaim, defense or cross claim. The costs and attorney's fees imposed under CPLR 8303-a are capped at $10,000. *Id. See* Marcus v. Bressler, 277 A.D.2d 108, 109, 716 N.Y.S.2d 395, 396 (App. Div. 1st Dep't 2000) ($10,000 maximum sanction applicable to each frivolous cause of action); Entm't Partners Group, Inc. v. Davis, 155 Misc. 2d 894, 901, 590 N.Y.S.2d 979, 984 (Sup. Ct. New York County 1992), *aff'd* 198 A.D.2d 63, 64, 603 N.Y.S.2d 439, 440 (App. Div. 1st Dep't 1993) ($10,000 maximum sanction does not apply to whole case, but to each prevailing party and each individual claim).

[171] Part 130 does not apply in certain lower courts. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2005). In addition, Part 130 does not apply to requests for costs or attorneys' fees subject to CPLR 8303-a.

[172] N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2005). Costs are paid to the opposing party or her attorney. Sanctions are paid to the State. *Id. See* N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.3 (2005). *See also* SIEGEL, *supra* note 36, § 414A; 133 Siegel's Practice Review, *Both Kinds of Sanctions Applied: Frivolous Claim and Frivolous Conduct Bring Both Compensatory and Punitive Sanctions*, at 2-3 (Mar. 2003). The maximum sanction permissible for a single occurrence of frivolous conduct is $10,000, while costs and reasonable attorney's fees are not capped. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.2 (2005).

[173] N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(c)(1) (2005).

[174] N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(c)(3) (2005).

[175] N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(c) (2005). "An award of costs or the imposition of sanctions may be made either upon [a] motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard" has been accorded the offending party. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(d) (2005). In making an award of costs and/or imposing sanctions pursuant to section 130-1, the court must issue a written decision setting forth the conduct on which the award and/or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded and/or imposed to be appropriate. N.Y. COMP. CODES R. & REGS. tit.

under its statutory sibling, CPLR 8303-a. While a court may only impose a penalty pursuant to CPLR 8303-a if it finds that a party has asserted or maintained a frivolous cause of action, counterclaim, cross-claim or defense, a court may punish any frivolous conduct that occurs during the course of litigation under Part 130, including the making of a frivolous motion.[176]

In *Brill*, for example, although the motion for summary judgment was ultimately denied as untimely, the plaintiffs were placed on notice that there was a critical deficiency in the proof necessary to establish a cause of action against the City.[177] If the plaintiffs continued to prosecute the case through trial without any proof that the City was on written notice of the defect, a strong argument could be made that the plaintiffs and their attorney should be subject to sanctions under CPLR 8303-a or Part 130.[178] In these circumstances, the plaintiffs

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22, § 130-1.2 (2005). An award of costs and/or the imposition of sanctions is entered as a judgment of the court. *Id*.

[176] *See* SIEGEL, *supra* note 36, § 414A. *See also* Testa v. Koerner Ford of Syracuse, Inc., 261 A.D.2d 866, 868, 689 N.Y.S.2d 818, 821 (App. Div. 4th Dep't 1999); Harley v. Druzba, 169 A.D.2d 1001, 1002-03, 565 N.Y.S.2d 278, 280 (App. Div. 3d Dep't 1991).

[177] Although the Court of Appeals did not consider the merits of the City's motion, two courts did, and found that plaintiffs failed to establish that the City had prior written notice. Brill v. City of New York, 781 N.Y.S.2d 261, 263 (N.Y. 2004); *see supra* notes 156-60 and accompanying text. In light of the mandate of *Brill* and its progeny that the merits of an untimely motion are not to be considered absent good cause, *supra* notes 25-28, it is unlikely that such pre-trial findings will be expressly made in future cases in which a movant fails to comply with CPLR 3212(a). 151 Siegel's Practice Review, *Sanction Against Plaintiff for Continuing Action in Which Summary Judgment for Defendant Was Warranted, but Was Denied for Lateness?*, at 3-4 (July 2004). There will, however, be many instances in which the supporting proof submitted by defendant with an untimely motion will place the plaintiff on notice that her allegations lack a reasonable basis. In addition, there will be instances in which an appellate court reverses a finding of "good cause" and remands the case for trial pursuant to *Brill*'s direction. *See supra* notes 150-51 and accompanying text. In these circumstances, it may be apparent that the plaintiff will be unable to establish a necessary element of the cause of action.

[178] *See* Mitchell v. Herald Co., 137 A.D.2d 213, 218-19, 529 N.Y.S.2d 602, 605-07 (App. Div. 4th Dep't 1988) (plaintiff and his counsel sanctioned under CPLR 8303-a because they had a duty to act in good faith to investigate claims and promptly discontinue action where inquiry would reveal that claims lacked reasonable basis). N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.5 (2005) states that Part 130-1.1 will not apply "to requests for costs or attorneys' fees subject to the provisions of CPLR 8303-a." *See* Entm't Partners Group, Inc. v. Davis, 590 N.Y.S.2d 979, 984 (Sup. Ct. New York County 1992), *aff'd*, 603 N.Y.S.2d 439 (App. Div. 1st Dep't 1993); Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C8303-a, at 89-92 (Supp. 2006). *See also Testa*, 689 N.Y.S.2d at 821; 1051 Enters., Inc. v. DeBeer, 230 A.D.2d 731, 732, 646 N.Y.S.2d 57, 58 (App. Div. 2d Dep't 1996); *Harley*, 565 N.Y.S.2d at 280; Guevara v. Jocara Realty Co., No. 2002-1510, 2003 WL 21704397, at *1 (N.Y. App. Term, 2d & 11th Jud. Dists. 2003); Forstman v. Arluck, 149 Misc. 2d 929, 932-33, 566 N.Y.S.2d 462, 463-64 (Sup. Ct. Suffolk County 1991).

would have been placed on notice of the absence of a necessary element of their cause of action and yet continued, knowing that it lacked merit.[179]

3. Voluntary Discontinuance

Although the City was denied summary judgment in *Brill*, the plaintiffs were placed in a rather difficult position. If proof of prior written notice could not be obtained, the plaintiffs had the option of voluntarily discontinuing the action under CPLR 3217(a)(2). This subdivision allows a party to discontinue an action prior to its submission to a court or jury by, among other methods, filing a stipulation with the clerk of the court.[180] The court could also sign an order of discontinuance upon such terms and conditions it deems proper.[181]

If the plaintiffs in *Brill* decided to voluntarily discontinue their action, it would likely be without prejudice to commence a new action.[182] The statute of limitations would, however, likely bar any future action. In *Brill*, the plaintiffs'

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[179] *See Mitchell*, 529 N.Y.S.2d at 605-06 ("The bad faith of plaintiff and his counsel was compounded by their failure to discontinue the action after being specifically advised by defendant's attorney that the claim was baseless."). *See also* N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(2) (McKinney 2005) (a lawyer shall not "knowingly advance a claim that is unwarranted under existing law").

[180] N.Y. C.P.L.R. 3217(a)(2) (McKinney 2005). The stipulation must be in writing signed by the attorneys of record for all parties. *Id. See also* N.Y. C.P.L.R. 2104 (McKinney 2005) (stating requirements for valid stipulation). The stipulation must be filed with the county clerk by the defendant, requiring the payment of a fee. N.Y. C.P.L.R. 3217(d) (McKinney 2005) (listing fees); N.Y. C.P.L.R. 8020(d) (McKinney Supp. 2006) (same). *See* Certified Elec. Contracting Corp. v. City of New York, 804 N.Y.S.2d 794, 796 (App. Div. 2d Dep't 2005) (plaintiff never executed stipulation of discontinuance and never filed it with the court). CPLR 3217(a)(2) cannot be used if one of the parties is an infant, incompetent person or conservatee or if a person not a party has an interest in the subject matter of the action. N.Y. C.P.L.R. 3217(a)(2) (McKinney 2005). CPLR 3217(a)(2) allows the parties to discontinue the action without a court order. *Id.*

[181] N.Y. C.P.L.R. 3217(b) (McKinney 2005). If the case has been submitted to the jury or court, "the court may not order an action discontinued except upon the stipulation of all parties appearing in the action." *Id.*

CPLR 8020(d) imposes a $35 fee for the filing of all discontinuances in actions pending in supreme and county courts. N.Y. C.P.L.R. 8020(d) (McKinney Supp. 2006). Pursuant to CPLR 3217(d), all discontinuances in actions pending in supreme and county court must be filed with the clerk of the court by the defendant. *Id*. *See* 137 Siegel's Practice Review, *Administrative Problems for Courts and Procedural Pitfalls for Parties Abound as Fees are Imposed for Making Motions and Cross-Motions, and Filing of Settlements is Made Mandatory (Part II)*, at 3 (July 2003).

[182] N.Y. C.P.L.R. 3217(c) (McKinney 2005). If the party seeking to voluntarily discontinue the action has not obtained such relief in the past, the discontinuance is generally without prejudice. *Id.* The notice, stipulation or order of discontinuance could, however, provide otherwise. *Id.*

cause of action, which sounded in negligence, accrued on February 15, 1998 when Ona Brill tripped and fell on a sidewalk in Brooklyn.[183] Their action was commenced on June 4, 1998,[184] within the one year and ninety days after the fall.[185] The period within which to commence an action expired in May 1999.[186] Therefore, a discontinuance would have had to have been accomplished, so as to permit a timely second action, long before the summary judgment motion in *Brill* was made.

4. Ethical Obligations To Client

New York State's civil caseload is comprised largely of personal injury cases.[187] In an overwhelming majority of these

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[183] *See, e.g.*, SIEGEL, *supra* note 36, § 40 ("In the personal injury case predicated on negligence, the applicable . . . period starts at the moment of injury.").

[184] An action or special proceeding is commenced in New York's superior courts (i.e., supreme and county courts) when the initiatory papers related to the action or proceeding are filed with the appropriate clerk. *See, e.g.*, N.Y. C.P.L.R. 304 (McKinney 2005); Harris v. Niagara Falls Bd. Of Educ., 811 N.Y.S.2d 299 (N.Y. 2006); Mendon Ponds Neighborhood Ass'n v. Dehm, 98 N.Y.2d 745, 746-47, 781 N.E.2d 883, 883-84, 751 N.Y.S.2d 819, 819-20 (2001); Peace v. Zhang, 15 A.D.3d 956, 957, 789 N.Y.S.2d 362, 363 (App. Div. 4th Dep't 2005); SIEGEL, *supra* note 36, §§ 63, 77. Effective September 8, 2005, in the New York City Civil Courts, District Courts and City Courts, a "filing" system has replaced the prior procedure in which actions were commenced by service of process. 2005 N.Y. Sess. Laws page 1332 (McKinney). For a discussion of the new filing system in these lower courts and a discussion of various distinctions with the commencement system in Supreme and County Court, see 164 Siegel's Practice Review, *Basic Change in Practice in Civil, District, and City Courts: "Filing" System Adopted; Summons Service No Longer Deemed "Commencement" Part I*, at 1-4 (Aug. 2005); 165 Siegel's Practice Review, *Basic Change in Practice in Civil, District, and City Courts: "Filing" System Adopted; Summons Service No Longer Deemed "Commencement" Part II*, at 1-4, (Sept. 2005).

[185] N.Y. GEN. MUN. LAW § 50-i(1)(c) (McKinney 2005) (action against a city for personal injury must be "commenced within one year and ninety days after the happening of the event upon which the claim is based"). In addition, a plaintiff in these circumstances must serve a notice of claim upon the municipal entity "in compliance with section 50-e of this chapter." *Id.* § 50-i(1)(a). The plaintiff must also plead that at least thirty days have elapsed since the service of the notice of claim and that "adjustment or payment" of the claim has been refused. *Id*. § 50-i(1)(b); *supra* note 159.

[186] N.Y. GEN. MUN. LAW § 50-i(1)(c) (McKinney 2005).

[187] *See generally* 26TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK, at 11-12 (indicating that 189,306 requests for judicial intervention were filed in actions pending in supreme court for the calendar year 2003, and that 42% of these cases involved torts [i.e. cases involving motor vehicle accidents – 24%, medical malpractice – 2%, and "other tort[s]" – 16%]); 25TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK, at 11-12 (indicating that 189,921 requests for judicial intervention were filed in actions pending in supreme court for the calendar year 2002, and that 43% of these cases involved torts [i.e. cases involving motor vehicle accidents – 24%, medical malpractice – 2%, and "other tort[s]" – 17%]); 24TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK, at 11-12 (indicating that 184,490 requests for judicial intervention were filed in actions pending in supreme court for the calendar year 2001, and that 43% of these cases involved torts [i.e. cases involving motor vehicle accidents – 24%, medical malpractice – 2%, and "other tort[s]" – 17%]); 23RD ANNUAL

cases, the plaintiff is represented on a contingent fee basis.[188] Based on these two facts, it is reasonable to anticipate that the Court's holding in *Brill* may result in many situations in which a plaintiff's lawyer no longer has an incentive to vigorously prosecute her client's case.

We can highlight the nature of the problem using the facts and procedural history in *Brill* as a typical example.[189] As noted above, *Brill* provides that if an untimely summary judgment motion is made without good cause, the case must proceed to trial.[190] In a case similar to *Brill*, where two courts have determined that an untimely defendant's motion has merit, the plaintiff's lawyer may see the writing on the wall and anticipate the outcome of an inevitable motion to dismiss during trial.[191] Given the significant time and expense necessary to bring a case to trial,[192] and the strong probability of a directed verdict, an attorney representing a plaintiff in these circumstances may decide to devote her attention to other matters. If the case is one in which the lawyer represents the client on a contingent fee basis, there is a strong economic disincentive to bring the case to trial.[193]

REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK, at 11-12 (indicating that 183,391 requests for judicial intervention were filed in actions pending in supreme court for the calendar year 2000, and that 42% of these cases involved torts [i.e. cases involving motor vehicle accidents – 23%, medical malpractice – 2%, and "other tort[s]" – 17%]).

[188] *See* N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-106 (McKinney 2005) (discussing fees, including contingent fees, in various circumstances). There are rules in each of the four departments of the Appellate Division governing contingency fees. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7 (2005) (rules for the 1st Dep't); *Id*. § 691.20 (rules for the 2d Dep't); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.13 (2005) (rules for the 3d Dep't); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.2 (2005) (rules for the 4th Dep't).

[189] This discussion does not reflect or attempt to describe the actual conduct of the lawyers representing the plaintiffs in *Brill*. The discussion simply uses the facts and procedural history of *Brill* as an example to demonstrate a perceived problem.

[190] Brill v. City of New York, 781 N.Y.S.2d 261, 265 (N.Y. 2004). *See supra* notes 149-51 and accompanying text.

[191] *See supra* notes 156-60 and accompanying text.

[192] *See Court of Appeals Addresses Disputed Time Issue on Summary Judgment Motions*, N.Y. ST. L. DIG., June 2004, at 1 ("The majority view [in *Brill*], taken strictly, would therefore require that the plaintiff call her witnesses and put in her case, and that would be an undertaking – if we assume that the case has been ripe for summary judgment all the while – that will indeed impose on all.").

[193] If the lawyer's fee is contingent on a recovery in the action, the lawyer will obviously not be compensated for her time. *See* N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-106(D) (McKinney 2005) (prescribing writing in contingent fee matter). In addition, most lawyers in personal injury litigation agree to advance the expenses of litigation, such as court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. The New York Lawyers' Code of Professional Responsibility permits a lawyer to reach an agreement of this

Despite the dark cloud hanging over many cases as a result of *Brill*'s holding, the lawyer for the plaintiff in such a case still has a duty to zealously represent her client.[194] Therefore, the lawyer has an obligation to attempt to correct any apparent deficiency in the case and prepare for trial.[195] If the lawyer reasonably believes that the deficiency cannot be cured, the lawyer must confer with the client and discuss the possibility of voluntarily discontinuing the action or offering to settle.[196] In addition, the lawyer must discuss the possibility of a court awarding sanctions for frivolous conduct.[197] It is the client, however, who has the ultimate authority to make the decision on how to proceed.[198]

If the client in a case similar to *Brill* rejects the lawyer's advice and decides to go to trial, the lawyer may need to consider withdrawing from the representation. If the lawyer reasonably believes that the plaintiff's claims are no longer supported by existing law, and there is no good faith argument

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nature with a client, "provided the client remains ultimately liable for such expenses." N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-103(B)(1) (McKinney 2005). Frequently, however, the lawyer is not able to recoup these expenditures from the client in a personal injury action.

[194] *See* N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-101 (McKinney 2005) ("Representing a client zealously").

[195] The lawyer may attempt to accomplish this task by securing new and additional proof. *See supra* notes 161-65 and accompanying text.

[196] N.Y. C.P.L.R. 3217 (McKinney 2005). *See supra* notes 180-86 and accompanying text. *See generally* N.Y. CODE OF PROF'L RESPONSIBILITY EC 7-8 (McKinney 2005):

> A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint.

Id.

[197] *See supra* notes 166-76 and accompanying text.

[198] *See* N.Y. CODE OF PROF'L RESPONSIBILITY EC 7-7 (McKinney 2005):

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer or whether to waive the right to plead an affirmative defense.

Id.

to change the existing law, the lawyer is obligated to make a motion to withdraw from the representation.[199]

B. What Does the Defendant Do Now?

What can a party, whose motion for summary judgment was denied on the ground that it was untimely, do to ameliorate the loss of the use of summary judgment? The *Brill* court prescribed several variations of one particular remedy, a motion for judgment during trial pursuant to CPLR 4401. Other remedies may also exist, including a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7). Both varieties of remedies – those spelled out by the *Brill* court and the possible alternatives – will be discussed below.

1. CPLR 4401 – Motion for Judgment During Trial

The majority in *Brill* stated that a defendant who fails to move for summary judgment in a timely manner has two options: (1) move to dismiss the action after the plaintiff rests, or (2) move for a directed verdict during the trial. These options are sanctioned by CPLR 4401, which permits a party to:

> move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.[200]

The dissent in *Brill* offered a third option ostensibly under CPLR 4401, a motion to dismiss following the parties' opening statements. As a general rule, a motion for judgment

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[199] *Id.* at DR 2-110(B)(2) (requiring lawyer representing a client before a tribunal to make a motion to withdraw if "[t]he lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule"); *Id.* at DR 7-102(A)(2) (preventing a lawyer from "[k]nowingly advanc[ing] a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law"). *See also id.* at DR 2-110(B)(1) (requiring lawyer to move to withdraw from representing client if "[t]he lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person"); *Id.* at DR 2-110(C)(1)(iii) (allowing lawyer to withdraw if client "[i]nsists that lawyer pursue a course of conduct which is illegal or prohibited under the Disciplinary Rules"); *Id.* at DR 7-102(A)(1) (requiring that when representing a client, a lawyer may not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another").

[200] N.Y. C.P.L.R. 4401 (McKinney 2005).

as a matter of law under CPLR 4401 only lies after the conclusion of the case of the party against whom judgment is sought.[201] However, judgment as a matter of law at this juncture on the basis of an "admission," such as a statement by a party's counsel, is only appropriate where, assuming the truth of the facts alleged by the plaintiff, the plaintiff has no case.[202] This occurs when counsel "intentionally states or admits some fact that, in any view of the case, is fatal to the action."[203]

While the various applications for judgment as a matter of law pursuant to CPLR 4401 offer the defendant what she ultimately desires to obtain, i.e., a dismissal of the action, they require the defendant to prepare for and participate in a trial.[204] Other mechanisms may exist that will allow a defendant who has lost the ability to make a summary judgment motion to secure dismissal of an action without participating in a trial.

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[201] *See, e.g.*, Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C4401:5 (1992).

[202] *See, e.g.*, Siegel, *supra* note 201, at C4401:2, at 406; *see also* Cuellar v. City of N.Y., 5 A.D.3d 530, 531, 772 N.Y.S.2d 872, 873 (App. Div. 2d Dep't 2004) (applications to dismiss after completion of counsels' opening statements are "disfavored," and should only be granted where, "from all available indications, the case is doomed to defeat" (citation omitted)); Jones v. Davis, 307 A.D.2d 494, 498, 763 N.Y.S.2d 136, 140 (App. Div. 3d Dep't 2003) (stating that "practice of dismissing a complaint at the conclusion of counsel's opening statement is disfavored, and should only be done if 'on the opening it becomes obvious that the suit cannot be maintained because it lacks a legal basis or, when taken in its strongest light, cannot succeed'"(citation omitted)).

[203] *See* Riccio v. De Marco, 188 A.D.2d 847, 849, 591 N.Y.S.2d 569, 572 (App. Div. 3d Dep't 1992) (quoting Hoffman House v. Foote, 172 N.Y. 348, 351, 65 N.E. 169, 169 (1902)). *See also* Ballantyne v. City of New York, 19 A.D.3d 440, 440-41, 797 N.Y.S.2d 506, 506 (App. Div. 2d Dep't 2005):

> A dismissal of the complaint after plaintiff's attorney's opening statement is warranted only where "it can be demonstrated either (1) that the complaint does not state a cause of action . . . (2) that a cause of action well-stated is conclusively defeated by something interposed by way of defense and clearly admitted as a fact or (3) that . . . counsel for the plaintiff, in his [or her] opening [statement], by some admission or statement of fact, so completely ruined his [or her] case that the court was justified in granting [a motion to dismiss]."

(citation omitted); Gleyzer v. Steinberg, 254 A.D.2d 455, 455, 679 N.Y.S.2d 154, 154 (App. Div. 2d Dep't 1998) (same).

[204] In the event that a defendant is forced to participate in a trial to vindicate her position, and plaintiff has not offered proof additional to that offered on the late summary judgment motion, the defendant may seek to recover costs and reasonable attorney's fees. *See supra* notes 166-76 and accompanying text.

2. CPLR 3211(a)(7) – Motion to Dismiss

The motion to dismiss resides in CPLR 3211. Such a motion is directed at the entire complaint or a particular cause of action therein, based on one or more of the grounds enumerated in the statute.[205] Generally, a motion to dismiss must be made by a defendant prior to the service of her answer. Certain grounds for dismissal may, however, be raised at any time, including the CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action.[206]

CPLR 3211(a)(7) permits a party to move for dismissal of one or more causes of action asserted against her on the ground that a "pleading fails to state a cause of action." In addition to testing the facial validity of a complaint, CPLR 3211(a)(7) allows a defendant to challenge the merits of a plaintiff's claim or claims.[207] Specifically, where affidavits or other evidentiary materials are submitted by a CPLR 3211(a)(7) movant, the court may elect to treat the motion as one for summary judgment after providing proper notice to the parties.[208] If the court makes this election and the papers and

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[205] N.Y. C.P.L.R. 3211(a) (McKinney 2005). *See* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:5, C3211:6, C3211:9 (2005). CPLR 3211(b) permits a party to seek dismissal of a defense asserted in another party's pleading.

[206] N.Y. C.P.L.R. 3211(e) (McKinney 2005). *See, e.g.*, Schel v. Roth, 242 A.D.2d 697, 697, 663 N.Y.S.2d 609, 610 (App. Div. 2d Dep't 1997); Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:28, C3211:52, C3211:58 (2005).

[207] N.Y. C.P.L.R. 3211(c) (McKinney 2005) (allowing any party to a motion under CPLR 3211(a) to submit any evidence that could be considered on a motion for summary judgment). *See, e.g.*, 150 Siegel's Practice Review, *Is There Any Way Around the Court of Appeals* Brill *Case, Which Forces to Trial an Action Ripe for Summary Judgment But Not Moved For on Time?*, at 1 (June 2004) [hereinafter *Is There Any Way Around* Brill*?*]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:23, C3211:25 (2005); SIEGEL, *supra* note 36, § 265.

[208] N.Y. C.P.L.R. 3211(c) (McKinney 2005) (stating that "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment"). Courts have recognized three exceptions to the requirement that notice be given of conversion of a motion to dismiss into one for summary judgment: (1) where the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides, (2) when request for summary judgment treatment is specifically made by both sides, and (3) when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting summary judgment course. *See, e.g.*, Four Seasons Hotels Ltd. v. Vinnik, 127 A.D.2d 310, 316, 515 N.Y.S.2d 1, 8 (App. Div. 1st Dep't 1987); Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am., 6 Misc. 3d 1024(A), 800 N.Y.S.2d 347, No. 605910-01, 2003 WL 24013814 (Sup. Ct. New York County 2003). *See also* Mihlovan v. Grozavu, 72 N.Y.2d 506, 508, 531 N.E.2d 288, 289, 534 N.Y.S.2d 656, 657 (1988) (stating that court, and not a party, must give notice that it is treating a motion as one for summary judgment).

proof submitted in support of a motion to dismiss establish that the defendant should be awarded judgment as a matter of law, the complaint may be dismissed.

There are, however, several obstacles that may prevent a party from moving under CPLR 3211(a)(7) after the time period in CPLR 3212(a) has expired. Although it may occur on occasion,[209] it will be the rare case in which, after the filing of a note of issue, a party's pleading still fails to state a cause of action. In addition, a party seeking to use the motion to dismiss for failure to state a cause of action in lieu of a summary judgment motion will be foreclosed from doing so if the party previously made a motion pursuant to CPLR 3211(a). The "single motion rule," which is a product of CPLR 3211(e),

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Several courts have also awarded dismissal on a CPLR 3211(a)(7) motion, apparently in the absence of an election under CPLR 3211(c), when plaintiff's legal conclusions are "either inherently incredible or flatly contradicted by documentary evidence." Greene v. Doral Conference Ctr. Assocs., 18 A.D.3d 429, 430, 795 N.Y.S.2d 252, 253-54 (App. Div. 2d Dep't 2005); Asgahar v. Tringali Realty, Inc., 18 A.D.3d 408, 409, 795 N.Y.S.2d 68, 70 (App. Div. 2d Dep't 2005); Meyer v. Guinta, 262 A.D.2d 463, 464, 692 N.Y.S.2d 159, 161 (App. Div. 2d Dep't 1999); *see also* Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20-21, 401 N.Y.S.2d 182, 185 (1977) (stating that "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate"); Williams v. N.Y. City Hous. Auth., 238 A.D.2d 413, 414, 656 N.Y.S.2d 332, 333 (App. Div. 2d Dep't 1997) ("Where, as here, evidentiary material is submitted on a CPLR 3211 motion, it may be considered in assessing the viability of a complaint, but unless the defendant demonstrates that a material fact alleged by the plaintiff to be true 'is not a fact at all' and that 'no significant dispute exists regarding it,' the complaint should not be dismissed." (citation omitted)).

[209] At least one court has granted a CPLR 3211(a)(7) motion to dismiss a complaint where the movant was foreclosed from moving for summary judgment due to its failure to comply with the timeliness provision of CPLR 3212(a). Santana v. City of New York, 6 Misc. 3d 642, 643, 787 N.Y.S.2d 651, 652-53 (N.Y. Civ. Ct. New York County 2004). In *Santana*, the plaintiff was assaulted by an inmate whom she was visiting at a correctional facility operated by the defendant. The plaintiff subsequently commenced an action to recover damages against the defendant, alleging negligence in the operation of the correctional facility. The defendant's motion for summary judgment dismissing the complaint was denied by the court, which cited *Brill*, on the ground that the motion was untimely under CPLR 3212(a). However, the court granted the defendant's motion to dismiss for failure to state a cause of action, noting that the plaintiff failed to allege that a "special relationship" existed between the plaintiff and defendant, an element of the plaintiff's case.

A motion in limine, which is generally used to test the admissibility of evidence in advance of trial, is an inappropriate device to obtain relief in the nature of summary judgment. *See, e.g.*, Clermont v. Hillsdale Indus., Inc., 6 A.D.3d 376, 377, 773 N.Y.S.2d 901, 902 (App. Div. 2d Dep't 2004); Downtown Art Co. v. Zimmerman, 232 A.D.2d 270, 270, 648 N.Y.S.2d 101, 101 (App. Div. 1st Dep't 1996); George Miller Brick Co., Inc. v. Stark Ceramics, Inc., 9 Misc. 3d 151, 166-67, 801 N.Y.S.2d 120, 134 (Sup. Ct. Monroe County 2005). Accordingly, a party cannot circumvent the timeliness provision of CPLR 3212(a) by labeling her motion as one in limine. *Clermont*, 773 N.Y.S.2d at 902; *George Miller Brick Co., Inc.*, 801 N.Y.S.2d at 134.

proscribes multiple motions to dismiss premised on the grounds listed in CPLR 3211(a).[210] Therefore, if a party seeks to make a CPLR 3211(a)(7) motion after the service of her answer, it will not be entertained if she has already made a pre-answer motion to dismiss.[211]

If the court elects to "treat the motion as a motion for summary judgment" pursuant to CPLR 3211(c),[212] there are indications that it should be considered a motion for summary judgment under CPLR 3212, rather than one for dismissal under CPLR 3211.[213] If such treatment is afforded a CPLR 3211(a)(7) motion, the timeliness provision of CPLR 3212(a) will likely apply.[214] If a party is allowed to circumvent the timing requirements in CPLR 3212(a) in this fashion, "it could invite wholesale resort to the CPLR 3211(a)(7) motion in any case in which the time for a CPLR 3212 summary judgment motion has expired."[215] Furthermore, allowing a party to proceed in this fashion will ultimately result in the very problems that CPLR 3212(a) and the *Brill* decision attempted

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[210] CPLR 3211(e) states, in pertinent part, that: "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) [of 3211], and no more than one such motion shall be permitted." N.Y. C.P.L.R. 3211(e) (McKinney 2005). *See* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:55 (2005); SIEGEL, *supra* note 36, § 273.

[211] *See* McLearn v. Cowen & Co., 60 N.Y.2d 686, 688, 455 N.E.2d 1256, 1257, 468 N.Y.S.2d 461, 462 (1983); Miller v. Schreyer, 257 A.D.2d 358, 683 N.Y.S.2d 51 (App. Div. 1st Dep't 1999); Reilly v. Prentice, 141 A.D.2d 520, 520, 529 N.Y.S.2d 343, 344 (App. Div. 2d Dep't 1988).

[212] *See supra* notes 207-08 and accompanying text.

[213] Rich v. Lefkovits, 56 N.Y.2d 276, 281-82, 437 N.E.2d 260, 263, 452 N.Y.S.2d 1, 4 (1982).

[214] *See Is There Any Way Around* Brill*?*, *supra* note 207:

> CPLR 3211(c) anticipates that the evidence before the court in a given case may be ample enough to support a summary judgment motion. It does this by empowering the court to treat the CPLR 3211 motion as such as long as it gives the parties notice of its intention.
>
> An argument that would put a quick end to this possibility is that the court should not 'treat' as summary judgment a motion that would now be untimely under the terms of the summary judgment provision itself, CPLR 3212(a).

Id. *See also* Diaz v. N.Y. City Health & Hosps. Corp., 289 A.D.2d 365, 734 N.Y.S.2d 882 (App. Div. 2d Dep't 2001) ("Contrary to the defendants' contention that their motion was addressed to the pleadings pursuant to CPLR 3211(a)(7), the motion was for summary judgment, and therefore it should have been made no later than 120 days after the filing of the note of issue." (citation omitted)).

[215] 166 Siegel's Practice Review, *Can a Motion to Dismiss under CPLR 3211 Circumvent the Time Limit on the Motion for Summary Judgment under CPLR 3212?*, at 1 (Oct. 2005).

to remedy.[216] Accordingly, where a party seeking to circumvent the timeliness provisions in CPLR 3212(a) makes a CPLR 3211(a)(7) motion to dismiss, which is subsequently converted to a motion for summary judgment under CPLR 3211(c), the movant should wind up in the same position: foreclosed from moving for summary judgment absent a showing of good cause.

3. CPLR 3404 & 22 NYCRR § 202.27 – Laxness Dismissals

A defendant who has been foreclosed from the use of the summary judgment tool as a result of a violation of the timeliness provision of CPLR 3212(a) may attempt to obtain dismissal of an action pending against her by doing nothing more than diligently pressing for a trial on the very matter that the defendant has insisted contains no triable issue of fact. If the plaintiff fails to appear or is unable to proceed when the matter is set for trial, the defendant may be able to obtain a "laxness dismissal."[217] 22 NYCRR section 202.27 and CPLR 3404 form the core of post-note of issue laxness dismissals,[218] and are the focus of the ensuing discussion.

Following the disposition of a summary judgment motion, it is customary for a trial court to conduct a pretrial conference.[219] The purpose of this conference is, among other things, to review the issues to be tried and select a date on which the trial is to commence.[220] Where a defendant's otherwise meritorious summary judgment motion has been denied due to its untimeliness, plaintiff's counsel, acknowledging the fact that the action is unlikely to succeed,

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[216] *See supra* notes 19, 154 and accompanying text. *Cf.* Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C., 5 N.Y.3d 514, 521, 840 N.E.2d 565, 569, 806 N.Y.S.2d 453, 457 (2005):

> [W]hat is undesirable is sometimes also necessary, and it is often necessary, as it is here, to hold parties responsible for their lawyers' failure to meet deadlines. Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated.

(citations omitted).

[217] This phrase is borrowed from Professor Siegel's treatise. SIEGEL, *supra* note 36, at 625.

[218] With respect to cases in which a note of issue has been filed, care must be taken to avoid reliance on CPLR 3216 ("want of prosecution") as a ground for dismissal. CPLR 3216 only applies to cases that are in the pre-note of issue stage. *E.g.*, Johnson v. Sam Minskoff & Sons, Inc., 287 A.D.2d 233, 237, 735 N.Y.S.2d 503, 506 (App. Div. 1st Dep't 2001); Lopez v. Imperial Delivery Serv., Inc., 282 A.D.2d 190, 194, 725 N.Y.S.2d 57, 60 (App. Div. 2d Dep't 2001).

[219] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.26 (2005).

[220] *Id.* § 202.26(c); *see also* SIEGEL, *supra* note 36, § 374.

may want to dedicate her energies to other matters.[221] Concomitantly, plaintiff's counsel may elect to skip or lightly forget a pretrial conference scheduled on the matter, or send an attorney to cover the conference who is unfamiliar with the case or without authority to take meaningful actions with respect to the matter.[222]

Should this scenario unfold, plaintiff's counsel will expose the action to a laxness dismissal based on 22 NYCRR section 202.27(b).[223] This rule authorizes a trial court to dismiss an action where plaintiff's counsel fails to appear for a conference or, upon appearing, fails to announce her readiness to proceed with the conference.[224] Thus, a violation of the rule may provide another alternative for a defendant who can no longer avail herself of a meritorious summary judgment motion, but is still bent on attaining a dismissal.[225] If the trial court invokes § 202.27(b) and dismisses the action, plaintiff must provide a reasonable excuse for the default and demonstrate that her action has merit to successfully vacate the default.[226] If a meritorious summary judgment motion was

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[221] *See supra* notes 194-198 and accompanying text.

[222] The Uniform Rules require an attorney who appears at a pretrial conference to be "fully familiar with the action and authorized to make binding stipulations or accompanied by a person empowered to act on behalf of the party." N.Y. COMP. CODES R. & REGS. tit. 22, § 202.26(e) (2005).

[223] While Uniform Rule section 202.27 is only applicable to actions in the supreme and county courts, the respective uniform rules of the New York City Civil Court, the City Courts, and the District Courts provide each of these courts with an analogous calendar control device. *Id.* § 208.14(b) ("Uniform Civil Rules for the New York City Civil Court"; "Calendar default; restoration; dismissal"); *Id*. § 210.14 ("Uniform Civil Rules for the City Courts Outside of the City of New York"; "Defaults"); *Id*. § 212.14(b) ("Uniform Civil Rules for the District Courts"; "Calendar default; restoration; dismissal").

[224] *See, e.g*, Echevarria v. Waters, 8 A.D.3d 330, 331, 777 N.Y.S.2d 724, 724 (App. Div. 2d Dep't 2004) (dismissing the action pursuant to section 202.27(b) where plaintiff's counsel failed to appear at pretrial conference); Contractors Cas. & Sur. Co. v. 535 Broadhollow Realty L.L.C., 276 A.D.2d 737, 737, 715 N.Y.S.2d 434, 435 (App. Div. 2d Dep't 2000) (striking defendants' answer and ordering an inquest pursuant to section 202.27(a) where defendants' counsel failed to appear at pretrial conference); Booth v. Hawk Contractors, Inc., 259 A.D.2d 577, 577, 686 N.Y.S.2d 770, 771 (App. Div. 1st Dep't 1999) (dismissing action pursuant to section 202.27(b) where plaintiff's counsel failed to appear at trial-readiness conference).

[225] Presumably a plaintiff's lawyer would not intentionally skip or lightly forget a pretrial conference for an action that the lawyer believes is meritorious. In any event, if the conference is missed and the action is dismissed pursuant to section 202.27(b), the lawyer may be able to vacate the default. *See infra* note 226 and accompanying text.

[226] *See, e.g*, Solomon v. Ramlall, 18 A.D.3d 461, 461, 795 N.Y.S.2d 76, 77 (App. Div. 2d Dep't 2005); *Echevarria*, 777 N.Y.S.2d at 724-25; Brannigan v. Bd. of Educ. of Levittown Union Free School Dist., 307 A.D.2d 945, 946, 763 N.Y.S.2d 471, 472 (App. Div. 2d Dep't 2003); Uddaraju v. City of New York, 1 A.D.3d 140, 141, 766 N.Y.S.2d

denied solely on the basis of the timeliness provisions in CPLR 3212(a), it may be very difficult for the plaintiff to demonstrate that the default should be vacated based on the merits of the action. In many instances, she may have no incentive to try.[227]

In the event that a case similar to *Brill* is not dismissed[228] or discontinued[229] prior to reaching its turn on the trial calendar, the defendant may avert trial if the plaintiff fails to appear for the commencement of the trial by failing to answer a call at the trial calendar, or appears but is not ready to proceed.[230] Confronted with a plaintiff's failure to appear for the commencement of trial or failure to be ready to proceed, the trial court has four options.[231] The court has the discretion to: (1) adjourn the case, (2) mark the case "off" or strike it from the trial calendar pursuant to CPLR 3404,[232] (3) vacate the note of issue pursuant to Uniform Rule § 202.21(e),[233] or (4) dismiss the action pursuant to Uniform Rule § 202.27.[234]

Neither the first nor the third option result in the dismissal of the action. It is unlikely, however, that a court would employ these options to a case resembling *Brill*, where the merits of plaintiff's claims are doubtful. The first option, allowing for an adjournment of the case, is the "least drastic course of action" and carries no consequences to the defaulting party.[235] Given that it is the responsibility of the trial courts under the Individual Assignment System[236] to move cases to disposition expeditiously,[237] an adjournment of the trial of a case that has no merit would be inappropriate.[238] Furthermore,

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207, 208 (App. Div. 1st Dep't 2003); Lopez v. Imperial Delivery Serv., 725 N.Y.S.2d 57, 62 (App. Div. 2d Dep't 2001); *Contractors Cas. & Sur. Co.*, 715 N.Y.S.2d at 435; *Booth*, 686 N.Y.S.2d at 771.

227 *See supra* notes 194-98 and accompanying text.

228 *See supra* notes 207-27 and accompanying text.

229 *See supra* notes 181-82 and accompanying text.

230 *See* N.Y. C.P.L.R. 3404 (McKinney 2005).

231 *Brannigan*, 763 N.Y.S.2d at 472; Basetti v. Nour, 731 N.Y.S.2d 35, 41 (App. Div. 2d Dep't 2001).

232 *See infra* notes 242-47 and accompanying text.

233 *See supra* note 84 and accompanying text.

234 *See supra* notes 223-27 and accompanying text.

235 *Basetti*, 731 N.Y.S.2d at 41.

236 Under the Individual Assignment System, which New York adopted on January 6, 1986, a case gets assigned to a single judge who handles the case through its disposition. *See* SIEGEL, *supra* note 36, § 77A.

237 Vincent C. Alexander, *New Approach to Restoring Cases Marked 'Off' the Trial Calendar*, N.Y.L.J., Nov. 10, 2001, at 3, 5.

238 Adjournments of trial dates are frequently granted due to the engagement of counsel in another matter before a different court. *See generally* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 125.1, 202.32 (2005). Adjournments are also frequently employed

the third option of vacating the note of issue would be inappropriate in a *Brill* situation, unless the certificate of readiness[239] accompanying the note of issue is incorrect in some material respect.[240]

The remaining options of marking the matter "off" the trial calendar pursuant to CPLR 3404 and dismissal under Uniform Rule § 202.27 offer the prospect of dismissal of the action, with the latter providing it immediately.

CPLR 3404, entitled "Dismissal of abandoned cases," provides:

> A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.[241]

The statute, which should only be invoked where all parties appear but some circumstance prevents the case from immediately going to trial,[242] affords a dilatory plaintiff one year to restore an action marked "off" the trial calendar.[243] Upon the expiration of the one-year period, the case is automatically dismissed[244] if a motion to restore has not been

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to accommodate scheduling problems related to witnesses, the illness of counsel, a party or a witness, and personal or family emergencies.

[239] *See supra* notes 83-84 and accompanying text.

[240] *Basetti*, 731 N.Y.S.2d at 41.

[241] N.Y. C.P.L.R. 3404 (McKinney 2005).

[242] *See Basetti*, 731 N.Y.S.2d at 41.

[243] There is disagreement as to the applicability of CPLR 3404 to actions in the lower courts. *See, e.g.*, Chavez v. 407 Seventh Ave. Corp., 10 Misc.3d 33, 807 N.Y.S.2d 785 (App. Term 2d & 11th Jud. Dists. 2005) (declining to follow prior holdings and concluding that CPLR 3404 is applicable to the Civil Court of the City of New York); *But cf.* Jeganathan v. O'Reilly, 195 Misc. 2d 197, 199-200, 753 N.Y.S.2d 814, 818 (City Ct. White Plains 2003) (holding that CPLR 3404 is not available as a calendar control device in City Court); SIEGEL, *supra* note 36, § 376. As to actions in the New York City Civil Court, the City Courts and the District Courts, the individual rules applicable to those courts must be consulted. N.Y. COMP. CODES R. & REGS. tit. 22, § 208.14 (2005) ("Uniform Civil Rules for the New York City Civil Court"; "Calendar default; restoration; dismissal"); N.Y. COMP. CODES R. & REGS. tit. 22, § 210.14 (2005) ("Uniform Civil Rules for the City Courts Outside the City of New York"; "Defaults"); N.Y. COMP. CODES R. & REGS. tit. 22, § 212.14 (2005) ("Uniform Civil Rules for the District Courts"; "Calendar default; restoration; dismissal").

[244] *See, e.g.*, Threatt v. Seton Health Sys., Inc., 277 A.D.2d 796, 796, 715 N.Y.S.2d 791, 792 (App. Div. 3d Dep't 2000) (dismissal of abandoned case accomplished automatically upon passage of one-year period); Meade v. L.A. Lama Agency, Inc., 260 A.D.2d 979, 980, 689 N.Y.S.2d 302, 304 (App. Div. 3d Dep't 1999) (dismissal of action where plaintiff fails to restore within statutory period is self-executing, requiring no further ministerial action); Nunez v. County of Nassau, 265 A.D.2d 312, 313, 696 N.Y.S.2d 217, 218 (App. Div. 2d Dep't 1999) (no motion to dismiss by defendant necessary where plaintiff failed to restore action within one-year period, as dismissal

made.[245] Restoration within the one-year period is free for the asking and the plaintiff is not burdened with any required showing.[246] If a plaintiff fails to duly restore the action within one year and the action is dismissed, the plaintiff must make a motion to vacate the dismissal. To succeed on such a motion, the plaintiff must establish, among other things, that her action is meritorious,[247] a showing that a plaintiff in a *Brill* situation will be hard-pressed to make. Accordingly, CPLR 3404 may prove useful to the defendant in a *Brill* situation, provided that plaintiff's conduct causes the action to be marked "off" the trial calendar and plaintiff is not inclined to move for restoration of the action within the prescribed period.

The final option, dismissal pursuant to Uniform Rule § 202.27(b),[248] is not only the most desirable remedy in the eyes of a defendant in a *Brill* situation, but is probably the most appropriate. Should the plaintiff in a *Brill* situation fail to appear for the commencement of trial, or appear but not be ready to proceed, the trial court may dismiss the action pursuant to § 202.27(b).[249] This would remove the one-year grace period offered by CPLR 3404,[250] result in the immediate

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was automatic); Lee v. Chion, 213 A.D.2d 602, 603, 623 N.Y.S.2d 927, 927 (App. Div. 2d Dep't 1995) (same); SIEGEL, *supra* note 36, § 376.

[245] *See, e.g.*, Ronsco v. Constr. Co. v. 30 East 85th Street Co., 219 A.D.2d 281, 283, 641 N.Y.S.2d 33, 35 (App. Div. 1st Dep't 1996); Maida v. Rite Aid Corp., 210 A.D.2d 589, 590, 619 N.Y.S.2d 812, 813 (App. Div. 3d Dep't 1994).

[246] *See, e.g.*, Brannigan v. Bd. of Educ. of Levittown Union Free Sch. Dist., 763 N.Y.S.2d 471, 472 (App. Div. 2d Dep't 2003); Basetti v. Nour, 731 N.Y.S.2d 35, 39 (App. Div. 2d Dep't 2001); Lopez v. Imperial Delivery Serv., Inc., 725 N.Y.S.2d 57, 62 (App. Div. 2d Dep't 2001); SIEGEL, *supra* note 36, § 376.

[247] *See, e.g.*, *Basetti*, 731 N.Y.S.2d at 39; *Lopez*, 725 N.Y.S.2d at 62; SIEGEL, *supra* note 36, § 376. The plaintiff must also establish: (1) a reasonable excuse for the failure to timely restore; (2) lack of intent to abandon the action; and (3) a lack of prejudice to her adversary. Castillo v. N.Y. City Hous. Auth., 6 A.D.3d 568, 568, 775 N.Y.S.2d 82, 82 (App. Div. 2d Dep't 2004); *Basetti*, 731 N.Y.S.2d at 39; Aguilar v. Djonvic, 282 A.D.2d 366, 366, 723 N.Y.S.2d 474, 476 (App. Div. 1st Dep't 2001); *Lopez*, 725 N.Y.S.2d at 62; Bray v. Thor Steel & Welding Ltd., 275 A.D.2d 912, 912, 713 N.Y.S.2d 400, 401 (App. Div. 4th Dep't 2000); Sanchez v. Javind Apt. Corp., 667 N.Y.S.2d 708, 710 (App. Div. 1st Dep't 1998).

[248] *See supra* notes 223-27 and accompanying text.

[249] *See, e.g.*, Solomon v. Ramlall, 795 N.Y.S.2d 76, 77 (App. Div. 2d Dep't 2005) (dismissing action pursuant to section 202.27(b) upon plaintiff's counsel failure to appear on date set for jury selection). The defendant should remind the trial judge of any meritorious summary judgment motion that was denied based on untimeliness. *See generally Is There Any Way Around* Brill*?*, *supra* note 207, at 1 ("The trial judge should be apprised of any situation in which the case is ripe for summary disposition, but in which a summary judgment motion was made too late, or – the more likely scenario – was never made at all because the would-be movant recognized its lateness.").

[250] *See supra* notes 242-47 and accompanying text.

dismissal of the action, and place the burden on the plaintiff, should she elect to move to vacate the dismissal,[251] to demonstrate the merits of her case.[252] This type of dismissal is warranted in such a case because it will expedite the disposition of the matter, a main objective of the Individual Assignment System.[253]

4. Defense Lawyer's Potential Exposure to Legal Malpractice

If a defendant has meritorious grounds for a summary judgment motion, it is obviously in her economic interests to move promptly. Disposing of the case at the earliest possible moment will generally result in a cost benefit to the defendant, who can avoid the continued expense of attorney's fees and litigation disbursements. If a defendant is precluded from making a meritorious motion for summary judgment based on a failure to comply with CPLR 3212(a)'s time period,[254] it will usually result from a lawyer's failure to meet the deadline. As the Court of Appeals held in *Brill*, the case will now have to proceed to trial.[255] This will require a substantial amount of preparation by the lawyers representing the defendant, including the expense of hiring any necessary experts.

If the grounds for the untimely summary judgment motion are meritorious, the defendant who is precluded from making the motion because of a failure to comply with CPLR 3212(a)'s time frame may have a legal malpractice claim against her lawyer. A legal malpractice action requires the plaintiff to prove "three essential elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause

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[251] The plaintiff in a *Brill* situation will have little or no incentive to move to vacate a dismissal based on § 202.27. *See supra* notes 187-93 and accompanying text.

[252] *See supra* note 226-27 and accompanying text.

[253] *E.g.*, Basetti v. Nour, 731 N.Y.S.2d 35, 41 (App. Div. 2d Dep't 2001) ("[T]he overall purpose of the Individual Assignment System (IAS) [is] to give trial judges greater control over their cases and to move cases to disposition more expeditiously."); Johnson v. Minskoff & Sons, Inc., 735 N.Y.S.2d 503, 506 (App. Div. 1st Dep't 2001) (stating that "the Individual Assignment System . . . was intended to encourage trial court control of cases and promote the disposition of cases within reasonable periods of time"); Lopez v. Imperial Delivery Serv., Inc., 725 N.Y.S.2d 57, 61 (App. Div. 2d Dep't 2001) ("Two of the objectives of the IAS were to encourage efficient trial court control of cases and to promote the disposition of cases within reasonable periods of time.").

[254] *See* Brill v. City of N.Y., 781 N.Y.S.2d 261, 264-65 (N.Y. 2004) (stating that meritorious, nonprejudicial filings, however tardy, cannot be considered in the absence of good cause for the delay); *supra* notes 25-28 and accompanying text.

[255] *Brill*, 781 N.Y.S.2d at 265.

of the loss sustained; and (3) proof of actual damages."[256] An attorney who agrees to represent a client impliedly warrants that, among other things, she "is familiar with the rules regulating practice in actions of the type which [she] undertakes to bring or defend and with such principles of law in relation to such actions as are well settled in the practice of law."[257] From the two Court of Appeals cases that specifically address the timeliness requirements of CPLR 3212(a),[258] it is apparent that the dictates of the statute are now well settled. If a lawyer fails to serve a meritorious motion for summary judgment on a timely basis and cannot establish good cause for the delay, a strong argument may be made that the attorney's conduct constituted negligence.

If negligence is established in this context, it will not be difficult to satisfy the second and third elements of a legal malpractice claim. Virtually any subsequent expense incurred during the course of the litigation can be linked to the lawyer's failure to make the meritorious motion on a timely basis. The proof of actual damages in this scenario will not be difficult to establish, and may take the form of the lawyer's invoice for any services after the failed motion.[259]

The prospect of a legal malpractice claim will only arise in cases where the defendant actually possesses meritorious grounds for a summary judgment motion. A court may volunteer this observation when refusing to entertain a late motion for summary judgment based on CPLR 3212(a)'s timing

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[256] Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 170 A.D.2d 108, 114, 573 N.Y.S.2d 981, 985 (App. Div. 1st Dep't 1991), *aff'd*, 80 N.Y.2d 377, 590 N.Y.S.2d 831, 605 N.E.2d 318 (1992).

[257] 1B NEW YORK PATTERN JURY INSTRUCTIONS – CIVIL § 2:152, at 857 (3d ed. 2005).

[258] *See supra* notes 21-28 and accompanying text.

[259] The dispute may arise when, after receiving the lawyer's invoice, the client refuses to pay the lawyer for any services rendered or disbursements incurred after the failed summary judgment motion. Before the lawyer can sue the client for any unpaid fees, she must plead and prove compliance with New York's Fee Dispute Resolution Program. N.Y. COMP. CODES R. & REGS. tit. 22, § 137 (2005). "An attorney who institutes an action to recover a fee must allege in the complaint: (1) that the client received notice under this Part of the client's right to pursue arbitration or (2) that the dispute is not otherwise covered by this Part." *Id*. § 137.6(b). *See* Lorin v. 501 Second St. LLC, 2 Misc. 3d 646, 647, 769 N.Y.S.2d 361, 362 (N.Y. Civ. Ct. Kings County 2003) (granting reargument and adhering to the earlier determination that complaint must be dismissed for failure to comply with Part 137's requirements). Part 137 does not apply, however, to "claims involving substantial legal questions, including professional malpractice or misconduct." N.Y. COMP. CODES R. & REGS. tit. 22, § 137.1(b)(3) (2005).

requirements.[260] Even if a court is silent on the point, if it is apparent that the client was denied the right to have a case dismissed on summary judgment grounds because of the attorney's failure to comply with CPLR 3212(a)'s time periods, the attorney may have an obligation to disclose the problem to the client.[261]

VIII. CONCLUSION

CPLR 3212(a)'s timing requirement for summary judgment motions will continue to have a pervasive and significant effect on litigation in New York State courts. This article has attempted to address the rule's application in a variety of contexts to provide guidance to the bench and bar.

As with so many aspects of civil procedure, the rule will gradually settle into place on the landscape and become a noncontroversial part of practice. In the meanwhile, given the large number of cases still addressing CPLR 3212(a)'s requirements, and the dramatic effect of the Court of Appeals' recent decisions in *Brill* and *Miceli*, there will be several more chapters in this saga.

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[260] In *Brill*, both the Supreme Court and the Appellate Division concluded that defendant's motion for summary judgment was meritorious. *See supra* notes 156-59 and accompanying text. The Court of Appeals did not consider the merits of the defendant's motion. Brill v. City of N.Y., 781 N.Y.S.2d 261, 263 n.2 (N.Y. 2004).

[261] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Opinion No. 734 (Nov. 1, 2000) (opining that an attorney must report to the client a significant error or omission that may give rise to a possible malpractice claim and, depending on the circumstances, may be required to withdraw its representation of the client).

POSTSCRIPT

Chief Judge Judith Kaye, New York Court of Appeals

As the author of *Brill v. City of New York*, I have several reactions to Professor Connors' article. First, I am impressed – indeed, dazzled – by the author's comprehensive treatment of his subject, and by his scholarship. As a CPLR "junkie," I find all of the pathways to, from, in, out and around *Brill* downright fascinating.

On another level, I feel both elation and dismay. Elation because the Court's purpose in insisting upon strict compliance with the clear statutory prescription was in part to underscore the seriousness of deadlines and jog a delay-oriented culture (*see also Kihl v. Pfeffer*[262]). Thus, elation because the decision sure was noticed!

But dismay quickly followed. So much effort, so much lawyer and court time, so much client risk and expense, to avoid simple compliance with a rule requiring that motions for summary judgment be made no later than 120 days after the filing of the note of issue, unless the movant can establish good cause.

Professor Connors attributes this to "the adventuresome nature of a healthy segment of the bar," and provides guidance to the bench and bar in dealing with the timing requirement for summary judgment motions. I can't avoid offering some guidance of my own: just honor the deadlines, whether statutory or court-ordered. There's lots of other room for adventure in, and beyond, the law.

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[262] 94 N.Y.2d 118, 123, 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999).