

Table of Contents

CHAPTER 1. SUMMARY JUDGMENT

I. SUGGESTED MOTION TEXT

- § 1:1 Summary judgment
- § 1:2 Overview of motion

II. KEY SUPPORTING CITATIONS

- § 1:3 Summary judgment—Supporting proof; grounds; relief to either party [CPLR 3212(b)]
- § 1:4 — —Description and purpose
- § 1:5 — —Cautious measure
- § 1:6 — —“Triable issues”
- § 1:7 — —Triable issues re opposition to motion
- § 1:8 — —State of mind/credibility
- § 1:9 — —Discovery
- § 1:10 — —Conclusory assertions
- § 1:11 — —Summary judgment in specific cases—Dangerous condition of property
- § 1:12 — —Personal injury/property damage
- § 1:13 — —Employment cases
- § 1:14 — —Premises liability
- § 1:15 — —Contract
- § 1:16 — — —Instrument for payment of money
- § 1:17 — —Insurance
- § 1:18 — —Legal malpractice
- § 1:19 — —Defamation cases
- § 1:20 — —Cases involving licensed architects, engineers, land surveyors or landscape architects
- § 1:21 — —Residential foreclosure
- § 1:22 — —Debt collection in consumer credit transactions
- § 1:23 Procedural considerations—Generally
- § 1:24 — —Moving for summary judgment
- § 1:25 — —Lateness; good cause
- § 1:26 — —Proof requirements in support of motion
- § 1:27 — — —Affidavits
- § 1:28 — —Proof requirements in opposition to motion
- § 1:29 — —Proof issues—Proof within exclusive knowledge of moving party
- § 1:30 — —Admissibility of evidence
- § 1:31 — —Further discovery necessary

- § 1:32 —Continuance
- § 1:33 Case not fully adjudicated on motion—Partial summary judgment
- § 1:34 —Hearing on limited fact issues
- § 1:35 Burden of proof—Generally
- § 1:36 —Burden where defendant brings motion
- § 1:37 —Burden where plaintiff brings motion
- § 1:38 Evidence on motion—Generally
- § 1:39 — —Strict construction of movant’s evidence/liberal treatment of opponent’s evidence
- § 1:40 —Pleadings
- § 1:41 —Discovery responses
- § 1:42 —Proofs in support of motion generally
- § 1:43 — —Inferences
- § 1:44 — —Admissibility of evidence
- § 1:45 —Competent evidence required—Generally
- § 1:46 — —Incompetent affidavits & declarations
- § 1:47 — —Speculation or conjecture
- § 1:48 Effect of denial of motion
- § 1:49 Review of motion—Standard of review
- § 1:50 —Appealable orders

III. SAMPLE SUPPORTING AND OPPOSITION BRIEFS

- § 1:51 Motion for summary judgment by defendant—Notice of motion for summary judgment
- § 1:52 —Memorandum of points and authorities in support of motion for summary judgment
- § 1:53 —Statement of undisputed material facts in support of motion for summary judgment
- § 1:54 —Affidavit in support of motion for summary judgment
- § 1:55 Plaintiff’s opposition to motion for summary judgment—Memorandum of points and authorities in opposition to motion for summary judgment
- § 1:56 —Plaintiff’s response to defendant’s statement of facts and plaintiff’s additional statement of material facts at issue in opposition to motion for summary judgment
- § 1:57 Sample orders—Order for entry of summary judgment
- § 1:58 —Order denying summary judgment
- § 1:59 Sample Judgment

CHAPTER 2. MOTIONS TO DISMISS BASED UPON SPECIFIC DEFENSES

- § 2:1 Suggested motion text

TABLE OF CONTENTS

- § 2:2 Overview of motion
- § 2:3 Time to raise defenses [CPLR 3211(e)]

I. FAILURE TO STATE A CAUSE OF ACTION

- § 2:4 Overview
- § 2:5 Standard of review
- § 2:6 —Facts deemed admitted
- § 2:7 —Treating motion as summary judgment
- § 2:8 Plaintiff's burden to withstand motion
- § 2:9 —Plaintiff's failure to meet burden
- § 2:10 Leave to replead complaint as remedy
- § 2:11 Infrequent grant of motion
- § 2:12 Standard of review on appeal
- § 2:13 Review of allegations in total
- § 2:14 Defects in complaint

II. SUBJECT MATTER JURISDICTION

- § 2:15 Overview
- § 2:16 Procedure
- § 2:17 Preservation of the defense of subject matter jurisdiction

III. PERSONAL JURISDICTION

- § 2:18 Overview
- § 2:19 Waiver
- § 2:20 Objections to personal jurisdiction; appearance
- § 2:21 Appearance generally

IV. INSUFFICIENT LEGAL CAPACITY TO SUE

- § 2:22 Overview
- § 2:23 Insufficient legal capacity
- § 2:24 Issue of “standing” as lack of capacity
- § 2:25 Waiver of defense

V. SAME PARTIES AND CAUSE OF ACTION IN DIFFERENT FORUM

- § 2:26 Overview
- § 2:27 Commencement of another action
- § 2:28 Judicial discretion; priority of other action
- § 2:29 Similar pending cause of action

VI. DEFENSE FOUNDED UPON DOCUMENTARY EVIDENCE

- § 2:30 Overview

- § 2:31 Sufficiency of documentary evidence
- § 2:32 What constitutes “documentary evidence”
- § 2:33 Notice of motion to dismiss for failure to state a cause of action
- § 2:34 —Memorandum of points and authorities in support of motion to dismiss for failure to state a claim
- § 2:35 Notice of motion to dismiss complaint based upon lack of jurisdiction over the subject matter
- § 2:36 Memorandum of points and authorities in support of motion to dismiss based upon lack of jurisdiction over the subject matter
- § 2:37 Notice of motion to dismiss complaint based upon lack of jurisdiction over the person
- § 2:38 Memorandum of points and authorities in support of motion to dismiss based upon lack of jurisdiction over the person
- § 2:39 Affidavit in support of motion to dismiss complaint for lack of jurisdiction over the person

CHAPTER 3. VOLUNTARY AND INVOLUNTARY DISMISSAL; JUDGMENT DURING TRIAL/POST-TRIAL

- § 3:1 Suggested motion text—Voluntary discontinuance
- § 3:2 Overview of voluntary dismissal
- § 3:3 Authority for voluntary dismissal [CPLR 3217]

I. VOLUNTARY DISMISSAL

- § 3:4 Construction and application
- § 3:5 Purpose of rule and dismissal generally
- § 3:6 Leave of court
- § 3:7 Terms and conditions
- § 3:8 A defendant’s counterclaim
- § 3:9 Discontinuance without prejudice
- § 3:10 Effect of discontinuance
- § 3:11 Denial of discontinuance/waiver
- § 3:12 Review on appeal

II. DISMISSAL FOR REFUSAL TO COMPLY WITH ORDER OR TO DISCLOSE

- § 3:13 Suggested motion text—Dismissal for refusal to comply with order or to disclose
- § 3:14 Overview of dismissal for refusal to comply with order or to disclose

TABLE OF CONTENTS

- § 3:15 Authority for dismissal motions for refusal to comply with order or to disclose CPLR 3126
- § 3:16 General comments
- § 3:17 Failure to comply with court order
- § 3:18 Dismissal—Deliberate or willful conduct
- § 3:19 Dismissal of complaint—Generally
- § 3:20 Discretion of court
- § 3:21 Disposal of evidence
- § 3:22 Purpose of sanction
- § 3:23 Review by appellate court

III. MOTION FOR JUDGMENT AT TRIAL

- § 3:24 Suggested motion text—Judgment during trial
- § 3:25 Overview of motion for judgment during trial
- § 3:26 Authority for motion for judgment during trial—CPLR 4401
- § 3:27 General comments
- § 3:28 The motion for judgment at trial—Generally
- § 3:29 Determination of motion
- § 3:30 Accepting evidence as true
- § 3:31 Ruling upon motion
- § 3:32 Review by appellate court

IV. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

- § 3:33 Suggested motion text—motion for judgment notwithstanding the verdict
- § 3:34 Overview of motion for judgment notwithstanding the verdict
- § 3:35 Authority for motion for judgment notwithstanding the verdict CPLR 4404(a)
- § 3:36 General comment
- § 3:37 Timing and renewal of motion
- § 3:38 General principles
- § 3:39 Determination of motion
- § 3:40 Interpreting evidence
- § 3:41 Ruling upon motion
- § 3:42 New trial motion
- § 3:43 Review

V. SAMPLE FORMS

- § 3:44 Stipulation of discontinuance
- § 3:45 Notice of motion for order dismissing action with approval of parties

- § 3:46 Notice of motion to dismiss for failure of plaintiff to comply with court order
- § 3:47 Notice of motion for judgment during trial
- § 3:48 Order granting motion for judgment during trial
- § 3:49 Notice of motion for judgment post-trial

CHAPTER 4. OTHER DISMISSAL MOTIONS

I. CHAPTER OVERVIEW

- § 4:1 Summary of motions

II. DISMISSAL BASED ON FORUM NON CONVENIENS

- § 4:2 Suggested motion text
- § 4:3 Overview of motion

A. KEY SUPPORTING CITATIONS

- § 4:4 Authorities [CPLR 327(a)] and New York Common Law
- § 4:5 —Description and purpose
- § 4:6 —Discretionary motion
- § 4:7 —Factors weighed by court
- § 4:8 — —Suitability of forum
- § 4:9 —Stay of action
- § 4:10 Procedural considerations—Timing of motion
- § 4:11 —Burden of proof
- § 4:12 Forum selection clauses

B. KEY OPPOSITION CITATIONS

- § 4:13 Suitability of alternative forum
- § 4:14 Presumptively convenient forum
- § 4:15 Stay as alternative remedy
- § 4:16 Waiver

III. DISMISSAL BASED ON FAILURE TO ISSUE COMPLAINT WITH SUMMONS

- § 4:17 Suggested motion text
- § 4:18 Overview of motion

A. KEY SUPPORTING CITATION

- § 4:19 Primary authority [CPLR 3012(b)]

TABLE OF CONTENTS

- § 4:20 —Description
- § 4:21 —Prejudice to defendant
- § 4:22 Procedural considerations—Discretion of court
- § 4:23 —Timing of motion
- § 4:24 Opposition defenses—Limitation of actions
- § 4:25 —Review
- § 4:26 —Excuses for delay

B. KEY OPPOSITION CITATIONS

- § 4:27 General authorities—Policy to try cases on merits/no prejudice by delay

IV. DISMISSAL BASED ON DELAY IN PROSECUTION

- § 4:28 Suggested motion text
- § 4:29 Overview of motion

A. KEY SUPPORTING CITATIONS

- § 4:30 Primary authority [CPLR 3216]
- § 4:31 —Purpose of motion
- § 4:32 Primary authority [CPLR 3215]—Purpose of rule
- § 4:33 Primary authority [CPLR 3216]—Discretionary motion
- § 4:34 Grounds for motion/notice of demand
- § 4:35 Procedural considerations—Effect of dismissal of action
- § 4:36 —Reinstatement

B. KEY CITATIONS FOR PARTY PROSECUTING ACTION

- § 4:37 General authorities—Case on the merits
- § 4:38 —No inference of prejudice
- § 4:39 —Court’s discretion
- § 4:40 Factors considered
- § 4:41 Responses to a potential dismissal under CPLR 3215
- § 4:42 Procedural considerations

V. DISMISSAL BASED ON PLAINTIFF’S FAILURE TO DISCLOSE

- § 4:43 Suggested motion text
- § 4:44 Overview of motion

A. KEY SUPPORTING CITATIONS

- § 4:45 Primary authority [CPLR 3126]

- § 4:46 —Generally
- § 4:47 —Dismissal sanction
- § 4:48 — —Nonmovant’s burden to show failure not willful
- § 4:49 Procedural considerations
- § 4:50 Dismissal as drastic remedy
- § 4:51 Measure of conduct-dismissal sanction

VI. DISMISSAL BASED ON FAILURE TO JOIN INDISPENSABLE PARTY

- § 4:52 Suggested motion text
- § 4:53 Overview of motion
- § 4:54 Purpose of rule
- § 4:55 Indispensable parties
- § 4:56 Effect of failure to join
- § 4:57 Discretion of court

VII. DISMISSAL UNDER ANTI-SLAPP STATUTE

- § 4:58 Suggested motion text
- § 4:59 Overview of motion

A. KEY SUPPORTING CITATIONS

- § 4:60 Primary authority [CPLR § 76-a, CPLR § 3211(g) and
CPLR § 3212(h)]
- § 4:61 Description of anti-SLAPP motions
- § 4:62 Policy underlying anti-SLAPP motions
- § 4:63 Activities subject to motion—Action involving public
petition and participation
- § 4:64 —Involvement of public applicant or permittee
- § 4:65 —“Materially related”
- § 4:66 —Suit must involve communication
- § 4:67 —Suit must involve a government body
- § 4:68 Timing of anti—SLAPP motions
- § 4:69 Burden of proof
- § 4:70 Standard for motion to dismiss
- § 4:71 Damages and costs

B. KEY OPPOSITION CITATIONS

- § 4:72 Activities subject to motion
- § 4:73 Activities not subject to motion
- § 4:74 Evidence on motion
- § 4:75 Damages and costs

TABLE OF CONTENTS

VIII. SAMPLE PLEADINGS

**A. MOTION TO DISMISS PLAINTIFF'S ACTION
[FAILURE TO SERVE COMPLAINT]**

- § 4:76 Notice of motion to dismiss
- § 4:77 Memorandum of points and authorities in support of
motion to dismiss
- § 4:78 Affidavit of defendant in support of motion to dismiss

**B. PLAINTIFF'S OPPOSITION TO MOTION TO
DISMISS ACTION [FORUM NON CONVENIENS]**

- § 4:79 Memorandum of points and authorities in opposition to
motion to dismiss action
- § 4:80 Affidavit of plaintiff in opposition to motion to dismiss
action

**C. PLAINTIFF'S MOTION TO REINSTATE ACTION
[DELAY IN PROSECUTION]**

- § 4:81 Memorandum of points and authorities in motion to
reinstate action
- § 4:82 Affidavit of plaintiff in motion to reinstate complaint

D. SAMPLE ORDERS

- § 4:83 Order to dismiss action [failure to serve complaint]
- § 4:84 Order to reinstate action [delay in prosecution]

Table of Laws and Rules

Table of Cases

Index