



***A GUIDE TO SUING ON A
COMMERCIAL CLAIM IN NEW YORK***

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THE LITIGATION PROCESS IN NEW YORK STATE COURTS ("NYSC")

The purpose of this brief Guide is to provide a frank non-technical introduction to bringing a commercial claim here in New York City. This Guide is designed to provide the reader, a prospective litigant unfamiliar with the litigation process in NYCS, with basic answers to the most frequently asked questions.

Our Guide aims at enabling the reader, to make an informed and efficient decision on whether to commence a lawsuit here in the United States. If you already know that you have a meritorious case and wish to contact us about commencing a lawsuit, please do so at the contact information provided in our website.

INTRODUCTION

Specialized courts excepted, there are three (3) courts in New York City where a Plaintiff (the party which is bringing the action) can commence a commercial action against a New York Defendant (the party that is being sued) 1. The Civil Court of the City of New York; 2. The Supreme Court of the State New York; and 3. The Federal District Court (Southern District in Manhattan).

To be sued in New York, the Defendant must have sufficient ties in the State so that the Court may assert jurisdiction over it. Generally speaking, a Defendant which is a New York Corporation, or who does business in New York through its permanent office here, is amenable to the jurisdiction of the New York Court. To sue in the federal court, the claim must exceed \$75,000, and additional technical requirements -having to do with the residence of the parties- apply.

RESOLVING THE CASE WITHOUT LITIGATION

Unless you instruct us to begin litigation at once, we may choose to first attempt to resolve your matter without commencing litigation. In our experience, this is rarely successful as Defendants need to feel the pressure of a lawsuit. However sometimes a simple attorney letter may set in motion, a give-and-take between the parties that may ultimately obviate the need for litigation.

THE DECISION TO COMMENCE A LAWSUIT

In our experience, legal fees and the costs associated with litigation, render it uneconomical to begin a commercial lawsuit in New York City unless the case meets each of the following five (5) requirements:

1. There is a basis of liability entitling the Plaintiff to recover from the Defendant. In other words, your claim must be a valid one under applicable law. This is for your attorney to determine; generally, unpaid unreturned goods ordered by the buyer, always provide a sufficient basis of liability, enabling the seller to bring an action against the buyer;
2. The amount to be recovered in damages is – unless we decide to take your commercial case on a mixed-fee basis (fixed fee plus success fee) – at least \$20,000.00;
3. The Defendant is a juridical person¹ able and amenable to pay an eventual judgment. Unfortunately a small percentage of would-be Defendants are what we call "judgment-proof." In other words, they are able to organize their affairs so that enforcing a judgment against them can often turn into an expensive and fruitless game of cat and mouse. Other Defendants may not have the means to satisfy an eventual judgment; in extreme cases, some Defendants choose not to pay for legal representation of their matter and allow

the entry of a default judgment against them, *See our Section on Defaults at page 11 below*; or some Defendants decide to file for bankruptcy as a way of stopping the lawsuit, *See below our Section on the "Automatic Stay" at page 6 below*.

4. Furthermore, in many cases your claim must be substantiated by writings/documents signed by the person now about to be sued.
5. Litigation is expensive. The client need consider whether to invest in the claim. Please find set forth below some basic information about each of these five (5) matters.

1. Basis of Liability:

Unless the Defendant is legally deemed to be responsible for Plaintiff's losses, Plaintiff may not recover. In other words, the Defendant must have breached a valid legal obligation to the Plaintiff, imposed by law, by contract, or otherwise; the Defendant must, before the Plaintiff may collect from him, be shown to have been liable for the damages that Plaintiff has suffered for which Plaintiff seeks redress. In some cases, of course, liability is quite obvious; in others, not so.

It is therefore one of the jobs of the attorney, to determine at the very outset of the matter, whether the applicable law² recognizes a basis of liability against Defendant, enabling Plaintiff to recover (technically known as a cause of action). Unless the attorney can find such a basis of liability, such that commencement of the lawsuit is justified and permitted, we respectfully submit that the lawsuit may be a waste of money, and may further be deemed frivolous.

In this respect, our clients should know that all New York attorneys are required by law to personally sign all papers submitted to the court in litigation. The attorney's signature is a certification that the attorney has made inquiry into the facts and the law.

Three (3) standards must be met in order for the attorney to make such a certification: (a) that there is legal merit in any legal argument made; (b) that all material facts are true; and (c) that the papers are not intended primarily to prolong litigation or to harass or maliciously injure another party.

Moreover, unless liability is uncontested, such as in the situation where Defendant defaults, the whole purpose of the lawsuit is to establish that Defendant is indeed liable to Plaintiff for its losses and must consequently compensate Plaintiff accordingly, *Please see our Section on Damages, below.*

2. Damages:

In commercial lawsuits, once a Plaintiff has established to the Court that the Defendant is liable to Plaintiff, Plaintiff is entitled to recover two (2) types of compensatory damages, actual damages and consequential damages, and in extremely rare examples, even punitive damages.

The exact computation (how many dollars and cents may Plaintiff recover) is determined after Plaintiff has prevailed on liability, in a court procedure called inquest.

At the Inquest, the Defendant may not challenge its liability (that was done at the trial, and Defendant presumably lost on the issue of liability). However, the Defendant is allowed to introduce any evidence to reduce the amount of damages that Plaintiff will be allowed to recover from Defendant.

The types of damages in a commercial lawsuit are:

Actual damages:

These are the damages that the Plaintiff has suffered, by reason of the breach by the Defendant of an obligation owed to the Plaintiff.

For example, if goods in the amount of \$100,000.00 have not been paid when due, Plaintiff's actual damages are \$100,000.00. Plaintiff is also entitled if it prevails at trial, to add interest to Plaintiff's actual damages computed from the time that the obligation of payment was breached. Unless the parties have by contract agreed to otherwise, New York Law provides for 9% simple interest from the date the Plaintiff was entitled to payment.

Plaintiffs however should know that they are under certain circumstances obligated to mitigate, i.e., to reduce their damages. For example, under applicable law in New York, a seller of perishable goods has the obligation to attempt to resell the goods that the buyer has refused to accept. It is not enough for the Plaintiff to simply sit on its rights.

Consequential damages:

These are the damages that a Plaintiff has incurred, which do not flow directly from Defendant's breach of an obligation [to Plaintiff] but which Plaintiff has nonetheless actually incurred, by reason of the consequences or results of such breach.

For example in our \$100,000.00 for goods non-paid example, assume that because of non-payment, the Plaintiff has been unable to pay its suppliers and they have stopped providing credit. Plaintiff has incurred a commercial loss; under certain circumstances, the Defendant in this example, may be also liable for the loss Plaintiff has suffered by reason of such shut-down of credit from its own suppliers.

Lost Profits damages:

Lost profits represent an interesting subset of Consequential Damages. New York law allows a claimant to recover lost profits for breach of contract if it can demonstrate that such lost profits:

1. Were caused by the Defendant's breach;
2. Were within the parties' contemplation at the time they entered into their contract; and

3. Can be proven with reasonable certainty. In other words, Plaintiff need not prove such lost profits damages with mathematical precision. However when quantifying them for the Court, Plaintiff must abstain from undue speculation, and use known reliable factors to arrive at a specific sum for its lost profits.

Punitive damages:

These are generally damages awarded to a Plaintiff above and beyond Plaintiff's losses, when the defendant's conduct has been particularly reprehensible; they are generally imposed to punish the Defendant and deter such further conduct.

These are generally never awarded in commercial lawsuits, and are infrequently awarded in torts cases, in part to set an example and deter future wrongdoers.

Attorney's fees:

Unless payment of legal fees was specified in a contract between the parties e.g. "in the event of non-payment by such and such date, party X shall pay for party Y's legal fees and expenses", or unless Plaintiff proves the Defendant committed fraud, attorney's fees are generally not recoverable in New York.

However if/when Plaintiff has prevailed in the lawsuit, the law provides for the recovery of certain statutory costs and expenses to be added to the amount of the judgment; these rarely exceed \$2,000.00.

3. The Defendant is a Person or Entity Able to Pay an Eventual Judgment:

Under New York Law, judgments are valid for twenty (20) years from the date they are entered and filed in the Court. During this time, the judgment accrues 9% interest for each year or fraction thereof it remains unpaid.

This notwithstanding, the would-be Plaintiff would do well to ascertain prior to commencing litigation, whether the prospective Defendant has or is likely to have in the foreseeable future, assets which can be sold to satisfy the judgment.

The Effect of Defendant's Filing of a Bankruptcy Petition – The Automatic Stay:

Potential Plaintiffs should be aware that a Defendant may at any time during the pendency of the litigation, or at any time prior to the enforcement of a judgment against it, file a petition with the Bankruptcy Court to be adjudicated bankrupt under the US Bankruptcy Laws.

Such a filing has the effect of staying (i.e stopping) the litigation or the enforcement of a judgment dead in its tracks, at whatever stage it may be (called the "automatic stay") until further proceedings are had in the Bankruptcy Court, which may or may not lift the automatic stay.

4. The Statute of Frauds:

Written agreements entered into and in accordance with applicable law are generally binding upon the parties, in accordance with the terms of the agreement.

New York has indeed borrowed the old English statute of frauds which barred certain claims unless substantiated by a specific writing signed by the person to be charged.

However with respect to the validity of oral agreements, the statute of frauds does not mean that unless there is a specific contract, a commercial claim is unenforceable: In various cases New York courts have liberalized the statute of frauds.

Accordingly, a Plaintiff is now permitted to submit, and the courts will seriously consider a series of documents, none of which by itself conclusively binds the Defendant, but which in the aggregate establish Defendant's liability.

5. Legal Fees:

The client should realize that litigation is by its very nature, a lengthy and expensive alternative to resolving the dispute.

To reduce litigation expenses for certain commercial cases, New York provides a little-used Simplified Procedure for Court Determination of contractual disputes only. It is a consensual procedure that requires the agreement of all parties to the contract. If available this procedure largely dispenses with the rules of evidence of trial, as well as, with the right to appeal.

THE LAWSUIT

A lawsuit is typically divided into three (3) parts, the pleadings part, the discovery part, and the trial part. There may also be appeals. In addition, there is usually some motion practice in most cases. A very short explanation of each of these stages would, we think, benefit the reader.

1. The Pleadings Part:

These typically consists of a Complaint, an Answer (which may contain Counterclaims) and a Reply to the Counterclaim(s).

The Complaint sets forth the matter(s) complained of, and the Plaintiff's monetary or other demands, organized in one or more cause of action, *See "Basis of Liability", above at page 3.*

The Answer typically denies most of the matters asserted in the Complaint, and in particular, the Defendant's liability therefor. Sometimes the Defendant asserts Counterclaims in its Answer.

A Counterclaim is a claim made by the Defendant against the Plaintiff within the same lawsuit. In New York, a Counterclaim may relate to the matter Plaintiff sued for (e.g. Defendant incurred damages because Plaintiff's goods arrived late), or a Counterclaim may be wholly independent of the matter sued upon.

If Defendant has asserted any Counterclaim, Plaintiff must serve a Reply, typically denying Defendant's Counterclaim.

2. The Discovery Part:

New York allows broad discovery allowing the litigants to obtain from each other, as well as from any other person upon notice, any evidence (letter, documents, or oral testimony) material and necessary in the prosecution or defense of the case, regardless of the burden of proof. This broad standard is subject to certain technical exceptions including for evidence that is privileged, or that is the work product of either of the attorneys in the case.

Our office typically starts the discovery process by seeking from the other side all relevant documents (Request for Production of Documents).

Subsequently, we draft specific written questions (called Interrogatories) seeking to elicit critical evidence. Defendants sometimes offer inconclusive or evasive answers to Interrogatories.

Finally, we typically conclude discovery with the deposition of the Defendant. A deposition is a question-and-answer session which generally takes place at the deposing attorney's office.

At the outset of the deposition, a stenographer puts the witness who will testify, under oath. The attorney proceeds to question the witness in order to prove his/her client's case at trial. The emphasis at the deposition is usually on:

1. Who agreed to what, upon what terms including what price, when, and with whom;
2. Questions about the documents obtained from the party being deposed (or from another source) during the discovery process; and
3. Clarification of the party's responses (if vague or inconclusive) to the Interrogatories.

The Defendant who has appeared by an attorney is always represented by its attorney at the deposition. A Defendant or a Plaintiff who refuses to answer questions at a deposition, risks severe damage to its case or defense in the lawsuit in the form of appropriate court sanctions.

While some of our clients in the NY metro area choose to be present at the deposition of the opposing party, this is not necessary as by law they cannot interject comments, ask questions or effectively participate at the deposition, except through their attorney.

Some depositions last a few hours, others a few days (always with breaks as needed), depending on the quantity of the evidence to be covered, the witness being questioned, and the thoroughness of the attorney conducting the deposition.

After the completion of discovery, the Plaintiff will file a note of issue, which puts the case on the trial calendar of the Court. In New York, Civil cases are tried in the order in which notes of issue have been filed, except that certain cases are allowed to "jump the line" by reason of a special preference. Those cases that are allowed a special trial preference allowing them an earlier trial date, include cases where a party is 70 years

old or older, or where the interests of justice will be served by an early trial, or where the law otherwise specifically so provides.

3. The Trial Part:

The trial is generally the most climactic part of the case. At the trial, both sides attempt to convince the judge or the jury (whoever has been chosen as the trier of fact) that they should win.

The reason for a trial, is that there remains open issues of fact on which a determination is needed to ascertain liability or other issues in the case. At the end of the trial, if the Plaintiff has prevailed, a judgment is entered in Plaintiff's favor.

Generally, a Plaintiff prevails at trial when:

1. Plaintiff has satisfied its burden of proof with respect to what Plaintiff has alleged in the original Complaint; and
2. Defendant has not been able to satisfy its burden of proof with respect to its defenses as alleged in Defendant's Answer.

At the trial, each side makes an opening statement. Next the Plaintiff introduces its witnesses, and the Defendant's attorney may cross-examine them to weaken their testimony. Sometimes the judge forgoes the parties' direct examination in Court of their own respective witnesses, instructing that the direct examination be not oral but through Affidavits (i.e written sworn statements).

Following the introduction of all the evidence Plaintiff has to offer, Plaintiff will "close" its case. After the Plaintiff has "closed" its case, the Defendant introduces its own witnesses, and the Plaintiff's attorney may cross-examine them. Finally, each side closes (i.e., presents a closing argument) summarizing and weaving together the evidence submitted, to convince the trier of fact to rule in his client's favor. There are also

applications to the court (i.e., motions) during trial and after trial, but they are beyond this short Guide.

4. Motion Practice:

At some stages of the case, either party may apply to the Court for an Order by preparing and filing a "motion". What attorneys call a "motion" is simply an application by any party (and sometimes by a non-party intervenor) to obtain a specific Order of the Court. The party making the motion must establish to the Court that it is entitled to such an Order.

A movant (party making the motion) typically establishes its entitlement to the Order being sought by submitting to the Court, a proposed Order, one or more affidavits, an affirmation, and a legal brief setting forth the relevant law.

The party opposing the motion also typically submits opposing affidavit(s), an affirmation, and a legal brief.

An affidavit is a sworn written statement by someone --sometimes the client, sometimes third parties--having first-hand knowledge of the facts alleged.

An affirmation is the attorney's sworn statement reciting the relevant facts entitling his/her client to the specific relief now being sought.

A legal brief sets forth all the law applicable to the particular motion now being presented as to which the movant now seeks an Order.

For example, assume the Defendant has not provided to Plaintiff, the evidence requested during discovery. The Plaintiff may -after having unsuccessfully tried to obtain the information from Defendant's lawyer- apply to the Court for a conditional Order obligating the Defendant to either provide the discovery within a certain number of days or to lose the case. In New York, lawyers must before making a discovery motion, first

attempt to in good-faith resolve their discovery dispute. Some Judges require that the parties first attempt to resolve their discovery disputes by means of a conference with the Court, others that the Court's permission be obtained prior to making a discovery motion.

Under New York Supreme Court practice, the Judge presiding over the case has sixty (60) days from the date the motion is submitted within which to rule on it. The Judge can issue a decision asking the parties to "settle" (i.e agree) on a final Order, or she can issue her Order disposing of the motion.

You should also know that New York allows a second shot at a motion in the form of reargument and renewal motions, provided they are timely filed.

Briefly, in a reargument motion, the movant party attempts to convince the Court to change its Order, but introduces no new evidence.

On the other hand, in a renewal motion, the movant party does introduce new evidence, but must present a sufficiently valid excuse as to why the evidence was not initially submitted with the motion papers.

This firm in accordance with its ethical responsibilities, believes that the least possible motion practice (sometimes a rare chance at summary judgment, see below, is too good to pass up) best serves the client's interest, and least clogs an already overburdened judicial system. However sometimes, there is simply no choice at avoiding motion practice, as a motion by the opposing side must be responded to, or it is defaulted, i.e the movant will by default, generally get the Order it sought.

5. Motion for Summary Judgment:

Also in cases where the liability is clear and open-and-shut, and where there are no disputed issues of fact, either side may apply to the court for an Order granting early judgment (called "summary judgment"). You should think of this motion as a fact-finding

motion: If there are open facts in issue, the judge should normally deny a motion for summary judgment as it is for the ultimate trier of fact to decide on open factual issues, one way or another.

If successful, an Order granting summary judgment early in the case, swiftly terminates the litigation, subject to appeals and reargument and/or renewal motions. Such an Order would save Plaintiff considerable legal fees: There would be neither the need to conduct expensive discovery, nor the need for a time-consuming trial.

6. Appeals:

New York has a liberal Appellate Practice allowing the appeal to a higher court, of virtually every Order made by the Judge in the case. However, if Plaintiff has been successful at the trial, Defendant must post a Bond in order to prevent Plaintiff from enforcing the judgment against Defendant's assets. Companies that issue Bonds evaluate the Judgment-Debtor's creditworthiness and may require the Judgment-Debtor to post in cash the exact amount of the judgment, or they will not issue their Bond.

SETTLEMENT OF THE LAWSUIT

A case can settle at any time, even during trial. Most cases in New York are eventually settled by agreement of the parties. This means the lawsuit is ended with the Plaintiff accepting typically less than the full amount sued on. Once it has begun a lawsuit, this firm unless our client instructs us otherwise typically leaves it to the Defendant to make a settlement offer.

We cannot settle your case without your prior written consent. Moreover, we are required to promptly communicate to you any settlement offer made by the other side.

It is the practice of this firm to carefully evaluate all serious settlement offers received, in light of the client's stated objectives. While we will recommend whether or not you should accept a settlement, the ultimate decision on whether to accept a settlement is of course our Client's, whose decision we respect.

Notwithstanding the above, this firm believes and it is its policy to prepare each case as if it were to go to trial.

First, the opposition can generally recognize a poorly prepared case, and their settlement offers, if any will be accordingly.

Secondly, if the case does not settle, a poorly prepared case can significantly reduce the party's chances at trial, both on liability and with respect to damages.

There is simply no substitute for a well-prepared case, because it maximizes the Client's settlement and trial options.

THE DEFAULT

In our experience, some Defendants sued choose to ignore the Summons and Complaint served upon them. After the period for answering the Complaint has elapsed (generally twenty (20) to thirty (30) days), and certain other applicable technical requirements have been met, the Plaintiff can apply to the Court for a default judgment.

A Defendant's default can also occur, even after the Defendant files its Answer, if the Defendant disobeys an Order of the Court under circumstances warranting the striking of the Defendant's Answer.

Plaintiffs should be aware that the Defendant's default does not automatically result in a judgment for the full amount of the Plaintiff's claim. The Plaintiff must often

first present evidence to the Court of the actual damages suffered, by sworn testimony and/or documentary evidence, before the Court will determine the amount to be awarded in judgment. Sometimes the Court will refer the issue of damages to a Referee whose function is to ascertain the amount of Plaintiff's damages and issue a report. On Motion, Plaintiff's counsel will then seek to have the Court to confirm the Referee's Report so that the Court can ultimately issue its Judgment.

In this regard, this office has represented parties who have been held in default in earlier litigation, and who approached us to see what their rights were. Under appropriate circumstances, we have been able to vacate (or open) a prior default, and obtain for our Clients the opportunity to present their defenses to the Court.

Even if the Court refuses to open the default, we can represent the Client at the Hearing on damages, to limit the default judgment to the smallest amount possible.

ENFORCING JUDGMENTS

Many Plaintiffs obtain judgments, but not all obtain justice, i.e not all get paid. Our advice to our clients is that a money judgment against a Defendant is only as good as its enforcement.

Let us say a Court has granted judgment against the Defendant in favor of our Client in the amount of \$100,000. This office does not simply send a stamped, self-addressed envelope to the Defendant, and wait for the check to come in the mail.

Although a large and well-respected corporate Defendant will normally appeal or pay a judgment without difficulty or delay, some Defendants make no attempt to pay a judgment without further action on our part.

To enforce a judgment, first, we attempt to find the Defendant's assets and sources of income. We send Information Subpoenas to his associates, banks, employers, and anyone else with possible information about its financial affairs. Upon locating assets, and to prevent the transfer of assets to Defendant, we issue restraining notices including notices to Defendant's creditors. If the Defendant is an individual with a steady source of income, such as a salary, we can obtain payment of a portion of this income (typically 10%) to pay the Judgment. If necessary, we issue an execution to the local Sheriff, who will actually seize property of the Defendant and sell it to satisfy the Judgment.

We also work with private investigators who access databases to locate any information that would help us enforce the judgment.

In all these enforcement procedures we maintain strict adherence to the complex requirements of New York and Federal statutes protecting the rights of debtors. Certain types of assets are completely exempt from the claims of creditors, and other types are partially exempt.

Sometimes, provided we are able to obtain the necessary evidence, we commence an entirely new action against a Shareholder, director or officer of the Judgment Debtor for misuse of the corporation's assets, *See the importance of keeping good corporate records at page 10 of our Guide to Creating a Business Entity in New York, also on this website.*

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