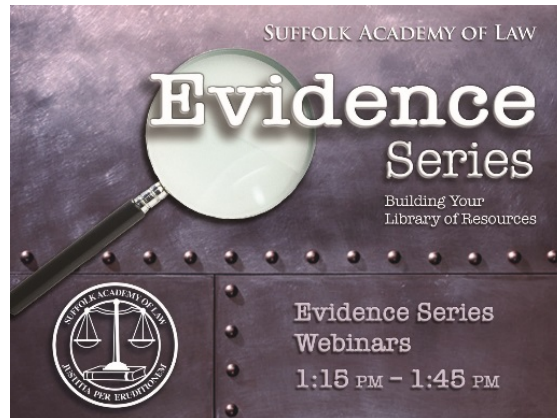




**SUFFOLK ACADEMY OF LAW**  
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**560 Wheeler Road, Hauppauge, NY 11788**  
**(631) 234-5588**



## **ZOOM WEBINAR**

### **EVIDENCE SERIES** **Evidence in Motion Practice**

**FACULTY:**

**Jarrett M. Behar, Esq.**

**MODERATOR: Hon. James A. McDonaugh**

**Coordinators: Hon. John J. Leo and Harry Tilis, Esq.**

**May 26, 2021**  
**Suffolk County Bar Association, New York**

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## Outline:

1. Introduction - 5 minutes
2. Motion to Dismiss 3211 – 10 minutes
3. Motion for Summary Judgment -10 minutes
4. New Civil Court Rules – 10 minutes
5. Question – 5 minutes



**Jarrett M. Behar** is a Partner in the Litigation Practice Group of Certilman Balin Adler & Hyman, LLP and is based in the Hauppauge office. He has vast litigation experience in the areas of real estate, commercial lending, construction, general contractual disputes, land use, bankruptcy, intellectual property, professional liability defense matters and appellate practice in both federal and state courts.

Prior to joining Certilman Balin, Mr. Behar was a Partner at a Long Island law firm in Suffolk County where he focused on commercial real estate and development matters. He also practiced as an associate at a prominent New York City law firm. For one year, he was counsel and project manager at the large retail chain, Steve & Barry's University Sportswear.

He earned his Juris Doctor from New York University School of Law and his Bachelor of Arts in Political Science from the University of Florida. In law school he served as the Competitions Editor on the Moot Court Board.

Mr. Behar has authored articles in a myriad of publications including *New York Law Journal Magazine* and the *Suffolk Lawyer*.

He serves as Vice President of the Commack Union Free School District Board of Education where he manages an annual budget of approximately \$200 million. He is the Associate Dean and an Officer of the Suffolk Academy of Law, and he co-chairs the Suffolk County Bar Association Transaction & Corporation Law Committee.

He is admitted to practice in New York and the U.S. District Court, Southern and Eastern Districts of New York and the United States Court of Appeals for the Second Circuit.

McKinney's Consolidated Laws of New York Annotated  
Civil Practice Law and Rules (Refs & Annos)  
Chapter Eight. Of the Consolidated Laws  
Article 32. Accelerated Judgment (Refs & Annos)

McKinney's CPLR Rule 3211

Rule 3211. Motion to dismiss

Effective: November 10, 2020  
Currentness

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
2. the court has not jurisdiction of the subject matter of the cause of action; or
3. the party asserting the cause of action has not legal capacity to sue; or
4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
6. with respect to a counterclaim, it may not properly be interposed in the action; or
7. the pleading fails to state a cause of action; or
8. the court has not jurisdiction of the person of the defendant; or
9. the court has not jurisdiction in an action where service was made under section 314 or 315; or
10. the court should not proceed in the absence of a person who should be a party.
11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal

revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. 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), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

(g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that

the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, “complaint” includes “cross-complaint” and “petition”, “plaintiff” includes “cross-complainant” and “petitioner”, and “defendant” includes “cross-defendant” and “respondent.”

(h) Standards for motions to dismiss in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

#### **Credits**

(L.1962, c. 308. Amended Jud.Conf.1964 Proposal No. 6; Jud.Conf.1965 Proposal Nos. 5, 6; L.1965, c. 773, § 9; Jud.Conf.1973 Proposal No. 4; L.1986, c. 220, § 12; L.1990, c. 904, § 26; L.1991, c. 656, § 4; L.1992, c. 767, § 4; L.1996, c. 501, § 1; L.1996, c. 682, § 2; L.1997, c. 518, § 2, eff. Sept. 3, 1997; L.2005, c. 616, § 1, eff. Jan. 1, 2006; L.2020, c. 250, § 3, eff. Nov. 10, 2020.)

McKinney's CPLR Rule 3211, NY CPLR Rule 3211

Current through L.2021, chapters 1 to 109. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated  
Civil Practice Law and Rules (Refs & Annos)  
Chapter Eight. Of the Consolidated Laws  
Article 32. Accelerated Judgment (Refs & Annos)

McKinney's CPLR Rule 3212

Rule 3212. Motion for summary judgment

Effective: December 11, 2015  
Currentness

**(a) Time; kind of action.** Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

**(b) Supporting proof; grounds; relief to either party.** A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If 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.

**(c) Immediate trial.** If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

**(d) Repealed.**

**(e) Partial summary judgment; severance.** In a matrimonial action summary judgment may not be granted in favor of the non-moving party. In any other action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or
2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

**(f) Facts unavailable to opposing party.** Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

**(g) Limitation of issues of fact for trial.** If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

**(h) Standards for summary judgment in certain cases involving public petition and participation.** A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

**(i) Standards for summary judgment in certain cases involving licensed architects, engineers, land surveyors or landscape architects.** A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in fact and in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

#### Credits

(L.1962, c. 308. Amended L.1963, c. 533, § 1; L.1965, c. 773, § 10; L.1973, c. 651, § 1; Jud.Conf.1973 Proposal No. 5; L.1978, c. 532, §§ 1 to 3; L.1984, c. 827, § 1. Amended L.1992, c. 767, § 5; L.1996, c. 492, § 1; L.1996, c. 682, § 3; L.1997, c. 518, § 3, eff. Sept. 3, 1997; L.2015, c. 529, § 1, eff. Dec. 11, 2015.)

McKinney's CPLR Rule 3212, NY CPLR Rule 3212

Current through L.2021, chapters 1 to 109. Some statute sections may be more current, see credits for details.



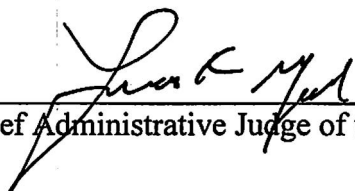
**ADMINISTRATIVE ORDER OF THE  
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

WHEREAS, the Commercial Division of New York State Supreme Court is an efficient, sophisticated, up-to-date court, dealing with challenging commercial cases, and has had as its primary goal the cost-effective, predictable and fair adjudication of complex commercial cases, and

WHEREAS, since its inception the Commercial Division has implemented rules, procedures and forms especially designed to address the unique problems of commercial practice, and through the work of the Commercial Division Advisory Council – a committee of commercial practitioners, corporate in-house counsel and jurists devoted to the Division’s excellence – the Commercial Division has functioned as an incubator, becoming a recognized leader in court system innovation, and demonstrating an unparalleled creativity and flexibility in development of rules and practices, and

WHEREAS, the Administrative Board of the Courts (Board) requested public comment on the advisability of adopting Commercial Division Rules into general civil practice, and after review of public comments, including those received from the Advisory Committee on Civil Practice and the Advisory Committee on Matrimonial Practice, and after input from a working group of judges and attorneys, and recognizing that the COVID-19 pandemic has created unique opportunities for permanent reform, the Board approved adoption of certain Commercial Division Rules to other courts of civil jurisdiction, and

NOW THEREFORE, upon consultation with and approval of the Administrative Board of the Courts, pursuant to authority vested in me as Chief Administrative Judge of the State of New York under Article VI, section 28(b) of the State Constitution, I have determined to incorporate certain rules, and variations thereof, of the Commercial Division into the Uniform Rules for the Supreme Court and the County Court, effective February 1, 2021 until further order as per the attached Exhibits delineating each rule so adopted.

  
Chief Administrative Judge of the Courts

Dated: December<sup>29</sup>, 2020

AO/270/2020

# **EXHIBIT U**

## **Regarding Rule 19-a: Motions for Summary Judgment; Statements of Material Facts**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-g as follows:

### Section 202.8-g Motions for Summary Judgment; Statements of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.



## **SCBA Lawyers Helping Lawyers Committee**

**The SCBA Lawyers Helping Lawyers Committee** provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

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to speak with an attorney who will provide support and recommend  
resources. All calls are private and confidentiality is protected under  
Judiciary Law Section 499. (Lawyer Assistance Committee)**

### ***Feel Free to Join Us at Our Weekly Recovery Meeting***

*The Lawyers Helping Lawyers Committee  
Recovery Meeting  
Open to anyone in the legal profession who has a desire to stop  
drinking or using other substances.*

*Every Wednesday at 6PM  
United Methodist Church of Hauppauge  
473 Townline Road, Hauppauge, NY*