PERSPECTIVE

Taking **Issue** With the Note of Issue

An overburdened court system is no excuse to prematurely place cases in line for trial.

BY ROBERT A. GLICK

THERE IS LITTLE DOUBT that New York's trial court system is heavily overburdened, strained and backlogged from what seems to be a never-ending influx of lawsuits and protracted litigation. Like the old saying goes, "You don't need liability in the Bronx, you just need a client."

As a result, attorneys seek to have their cases placed on the trial calendar sooner rather than later and often prematurely file the Note of Issue (NOI) and Certificate of Readiness (a sworn document), knowing discovery remains incomplete. This type of practice, in light of our current procedural rules, raises serious questions about fairness to litigants, ethical concerns for counsel and the need to modify our current laws.

Notwithstanding the legislative intent behind the NOI, signifying that all discovery is complete and the case is trial ready, motions to strike the NOI due to incomplete discovery are routinely denied, resulting in cases not ready for trial being permitted to remain on the trial calendar while the court issues further orders, over counsel's objection, directing additional discovery to continue for a lengthy period of time and failing to permit any extension of time to file a motion for summary judgment pursuant to CPLR 3212(a).

ROBERT A. GLICK *is a partner with Brand Glick & Brand.*

My practice over the last 20 years has been in both New York state and federal courts, with a concentration in the five boroughs of New York City, Nassau, Suffolk and Westchester counties. With no exaggeration, I can say that more than 50 percent of the time when an NOI is filed and served in these state courts, significant discovery remains knowingly outstanding. Moreover, when a motion is made to strike the NOI because discovery remains outstanding, as described above, it is an extremely rare occasion that such a motion is granted, resulting in cases remaining on the trial calendar while discovery is permitted to continue.

Not only are these practices in direct contravention of the original intent of our Legislature, requiring that the NOI signify that all discovery is actually complete, but procedural conundrums arise that cause undue prejudice to parties.

CPLR 3212 (a) specifically prohibits the filing of summary judgment motions more than 120 days after the NOI is filed absent "good cause" for the delay. See *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004). However, a party who has not obtained what it believes to be vital discovery from the other side (who knowingly filed a premature NOI) finds itself in a predicament: The party is ill prepared to move for summary judgment within this abridged time period as it awaits the additional discovery in support of its motion.

Often courts permit discovery to continue beyond these time constraints set by CPLR 3212(a) and, down the road, once the discovery is obtained, inevitably a late summary judgment motion is filed. Counsel who knowingly filed the premature NOI often seeks to dismiss the motion on procedural grounds, citing *Brill* and CPLR 3212(a), arguing that the motion is late. This is inherently unfair to litigants.

Counsel who had been awaiting appreciable, overdue discovery is compelled to file a knowingly late summary judgment motion hoping the court will consider the premature filing of the NOI and delayed discovery as "good cause." Counsel should not be able to file a knowingly premature NOI without fear of consequence, while opposing counsel files a knowingly late summary judgment motion and fears the motion's dismissal because the court either does not agree that the delayed discovery was necessary to file the motion, or does not agree that counsel's premature filing of the NOI while discovery was directed to continue is "good cause" to extend the motion filing time.

So I take issue with the note of issue. Counsel should not be burdened with the challenge of an NOI that is not struck even though discovery remains due, deadlines ignored by the adversary and compressed deadlines that must be met, all the while being ill-equipped to file a summary judgment motion.

Applicable Provisions

CPLR 3402 speaks to the procedure for filing the NOI, informing the court that all pretrial discovery between the parties is complete and the case is ready for trial. The only remedy available to a defendant objecting to the filing of the NOI is to move to strike it within 20 days of its receipt.

New York Court Rules, Section 202.21 requires that the NOI be accompanied by a Certificate of Readiness attesting that "the case is ready for trial, that all pretrial procedures have been completed or that an opportunity for them has been had, but not exploited." It provides a number of specifics for counsel to affirm under penalties of perjury including that all discovery is "complete," "waived" or "not required" and that "the case is ready for trial."

These codified rules of procedure are all too often overlooked to hasten dispositions, which results in lowering the number of cases on our overburdened dockets. However, the Appellate Division has repeatedly held that "... the statement of readiness ensures that only those actions in which all preliminary proceedings have been completed and which are actually ready for trial shall be on the trial calendar." See *Warren v. Vick Chemical Co.*, 37 A.D.2d 913, 325 N.Y.S.2d 495 (4th Dept. 1971); see also *Mazzara v. Town of Pittsford*, 30 A.D.2d 634, 290 N.Y.S.2d 435 (4th Dept. 1968); *Tirado v. Miller*, 75 A.D. 3d 153, 301 N.Y.S. 2d 358 (2d Dept. 2010). Moreover, "...the Statement of Readiness rule will be rigidly enforced absent a showing of special, unusual or extraordinary circumstances warranting exercise of the court's discretion." *Haviland v. Smith*, » Page S18

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101 A.D. 2d 626, 474 N.Y.S.2d 885 (3d Dept. 1984); see also, *Alfarone v. Robinson*, 2010 NY Slip Op 30297U) (Sup. Ct., Queens Co. 2010).

Laxity Erodes the Rules

This relaxation of our procedural laws invites the filing of the NOI at almost any opportunity, without fear of consequence that such improper practice will be frowned upon by our courts. Unfortunately, nowadays the certificate of readiness does not appear to be worth the paper it is prepared on.

Carte blanche should not be taken to misinform the court that all discovery is complete so as to have a case prematurely placed in line for trial.

Why have a requirement to attest under penalties of perjury that "all discovery has been exchanged," "all depositions are completed" or all "independent medical examinations have been performed," knowing that these attestations are patently false? Counsel should not be permitted to unilaterally state under oath that the adversary has "waived" certain discovery, merely because the parties have not adhered to prior discovery schedules ordered by the court.

It is not uncommon for lawyers to defend this type of discovery practice by stating in essence: "If the certificate of readiness is not prepared in this [improper] manner, the filing clerk will reject it and the case will not be placed on the trial calendar." This response is without merit. Counsel's remedy is to seek an extension of time or to move the court to extend the deadline to file the NOI. These motions are rarely made, however, because counsel relies on the fact that courts are not striking the NOI once it is filed. This type of response fails to address the ethical issue of an attorney swearing under penalties of perjury that all discovery is complete, when knowingly it is not.

Other arguments include, "I had no choice but to file the NOI and prepare the certificate of readiness in this manner because the court requires me to file it pursuant to the preliminary conference order." Do attorneys also accept automatic preclusion against their own clients if they fail to timely serve discovery as directed in the initial preliminary conference order? Of course not.

Nowadays, the intent of the preliminary conference order is to set "artificial" dates by which the court expects the parties to complete discovery, which includes the filing of the NOI. I say "artificial" because it has become commonplace for discovery deadlines in state court to pass without compliance. State courts often liberally permit deadlines to be revised because purported "circumstances" arise during the litigation that give rise to a need for extensions. I submit that these "circumstances" should also form a basis to extend the time to file the NOI.

Often compliance conferences are held specifically to modify discovery schedules. Consideration should be given at those conferences to extending the date to file the NOI, but too often the filing date remains the same.

Arguing that "the court directed me to file the NOI" is a creative argument made by zealous attorneys, but not one based upon fact. The preliminary conference order does not direct, nor give counsel permission to, perjure themselves in a sworn affidavit.

If courts required parties to rigidly adhere to the initial discovery deadlines, absent unforeseen circumstances, then matters would be disposed of in a much more expeditious and cost effective manner. If discovery is incomplete and the parties need more time for discovery, then before filing a knowingly improper NOI, counsel's procedural remedy is to make a motion to extend the plaintiff's time to file the NOI.

Again, this path is not chosen because it requires additional work, expense, and time in court, and counsel knows that filing a procedurally defective NOI has no repercussions. The NOI is filed with a liberally construed certificate of readiness while waiting to see if the adversary moves to timely strike it.

Defendants have financially more to lose if they do not get their discovery prior to trial. Counsel is aware of this; defendants and their insurance carriers expend time, effort and cost in filing a motion to strike the NOI, compel discovery and extend the end date for discovery, knowing all too well that such efforts will result in nothing more than a ruling that the case remain on the trial calendar while both sides stipulate to the exchange of the remaining discovery.

Enforce the Laws or Change Them

If our laws are not being changed to adapt to more modern times, then our courts should adhere to and strictly construe our current procedural rules. There should be no deviation from what our current laws mandate.

Courts' summarily turning their heads to existing law and routinely permitting cases to remain on the calendar while pertinent discovery remains outstanding fosters a breeding ground of disregard for our system of justice and purported fairness. The CPLR contains sufficient tools for sanctioning a non-complying party for discovery abuses. Yet these tools remain largely untouched.

Federal court dockets have far fewer cases than state courts. However, in federal court litigation the procedural rules and deadlines are stringently adhered to and enforced. Liberties are generally neither taken nor tolerated, without repercussion. If our state courts modeled their tracking of pretrial discovery after the federal courts, there would be far less abuse, greater adherence to our rules of law and cases would in fact be disposed of with greater swiftness and fairness.

Many attorneys are unaware that Section 202.16 of the Uniform Rules for Civil Procedure for the Supreme and County Courts was enacted to control frivolous attorney conduct. Section 202.16 requires lawyers to sign all papers served or filed in civil proceedings to certify that after a reasonable inquiry, the lawyer finds neither the pleadings nor statements of fact to be frivolous or false. Such conduct is subject to a sanction not to exceed $10,000. "Frivolous conduct" is defined to include any conduct that is completely without merit in law or asserts material factual statements that are false.

This rule permits a court, when considering whether conduct in question is frivolous, to determine "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent to counsel, or was brought to the attention of the counsel or the party."

It was the hope of our Legislature that such harsh sanctions would provide an impetus for attorneys to make substantial inquiries into the truth of assertions contained in all papers filed in our courts. When was the last time you learned that a judge admonished or sanctioned counsel in accordance with Section 202.16 for asserting falsely that all discovery is complete and the matter is ready for trial?

The Model Rules of Professional Conduct, Section 3.1, "Meritorious Claims and Contentions," sets forth that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Upon admission to the bar, attorneys are obligated to practice law within the confines of our Rules of Professional Conduct and our Canons of Ethics. Failure to do so in accordance with these guidelines may subject an attorney to potential discipline. I thus rhetorically ask: Why have these rules in place if it has become accepted by the courts that violating these rules will be of no consequence?

So I take issue with the Note of Issue. If this type of practice is tolerated and condoned, the ameliorative statute is, for all intents and purposes, obliterated.

Given the current state of our court system compared to when these discovery rules were enacted, if our procedural laws and rules are outdated, they should be revised and modified to ensure that all litigants have their fair day in court, and that counsel can zealously represent their clients without fear of breaching ethical boundaries.

If courts **required** parties to **rigidly adhere** to the initial discovery deadlines, absent unforeseen circumstances, then matters would be disposed of in a **much more expeditious** and cost effective manner. If discovery is incomplete and the parties need more time, then before filing a **knowingly improper** Note of Issue, the **procedural remedy** is to **move** to **extend** the plaintiff's time to file the NOI.