



JOSEPH F. CASTIGLIONE (jcastiglione@youngsommer.com) is a senior litigation associate with the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore LLC, in Albany, New York (www.youngsommer.com). The author primarily practices in commercial, land-use, environmental and municipal litigation, and appellate practice, in both actions and special proceedings. This article was prepared in part with the helpful research assistance of law school student Taber Ward.

The Implications of Responding to Pleadings if a Motion to Dismiss Is Denied

By Joseph F. Castiglione

The grounds generally identified for a motion to dismiss in Civil Practice Law and Rules 3211 (CPLR), although not necessarily addressing the merits, are legitimate means of accomplishing the desired end in litigation: winning. As lawyers and officers of the court, practitioners are obviously obligated to act in good faith when asserting arguments or facts on a motion to dismiss under § 3211. No amount of good faith or sincere belief in an argument will ensure that a motion is legally correct or factually indisputable; there is always the reality that the motion may not prevail. The question practitioners must ask themselves when making a motion to dismiss – before their clients are on the wrong side of prevailing – is, “Can I still respond to the pleadings if the motion is denied?”

Making a CPLR 3211 motion to dismiss can affect the client’s ability to respond to pleadings, both in actions and special proceedings, under the CPLR. This article addresses procedural distinctions in the CPLR, and related case law, between actions, special proceedings under CPLR Article 4, and special proceedings under CPLR Article 78, relevant to the possible, but significant, impact that a motion to dismiss may have on the ability to respond to pleadings.

Reprinted with permission from: the February 2011 New York State Bar Association Journal, Copyright 2011, published by New York State Bar Association, One Elk Street, Albany, New York 12207

46 | February 2011 | NYSBA Journal

The Procedures Governing “Civil Judicial Proceedings” Under the CPLR

The New York State Legislature enacted the CPLR to “govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.”¹ The CPLR explains that “[a] ‘civil judicial proceeding’ is a prosecution, other than a criminal action, of an independent application to a court for relief.”² A “civil judicial proceeding” includes those civil prosecutions identified both as “actions” and “special proceedings.”

An action is generally defined as “the plenary prosecution of a right in a court of law, seeking the vindication of that right in a final judgment.”³ While an action is based upon a party’s “right” and vindication of that right, a special proceeding is primarily predicated upon statute, that is, “[a] special proceeding is a form of a civil judicial proceeding which must be based on specific statutory authorization.”⁴ The CPLR directs that all civil judicial proceedings are either actions or special proceedings. In fact, “[a]ll civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized.”⁵ The

definition of the word “action” in the CPLR reiterates this interpretation, as the “word ‘action’ includes a special proceeding.”⁶

The procedures for prosecuting actions and special proceedings are generally prescribed by the CPLR. The CPLR directs that, “[e]xcept where otherwise prescribed by law[7], procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings.”⁸ In other words, “under the Civil Practice Law and Rules, special proceedings are to be treated in the same manner as regular actions with respect to form and procedure generally.”⁹ However, special proceedings are further regulated by other laws that otherwise address procedures in special proceedings, such as Articles 4 and 78 of the CPLR.

As indicated by the title – “Special Proceedings” – the “procedures for ‘special proceedings’ are set forth in CPLR article 4.”¹⁰ In that regard, “[t]he purpose of CPLR Article 4 is to provide a uniform procedure for special proceedings *other than* those for which a different procedure is prescribed by statute.”¹¹ Article 4 does not authorize or empower a party to challenge any specific issue or matter; rather, it supplies the procedures to prosecute challenges to specific issues or matters authorized by other statutes.¹²

Akin to an Article 4 proceeding, an Article 78 proceeding is statutorily identified as “a special proceeding.”¹³ However, rather than only supplying the procedures for other statutory authorized proceedings, like Article 4, the provisions in Article 78 authorize and provide the means to challenge certain actions and determinations. The authorized challenges include, *inter alia*, contesting actions or decisions of a governmental body or officer, such as “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”¹⁴ As a special proceeding, “[a] proceeding pursuant to CPLR Article 78[] ‘is governed by Article 4 of the CPLR, except when Article 78 contains a specific provision that is contrary to Article 4. If a procedural problem arises that is covered in neither Article 4 nor Article 78, then the procedure is the same as in an ordinary action.’”¹⁵

Significantly, Articles 4 and 78 look to the CPLR’s general procedure for actions for a motion to dismiss. The provisions in CPLR 3211 provide the primary, but not exclusive, grounds and procedure for a party to move to dismiss an action entirely or to dismiss a specific cause of action or a defense in an action.¹⁶ The provisions in § 3211 are generally incorporated into special proceedings through CPLR 404(a) and also separately into Article 78 proceedings through § 7804(f).¹⁷ There are significant procedural distinctions between how the terms of § 3211 are applied in actions, special proceedings under Article 4, and special proceedings under Article 78, concerning

a party’s ability to answer a pleading after a motion to dismiss is denied by a court.

The Implications of a CPLR 3211 Motion to Dismiss in an Action

A party moving to dismiss a pleading in an action under CPLR 3211 is given the express right to answer the assaulted pleading if the motion is denied. In particular, § 3211 states: “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 10 days after service of notice of entry of the order.”¹⁸ The procedure in § 3211 for a motion to dismiss, therefore, apparently provides an unqualified right to serve responsive pleadings if the motion is denied.

Practitioners should note that “[a] motion to dismiss pursuant to CPLR § 3211 will extend the time in which a defendant may serve a responsive pleading only if the motion is made before that pleading was originally due and will not operate to relieve a party’s default in pleading[.]”¹⁹ Additionally, it has been held “that a CPLR § 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it.”²⁰ It has also been held that a defendant who served a counterclaim, after the defendant made a motion to dismiss and the motion was still pending, effectively waived the stay provided by § 3211(f). In other words, a defendant “cannot serve part of a responsive pleading, a counterclaim, while at the same time seeking the benefit of the automatic stay as to the other part.”²¹

There are seemingly no adverse implications on the right to answer a pleading if a party makes a § 3211 motion in an action. However, there are significant implications concerning the ability to submit responsive pleadings if a party makes a § 3211 motion to dismiss in Article 4 and Article 78 proceedings.

The Implications of a CPLR 3211 Motion to Dismiss in an Article 4 Special Proceeding

The CPLR empowers a party in a special proceeding governed by Article 4 to “raise an objection in point of law . . . by a motion to dismiss the petition.”²² As opposed to the apparently unqualified right to respond to a pleading after a § 3211 motion is denied in an action, in an Article 4 special proceeding, however, “[i]f the motion is denied, the court may permit the respondent to answer, upon such terms as may be just.”²³ While Article 4 provides for procedures “otherwise prescribed by law,” the right to submit a responsive pleading provided in CPLR 3211(f) is superseded by the conflicting procedures otherwise prescribed by CPLR 404(a). For instance,

while CPLR 404(a), which applies to special proceedings generally, provides that a respondent in a special proceeding may move to dismiss within the time

allowed for answer and that, if the motion is denied, the court may permit the respondent to answer, this provision, unlike CPLR 3211(f), which is applicable in plenary actions, does not automatically extend the respondent's time to answer.²⁴

The New York Court of Appeals has specifically acknowledged that there is no "right" to respond to a pleading after a motion to dismiss is denied, based upon "the express language of CPLR § 404 (subd. [a])."²⁵ Rather, "[l]eave to answer is a matter within the sound discretion of the court"; in other words, a court can dispose of an Article 4 special proceeding on the motion to dismiss, if the motion is denied, by not allowing any responsive pleading.²⁶ The discretion to allow or refuse a responsive pleading in an Article 4 special proceeding is not unlimited and is subject to review based upon the standard of abuse of discretion.²⁷

Appellate courts have identified several considerations when reviewing the propriety of a lower court's exercise of discretion to preclude a responsive pleading in an Article 4 special proceeding. In affirming a lower court's decision not to allow an answer in an Article 4 special proceeding after a motion to dismiss, the Court of Appeals noted that the lower court properly determined that

no useful purpose can be served by any answer interposed and especially does this hold true by virtue of the fact that it has been indicated that the answer would refute the factual background set forth by the petitioner, which factual background the Court deems to have no bearing on the simple legal issue involved.²⁸

In *Lefkowitz v. Therapeutic Hypnosis, Inc.*, the Appellate Division, Third Department overturned a lower court's denial of an answer in an Article 4 proceeding, noting the lack of notice of a summary disposition of the proceeding, as well as a general lack of clarity "that no factual issue exists which may be raised by answer," as grounds for allowing a party to answer.²⁹ The court appeared to highlight the lack of notice of the potential for summary disposition because of the losing party's pro se status in the case.³⁰

The Appellate Division, Second Department, in annulling a lower court's determination to preclude an answer in a proceeding subject to Article 4, permitted an answer based upon a meritorious showing for conducting disclosure in the proceeding.³¹ In addition, the Appellate Division, First Department, in affirming a lower court's denial of a request to answer in an Article 4 proceeding, held that "the absence of a factual showing of meritorious defenses" was sufficient to determine that the lower court did "not abuse its discretion" in prohibiting an answer.³² The First Department subsequently adhered to its "factual showing" inquiry and seemingly agreed with the Third Department's analysis in *Lefkowitz*, when it recently

annulled a lower court's determination to preclude an answer; the appellate court determined that "a 'factual issue exists which may be raised by answer.'"³³

The underlying "policies of CPLR article 4 favor[] swift adjudication of special proceedings."³⁴ These policies are unequivocal, as Article 4 simultaneously prohibits disclosure as of right and empowers courts with exclusive discretion to decide to allow an answer when a motion to dismiss is made.³⁵ There is no apparent direct standard to determine when an answer should be allowed if a motion to dismiss is denied in an Article 4 special proceeding, other than the standard of abuse of discretion. A reasonable, but broad, test may be that used in *In re Dodge's Trust* in which the Court questioned whether any "useful purpose can be served by any answer interposed."³⁶ Practitioners are advised, however, to make that determination using their own sound discretion.

The Implications of a CPLR 3211 Motion to Dismiss in an Article 78 Special Proceeding

Similar to CPLR 404(a), a party in an Article 78 special proceeding is allowed to "raise an objection in point of law . . . by a motion to dismiss the petition."³⁷ As opposed to the discretionary power of a court to allow a party to respond to a pleading in an Article 4 proceeding, a party in an Article 78 proceeding is purportedly given the right to answer a pleading after a motion to dismiss is denied. Specifically, "[i]f the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just."³⁸ As such, while Article 4 and Article 78 proceedings are both special proceedings, the procedures regarding responding to pleadings in an Article 4 proceeding after a motion to dismiss is denied do not apply to the provisions "otherwise prescribed by law" that govern the procedure to respond to pleadings after a motion to dismiss is denied in an Article 78 proceeding.³⁹

At first glance, CPLR 7804(f) appears consistent with the right in an action provided by § 3211(f) to respond to a pleading after a motion to dismiss is denied. However, the language of § 7804(f), which states that "the court shall permit the respondent to answer," has been qualified by case law over the years. The First Department previously explained that "[n]otwithstanding the clear meaning and intent of the relevant language in CPLR § 7804(f), some authority has developed to the effect that a court need not permit a respondent to answer upon denial of its § 7804(subd [f]) motion."⁴⁰ As the Court of Appeals said,

[t]he mandate of CPLR 7804 (subd [f]) . . . proscribes dismissal on the merits following such a motion [(i.e. a motion to dismiss)], unless the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.⁴¹

The necessary showing to preclude a court from denying the right to answer includes “factual and legal issues” that “are in dispute and have not been fully addressed by the parties.”⁴² In other words, before a party can be deprived of responding, “all legal and factual issues” must have been raised and fully addressed by the par-

are generally reluctant to endorse summary disposition of an Article 78 proceeding on a motion to dismiss, seemingly endeavoring to limit its use to “the rare case.”⁵¹ There appears, however, to be a greater willingness to accept such summary disposition if notice and an opportunity to be heard is afforded parties in an Article

There are significant implications concerning the ability to submit responsive pleadings if a party makes a § 3211 motion to dismiss in Article 4 and Article 78 proceedings.

ties on the motion, and “no prejudice will result from the failure to require an answer.”⁴³ The purported case law qualification on the right to respond may not apply if parties are not given the opportunity for “development of the facts,”⁴⁴ such as allowing a losing party to “complete any relevant discovery” in the appropriate circumstances, if the motion to dismiss is denied.⁴⁵ But, as long as “the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and that no prejudice will result,” case law seemingly allows a court to unilaterally dispose of an Article 78 proceeding when the court denies a motion to dismiss.⁴⁶

Although authority has developed purporting to allow a court to preclude answering after a motion to dismiss is denied, courts have concomitantly cautioned about exercising that authority, in light of the intent and clear language in CPLR 7804(f). The Court of Appeals directly held that “in light of the express direction of CPLR § 7804(f)” a court “shall” permit a party to answer. Specifically, “the petition in such a proceeding should not be granted before the respondent has filed an answer.”⁴⁷ The First Department separately questioned the legitimacy of prior case law, seeming to allow courts to deny an answer on a motion to dismiss in an Article 78 proceeding based on the clear language in § 7804(f).

In *230 Tenants Corp. v. Board of Standards and Appeals of the City of New York*, the First Department, while acknowledging the theoretical utility of such power and noting that it could be useful on “occasions in which the efficient and economical disposition of article 78 proceedings would best be served,” questioned the precedential “validity” of the prior case law and annulled the lower court’s decision to preclude an answer on a motion to dismiss.⁴⁸ The appellate court explained that “the procedural shortcut adopted [by the lower court] cannot be reconciled with the clear language and intent of the controlling section”⁴⁹ and concluded that, based upon the word “shall” in § 7804(f), “the Legislature meant what the statutory language so clearly states.”⁵⁰

As indicated above, based upon reasons founded on law and perhaps reasons of fairness to litigants – courts

78 proceeding, similar to what is required under CPLR 3211(c) when a motion to dismiss is treated as a motion for summary judgment.

In reviewing a lower court’s summary disposition of an Article 78 proceeding on a motion to dismiss, the Court of Appeals explained that

[a]lthough, as respondents argue, an article 78 proceeding “on analysis closely correspond[s] to an action if a motion for summary judgment could be made simultaneously with the commencement of the action” . . . , it is also true that a motion for summary judgment is usually made only “after issue has been joined” (CPLR 3212, subd [a]) and that a motion to dismiss may be treated as a motion for summary judgment only when the parties have had the opportunity to “submit any evidence that could properly be considered on a motion for summary judgment” (CPLR 3211, subd [c]). Thus, notice that a motion to dismiss under CPLR 3211 will be treated as a motion for summary judgment is required prior to dismissal on the merits unless it is clear from the papers that no prejudice has resulted from omission of notice The more particularly is this so with respect to an article 78 proceeding, in light of the express direction of CPLR 7804 (subd [f]).⁵²

The Court was referring to “[t]he mandate of CPLR 7804 (subd. [f]) that, ‘If the motion is denied, the court shall permit respondent to answer.’”⁵³

The Court of Appeals ultimately held that “the motion papers clearly did not establish that there were no triable issues of fact and the procedure dictated by CPLR § 7804 (subd. [f]) should have been followed.”⁵⁴ The Court did not say it was requiring § 3211(c) notice and opportunity to be heard as a mandatory predicate to summarily disposing of an Article 78 proceeding on a motion to dismiss; however, the Court indicated that notice was a “particularly” important consideration in determining prejudice and then employed an apparent summary judgment standard in reviewing the propriety of the lower court decision.

In *230 Tenants Corp.*, the First Department made similar remarks about requiring notice and opportunity to be

heard under § 3211(c) before a court summarily disposes of an Article 78 proceeding on a motion to dismiss.

[I]t may well be that there is sufficient flexibility in the statutory pattern to permit adaptation of the procedure set forth in CPLR 3211 (subd [c]) in which the court, after adequate notice to the parties, may treat a motion to dismiss pursuant to CPLR 3211 (subd [a] or [b]) as a motion for summary judgment.⁵⁵

In *Phillips v. Town of Clifton Park Water Authority*,⁵⁶ the Third Department appears to have been more direct about the issue. The record in *Phillips* showed that the lower court “failed to provide any notice to the parties that it intended to treat respondents’ motion as one for summary judgment” in an Article 78 proceeding.⁵⁷ The appellate court, after first citing the notice and opportunity requirements in § 3211(c) for treating a motion to dismiss as a motion for summary judgment in an action, explained

that in a CPLR article 78 proceeding, prior notice must be afforded due to the clear mandate of CPLR 7804(f) which details that when an objection in point of law is raised pursuant thereto, the denial thereof mandates that the court shall permit the respondent to answer.⁵⁸

The Third Department concluded, however, that “[w]hile such failure [to provide notice to treat a motion as one for summary judgment] has not been held to be fatal in appropriate circumstances, we cannot find that the parties herein were ‘deliberately charting a summary judgment course’ . . . by laying bare their proof.”⁵⁹ The court, therefore, seemingly qualified the requirement of notice and an opportunity to be heard under § 3211(c), before precluding an answer in an Article 78 proceeding, explaining that lack of notice would not be fatal “in appropriate circumstances.”⁶⁰

New York courts have clearly cautioned against unilaterally denying a party the opportunity to answer in an Article 78 proceeding. While there may be some preference for requiring the same or similar notice requirements from § 3211(c), when reviewing any summary disposition of an Article 78 proceeding on a motion to dismiss, it has not been directly imposed as a prerequisite to any such summary disposition in an Article 78 proceeding. If the “rare case”⁶¹ exists where a motion purports to show there are no issues of law, no issues of fact, and no prejudice to the party, summary disposition of an Article 78 proceeding will seemingly be forgiven. However, apart from the general “strong public policy favoring disposition of cases on the merits,”⁶² the CPLR’s direction that its general provisions be applied to special proceedings when there is no statute otherwise prescribing the procedures, seemingly already requires that parties be afforded the notice and opportunity required in § 3211(c), before

summarily disposing of an Article 78 proceeding on a motion to dismiss.

Notice and an Opportunity to Be Heard Before Summarily Disposing of an Action

The provisions in CPLR 7804(f) direct that an answer “shall” be allowed if a motion to dismiss is denied. There is no language in Article 78 generally, or even in Article 4, otherwise prescribing how to accomplish the summary disposition of an Article 78 proceeding or individual cause of action on a motion to dismiss under § 7804(f). Unlike the lack of direction in § 7804(f) for summary disposition of an Article 78 proceeding on a motion to dismiss, CPLR 3211(c) promulgates procedures to summarily dispose of an action, any cause of action, or defense, on a motion to dismiss in an action:

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.⁶³

CPLR provisions governing summary judgment motions further address how a party can obtain final judgment in any action, or on any cause of action or defense, in an action.

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 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 . . . [and] the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.⁶⁴

A court can also, in the appropriate circumstances, award summary judgment to a non-moving party.⁶⁵

As such, the language in CPLR 3211(c) and 3212(b), when read together, seemingly fills the gap and prescribes the procedure for how to summarily dispose of an Article 78 proceeding (or any cause of action/defense in an Article 78 proceeding) on a motion to dismiss and issue a final judgment disposing of the proceeding. No provisions otherwise prescribe the procedure, so the CPLR’s general procedure for an action should govern.⁶⁶

Imposing the same notice and opportunity to be heard requirements under § 3211(c) in an action, as a prerequisite to summarily disposing of an Article 78 proceeding on a motion to dismiss, also addresses the problem imposed by the lack of disclosure as of right in Article 78 proceedings. Unlike an Article 78 proceeding, disclosure is allowed in an action as of right.⁶⁷ A party in an action can

oppose a motion for summary judgment under the CPLR by showing that “facts essential to justify opposition may exist but cannot then be stated” and require disclosure.⁶⁸ A court can treat a motion to dismiss as a motion for summary judgment if proper notice and opportunity to submit all relevant evidence is provided because, under § 3211(c) and § 3212(b) and (f), parties have the statutory right to oppose summary judgment if they show disclosure is necessary. In an Article 78 proceeding, however,

“Swift adjudication” should not subvert the “just, speedy and inexpensive determination of every civil judicial proceeding.”

without any ability to obtain evidence through disclosure as of right, parties are generally relegated to the record for the proceeding.

In general, the record in an Article 78 proceeding is not prepared before a motion to dismiss is made.⁶⁹ Any co-respondents not responsible for preparing the record, and even petitioners, typically rely on the record to provide some of the necessary evidence to support their claims.⁷⁰ Requiring notice and an opportunity to be heard before a court summarily disposes of an Article 78 proceeding on a motion to dismiss would afford opposing parties the ability to show that summary disposition of the proceeding on the motion is inappropriate by showing a need to obtain evidence from the potential record that has likely not yet been prepared for the proceeding.

The Legislature intended that “swift adjudication . . . be achieved by way of a special proceeding.”⁷¹ However, swift adjudication should not subvert the Legislature’s concomitant direction that there be “just, speedy and inexpensive determination of every civil judicial proceeding.”⁷² Regardless of procedures under the CPLR, the Legislature intended that there be a distinction in the right to answer in a CPLR Article 4 special proceeding and in an Article 78 proceeding, after a motion to dismiss was denied. For instance, the Legislature included the term “may” in CPLR 404(a) versus the word “shall” in CPLR 7804(f).⁷³ There are no apparent provisions of law in Article 78 that otherwise prescribe how a court can summarily dispose of an Article 78 proceeding when a motion to dismiss is denied; however, CPLR 3211(c) directly addresses the procedures, including notice and an opportunity to be heard, for a court to summarily dispose of an action, or any cause of action or defense, on a motion to dismiss under § 3211 in an action. The judicial inclination generally favoring notice and an opportunity to be heard before summarily disposing of an Article 78

proceeding on a motion to dismiss is just. It adheres to the CPLR’s most fundamental direction regarding procedures in civil judicial proceedings: “Except where otherwise prescribed by law[], procedure in special proceedings shall be the same as in actions, and the provisions of the [CPLR] applicable to actions shall be applicable to special proceedings.”⁷⁴

Conclusion

Significant issues may arise regarding a party’s ability to respond to pleadings after making a motion to dismiss. Practitioners should always remember to ask themselves whether they will be able to answer or respond if they make a motion to dismiss and the motion is denied. Unfortunately, the only available answer is the often unsettling and inclusive – maybe. ■

1. CPLR 101; see also CPLR 105(o) (providing the CPLR definition of the term “law,” to also mean “any statute”).
2. CPLR 105(d).
3. See, e.g., *Freudenthal v. Cnty. of Nassau*, 283 A.D.2d 6, 10, 726 N.Y.S.2d 116 (2d Dep’t 2001), *aff’d*, 99 N.Y.2d 285, 755 N.Y.S.2d 56 (2003).
4. See *Town of Johnstown v. City of Gloversville*, 36 A.D.2d 143, 144, 319 N.Y.S.2d 123 (3d Dep’t 1971).
5. CPLR 103(b); see also *Freudenthal*, 283 A.D.2d at 10; *City of Syracuse v. Pub. Emp’t Relations Bd.*, 279 A.D.2d 98, 105, 719 N.Y.S.2d 401 (4th Dep’t 2000).
6. CPLR 105(b), (a); see also *City of Syracuse*, 279 A.D.2d at 105.
7. The CPLR provides that “[t]he word ‘law’ means any statute or any civil practice rule.” CPLR 105(o).
8. CPLR 103(b).
9. See *1825 Realty Co. v. Gabel*, 44 Misc. 2d 168, 170, 253 N.Y.S.2d 269 (Sup. Ct., N.Y. Co. 1964).
10. See *City of Syracuse*, 279 A.D.2d at 105.
11. See *Allyn v. Markowitz*, 83 Misc. 2d 250, 252, 373 N.Y.S.2d (Rockland County Ct. 1975) (emphasis in original).
12. See generally CPLR Art. 4; see also, e.g., *In re Foley*, 140 A.D.2d 892, 892–93, 528 N.Y.S.2d 709 (3d Dep’t 1988) (applying CPLR 404 as the procedures in a proceeding under Mental Hygiene Law Art. 77); see also *Ford v. Pulmosan Equip. Corp.*, 52 A.D.3d 710, 710, 862 N.Y.S.2d 56 (2d Dep’t 2008) (applying CPLR Art. 4 for procedures for proceeding under Business Corporation Law § 1008).
13. See CPLR 7804(a).
14. CPLR 7803(3); see generally CPLR 7801.
15. See *Long Island Citizens Campaign, Inc. v. County of Nassau*, 165 A.D.2d 52, 54, 565 N.Y.S.2d 852 (2d Dep’t 1991); see also CPLR 103(b).
16. See CPLR 3211(a), (b).
17. See CPLR 404(a); see also CPLR 7804(f); see also *Bernstein Family Ltd. P’ship v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 5, 883 N.Y.S.2d 201 (1st Dep’t 2009) (stating about CPLR 404(a) that “its evident purpose is to permit a motion to be made on all grounds available in an action under CPLR 3211”); see also *230 Tenants Corp. v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 56, 747 N.Y.S.2d 498 (1st Dep’t 1984) (determining CPLR 3211 applied in Art. 78 proceeding based upon § 7804(f)).
18. CPLR 3211(f); see also *Wenz v. Smith*, 100 A.D.2d 585, 586, 473 N.Y.S.2d 527 (2d Dep’t 1984); *Salzman & Salzman v. Gardiner*, 100 A.D.2d 846, 846, 474 N.Y.S.2d 86 (2d Dep’t 1984).
19. See *Wenz*, 100 A.D.2d at 586; see also *Miller v. Weyerhaeuser Co.*, 179 Misc. 2d 471, 685 N.Y.S.2d 393 (Sup. Ct., N.Y. Co. 1999) (quoting *Wenz*, 100 A.D.2d 585).
20. See *United Equity Servs., Inc. v. First Am. Title Ins. Co.*, 75 Misc. 2d 254, 255, 347 N.Y.S.2d 377 (Sup. Ct., Nassau Co. 1973); see also *Chagnon v. Tyson*, 11 A.D.3d 325, 326, 783 N.Y.S.2d 29 (1st Dep’t 2004) (finding that defendant that

moved to dismiss one cause of action “extended his time to respond to the other causes of action as well”).

21. See *Design Strategy Corp. & Network Integration Servs., Inc. v. Spicandler*, 2 Misc. 3d 1004(A), *1, 784 N.Y.S.2d 920 (Sup. Ct., N.Y. Co. 2004).

22. CPLR 404(a).

23. See *id.*

24. See *860 Nostrand Assocs., LLC v. WF Kasher Food Distribs. Ltd.*, 27 Misc. 3d 16, 18, 898 N.Y.S.2d 753 (App. Term 2d Dep’t 2010) (citing *In re Dodge’s Trust*, 25 N.Y.2d 273, 286, 303 N.Y.S.2d 847 (1969)); see also *Eklecco Newco, LLC v. Chagit, Inc.*, 12 Misc. 3d 143(A), *1, 824 N.Y.S.2d 762 (App. Term. 9th and 10th Dists. 2006) (stating “[i]n addition, tenant’s contention that CPLR 3211(f) automatically extended its time to answer is without merit since said section is inapplicable in a summary proceeding (see CPLR 404[a])”).

25. See *Dodge’s Trust*, 25 N.Y.2d at 286; see also *In re Application of Cunningham*, 75 A.D.2d 521, 522, 426 N.Y.S.2d 765 (1st Dep’t 1980) (stating, after losing a motion to dismiss, that the party “has no absolute right to answer”).

26. See *Application of Cunningham*, 75 A.D.2d at 522; see also *State v. Spodek*, 89 A.D.2d 835, 836, 454 N.Y.S.2d 4 (1st Dep’t 1982) (holding that the lower court “did not abuse its discretion in not granting . . . permission under CPLR 404(a) to answer”); *Ford v. Pulmosan Safety Equip. Corp.*, 52 A.D.3d 710, 711, 862 N.Y.S.2d 56 (2d Dep’t 2008); *Huber v. Mones*, 235 A.D.2d 421, 422, 653 N.Y.S.2d 353 (2d Dep’t 1997) (holding “the submission of an answer following denial of a motion to dismiss a special proceeding is subject to the discretion of the court (CPLR 404[a])”).

27. See *Spodek*, 89 A.D.2d at 836 (holding that the lower court “did not abuse its discretion” in denying ability to answer); *In re Foley*, 140 A.D.2d 892, 893, 528 N.Y.S.2d 709 (3d Dep’t 1988) (stating “we see no abuse of discretion here”); see also *Varkonyi v. S.A. Empresa De Viacao Airera Rio*, 22 N.Y.2d 333, 337, 292 N.Y.S.2d 670 (1968).

28. See *Dodge’s Trust*, 25 N.Y.2d at 286–87.

29. 52 A.D.2d 1017, 1018, 383 N.Y.S.2d 868 (3d Dep’t 1976) (stating “[a]lthough this was a special proceeding and not an action (cf. CPLR 3211, subd [c]; . . .) it does not appear that Special Term advised the parties it would proceed to consider the matter in a summary fashion should appellant’s motion be denied”).

30. See *Lefkowitz*, 52 A.D.2d at 1018 (stating, “[g]iven the pro se nature of appellant[s] appearance and petitioner’s request, we believe the circumstances demanded that appellant [] be made aware of the possibility of a summary disposition”).

31. See *Lev v. Lader*, 115 A.D.2d 522, 522, 496 N.Y.S.2d 52 (2d Dep’t 1985).

32. See *Spodek*, 89 A.D.2d at 836.

33. See *In re Cline*, 72 A.D.3d 471, 473, 901 N.Y.S.2d 2 (1st Dep’t 2010) (quoting *Lefkowitz*, 52 A.D.2d 1017).

34. See *Lev*, 115 A.D.2d at 522.

35. See CPLR 408.

36. 25 N.Y.2d at 286–87.

37. CPLR 7804(f).

38. *Id.*

39. See also *230 Tenants Corp., v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 56, 474 N.Y.S.2d 498 (1st Dep’t 1984); see also *Lefkowitz*, 52 A.D.2d at 1018.

40. See *230 Tenants Corp.*, 101 A.D.2d at 56.

41. See *Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs.*, 63 N.Y.2d 100, 102, 480 N.Y.S.2d 190 (1984); see also *Timmons v. Green*, 57 A.D.3d 1393, 1393, 871 N.Y.S.2d 562 (4th Dep’t 2008).

42. See *Wood v. Glass*, 226 A.D.2d 387, 388, 640 N.Y.S.2d 234 (2d Dep’t 1996).

43. See *Vill. of Delhi v. Town of Delhi*, 72 A.D.3d 1476, 1478, 900 N.Y.S.2d 168 (3d Dep’t 2010) (noting possible defenses of lack of “necessary parties and statute of limitations issues”); see also *Wood*, 226 A.D.2d at 388 (holding that “[t]he record reflects several factual and legal issues which are in dispute and have not been fully addressed by the parties”); see also *Laurel Realty, LLC v. Planning Bd.*, 40 A.D.3d 857, 860, 836 N.Y.S.2d 248 (2d Dep’t 2007) (looking to see if both “the dispositive facts . . . and the arguments of the parties were fully set forth in the record” before the lower court).

44. See *Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 102.

45. See *Vill. of Delhi*, 72 A.D.3d at 1479; see also *Lev v. Lader*, 115 A.D.2d 522, 522, 496 N.Y.S.2d 52 (2d Dep’t 1985) (allowing a party to answer in Article 78 proceeding, based upon a meritorious showing for conducting disclosure in the proceeding).

46. See *Kuzma v. City of Buffalo*, 45 A.D.3d 1308, 1311, 845 N.Y.S.2d 880 (4th Dep’t 2007) (internal quotes and brackets omitted); see *Laurel Realty, LLC*, 40 A.D.3d at 860 (holding that lower court properly denied the opportunity to answer, “since the dispositive facts were undisputed, and the arguments of the parties were fully set forth in the record”); but see also *Karedes v. Colella*, 306 A.D.2d 769, 769, 761 N.Y.S.2d 534 (3d Dep’t 2003) (stating that there were “other defenses involving allegations” that the party alleged “would be pleaded” to support its case); but see also *Miller v. Regan*, 80 A.D.2d 968, 968, 438 N.Y.S.2d 622 (3d Dep’t 1981) (holding that a party “raised a question of substantial evidence”).

47. See *Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 102.

48. See *230 Tenants Corp., v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 57, 474 N.Y.S.2d 498 (1st Dep’t 1984).

49. See *id.* at 57.

50. See *id.*

51. See also *Vill. of Delhi*, 72 A.D.3d at 1478.

52. See *Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 103 (case and treatise citations omitted).

53. See *id.* at 102.

54. See *id.* at 104; see also CPLR 3212(b).

55. See *230 Tenants Corp.*, 101 A.D.2d at 57–58; see also *Laurel Realty, LLC v. Planning Bd.*, 40 A.D.3d 857, 860, 836 N.Y.S.2d 248 (2d Dep’t 2007) (affirming lower court determination on motion to dismiss without allowing “an answer pursuant to CPLR 7804(f) and 3211”).

56. 215 A.D.2d 924, 626 N.Y.S.2d 865 (1995).

57. *Id.* at 924. The matter had been initiated as an Article 78 proceeding, but was converted to a declaratory judgment action by the lower court. The appellate court did not appear to endorse the conversion and treated the appeal as an appeal “in a proceeding pursuant to CPLR article 78.” See *id.* at 924.

58. *Id.* at 926.

59. *Id.*

60. The Third Department subsequently referred to *Phillips*, in *Karedes v. Colella*, 306 A.D.2d 769, 770, 761 N.Y.S.2d 534 (3d Dep’t 2003), as authority for requiring notice in an Article 78 proceeding before a court could convert a motion to dismiss to a motion for summary judgment, citing to the right to answer in CPLR 7804(f), as the basis for requiring notice. See *Karedes*, 306 A.D.2d at 770.

61. See *Vill. of Delhi v. Town of Delhi*, 72 A.D.3d 1476, 1478, 900 N.Y.S.2d 168 (3d Dep’t 2010).

62. See, e.g., *Castell v. City of Saratoga Springs*, 3 A.D.3d 774, 776, 772 N.Y.S.2d 97 (3d Dep’t 2004).

63. CPLR 3211(c).

64. CPLR 3212(b).

65. See *id.*

66. See CPLR 103(b).

67. See generally CPLR Art. 31; but see CPLR 408 (providing disclosure by court order in special proceedings).

68. CPLR 3212(f).

69. See CPLR 7804(e), (f).

70. See generally, e.g., *Simpson v. Wolansky*, 38 N.Y.2d 391, 380 N.Y.S.2d 630 (1975).

71. See *Lev v. Lader*, 115 A.D.2d 522, 522, 496 N.Y.S.2d 52 (2d Dep’t 1985).

72. CPLR 104.

73. See also *230 Tenants Corp., v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 56, 474 N.Y.S.2d 498 (1st Dep’t 1984) (reiterating “this difference was intended”).

74. CPLR 103(b).