

Motions To Dismiss: Why Clients Must Go In With Eyes Wide Open

By Daniel J. Schneider

To defense clients, early motions to dismiss, at first glance, are enormously attractive. Who wouldn't want to skip over all of the litigation processes and costs and get right to dismissal? One of the most difficult tasks in my almost 20 years of practicing law has been explaining to these clients that it is not that simple. As a practitioner who has won more than his share of motions to dismiss, I have concluded that the decision to file a motion to dismiss is the client's. Further, they must make an informed decision understanding what a motion to dismiss is, the standards involved, the consequences of losing the motion and the relative dearth of motions to dismiss that are successful. Explaining this topic, such that I am satisfied that the client is not spending money without full understanding of the risks, has been one of the biggest challenges in my career.

My strategy has been to tell it to them straight: motions to dismiss are incredibly hard to win at the very beginning of the case. From a client services perspective, I have found that those who make promises that cannot be kept erode the client's confidence in them, often leading to a change of counsel, the foreclosure on any repeat retention, or a dissatisfied client. My attitude is that if clients are going to incur the cost, they should go in with their eyes wide open.

A motion to dismiss is a device used by a defendant, typically very early in the case, usually before any discovery has been completed. It is a device used to dispose of, early, cases that have no merit. Since no discovery has been done, the motion is essentially assessing the complaint alone. For a defendant to win in such a scenario, they must show conclusively that the complaint, under any circumstances, has no merit.

As distinct from motions for summary judgment and/or a fact finding at a trial, only a small percentage of pre-discovery motions to dismiss are successful. Many clients who have been sued and believe they are in the right have a misconception that there is a shortcut in any litigation that will allow them to get out of it without going through the entire process. While some of them are right, most must go through the process and seek dismissal on a full record at the close of discovery. Because a motion to dismiss presents the opportunity to end the case in favor of a defendant at the inception, without discovery or trial, the standard for winning one is herculean.



Now, telling a client that motions to dismiss are tough to win is easy enough, but the “why” is where it gets complicated. How does one tell a defendant, who believes all of the claims of the plaintiff are hogwash, that the court is going to consider the allegations in the complaint as true? The black letter law, whether in state or federal court, on a motion to dismiss for failure to state a claim is that the court is going to assume the truth of the allegations in the complaint.¹

The number of times I have explained this only to hear the response, “but their claims are not true, so why would the court assume it!” are countless. My response is measured and patient to ensure the client understands why the court does this. The answer that the client must be assisted to understand is that the court is assuming truth only for the purpose of the motion to dismiss, not the case at large. Many defense clients have assumed that a lost motion to dismiss means a lost case. That this is not the case is critical to their understanding of the risks and rewards of this tool.

As a seasoned litigator knows, for a motion to dismiss to fail, a plaintiff must simply “state a cause of action.” This bit of legalese means that the plaintiff is not required to prove its case at this early stage, and the court's role on such a motion is to “determine only whether the facts as alleged fit within any cognizable legal theory.”² “Any cognizable legal theory” means that there is any imaginable set of facts wherein the plaintiff

could be entitled to relief. Therefore, plaintiffs “are accorded every favorable inference,”³ and to do this, with few exceptions beyond the scope of this article, the allegations in a complaint are assumed to be true.

To get the case dismissed under this standard, a defendant must show that, regardless of what the complaint says, the plaintiff is still not entitled to relief. This means that regardless of any discovery, any evidence – any inference in plaintiff’s favor – anything else, plaintiff’s complaint does not, under any circumstances, make out a claim against the defendant. In granting a motion to dismiss, the court is saying that it has found, even if the claims were true, there is still no case – the case is meritless on its face.

An additional justification that, in my experience, helps the client understand the nature of the pre-discovery motion to dismiss is the consequence of defeat on such a motion. A denied motion to dismiss does not mean the plaintiff wins the case. It means the case is permitted to move on to discovery. It means that the plaintiff has met the most minimal of burdens in that the court has found some universe where the plaintiff could plausibly win, and therefore it is permitted to continue exploring its claims. That’s it. The case goes back to the beginning with the complaint in place and the defendant must interpose an answer to the complaint, litigate the case, go through discovery (which is itself expensive), as it could have done had it not brought the motion.

This detail illuminates cost as an additional consideration of risk in considering a motion to dismiss. I tell every client that motions to dismiss are labor-intensive in terms of attorney’s fees in that there is drafting of motion papers and reply papers and often one or more court appearances to argue the motion. Since a motion to dismiss is a permissive step in litigation, the added cost could be avoided by simply interposing an answer upon receipt of the complaint, which would be the identical next step following a failed motion to dismiss. The ability for an early win would be the only forfeiture.

The final thing that needs to be explained for consideration by the client is whether the plaintiff will be able to bring the action over again if the dismissal is successful. Absent comment otherwise, a motion to dismiss is “not on the merits,” meaning that the plaintiff could recommence the action and attempt to make a better pleading.⁴ In state court, most often, this will be the case, and if a plaintiff has the funds and/or the vitriol, a new case could be commenced. In practice, in my experience, a plaintiff will, at most, appeal the dismissal and rarely will recommence.

In some cases, especially in federal court, a successful motion to dismiss will be with prejudice.⁵ In such cases, the defendant will be permanently cleared of the charges absent further appeal.

Armed with the understanding of these issues, the client can make a more informed decision about whether to pursue dismissal before discovery is commenced. There is added cost, and the motion is risky, but a successful motion to dismiss could short-circuit a plaintiff’s strategy and, in the long run, save the defendant money. There are many reasons to make this investment including controlling the timing of the case and testing the plaintiff’s proofs. Obviously, in this regard, there must be non-frivolous arguments, or no practitioner should ever make such a recommendation.

This article likely solidifies the point that talking to your clients about motions to dismiss is difficult. There are many considerations, and the issues are complex. However, a full-some conversation and your client’s informed consent are, in my opinion, necessary elements of undertaking such a filing. Bringing such a motion is a calculated risk on the part of any defendant and should be carefully weighed and considered. Lawyers have different styles, but I think that the foregoing are necessary discussions for one’s client to have a full understanding.

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Endnotes

1. *See Maas v. Cornell University*, 94 N.Y.2d 87, 91 (1999); *Hu v. City of New York*, 927 F.3d 81, 88 (2d Cir. 2019).
2. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).
3. *Maas v. Cornell University*, 94 N.Y.2d 87, 91 (1999).
4. *See, e.g., In re Hock*, 125 A.D.3d 722, 723 (2d Dep’t 2015).
5. *See, e.g., LaNasa v. Stiene*, 731 F. Supp. 3d 403, 421 (E.D.N.Y. 2024), *aff’d*, No. 24-1325, 2025 WL 893456 (2d Cir. Mar. 24, 2025) (“The Court sees no reason to protract this tortured litigation even further when LaNasa had a clear opportunity to justify another amendment and simply refused to do so.” *Id.*).

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