2 TIME LIMIT FOR ANSWERING A COMPLAINT, CROSS-CLAIM OR COUNTERCLAIM AND REMOVAL TO FEDERAL COURT

State Court

Alaska Rule of Civil Procedure 12(a) requires a defendant to serve an answer within twenty (20) days of service of the summons and complaint. The rule also requires a party served with a pleading stating a cross-claim to serve an answer within twenty (20) days after service. A plaintiff served with an answer asserting a counterclaim shall serve a reply within twenty (20) days after service of the answer, unless the reply is ordered by the court, in which case the reply is due within twenty (20) days after service of the order unless the order otherwise directs.

The State of Alaska, including any agency thereof, has forty (40) days after service upon the attorney general to serve an answer to a complaint or cross-claim. A non-governmental party also has forty (40) days to serve an answer to a complaint or cross-claim when service is made upon an officer or agency of the state appointed, authorized, or designated to accept service for such party pursuant to statute.

By way of example, AS 21.09.180 provides that each insurer applying for authority to transact insurance in the State of Alaska thereby appoints the Director of the Division of Insurance as its attorney to receive service of legal process issued against it in the State of Alaska. Service of the summons and complaint in a civil action against such an insurer may therefore be made upon the Director who then "promptly" forwards a copy by certified mail to the person last designated by the insurer to receive it. At that point, service is complete and the insurer has forty (40) days to serve its answer.

The dates set forth in Rule 12 are altered by the service of a motion under the rule prior to the filing of an answer, including the filing of a motion to dismiss for lack of jurisdiction or a motion to dismiss for failure to state a claim upon which relief can be granted.

Removal from State to Federal Court

It is important to keep in mind that, whereas the deadline for answering a complaint, counterclaim, or cross-claim can be extended by agreement or stipulation, the thirty (30) day deadline for removing a case from state court to federal court on the basis of diversity of citizenship cannot be extended by agreement or stipulation and starts to run as soon as the defendant receives, through service or otherwise, a copy of

the initial pleadings setting forth the claim(s) for relief upon which such action or proceeding is based.[2]

If a defendant removes an action to federal court before answering the complaint, the defendant shall answer or present other defenses or objections available under the federal rules within twenty (20) days after receipt, through service or otherwise, of a copy of the initial pleadings then filed or within five (5) days after the filing of the petition for removal, whichever period is longest.[3]

Appendices:

Alaska R. Civ. P. 12
AS 21.09.180 - 190
28 U.S.C. § 1446(b)
Fed. R. Civ. P. 81(c)

[2] 28 U.S.C. § 1446(b)

[3] Fed. R. Civ. P. 81(c).

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(a) **When Presented.** A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, unless otherwise directed when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered order, unless the order otherwise directs. The state or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 40 days after the service upon the attorney general of the pleading in which the claim is asserted. A non-governmental party shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim within 40 days after service upon an officer or agency of the state appointed, authorized or designated as agent to receive service for such party pursuant to statute. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other times as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of Defenses in Motion.** A party who makes a motion under the rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except as provided in subdivision (h) (2) hereof on any of the grounds there stated.

(h) **Waiver or Preservation of Certain Defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a

claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter the court shall dismiss the action.

(Adopted by SCO 5 October 9, 1959; amended by SCO 258 effective November 15, 1976; and by SCO 1153 effective July 15, 1994)

Annotations

Cases

I. In General

Federal authorities supporting the practice to hear and determine the affirmative defense of lack of jurisdiction on pleadings, affidavit counter-affidavits and similar documents prior to the trial of the merits are persuasive for Alaska. **Fenner v. Bassett**, Op. No. 331, 412 P2d 318 (Alaska 1966).

Where complaint stated a claim for relief, defendant who needed more facts to frame a responsive pleading could have called for them under this rule or could have obtained them by utilizing discovery proceedings and summary dismissal for failure to set out evidentiary facts was error. **Shannon v. City of Anchorage**, Op. No. 416, 429 P2d 17 (Alaska 1967).

Party raising an affirmative defense generally bears the burden of proof on that issue. **Morrow v. New Moon Homes, Inc.**, Op. No. 1253, 548 P2d 279 (Alaska 1976).

That want of personal jurisdiction was raised as an affirmative defense rather than merely by denial does not shift burden of proof to defendant. **Morrow v. New Moon Homes, Inc.**, Op. No. 1253, 548 P2d 279 (Alaska 1976).

Where plaintiff's claim would not have been barred if state had been required to file answer within time set by court rule, state was prohibited by equitable estoppel from asserting plaintiff's incapacity to sue when answer was filed at end of extended period allowed by stipulation. **State v. Reefer King Co., Inc.**, Op. No. 1344, 559 P2d 56 (Alaska 1976).

A complaint is subject to dismissal under Civil Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense, but the defense must clearly appear on the face of the pleading. The pleading must clearly allege the fact upon which the motion to dismiss is based. **Martin v. Mears**, Op. No. 1958, 602 P2d 421 (Alaska 1979).

When material outside the pleadings is presented to the trial court a motion to dismiss is automatically converted into one for summary judgment unless the court "affirmatively" and "expressly" rules that it is not considering evidence outside of the pleadings. **Adkins v. Nabors Alaska Drilling, Inc.**, Op. No. 2056, 609 P2d 15 (Alaska 1980).

Plaintiff's demand for jury trial on issues raised in defendant's counterclaim was untimely where plaintiff's reply to the counterclaim was filed more than a year and a half after the counterclaim and only 18 days before trial. **Pankratz v. State, Depart. of Highways**, Op. No. 2564, 652 P2d 68 (Alaska 1982).

Given the narrow scope of the materials outside of the pleadings which were consulted by the superior court and appellants' failure to show any prejudice occurring to them as a result of the court's unarticulated conversion of a Rule 12(b)(6) motion to a motion for summary judgment court's error in not expressly indicating whether it had considered or excluded matters submitted outside the pleadings was harmless. **Brice v. State, Div. of Forest, Land & Water**, Op. No. 2731, 669 P2d 1311 (Alaska 1983).

Where trial court considered matters outside the pleadings in deciding to dismiss a suit upon the court's own motion for failure to state a claim upon which relief could be granted, the motion should have been treated as one for summary judgment, the reviewing court chose to treat the dismissal as a judgment on the pleadings and confined review to the issue of whether plaintiff did fail to state a claim upon which relief could be granted since treating the trial court's sua sponte dismissal as a motion for summary judgment would have denied plaintiff certain procedural safeguards relevant to summary judgments. **Shooshanian v. Wagner**, Op. No. 2747, 672 P2d 455 (Alaska 1983).

Trial judge did not abuse his discretion in granting defendant's oral motion to amend the answer to add a statute of limitations defense where the only claim of prejudice by plaintiff was $4,000 spent litigating the two million dollar lawsuit before defendant raised the limitation defense. **Blake v. Gilbert**, Op. No. 2947, 702 P2d 631 (Alaska 1985).

Motions to dismiss are viewed with disfavor and should rarely be granted. **Kollodge v. State**, Op. No. 3342, 757 P2d 1024 (Alaska 1988).

If a trial court considers matters outside the pleadings, it must treat a motion to dismiss for failure to state a claim as a motion for summary judgment; if the trial court does not state whether or not it excluded evidence outside the pleadings, the appellate court may remand for proper consideration, review the decision as if the motion for failure to state a claim was granted after exclusion of the outside materials, or review the decision as if the trial court granted a motion for summary judgment. **Homeward Bound v. Anchorage School Dist.**, Op. No. 3589, 791 P2d 610 (Alaska 1990).

If matters outside pleadings are presented in motion to dismiss for failure to state claim upon which relief may be granted, and trial court fails to state expressly what materials it considered, appellate court may remand for proper consideration, review decision as if motion was granted after exclusion of outside materials, or review decision as if trial court granted motion for summary judgment. **Andrews v. Wade & DeYoung, Inc., P.C.**, Op. No. 4088, 875 P2d 89 (Alaska 1994).

Client's malpractice claim was not compulsory counterclaim in attorney's fee recovery action, although both arose from same litigation, because trial court in fee recovery action converted motion to dismiss to motion for summary judgment without notice, thereby depriving client of reasonable opportunity to present all material pertinent to such motion. **Andrews v. Wade & DeYoung, Inc., P.C.**, Op. No. 4088, 875 P2d 89 (Alaska 1994).

Sec. 21.09.180. Director attorney for service of process. (a) Each insurer applying for authority to transact insurance in this state shall appoint the director as its attorney to receive service of legal process issued against it in this state. The appointment shall be made on a form designated and furnished by the director. The appointment shall be irrevocable, shall bind the insurer and any successor in interest to the assets or liabilities of the insurer, and shall remain in effect as long as there is in force in this state a contract made by the insurer or obligations arising from it.

(b) Service of process against a foreign or alien insurer shall be made only by service of process upon the director or upon a deputy or other person in charge of the office during the absence of the director. Service of process against a domestic insurer may be made either upon the director or upon the insurer corporation in the manner provided by laws applying to corporations generally, or upon the insurer's attorney-in-fact if a domestic reciprocal insurer.

(c) Each insurer at the time of application for a certificate of authority shall file with the director the name and address of the person to whom process against it served upon the director is to be forwarded. The insurer may change the designation by a new filing. (§ 1 ch 120 SLA 1966)

Opinions of attorney general. — Process consists of only the initial pleadings where the court obtains jurisdiction over the person. Thus, notices of hearings, discovery pleadings, and motions are not generally considered process; summons, complaints, writs, search warrants, court orders and judgments, and all types of subpoenas are generally considered process. The usual distinction is that process is issued by the court, while other pleadings are signed and filed by the parties. June 10, 1986, Op. Att'y Gen.

Collateral references. — 36 Am. Jur. 2d, Foreign Corporations, §§ 259 to 262, 488, 492 to 494, 516, 528; 43 Am. Jur. 2d, Insurance, §§ 72 to 79.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings. 9 ALR3d 738.

Sec. 21.09.190. Service of process. (a) Duplicate copies of legal process against an insurer for whom the director is attorney under AS 21.09.180 shall be served upon the director, or upon a deputy of the director or other person in charge of the office during the absence of the director. At the time of service the plaintiff shall pay to the director a fee set under AS 21.06.250, taxable as costs in the action. Upon receiving service the director shall promptly forward a copy by certified mail with return receipt requested to the person last designated by the insurer to receive it.

(b) Process served upon the director and the copy forwarded as provided in this section constitutes service upon the insurer. (§ 1 ch 120 SLA 1966; am § 6 ch 26 SLA 1985)

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a wavier of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be

held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(June 25, 1948, ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139, § 83, 63 Stat. 101; Sept. 29, 1965, P. L. 89-215, 79 Stat. 887; July 30, 1977, P. L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, P. L. 100-702, Title X, § 1016(b), 102 Stat. 4669.)

Rule 81. Applicability in General

(a) To What Proceedings Applicable

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651–7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect.

[(7) Abrogated, effective Aug. 1, 1951. (Supreme Court Order, Apr. 30, 1951.)]

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within

a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

[(d) Abrogated, effective Oct. 20, 1949. (Supreme Court Order, Dec. 29, 1948)].

(e) Law Applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

(f) References to Officer of the United States. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

(As amended Dec. 28, 1939, eff. Apr. 3, 1941; Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 1951, eff. Aug. 1, 1951; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987.)