

mailed 4-21-18

**UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK**

• 445 Broadway; Albany, NY 12207-2936 •

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John Vidurek, Gerard Aprea, et al
Plaintiffs

- Against -

Governor A. Cuomo, New York State Senate
and New York State Assembly
Defendants

Jurisdiction: Court of Record, under
the rules of Common Law¹

Magistrate: Christian F. Hummel
Case NO: 1:18-cv-392

**WRIT OF ERROR
AND SHOW CAUSE**

NEW YORK STATE)
) :SS.
DUTCHESS COUNTY)

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Defendants' pre-motion letter seeking the Court's permission to file a motion to dismiss pursuant to ¶ 2(A)(i) does not exist. Plaintiffs presume that the defendants are referring to 12.1 Motions and Other Papers (a)², which provides that "*the moving party may file reply papers only with leave of Court, upon a showing of necessity*". Nowhere does the

¹ "A Court of Record is a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of common law, its acts and proceedings being enrolled for a perpetual memorial." Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689.

² (a) The moving party must file all motion papers with the Court and serve them upon the other parties no less than THIRTY-ONE CALENDAR DAYS prior to the return date of the motion. The Notice of Motion should state the return date that the moving party selected. The moving party must specifically articulate the relief requested and must set forth a factual basis which, if proven true, would entitle the moving party to the requested relief. The opposing party must file opposing papers with the Court and serve them upon the other parties not less than SEVENTEEN CALENDAR DA YS prior to the return date of the motion. For non-dispositive motions, the moving party may file **reply papers** only with leave of Court, upon a showing of necessity. Permission to file a reply does not exist where CMIECF automatically generates a deadline for a reply on a non-dispositive motion. However, such permission does exist where the Court sets a reply date through a text order. For dispositive motions, permission to file a **reply is granted** where CM/ECF automatically generates a deadline for a reply. **Reply briefs**, if allowed, must be filed and served not less than ELEVEN CALENDAR DAYS prior to the return date of the motion.

15 rule provide for the filing a motion to dismiss before answering the action. Because the
defendants cited no lawful argument to move the court, the court moved in error.
Furthermore “THE LAW” Trumps federal rules, local rules, legislation and state
constitutions that are repugnant to the Law and the unalienable rights of the plaintiffs.

All the Defendants are elected servants and have a duty to answer. “*Silence can only be*
20 *equated with fraud where there is a legal or moral duty to speak, or where an inquiry*
left unanswered would be intentionally misleading.”³ Defendants are free to state their
opposition to plaintiffs’ position with their answer as is the process of law and plaintiffs
will respond. IF DEFENDANTS FAIL TO ANSWER WITHIN 30 DAYS OF SERVICE A DEFAULT
JUDGMENT WILL BE FILED AGAINST THE DEFENDANTS and we expect that the court will
25 follow the Law, not status quo.

Therefore, Judge Mae A. D’Agostino is in Error as defendants have shown no authority
by rule, statute or law to grant defendants’ “pre-motion letter” which violates plaintiffs’
unalienable right of due process in this court of justice.

RULE MAKING

30 *"All laws, rules and practices which are
repugnant to the Constitution are null and void."*⁴

Plaintiffs would like to remind the court again, that this Action at Law is to proceed
according to the Rules of Common Law, any rule or statute repugnant to the same is
null and void. The original purpose of the Federal Rules of Civil Procedure was to

³ U.S. v. Tweel, 550 F.2d 297, 299. See also U.S. v. Prudden, 424 F.2d 1021, 1032; Carmine v. Bowen, 64 A. 932.

⁴ Marbury v. Madison, 5th US (2 Cranch) 137, 174, 176,(1803).

35 promote consistency and efficiency within the federal judicial system⁵. The need for amendments was anticipated by the drafters, who realized that the Federal Rules must respond to changes in the court system. *"The expectation of the draftsmen was that the power to make local rules would be used only on rare occasions when the Civil Rules deliberately had left gaps to be filled in the light of recognized local needs⁶."*

40 *"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them"* Miranda v. Arizona, 384 U.S. 436, 491. The New York State Constitution Article I Section 1 states: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof.

45 **THE COURT IS DIRECTED TO TAKE JUDICIAL NOTICE⁷
OF THE LAW OF THE LAND⁸**

50 *"Due course of law, this phrase is synonymous with "due process of law" or "law of the land" and means law in its regular course of administration through courts of justice."⁹ "By the law of the land is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."¹⁰*

⁵ See 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (2d ed. 1987); see also MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE 2 (4th ed. 1985).

⁶ See 12 WRIGHT & MILLER, supra note 1, § 3152. Id.

⁷ JUDICIAL COGNIZANCE: Judicial notice, or knowledge upon which a judge is bound to act without having it proved in evidence. Jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases. Board of Trustees of Firemen's Relief and Pension Fund of City of Marietta v. Brooks, 179 Okl. 600, 67 P.2d 4, 6; Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641; State v. Barnett, 110 Vt. 221, 3 A.2d 521, 526.

⁸ Article VI This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

⁹ Kansas Pac. Ry. Co. v. Dunmeyer 19 KAN 542.

¹⁰ Dartmouth College Case, 4 Wheat, U.S. 518, 4 ED 629.

The Law of the Land consists of the Declaration of Independence, US Constitution, Bill of Rights, Granted legislative powers¹¹, Common Law¹², and the “*rules of the common law*”¹³, “*anything in the Constitution or laws of any State to the contrary notwithstanding*”¹⁴. “*Law in its regular course of administration through courts of justice*¹⁵ a/k/a *courts of common law is due process.*”¹⁶ In *Brown v. Levese Com'rs*, 50 MIS 479, “it is said that these constitutional provisions do not mean the general body of the law as it was at the time the Constitution took effect; but they refer to certain fundamental rights which the system of jurisprudence of which ours is derivative has always been recognized; if any of these are disregarded in the proceedings by which the system of jurisprudence of which ours is derivative has always been recognized; if any of these are disregarded in the proceedings by which a person is condemned to the loss of liberty, etc., then the deprivation has not been by due process of law, and it has been held that the state cannot deprive a person of his property without due process of law through an act of legislature,” much less by a “RULE”?

The Miranda Decision: *Ernesto A. Miranda v. State of Arizona*, United States Supreme Court, decided June 13, 1966. “*Where rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them.*” The United

¹¹ Article 1 Section 8.

¹² Article III Section 2. "in law".

¹³ Article VII.

¹⁴ Article VI clause 2.

¹⁵ JUSTICE. [Bouvier's Law, 1856 Edition] In the most extensive sense of the word, it differs little from virtue, for it includes within itself the whole circle of virtues. Justice being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.; Luke 6:19 And the whole multitude sought to touch him: for there went virtue out of him, and healed them all.

¹⁶ *Leeper vs. Texas*, 139, U.S. 462, II SUP CT. 577, 35 L ED 225.

States Supreme Court stated further that all rights and safe guards contained in the first
70 eight amendments to the federal constitution are equally applicable in every State...
"because a denial of them would be a denial of due process of law"¹⁷.

"As to the construction, with reference to Common Law, an important canon of
construction is that constitutions must be construed to reference to the Common Law."
The Common Law, so permitted destruction of the abatement of nuisances by summary
75 proceedings and it was never supposed that a constitutional provision was intended to
interfere with this established principle. Although there is no common law of the United
States in a sense of a national customary law as distinguished from the common law of
England, adopted in the several states. In interpreting the Federal Constitution, recourse
may still be had to the aid of the Common Law of England. It has been said that without
80 reference to the common law, the language of the Federal Constitution could not be
understood." -- 16Am Jur 2d., Sec. 114:

**SUMMARY PROCEEDINGS ARE OUT OF
THE REGULAR COURSE OF THE COMMON LAW**

85 *"Any proceeding by which a controversy is settled, case disposed of, or trial conducted,
in a prompt and simple manner, without the aid of a jury... or in other respects out of
the regular course of the common law."* Sweet see Phillips v. Phillips, 8 N.J.L. 122.

¹⁷ William Malloy vs. Patrick J. Jogan, 378 U.S. 1, 84 S. Ct. 1489, argued Mar 5, 1964, decided June 15, 1964.

Wherefore, Judge Mae A. D'Agostino is in error and is directed to rescind the TEXT ORDER entered on 4-18-2018 or show cause within five (5) days of receipt of this Writ of Error by what authority you act.

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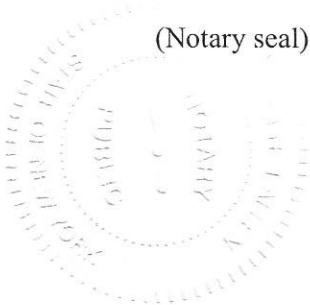
John Vidurek, et al

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NOTARY

In New York State, Dutchess County, on April 21, 2018 before me, Antonette Allen, the undersigned Notary Public, personally appeared John Vidurek, to me known to be the living man described herein, who executed the forgoing instrument, and has sworn before me that he/she executed the same as his/her free-will act and deed.

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[Handwritten signature]

Notary

