CLARO BASIC TRAINING

Monday, June 4, 2018
3:00 PM – 6:00 PM

Fordham Law School
150 W 62nd St, New York, NY 10023, Room 3-01

Presenters
Dora Galacatos
Fordham Law School, Feerick Center for Social Justice

Matthew Schedler
CAMBA Legal Services, Inc.

The CLARO Program Partners

**Bronx CLARO:** Bronx County Bar Association, Fordham Law School Feerick Center for Social Justice, Legal Services NYC – Bronx, New York City Bar Association, NYU Law School Students for Economic Justice

**Brooklyn CLARO:** Brooklyn Bar Association Volunteer Lawyers Project, Brooklyn Law School

**Manhattan CLARO:** Fordham Law School Consumer Law Advocates, Fordham Law School Feerick Center for Social Justice, Fordham Law School Lincoln Square Legal Services, Manhattan Legal Services, New York County Lawyers’ Association

**Queens CLARO:** Queens County Bar Association Volunteer Lawyers Project, St. John’s University School of Law

**Staten Island CLARO:** Richmond County Bar Association, Staten Island Women’s Bar Association, Wagner College

**Westchester CLARO:** Legal Services of the Hudson Valley, Pace University School of Law, Westchester County Bar Association

The CLARO Programs operate under the auspices of the New York State Unified Court System’s Access to Justice Program. Justice Edwina G. Mendelson, Deputy Chief Administrative Judge for Justice Initiatives oversees the Access to Justice Program.
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TIMED AGENDA

WELCOME 3:00pm - 3:05pm (5)

INTRODUCTION OF CLARO & ETHICAL CONSIDERATIONS
Dora Galacatos 3:05pm - 3:30pm (25)

CLIENT INTERACTION 3:30pm - 3:45pm (15)
Dora Galacatos & Matthew Schedler

DEBT COLLECTION PROCESS: PRE-LITIGATION & THE LIFE OF A DEBT
Dora Galacatos 3:45pm – 4:15pm (30)

BREAK 4:15pm - 4:25pm (10)

THE COURT PROCESS & KEY MOTIONS 4:25pm - 4:50pm (25)
Matt Schedler

SUBSTANTIVE DEFENSES (CONSUMER CREDIT ACTIONS; BROKEN LEASE CASES) 4:50pm - 5:20pm (30)
Dora Galacatos & Matt Schedler

DISCOVERY 5:20pm – 5:30pm (10)
Dora Galacatos

NEGOTIATING A SETTLEMENT; STIPULATIONS 5:30pm – 5:40pm (10)
Matt Schedler

CLIENT-ATTORNEY SESSION SIMULATION 5:40pm - 5:45pm (5)
Dora Galacatos & Camilla Leonard

QUESTIONS & ANSWERS 5:45pm - 6:00pm (15)

TOTAL TIME 180 MINUTES

Note: 150 CLE min. + 30 non-CLE min. = 3 CLE CREDITS
BASIC CLARO TRAINING
Biography of Presenters

Dora Galacatos, Fordham Law School, Feerick Center for Social Justice

Dora Galacatos, the Executive Director of the Feerick Center, is a Fordham Law alumna (1996), with experience working in city government, the not-for-profit sector, and legal services for low-income individuals. Prior to coming to Law School, Dora worked for the New York City Department of Juvenile Justice and the New York City for Mayor's Office of Drug Abuse Policy from 1989 to 1993. As part of a Skadden Fellowship (1997-98), Dora worked at Northern Manhattan Improvement Corporation, in Washington Heights, Manhattan. Dora was the Staff Director to the New York City Family Homelessness Special Master Panel (2003-2005). Dora also served as a law clerk to the late-Honorable Milton Pollack (1996-97) and to the Honorable Paul A. Crotty (2005-2006), both District Judges in the Southern District of New York. Dora is a member of the New York County Lawyers’ Association Pro Bono Committee and the former chair of the New York City Bar Civil Court Committee.

Matthew Schedler, CAMBA Legal Services Inc.

Matthew Schedler is the Supervising Attorney in charge of the CAMBA Legal Services Consumer Law Project. The Consumer Law Project works in coalition with the Urban Justice Center, Housing Conservation Coordinators, Northern Manhattan Improvement Corporation, and Westside SRO Law Project to assist housing clients at these organizations with debt collection and credit issues in order to achieve self sufficiency after representation is complete. Mr. Schedler has also been a founding member of the DV CLARO Project and works with domestic violence survivors regarding financial abuse and consumer debt issues. Mr. Schedler received his B.A. from the University of Rochester and his J.D. from Boston University.
# Table of Contents

I. **Introducing the CLARO Program** ................................................................. 1  
   a. CLARO – 1  
   b. The CLARO Team – 2  
   c. New York City Civil Court – 3  
   d. Training – 3  
   e. CLE Credit – 3  
   f. How a CLARO Session Operates – 3  
   g. Greeting the CLARO Visitor – 4  
   h. Common CLARO Scenarios – 5  

II. **The Ethics of Working With Pro se Litigants & Unbundling Legal Services** . . . 9  
   a. Access to Justice – 9  
   b. Legal Information versus Legal Advice – 9  
   c. Unbundled Legal Services and Ethical Considerations – 10  

III. **Debt Collection Process** ................................................................. 11  
    a. Exempt Income – 12  
    b. The Exempt Income Protection Act – 13  
    c. The 2011 Treasury Rule – 14  
    d. The Life of a Debt – 15  
    e. The Fair Debt Collection Practices Act – 17  
    f. The New York State Department of Financial Services – 17  
    g. The New York City Rules – 18  
       i. Sample “Verify Debt” Letter – 20  
    h. Telephone Harassment – 21  
       i. Sample “Judgment-Proof/ Cease Contact/Verify Debt” Letter – 22  
    i. Settling with Debt Collectors Prior to Litigation – 23  
    j. Debt Settlement Companies – 23  

IV. **Court Process** ................................................................. 25  
    a. Summons and Complaint – 25  
    b. Summons Served Without Complaint – 26  
    c. Timing for Filing and Answer – 26  
    d. How to Serve and File the Answer – 27  
    e. How to File a Motion or an Application for an Order to Show Cause – 28  
    f. Process for Vacatur of a Default Judgment – 29  
    g. New York City Civil Court Directives Regarding Default Judgments – 31  
    h. Methods of Service on the Plaintiff – 32  
       i. How to Obtain Court Records – 32  
    j. Court Appearance and Conduct – 32  
    k. Enforcing Judgments – 33  
    l. Ways of Collecting – 33  
    m. Summary Judgment – 34  
    n. Appeals – 34  

V. **Substantive Defenses** ................................................................. 35  
    a. Substance of the Answer: Responding to Allegations in the Complaint – 35  
    c. Additional Defenses to Account Stated Claim – 41  

VI. **Counterclaims** ................................................................. 41  

VII. **Cross Claims** ................................................................. 43
VIII. Broken Lease Cases .................................................. 43

IX. Negotiating Settlement ................................................ 44

X. Settlement Prior to Trial .............................................. 45

XI. Discovery Devices .................................................... 46
    a. Demand for a Bill of Particulars – 47
    b. Depositions – 47
    c. Interrogatories – 47
    d. Demand for Discovery and Inspection – 47
    e. Request for Admissions – 48
    f. If the Litigant Does not Respond to a Demand for Discovery – 48
    g. Objecting to Discovery – 48
    h. Serving Discovery – 48

XII. Referral of CLARO Visitors to Other Assistance ............... 50

XIII. Tax Consequences of Settlements ................................ 51
    a. General Rules – 51
    b. Advising CLARO Visitors regarding tax implications of settlements – 52
    c. Advising Visitors who have received a Form 1099-C – 52
    d. Tax Resources for Volunteer Attorneys and Visitors – 53

Appendices
About this Guidebook
The CLARO Guidebook was developed and produced by the Brooklyn Volunteer Lawyers Project and Brooklyn Law School CLARO/SAG with major contributions from Claudia Wilner, Esq., formerly with the New Economy Project; Carolyn E. Coffey, Esq., Director of Litigation for Economic Justice at Mobilization for Justice Legal Services; Corina N. Stonebanks, Esq. formerly of the Brooklyn VLP; and the Hon. April Newbauer, former Attorney-in-Charge, The Legal Aid Society Queens Civil Practice. In July 2009, the Guidebook was adapted and updated by the sponsors of the Bronx CLARO Program to reflect developments in the law. It has been updated since then on a regular basis to reflect legal developments in the field. The Guidebook is available for use in other consumer debt programs; however, the CLARO program directors respectfully ask that future use of the materials credit the original source and authors of the Guidebook.
I. INTRODUCING THE CLARO PROGRAM

A. CLARO

The Civil Legal Advice and Resource Office (“CLARO”) is a limited, legal advice project for unrepresented debtor-defendants. CLARO is an innovative and collaborative effort that operates in the New York Civil Courts in all five boroughs – the Bronx, Brooklyn, Manhattan, Queens and Staten Island – and in Westchester.\(^1\) CLARO also operates in Erie County. Volunteer attorneys and volunteer students at CLARO respond to the needs of unrepresented persons in consumer credit cases in various types of courts by advising litigants on self-representation strategies. Programs such as CLARO are part of a greater national *pro se* movement in legal services, which seeks to maximize legal resources for low-income individuals by providing limited-scope legal advice to unrepresented litigants.

In January 2006, the first Civil Legal Advice and Resource Office opened in Kings County Civil Court, after months of planning and collaborative effort by the Brooklyn Bar Association Volunteer Lawyers Project and the Public Interest Center at Brooklyn Law School, in partnership with public interest practitioners and the Supervising Judge of Kings County Civil Court. Today CLARO is a highly regarded program, which is staffed by volunteer lawyers and students from local law schools and colleges and is run with the support of the pro bono programs of bar associations and legal service providers.

While rich in diversity, New York City and New York State have significant indigent populations. Nine years after the deepest recession since the Great Depression, NYC residents continue to experience disconcertingly high levels of unemployment and wage depression. According to NYC's most recent census data, 20.3% New Yorkers lived in poverty.\(^2\) According to the leading NYC child advocacy organization, a stunning 26.6% of children in the City lived in poverty in 2016.\(^3\) Since 2008, the recovery has resulted in a net loss of nearly 34,000 high and middle-wage jobs compared to a net gain of over 100,000 low-income jobs that do not bring households above

\(^1\) CLARO operates with the support and collaboration of the New York City Civil Courts and of the Honorable Fern A. Fisher, Deputy Chief Administrative Judge for New York City Courts and Director for New York State Access to Justice Program.

- **Bronx CLARO** is cosponsored by the Bronx County Bar Association, New York City Bar, Fordham Law School’s Feerick Center for Social Justice, Legal Services NYC-Bronx, and NYU Law School Debtors’ Rights Project.
- **Brooklyn CLARO** is cosponsored by the Brooklyn Bar Association Volunteer Lawyers Project and Brooklyn Law School. Manhattan CLARO is cosponsored by New York County Lawyers’ Association and the Feerick Center for Social Justice at Fordham Law School.
- **Manhattan CLARO** is cosponsored by Fordham Law School’s Feerick Center for Social Justice and the New York County Lawyers’ Association.
- **Queens CLARO** is cosponsored by the Queens Volunteer Lawyers Project and St. John’s University School of Law.
- **Staten Island CLARO** is cosponsored by the Richmond County Bar Association, the Staten Island Women’s Bar Association, and Wagner College.
- **Westchester CLARO** is cosponsored by Legal Services of the Hudson Valley, Pace Law School, and the Westchester County Bar Association.


200% of the federal poverty level. According to CSS’s polling, over a third of the low-income respondents report that they faced three or more hardships in the last year, including skipping meals, not being able to afford the subway, and being threatened by foreclosure or eviction. The unemployment rate in NYC dropped to 5.1% as of September 2017 yet remained significantly higher than the nationwide unemployment level of 4.1%. According to the U.S. Census Bureau, 14.7% of NYS residents live below the poverty level. In New York State, the poverty rate for children is 22.2% and for seniors 12.7%. Of people living in poverty in NYS, data show that women, children, and people of color are disproportionately represented. 38.4% of female-headed households with children live in poverty in the state.

The frequency and impact of Civil Court debt collection cases grew markedly from the 2000s until 2008 and then declined due to court reforms and concerted and successful advocacy efforts. Even now, however, with significantly lower numbers of consumer credit action filings, too few legal service providers in New York City handle these cases. Elderly persons, single mothers, persons with low-level English proficiency, and low-income people are forced to represent themselves against collection agency attorneys who have vastly greater knowledge of the Civil Court debt collection process and far greater bargaining power.

CLARO attempts to remedy this imbalance. Rather than attempt representation of just a relative handful of litigants, CLARO maximizes the limited pro bono legal resources available to debtors by offering a free walk-in clinic that provides legal advice on how they can best represent themselves.

1. The CLARO Team

The typical CLARO volunteer team consists of three or more volunteer attorneys, one session administrator, and usually two or more college or law students. The atmosphere at CLARO

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10. Id.
11. Id. (25.9% of Latinos and 23.4% of African-Americans live in poverty compared to 11.3% of white New Yorkers).
12. Civil Court filings peaked in 2008 and have been declining ever since. The New York City Civil Court reports that in 2015 the total number of consumer credit filings was 55,408: Bronx County had 10,955 consumer credit filings; Kings County Kings County had 16,759 filings; New York County had 7,425 filings; Richmond County had 4,053 filings; and Queens County had 16,216 filings.
13. The New York State courts estimated in 2014 that 98% of consumers were unrepresented in debt collection cases. New York State Chief Judge Jonathan Lippman, Law Day Remarks: Consumer Credit Reforms 1 (transcript) (Apr. 30, 2014). That percentage has decreased to 85% of consumers following an increase in civil legal services funding.
sessions is professional, informal and collegial. A CLARO session focuses on both providing information to the pro se litigants and demystifying the legal process. CLARO aims to alleviate some of the anxiety experienced by the unrepresented litigant by providing useful and clear guidance.

2. New York City Civil Court

Each of the five boroughs of New York City has a civil court. The cases handled by the Court generally include monetary claims of up to $25,000, recovery of personal possessions worth up to $25,000, and relief related to real property worth up to $25,000.

The New York City Civil Courts utilize separate calendars (called the “Pro se Part” or “Personal Appearance Part”) for cases involving at least one pro se litigant. The court clerks in these Parts are accustomed to working with pro se litigants and can be of some assistance to them, but cannot give legal advice or inform the litigant how best to proceed with a case. The Clerk may refer litigants seeking such advice to CLARO. Most CLARO Programs arrange for flyers with information about CLARO to be distributed by the Clerk’s Office.

3. Training

No specific prior legal knowledge in Civil Court debtor law is required in order to volunteer for CLARO. Training is provided through live or videotaped CLE trainings. Experienced consumer law attorneys are on hand at each CLARO session to provide supervision and mentoring. In the event that a litigant’s question requires further research, volunteers should always feel comfortable informing the pro se litigant that, even though an answer is not immediately available, one will be forthcoming in a follow-up phone call or at the next CLARO session.

4. CLE Credit

Several CLARO Programs operate as follows: volunteers receive a certificate for three, free CLE credits on the condition they attend the training program and serve a total of three two-hour (or two three-hour) CLARO sessions within a certain period of time (typically six months).

B. How A CLARO Session Operates

The CLARO administrator (typically a law school or college student volunteer) greets each litigant and asks him or her to briefly explain his or her legal issue. The CLARO administrator makes sure that the litigant has a consumer debt issue involving debt collection; CLARO also assists litigants with credit reporting issues.

Before the litigants meet with the attorney, a volunteer student may meet with the litigants to assist in completion of the following two (2) forms:

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14 From time to time, visitors with consumer debt cases filed in Supreme Court seek assistance from CLARO.
15 The Small Claims Court is for pro se litigants who wish to sue for money damages of no more than $5,000. Persons who wish to sue in Small Claims Court can obtain a very helpful and informative brochure entitled “A Guide to Small Claims Court” at the Small Claims Court Clerk’s Office in each borough’s civil court. Creditors sometimes file debt collection cases for amounts less than $25,000 in Supreme Court. See N.Y. Const. art. VI, § 7(a).
16 See N.Y. Const. art. VI, § 11(a).
1. Civil Legal Advice and Resource Office Visitor Questionnaire (See Appendix A)
This is a confidential survey, designed to provide contact information, statistical information, and information about the litigant’s legal problem. This information aids in assessment of the needs of litigants and the services provided by the CLARO Program. This information is inputted into a database so that the CLARO Programs can collect and analyze data, which is helpful for both provision of quality services and also advocacy efforts.

2. Limited Scope of Legal Services Acknowledgement and Understanding (See Appendix B)
This form explains the limited scope of the legal services being offered at the CLARO session, the fact that visitors permit the program to share confidential information for purposes of referrals only, and that information from the Questionnaire is inputted into a database and compiled.17

Upon completion of the forms, the litigants meet with the volunteer attorneys. If time permits, litigants with other types of claims may receive appropriate referrals. Student volunteers are encouraged to sit with the attorney and the unrepresented litigant during their meeting, noting any legal forms that the litigant may need to fill out and what legal arguments and facts should be included within these forms.

Because the CLARO sessions can become very busy, time management by all volunteers is critical. If you are waiting a long time between CLARO visitors, be sure to seek out the session administrator to let them know you are available to see the next CLARO visitor. If you find that the CLARO visitor you are assisting has a very complicated and time-consuming case, be sure to speak to the session administrator and to the consumer law expert. It may be helpful for the consumer law expert to get involved to help with the consultation.

1. Greeting the CLARO Visitor

Introduce yourself. Be compassionate. Remember that CLARO exists in part to reassure and guide the pro se litigant. Explain to the litigant that you are a volunteer attorney; that the services being offered are free and extend to the duration of your meeting only; and that you will be providing legal advice based on the information that the litigant provides. Further explain that the person is representing himself or herself in the case.

Review the forms that the litigant completed with the student volunteer, ensuring that the litigant understands in particular the limited scope of the legal service being provided.

The unrepresented litigant may be scared, nervous or reluctant to face the court system and may be embarrassed about owing a debt. Remain respectful and compassionate and be mindful that the CLARO visitors are not legal experts. Understandably, the litigant may have a difficult time

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17 This form is available in Staten Island in Spanish and in Russian and in Spanish in the Bronx and Manhattan. During daytime hours the CLARO Program can request a court interpreter to assist with Spanish- or Russian-speaking litigants. This form is slightly different for Manhattan CLARO and the volunteer attorney must include his or her name in the form.
identifying salient legal facts and issues and presenting them in an orderly fashion. Most litigants are largely unfamiliar with legal terminology and may consider it to be nearly incomprehensible.

Some litigants may be of limited literacy or limited English language proficiency. Functionally illiterate people may be able to read and write text (to various levels of competency) but may be unable to function effectively when confronted with printed materials. Of course, all CLARO visitors deserve respect and patience. One gentle way to assist a person you suspect may be of limited literacy is to ask, “Would you like me to read it for you?” or “Would you like me to write it for you?”

Try to help the litigant present a clear story by steering them towards relevant information. For example, you may start with questions such as, “So, what brings you here?”, “Were you served with some legal papers?”, or “I see you have some papers in your hand . . . .”

2. Common CLARO Scenarios

CASE 1

Ms. Jones comes to CLARO with a handful of papers and seems very anxious and confused. She says that she got a letter from her boss two days ago saying someone was going to take part of her paycheck. She called the court, and they told her to come and file papers. She said the clerk gave her some papers and told her to go to CLARO. She is very clear that she had no idea she had been sued until she got the notice of wage garnishment, and that she has no idea who this person is who is suing her. She adds that she had some store cards in the past, but has paid them off over the past few years.

You look at the intake form and see that she was sued several years ago by a well-known debt buyer, represented by a large debt collection law firm, for a retail credit card account. You ask to see the papers that Ms. Jones brought to the session and begin to skim through them. Some documents are old credit card bills, others are money order receipts and canceled checks for payments made—you keep note of what you have read, knowing that it may be useful later on in the session. Finally, you find the copy of the court file.

As you read the summons and complaint, you explain to Ms. Jones what they mean. You explain what a debt buyer is. You point out the name of the original creditor, and the amount they sued for. She says the limit on the card was far less than that amount. You explain what a default judgment is, and confirm that she was never served. You go over the affidavit of service, which claims that a person named Mr. Jones, her husband, accepted the summons and complaint, and describes Mr. Jones. She says she has lived alone for many years, has never been married, and does not know anyone who fits the description in the affidavit of service. You think you recognize the process server agency and the process server listed on the affidavit of service and written on the intake form, and do a quick internet search—the agency was investigated for wide-spread “sewer service” around the time that Ms. Jones was sued.

18 Possible signals of literacy difficulties include: glancing at printed materials; not automatically righting an upside-down page when looking at it; claiming another person will fill out the paperwork or will look it over at a later time; claiming headache or sickness that reading intensifies; or even going on the offensive—demanding that the person dictating slow down or demanding another to transcribe for him or her.
You go back to the other papers she brought, and see that she paid the original balance, but not late fees that were being tacked on.

You explain that Ms. Jones can vacate the default judgment and have a chance to defend herself. You fill out an affidavit of support of an order to show cause, checking off that she was never served, and including her meritorious defenses: lack of personal jurisdiction, plaintiff’s lack of standing, and that she paid all or part of the alleged debt. You also complete a proposed answer. You explain to Ms. Jones how to file these papers and the various steps involved. You also explain to Ms. Jones that, since she just received the wage garnishment notice, she has time to file the papers before any of her pay gets taken, and that vacating the default judgment means her wages can’t be garnished unless she misses her court date or loses the case. You also make it clear to Ms. Jones that she should be on the lookout for any documents sent by the plaintiff, and that they might require her to respond or go back to court (for example, a notice to admit or a motion for summary judgment). You tell her she can come back to CLARO if she gets these papers, or before her court date. She is very relieved that she can try to prevent her wages from being garnished and that she knows what is happening and what she needs to do.

CASE 2

The session administrator tells you that you will be meeting with Mr. Rosario, who has been to CLARO before. Mr. Rosario has also given permission to have a law student volunteer sit in. He got help with an order to show cause and an answer in a debt buyer case, and also sent a demand for documents (Lawsuit # 1). He received the plaintiff’s response. He was also personally served in another lawsuit this week (Lawsuit # 2). You see on the intake form that Mr. Rosario’s only source of income is SSI. Before you start looking into the two lawsuits, you make sure that Mr. Rosario understands that his income is exempt from collection and that it has been explained to him before; Mr. Rosario confirms that a volunteer attorney explained both exempt income and the Exempt Income Protection Act19 protections to him at his very first CLARO session.

You tell Mr. Rosario that you will start by looking at Lawsuit # 1. He says he thinks the plaintiff’s response is inadequate—they did not send a signed contract and there is just one paper saying that the debt buyer plaintiff bought a “pool” of accounts. Mr. Rosario learned a great deal about this at the prior CLARO session and has also done some research on his own. You review the documents and agree and talk briefly about his upcoming court date. You explain that there are people waiting to be seen, and that you want to move on to the new case. You give Mr. Rosario a referral sheet and circle the numbers of two hotlines he can call if he has additional questions before the court date next week.

Lawsuit # 2 was brought by an original creditor, but Mr. Rosario never had a credit card with this bank. He mentions that his wallet was stolen last year. You ask if he has looked at his credit report, and he has not. You ask whether he has seen other strange charges, and he says he got a debt collection letter regarding an account he never had. You explain to Mr. Rosario that he seems to be a victim of identity theft, and that he needs to take certain steps to deal with Lawsuit # 2 and to deal with the identity theft generally.

You note that Mr. Rosario has twenty days total to reply with his Answer, since he was personally served. You assert a general denial, “I do not owe this debt,” and “I did not incur this debt. I am

19 See infra Part III for a brief overview of the Exempt Income Protection Act and applicable federal Treasury Rule.
a victim of identity theft.” Finally, you include on the Answer form that Mr. Rosario’s only source of income is SSI. You tell Mr. Rosario that he should complete the FTC’s ID theft affidavit and file a police report before his court date, and bring copies of them and of his SSI award letter to court.

You outline some basic steps for Mr. Rosario and the student and ask her to help him. There is a sample letter that Mr. Rosario can send to creditors to dispute the debt, assert the identity theft, and note that his only source of income is SSI. The student will get copies of this and go over it with Mr. Rosario, and also give him copies of the credit report request form and instructions about placing a security freeze and disputing any accounts that are not his, and will also go over the identity theft affidavit. Mr. Rosario is distressed by the identity theft, but pleased to have a roadmap for going forward and good defenses in both lawsuits.²⁰

CASE 3

Ms. Jones comes to CLARO with a handful of papers and seems very anxious and confused. She mentions that she received letters from someone about a debt, but she does not recognize the identity of the sender. She also says that debt collectors have called her countless times, at all hours of the day and night. Furthermore, Ms. Jones does not know if her case is in court.

You ask to see the papers that Ms. Jones brought to the session and begin to skim through them. Some documents are old credit card bills, others are money order receipts and canceled checks for payments made – you keep note of what you have read, knowing that it may be useful later on in the session. Finally, you find the letter from a law firm/debt collection agency addressed to Ms. Jones. In sum, the letter uses somewhat forceful language and urges Ms. Jones to contact the firm so that she can settle her debt. Attached to the letter, or perhaps within the letter, is an explanation of the original debt, and you see that the firm purchased the debt from XYZ Phone Company.

As you read the letter, you explain to Ms. Jones what the letter means: that the firm has not filed a case in court yet and, at this point, seeks to settle the debt that the collection agency purchased from XYZ Phone Company. Relieved, Ms. Jones recalls an account she had four years ago with XYZ Phone Company, but claims that the amount the debt collection firm says she owes far exceeds the balance she remembers having on the account. Unfortunately, all of the other papers Ms. Jones brought along concern other accounts and not the XYZ Phone Company account. You explain to Ms. Jones that the amount in the letter likely represents that original amount, plus interest and fees, but that the sum is difficult to interpret without proper documentation.

Next, you advise Ms. Jones on what to do after she leaves the CLARO session. First, you tell her to try to find any past bills from XYZ Phone Company reflecting the balance on the account. In addition, you advise Ms. Jones to contact her bank and obtain a copy of each check written to XYZ Phone Company in payment of a balance owed. Since Ms. Jones disputes the total amount the debt collection agency wishes to settle for, you urge her to delay settling the case. You also mention that the likely result of her refusal to settle will be that the firm files a claim against her. You minimize her anxiety over the potential lawsuit by explaining that a lawsuit has no immediate ramifications and that it is usually preferred to settle a dispute with the weight of the Court behind the settlement. You advise her to watch out for a Summons and show her a sample of what one

²⁰ Please note that Fordham Law School’s Feerick Center for Social Justice has a special identity theft project and is training CLARO and other volunteers to provide specialized assistance to identity theft victims.
might look like. Lastly, you give Ms. Jones a copy of a letter urging the collection agency to cease contact with her during inappropriate times and in inappropriate places. Ms. Jones, much more relaxed, thanks you and promises to return to CLARO if her case ends up in court.

**CASE 4**

Mr. Thomas arrives at CLARO with a bundle of documents, on top of which is a Summons and Complaint. You ask about delivery of the Summons, and Mr. Thomas says that he received the documents in the mail four days ago. You note that Mr. Thomas has thirty days total to reply with his Answer, since service was through the mail and he had previously found one attached to his door. You offer your assistance to Mr. Thomas in filling out the Answer form, and he readily accepts.

First, you ask a few questions to get a better understanding of the situation. From the documents, you saw that the collection agency seeks to recover on a purchased account - an unpaid ABC Department Store (“ABC”) credit card in Mr. Thomas’ name. You ask Mr. Thomas if he remembers ever having an ABC credit card and he responds that he did. In fact, some of the documents he brought to the CLARO session reflect a credit card with ABC. You ask him when he made the last payment on the account, and he says that it was exactly two years ago when he closed the account. That bit of information directly matches up with the documentation that he has. However, you see that the amount alleged on the Summons and Complaint far exceeds the balance on the card as of the last statement.

With a better understanding of the situation, you begin to assist Mr. Thomas with the Answer. You help him choose the proper defenses. First, a general denial, and “I dispute the total amount owed. I have no relationship to this creditor,” since Mr. Thomas remembers the debt but not the amount alleged, and does not have any relationship with or know the collection agency. You then explain that Mr. Thomas should take the completed Answer to the appropriate office or window at the courthouse. After he files the Answer, you tell him that the Clerk’s Office in New York City will serve the Answer on the Plaintiff’s counsel. Lastly, you give Mr. Thomas a general overview on what to expect on his court date, and tell him what kind of documents he should bring to court with him.

As you review the CLARO Intake Form you note that Mr. Thomas’ only source of income is SSI. You ask Mr. Thomas to affirm his source of income and assets. He explains that he only receives SSI, does not own a home, and has no other assets outside of a bank account containing monies received through SSI. You note that Mr. Thomas qualifies as a so-called judgment-proof individual and hand him a copy of the judgment-proof cease contact letter. You advise him to send a similar letter to the debt collection agency, along with a copy of the SSI award letter as proof of income. You add the fact that his only source of income is SSI to the Answer for its possible persuasive effect on the Court. You mention that this may result in the collection agency discontinuing the case, but still advise Mr. Thomas to gather the materials necessary for a trial. In addition, you mention to Mr. Thomas that both federal and state legal provisions protect income

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21 A more accurate term would be “collection proof” litigant. Litigants with income exempt from collection can still have judgments entered against them, but creditors may not enforce the judgments with debtors’ exempt income.
exempt from seizure, such as SSI, pension income, workers’ compensation, and unemployment benefits. Feeling better, Mr. Thomas leaves the CLARO session.

* * *

A good practice is at the end of the session to summarize in writing any oral advice given to the CLARO visitor. Student volunteers can be helpful in writing out any specific next steps that you discuss with the CLARO visitor.

II. THE ETHICS OF WORKING WITH PRO SE LITIGANTS & UNBUNDLING LEGAL SERVICES

A. Access to Justice

*Pro se* representation is very common in personal civil matters beyond the traditional areas of traffic, housing, small claims, and domestic relations. Courts report that dockets for unrepresented litigants have not just increased, but have reached the saturation point.

Courts have responded by trying to provide substantial assistance to unrepresented litigants. The scope of this assistance, however, is limited because court clerks can only offer legal information, not legal advice.

Volunteer attorneys can provide unrepresented litigants with unbundled legal services, such as limited legal advice, and thus expand access to justice for low-income persons.

B. Legal Information versus Legal Advice

Court clerks are only permitted to provide unrepresented litigants with legal information, not legal advice.

Courts will prohibit their staff from providing legal advice “because of concerns about their ‘practicing law,’ about their giving incorrect information, and about their binding the judge by such incorrect information.”

General legal information is not based on the specific individual facts the way legal advice is.

- A rough test: If two lawyers could give the unrepresented litigant differing instructions on a given question, without either one committing legal malpractice, then the instructions are legal advice, not legal information.

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22 See Part III, below, which provides a brief overview on a federal Treasury Rule governing income exempt from collection and the New York State Exempt Income Protection Act.

The problem is that “most persons representing themselves in court do so because they cannot afford to retain counsel. Without competent advice concerning available options and their advantages and disadvantages, litigants cannot obtain a just outcome.”

CLARO volunteer attorneys provide legal advice and assistance as well as legal information (such as how the court works, where to go within the court to obtain certain forms, etc.) to unrepresented CLARO visitors.

C. Unbundled Legal Services and Ethical Considerations

On April 1, 2009, new Rules of Professional Conduct went into effect in New York State. Rule 6.5 governs participation in limited pro bono legal services programs. The Rule defines such programs as follows:

Short-term limited legal services are services providing legal advice or representation free of charge as part of a program [sponsored by a court, government agency, bar association, or not-for-profit legal services organization] with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance. Rules of Professional Conduct 6.5(a) & (c).

Conflicts of Interest. There is often concern that a strict application of the conflict-of-interest rules may deter lawyers from volunteering to provide short-term legal services to those who would otherwise go unrepresented. However, this is not the case. Under Rule 6.5, volunteer lawyers participating in limited pro bono legal services programs must comply with Rules 1.7, 1.8, and 1.9, which place restrictions on representation where conflicts exist or may exist, “only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest.” Rule of Professional Conduct 6.5(a)(1). Volunteer lawyers participating in limited pro bono legal services programs, thus, need not first conduct a conflicts check prior to providing limited legal advice so long as they do not have actual knowledge of a conflict or of a potential conflict.

Informed Consent. Rule 6.5(d) also requires the lawyer to “secure the client’s informed consent to the limited scope of the representation.” Rule 1.0(j) defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.” Further, “[i]f a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client, but must also advise the client of the need for further assistance of counsel.” See Rule 6.5, cmt. 2. The Rule thus requires for the volunteer lawyer to assess whether the CLARO visitor’s circumstances and legal issues are such that they warrant legal representation; if that is the case, the volunteer lawyer should advise the CLARO visitor to try to obtain an attorney. The volunteer lawyers should, in such an instance, consult with the consumer law expert, notify the session administrator, and indicate the

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24 Id. (summarizing Russell Engler, Professor of Law and Director of Clinical Programs at the New England School of Law).
26 Please see Appendix C for a copy of the Rule.
need for a referral in the Intake Form. Please note that many CLARO Programs also have referral sheets available for CLARO visitors with information on other legal services providers and resources.

Confidentiality. The representation provided through a limited pro bono legal services program must comply with the confidentiality requirements set out in Rule 1.6. Rule of Professional Conduct 1.6 (Confidentiality of Information). The CLARO Project in your borough may ask volunteer attorneys and volunteer students to sign an acknowledgement form of volunteers’ responsibility to maintain client confidences.

III. DEBT COLLECTION PROCESS

Sometimes, a visitor to the CLARO Program has only a letter outlining a threat of legal action, or a debt collection letter, but does not have any documents or knowledge of a pending case.

To ensure that no court action has commenced, ask the visitor if he or she, or anyone at his or her residence, received any legal papers, such as a Summons or court order. You may also wish to ask whether the visitor has recently experienced collection activity that would signal the presence of a default judgment, such as a frozen bank account or wage garnishment.

* Practice Tip: A good practice is for volunteer attorneys to request that a volunteer student check the eCourts database of the New York State Unified Court System web site (available at http://iapps.courts.state.ny.us/webcivil/ecourtsMain) to see if any other cases have been filed against the litigant. Please note, however, that the database is sometimes incomplete, inaccurate, and/or not current.

* Practice Tip: Litigants frequently come in with copies of their credit reports. If a litigant has not yet obtained a copy of their credit report, the volunteer attorney can inform the litigant of consumers’ right to one free copy of their credit report from each of the three credit reporting agencies (Experian, Equifax, and TransUnion). Consumers can alternate and stagger their requests (requesting a free credit report once every four months and rotating their requests among the bureaus). The CLARO Program has copies of a mail-in form; credit reporting agencies now require proof of identification and proof of address. Volunteers can also refer litigants to the FTC’s website at http://www.ftc.gov/freereports (which will in turn refer them to AnnualCreditReport.com) or give them the FTC number (1-877-322-8228). Caution litigants against using unnecessary for-profit credit report web sites.

Once you are satisfied that there is no legal action, review the letter regarding the debt and counsel on proactive steps toward resolution.

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27 See Part XII, infra.
28 See Appendix Q for copies of the Referral Sheets for the Bronx, Manhattan, and Staten Island Programs.
If the claim has no merit, the person may wish to refute it entirely. Or, the claim may have merit, but the visitor simply cannot afford to make any payments at this time. Depending on his or her circumstances, the visitor may wish to offer some sort of settlement offer with a proposed repayment schedule. Attorney volunteers should ensure that the visitor understands his or her options with regard to the debt and does not inadvertently take steps that will cause him or her harm (such as reviving a time-barred debt by making a partial payment on it).

* Practice Tip: New York City runs Financial Empowerment Centers at many locations throughout the city, which provide free, one-on-one financial counseling. FEC counselors can help people obtain their credit reports, decide whether to pay a debt, and negotiate with creditors and debt collectors. For locations, call 311 or go to http://www1.nyc.gov/site/dca/consumers/get-free-financial-counseling.page.

The debt collection process is governed by the federal Fair Debt Collection Practices Act (FDCPA), which controls what debt collectors may do and say to consumers in the course of collecting a debt. In addition, debt collectors must comply with New York City rules regulating debt collection. These rules are administered by the New York City Department of Consumer Affairs, which licenses and regulates debt collectors in New York City.

**A. Exempt Income**

Judgment creditors cannot enforce judgment awards against certain individuals. These so-called “judgment proof” litigants (a somewhat inaccurate but popular term) either have no income or property to garnish or have an income derived from public funds. As a matter of policy, monies received from public funds cannot be seized or garnished. Funds that are exempt from debt collection include Social Security, Supplemental Security Income (SSI), veteran’s benefits, survivor’s benefits (if the spouse was a veteran), public assistance, unemployment insurance, worker’s compensation benefits, payments from public and private pensions, spousal maintenance (alimony), child support, and any other form of public assistance. Earned income less than 30 times the minimum wage per week, after taxes, is also exempt from debt collection. If the litigant takes home $390 per week or less, all of his / her earned income is exempt from debt collection. If the litigant takes home more than $390 per week, 90% of his / her gross income or 75% of his / her disposable income, whichever is greater, is exempt from debt collection.

Understanding the source of a CLARO visitor’s income is crucial to giving that person effective legal advice. Listen carefully to the unrepresented litigant’s situation. Does he or she envision only a limited use of public assistance? Can he or she afford to make any payments at all? In some cases, the litigant with exempt income envisions no change in his or her circumstances; this client should be counseled with an eye towards ending any existing debt collection harassment and

29 New York State law also prohibits debt collection harassment. See N.Y. Gen. Bus. Law §§ 600-04. However, as the state law has no private right of action and simply tracks the federal law, it is not particularly useful for most New Yorkers.
30 See notes under Section V of Substantive Defenses, below, for statutory references.
31 See N.Y. C.P.L.R. § 5231 (income exclusions). Also, New York case law applies the exemption even in the absence of a formal income execution. Morris Plan Ind. Bank of N.Y. v. Gunning, 295 N.Y. 324, 331 (1946) (protecting 90% of debtor’s wages from attachment by sheriff and asserting that “it is our State policy to protect all but 10% of wages from any seizure for debt”) (emphasis added).
protecting his or her income from creditors. Other CLARO visitors envision going back to work in the future. Depending on the case, these individuals may be better off negotiating a settlement with the creditor so as to prevent a judgment from appearing on their credit reports. If a settlement is impossible, or if the individual has many other debts, you may wish to recommend that the individual also meet with a bankruptcy attorney to gain a more complete picture of his or her options.

Note that individuals filing for bankruptcy under Chapter 7 or undergoing a financial reorganization supervised by a federal bankruptcy court under Chapter 13 are often—also somewhat inaccurately—referred to as judgment-proof with respect to all relevant and protected debt. If this is the case, ask to see all legal paperwork regarding filing or application. If the litigant forgot to list the debt in question as a part of the bankruptcy filing, the litigant remains liable for the debt.

B. The Exempt Income Protection Act

On January 1, 2009, the Exempt Income Protection Act (EIPA) went into effect.32 This law aims to protect low-income New Yorkers from seizure of exempt income by debt collectors.33 Under the EIPA, the entire procedure for restraining New Yorkers’ bank accounts has changed. Briefly, EIPA provides as follows:

- When exempt funds are directly (i.e., electronically) deposited into accounts within 45 days of the date the restraining notice was served on the bank, the first $2,750 of the account is not subject to any restraint. Most low-income account holders who depend on exempt income are likely to have $2,750 or less in their accounts; in such instances, the restraining notice will be void.34

- For accounts without directly deposited exempt income, EIPA provides that the first $3,120 is exempt from restraint. This amount tracks New York’s wage exemption, which is based on the current minimum wage.35

- Banks may not charge fees to account holders if no funds can be legally restrained. Amounts over $2,750 or $3,120 will be subject to both restraint and, presumably, fees.

- EIPA also contains detailed procedures for releasing frozen accounts, which should simplify and expedite the process considerably.\(^{36}\) If any funds are restrained, the accountholder should receive a notice and an exemption claim form, mailed by the bank. You should ask whether the CLARO visitor received the form, which is designed to be a self-explanatory, self-help measure. The accountholder must complete the form within 20 days and mail it back to the judgment creditor’s attorney and the bank, which then triggers various other procedures.

If you see a CLARO visitor who appears to have had exempt income restrained in violation of the EIPA, please alert the CLARO session administrator and/or consumer law expert immediately.

**C. The 2011 Treasury Rule**

In May 2011, the U.S. Treasury issued a new rule strengthening protections for bank accounts containing directly deposited federal benefits, like Social Security, Supplemental Security Income, and Veterans Benefits.\(^{37}\) The rule is similar, but not identical, to EIPA. The federal rule preempts state law in instances where there is a direct conflict and the federal rule offers more protections.\(^{38}\)

There are two main differences between the federal rule and EIPA. The first pertains to the amount of money that is automatically exempt from restraint. Under the federal rule, the “protected amount” is twice the recipient’s monthly benefit. Accounts containing less than this protected amount may not be restrained (even if the protected amount exceeds $2,750). The second difference concerns what happens to the account if it contains excess funds. Under EIPA, the account will be frozen, and will remain frozen for one year unless the accountholder takes certain actions to release the account, such as filling out an exemption claim form, filing an Order to Show Cause, or reaching a settlement with the judgment creditor’s attorney. Future deposits will be subject to the restraining notice unless the account is released as described above. Under the federal rule, the excess funds in the account will be set aside for the creditor and the account will be released. Future deposits are not subject to the restraining notice.

Below is a summary of the benefits under EIPA and the federal rule:

**Accounts containing directly deposited federal benefits**, like Social Security, SSI, or veteran’s benefits: The protected amount is $2,750 or twice as much as the account holder’s monthly benefit, whichever is greater. Excess funds will be set aside for the judgment creditor, and the account will be released. The accountholder can use the exemption claim forms or file an Order to Show Cause to obtain release of any restrained funds.

**Accounts containing directly deposited state or private benefits**, like unemployment, workers compensation, disability, child support, spousal maintenance, public assistance, and pension payments: The protected amount is $2,750. If the account contains excess funds, it will be restrained for up to one year, although the accountholder will have access to $2,750. The accountholder can use the exemption claim form or file an Order to Show Cause to obtain release of the account.

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\(^{36}\) *Id.*


\(^{38}\) 31 C.F.R. § 212.9 (2012).
All other accounts: The protected amount is generally treated by banks as $3,120. If the account contains excess funds, it will be restrained for up to one year, although the accountholder will have access to $3,120. The accountholder can use the exemption claim form or file an Order to Show Cause to obtain release of the account. (The exact amount depends on the number of employees the employer of a judgment-creditor has due to the variable minimum wage set by state law.)

D. The Life of a Debt

A basic understanding of consumer debt—one how is it created, who owns it, who collects it, and what rules apply at each stage of the process—is crucial for CLARO volunteers. The process is similar for all debts, but we will use the example of a credit card debt. Please refer to Appendix D for guidance regarding the life cycle of a debt developed by the organization NEDAP.

Default – Original Creditor

A debt is created at the moment the consumer misses a payment to his or her credit card company. The credit card company will usually report the late payment to the credit bureaus. The credit card company will also assess a late fee, may raise the interest rate, and may telephone the consumer to inquire about the missed payment.³⁹ Penalty interest rates in many credit card agreements have been upwards of 30%, while late fees range from $25 to $35.⁴⁰

In-House Debt Collector

If the consumer continues to miss payments, the creditor will usually send the account to the in-house collections department. In-house collectors will send letters and make telephone calls to the consumer in an effort to collect the debt. These collection efforts can range from relatively pleasant to quite nasty. The FDCPA does not apply to these collection contacts from in-house debt collectors.⁴¹

Charge Off

If 180 days go by without a payment, the creditor will usually “charge off” the debt, or write it off as a bad debt. Many consumers are confused about what “charge off” means and may even believe they no longer owe a charged-off debt. In fact, however, the consumer does continue to owe the charged-off debt. Furthermore, the creditor may continue to assess interest at the rate set forth in the credit card contract. However, the creditor may not continue to impose late fees or over-the-limit fees.

Outside Debt Collector

⁴¹ New York City rules protect consumers against harassing phone calls from original creditors. 6 R.C.N.Y. § 5-77(b)(1)(iv); 6 R.C.N.Y. § 5-76(1).
At some point prior to or after charge-off, the creditor will usually send the debt to an outside collection agency. Outside collection agencies vary widely in terms of the tactics they will use. Some agencies, known as “flat rate” debt collectors, do nothing but send one or a series of debt collection letters, for which they are paid a flat rate by the collector. Other agencies, working on commission, send letters and make telephone calls to the debtor. Some collection agencies treat consumers nicely, while others are more aggressive. All collection agencies will send the account back to the original creditor if they do not obtain payment within a specified period of time. It is common for a creditor to send a debt to several different collection agencies.

It is important to note that, once an outside debt collector is involved, the FDCPA governs the debt collection process, and the consumer gains substantive rights, such as the right to verify the debt and the right to cease communication (see below).

**Debt Buyer**

If the debt is charged-off and the creditor cannot obtain payment through its in-house or third-party debt collectors, the creditor will likely sell the debt to a debt buyer. Debt buyers are companies that buy charged-off debt from original creditors, often for pennies on the dollar, and then attempt to collect it for themselves. They may try to collect it in-house or they may send it out to one or a series of outside collection firms. If they do not succeed in collecting the debt, they may sell it to another debt buyer. It is not uncommon for a debt to be bought and sold more than once.

The FDCPA applies to debt buyers as well as the outside collection firms they employ. In addition, debt buyers that engage in collection activities in New York City must obtain a debt collection license from the New York City Department of Consumer Affairs.42

**Debt Collection Law Firm**

Eventually, if the debtor does not make a payment, the debt will most likely be sent to a debt collection law firm. Both original creditors and debt buyers use the services of debt collection law firms. Local debt collection law firms typically send a letter and make phone calls to attempt to negotiate a settlement prior to suit and even during debt collection litigation.

The FDCPA applies to debt collection law firms. Accordingly, in addition to state procedural rules, local debt collection law firms must follow federal rules pertaining to debt verification and cease communication letters. If, during the course of litigation, the debt collection law firm makes false statements (including false statements in legal pleadings) or engages in unfair practices, it may be liable under the FDCPA.

The debt collection law firm’s rights, duties, and obligations under the FDCPA overlap with New York State substantive and procedural law, but they are not identical. Sometimes these overlapping legal systems are a source of confusion for CLARO visitors.

**E. The Fair Debt Collection Practices Act**

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, applies to all persons who regularly collect the debts of another. In other words, it applies to third-party debt collectors, not original creditors. The definition includes debt buyers and any other party who acquires the debt after default. The FDCPA only applies to consumer debts—debts incurred for personal, family, or household purposes. It does not apply to business debts, parking tickets, or other fines.

The FDCPA prohibits debt collectors from engaging in deceptive or unfair tactics in order to collect on a debt. The use of false and misleading statements, either verbally or in written documents, is prohibited. The FDCPA also bars debt collectors from harassing debtors by making frequent telephone calls, using profanity, or discussing the debt with third parties.

The FDCPA also grants debtors substantive rights, including the right to verify the debt. This right is limited in scope and time. In short, within five days of a debt collector’s first communication with a debtor, the debt collector must send the debtor a written notice stating the amount of the debt, the name of the creditor to which the debt is owed, and information about how to dispute the debt. This notice is often called a “g notice,” because it is required by 15 U.S.C. § 1692g. The consumer then has thirty days from receiving the “g notice” to request “verification” of the debt. Once the debt collector receives the request for verification (see sample “Debt Verification Letter” below), it may not engage in any debt collection activities unless and until it verifies the debt.

The actual “verification” required by case law is minimal. However, some debt collectors will abandon the debt rather than verify it. The main benefit to consumers of requesting verification is that all debt collection activity (including the filing of a debt collection lawsuit) must stop unless and until the debt collector provides verification. This is a particularly valuable tool if the debt is close to the statute of limitations and a lawsuit has not yet been filed.

If a CLARO visitor brings in a recent letter containing a “g notice,” you should discuss with the client the possibility of requesting verification of the debt.

* Practice Tip: Many unrepresented litigants demand verification of the debt upon receiving notice that they have been sued. It is important that an unrepresented litigant understand that despite the request for verification, the consumer must appear in court, or a default judgment will ensue.

F. The New York City Department of Financial Services Rules

The New York State Department of Financial Services promulgated debt collection rules, most of which went into effect on March 3, 2015. The rules:

- Focus exclusively on credit card debt and expressly exempt credit that has been extended by a seller of goods or services, such as auto loans, medical loans, and retail installment contracts; and
- Apply to third-party debt collectors, debt collection law firms (engaged in pre-litigation activity only), and debt buyers; the rules expressly exempt original creditors.

The rules impose a variety of written disclosure requirements on debt collectors, including:

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43 23 N.Y.C.R.R. § 1.1(d).
44 23 N.Y.C.R.R. § 1.1(e).
• Initial disclosures that inform consumers of their federal protections, their rights if they receive income exempt from collection, and detailed information regarding the account that is claimed owed (for the latter only if the debt has been charged off);\textsuperscript{45} and
• Disclosure if the debt may be time-barred.\textsuperscript{46}

The rules provide consumers with verification rights if they dispute the debt; however, this right is limited to charged-off debt only.\textsuperscript{47} The rules set out protections for consumer in connection with settlement agreements, including written confirmation of debt settlement agreements and regular account of the debt while the consumer is paying off a debt pursuant to a settlement agreement.\textsuperscript{48}

\subsection*{G. The New York City Rules}

New York City’s debt collection protections are among the strongest in the country. They give NYC residents extra protections that are not provided by federal and state debt collection laws. For example, under NYC law, debt collectors:

• Must be licensed by the NYC Department of Consumer Affairs;\textsuperscript{49}
• Must confirm any settlement agreement in writing within five business days;\textsuperscript{50} and,
• Must disclose certain information if they try to collect on a debt that is past the statute of limitations.\textsuperscript{51}

Furthermore, the New York City rules provide enhanced verification rights. First, under New York City law, a consumer may request verification at any time.\textsuperscript{52} Second, New York City law now details the information that a debt collector must provide in response to the verification request. A debt collector must provide ALL of the following:

• Proof of the consumer’s agreement to pay the original creditor (for example, a copy of the credit card agreement);
• The final account statement issued by the original creditor;
• A breakdown of the total amount due, showing principal, interest, and other charges; and
• For all other charges, the date of and basis for each charge.\textsuperscript{53}

If the debt collector cannot provide this information, it must stop collecting the debt.\textsuperscript{54} If a consumer requests verification and a lawsuit has not yet been filed, the debt collector may not file suit. These rules apply to debt collection agencies, debt buyers, and debt collection law firms.\textsuperscript{55}

\begin{footnotesize}
\begin{itemize}
\item 23 N.Y.C.R.R. § 1.2.
\item 23 N.Y.C.R.R. § 1.3.
\item 23 N.Y.C.R.R. § 1.4.
\item 23 N.Y.C.R.R. § 1.5.
\item N.Y.C. Admin. Code § 20-490.
\item N.Y.C. Admin. Code § 20-493.1(b).
\item N.Y.C. Admin. Code § 20-493.2(b); 6 R.C.N.Y. § 2-191.
\item N.Y.C. Admin. Code § 20-493.2(a).
\item 6 R.C.N.Y. § 2-190.
\item N.Y.C. Admin. Code § 20-493.2(a).
\item N.Y.C. Admin. Code § 20-489.
\end{itemize}
\end{footnotesize}
SAMPLE "VERIFY DEBT" LETTER (SEE APPENDIX E)

BY CERTIFICATE OF MAILING

Collection Agency / Debt Collection Law Firm

Street Address

City, State, Zip Code

Dear Sir or Madam:

I am writing to you about my account, number ___________________________ with _________________________.

[name of debt collection agency / debt collection law firm]

I, the consumer whose name and address are set forth below, am disputing the above-referenced debt. Please verify this debt as required by the Fair Debt Collection Practices Act (FDCPA) (section 1692g) and New York City Administrative Code (section 20-493.2). Please note that New York City regulations require all debt collectors to send specific written documentation verifying the debt. Under New York City regulations (section 2-190 of the Rules of the City of New York), verification requires all of the following:

• Proof of my agreement to pay the original creditor;
• A copy of the final account statement issued by the original creditor;
• A breakdown of the total amount due, showing principal, interest, and other charges; and
• For all other charges, the date of and basis for each charge.

I dispute this debt because __________________________________________________________________.

Because I am disputing this debt, you should not report it to the credit reporting agencies. If you have already reported it, please notify the credit reporting agencies that the debt is disputed and/or delete the tradeline from my credit report. Reporting information that you know to be inaccurate, or failing to report information correctly, violates the FDCPA and the Fair Credit Reporting Act.

Also, I __ have / __ do not have exempt income.

In addition, pursuant to 15 U.S.C. 1692c(c) and § 5-77(b)(4) of title 6 of the Rules of the City of New York, I advise you to cease communicating (through any medium) with me in reference to any and all debts with respect to which you have instituted debt collection procedures (as defined in § 5-76 of title 6 of the Rules of the City of New York) as of the date hereof.

Sincerely,

____________________________________  ______________________________________
Name         SIGNATURE

____________________________________  ________________________________
Address         DATE

____________________________________
City, State, Zip

cc:  Original Creditor: ____________________________, FTC; NYS AG’s OFFICE, NYC DCA

56 Under the FDCPA, disputing the debt is a prerequisite for a verification of the debt, so the letter should contain language disputing the debt. Even if the litigant does not dispute owing some debt to this creditor, it is usually wise to dispute the amount, which will often include very high finance charges and late fees (although they may have been legal under the credit card agreement during the time in question). Also, it is worthwhile to dispute at least the amount of the debt to verify that all of the charges were legitimately incurred by the debtor. Thus, the optional language of disputing only the amount is included.
H. Telephone Harassment

Under the Fair Debt Collections Practices Act, creditors/collectors cannot call debtors prior to 8am or after 9pm. Collectors cannot make repeated or continuous telephone calls with the intent to annoy, harass or abuse any person at the called number.

To help prevent creditors/collectors from contacting the litigant at a particular place, the person receiving such phone calls should say: “This time and/or place is inconvenient for me to receive calls. Please stop calling at this time and/or place.” Under the Fair Debt Collections Practices Act, this statement ceases contact at the proscribed time and place.

In addition, the New York City Rules define “excessive frequency” as calling someone after the debt collector has already spoken with the debtor twice in a seven-day period. If the debtor answers the phone twice, identifies him or herself as the right person and then hangs up, the third time the agency calls back, the call can be reported to the New York City Department of Consumer Affairs for violating 6 R.C.N.Y. § 5-77(b)(1)(iv). Please note that for purposes of the New York City Rules, a debt collector is defined as “an individual who, as part of his or her job, regularly collects or seeks to collect a debt owed or due or alleged to be owed or due,” 6 R.C.N.Y. § 5-76(1), which arguably includes the collections department of an original creditor.

However, if the consumer wants the debt collector to stop all contact, the consumer must send a “Cease Communication” letter. Once the third-party debt collector receives this letter, it may not continue to contact the consumer by telephone or mail (except once, to tell the consumer that it will cease communications). The third-party debt collector may, however, file a debt collection lawsuit even after the consumer sends a cease communication letter.

If a “judgment-proof” litigant arrives at CLARO in the debt collection stage, advise the litigant to explain their “judgment-proof” status in his or her cease communications letter (see sample below).

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57 6 R.C.N.Y. §5-77 (Unconscionable and Deceptive Trade Practices). This provision states as follows:

It is an unconscionable and deceptive trade practice for a debt collector to attempt to collect a debt owed, due, or asserted to be owed or due except in accordance with the following rules: . . .

(b) Communication in connection with debt collection. A debt collector, in connection with the collection of a debt, shall not:

(1) After institution of debt collection procedures, without the prior written consent of the consumer given directly to the debt collector after the institution of debt collection procedures, or without permission of a court of competent jurisdiction, communicate with the consumer in connection with the collection of any debt; . . .

(iv) with excessive frequency. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that more than twice during a seven-calendar-day period is excessively frequent. In making its calculation, the debt collector need not include any communication between a consumer and the debt collector which is in response to an oral or written communication from the consumer, or returned unopened mail, or a message left with a party other than one who is responsible for the debt as long as the message is limited to a telephone number, the name of the debt collector and a request that one who is responsible for the debt telephone the debt collector; or any communication which is required by law or chosen from among alternatives of which one is required by law.

The employer of a debt collector may not be held liable in any action brought under §5-77(b)(1)(ii)-(iv) if the employer shows by a preponderance of the evidence that the violation was not intentional and resulted despite maintenance of procedures reasonably adapted to avoid any such violation.
SAMPLE “JUDGMENT-PROOF/CEASE CONTACT/VERIFY DEBT” LETTER (SEE APPENDIX E)

Your Name
Your Street Address
City, State ZIP Code

Date: ______________________________

BY CERTIFICATE OF MAILING
Collection Agency’s Name
Collection Agency’s Address
City, State ZIP Code]
(NYC Department of Consumer Affairs License Number: _________________)

Re: Name of Original Creditor, Account Number

Dear Sir/Madam:

I am disputing the above-referenced debt. Please verify this debt as required by the Fair Debt Collection Practices Act (FDCPA) (section 1692g) and New York City Administrative Code (section 20-493.2). Please note that New York City regulations require all debt collectors to send specific written documentation verifying the debt. Under New York City regulations (section 2-190 of the Rules of the City of New York), verification requires all of the following:

- Proof of my agreement to pay the original creditor;
- A copy of the final account statement issued by the original creditor;
- A breakdown of the total amount due, showing principal, interest, and other charges; and
- For all other charges, the date of and basis for each charge.

I dispute this debt because [______________________________________________________].

Because I am disputing this debt, you should not report it to the credit reporting agencies. If you have already reported it, please notify the credit reporting agencies that the debt is disputed and/or delete the tradeline from my credit report. Reporting information that you know to be inaccurate, or failing to report information correctly, violates the FDCPA and the Fair Credit Reporting Act.

Aside from verifying the debt, do not contact me about this debt. The FDCPA and Rules of the City of New York (section 5-77) requires that you honor this request.

[Furthermore, my only source of income is exempt from collection. See N.Y. C.P.L.R. § 5222(e). I have no income or assets that are lawfully collectable for an enforceable judgment or debt. Enclosed is proof of my income. In the event that this debt is sold, include this letter in my file to ensure that the buyer has notice of my exempt status.] Thank you.

Sincerely,

cc:
Name of Original Creditor
Federal Trade Commission – Consumer Response Center
New York City Department of Consumer Affairs
I. Settling with Debt Collectors Prior to Litigation

Many consumers want to arrive at negotiated settlements or payment arrangements with debt collectors in order to avoid litigation.

Consumers should always obtain settlement agreements in writing. A New York City law passed in 2009 requires that debt collection agencies “[c]onfirm in writing to the consumer, within five business days, any debt payment schedule or settlement agreement reached regarding the debt.”58 One way for a consumer to proceed is to send a written settlement offer to the creditor. The letter outlining the terms of the settlement offer should contain the words “For Settlement Purposes Only and Without Prejudice” clearly marked near the top of the letter, so that the settlement is done without prejudice. Remember the negotiating tactics outlined below (see “Negotiating a Settlement”) in giving counsel at this stage.

Be sure to advise consumers that that they should never give sensitive information (such as their bank account number or Social Security Number) to a debt collector, either in writing or over the phone.

* Practice Tip: If the consumer cannot work out an acceptable settlement with a debt collector, he or she can always open a savings account and save toward reducing his or her debt. Eventually, the debt collector will come around, the debt will expire with the passage of time, or the consumer will accumulate enough to pay off the debt or part of the debt in one lump sum. All of these options are usually better than entering into a protracted payment plan, which the consumer may be unable to maintain over time. Sometimes, however, a consumer may simply not be able to afford any payments at all. Depending on the consumer’s circumstances, he or she should be counseled to seek information on filing bankruptcy.

Finally, settlements should take into account the consumer’s credit report. If possible, the settlement agreement should provide that the collection account will be deleted from the individual’s credit report upon full payment. If making a settlement with the original creditor, the credit report should ideally state “paid in full.” Finally, New York State law provides that collection accounts and charge-offs, if paid, may not be reported after five years.59

J. Debt Settlement Companies

Debt settlement companies are for-profit companies that target consumers who are in debt, promising to settle their debts for a deeply discounted lump sum. Though the model varies, historically debt settlement companies have required consumers to pay a certain amount of money into an escrow account controlled by the debt settlement company; that account presumably compiles savings from which the debt settlement company eventually draws to pay off the creditors once a settlement is negotiated. Typically, and prior to the passage the amended Telemarketing Sales Rule discussed below, instead of payments being made to the creditors from the beginning of the program, consumers’ payments were applied to exorbitant up-front “set-up”

fees, which were required to be paid in full before the company would take any steps to negotiate with creditors; those fees were compounded by monthly “maintenance” and other fees. In most cases, debt settlement companies do not settle many, if any debts and consumers find themselves in a worse position than before.

Consumer advocates including the Center for Responsible Lending, Consumers Union and the National Consumer Law Center, have long criticized the debt settlement model as fraudulent and deceptive. During the past five years or so, the abuses inherent in the debt settlement industry have been the source of media attention and regulation across the country.

1. The Telemarketing Sales Rule (TSR) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, §§ 15 U.S.C. 6101-6108

The most significant development in the regulation of this abusive industry thus far has been the Federal Trade Commission’s amendment of the Telemarketing Sales Rule (TSR) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108. The TSR, which went into effect on October 27, 2010, applies to outgoing calls by debt settlement companies, as well as incoming calls by consumers in response to advertising, and imposes regulations on companies selling “debt relief services,” including debt settlement companies. It imposes limits on some of the most harmful aspects of the debt settlement industry, including a ban on up-front fees and replacement of such fees with a so-called “pay as you go” fee model; the requirement of key disclosures to consumers; and the prohibition of misrepresentations to consumers about any material aspect of the debt relief service. However, the TSR does not apply to in-person or internet-only sales of debt settlement service, paving the way for some debt settlement companies to adapt their business model to evade regulation. In addition, the TSR exempts attorneys and some debt settlement companies are using an “attorney model” (without however meaningful involvement of attorneys) in order to charge advance fees.

2. The Debt Settlement Industry in New York

Many states have enacted legislation to prevent debt settlement abuses against consumers. For example, in May 2010 Illinois passed a law that limits any settlement fee to 15% of the consumer’s savings and prohibits such a fee from being charged until after a debt settlement company has negotiated and executed a settlement agreement with the creditor. The Illinois law requires that an individualized consumer financial analysis be conducted to determine suitability before a consumer is enrolled in a program. Other states, including Hawaii, Louisiana, North Carolina, New Jersey and Wyoming, have banned for-profit debt settlement altogether.

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Some states have sought to regulate or ban abusive debt relief companies, including for-profit debt settlement companies, but New York’s current regulatory scheme as written does not specifically regulate these entities and instead only regulates not-for-profit budget planners.

- **Practice Tip:** If a consumer comes to CLARO and they are currently working with a debt settlement company and being sued, the normal practice is to send a letter to the debt settlement company terminating their agreement and demanding a refund of all monies paid. Complaints should be filed with the FTC, the NYS Attorney General’s Office, and the NYS Department of Financial Services. Fordham Law School’s Feerick Center for Social Justice assists consumers with preparing complaints to government agencies. In addition, it is good practice to advise the client to ask the judge for permission to add the debt settlement as a third-party defendant. In Kings County, default judgments have been entered against debt settlement companies that don’t appear in these cases after they’ve been named as third-party defendants.

**IV. COURT PROCESS**

**A. Summons and Complaint**

In the Civil Court, an action is typically commenced by filing and then serving a Summons and Complaint. See sample Summons and Complaint and Affidavit of Service (Appendix F).

**New York City Notice Requirement for Plaintiffs**

Since the mid- to late 2000s, the New York City Civil Court entered a high number of default judgments against defendants in consumer debt collection cases. The Court has implemented an administrative directive regarding service. At the time of filing with the Clerk of the proof of service of the Summons and Complaint in an action arising from a consumer credit transaction, or at any time thereafter, the plaintiff must now submit to the Clerk a stamped envelope addressed to the Defendant and containing the Court’s return address. The notice, in both English and Spanish, essentially serves as a back up to service, reminding or perhaps informing the Defendant for the first time if initial service was not effected, that a case has been filed against him or her and to see the Court Clerk. The envelope is mailed by the Court Clerk. No default judgment based on Defendant's failure to answer can be entered unless there has been compliance with this subdivision and at least twenty (20) days have elapsed from the date of mailing by the Clerk.

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64 See N.Y. Gen. Bus. §§ 455-457. Not-for-profit budget planners is New York State’s statutory term for professionals commonly referred to as credit counselors, financial counselors, or budget counselors.
65 Since 2008, the rate at which defendants fail to answer in New York City Civil Court debt collection actions has been declining from an estimated (and astounding) 70% that year to, in 2010, 58% and, in 2015, 41%. Fordham Law School’s Feerick Center for Social Justice estimates that between 2008 and 2015 debt collectors obtained over 700,600 default judgments in New York City Civil Court.
66 Uniform Rules for the New York City Civil Court § 208.6 (2012). This additional notice requirement has been adopted throughout the state. New York State Unified Court System, New Consumer Credit Rules and Resources, http://nycourts.gov/rules/ccr/#1 (last visited Jan. 29, 2018).
Explain that once the Summons has been served, a legal action has been commenced, and that a court date will be scheduled once the defendant answers; or, that a court date may have already taken place if the defendant failed to answer, the plaintiff moved for default judgment, and the clerk reviewed the application for the default judgment. If the pro se litigant is not sure what stage the case is at, he or she should first visit the records office at the courthouse. See “How to Obtain Court Records,” below.

B. Summons Served Without Complaint

The plaintiff has the option of serving a Summons with Notice instead of a Summons and Complaint.67 The defendant then has either 20 or 30 days to either file a Demand for a Complaint or an Answer. The Demand for a Complaint puts the burden back on the plaintiff to serve the Complaint, and the defendant would have the opportunity to file the Answer after seeing the claims against him or her in greater detail. However, because the plaintiff has 30 days to serve and file the Complaint after receiving the Demand for a Complaint by mail, a Demand for a Complaint will also delay the proceeding.

C. Timing for Filing and Answer

Defendant has 20 days to file an answer if defendant was personally served and 30 days if service was by either delivery to a person of suitable age and discretion or by nail and mail, the time for which in a New York City Civil Court action is measured from when the affidavit of service is filed with the Clerk.68 If the time has already passed, defendant should try to file an Answer as soon as possible. Courts are lenient with pro se litigants. If a very long period of time has passed, the pro se litigant can file a motion or order to show cause for additional time to file the Answer.69

If a pro se litigant has already filed an Answer and, after consultation with the volunteer attorney wants to change it after visiting the CLARO Program, the litigant can amend his or her Answer as of right within 10 days of service of the original Answer.70 After that, the litigant has to make a motion. If you think the pro se litigant has substantive defenses or counterclaims that he or she

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67 N.Y. C.P.L.R. § 3012. See also N.Y. C.P.L.R. § 320(a) (“An appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant . . . pursuant to . . . [C.P.L.R. § 308(2) or (4)], the appearance shall be made within thirty days after service is complete.”).

68 N.Y. C.P.L.R. §§ 3012(a) (“Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.”), (c) (“[I]f service of the summons and complaint is made pursuant to . . . paragraphs two [or] four . . . of section 308 [i.e., “deliver and mail” or “nail and mail”] . . . service of an answer shall be made within thirty days after service is complete.”); see also N.Y. C.P.L.R. § 308(4) (noting that, for “nail and mail” service, the affixing and mailing must be effected within twenty days of each other, that proof of such service shall be filed with the clerk within twenty days of either such affixing or mailing, whichever is effected later, and that “service shall be complete ten days after such filing”).

Note that pursuant to the New York City Civil Court Act service pursuant to methods other than in-hand, personal delivery is complete as of the filing of the affidavit of service with the clerk. N.Y. N.Y.C. Civil Ct. Act § 402(a) (“If the summons is personally delivered to the defendant within the city of New York, it shall require him to appear and answer within twenty days after its service.”) (emphasis added)); § 402(b) (“If the summons is served by any means other than personal delivery to the defendant within the city of New York, it shall provide that the defendant must appear and answer within thirty days after proof of service is filed with the clerk.”) (emphasis added)).

69 N.Y. C.P.L.R. §§ 320, 3012(d).

left out, encourage him or her to make the motion by Order to Show Cause. Leave to amend is freely given71—the plaintiff bears a heavy burden in showing that it would be prejudiced.72

* Practice Tip:  
If 10 days has elapsed since the litigant filed his / her Answer, the litigant can still try to file an Amended Answer even without making a motion. The volunteer attorney can help the litigant fill out a Written Answer Form and add “Amended” to it and the litigant can try to file it with the Clerk. Oftentimes, the Clerk will accept it. At the court date, the Court may accept the Amended Answer, even over the objections of the plaintiff’s attorney. If the Court does not accept it, the litigant can then request permission to file a motion to amend the Answer by Order to Show Cause and come back for assistance with that application.

* Practice Tip:  
If a pro se litigant has not filed an Answer within the allotted time, DON’T GIVE UP! Tell the litigant to check the file to see whether a motion for a default judgment has been filed by plaintiff. If not, tell him or her to file and serve an Answer. If the motion has been filed, make sure he or she responds to it!

* Practice Tip:  
The CLARO Programs have developed a model affidavit in support of an Order to Show Cause to amend the Answer and an overview of this application. If an application to amend the Answer should be filed, ask the session administrator for a copy of this set of papers. Be sure to prepare a proposed amended Answer. See Appendix G-5.

Substantive defenses to be considered when filing an answer are discussed in Section V, infra.

D. How to Serve and File the Answer

Pro se litigants file Answers and Amended Answers in the Clerk’s Office. Although the process varies county by county, the Clerk’s Office has been scheduling court appearances for cases involving pro se defendants within two to three weeks from the date of the filing of Answers. The New York City Civil Court has developed a check-off form for unrepresented defendants. In addition, the New York State Office of Court Administration has adapted that check-off form for statewide usage. See Appendices G-1, G-2 and G-4 for copies of the New York City form and of a sample Amended Answer as well as an explanation related to amending the Answer.

71 N.Y. C.P.L.R. § 3025(b); Fahey v. County of Ontario, 44 N.Y.2d 934, 935 (1978) (“Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay.”) (internal citations omitted); Siegel, New York Practice, 3rd Ed. § 237 (“If there is no prejudice to the other side, leave to amend must be freely given. The courts stress this time and again.”); Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 (1983); Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18 (1981); Ancrum v. St. Barnabas Hosp., 301 A.D.2d 474 (1st Dep’t 2003).
As a matter of course, a copy of the Answer must be served on the plaintiff’s attorneys. This can be done by regular mail, with proof of mailing. The original Answer and proof of service must be filed with the Clerk of the Court. In most counties in New York City, however, such as in the Bronx, the Clerk’s Office mails the copy of the Answer to the plaintiff’s attorney and the pro se defendant does not have to do so.

E. How to File a Motion or an Application for an Order to Show Cause

Many CLARO visitors do not receive a Summons. Rather, their first notice of the lawsuit is the appearance of judgments on credit reports or the garnishment of their wages; or, depending on their source of income, some CLARO visitors first learn of the lawsuit when their bank accounts are frozen.\(^\text{73}\) If the CLARO visitor has directly deposited exempt income, to obtain release of his or her bank account, the pro se litigant should complete the Exemption Claim Form, described above, which is part of the EIPA procedures. The litigant should also file an Order to Show Cause (OSC) to request vacatur of the default judgment. If the litigant has had her or his wages garnished, they should request both vacatur of the default judgment and an order to cease the wage garnishment. See Appendices H-3 and H-4 for samples of model Affidavits in Support of Orders to Show Cause to Vacate Default Judgments.

A motion is a request for an order of the court. An OSC is a type of motion in which the court is usually asked to order immediate relief in the form of an ex parte order, which temporarily stays the proceeding until the disposition of the motion. All motions, including OSCs, carry no filing fees in the Civil Court. The CLARO Program assists litigants in completing the OSC form. It is important to review the relief requested in the OSC with the applicant.

Many types of motions, specifically Orders to Show Cause to vacate a default, must include an affidavit (sworn before a notary public); the Clerk can sign off for the person swearing to the affidavit if they do so in front of the Clerk. The affidavit must include the reason the litigant makes the request, the relevant facts about the case, and a statement on whether the litigant has made the same request before. (See Appendices H-3 and H4, OSC – Vacating a Default Judgment and Supporting Affidavit forms.)

A copy of the judgment must accompany the request to vacate a judgment, unless the judgment exists on the Court’s computer system. (See “How to Obtain Court Records” below.) Once the judge approves the Order to Show Cause, the Clerk provides the moving party with the date of the motion hearing. The judge who signs the OSC also provides instructions on service of the OSC on plaintiff’s counsel. Generally, the moving party will appear within two weeks to argue the OSC, usually before a different judge.

The applicant will be required to file proof of service with the Court detailing the method of service of the OSC papers. Proof of service can usually be submitted on the return date of the motion or of the OSC. The opposition may serve and submit papers in response, and the moving party may answer in a reply affidavit. The applicant must then appear on the scheduled court date stated in the motion papers (“return date”) to tell the judge of the reason for the request.

F. Process for Vacatur of a Default Judgment

\(^{73}\) Many CLARO visitors’ only source of income is exempt income. Following EIPA going into effect, the numbers of CLARO visitors who first receive notice of the lawsuit because of a frozen bank account has declined significantly.
(While the process will vary somewhat from one courthouse to another, what follows is a general description of the process for vacatur of a default judgment.)

1. The creditor obtains a judgment against the defendant. The defendant may learn of the judgment after receiving notice of restraint on a bank account, property execution, or wage garnishment; or upon review of his or her credit.

2. The defendant obtains from the court a pre-printed OSC form that consists of a one-page supporting affidavit. [The CLARO Program has developed model papers to set aside a default judgment, comprised of an affidavit. The session administrator can provide a copy.]

3. The defendant fills out the affidavit: “I was never served with a Summons; I became aware of the judgment when ...; I have a good defense in that ...; I had made no prior application for this relief.” The defendant swears to the truth of the affidavit before the Clerk, in lieu of appearing before a notary. The Clerk checks for completeness, inserts a return date, and sends the proposed Order to Show Cause and the supporting affidavit to a judge for review. The defendant may be asked to wait in the Clerk’s Office, or will be told to come back at a later time.

4. Once the judge signs the OSC—usually done as a matter of course—the Clerk hands a copy of the signed papers back to the defendant or instructs her to make a photocopy from the original, instructs her on how to serve them, and tells her to come back on the return date with proof of service.74 Barring exceptional circumstances where the pro se litigant has successfully convinced the Court to decide otherwise, the ultimate relief sought is not normally granted on the day that the OSC is signed, but rather only after the recipient of the OSC has a chance to oppose, on the return date, about two weeks later. Any wage garnishment or account restraints remains in effect in the meantime.

5. On the return date, the case is called in the Part where motions and orders to show cause are heard. Often, the judge will have the parties talk to the court attorney and try to settle the issues in the motion before the judge has to get involved. Many times the plaintiff’s attorney will approach an unrepresented defendant to offer a proposed settlement. If no settlement is reached, the parties speak to the judge (the oral argument), and offer their written positions (that is, their Opposition/Reply) for the judge’s consideration. If the judge does not make an immediate decision, the motion is simply deemed submitted.

6. The Decision/Order of the motion (that is, the motion that was brought on by the OSC) is the legal document that either grants or denies the relief requested.75

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74 To use the correct terminology, this process is an application for an order to show cause, it is not a “motion” for an order to show cause. The order to show cause is the motion for an order to vacate etc., i.e. a motion brought on by order to show cause, rather than by notice of motion.

75 The disposition of the motion is not called a judgment. A judgment is what disposes of the underlying action, on the merits.
This dispositive document is what the defendant needs to release restraints or executions. Note, however, unless the court dismisses the action, the defendant must file a proposed answer pursuant to the Decision/Order. Failure to do so can lead to another default judgment being entered. It is therefore important to urge the pro se litigant to fulfill the conditions contained in the Decision and/or Order. In addition, some judges deem the affidavit in support of the OSC as the Answer, so you should mention this to CLARO visitors, as well.

* Practice Tip: Volunteers should review CPLR 5015(a)(1), CPLR 317, and CPLR 5015(a)(4), the common grounds for vacatur of default judgments. Importantly, CPLR 5015(a)(4) is based on “lack of jurisdiction to render the judgment or order.” If the defendant had not received notice of the lawsuit the volunteer should cross off the court form and write “Vacatur of Default Judgment and Dismissal of the Action” in the caption. The OSC can also be sought, in the alternative, should the court deny the OSC based on CPLR 5015(a)(4), pursuant to CPLR 5015(a)(1), “excusable default, if such motion is made within year after service of a copy of the judgment or order with written notice of its entry upon the moving party,” or CPLR 317, “A person served with a summons other than by personal delivery to him . . . may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry.”

There are key distinctions between these two provisions that are routinely blurred by counsel for creditors. For example, CPLR 5015(a)(4) does not require any showing of a meritorious defense, and there is no clear time limit regarding when it may be effectively asserted, although individual cases may raise issues of laches and waiver, particular if there has been wage garnishment.

CPLR 317 should also typically be alleged in cases not involving in-hand service to the consumer defendant. Although CPLR 317 (like CPLR 5015(a)(1)) does require a meritorious defense, it need not be filed within one year of entry of judgment. Rather, a defendant seeking relief from judgment under CPLR 317 may do so if the motion is made within one year of obtaining knowledge of the judgment, so long as the motion is also made within five years of the entry of judgment.

* Practice Tip: Volunteers should prepare a Proposed Answer with each OSC.

* Practice Tip: Due to drastic budget cuts to the courts starting in 2010, there have been long delays in obtaining court files of cases commenced generally more than two years prior; older case files are archived in a facility in Brooklyn. Consult with the CLARO expert regarding how best to advise the CLARO visitor. Generally, it is advisable to have a copy of the court file and of the affidavit of service in order
to prepare an affidavit in support of the Order to Show Cause to vacate the default judgment that is as detailed as possible. However, there is a new court procedure to address this problem that requires the Clerk’s Office to stamp the application with a note that the file is unavailable and gives the Defendant an opportunity to review the affidavit of service (which the Plaintiff must provide) on the return date and either prepare a supplementary affidavit on the spot (using a court form) or else request an adjournment (for example, to come to CLARO for assistance in preparing a supplementary affidavit). (See Appendices H-6 and H-7.)

* Practice Tip: Some of the CLARO Programs have developed model Orders to Show Cause applications to vacate the default judgment—one for applications that append a copy of the affidavit of service and another that explains that the CLARO visitor has requested but that has not yet obtained a copy of the court file.

G. New York State Office of Court Administration Rules Regarding Default Judgments

Prior to October 1, 2014, consumer advocates had long protested that creditors were obtaining default judgments based on faulty applications, which included insufficient proof and hearsay allegations. Creditors obtained hundreds of thousands of default judgments against New York City and New York State residents in the last decade, which caused tremendous harm, such as damaged credit, wage garnishment, restrained bank accounts, and bars to employment and housing.

In April 30, 2014, former New York State Chief Judge Jonathan Lippman announced that the court would promulgate rules to address documented abuses in the entry of default judgments in consumer credit actions. The New York State Office of Court Administration promulgated rules, which among other provisions:

- Instituted statewide check-off forms for answers in consumer credit actions;
- Instituted a statewide court notice of the action, to help ensure that default judgments are not entered against defendants who are not served service of process; and
- Created a series of mandates in connection with applications for default judgments in consumer credit actions.

With regard to the latter, the mandates will help stem abusive practices by requiring creditors to submit affidavits including detailed proof of the validity of the debt and the chain of title.

H. Methods of Service on the Plaintiff

The Court Clerk or judge provides instructions on proper service, whom to copy, and where to file all motions (including an OSC). Generally, papers should be served by someone over the age of 18 and who is not a party to the case, unless the judge has permitted otherwise.76 The litigant may

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present a *pro se* Answer in writing to the Clerk of the Court before mailing it to the attorneys for the plaintiff. The Clerk will notarize the Answer, accept it for filing, and instruct the litigant to mail a copy to the plaintiff’s attorneys.\footnote{In some counties (such as in the Bronx), the Clerk of the Civil Court will mail a copy of the Answer or Amended Answer to plaintiff’s counsel.} Although the Clerk does not direct it, litigants are urged to pay a small extra charge ($2) to obtain a certificate of mailing at the post office. This will ensure that the litigant has proof in case the plaintiff challenges service.

I. How to Obtain Court Records

Oftentimes, a litigant does not possess a copy of the Summons and Complaint or of a past judgment, which may be helpful to review. Unfortunately, obtaining a copy of the judgment may be difficult and time-inefficient. Litigants should go to the Clerk’s Office to request copies of their court file. They should be instructed to bring coins for making copies. Each copy costs 25 cents.

The various borough Civil Courts store some of the older case files off-site and there is usually at two- to eight-week delay (and sometimes longer) before they can be produced. If a CLARO visitor tells you that she requested her court file and that it would take several weeks, discuss the next steps with the consumer law expert, particularly if she has received a notice of wage garnishment. Recall the new procedure instituted by the New York City Civil Court. See Appendices H-6 and H-7.

J. Court Appearance and Conduct

Hearings and motions are heard in the Personal Appearance, or *Pro se*, Parts. Volunteers in each borough will receive borough-specific instructions on the exact locations (rooms and Part numbers) in which hearings and motions are heard. Trials are without jury unless a litigant files a “jury demand” with the Court and serves the demand to all parties.

The litigant has the right to an interpreter, free of charge. If the litigant is not fluent in English, advise the litigant to ask for an interpreter from the Clerk when filing the Answer or on the date of the court appearance or trial.

Litigants should extend courtesy to each other and to the Court. It is common practice in the Civil Court for the litigant to speak with the collection agency attorney in the hallway outside of the courtroom to discuss settlement and limit differences; however, *pro se* litigants have drastically less knowledge and bargaining power and often can be taken advantage of, so if they decide to do this, they must proceed with caution. (Refer to the Negotiation Tactics below for assistance.) Once their case is called, litigants speak only to the judge and not to each other. Litigants should be cautioned not to interrupt their adversary and the judge. Objections should be made only when there is a suitable pause. *Ex parte* communications, or conversation between the judge and only one party to the lawsuit, are not allowed, so advise the litigant to communicate with the judge only when the opposing party is present.

K. Enforcing Judgments
If the claimant wins, the Court enters a judgment for a sum of money. A money judgment is legally enforceable for 20 years and creditors can charge a maximum of 9% interest on an unpaid judgment amount. In addition, the 20 years is renewable after each payment.78

Once the Court enters judgment, the claimant then “enforces” or collects the amount of the judgment. To collect the award, the judgment creditor contacts the judgment debtor and requests payment of the judgment amount.

If the judgment debtor refuses to pay, the judgment creditor utilizes an Enforcement Officer (Sheriff or City Marshal), who can seize a judgment debtor’s assets to pay the judgment. In New York City, a Clerk can provide a list of City Marshals, or the litigant can consult the telephone book. The judgment creditor pays a fee to the Enforcing Officer. This fee, plus 5% of the judgment, is added to the balance owed by the debtor. The fee is non-refundable, even if the judgment creditor and debtor subsequently reach an agreement before the Enforcement Officer seizes the assets, and the 5% poundage is computed and paid on the settlement amount.

L. Ways of Collecting

When a litigant has a judgment entered against him or her, the Sheriff’s Department or a City Marshal may send a packet in the mail that asks for detailed information about income sources and assets. Advise the litigant to fill these documents out and return them via Certified Mail (be sure to keep a receipt). If the litigant fails to fill out the forms, he or she may be subject to a fine or jail time. Alternatively, the creditor can use an information subpoena to locate the debtor’s assets. The creditor sends the subpoena to any person or business that may have knowledge of the debtor’s assets.

A simple way of collecting involves seizing money at the debtor’s bank. The creditor may also garnish the debtor’s wages, up to a maximum of 10% per pay period. If a litigant already has child support, alimony, or support payments taken out of their paycheck, the total amount garnished cannot exceed 25%. As mentioned above in “Judgment-Proof Litigants,” creditors cannot take or garnish income derived from Social Security, SSI, veteran’s, survivor’s (if the spouse was a veteran), unemployment, disability, worker’s compensation benefits, any other form of public assistance, or from private or public pensions, maintenance (alimony) or child support. If the litigant owes federal taxes, student loans, or child support, advise the litigant to contact an attorney to find out how these debts can affect their normally “judgment-proof” benefits.

A creditor cannot seize or forcibly sell a home in which the debtor resides without a court order. However, a creditor can take out a lien on any home or property the debtor owns. This means that if the debtor sells the property or home at a later date, the unpaid debt will be taken out of the proceeds. A docketed judgment becomes a lien on real property even if the real property is acquired after the state judgment was issued. The New York State Department of Motor Vehicles can also inform the creditor if the debtor owns a car, which an Enforcement Officer can take and sell to pay the judgment. However, if the judgment debtor borrowed money to buy the car, that loan must be paid before the creditor receives any money. There are exceptions to the above rules.

78 N.Y. C.P.L.R. 211(b).
Note again that a judgment is collectable for twenty (20) years and that creditors can charge 9% annual interest on unpaid judgments, effectively making the amount the debtor owes increases every year it remains unpaid.

M. Summary Judgment

Sometimes a litigant will show up at the CLARO Program with a motion for summary judgment by plaintiff’s counsel. The simplest way to oppose such a motion is to help the litigant draft an affidavit pointing out all the factual issues in dispute and attacking the admissibility of the plaintiff’s “evidence” of assignment and indebtedness. Include any affirmative defenses that the litigant already raised precluding summary judgment, i.e., that he or she disputes the debt or does not owe it. Please check the CLARO visitor’s upcoming court dates. Sometimes, the return date for the motion is prior to the next trial date and litigants get confused. It is imperative that they appear on the return date to ensure they do not default, in which case the court will likely grant the summary judgment motion.

If the litigant missed the return date for the motion, have a student volunteer check eCourts to see what the status of the case is. In all likelihood, a default judgment will have been entered against the defendant and an Order to Show Cause will need to be prepared to set aside the default.

* Practice Tip: Please note that Pro Bono Net and Mobilization for Justice have created a web-based interactive form for an affidavit in opposition to a motion for summary judgment with an accompanying memorandum of law. Please consult with the session administrator or consumer law expert to learn how to use this helpful tool. You must create your own account with Pro Bono Net to access the interactive form.

* Practice Tip: The New York City Civil Court has issued an Advisory Notice requiring that motions for summary judgment be returnable on the next scheduled court appearance or hearing date, in order to minimize confusion and failure to appear by unrepresented defendants.

N. Appeals

Explain to the pro se litigant that an appeal of a decision is when a party asks a higher court to review a judge’s decision for any error. If the litigant is within the time to appeal, he or she may also ask the Civil Court to reconsider new facts or arguments. In extreme cases, advise the litigant to appeal a judgment to the Appellate Term. However, encourage the litigant to obtain the services of an attorney if possible. As a general rule, most CLARO Programs are unable to assist CLARO visitors with preparing court papers in connection with appeals.

V. SUBSTANTIVE DEFENSES

Showing up can win you half the battle in debt collection cases. It is imperative that the debtors answer the complaints filed against them and assert their rights. In cases where the plaintiff is not the original creditor, they often do not have the proof to make even a basic case that the account

79N.Y. C.P.L.R. § 2221.
they are suing on has been assigned to them. Therefore, it is often advisable for the defendant to insist on taking the case to trial.

### A. Substance of the Answer: Responding to Allegations in the Complaint

Encourage the *pro se* litigant to be truthful. BUT he or she should NOT reveal more information than necessary to the other side. The *pro se* litigant may mark off “general denial” on the answer form, or may want to go through each paragraph of the complaint and state whether he or she:

- Admits the allegation
- Denies the allegation
- Lacks the knowledge or information sufficient to form a belief as to the truth of the allegation. This has the effect of a denial. In other words, the plaintiff would have to prove any of these allegations if the matter went to trial.

In New York City and now throughout New York State, the defendant can also use the check-off Answer form developed by the courts. See Appendix G-1.

*Practice Tips:*

- **The fact that plaintiff is assignee:** If the plaintiff is anyone but the original creditor, it will allege that it is the “assignee” of the account. In that case, make sure the *pro se* litigant alleges that he/she “lacks knowledge or information sufficient . . . .” There is likely no way that the debtor has a basis to believe that plaintiff really owns the account.

- **Amount alleged in complaint:** Unless the debtor is certain that he or she owes EXACTLY the amount alleged in the complaint, the debtor “lacks knowledge or information sufficient . . . .” If the debtor says the amount is too high, DENY the allegation.

### B. Substance of the Answer: Breach of Contract - Affirmative Defenses

#### 1. No Personal Jurisdiction – Improper Service

N.Y. C.P.L.R. § 308 governs service requirements. The Summons may be served on the defendant personally anywhere in New York State; in a New York City Civil Court action, the defendant generally must be served in New York City. If not hand delivered, service must be made at the actual home or place of business of the defendant. “Due diligence” must be exercised in the effort to personally serve before resorting to conspicuous place service (“nail and mail”).

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80 See Supplementary Materials, Appendix G-1 for a copy of the Civil Court’s Written Answer Form Consumer Credit Transaction. Please note that there are two Forms of the Answer – a Written Answer, which is verified, and an Oral Answer. The Written Answer is filled out completely by the litigant and then notarized before being filed as is by the Clerk. By contrast, a clerk will input the responses in an Oral Answer and generate an Answer that then becomes part of the court file. The better practice is to assist litigants complete Written Answers in order to ensure that all of the defenses are raised and that information is not accidentally omitted by a clerk.

81 N.Y. CPLR § 3018(a).

82 The due diligence standard generally requires at least three attempts at personal service, with one being outside of business hours. Three attempts to personally serve at home, at 7:22 A.M., 3:39 P.M. and 8:34 P.M., was not due
If service is improper, the litigant can choose to make a pre-answer motion (by Order to Show Cause) or file an Answer containing a personal jurisdiction defense. If an Answer is filed, the litigant must then make a motion to dismiss the case within 60 days of the Answer or the defense is waived. It is also possible for the litigant to file an Answer and a motion to dismiss based on lack of personal jurisdiction at the same time. The possible outcomes of such a motion are:

1) The Court schedules a traverse hearing to determine whether service is proper, which may occur at a later date or at the time of trial. At a traverse hearing, the Court either decides at argument that service was improper as a matter of law and dismisses the Complaint without prejudice or, more likely, orders plaintiff to re-serve the Complaint properly. The Court might allow re-service of the Complaint in court.

2) The motion is denied and the litigant must answer the Complaint if he or she has not already done so.

3) The plaintiff consents and agrees to dismiss the case without prejudice.

* **Practice Tip:** To make the motion, in most counties, the litigant must complete the appropriate sections of the Order to Show Cause form, which the CLARO volunteer reviews with the litigant during the CLARO session. Some of the CLARO Programs have developed model Affidavits in support of applications to dismiss for lack of personal jurisdiction. A dismissal for lack of personal jurisdiction is without prejudice to the case being brought again.

* **Practice Tip:** Due to budget cuts and limited staffing, there are currently significant delays in the filing of affidavits of service submitted by plaintiffs into court files. The defendant must have a copy of the affidavit of service in order to file an application to dismiss for lack of personal jurisdiction. Consult the consumer law expert if the CLARO visitor is approaching the 60-day deadline for filing such an application.

Please note that the defense of lack of personal jurisdiction must be raised in the first instance, with the first Answer or pursuant to CPLR 3025(a) in an Amended Answer filed as of right.

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* N.Y. C.P.L.R. § 3211(a)(8).
* N.Y. C.P.L.R. § 3211(e).
* N.Y. C.P.L.R. § 5013.
* See N.Y. C.P.L.R. § 3211(e); Naccarato v. City of Troy, 124 A.D.2d 365, 366 (3d Dep’t 1986) (“An amendment to a pleading taken as of right (see, CPLR 3025(a)) may contain an objection to personal jurisdiction not previously asserted, since such an amendment relates back in time to the original pleading.” (citations omitted)).
2. Statute of Limitations – Claim is Time-Barred

Because most debt collection of credit card debt and cell phone debt is based in contract law, the statute of limitations (“SOL”) generally starts to run from the time of the first missed payment by the consumer. As a general rule, if a consumer fails to pay and then makes a payment the SOL will be revived or start to run again.

The statute of limitations can vary tremendously based on the type of debt and the law of the state under which the cause of action accrued. Often, it can be difficult to tell at the outset of the case what statute of limitations applies. Here are some general guidelines:

- In New York State, the cause of action on a breach of contract is 6 years. Credit card debts may fall into this category.
- Contracts for the sale of goods (computers, cars, and, in some very limited instances, some store cards issued by the stores themselves) are governed by the UCC, which has a 4-year statute of limitations.
- Cellular telephone contracts are governed, arguably, by the 2-year statute of limitations contained in the federal Telecommunications Act.

New York State law, C.P.L.R. 202, also provides that when a foreign entity sues a New York State resident on a claim that accrued outside the state of New York, courts must apply the foreign state's statute of limitations if it bars the claim. Debts that accrue to a foreign corporation are deemed to accrue in the state where the creditor resides and sustains economic injury. A corporation is said to reside in the state of its principal place of business or its state of incorporation. The Court of Appeals has not expressly held whether a plaintiff’s state of incorporation or principal place of business should govern for purposes of C.P.L.R. 202 if conflicting statutes of limitations would result in different answers with regard to whether a claim was timely filed. Numerous lower courts, while not directly addressing that specific question, have looked to the principal place of business to determine where the plaintiff sustained the economic impact of the alleged breach.

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87 N.Y. C.P.L.R. § 203(a) (2012); Benson v. Boston Old Colony Ins. Co., 134 A.D.2d 214 (1st Dep’t 1987) (stating that the general rule is that the statute of limitations in an action on a contract begins to run at the time of breach of the agreement).
88 Lew Morris Demolition Co. v. Board of Education, 40 N.Y.2d 516, 521 (1976) (“In order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder.”).
95 See id. (“Here, plaintiff's causes of action are time-barred whether one looks to its State of incorporation or its principal place of business. Thus, we need not determine whether it was in Delaware or Pennsylvania that plaintiff more acutely sustained the impact of its loss.”).
The latest Court of Appeals case to deal with C.P.L.R. 202 and the issue of where a claim accrues, *Portfolio v. King*, does not address the question specifically. (There, the original creditor was Discover and Discover’s state of incorporation and principal place of business were both Delaware.) The Court, however, did cite the state of incorporation when describing where the plaintiff resided and sustained the economic injury.97

Many credit card companies are incorporated in states other than New York, such as Delaware and elsewhere, and many of these states have shorter statutes of limitations than New York.98

The issue of the state of residence of credit card issuer is further complicated by the fact that many credit card issuers are not corporations, but instead are state- or federally-chartered banks. In sum, determining the residence of a credit card issuer for purposes of C.P.L.R. 202 raises many issues of first impression.

* Practice Tip: It can be difficult to tell, based on the complaint only, what statute of limitations applies. The best practice is to include a statute of limitations defense in the Answer unless the litigant is sure that the last payment date is very recent (e.g., payment on a credit card within the last two years).

* Practice Tip: If a litigant is being sued for a very old debt on which she made one recent, negligible payment in response to repeated harassment or misinformation, encourage her to use the defense nevertheless. If plaintiff’s counsel tries to make the argument that a payment was recently made, make sure the litigant knows to explain the circumstances under which that payment was made to the judge.

* Practice Tip: The mere threat of a lawsuit where there is no actionable claim – like when the statute of limitation has run – violates the Fair Debt Collection Practices Act (FDCPA).99 Consult with the consumer law expert about whether to list this as a counterclaim if it applies.

3. **Identity Theft – Not My Credit Card**

It is an affirmative defense that a person being sued did not apply for, receive or use the credit card account in question. Also, New York General Business Law § 514 makes it a statutory defense to a claim of credit card use that such use arose out of the unauthorized use of a credit card that was


97 *Portfolio*, 14 N.Y.3d at 416.

Here, it is evident that the contract causes of action accrued in Delaware, the place where Discover sustained the economic injury in 1999 when King allegedly breached the contract. Discover is incorporated in Delaware and is not a New York resident. Therefore, the borrowing statute applies and the Delaware three-year statute of limitations governs.

*Id.*

98 Delaware has a three-year statute of limitations on written contract claims. 10 Del. C. § 8106 (2008).

not delivered to the defendant or that such use arose after the creditor was notified of the unauthorized use.

* **Practice Tip:** New York General Business Law § 514(2) provides for attorneys fees in cases where the judge finds that the defendant cooperated with the issuer and the issuer brought the action nevertheless.\(^{100}\)

4. **Mistaken Identity – Similar or Same Name, Different Person**

It is an affirmative defense that the person being sued is not the right person. N.Y. Gen. Bus. Law § 514 applies in this case as well. Cases of mistaken identity are not uncommon in debt buyer cases, because the documentation purchased of the underlying accounts may be meager.

A counterclaim can also be made under the FDCPA if the litigant has informed the collector on a prior occasion that it has the wrong person.\(^{101}\) The FDCPA forbids communication with any third parties about another’s debt except in very specific circumstances.

* **Practice Tip:** Tell the litigant to be wary of sharing his or her Social Security Number (SSN) with the opposing party. If the SSN is necessary to prove that plaintiff is suing the wrong person, tell the litigant to insist that opposing counsel provide the SSN of the original account holder first. If it is different, tell the litigant to ask the judge to review the papers and make a representation to opposing counsel without entering the number in a public record.

5. **No Debtor/Creditor Relationship – No Credit Card/Contract with Plaintiff**

* **Note that this defense applies only if the plaintiff is NOT the original creditor.**

More often than not, an “assignee” is suing on an account that it allegedly purchased from the original creditor or another assignee. Where this is the case, the litigant can argue that she has no relationship with the party filing the suit. At trial, the creditor would be required to prove (with admissible evidence) that it purchased the account in question, and therefore has standing to bring suit. This is often the strongest defense for defendants in debt buyer cases.

6. **Plaintiff is Not Licensed by the Department of Consumer Affairs as a Debt Collectors**

* **Note that this defense only applies if the plaintiff is NOT the original creditor.**

N.Y.C. Administrative Code § 20-490 requires every “debt collection agency” to be licensed. A litigant can call the Department of Consumer Affairs at 212-487-4110 or check online at http://www1.nyc.gov/site/dca/consumers/check-license.page to find out if the plaintiff in his or her


\(^{101}\) 15 U.S.C. § 1692b (forbidding communication with any party other than the consumer).
case is a licensed debt collection agency. Without a license, such an agency cannot lawfully act as a debt collection agency.

7. **Plaintiff Does Not allege its License Number in the Complaint**

*Again, this defense only applies if the plaintiff is NOT the original creditor.*

Under N.Y. C.P.L.R. § 3015(e), a plaintiff required to be licensed by the New York City Department of Consumer Affairs “shall allege, as part of the cause of action, that plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license.”

Debt collection agencies are required to be licensed under the N.Y.C. Administrative Code. Debt collection agencies are required to be licensed under the N.Y.C. Administrative Code. Check the Complaint and see if the license number is alleged. If it is not, the pro se litigant can use this as an affirmative defense. However, this is a curable defect, which means the Court can allow a plaintiff to simply serve a new Complaint with the number or to even become licensed while the case is pending.

8. **Defendant Cannot Afford to Pay**

Technically, this is not a valid defense, but litigants should include this fact as “additional information” in his or her Answer. However, the litigant should be careful, because simply stating that he or she cannot afford to pay or would like to make a payment plan might be interpreted as an admission that the litigant owes the amount claimed in the Complaint.

Judges sometimes provide some relief when litigants present this information along with a valid basis for the litigant’s inability to pay in an OSC. This usually provides the litigant with time to address the debt if the litigant acknowledges owing the amount in dispute and provides an opportunity to set up a suitable payment arrangement.

9. **Defendant’s Only Sources of Income are Exempt From Collection**

Whether this is technically a defense is arguable. However, if it is true, encourage the litigant to put this in the Answer, again, as “additional information.” Advise the litigant that even if the debt collector wins, it will not be able to collect on the judgment as long as the defendant’s source of income continues to be exempt. Be sure to advise litigants that a judgment is valid for 20 years and that the judgment will affect their credit. Note that the Exempt Income Protection Act and federal Treasury Rule protect low-income New Yorkers who subsist on exempt income directly deposited from having their bank accounts “frozen.”

Common sources of income that are exempt from collection are Social Security, Social Security Disability (SSD), Supplemental Security Income (SSI), Veteran’s Benefits, Unemployment

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103 The wording of 42 U.S.C. § 407 protects benefits provided under the Social Security Act from being “subject to . . . other legal process.” It is arguable that a collection action in Civil Court is “other legal process” and should be discontinued if the court makes a determination that the client’s sole source of income is exempt under 42 U.S.C. § 407.
Insurance, payments from pensions and retirement accounts, and Worker’s Compensation, among others. See “Ways of Collecting” above.

10. I Do Not Owe This Debt

A litigant can assert this defense if he or she is the victim of identity theft or mistaken identity or if he or she has already paid the debt. This defense also applies if the litigant was only an authorized user of the card and not a co-signor for the debt.

C. Additional Defenses to Account Stated Claims

The defenses discussed above relate to breach of contract claims, the primary cause of action asserted by debt collectors. However, CLARO volunteers should also look out for complaints containing a second cause of action, known as “account stated.” The theory of the account stated cause of action is that the credit card issuer and the accountholder had an ongoing relationship, the credit card issuer presented a statement to the accountholder, the accountholder failed to object to the statement within a reasonable period of time, and that, therefore, the accountholder is liable for the amount set forth in the statement. In other words, the credit card issuer is relieved of its burden of proof as to the individual items set forth in the statement, and must only prove that the accountholder received bills and retained them without objection for an unreasonable period of time.

1. Affirmative Defense - No Proof of Mailing

A common defense to an account stated cause of action is failure to provide proof that the original creditor mailed the statements to defendant. This issue usually arises in the context of a summary judgment motion, where an affidavit attesting to mailing of the statements by the credit card issuer is required. In the context of a debt buyer lawsuit, the Plaintiff almost always fails to submit the required affidavit from the original creditor.

VI. COUNTERCLAIMS

The defendant has the right to make counterclaims in his or her Answer. If viable, counterclaims may give the defendant leverage in negotiating. The litigant should be made aware that once he/she makes the counterclaims, res judicata will apply. If the litigant thinks he or she wants to bring a separate civil case for harassment in the process of debt collection under the FDCPA, then the counterclaims should not be made here. Please consult with the consumer expert before raising a counterclaim.

* Practice Tip: The statute of limitations for an FDCPA claim is “one year from the date on which the violation occurs.” Most litigants are not able to file a separate FDCPA case within that time so if there are FDCPA counterclaims, the litigant should be made aware of them.

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106 N.Y. Labor Law § 595(2).
108 N.Y. Workers Comp. Law § 33.
110 N.Y. C.P.L.R. § 3019.
**A. Unfair and Deceptive Business Practice: N.Y. General Business Law § 349**

Certain debt collectors and their attorneys sometimes use deceptive tactics on debtors to either get them to pay or to get them to default. New York General Business Law § 349 states: “Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”

The litigant can recover actual damages or $50, whichever is greater, or both. The Court can also triple the damages up to $1000 if it “finds the defendant willfully or knowingly violated this section.” There is also a provision for attorney’s fees.

Here are some examples of what might be deceptive business practices:

- A homebound litigant received court papers. She called opposing counsel. She was told that she can start making monthly payments and ignore the court papers. Opposing counsel then took a default judgment against her.

- A litigant was served with two Summonses that had two different case numbers by two different law firms within a few weeks of each other for the same debt.

If the litigant feels he or she has been deceived or tricked in some way, inform him or her of this counterclaim.

**B. Fair Debt Collection Practices Act**

There are a number of protections under the FDCPA, which can be found at 15 U.S.C. § 1692a-1692o. A few common ones are listed below:

- 15 U.S.C. § 1692c(b): prohibiting contact with third parties (if a litigant’s neighbor, family member, etc., were contacted and informed about the litigant’s debt)

- 15 U.S.C. § 1692d: prohibiting harassment or abuse (threat of violence, obscene language, causing telephone to ring incessantly with intent to annoy, abuse, harass)

- 15 U.S.C. § 1692e: prohibiting false, deceptive or misleading representations (if the debt is older than 6 years and they sue on it, if the collector threatened arrest or imprisonment, false representation that documents do not require action)

The court can award actual and statutory damages. Statutory damages are $1,000. The law in the Second Circuit is still unsettled with respect to the issue of whether those damages are for each violation/claim or for each case.

**VII. CROSS CLAIMS**

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112 N.Y. Gen. Bus. Law § 349(h) creates a private right of action.
113 Id.
Sometimes the Summons and Complaint will name more than one defendant. The litigant before you may believe the debt sued on is really the obligation of the other defendant, perhaps a friend or relative who used a credit card to charge items for their own use. Even if the use was authorized, the litigant may want to shift responsibility for the debt to the other defendant by filing a cross claim. Asserting a cross claim may at least permit the litigant to get a court’s finding that the other party was responsible, although it may not remove the litigant’s responsibility to the plaintiff. The answer must be served on the other defendant or their attorney as well as on the plaintiff’s attorneys.

VIII. BROKEN LEASE CASES

As a CLARO volunteer you may encounter a Broken Lease case. Broken Lease cases are post-possessory actions brought by landlords for alleged rent arrears, attorney fees and other tenancy-related charges. Landlords file these actions most frequently in New York City Civil Court but also in Supreme Court in primarily two circumstances: (1) to collect on money judgments that are obtained in Housing Court in nonpayment actions, or concurrent with Housing Court actions; and (2) when tenants vacate residential tenancies prior to the end of the term of the lease. In the latter circumstance, tenants are often compelled to break their lease because of conditions in the apartment (which sometimes constitute constructive eviction) and/or because of economic hardship. In the case of economic hardship, tenants often receive oral assurances from management companies—as well as from counsel for landlords and even housing court judges, according to some tenants—that the tenants may break their lease without any adverse consequences. In the First and Second Departments, there is precedent that landlords do not have a duty to mitigate in the latter circumstance. Therefore, a landlord can let an apartment sit empty for the remainder of an unexpired lease and then collect on the entire owed rent.

The CLARO Programs have developed a specific check-off answer form for Broken Lease cases. Please consult with the consumer expert in preparing the Answer, as both debt collection and landlord / tenant defenses may be available to the CLARO visitor.

IX. NEGOTIATING A SETTLEMENT

The parties can agree to settle a case:
- before the first court date;
- at any court date;
- before the judge hears the evidence on the day of trial; or
- even during the trial.

114 N.Y. C.P.L.R. § 3019(b) (2012).
The advantages to settlement are:

1. The settlement amount is generally less than the amount claimed in the Complaint.
2. It saves time for the litigant. The litigant often has to take several days off from work to come to court.
3. The litigant can negotiate a payment arrangement over time.
4. The litigant can avoid having a judgment entered, which often shows up on a credit report and can put the litigant at risk of having his or her bank account frozen.

It is possible, however, for some litigants to end up in unfavorable settlements because of pressure and deceptive tactics by certain attorneys.

The following are important facts to make the litigant aware of:

1. The litigant is not obligated to negotiate a settlement with opposing counsel. The attorney who approaches the litigant, even if sent over by a court officer, is NOT a court officer. That attorney represents the creditor/debt collection agency alone and is the litigant’s legal adversary.
2. The litigant should not be afraid of appearing before a court attorney or judge. The plaintiff’s attorney may say things like “then let’s see the judge” if the litigant is trying to hold his or her ground in a settlement, making it seem as though this is something for the litigant to fear. The court attorney or judge, however, should act fairly and reasonably. The litigant should be confident about making his or her point to the judge or court attorney.
3. Advise the litigant to settle the case only in a conference with a court attorney and to never settle the case in the hallway outside of court. Tell the litigant to make sure he or she understands EVERY TERM in the settlement and to ask the judge or court attorney to explain anything that he or she does not understand.
4. The litigant should only agree to terms that he or she feels are reasonable or that the litigant can comply with. Advise the litigant to make a budget and determine his or her BOTTOM LINE before going into a settlement conference, and then to not go over that amount.
5. Advise the litigant that, if possible, he or she may obtain a more favorable settlement by making a one-time, lump sum payment. Many creditors are willing to settle for substantially less than the amount sued for if settlement is made in a lump sum. With a payment plan, creditors tend to make a higher settlement demand.
6. The litigant should know that it is preferable to take his or her chances at trial if opposing counsel will not agree to his or her bottom line. Failing to comply with a stipulation or defaulting on payment gives the creditor the right to enter judgment against the litigant for the full amount listed in the Complaint, less any payments the litigant made. Remember, many debt collectors have trouble proving their cases at trial.
7. The litigant should never make the first or best offer and should not share his or her bottom line right off the bat. If the litigant has any counterclaims, he or she should use them as leverage.
8. Finally, advise the litigant to stop the settlement process at any point where the offer or demand from the opposition becomes unacceptable. At that point, resume the court proceedings.
9. If the litigant is able to pay to settle the debt, provide to the litigant guidance on provisions to include in the stipulation regarding reporting of the debt to credit reporting agencies in order to protect the litigant’s credit as much as possible. The consumer law expert will be able to provide assistance.

* **Practice Tip:** Give the litigant an idea, based on the amounts at stake and how much the litigant can actually pay, of how much to offer in the beginning of the settlement process. Next, provide the litigant with reasonable subsequent increases or decreases to the offer, as necessary, which approach the desired amount.

* **Practice Tip:** Settlements can contain terms to protect the impact of the litigation on consumers’ credit reports. Speak to the consumer law expert if you are reviewing a proposed stipulation of settlement to propose terms depending on the litigant’s circumstances.

**X. SETTLEMENT PRIOR TO TRIAL**

If both parties settle before the court date, the claimant should notify the Clerk by mailing a Stipulation, or giving a Notice of Discontinuance, both signed by all parties to the suit. The parties then do not have to appear in court. The litigant should get any agreement in writing and make sure that it is submitted to the Court. In addition, as noted earlier, a New York City local law passed in 2009 requires that debt collection agencies “[c]onfirm in writing to the consumer, within five business days, any debt payment schedule or settlement agreement reached regarding the debt.”

If there is a court date in close proximity to the settlement date, the litigant must appear to ensure that the case is adjourned pending settlement and is not sent to inquest with a default judgment. A new hearing date will be scheduled.

The parties can also agree to a settlement after the judge has heard the case, but before the judge rules on the case.

**A. Settlements for Defendants with Exempt Income**

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Defendants whose income is exempt from collection and who lack affirmative defenses (particularly in cases brought by the original creditor) could consider settling a case before trial by agreeing to a “Confession of Judgment.” In a Confession of Judgment, the plaintiff essentially wins without having to prove its case at trial. The advantage is that the defendant can avoid defending the court action (e.g., the stress of court appearances, responding to court documents, etc.). The disadvantage is that a judgment is entered against the defendant, which can affect his or her credit. Also, if the defendant ultimately obtains nonexempt income (i.e., an inheritance or lottery winnings) while the judgment is enforceable, he or she will be liable for the debt that has accrued. The following is sample language for a Confession of Judgment:

1. Defendant admits to owing the sum of $____ as the result of his/her use/benefit of ______________, account # ____________________.
2. Defendant affirms that all of his/her income is exempt from judgment enforcement as it consists solely of government assistance in the form of ____________________.
3. Defendant has no assets.
4. The Clerk is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of $_________, plus interest at 9% per annum from ____________, plus costs and disbursements.
5. Plaintiff is stayed from enforcing this judgment on Defendant’s social security funds and other exempt funds.

B. Checklist For Litigants

1. Show up, show up, show up. File an answer and make your court dates.
2. Keep a copy of everything you file in court or send to the other side.
3. Obtain any promise or agreement from the other side in writing.
4. Mail everything you file in court to opposing counsel.
5. Go to the post office and obtain a Certificate of Mailing.
6. The plaintiff bears the burden of proof and must prove that it owns the debt and that you owe the debt.
7. Don’t sign anything you don’t understand. Ask the court for help.

XI. DISCOVERY DEVICES

A pro se litigant sometimes arrives at the CLARO Program with a document relating to discovery; alternately, Demands for Documents should always be provided to CLARO visitors as a matter of course. In addition, Civil Court judges frequently issue Discovery Orders. (See Appendix J for a Sample Discovery Order and Appendix O for some CPLR provisions and commentary related to discovery.) Discovery includes a Demand for a Bill of Particulars, a Notice of Deposition, an Interrogatory, or a Demand for Discovery and Inspection. Note that the litigant has the right to object to certain types of discovery, as discussed below, but advise objecting to discovery only in extreme circumstances. Generally, review any discovery documents a litigant brings to CLARO and, unless the questions or demands are unreasonable, advise the litigant on their proper completion.

118 N.Y. C.P.L.R. § 3218.
A. Demand for a Bill of Particulars

A Demand for a Bill of Particulars is a list of written questions requesting details about a claim or defense. A litigant has 30 days to respond or object to the questions listed. When answering the questions, advise the litigant to put the name and index number at the top of each page, and ensure that the number of the answer matches the number of the question. The Bill of Particulars must be signed and notarized and can be mailed to the opposition; after serving the document on the plaintiff’s attorney, the litigant should file the original with the Court, along with an Affidavit of Service. Advise the litigant to keep a copy for personal records, as well as obtain a certificate of mailing of the Bill for evidentiary reasons.

B. Depositions

A deposition is sworn testimony taken by one party of another party before the trial takes place. The deposed person is asked questions, while under oath, and a court reporter records and transcribes the answers. Most depositions occur at the Courthouse or at the office of the opposition’s counsel. In order to take a deposition, the party wishing to depose must serve a written Notice of Deposition. If the litigant brings in such a notice, advise the litigant to attend the deposition and answer the questions fully and honestly. Note that the litigant also has the right to object to the deposition. As a rule, plaintiffs’ counsel do not take depositions of pro se litigants in consumer credit cases filed in New York City Civil Court.

C. Interrogatories

Interrogatories consist of written questions sent to the opposing party to answer in writing. If the litigant receives an interrogatory, advise him or her to respond to the questions as presented within 20 days of receipt of the interrogatory and to keep a copy of the answers for personal records. The litigant can also object to the interrogatory. Increasingly, plaintiffs’ counsel are serving interrogatories on pro se defendants in consumer credit cases filed in New York City Civil Court.

D. Demand for Discovery and Inspection

A Demand for Discovery and Inspection is a request to a party to produce anything relevant to the case for inspection or copy. A litigant has 20 days to respond after receipt of the Demand, assuming receipt through mail. The litigant can object to the Demand for Discovery and Inspection as well.

E. Request for Admissions
A Request for Admissions or Notice to Admit contains a series of statements that the litigant must either admit or deny. It can also include documents with requests to admit their genuineness. Creditors’ counsel commonly uses this device in consumer debt collection actions, particularly with debt buyer cases. According to the statute, the statements should be matters as to which the party requesting admission believes there can reasonably be no dispute. Responses must be served within 20 days of service. The response must be under oath. If the litigant does not respond, everything is deemed admitted. If the litigant unreasonably denies matters stated in the Request for Admissions and the party who made the Request ultimately proves the matter at trial, the litigant may be penalized, i.e., by having to pay the other party’s costs of proving the matter.

The litigant need not provide a blanket denial or admission for every statement. In fact, it may be advisable not to provide blanket admissions or denials if the litigant does not know the truth or falsity of the express, specific statement. One example could be the balance allegedly owed. In this situation the litigant may, under N.Y. C.P.L.R. § 3123: (1) set forth in detail the reasons why he or she cannot truthfully admit or deny the matter; or (2) if the statement cannot be fairly admitted without some material qualification or explanation, the litigant should provide a statement admitting the matter with the material qualification or explanation.

F. If the Litigant Does Not Respond to a Demand for Discovery

The opposition generally requests that the Court issue an order compelling the litigant to comply with the discovery request or in the alternative striking the Answer for defendant’s failure to comply with discovery demands, in the event that the defendant fails to respond. It is within the Court’s discretion to take stronger action upon failure to comply with the request; potential actions include dismissal of the case or striking an Answer that the litigant made. Advise the litigant to either respond, or object, but never to ignore a request for discovery.

G. Objecting to Discovery

A litigant can object to a demand for discovery, if the litigant believes that the request calls for irrelevant information or asks for more information than necessary. Generally, litigants object through an OSC accompanied by an affidavit stating the reasons the request for discovery is improper. Note that an objection must be filed within the same time as originally allotted for the request.

H. Serving Discovery

The litigant should be encouraged to serve a Demand for Discovery and Inspection and, possibly, Interrogatories on the creditor (through their counsel). Often, the creditor cannot prove that it is entitled to recover the debt and by demanding the material documents, the debtor might succeed in winning the case. A Demand for Discovery and Inspection would be the primary vehicle, because most of the information would be contained in documents. The types of documents that the litigant should request include:

• the original credit card application;
• the original credit card agreement and all amendments;
• periodic credit card statements showing the balance;

• all payment records; and
• documents establishing that the creditor, if not the original creditor, is entitled to recover the debt.

The litigant should ask for the following information in Interrogatories, although some of this may be answered by the production of documents:
• the name of the original creditor;
• the original creditor’s account number for this account;
• an explanation of how the plaintiff came to own the debt, including the amount paid for the debt;
• an explanation of how the account was issued to the debtor, if there is not a written application;
• the basis for plaintiff’s belief that the debtor entered into an agreement to pay this debt;
• the date of the last payment on the account; and
• a description of the amount claimed, with detail as to principal, finance charges, late fees and any other fees.

Tell the litigant that if the creditor does not respond to the discovery within 20 days, the litigant can seek a remedy from the court. The litigant can seek the same remedies described above: an order compelling responses and if there is no response after that, the litigant can seek penalties, including dismissal of the lawsuit. The litigant should always request a dismissal with prejudice so that the creditor cannot re-file the lawsuit.

* Practice Tip: As a routine matter and especially in debt-buyer cases, volunteer attorneys should assist litigants in preparing a Demand for Discovery. CLARO Programs have developed Demand for Discovery forms for litigants to complete. It is common for plaintiff’s counsel to respond to a Demand for Discovery by serving the litigant with Interrogatories and/or a Notice to Admit. The volunteer attorney should warn the litigant about this possibility, explain the most common discovery devices, and emphasize the importance of returning for assistance in responding to all discovery demands.

* Practice Tip: Court rules require litigants to first make a good faith effort to resolve discovery disputes before seeking court intervention. If a CLARO visitor serves a Demand for Discovery and the plaintiff’s counsel does not respond or does not comply with the request, assist the CLARO visitor in completing a “good faith” letter.

* Practice Tip: There are Demand for Document Interactive Forms on Pro Bono Net for actions involving other types of debt, such as medical debt, breach of lease cases.

XII. REFERRAL OF CLARO VISITORS FOR OTHER ASSISTANCE

The legal services provider community has limited capacity to assist the high numbers of debtor defendants. In 2011, court data indicated that only 2.5% of defendants had representation in Civil

Court debt collection cases. CLARO serves an important function in expanding the resource available to New Yorkers with debt collection cases and issues. CLARO also serves a critical role in connecting litigants to legal services programs for those litigants who are unable to navigate the court process on their own, have strong legal defenses, have a great deal at stake (for example, their wages might be garnished for significant periods of time), or present exigent circumstances or important legal issues.

The Claro Programs have developed a referral form. (See Appendix J of the Supplementary Materials for the CLARO Referral Form for Staten Island CLARO.) The following are legal services providers who accept referrals citywide:

- CAMBA
- Mobilization for Justice
- Urban Justice Center

In addition, Bronx Legal Services and Manhattan Legal Services accept referrals for residents residing in their respective boroughs.

There are two bankruptcy projects that also accept referrals and provide assistance for free:

- The New York City Bar Justice Center’s Consumer Bankruptcy Project; and
- Legal Services NYC’s Bankruptcy Assistance Project.

Other helpful resources to keep in mind include:

- The New York City Department for Consumer Affairs and the Office for Financial Empowerment, which runs Financial Empowerment Centers that provide free financial counseling;
- Low-income tax payer clinics for litigants with tax arrears (list for NYS available at http://www.irs.gov/advocate/article/0,,id=128802,00.html); and,
- The Legal Aid Society’s Health Law Unit, which can assist with questions related to medical debt. The Unit operates a Health Law Hotline on Tuesdays, 9am to 5pm, (212) 577-3575.

If you think a CLARO visitor has a particularly strong case and / or is not judgment proof and is unable to navigate the court process pro se, you can speak to the session administrator and consumer law expert about facilitating a referral to a legal services organization and also give the CLARO visitor a copy of the CLARO Referral Form.

In addition, litigants and volunteers sometimes ask about CLARO Programs in other boroughs. The information about the CLARO Programs in the Bronx, Brooklyn, Manhattan and Queens as well as the limited legal advice program run through the New York State Unified Court System’s Access to Justice Program is contained in Appendix K. Information, about CLARO is also available online at www.claronyc.org.

**XIII. TAX CONSEQUENCES OF SETTLEMENTS**

**A. General Rules**
When you borrow money, you do not have taxable income. In tax terms, there is no accession to wealth, i.e., no income, because of the corresponding obligation to repay the loan. However, when your obligation to repay the loan is forgiven, you have income from discharge of indebtedness. IRC § 61(a)(12). Thus, when a CLARO visitor negotiates a settlement of a loan or other debt, s/he may have income from the forgiveness of the obligation to repay. For example, a visitor is sued for a debt of $6,000 by an original creditor. The visitor has agreed to pay the plaintiff (creditor) $4,000 in full satisfaction of the debt. The visitor has $2,000 of taxable income, the amount of the debt that was forgiven by the creditor. Note the creditor has a legal obligation to file an information return (Form 1099-C) with the IRS reporting the $2,000. See below for a more detailed explanation.

The tax laws provide several exceptions to the general rule that discharge of indebtedness is taxable income. The most important exceptions for consumer debt are: 1) the insolvency exception 2) the bankruptcy exception, and 3) the disputed debt/contested liability doctrine.

1. The Insolvency Exception

Someone who is “insolvent” will not realize income from discharge of indebtedness. IRC § 108(a)(2). For this determination, “insolvency” is the excess of liabilities over the fair market value of assets immediately before the discharge of the debt at issue. Liabilities include all of a person’s liabilities, including the one that is being discharged by the settlement. Assets include everything owned by the person, including exempt assets. Assets are valued at their fair market value; assets like whole life insurance and defined benefit plans are valued at their cash surrender value.

Note: The exemption only applies to the extent that the person remains insolvent after the discharge, i.e. if, after the debt at issue is settled, the person is still insolvent then the entire amount of the discharge is exempt from tax. However, the debtor has income to the extent that the discharge renders him/her solvent, i.e. the person can exclude the income from the discharge only up to the amount by which s/he was insolvent before the discharge. IRS Publication 4681 contains an explanation of insolvency and partial insolvency and a worksheet for determining if a person is insolvent or partially insolvent and, thus, qualifies for this exemption.

2. The Bankruptcy Exception

When a debt is discharged as part of bankruptcy case, the person does not realize taxable income. IRC § 108(a)(1). This exception does not apply if the person settles the debt and then files for bankruptcy. The discharge MUST occur by order of the bankruptcy court OR the discharge has to take place DURING the court's jurisdiction.

3. The Disputed Debt Doctrine / Contested Liability Doctrine

If the amount of a debt is disputed, settlement of the amount does not constitute taxable income. There must be a bona fide dispute regarding the liability, i.e. the amount of the debt or the enforceability of the debt must be in dispute.121 If the debtor concedes that the debt is valid and/or

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121 See, N. Sobel, Inc. v. Commissioner, 40 B.T.A. 1263 (1939); Preslar v. Commissioner 167 F.3d 1323, 1327-28 (10th Cir. 1999) (if a taxpayer disputes the original amount of a debt in good faith, a subsequent settlement of that amount is treated as the amount of the debt for tax purposes) and Zarin v. Commissioner 916 F.2d 110, 113-116 (3rd
that it is legally enforceable, the disputed debt doctrine will not be available to exclude any discharge from income. In order to maintain this exemption it is important that the debtor does not concede that the amount of the debt is correct or that the debt is enforceable under state law.

B. Advising CLARO Visitors regarding tax implications of settlements

If a visitor comes to CLARO regarding a settlement, you can provide simple advice as spelled out in subsection A. Many visitors will qualify for the insolvency exception, especially if they have multiple consumer debts.

Debt buyers have different practices regarding reporting settlements to the IRS. However, they are required to file a Form 1099-C if they discharge a debt in excess of $600. See, IRC § 6050P & Treas. Reg. 1.6050P-1. The Form 1099-C will report that the creditor cancelled or settled a debt, the amount of debt discharged, the name, taxpayer identification number and address of the visitor. The Form 1099-C should be filed for the year that the debt was settled or for the year that it became clear that it will never be paid. See, Cozzi v. Commissioner, 88 TC 435, 445 (TC 1987).

* **Practice Tip:** Advise the visitor that the creditor might issue a Form 1099-C to him/her and to the IRS reporting the settlement as discharge of indebtedness income. When a visitor receives a Form 1099-C, s/he must file tax returns reporting the income or claiming that it is exempt. Many visitors, especially those with only exempt income, might not have filed a tax return for years. However, they must file when they receive a Form 1099-C as it is the best way to claim that the discharge is exempt from tax.

C. Advising Visitors who have received a Form 1099-C

If a visitor has received a Form 1099-C, s/he must file tax returns to report income from discharge of indebtedness or to claim one of the exemptions discussed above.

Many visitors will qualify for the insolvency exception. However, to claim this exception, the visitor must file income tax returns and attach IRS Form 982 to his/her federal and state return. Even if the visitor hasn’t filed returns in recent years, we strongly recommend that s/he file and use Form 982 to claim an exemption. Most reputable tax return preparers know how to complete this Form. You can also refer the visitor to a free tax preparation provider. See list available via links at [http://www.irs.gov/Individuals/Free-Tax-Return-Preparation-for-You-by-Volunteers](http://www.irs.gov/Individuals/Free-Tax-Return-Preparation-for-You-by-Volunteers).

Claiming an exemption under the disputed debt doctrine is less straightforward, as it requires the visitor to include a “disclosure statement” on his/her tax returns. This statement should explain that the debt was disputed and that the visitor has no income from the settlement of the debt. See A.3 above. The statement can be made on IRS Form 8275 or on an attachment to the returns. Again, many reputable tax return preparers and well trained tax preparation volunteers will know how to complete a disclosure statement.

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Cir. 1990)(liability implies a legally enforceable obligation to repay; a settlement of dispute regarding enforceability serves to fix the amount of the debt).
* Practice Tip: If the tax issue is particularly complicated or the visitor has a letter from the IRS or NYS Department of Taxation, refer them to a Low Income Taxpayer Clinic. The Clinics in and around New York City provide representation and advice to taxpayers who have controversies with the IRS. These clinics are listed in IRS Publication 4134, which is easily found by searching the IRS website.

D. Tax Resources for Volunteer Attorneys and Visitors

- IRS Publication 4681 - Canceled Debts, Foreclosures, Repossessions, and Abandonments (For Individuals)
- IRS Topic 431 - Canceled Debt – Is It Taxable or Not?
- IRS Form 982 - Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment).
- IRS Form 8275 - Disclosure Statement
- IRS Publ. 4134 – Low Income Taxpayer Clinics
CLARO BASIC TRAINING

Monday, June 4, 2018
3:00 PM – 6:00 PM

Fordham Law School
150 W 62nd St, New York, NY 10023, Room 3-01

APPENDICES – Part I

A. CLARO Visitor Questionnaire / Intake Form
B. CLARO Limited Scope Legal Services Acknowledgement and Understanding Form
C. New York State Rule of Professional Conduct 6.5
D. New Economy Project (NEDAP) - Life of a Debt
E. CLARO Model Letter to Debt Collector
F. Sample Summons, Complaint, and Affidavit of Service
G. Sample Answer Forms –
   1. New York City Civil Court Check-Off Answer Form for Unrepresented Defendants
   2. Explanation Related to Answers and Amending Answers
   3. Sample Amended Answer
   4. CLARO Model Order to Show Cause to Amend the Answer
   5. CLARO Model Answer – Broken Lease Cases
   6. CLARO Model Answer – Auto Loan Cases
H. Sample Order to Show Cause Papers –
   1. Sample Court Order
   2. Sample Court Affidavit Form
   3. CLARO Model Affidavit in Support of Order to Show Cause to Set Aside Default Judgment (with Affidavit of Service)
   4. CLARO Model Affidavit in Support of Order to Show Cause to Set Aside Default Judgment (without Affidavit of Service)
   5. Memorandum in Support of Order to Show Cause
   6. Advisory Notice 17 – Unavailable files in Consumer Debt Cases
   7. Chief Clerk’s Memorandum 203 – Unavailable Files in Consumer Credit Matters
CLARO Site: Bronx □  Manh. □  SI □  Date: ___/___/____  First time at CLARO?  Y □  No □

Last name: ___________________________  *First name: _______________________________

Primary phone: (_____ )_________ -__________  Second Phone: (_____ )_________ -__________

Email: ________________________________

Address: ________________________________  Apt. ________________

City, State: _____________________________  Zip: ________________

How did the visitor find out about CLARO?

Language spoken (check one):
- English □
- Spanish only □
- Other language only □

Visitor’s age: _______  Gender: ____________

Race/ethnicity: _________________________

Is the visitor a veteran?  Y □  N □

Employed?  Full-Time □  Part-Time □

Other source(s) of income __________________________

Monthly income: $__________________

Union Member?  Y □  N □

# total in HH: __________  # of children: __________

Has the visitor ever been involved with a debt relief agency?  Y □  N □

Name(s) of debt relief agency: ________________

Is the visitor receiving debt collection calls?
- No □
- Yes, twice a week or less □
- Yes, more than twice a week □

Has the visitor reviewed her/his credit report?
- No □
- Yes, within the past year □
- Credit Report Request YES _NO_ □

Approximate total debt load: $__________________

Bank Acct. Restraint: _ current _w/in 1 year

Complete this column on a separate form for each index number

| Index #·year/county: __________ - ______ / ______ |
| Civil court □  Supreme court □ |
| Plaintiff: ________________________________ |
| Original creditor name: _____________________ |
| Is Plaintiff a debt buyer?  Y □  N □ |
| Plaintiff’s law firm: ______________________ |
| Type of debt: ____________________________ |
| Amount being sued for $__________________ |
| Date/year of last payment ________________ |

Method of first notice (check one):
- Personal service □
- Substituted Service □
- Nail and mail □
- Mail only □
- Notice from court only □
- E-courts □
- Credit report □
- Wage garnishment □
- Frozen bank account □
- Other marshal’s notice □
- Served at home but improperly □
- Unsure if proper service □
- NEVER SERVED □ (please explain) __________

Process server company: __________________________

Process server first name: ______________________

Process server last name: ______________________

Method of claimed service: ______________________

Notes for the attorney: ______________________

______________________________

Potential Complaints:
- □ EIPA  □ Debt Collection
- □ Process Server  □ Debt Relief

VISITOR ID # ___________________________
Type of assistance (check all that apply)

**Assistance specific to court case:**
- Answer
- Amended answer
- OSC
  - Discovery: prepare
  - Discovery: respond
- MTD: prepare
- Summary judgment: respond
- Prep for court/trial date
- Referral

Other: ______________________________

**Assistance NOT specific to court case:**
- Draft FDCPA letter
- Assistance with consumer complaint (to FTC/DCA/AG)
  - Advice—
    - Debt collection harassment
    - Debt relief agency
    - Attempted Police Report
      - Successfully Filed Police Report
    - Credit Report Block/Dispute
      - Successfully Block/Dispute Credit Report
  - General
  - Referral

Other: ______________________________

**Defenses raised (check all that apply):**
- Contract defenses (i.e. unconscionability, unjust enrichment)
- Disputes amount/does not owe
- ID theft/mistaken identity
- Lack of standing
- No debt collector license or license number not included
- Personal jurisdiction
- SOL

Other: ______________________________

**Referred to (check all that apply):**
1. Legal Services (name of Org.)
2. VLFD: First time Follow Up
3. Bankruptcy: First time Follow Up
4. LEEAP ID Theft / Credit reporting
   - First time Follow Up
5. NYLAG Financial Counseling:
   - First time Follow Up
6. Financial Empowerment Center (OFE)
7. DV Program
8. Low-income taxpayer clinic

Other: ______________________________
Welcome to the Civil Legal Advice and Resource Office. This project is sponsored by the Bronx County Bar Association, the New York City Bar, the Feerick Center for Social Justice at Fordham Law School, Legal Services NYC.

This is an Acknowledgment between the Sponsors and you. It contains the basic terms of this project to provide you with limited legal advice and assistance so that you can better represent yourself in your case.

Volunteer Advocates: The Advocates who volunteer for this program are selected by the Sponsors, not by the Civil Court. They are not court employees.

Scope of Legal Advice: At this time, you are representing yourself in your case. Neither the Sponsors nor the Volunteer Advocates are representing you in any capacity. What we will do is provide you with legal advice based on the information that you give to us.

Duration of Legal Help: This arrangement to advise you will begin right now and will end at the completion of our meeting today. Unless agreed to in writing, we will not help you in any way assume no liability regarding the outcome of your case.

Attorney’s Fee and Costs: There is no cost for our meeting.

Referrals & Follow-Up: Should Bronx CLARO refer your case to a legal services provider, you acknowledge that the Sponsors may pass along any documents pertaining to your case then in possession of Bronx CLARO, including this acknowledgement and your intake form. You also acknowledge that Bronx CLARO may contact you in the future to learn about the status of your case.

Database: The CLARO Programs in New York City store visitor information in a shared database. All CLARO visitor information is kept confidential. CLARO partners use statistics.

Declining to Advise: We may decline to advise you:
1. if we have a conflict of interest for example, if we have already advised or provided representation to the opposing party in your case, we have a legal conflict of interest and cannot provide you with any legal advice;
2. if your legal problems are too complicated and beyond the scope of this project; or

Your Name (please print)

Your Signature

APPENDIX B

Updated 12-13-2011
New York State Rule of Professional Conduct – Rule 6.5

Participation in Limited Pro Bono Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client’s informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

Appendix C
THE LIFE OF A DEBT: follow the paths of a single debt, from its creation to its end...

DEBT IS CREATED

Paid in Full

Payment missed / Default

SECURED

Repossession

Redeem / Reinstatement

Repo Sale

No Deficiency

Deficiency

Paid in Full

UNSECURED

Billing Statements, Demand Letters

Account Cancelled

In-house Collection

Charged-off

Outside Debt Collector

Letters and calls

Sent back to creditor or debt buyer

Collection Law Firm

More letters and calls

Lawsuit

Defenses

Judgment

Paid in Full

Frozen Bank Account / Garnishment

Exemptions

Sold to Debt Buyer

Prepared by NEDAP, updated May 2008
For more info visit: www.nedap.org
Adapted from "The Life (and death?) of a Debt"
Michele A. Weinberg, Consumer Legal Assistance to the Elderly - Legal Assistance Foundation of Metropolitan Chicago.

Appendix D
BY CERTIFICATE OF MAILING

Collection Agency

NYC Department of Consumer Affairs License Number

Street Address

City, State, Zip Code

Dear Sir or Madam:

I am writing to you about my account, number _______________________ with ___________________________.

I, the consumer whose name and address are set forth below, am disputing the above-referenced debt. Please verify this debt as required by the Fair Debt Collection Practices Act (FDCPA) (§ 1692g) and New York City Administrative Code (§ 20-493.2). Please note that New York City regulations require all debt collectors to send specific written documentation verifying the debt. Under New York City regulations (§ 2-190 of the Rules of the City of New York), verification requires all of the following:

• Proof of my agreement to pay the original creditor;
• A copy of the final account statement issued by the original creditor;
• A breakdown of the total amount due, showing principal, interest, and other charges; and
• For all other charges, the date of and basis for each charge.

Please send verification to the address below. You are not permitted to continue to collect this debt until you provide me with verification. I dispute this debt because ____________________________________________

Because I am disputing this debt, you should not report it to the credit reporting agencies. If you have already reported it, please notify the credit reporting agencies that the debt is disputed and/or delete the tradeline from my credit report. Reporting information that you know to be inaccurate, or failing to report information correctly, violates the FDCPA and the Fair Credit Reporting Act.

Also, I ___ have / ___ do not have exempt income.

In addition, pursuant to 15 U.S.C. 1692c(c) and § 5-77(b)(4) of title 6 of the Rules of the City of New York, I advise you to cease communicating (through any medium) with me in reference to any and all debts with respect to which you have instituted debt collection procedures (as defined in § 5-76 of title 6 of the Rules of the City of New York) as of the date hereof.

Sincerely,

Name

SIGNATURE

Address

DATE

City, State, Zip

cc:

Original Creditor: ________________________________, FTC; NYS AG's OFFICE, NYC DCA

Prepared with the assistance of the CLARO Program by ____________________________

cc: FTC—Consumer Response Center

600 Pennsylvania Ave, NW

Washington, DC 20580

NYC Department of Consumer Affairs

42 Broadway

New York, NY 10004

New York State Department of Financial Services

Consumer Assistance Unit

One Commerce Plaza

Albany, NY 12257

Appendix E
CONSUMER CREDIT TRANSACTION
IMPORTANT! YOU ARE BEING SUED!!
THIS IS A COURT PAPER - A SUMMONS

DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY! PART OF YOUR PAY CAN BE TAKEN FROM YOU [GARNISHEED]. IF YOU DO NOT BRING THIS TO COURT, OR SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN'T PAY FOR YOUR
OWN LAWYER, BRING THESE PAPERS TO THIS COURT RIGHT AWAY. THE CLERK [PERSONAL APPEARANCE] WILL HELP YOU!

APPENDIX F: Summons, Complaint and Affidavit of Service
Plaintiff(s): MIDLAND FUNDING LLC A/P/O CITIBANK, N.A.

Defendant(s): 

STATE OF NEW YORK
COUNTY OF NEW YORK

Wendy Feliz, the undersigned, being duly sworn, deposes and says that I was at the time of service over the age of eighteen and not a party to this action. I reside in the STATE OF NEW YORK.

On 10/04/2014 at 1:18 PM, I served the within SUMMONS; COMPLAINT on [REDACTED] at [REDACTED] in the manner indicated below:

INDIVIDUAL: by delivering thereat a true copy of each to said recipient personally; deponent knew the person so served to be the person described herein by deponent asking the person if he or she is the named Recipient and the person responding that he or she is in fact the person named in this action as the Recipient.

A description of the Recipient, or other person served on behalf of the Recipient is as follows:

<table>
<thead>
<tr>
<th>Sex</th>
<th>Color of skin/age</th>
<th>Color of hair</th>
<th>Age</th>
<th>Height</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>White</td>
<td>Hat</td>
<td>60</td>
<td>5'0&quot;-6'0&quot;</td>
<td>130-160 lbs</td>
</tr>
<tr>
<td>Other Features</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

ADDITIONAL MAILING PURSUANT TO 3215

IN COMPLIANCE WITH CPLR 3215, on 10/14/2014 DEPONENT GAVE ADDITIONAL NOTICE OF THIS ACTION BY ENCLOSING A COPY OF THE SAID SUMMONS AND COMPLAINT IN A FIRST CLASS POSTPAID ENVELOPE ADDRESSED TO DEFENDANT(S) AT DEFENDANT(S) PLACE OF RESIDENCE AT [REDACTED] AND DEPOSITING SAID ENVELOPE IN AN OFFICIAL DEPOSITORY UNDER THE EXCLUSIVE CARE AND CUSTODY OF THE UNITED STATES POST OFFICE. THE ENVELOPE BORE THE LEGEND "PERSONAL AND CONFIDENTIAL" AND DID NOT INDICATE ON THE OUTSIDE THEREOF THAT THE COMMUNICATION WAS FROM AN ATTORNEY OR CONCERNS AN ALLEGED DEBT.

Sworn to and subscribed before me on 10/14/2014

[Signature]

[Address]

Notary Public, STATE OF NEW YORK
No. [REDACTED]
Qualified in King County
Commission Expires 07/02/2016

Wendy Feliz
License#: 2011178
Bulldog Process Service LLC
118 East 28th Street Suite 307
New York, NY 10016
646-461-8366

APPENDIX F: Summons, Complaint, and Affidavit of Service
FORMAL COMPLAINT

APPENDIX F: Summons, Complaint and Affidavit of Service

Plaintiff, by its attorney(s) complaining of the Defendant(s), upon information and belief, alleges:

1. That Defendant(s) resides in the county in which this action is brought; or that Defendant(s) transacted business within the county in which this action is brought in person or through his agent and that the instant cause of action arose out of said transaction.

2. ON INFORMATION AND BELIEF THE DEFENDANT IN PERSON OR THROUGH AN AGENT MADE CREDIT CARD PURCHASES OR TOOK MONEY ADVANCES UNDER A CREDIT CARD OR LINE OF CREDIT ACCOUNT OR PROMISSORY NOTE/LOAN- A COPY OF WHICH WAS FURNISHED TO DEFENDANT. PLAINTIFF, AS PURCHASER OF (A/P/O) THIS ACCOUNT, WHICH WAS ORIGINALLY OWNED BY THE ABOVE CREDITOR, PURCHASED IT FOR VALUE. THE DEFENDANT WAS NOTIFIED OF SAME.

3. THERE REMAINS AN AGREED BALANCE ON SAID ACCOUNT OF $ 1,981.11, DUE AND OWING ON PLAINTIFF'S CAUSE OF ACTION. NO PART OF SAID SUM HAS BEEN PAID ALTHOUGH DUEY DEMANDED.

4. DEFENDANT(S) IS IN DEFAULT AND DEMAND FOR PAYMENT HAS BEEN MADE.

5. PLAINTIFF, AS OWNER, IS AUTHORIZED TO PROCEED WITH THIS ACTION. PLAINTIFF IS LICENSED BY THE NYC DEPARTMENT OF CONSUMER AFFAIRS LICENSE NUMBER 1312658

There is due Plaintiff from Defendant(s) the amount in the complaint, no part of which has been paid, although duly demanded

WHEREFORE Plaintiff demands judgement against Defendant(s) for the sum of $ 1,981.11 together with the Disbursements of this action.

WE ARE DEBT COLLECTORS; ANY INFORMATION OBTAINED WILL BE USED IN ATTEMPTING TO COLLECT THIS DEBT.

Pursuant to Part 130-1.1-c of the Rules of the Chief Administrator this signature applies to the attached summons and complaint.

DATED: THE 18 DAY OF SEPTEMBER, 2014

FILE NO. Page 3

FORSTER & CARPUS LLP
ATTORNEY(S) FOR PLAINTIFF
60 MOTOR PARKWAY
COMMACK, NY 11725

Plaintiff's law firm

MIGUEL LEONOFF  JOEL D. LEIDERMAN  KEVIN M. KNAB
Defendant __________________________ answers the Complaint as follows:

ANSWER: (Check all that apply)
1. __ General Denial: I deny the allegations in the Complaint.

SERVICE
2. __ I did not receive a copy of the Summons and Complaint.
3. __ I received the Summons and Complaint, but service was not correct as required by law.

DEFENSES
4. __ I do not owe this debt.
5. __ I did not incur this debt. I am a victim of identity theft or mistaken identity.
6. __ I have paid all or part of the alleged debt.
7. __ I dispute the amount of the debt.
8. __ I do not have a business relationship with Plaintiff (Plaintiff lacks standing).
9. __ The NYC Department of Consumer Affairs shows no record of plaintiff having a license to collect debt.
10. __ Plaintiff does not allege a debt collector’s license number in the Complaint.
11. __ Statute of limitations (the time has passed to sue on this debt).
12. __ This debt has been discharged in bankruptcy.
13. __ The collateral (property) was not sold at a commercially reasonable price.
14. __ Unjust enrichment (the amount demanded is excessive compared with the original debt).
15. __ Violation of the duty of good faith and fair dealing.
16. __ Unconscionability (the contract is unfair).
17. __ Laches (plaintiff has excessively delayed in bringing this lawsuit to my disadvantage).
18. __ Defendant is in the military.
19. __ Other ____________________________________________________________

OTHER
20. __ Please take notice that my only source of income is ____________________, which is exempt from collection.

COUNTERCLAIM(S)
21. __ Counterclaim(s): $___________________ Reason:________________________________

VERIFICATION
State of New York, County of ________________________ ss:
__________________________________________, being duly sworn, deposes and says: I have read the Answer in Writing and know the contents to be true from my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

Sworn to before me this ____ day of ________, 20___ .

________________________________________
Notary/Court Employee

Signature of Defendant

Defendant’s address

This case is scheduled to appear on the calendar as follows:

Date: ______________ Part: ______ Room: ______ Time: ______ Both sides notified ______
FILING THE ANSWER AND AMENDING THE ANSWER

I. What This Section Covers
This section provides a brief overview related to the time for filing an Answer and an Amended Answer.

II. Why Amending the Answer is Important
In New York City Civil Court, there are two types of Pro Se Answer forms—Oral Answers and Written Answers. An Oral Answer is completed when an unrepresented litigant goes to the Clerk’s Office and responds to questions or when she files a written Answer that has not been notarized. In that instance, the clerk will type into the court computer the defenses and other information in the Answer, notarize the Answer, and generate the Answer.

The better practice is for litigants to file notarized Written Answers. The notarized Written Answer can be prepared at CLARO and becomes part of the court file. This ensures that all of the defenses will be in the Answer and prevents any errors from occurring in the transcription of the information into the computer by a clerk.

Please note that New York City Civil Court makes available two written check-off forms: (1) a Written Answer (which is required for broken lease cases that seek to obtain and / or enforce a money judgment derived from a prior tenancy); and (2) a Written Answer Consumer Credit Transaction. An interactive form accessible through the Pro Bono Net website’s New York City Consumer Defense Practice generates Answers (with specific defenses in various types of consumer debt collection cases) and interactive forms in development will generate:

- Amended Answers as of Right; and
- Proposed Amended Answers, Affidavits in Support of an Order to Show Cause to Amend the Answer, and accompanying Memoranda of Law.

The interactive forms can be accessed by CLARO volunteers and advocates who are members of Pro Bono Net and who join the New York City Consumer Defense Practice.

1 See Appendix A.
In addition, the CLARO Program has developed a model check-off Answer form for broken lease cases.

Many times, CLARO visitors will seek assistance from CLARO after having filed a pro se Answer. This may happen because the litigant first goes to the Clerk’s Office, files a pro se written Answer, and then learns about CLARO. Sometimes this happens because the clerk may complete an Oral Answer and the CLARO visitor will not even be aware that she has done so; or she may have simply answered some questions posed by the clerk.

**Practice Tip:** If you are counseling a CLARO visitor who has only received the court notice that there is a suit against them, counsel her to go to the Clerk’s Office to obtain a copy of the court file. Counsel her to make sure the file contains both the Summons and Complaint and the affidavit of service (if it has been filed). The affidavit will be helpful in determining whether the litigant has a personal jurisdiction defense.² Also, counsel her to be sure to tell the clerk that she is not filing an Answer, that she is receiving assistance from the CLARO Program, and that she only wants to obtain a copy of the court file.

**Practice Tip:** Due to problems at the Clerk’s Office with clerks pressuring pro se litigants to file Answers, the Feerick Center has developed a postcard that CLARO visitors can present at the Clerk’s Office that expressly states that the visitor only wants to obtain access to the court file to make copies and that visitor does not want to file an Answer at that time.

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² It has long been held that while an affidavit of service constitutes *prima facie* evidence of proper service, the affidavit of service is rebutted where a party submits “a sworn denial of service or specific statements to rebut the process servers’ affidavits.” *Parker v. Top Homes, Inc.*, 58 A.D.3d 817, 818 (App. Div. 2d Dep’t 2009) (emphasis added); see also *Puco v. DeFeo*, 296 A.D.2d 571, 571 (App. Div. 2d Dept 2002) (“The defendant failed to submit a sworn denial of service or swear to specific facts to rebut the statements in the process server’s affidavit.”); *Eur. Am. Bank v. Abramoff*, 201 A.D.2d 611, 612 (App. Div. 2d Dep’t 1994) (“[N]o hearing was required, because there was no “sworn denial” by the [defendant] of service, nor did the [defendant] swear to specific facts in support of any denial of proper service.”).
Practice Tip: Please note that if you are preparing an Answer in a Supreme Court action, some Clerk’s Offices have prepared pro se packets related to filing an Answer, copies of which are available at the CLARO Programs. Unlike the New York City Civil Clerk’s Office, the Supreme Court Clerk’s Offices will not serve unrepresented defendants’ Answers. Thus, you must instruct the CLARO visitor on service of the Answer on the Plaintiff and the filing of the Answer and Affidavit of Service with the Clerk’s Office. That is:

- A copy of the Answer must be served on the Plaintiff by a person not the defendant who is not a party to the case and is over 18 years of age; and then
- The original of the Answer and the original of an Affidavit of Service must then be filed with the Clerk’s Office.

The defendant must also file a Notice of Appearance.

III. Time to File the Answer and the Amended Answer

Different provisions govern the time to file the answer for cases filed in New York City Civil Court and Supreme Court. The difference, as explained below, depends on how completion of service is effected.

A. Time to File the Answer – New York City Civil Court

In New York City Civil Court, the action is commenced by filing a summons and complaint.\(^3\) Jurisdiction is acquired over a party to the action by service of the summons and complaint.\(^4\)

Personal Delivery. If the CLARO litigant was personally served (that is received the Summons and Complaint in hand from a process server) within New York City, the time to answer is 20 days.\(^5\)

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\(^4\) § 400(2).
\(^5\) § 402(a) (“If the summons is personally delivered to the defendant within the city of New York, it shall require him to appear and answer within twenty days after its service.” (emphasis added)).
Section II – Filing the Answer and Amending the Answer

“Deliver and Mail” or “Nail and Mail”. If “deliver and mail” or “nail and mail” is claimed, the CLARO litigant’s time to answer is **30 days** after proof of service is filed with the clerk.⁶

Service of the summons is complete in a New York City Civil Court action immediately upon personal delivery to the defendant and upon filing of the proof of service with any other method (such as for example “deliver and mail” or “nail and mail”).⁷

B. Time to File the Answer – Supreme Court

**Personal Delivery.** If the CLARO litigant was personally served (that is received the Summons and Complaint in hand from a process server), the time to answer is **20 days**.⁸

“Deliver and Mail” or “Nail and Mail”. If “deliver and mail” or “nail and mail” is claimed, the CLARO litigant’s time to answer is as follows:

- “Deliver and Mail” – **30 days** from when service is complete.⁹ Service is complete **10 days** after filing proof of service, which in turn must occur within **20 days** of the delivery or the mailing, whichever was effected later.¹⁰

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⁶ § 402(b) (“If the summons is served by any means other than personal delivery to the defendant within the city of New York, it shall provide that the defendant must appear and answer within **thirty days** after proof of service is filed with the clerk.”) (emphasis added).

⁷ § 410 (“The service of summons is complete: (a) immediately upon personal delivery to the defendant, where § 402(a) is applicable; or (b) upon the filing of proof of service, where § 402(b) is applicable.”).

⁸ N.Y. C.P.L.R. 320(a) (2013) (“An appearance shall be made within **twenty days** after service of the summons. . . .”) (emphasis added); N.Y. C.P.L.R. 3012(a) (2012) (“Service of an answer . . . shall be made within **twenty days** after service of the pleading to which it responds.”) (emphasis added); see also N.Y.C. Civ. Ct. § 402(a) (2012) (same).

⁹ N.Y. C.P.L.R. 320(a) (“if the summons was served on the defendant by delivering it . . . pursuant to . . . subdivision two . . . of section 308, . . . the appearance shall be made within **thirty days** after service is complete”) (emphasis added); C.P.L.R. 3012(c) (same); N.Y.C. Civ. Ct. § 402(b) (same).

¹⁰ N.Y. C.P.L.R. 308(2) (2012). Note that the “delivery” and “mailing” as well must occur within **twenty days** of each other. *Id.*
Section II – Filing the Answer and Amending the Answer

- “Nail and Mail” – **30 days** from when service is complete.\(^\text{11}\) Service is complete **10 days** after filing proof of service, which in turn must occur within **20 days** of the affixing or the mailing, whichever was effected later.\(^\text{12}\)

**Practice Tip:** You can find out when proof of service was filed by looking for a Clerk’s Office date filed stamp on the affidavit of service. In some counties, the Clerk’s Office may be behind in filing affidavits of service into court files and it may take several days or even weeks for affidavits of service to be filed into court files.

**Practice Tip:** Generally, so long as a default judgment has not been entered, unrepresented defendants can file Answers even after the time to answer has expired. The litigant can always request, by motion, an extension of time to appear or request that the court accept an Answer that was not timely served.\(^\text{13}\) The standard is “upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”\(^\text{14}\) This standard should be freely applied as it relates to an unrepresented litigant. The Clerk, pursuant to CPLR 2102(c), is required to accept the papers and they are deemed accepted unless the Plaintiff opposes.

C. **Timeframe for Amending the Answer**

The Defendant can amend the Answer as of right or by leave.\(^\text{15}\)

1. **Amending the Answer As of Right**

In New York City Civil Court, the Defendant may amend her Answer as of right:

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\(^{11}\) N.Y. C.P.L.R. 320(a) (“if the summons was served on the defendant by delivering it . . . pursuant to . . . subdivision . . . four . . . of section 308. . ., the appearance shall be made within **thirty days** after service is complete”) (emphasis added); C.P.L.R. 3012(c) (same).

\(^{12}\) N.Y. C.P.L.R. 308(4) (2012). Note that the “affixing” and “mailing” must occur within **twenty days** of each other. *Id.*

\(^{13}\) N.Y. C.P.L.R. 3012(d) (“Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”).

\(^{14}\) *Id.*

\(^{15}\) N.Y. C.P.L.R. 3025(a) & (b).
Section II – Filing the Answer and Amending the Answer

- Only once;\textsuperscript{16} AND
- Within 10 days after service of the Answer.\textsuperscript{17}

For cases filed in Supreme Court, the time is different. A party may amend the Answer as of right:
- Only once;
- Within 20 days of the service of the Answer.\textsuperscript{18}

2. Amending the Answer By Leave

If the Defendant cannot amend the Answer as of right, the Defendant can file a motion to amend her Answer.\textsuperscript{19} The CLARO Program has developed:

- a model notice of motion, affidavit in support of a motion to amend the Answer, and brief in support of such a motion; and
- model papers for an Order to Show Cause to Amend the Answer.

In the experience of CLARO Program administrators, most CLARO visitors navigate the Order to Show Cause process more easily than by Notice of Motion and Motion. Applications to Amend the Answer should, thus, be sought by Order to Show Cause unless there is a compelling reason to prepare the application by Notice of Motion.

As mentioned above, an interactive form is in development to generate:

- an Affidavit in support of an Order to Show Cause to Amend the Answer, a Proposed Amended Answer, and a Memorandum of Law in Support of the Motion; and
- an Amended Answer as of Right.

\textsuperscript{16} See C.P.L.R. 3025(a); N.Y.C. Civ. Ct. Act § 909(b) (2012).
\textsuperscript{17} N.Y.C. Civ. Ct. Act § 909(a) ("A party may amend his pleading once without leave of court at any time before the period for responding to it expires, or within ten days after its service or the service of a pleading responding to it.").
\textsuperscript{18} C.P.L.R. 3025(a) ("A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.").
\textsuperscript{19} N.Y. C.P.L.R. 3025(b).
Section II – Filing the Answer and Amending the Answer

The standard for granting such a motion is:

- “Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.”

Case law holds that such leave shall be freely granted to unrepresented litigants.

**Practice Tip:** Please note that a proposed Amended Answer must accompany a motion to amend the Answer.

IV. Filing the Answer or the Amended Answer as of Right

A. New York City Civil Court

As noted in the CLARO guidebook, the various New York City Civil Court clerk’s offices have different practices with regard to the filing of the Answer or the Amended Answer as of Right. In Bronx, Richmond (Staten Island) and New York counties, the Clerk’s Office mails the Answer or Amended Answer to the Plaintiff’s attorney. In other counties, the Clerk’s Office may instruct the litigant to serve the Answer on the Plaintiff by mailing a copy of the Answer.

The CLARO volunteer or advocate should prepare the Written Answer or Amended Answer as of Right. The caption should read either “Written Answer” or “Written Amended Answer as of Right”; the document should be notarized. The CLARO visitor can then be instructed on the filing of the document at the particular courthouse and, if necessary, the service and then filing of the document.

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22 N.Y. C.P.L.R. 3025(b) (“Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”).
B. Filing the Amended Answer by Leave of Court

If the Defendant’s Answer has not been filed within the statutory time limit the litigant may still be able to file an Answer. In CLARO’s experience, as long as the Plaintiff has not yet obtained a default judgment, the clerk’s office will generally accept pro se answers.

If the Defendant seeks to file an Amended Answer but can no longer do so as a matter of right, the Defendant may seek to file the Amended Answer by leave of court in one of the following three ways:

1) By making an oral application at her next court hearing;
2) By notice of motion and motion; or
3) By order to show cause and motion.

Tactical considerations should drive which option you advise the litigant to employ in seeking leave from the Court to file an Amended Answer. In advising the client, you should consider the procedural posture of the case and any other relevant factors, including but not limited to: how many court hearings have already taken place; the litigant’s ability to come to court; the litigant’s ability to navigate the notice of motion or order to show cause process; and the judge’s individual practice. Please consult with the consumer law expert if you are unsure how to proceed.

The CLARO Training Manual should be consulted for detailed instructions concerning how to file a Notice of Motion and Motion. In brief, filing an Amended Answer, by notice of motion and motion, requires that the litigant:

1. Complete a Notice of Motion to Amend the Answer.
2. Complete and have notarized an Affidavit in Support of the Motion to Amend the Answer. A Proposed Amended Written Answer should be included as an Exhibit to the Affidavit.
3. Prepare and notarize a Proposed Amended Written Answer. To do so change the caption on the Pro Se Written Answer to reflect that it is a “Proposed Amended Written Answer” and work through the document with the litigant.
4. Prepare a Brief in Support of the Motion to Amend Answer (if necessary).
5. Make **2 copies** of the following **PACKET** of documents:
   a. The Notice of Motion to Amend Answer;
   b. The **notarized** Affidavit in support of Motion to Amend Answer;
   c. Exhibits, which include a copy of the Summons and Complaint, a copy of the original Answer, and the **notarized** Proposed Amended Written Answer.
   d. Brief in support of Motion to Amend Answer (if there is one).

6. Have SOMEONE ELSE (over 18 years of age):
   a. MAIL one (1) **COPY** of the **PACKET** (not the original) to the Plaintiff’s lawyer by regular mail at the post office;
   b. Get a certificate of mailing from the post office and instruct the litigant to have the person bring it back with her;
   c. Complete an Affidavit of Service and get that **notarized**; and
   d. Make a copy of the **notarized** Affidavit of Service.
   e. **Practice Note:** Service can be effected by a CLARO volunteer depending on the capacity of individuals during a particular session.

7. File the **PACKET** containing the **originals** of the **PACKET** with the Clerk’s Office in the courthouse where the case was filed, including the original **notarized** Affidavit of Service of the person who mailed the copy of the **PACKET** to Plaintiff’s counsel.

8. Obtain a date stamp on the litigant’s copy of the filing.

The CLARO Training Manual should be consulted for detailed instructions concerning how to file an Order to Show Cause and Motion. In brief, filing an Amended Answer, by order to show cause and motion requires that the litigant:

1. Complete and have **notarized** an **Affidavit in Support of Order to Show Cause to Amend the Answer**.
   a. Please note that litigant should not sign the affidavit until he or she is before a notary public or the Clerk, who can also notarize the document.
   b. Be sure to include language advising the court that a “Proposed Amended Written Answer” is attached as an Exhibit.
   c. Be sure to include language asking the court for permission to serve the documents via certified mail.
2. Prepare and have **notarized** a **Proposed Amended Written Answer**. To do so change the caption on the Pro Se Written Answer to reflect that it is a “Proposed Amended Written Answer” and work through the document with the litigant.

3. File the following **PACKET** of documents with the Clerk’s Office in the courthouse where the case was filed:
   a. The **notarized** Affidavit in Support of Order to Show Cause Amend the Answer; and
   b. The Exhibits, which include a copy of the Summons and Complaint, a copy of the original Answer, and the **notarized** Proposed Amended Written Answer.

4. Inform the litigant that:
   a. The clerk will then send the PACKET up to a judge and that the clerk may ask the litigant to wait or come back later.
   b. If the litigant receives a signed Order to Show Cause, it will have a “Return Date” on which the litigant must come back to court.
   c. If the litigant receives a signed Order to Show Cause, the litigant must ask the Clerk delivering the signed Order to Show Cause whether the litigant must go to the Clerk’s window and submit the signed Order to Show Cause.

5. Also instruct the litigant that:
   a. The litigant **must** serve a copy of the signed Order to Show Cause and accompanying PACKET of documents on opposing counsel precisely as set out in the signed Order to Show Cause – litigants may be instructed to provide service via **certified mail** or to obtain a **certificate of mailing**. The Clerk’s Offices in Bronx and Richmond County provide litigants with as many copies of the Order as the litigants needs; individuals do not have to make their own copies.
   b. The litigant **must** obtain proof of mailing, usually a certificate of mailing, from the post office to present to the Court.

6. Advise the litigant to bring the following documents on the Return Date:
   a. A copy of certificate of mailing, or other proof of mailing, evidencing service of the signed Order to Show Cause and the packet on opposing counsel; and
Section II – Filing the Answer and Amending the Answer

b. The litigant’s copy of the signed Order to Show Cause and packet (which includes the notarized Proposed Amended Answer).

7. Advise the litigant that if the Court grants the application by Order to Show Cause to amend the answer to clarify with the Court the next step – usually, the litigant has to go to the Clerk’s Office and file the Amended Answer.

The CLARO Training Manual should be consulted for more detailed instructions concerning how to file an Order to Show Cause and Motion.
### Section II – Filing the Answer and Amending the Answer

#### C. Excerpts of Relevant Provisions

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<th>Provision</th>
<th>Excerpt</th>
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| CPLR 320 – Defendant’s appearance | § 320. Defendant's appearance  
(a) Requirement of appearance. The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within **twenty days** after service of the summons, except that if the summons was served on the defendant by . . . subdivision two, three, four or five of section 308, or . . . the appearance shall be made within **thirty days after service is complete**. If the complaint is not served with the summons, the time to appear may be extended as provided in subdivision (b) of section 3012. |
| New York City Civil Court Act – § 402 Summons; time to appear and answer | § 402. Summons; time to appear and answer  
(a) If the summons is personally delivered to the defendant within the city of New York, it shall require him to appear and answer within **twenty days** after its service. |
| CPLR 308 – when service is complete | § 308. Personal service upon a natural person  
[For substituted service or “deliver and mail”]  
2. . . delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; **service shall be complete ten days after such filing**; . . .  
4. [for “nail and mail”] . . . such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; **service shall be complete ten days after such filing**, . . . |
Section II – Filing the Answer and Amending the Answer

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<th>Excerpt</th>
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| C.P.L.R. 3012 – 3012. Service of pleadings and demand for complaint | § 3012. Service of pleadings and demand for complaint  
(a) Service of pleadings. The complaint may be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. **Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.**  
(b) Service of complaint where summons served without complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. **Service of the demand shall extend the time to appear until twenty days after service of the complaint.** If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.  
(c) Additional time to serve answer where summons and complaint not personally delivered to person to be served within the state. If the complaint is served with the summons and the service is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf or if service of the summons and complaint is made pursuant to section 303, paragraphs two, three, four or five of section 308, or sections 313, 314 or 315, **service of an answer shall be made within thirty days after service is complete.**  
(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default. |
<table>
<thead>
<tr>
<th>Provision</th>
<th>Excerpt</th>
</tr>
</thead>
</table>
| CPLR 3025 – Amended and supplemental pleadings | § 3025. Amended and supplemental pleadings  
(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.  
(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. **Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.**  
(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.  
(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds. |
| New York City Civil Court Act – § 909 Pleadings; amended and supplemental | § 909. Pleadings; amended and supplemental  
(a) A party may amend his pleading once without leave of court at any time before the period for responding to it expires, or within ten days after its service or the service of a pleading responding to it. An amended pleading which requires a responsive pleading shall be responded to within ten days after it is served, or within ten days after the expiration of the period during which the original pleading could have been responded to, whichever is later.  
(b) Except as provided in subdivision (a), the CPLR shall govern amended and supplemental pleadings in this court. |
### D. Overview Chart

<table>
<thead>
<tr>
<th>TASK</th>
<th>TIME FRAME</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FILING THE ANSWER</strong>&lt;sup&gt;23&lt;/sup&gt;</td>
<td>If Summons and Complaint Served By Personal (In-Hand) Service:</td>
</tr>
<tr>
<td></td>
<td>• 20 days</td>
</tr>
<tr>
<td></td>
<td>If Summons and Complaint Served by “Deliver &amp; Mail” or “Nail &amp; Mail”</td>
</tr>
<tr>
<td></td>
<td>• 30 days from when service is complete</td>
</tr>
<tr>
<td></td>
<td>• Service is complete upon filing of proof of service (e.g., affidavit of service) in New York City Civil Court</td>
</tr>
<tr>
<td></td>
<td>• Service is complete 10 days after filing of proof of service (e.g., affidavit of service) in Supreme Court; filing must be within 20 days of mailing and of either affixing or delivery</td>
</tr>
<tr>
<td><strong>FILING THE AMENDED ANSWER AS OF RIGHT</strong></td>
<td>• 10 days from filing the answer (for New York City Civil Court)</td>
</tr>
<tr>
<td></td>
<td>• 20 days from filing the answer (for Supreme Court)</td>
</tr>
<tr>
<td><strong>FILING THE AMENDED ANSWER BY LEAVE OF THE COURT</strong></td>
<td>By notice of motion or order to show cause. Legal standard is as follows:</td>
</tr>
<tr>
<td></td>
<td>• “Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” CPLR 3025(b).</td>
</tr>
</tbody>
</table>

---

<sup>23</sup> Please note that the Clerk’s Office routinely accepts late Answers and they are generally accepted by judges and plaintiffs.
Civil Court of the City of New York
County of ______________                  Index Number _____________

Plaintiff(s),

-against-

RENT ARREARS COLLECTION

Defendant(s).

Defendant __________________________ answers the Complaint as follows:

ANSWER: (Check all that apply)
1. □ General Denial: I deny the allegations in the Complaint.
2. □ I did not receive a copy of the Summons and Complaint.
3. □ I received the Summons and Complaint, but service was not correct as required by law.
4. □ I do not owe this debt.
   a. □ I paid all of the alleged debt.
   b. □ I was constructively evicted from the premises. (Forced to leave because of harassment or conditions dangerous to the occupants’ health and safety. Specify the conditions below, in line #17.)
   c. □ The lease and/or rent charged was illegal.
   d. □ Plaintiff accepted the surrender of the premises.
   e. □ I was not under a lease or other obligation for the months Plaintiff seeks rent. (May apply to Section 8, SCRIE, DRIE.)
5. □ I did not incur this debt. I am a victim of identity theft or mistaken identity.
6. □ I dispute the amount of the debt.
   a. □ I paid part of the alleged debt.
   b. □ Plaintiff sued for an incorrect amount of rent.
   c. □ Plaintiff failed to return or credit me for my security deposit.
   d. □ I am owed an abatement because the landlord breached the warranty of habitability based on conditions dangerous to the occupants’ health and safety. (Specify the conditions below, in line #17.)
   e. □ I was not a lease or other obligation for the months Plaintiff seeks rent.
   f. □ A third party is responsible for the rent allegedly owed. (May apply to Section 8, SCRIE, DRIE.)
7. □ I am a senior citizen who stopped making payments pursuant to Real Property Law § 227.
8. □ I am a domestic violence survivor who stopped making payments pursuant to Real Property Law § 227.
9. □ This debt was incurred under circumstances of duress.
10. □ Plaintiff lacks standing. (I do not have a business relationship with Plaintiff.)
11. □ Statute of limitations. (The time has passed to sue on this debt: more than six years.)
12. □ Laches. (Plaintiff has excessively delayed in bringing this lawsuit to my disadvantage.)
13. □ This debt has been discharged in bankruptcy.
14. □ Violation of the duty of good faith and fair dealing.
15. □ Unconscionability. (The contract is unfair.)
16. □ Defendant is in the military.
17. □ Other: __________________________________________________________________________
_______________________________________________________________________________________
_______________________________________________________________________________________
18. □ Please take notice that my only source of income is ____________________ , which is exempt from collection.

This case is scheduled to appear on the court calendar as follows:
Date: ________ Part: ________ Room: ________ Time: ________ Both sides notified: Yes  No

APPENDIX G-3
COUNTERCLAIMS

19. □ Plaintiff failed to refund/credit my security deposit of $________ plus interest.
20. □ Plaintiff is retaining overpayments that I made in an amount of $____________.
21. □ Plaintiff owes me damages for injuries I suffered as a result of conditions on the premises that were dangerous to my health and safety or that of my dependents. These damages total $____________.
22. □ Plaintiff owes me damages for expenses that I incurred as a result of Plaintiff’s failure to perform its obligation(s) arising under the lease. These damages total $____________.
23. □ Plaintiff owes me damages for expenses that I incurred in successfully defending this action and/or a previous action.

24. □ Other counterclaim(s): _____________________ Reason: ____________________________

____________________________________________________________________________________________

VERIFICATION

State of New York, County of __________________ss:

__________________________, being duly sworn, deposes and says: I am the respondent/person claiming possession in this proceeding. I have read the Answer in Writing and know the contents thereof to be true to my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

Sworn to before me this ______ day of ________________ 20___

____________________________________________________________

Signature of Defendant

____________________________________________________________

Notary/Court Employee

____________________________________________________________

Defendant’s address

Prepared with the assistance of the ___________________ CLARO Program by

____________________________________________________________________________________________

This case is scheduled to appear on the court calendar as follows:

Date: ___________ Part: ________ Room: ________ Time: ________ Both sides notified: Yes  No

APPENDIX G-3
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

X Y Z Collections

Plaintiff,

against-

George Accountholder

Defendant.

Defendant has appeared and answers the Complaint as follows:

ANSWER
1. [ ] General Denial: I deny the allegations in the Complaint.
2. [ ] Other:

SERVICE
3. [ ] I did not receive a copy of the Summons and Complaint.
4. [ ] I received the Summons and Complaint, but service was not correct as required by law.

DEFENSES (Check all that apply)
5. [ ] I do not owe this debt.
6. [ ] I did not incur this debt. I am a victim of identity theft or mistaken identity.
7. [ ] I have paid all or part of the alleged debt.
8. [ ] I dispute the amount of the debt.
9. [ ] I do not have a business relationship with Plaintiff. (Plaintiff lacks standing.)
10. [ ] On information and belief, Plaintiff does not have a license to collect debt.
11. [ ] Plaintiff does not allege a debt collection license number in the Complaint.
12. [ ] The claims are time-barred by the statute of limitations.
13. [ ] This debt has been discharged in bankruptcy.
14. [ ] The collateral was not sold at a commercially reasonable price.
15. [ ] Unjust enrichment (amount demanded excessive compared to original debt)
16. [ ] Violation of the duty of good faith and fair dealing.
17. [ ] Unconscionability (unfair contract).
18. [ ] Laches (plaintiff delayed bringing lawsuit to my disadvantage).
19. [ ] Other:

EXEMPTIONS
20. [ ] Please take notice that my source of income is unemployment, which is exempt from collection.

COUNTERCLAIM(S)
21. [ ] COUNTERCLAIM: $__________ Reason:

George Accountholder
Signature of Defendant 11/14/12
Date
(718) 999-9000
Defendant’s Telephone Number

220-02 109th Avenue
Defendant’s Address
Queens Village, N.Y. 11427
City, State, Zip Code

STATE OF NEW YORK, COUNTY OF

Queens

Sworn to before me this 14th day of November, 2012

George Accountholder
Defendant

Esquire Notary
Notary Public/County-Employees and Title

APPENDIX G - 4
STATE OF NEW YORK

ss:

COUNTY OF __________)

______________________________________, being duly sworn, depose and say that:

1. As pro se Defendant in this action, I submit this Affidavit to support my attached Motion to Amend the Answer.

2. On ________________________________, 201__, Plaintiff commenced this action by filing the Summons and Complaint (EXHIBIT A).

3. On ________________________________, 201__, unable to afford and without the benefit of representation, I filed an Answer (EXHIBIT B).

4. On __________, 201__, I sought legal advice from the CLARO Program (CLARO), and was advised that I have these additional defense(s) that I did not know about before:

☐ I do not owe the debt.

☐ No debt collection number in the Complaint.

☐ Identity theft or mistaken identity.

☐ No NYC Department of Consumer Affairs record that Plaintiff is licensed to collect debt.

☐ Payment.

☐ Incorrect Amount.

☐ Collateral (property) not sold at commercially reasonable price.

☐ No business relationship with Plaintiff. (Plaintiff lacks standing.)

☐ Statute of limitations.

☐ The debt was discharged in bankruptcy.
I am in the military.
☐ Unjust enrichment.
☐ Unconscionability (unfair contract).
☐ Other Defense(s):

☐ Violation of duty of good faith and fair dealing.
☐ Laches.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

5. The CLARO Program helped me prepare this Motion to Amend the Answer and the attached Proposed Amended Answer (EXHIBIT C).

6. Plaintiff will not be prejudiced if my Motion to Amend is granted because Plaintiff has invested only very limited resources to prosecute this case since I filed my Answer and will not be prejudiced if the Court grants my Motion. The Plaintiff has not engaged in meaningful discovery or motion practice such that the Court granting me leave to file an Amended Answer would be prejudicial.

7. In addition, I would like to tell the Court that:
___________________________________________________________________________
___________________________________________________________________________

8. I did not serve an Amended Answer as of right under C.P.L.R. § 3025(a), and I did not make this Motion to Amend earlier, because I cannot afford a lawyer and did not know of my additional defenses until I received advice through CLARO.

9. Upon information and belief based on the advice I received at CLARO, the law stated below is true and accurate:
10. CPLR 3025(b) provides that “[a] party may amend his pleading . . . at any time by leave of court” and that “[l]eave shall be freely given upon such terms as may be just.”


12. Notably, “prejudice is not established merely because the amended pleading will defeat on the merits an opposing party’s claim or defense.” 5-3025 Weinstein, Korn, & Miller, New York Civil Practice, Pt. 3025.14 (2011).


14. Leave to amend the pleadings is particularly compelling where a litigant is unrepresented. See In re Salon Ignazia, Inc., 34 A.D.3d 821, 822 (2d Dept. 2006) (reversing denial of motion seeking leave to amend pro se answer); 46 East 91st Street Assoc., LLC v. Bogoch, 23 Misc.3d 36, 37 (App. Term, 1st Dept. 2009) (same).

15. I have:

☐ not had a previous Order to Show Cause regarding this index number.

☐ had a previous Order to Show Cause regarding this index number but I am making this further application because:

__________________________________________________________________________

3

APPENDIX G - 5
WHEREFORE, as an unrepresented Defendant seeking to amend my *pro se* Answer as soon as I learned through legal advice at CLARO that I have additional defenses which will not prejudice Plaintiff if raised now, I respectfully request that the Court grant this Motion.

Pro Se Defendant

Sworn to before me on _________________, 201__

NOTARY PUBLIC

Prepared with the assistance of the _________________ CLARO Program by Volunteer Attorney _________________, with statements about the law prepared by Theodora Galacatos, Esq., of Fordham Law School’s Feerick Center for Social Justice, for the CLARO Program.
Civil Court of the City of New York
County of Kings

ORDER TO SHOW CAUSE

To Vacate a Judgment; restore case to the Calendar; and vacate any liens and income executions involving this defendant in this case.

UPON the annexed affidavit of __________ sworn to on August 18, 2008; and upon all papers and proceedings herein;

Let the Claimant(s)/Plaintiff(s) or Claimant(s)/Plaintiff(s)' attorney(s) show cause at:

Kings Civil Court
141 Livingston Street
Brooklyn, New York 11201
Part 34 Room 1102
on September 2, 2008 at 9:30AM

or as soon thereafter as counsel may be heard, why an order should not be made:

VACATING the Judgment, restoring to the Calendar; vacating any liens and income executions and/or granting such other and further relief as may be just.

PENDING the hearing of this Order to Show Cause and the entry of an Order thereon, let all proceedings on the part of the Claimant(s)/Plaintiff(s), Claimant(s)/Plaintiff(s)' attorney(s) and agent(s) and any Marshal or Sheriff of the City of New York not the enforcement of said judgment be stayed.

SERVICE of a copy of this Order to Show Cause, and annexed Affidavit, upon the:

Claimant(s)/Plaintiff(s) or named attorney(s):
Sheriff or Marshal:

(Judge to Initial)

by Personal Service by "In Hand Delivery"
by Certified Mail, Return Receipt Requested
by First Class Mail with official Post Office Certificate of Mailing

on or before __________, shall be deemed good and sufficient.

PROOF OF SUCH SERVICE shall be filed with the Clerk in the Part indicated above on the return date of this Order to Show Cause.

Attorney(s): Mail to:

Sheriff/Marshal:

________________________

________________________

August 18, 2008
DATE

Hon. __________ Civil Court Judge (NYC)

HON. __________
Civil Court of the City of New York
COUNTY OF

Claimant(s)/Plaintiff(s).

against

Defendant(s),

State of New York, County of

Defendant's Initials

being duly sworn, deposes and says:

1. PARTY

a) I am the party named as defendant in the above entitled action.

2. SERVICE

a) I have been served with a summons and complaint in this action [NOTE: If Small Claims skip #3, go to #4.]

b) I have not been served, and my first notice of legal action was [NOTE: If you complete any of #2b, skip #3, #4 & #5, go to #6].

3. APPEARANCE

a) I did not appear and answer in the Clerk's Office because: [NOTE: If you complete #3a, skip to #6.]

b) I did appear and answer in the Clerk's Office

and I received a date for trial, but the answer was entered late.

Other:

4. TRIAL

On the Date of Trial before Judge/Arbitrator

a stipulation (a written agreement) was made between claimant/plaintiff and defendant.

a judgment was entered after the trial.

a judgment was entered against me by default for my failure to appear.

Other:

5. EXCUSE

My reason for not complying with the stipulation is

appearing in court on the date scheduled for trial is

Other:

6. DEFENSE

I allege that I have a good defense because:

7. PRIOR

a) I have not had a previous Order to Show Cause regarding this index number.

b) I have had a previous Order to Show Cause regarding this index number but I am making this further application because

8. I request that the judgment be vacated, that the case be restored to the calendar, and permission to serve these papers in person.

Sworn to before me this day of 20

(Signature of Court Employee and Title)

APPENDIX H - 2

FREE CIVIL COURT FORM

No fee may be charged to fill in this form.

Form can be found at: https://www.nycourts.gov/courts/civil/forms.shtml

ORDER TO SHOW CAUSE FORM 1

FEERICK CENTER 11.11.13
Defendant has copy of Affidavit of Service.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF _____________________________

---------------------------------------------------------------

Index No.__________________

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE TO VACATE DEFAULT JUDGMENT AND DISMISS FOR LACK OF PERSONAL JURISDICTION

__________________________________________,

Plaintiff,

- against -

__________________________________________,

Defendant

STATE OF NEW YORK     )
ss:
COUNTY OF ___________)

__________________________________________, being duly sworn, depose and say that:

1. I am an unrepresented Defendant in the above-captioned action.

2. I am fully familiar with the facts set out in this Affidavit.

3. I submit this Affidavit in support of this Order to Show Cause to vacate the default judgment and dismiss the action for lack of personal jurisdiction and attach the following exhibit(s) in support: _______________________________________________________

____________________________________________________________________________
___________________________________________________________________________.

4. Because this Affidavit contains a sworn denial of the affidavit of service,

☐ and facts to rebut the process server’s affidavit, I request the Court hold a traverse hearing.

☐ and documentary evidence to rebut the process server’s affidavit, I request the Court grant this application pursuant to C.P.L.R. 3211(a)(8) without the need for a traverse hearing and dismiss the action for lack of personal jurisdiction.

Defendant has copy of Affidavit of Service.

APPENDIX H - 3
5. On ____________________________, 201__, Plaintiff commenced this action by filing the Summons and Complaint.

6. A default judgment was entered against me in this action on ____________________________.

7. I have reviewed the affidavit of service filed in this action, and I dispute the allegations of the process server for the following reasons:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________
8. I discovered that Plaintiff commenced this action when:

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________
9. Because I never received notice about the lawsuit, I have a reasonable excuse for my default.

10. I also have one or more meritorious defenses.

☐ I do not owe the money.

☐ I am a victim of identity theft or mistaken identity.

☐ Payment.

☐ Incorrect Amount.

☐ No business relationship with the plaintiff. (Plaintiff lacks standing.)

☐ The NYC Department of Consumer Affairs shows no record of plaintiff having a license to collect debt.

☐ There is no debt collection license number in the complaint.

☐ Statute of limitations.

☐ The debt was discharged in bankruptcy.

☐ The collateral (property) was not sold at a commercially reasonable price.

☐ Unjust enrichment.

☐ Violation of the duty of good faith and fair dealing.

☐ Unconscionability (the contract is unfair).

☐ Laches.

☐ Defendant is in the military.

☐ Other Defense.

___________________________________________________________

___ of ___
11. **Notice of Entry.** I note that:

- [ ] I was not served with written notice of entry of a judgment or order.
- [ ] I received a copy of the judgment or order with written notice of its entry on or about ________________________________ and I am filing this motion within the year of service.

12. **Protected Income.** In addition, I note that my sole source of income is ___________________________________, which is exempt from collection.

13. The CLARO Program helped me prepare this Affidavit in support of my Order to Show Cause to Vacate the Default Judgment.
14. Upon information and belief based on the advice I received at CLARO, the law stated below is true and accurate:

15. C.P.L.R. 5015(a)(4) mandates this Court to vacate a default judgment and dismiss an action when it finds that a defendant was not served with the Summons or the Summons and Complaint as required by C.P.L.R. § 308. Kiesha G.-S. v. Alphonso S., 57 A.D.3d 289, 289, 870 N.Y.S.2d 240, 240 (1st Dept. 2008) (citing Chase Manhattan Bank, N.A., v. Carlson, 113 A.D.2d 734, 493 N.Y.S.2d 339 (2d Dept. 1985) (“[a]bsent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated”)); Steele v. Hempstead Pub Taxi, 305 A.D.2d 401, 402, 760 N.Y.S.2d 188, 189 (2d Dept. 2003) (same).

16. Service of process is a constitutional requirement necessary for a court to have jurisdiction over a person. Patrician Plastic Corp. v. Bernadel Realty Corp., 25 N.Y.2d 599, 607, 307 N.Y.S.2d 868, 875 (1970) (“The short of it is that process serves to subject a person to jurisdiction in an action pending in a particular court and to give notice of the proceedings.” (citations omitted)).

17. The requirements for service of process are strictly enforced. Dorfman v. Leidner, 76 N.Y.2d 956, 958, 563 N.Y.S.2d 723, 725 (1990) (stating that “[s]ervice of process is carefully prescribed by the Legislature” and “requires adherence to the statute”).


19. In its moving papers, the defendant must either submit a sworn denial of service or swear to specific facts to rebut the process server’s affidavit. Puco v. DeFeo, 296 A.D.2d 571, ___ of ___

Defendant has copy of Affidavit of Service.

APPENDIX H - 3
Defendant has copy of Affidavit of Service.

APPENDIX H - 3
to remand for a factual hearing on the propriety of the service. . . . Because no disputed issue of fact is presented, a further hearing would be useless.”(internal citations omitted)).

21. If this Court finds that C.P.L.R. § 5015(a)(4) does not apply in this action, the Court may vacate the judgment based on excusable default under C.P.L.R. § 5015(a)(1). *Mayers v. Cadmen Towers, Inc.*, 89 A.D.2d 844, 845, 453 N.Y.S.2d 25, 26-27 (2d Dept. 1982) (remitting the case for a hearing to determine “whether the court had jurisdiction over defendant, and, if it did . . . whether leave to interpose an answer containing all or only some defenses should be granted in view of the prejudice, if any, caused by the defendant’s default”).


24. As described above, I have a reasonable excuse for my default as I never received the Summons or the Summons and Complaint and meritorious defenses.

25. I have:

- [ ] not had a previous Order to Show Cause regarding this index number.
- [x] had a previous Order to Show Cause regarding this index number but I am making this further application because:

  ________________________________________________________________
  ________________________________________________________________

__ of __

Defendant has copy of Affidavit of Service.
APPENDIX H - 3
26. I respectfully request that the Court grant my motion to vacate the default judgment or in the alternative, schedule a traverse hearing and, pursuant to C.P.L.R. 5015(a)(4), dismiss this case for lack of personal jurisdiction, lift all stays, order the return of any funds that have been garnished, and permit me to serve papers by mail.

27. If the Court denies my request pursuant to C.P.L.R. 5015(a)(4), I respectfully request that the Court grant my motion to vacate the default judgment pursuant to C.P.L.R. 5015(a)(1), restore the case to the calendar, lift all stays, order the return of any funds that have been garnished, permit me to file the proposed Answer, and permit me to serve papers by mail.

WHEREFORE, I respectfully request that the Court grant my motion in all respects.

__________________________
Date

__________________________
Pro Se Defendant Signature

__________________________
Pro Se Defendant Name

__________________________
Address

__________________________
Phone

Sworn to before me on the

_______ day of ______________, 20___

__________________________
NOTARY PUBLIC

Prepared with the assistance of the ____________________________ CLARO Program by Volunteer Attorney__________________________, with statements about the law prepared by Theodora Galacatos, Esq., of Fordham Law School’s Feerick Center for Social Justice, for the CLARO Program.

Defendant has copy of Affidavit of Service.

APPENDIX H - 3
APPENDIX H - 4

Defendant does not have access to affidavit of service.
6. A default judgment was entered against me in this action on ____________________
___________________________________________________________________________.

7. I have not had an opportunity to review the affidavit of service and have requested a copy of the court file from the Clerk’s Office. To my knowledge with regard to alleged service of the Summons and Complaint, I dispute the allegations of the process server for the following reasons:

☐ I was never personally served with a copy of the Summons and Complaint

☐ A copy of the Summons and Complaint was never left with a person of suitable age and discretion at my residence or place of employment.

☐ A copy of the Summons and Complaint was never attached to the door of my residence.

☐ I did not receive a copy of the Summons and Complaint in the mail.

8. I discovered that Plaintiff commenced this action when:

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________.
9. Because I never received notice about the lawsuit, I have a reasonable excuse for my default.

10. I also have one or more meritorious defenses.

   □ I do not owe the money.
   □ I am a victim of identity theft or mistaken identity.
   □ Payment.
   □ Incorrect Amount.
   □ No business relationship with the plaintiff. (Plaintiff lacks standing.)
   □ The NYC Department of Consumer Affairs shows no record of plaintiff having a license to collect debt.
   □ There is no debt collection license number in the complaint.
   □ Statute of limitations.
   □ The debt was discharged in bankruptcy.
   □ The collateral (property) was not sold at a commercially reasonable price.
   □ Unjust enrichment.
   □ Violation of the duty of good faith and fair dealing.
   □ Unconscionability (the contract is unfair).
   □ Laches.
   □ Defendant is in the military.
   □ Other Defense.

___________________________________________________________

___________________________________________________________
11. **Notice of Entry.** I note that:

- [ ] I was not served with written notice of entry of a judgment or order.
- [ ] I received a copy of the judgment or order with written notice of its entry on or about ____________________________
  and I am filing this motion within the year of service.

12. **Protected Income.** In addition, I note that my sole source of income is ________________________________, which is exempt from collection.

13. The CLARO Program helped me prepare this Affidavit in support of my Order to Show Cause to Vacate the Default Judgment.
14. Upon information and belief based on the advice I received at CLARO, the law stated below is true and accurate:

15. C.P.L.R. 5015(a)(4) mandates this Court to vacate a default judgment and dismiss an action when it finds that a defendant was not served with the Summons or the Summons and Complaint as required by C.P.L.R. § 308. Kiesha G.-S. v. Alphonso S., 57 A.D.3d 289, 289, 870 N.Y.S.2d 240, 240 (1st Dept. 2008) (citing Chase Manhattan Bank, N.A., v. Carlson, 113 A.D.2d 734, 493 N.Y.S.2d 339 (2d Dept. 1985) (“[a]bsent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated”)); Steele v. Hempstead Pub Taxi, 305 A.D.2d 401, 402, 760 N.Y.S.2d 188, 189 (2d Dept. 2003) (same).

16. Service of process is a constitutional requirement necessary for a court to have jurisdiction over a person. Patrician Plastic Corp. v. Bernadel Realty Corp., 25 N.Y.2d 599, 607, 307 N.Y.S.2d 868, 875 (1970) (“The short of it is that process serves to subject a person to jurisdiction in an action pending in a particular court and to give notice of the proceedings.” (citations omitted)).

17. The requirements for service of process are strictly enforced. Dorfman v. Leidner, 76 N.Y.2d 956, 958, 563 N.Y.S.2d 723, 725 (1990) (stating that “[s]ervice of process is carefully prescribed by the Legislature” and “requires adherence to the statute”).


19. In its moving papers, the defendant must either submit a sworn denial of service or swear to specific facts to rebut the process server’s affidavit. Puco v. DeFeo, 296 A.D.2d 571,

20. This Affidavit raises a question of fact with respect to this Court’s jurisdiction, which should be resolved through a traverse hearing. See Kingsland Grp. v. Pose, 296 A.D.2d 440, 440-41, 744 N.Y.S.2d 715, 716 (2d Dept. 2002) (“[S]ince there was a sworn denial of receipt of process, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing.”); In re St. Christopher-Ottilie, 169 A.D.2d 690, 691, 565 N.Y.S.2d 72, 73 (1st Dept. 1991) (“[T]he court erred in failing to hold a traverse hearing on the issue of the propriety of personal service, since respondent has raised an issue of fact with respect to the service of the petition.”).

21. If this Court finds that C.P.L.R. § 5015(a)(4) does not apply in this action, the Court may vacate the judgment based on excusable default under C.P.L.R. § 5015(a)(1). Mayers v. Cadmen Towers, Inc., 89 A.D.2d 844, 845, 453 N.Y.S.2d 25, 26-27 (2d Dept. 1982) (remitting the case for a hearing to determine “whether the court had jurisdiction over defendant, and, if it did . . . whether leave to interpose an answer containing all or only some defenses should be granted in view of the prejudice, if any, caused by the defendant’s default”).


24. As described above, I have a reasonable excuse for my default as I never received the Summons or the Summons and Complaint and meritorious defenses.

25. I have:

☐ not had a previous Order to Show Cause regarding this index number.

☐ had a previous Order to Show Cause regarding this index number but I am making this further application because:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
26. I respectfully request that the Court grant my motion to vacate the default judgment or in the alternative, schedule a traverse hearing and, pursuant to C.P.L.R. 5015(a)(4), dismiss this case for lack of personal jurisdiction, lift all stays, order the return of any funds that have been garnished, and permit me to serve papers by mail.

27. If the Court denies my request pursuant to C.P.L.R. 5015(a)(4), I respectfully request that the Court grant my motion to vacate the default judgment pursuant to C.P.L.R. 5015(a)(1), restore the case to the calendar, lift all stays, order the return of any funds that have been garnished, permit me to file the proposed Answer, and permit me to serve papers by mail.

28. I respectfully request that the Court order Plaintiff to produce a copy of the Summons and Complaint and of the Affidavit of Service so that I may supplement my application accordingly.

WHEREFORE, I respectfully request that the Court grant my motion in all respects.

Date

Pro Se Defendant Signature

Pro Se Defendant Name

Address

Phone

Sworn to before me on the

_____ day of _____________, 20___

__________________________
NOTARY PUBLIC

Prepared with the assistance of the CLARO Program by Volunteer Attorney
Theodora Galacatos, Esq., of Fordham Law School’s Feerick Center for Social Justice, for the CLARO Program.

APPENDIX H - 4
BRIEF FOR DEFENDANT IN SUPPORT OF ORDER TO SHOW CAUSE TO VACATE THE DEFAULT JUDGMENT AND TO DISMISS
PRELIMINARY STATEMENT

Defendant seeks to move this Court by Order to Show Cause to vacate a default judgment and dismiss this action for lack of personal jurisdiction pursuant to New York’s Civil Practice Law and Rules (hereafter “C.P.L.R.”) 5015(a)(4). Alternately, Defendant requests this Court to vacate the default on the ground of excusable default pursuant to C.P.L.R. 5015(a)(1).

Pursuant to C.P.L.R. 5015(a)(4), this Court must vacate a default judgment and dismiss an action when it finds that a defendant was not served with the Summons or the Summons and Complaint in accordance with the requirements of C.P.L.R. § 308 for service on a natural person. Kiesha G.-S. v. Alphonso S., 57 A.D.3d 289, 289, 870 N.Y.S.2d 240, 240 (1st Dept. 2008) (citing Chase Manhattan Bank, N.A., v. Carlson, 113 A.D.2d 734, 493 N.Y.S.2d 339 (2d Dept. 1985) (“[a]bsent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated”)); Steele v. Hempstead Pub Taxi, 305 A.D.2d 401, 402, 760 N.Y.S.2d 188, 189 (2d Dept. 2003) (same). Moreover, the requirements for service of process are strictly enforced. Dorfman v. Leidner, 76 N.Y.2d 956, 958, 563 N.Y.S.2d 723, 725 (1990) (stating that “[s]ervice of process is carefully prescribed by the Legislature” and “requires adherence to the statute”). In this case, the plaintiff has failed to properly serve Defendant in accordance with C.P.L.R. § 308. Accordingly, this Court has not obtained personal jurisdiction over the Defendant and the case should be dismissed.

If this Court finds C.P.L.R. § 5015(a)(4) inapplicable because the Plaintiff properly effected service of process, it may, nonetheless, vacate the judgment on the grounds of excusable default under C.P.L.R. § 5015(a)(1). Mayers v. Cadmen Towers, Inc., 89 A.D.2d 844, 845, 453

APPENDIX H - 5
N.Y.S.2d 25, 26-27 (2d Dept. 1982) (remitting the case for a hearing to determine “whether the court had jurisdiction over defendant, and, if it did . . . whether leave to interpose an answer containing all or only some defenses should be granted in view of the prejudice, if any, caused by the defendant’s default”). Excusable default requires a finding of a reasonable excuse for the default and the existence of a potentially meritorious defense to warrant vacatur of the default judgment. Gerdes v. Canales, 74 A.D.3d 1017, 1018, 903 N.Y.S.2d 499, 500 (2d Dept. 2010). Moreover, “[t]here is a ‘strong [public] policy favoring the determination of actions on their merits’.” Heskel’s West 38th Street Corp. v. Gotham Constr. Co., 14 A.D.3d 306, 307, 787 N.Y.S.2d 285, 287 (1st Dept. 2005) (alteration in the original). Defendant has a reasonable excuse for his/her default and meritorious defenses.

**STATEMENT OF FACTS**

1. On ____________________________, Plaintiff commenced this action by filing the Summons and Complaint with the Clerk’s Office.

2. Defendant was not properly served the Summons or Summons and Complaint.

3. Defendant discovered that Plaintiff commenced this action when:

4. Defendant refers the Court to the factual objections to the Process Server’s Affidavit of Service contained in Paragraph 3 of Defendant’s Affidavit In Support of Order to Show Cause to Vacate Default Judgment and Dismiss the Action, dated ________________________.
5. Defendant was not properly served as described in the Plaintiff’s Affidavit of Service because of the facts listed in Defendant’s Affidavit in support of this application. The Defendant refers the Court to the following paragraphs in Defendant’s Affidavit:

_____________________________________________________________________________

**RELEVANT STATUTES**

C.P.L.R. 5015 provides the procedures and permissible grounds for vacating a judgment. Under C.P.L.R. 5015(a)(4), a Court can set aside a judgment or order for lack of personal jurisdiction to render the judgment or order. C.P.L.R. 5015(a)(1) also permits a Court to set aside a judgment or order on the grounds of a defendant’s excusable default “if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party.”

C.P.L.R. § 308 governs personal service upon a natural person. Section 308 sets out five ways in which personal service can be effected: (1) personal delivery, § 308(1); (2) “deliver and mail” or substituted service on “a person of suitable age and discretion,” § 308(2); (3) service on an authorized agent pursuant to C.P.L.R. § 318, 308(3); (4) “nail and mail” or conspicuous service only where “due diligence” has been exercised in attempting service pursuant to C.P.L.R. §§ 308(1) and 308(2), 308(4); and (5), if service is impracticable under § 308(1), (2), or (4), in such manner as the Court directs. C.P.L.R. § 308(5).
ARGUMENT

BECAUSE THE DEFENDANT HAS RAISED PERSONAL JURISDICTION, THIS COURT FIRST MUST EXAMINE WHETHER THE PLAINTIFF PROPERLY EFFECTED SERVICE OF PROCESS.

When a defendant moves to set aside a default judgment pursuant to C.P.L.R. 5015(a)(4) for lack of personal jurisdiction, a court must first determine whether the Plaintiff properly effected service of process. Marable v. Williams, 278 A.D.2d 459, 459, 718 N.Y.S.2d 400, 401 (2d Dept. 2000) (“Whether or not service was properly effectuated is a threshold issue to be determined before consideration of discretionary relief pursuant to C.P.L.R. 5015(a)(1).”); Cipriano v. Hank, 197 A.D.2d 295, 298, 610 N.Y.S.2d 523, 520 (1st Dept. 1994) (“Defendant’s lack of a reasonable excuse . . . is obviated if the court is without personal jurisdiction over defendant, and all subsequent proceedings would be rendered null and void.” (citation omitted)); Anello v. Barry, 149 A.D.2d 640, 641, 540 N.Y.S.2d 460, 461 (2d Dept. 1989) (“[T]he court erred in vacating the default as excusable pursuant to C.P.L.R. 5015(a)(1) without initially resolving the jurisdictional issue under C.P.L.R. 5015(a)(4).” (citation omitted)).

Service of process is a constitutional requirement necessary for a court to have jurisdiction over a person. Patrician Plastic Corp. v. Bernadel Realty Corp., 25 N.Y.2d 599, 607, 307 N.Y.S.2d 868, 875 (1970) (“The short of it is that process serves to subject a person to jurisdiction in an action pending in a particular court and to give notice of the proceedings.” (citations omitted)). Moreover, the Court of Appeals has held that the statutory requirements for personal service mandate strict compliance. Dorfman v. Leidner, 76 N.Y.2d at 958,563 N.Y.S.2d at 725. The Court stated that:

Service of process is carefully prescribed by the Legislature . . . . Regularity of process, certainty and reliability for all litigants and for the courts are highly

APPENDIX H - 5
desirable objectives to avoid generating collateral disputes. These objects are served by adherence to the statute . . . .

Id. (citations omitted).


Here, Defendant’s affidavit sets out facts showing that Plaintiff failed to properly serve the Defendant as required by C.P.L.R. § 308. Plaintiff failed to comply with C.P.L.R. § 308 as follows:

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

_ of ___

APPENDIX H - 5

□ Accordingly, the Defendant’s documentary evidence in support of this application demonstrates that service of process was improper as a matter of law. In cases where the documentary evidence shows that service was not proper, the Court should grant the motion to dismiss for lack of personal jurisdiction without holding a traverse hearing. Ben-Amram v. Hershowitz, 14 A.D.3d 638, 638, 789 N.Y.S.2d 313, 314 (2d Dept. 2005) (“Since it was undisputed that the defendant did not reside at the address where personal service was attempted, and the address was not alleged to be the defendant’s place of business, any purported service pursuant to CPLR 308 was ineffective, and the complaint should have been dismissed.” (internal citations omitted)); Community State Bank v. Haakonson, 94 A.D.2d 838, 839, 463 N.Y.S.2d 105, 106 (3d Dept. 1983) (“Personal jurisdiction not having been acquired, the subsequently granted default judgment was a nullity and Special Term’s attempt to exercise discretion pursuant to CPLR § 5015 was ineffectual, for it was without authority to take any action other than to dismiss the complaint . . . . And not withstanding plaintiff’s assertion to the contrary, there is no reason to remand for a factual hearing on the propriety of the service . . . . Because no disputed issue of fact is presented, a further hearing would be useless.” (internal citations omitted)); Weinberg v. Hillbrae Builders Inc., 58 A.D.2d 546, 546, 396 N.Y.S.2d 9, 10-
Accordingly, the Defendant has at least raised a question of fact with respect to this court’s jurisdiction, which should be resolved through a traverse hearing. See Kingsland Grp. v. Pose, 296 A.D.2d 440, 440-41, 744 N.Y.S.2d 715, 716 (1st Dept. 2002) (“[S]ince there was a sworn denial of receipt of process, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing.”); In re St. Christopher-Ottilio, 169 A.D.2d 690, 691, 565 N.Y.S.2d 72, 73 (1st Dept. 1991) (“[T]he court erred in failing to hold a traverse hearing on the issue of the propriety of personal service, since respondent has raised an issue of fact with respect to the service of the petition.”).

BECAUSE THE PLAINTIFF FAILED TO PROPERLY SERVE THE DEFENDANT AS REQUIRED BY C.P.L.R. § 308, THE DEFAULT JUDGMENT IN THIS CASE MUST BE VACATED AND THE CASE DISMISSED.

Pursuant to C.P.L.R. § 5015(a)(4), when a Plaintiff fails to properly serve the Defendant, a Court must vacate the default judgment entered against the Defendant. Kiesha G.-S. v. Alphonso S., 57 A.D.3d at 289, 870 N.Y.S.2d at 241 (“[A]bsent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated” (internal quotations and citation omitted)); Steele v. Hempstead Pub Taxi, 305 A.D.2d at 402, 760 N.Y.S.2d at 189 (same); Anello v. Barry, 149 A.D.2d at 641, 540 N.Y.S.2d at 461 (same); Chase Manhattan Bank, N.A., v. Carlson, 113 A.D.2d at 735, 493 N.Y.S.2d at 340 (same). A finding that a Plaintiff failed to comply with

APPENDIX H - 5
C.P.L.R. § 308’s service provisions requires this Court to dismiss the action. Dorfman v. Leidner, 76 N.Y.2d at 958, 565 N.E.2d at 473-74.

☐ “When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents.” Raschel v. Rish, 69 N.Y.2d 694, 697, 504 N.E.2d 389, 390 (1986).


ALTERNATELY, THE COURT SHOULD VACATE THE DEFAULT JUDGMENT PURSUANT TO C.P.L.R. § 5015(a)(1) BECAUSE OF DEFENDANT’S EXCUSABLE DEFAULT AND MERITORIOUS DEFENSES.

Should this Court deny Defendant’s application to set aside the default judgment pursuant to C.P.L.R. § 5015(a)(4), the Court should vacate the default judgment pursuant to C.P.L.R. 5015(a)(1).

C.P.L.R. § 5015(a)(1) gives this Court discretion to vacate a default judgment upon finding that the defendant has demonstrated a reasonable excuse for the default and advanced a ___ of ___

Defendant reasonably defaulted in appearing because:

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________

Defendant has arguable meritorious defenses because:

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________

__ of ___
APPENDIX H - 5
CONCLUSION

The New York Court of Appeals has long held that C.P.L.R. § 308 requires strict compliance with its statutory mandates. Plaintiff failed to comply with § 308 and, thus, failed to properly serve the Defendant. Accordingly, this Court has not obtained personal jurisdiction over the Defendant. For these reasons, this Court should vacate the default judgment and dismiss this action pursuant to C.P.L.R. § 5015(a)(4). At the very least, this Court should vacate the default judgment and return this action to its calendar for further proceedings in light of Defendant’s excusable default. In addition, the Court should lift all restraints and order return of any seized funds or garnished wages.

Respectfully submitted,

____________________
Pro Se Defendant

Prepared with the assistance of the CLARO Program, _________________ County, _________________, Volunteer Attorney.

This brief was prepared by Theodora Galacatos, Esq., Senior Counsel with the Feerick Center for Social Justice at Fordham Law School, for the CLARO Program, and Ricardo Avila, Legal Research Volunteer with Fordham Law School’s Feerick Center for Social Justice.
CIVIL COURT OF THE CITY OF NEW YORK

ADVISORY NOTICE
Subject: Unavailable files in Consumer Debt cases
Class: AN-17
Category: GP-10
Eff. Date: April 23, 2015

BACKGROUND:

Court files in Consumer Debt cases can be unavailable for many reasons. A Defendant who is seeking to assert lack of personal jurisdiction is at a disadvantage when attempting to raise the issue if the affidavit is unavailable for review to determine how service was alleged to have been made. The Plaintiff’s attorney is the only source of the affidavit of service other than the court file. In light of this issue, it is advised that the following steps should be followed.

ADVISORY:

1. If a file is unavailable, the file will be marked by a clerk with such an indication.

2. If the defendant is raising lack of personal jurisdiction, the Order to Show Cause should order that the Plaintiff’s attorney shall produce a copy of the affidavit of service on the return date of the motion.

3. The defendant should be offered the opportunity to submit a supplemental affidavit in support of the defense of lack of personal jurisdiction by an adjourned date of the motion. If the defendant does not wish an adjournment, then you may allow the defendant to review the affidavit of service and submit to the court a supplemental affidavit before the end of the call of the calendar. A form supplemental affidavit will be provided in the courtroom which should be provided to the defendant. The Plaintiff should be afforded a reasonable opportunity to respond to any supplemental affidavit.

4. Any temporary relief, such as a stay on the enforcement of the judgment should be continued until the motion is decided.

Date: April 23, 2015

Hon. Fern A. Fisher
Deputy Chief Administrative Judge
New York City Courts

APPENDIX H - 6
CIVIL COURT OF THE CITY OF NEW YORK

CHIEF CLERK'S MEMORANDUM

Subject: Unavailable files in Consumer Credit Matters

Class: CCM-203
Category: GP-10
Eff. Date: April 23, 2015

BACKGROUND:

Court files in Consumer Debt cases can be unavailable for many reasons. When a defendant seeks to assert lack of personal jurisdiction, they are at a disadvantage when the affidavit of service is unavailable for review and the court is unable to determine how service was alleged to have been made. When a defendant makes an application to the court and the file is not available, the unavailability of the file is not always brought to the reviewing Judge’s attention.

In order to ensure consistent practice and bring to the attention of the reviewing Judge that a file is not available, we are establishing the following procedure:

PROCEDURE:

- When a file is not available, the clerk is to clearly stamp or print on the face of the Order to Show Cause "FILE UNAVAILABLE"

  and

- Ensure that the litigant includes in the affidavit that the file is unavailable.

Dated: April 23, 2015

Carol Alt
Chief Clerk

APPENDIX H - 7
APPENDIX I

PORTFOLIO RECOVERY ASSOCIATES, LLC

April 23, 2010

Jared Kung, Appellant

Court of Appeals of New York

Respondent

PORTFOLIO RECOVERY ASSOCIATES, LLC

In the Matter of Jared Kung, Appellant

ORDER

WHEREAS the pursuant to Article 12 of the New York State Uniform Judgments, Liens and Encumbrances Law, the judgment of the Supreme Court, New York County, New York, dated November 8, 2005, is affirmed without costs;

NOW, THEREFORE, IT IS ORDERED that the judgment of the Supreme Court, New York County, New York, dated November 8, 2005, is affirmed without costs;
APPENDIX I
APPENDIX I

[5] Portfolio, as the assignee of Discoverer, is not entitled to stand in a better position than that of its assignor. We must therefore first ascertain where the cause of action accrued in favor of Discoverer. Here, it is evident that the contract, causes of action accrued in Delaware, the place where Discoverer sustained the economic injury in 1999 when King allegedly breached the contract. Discoverer is incorporated in Delaware and is not a New York resident. Therefore, the borrowing statute applies and the Delaware three-year statute of limitations governs.

That does not end the inquiry, however, because in determining whether Portfolio’s action would be barred in Delaware, this Court must “borrow” Delaware’s tolling statute to determine whether under Delaware law Portfolio would have had the benefit of additional time to bring the action (see GML Inc. v. Cinque & Cinque, P.C., 9 N.Y.3d 949, 951, 846 N.Y.S.2d 899, 877 N.E.2d 649 [2007]). Delaware’s tolling statute—Delaware Code Annotated, title 10, § 8117—provides that:

"If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person’s absence
APPENDIX I

1062 N.Y. 957 NORTH EASTERN REPORTER, 24 SERIES

until such person shall have returned into the State in the manner provided in
this section, shall not be taken as any part of the time limited for the com-
mensurate of the action?"

Section 8:17 was meant to apply only in a

situation where the defendant had a

prior conviction to Delaware, meaning

that the tolling provision envisioned that

there would be some point where the de-

fendant would return to the state or where

the plaintiff could effect service on the
defendant to obtain jurisdiction (see

Williams v. Congregation Yesher Lus, 2904,

W1 285-140, 77, 2804 U.S. Dist. LEXIS

25522, *22 (S.D.N.Y. 2004)). Indeed, Dela-

ware's highest court has held that the lit-

eral application of its tolling provision

would result in the abolition of the de-

fense of statutes of limitation in actions

involving nonresidents (Harivitch v. Adams,

62 Del. 247, 252, 156 A.2d 591, 594

[1959]).

6] There is no indication that King

ever resided in Delaware, nor is there any

indication from the case law that Delaware

intended for its tolling provision to apply
to a nonresident like King. Therefore, we

conclude that Delaware's tolling provision
does not extend the three-year statute of

limitations. Moreover, contrary to Portfo-

lio's contention, it is of no moment that

Portfolio was unable to obtain personal

jurisdiction over King in Delaware; this

Court has held that it is not inconsistent to

apply CPLR 202 in such a situation (see

Insurance Co. of N. Am. v. ABB Power

Generation, 51 N.Y.3d 190, 157-158, 658

N.Y.S.2d 143, 690 N.E.2d 1249 (1997)).

Applying Delaware's three-year statute

of limitations, the instant action should

have been commenced not later than 2002.

Because the contract claims were, not

brought until 2005, they are time-barred

in Delaware, where the causes of action ac-

crued, and therefore they are likewise

time-barred in New York upon application

of the borrowing statute. This holding is

inconsistent with one of the underlying

statutes of limitations in this state (see

Antone v. General Motors Corp., Dutch Mo-

tor Div., 64 N.Y.2d 20, 27-28, 484 N.Y.S.2d

514, 478 N.E.2d 742 [1985]).

As a final matter, we note that only

Portfolio sought a summary judgment below.

Absent a cross motion for summary judg-
mint by King, we are not empowered to

now grant that relief (see Stern v. Black-

stone, 12 N.Y.3d 873, 876, 883 N.Y.S.2d

792, 911 N.E.2d 344 [2009]; Pzuk v. Chaf-

teden, 51 N.Y.3d 78, 78-79, 883 N.Y.S.2d

829, 836 N.E.2d 116 [2008]; Merrill Hill

Vineyards v. Windy Hills Vineyard, 61

N.Y.3d 196, 110-111, 472 N.Y.S.2d 590, 460

N.E.2d 1071 [1984]).

Accordingly, the order of the Appellate

Division should be reversed, with costs,

and Portfolio's motion for summary judg-
mint should be denied.

Chief Judge LIPPMAN and Judges

CIPARICK, GRAFFEO, READ, SMITH

and JONES concur.

Order reversed, etc.

14 N.Y.3d 628

The PEOPLE of the State of

New York, Respondent,

v.

Steven ACEVEDO, Appellant.

Court of Appeals of New York.

April 29, 2010.

Background: After defendant's convic-

tions for criminal possession of a con-
CLARO BASIC TRAINING

Monday, June 4, 2018
3:00 PM – 6:00 PM

Fordham Law School
150 W 62nd St, New York, NY 10023, Room 3-01

APPENDICES – Part II

J. Sample Discovery Order
K. CLARO Discovery Documents
   1. Defendant Demand for Documents and Information – Original Creditor
   2. Defendant Demand for Documents – Debt Buyer
   3. Defendant Demand for Documents – Auto Loan
   4. Defendant Demand for Documents – Broken Lease
   5. Defendant’s First Request for Production of Documents and Things
   6. Defendant’s First Set of Interrogatories
L. Sample Plaintiff Notice to Admit
M. Sample Plaintiff Notice to Produce
N. Sample Plaintiff Interrogatories
O. Selected CPLR Provisions Related to Discovery
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART II

Plaintiff(s)

ORDER FOR DISCOVERY

-against-

Defendant(s)

It is hereby ORDERED that the Plaintiff is to serve, by mail, upon the Defendant within

[ ] 45 Days
[ ] 90 days
[ ] 120 Days

[ ] A copy of the signed contract, application, or Card member agreement giving rise to the alleged debt

[ ] Any and all billing statements for the sued-upon account (transactional history)

[ ] Any and all documentation proving validation of the debt, acquisition of the alleged debt (if Plaintiff is not the original creditor, to prove standing); or any and all documentation proving assignment or transfer of the subject account.

Failure to comply with this Order shall result in the Plaintiff being precluded from presenting such evidence at trial.

Dated: 5-6-13

Judge, Civil Court

APPENDIX J
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

Plaintiff,

- against -

Defendant.


Index No. _________________

To: ________________, NY ________________

I, ________________, am the Defendant in the above-captioned action. Please provide me with all records pertaining to the alleged debt, including:

1. The fully executed credit agreement and all amendments.
2. The entire history of payments, and all statements sent to the account holder.
3. All documents related to proof of mailing of statements.
4. All documents relating to any dispute concerning the validity of the alleged debt.
5. All documents relating to cancellation or termination of the agreement.
6. A detailed breakdown of all interest and fees that Plaintiff is seeking.
7. All documents relating to any alleged payment or settlement agreement between Plaintiff and Defendant regarding the alleged debt.
8. All documents related to reporting made to any consumer reporting agencies.
9. All documents related to proof of service, including a copy of the affidavit of service filed with the court and all documents related to compliance with section 20-410 of the New York City Administrative code, including a hard-copy print out of the electronic record of the time, date and location of alleged service and any supporting documents.

Kindly send the information and documents to me at the below address within 25 days.

Sincerely,

__________________________

Signature

__________________________

Name

Defendant, pro se

__________________________, NY ________________

APPENDIX K-1

Original Creditor Prepared using the NYC Consumer Debt Defense Project's free advocate forms.
6/8/13 Prepared with the assistance of Bronx CLARO by ________________.
CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX  

Index No. _________________

Plaintiff,  
- against -  

Defendant.

Dear [Plaintiff’s Name],

I, [Defendant’s Name], am the Defendant in the above-captioned action. Please provide me with all records pertaining to the alleged debt, including:

1. The fully executed credit agreement and all amendments.
2. The entire history of payments, and all statements sent to the account holder.
3. All documents related to proof of mailing of statements.
4. All documents relating to any dispute concerning the validity of the alleged debt.
5. All documents relating to cancellation or termination of the agreement.
6. A detailed breakdown of all interest and fees that Plaintiff is seeking.
7. All documents relating to any alleged payment or settlement agreement between Plaintiff and Defendant regarding the alleged debt.
8. All information and documents relating to Plaintiff’s acquisition of the alleged debt, including, without limitation, executed copies of all assignments/transfers.
10. All documents related to reporting made to any consumer reporting agencies.
11. All documents related to proof of service, including a copy of the affidavit of service filed with the court and all documents related to compliance with section 20-410 of the New York City Administrative code, including a hard-copy print out of the electronic record of the time, date and location of alleged service and any supporting documents.

Kindly send the information and documents to me at the below address within 25 days.

Sincerely,

[Signature]

[Name]

Defendant, pro se

[Address], NY _________________

APPENDIX K-2

Debt Buyer  Prepared using the NYC Consumer Debt Defense Project’s free advocate forms.
6/8/13  Prepared with the assistance of Bronx CLARO by ____________________.
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

Plaintiff,

- against -

Defendant.

To:

I, ________________, am the Defendant in the above-captioned action. Please provide me with all records pertaining to the alleged debt, including:

1. The fully executed financing agreement and all amendments.
2. The entire history of payments, and all statements sent to the signatory, co-signer, or guarantor.
3. All documents related to proof of mailing of statements.
4. All documents relating to any dispute concerning the validity of the alleged debt.
5. All documents and correspondence relating to the condition or functioning of the vehicle and any subsequent sale of the vehicle.
6. A detailed breakdown of all interest and fees that Plaintiff is seeking.
7. All documents relating to any alleged payment or settlement agreement between Plaintiff and Defendant regarding the alleged debt.
8. All documents related to reporting made to any consumer reporting agencies.
9. All documents related to proof of service, including a copy of the affidavit of service filed with the court and all documents related to compliance with section 20-410 of the New York City Administrative code, including a hard-copy print out of the electronic record of the time, date and location of alleged service and any supporting documents.

Kindly send the information and documents to me at the below address within 25 days.

Sincerely,

_________________

Signature

_________________

Name

Defendant, pro se

_________________, NY _______________

APPENDIX K-3

Auto Loan

Prepared using the NYC Consumer Debt Defense Project's free advocate forms.

6/8/13

Prepared with the assistance of Bronx CLARO by _________________.

Prepared using the NYC Consumer Debt Defense Project's free advocate forms.
I, _________________, am the Defendant in the above-captioned action. Please provide me with all records pertaining to the alleged debt, including:

1. The fully executed lease agreement and all renewal leases, riders, and amendments.
2. A detailed breakdown of all rent, interest, fees, and other charges that Plaintiff is seeking, and of any payments made or credit applied, including for my security deposit.
3. The name(s) of any software used to generate the records provided pursuant to Demand No. 2.
4. Any and all statements sent to the lessee, co-signer, or guarantor.
5. All documents relating to any alleged payment or settlement agreement between Plaintiff and Defendant regarding the alleged debt.
6. All documents related to rent collected for the premises during the remainder of the period of the lease in question.
7. All documents related to proof of mailing of statements.
8. All documents relating to any dispute concerning the validity of the alleged debt.
9. All documents relating to the termination of the lease and lessee’s vacatur of the premises.
10. The Certificate of Occupancy and Multiple Dwelling Registration corresponding to the premises.
11. All documents and correspondence relating to repairs requested or performed at the premises from the beginning of the tenancy to present.
12. All documents relating to repairs requested or performed to address conditions in the building that affect the common areas or more than one unit from the beginning of the tenancy to present.
13. All documents relating to any formal and informal complaints by lessees or occupants of the premises from the beginning of the tenancy to present.
14. All documents relating to any complaints, investigations, or violations from the NYS Department of Housing and Community Renewal, NYC Housing Preservation and Development, or NYC Department of Buildings.
15. All documents related to reporting about Defendant made to any consumer reporting agencies.
16. All documents related to proof of service, including a copy of the affidavit of service filed with the court and all documents related to compliance with section 20-410 of the New York City Administrative code, including a hard-copy print out of the electronic record of the time, date and location of alleged service and any supporting documents.
17. The name(s) of the person(s) who maintain(s) the records provided pursuant to this Demand.
18. ______________________________________________________________________
   ______________________________________________________________________

APPENDIX K-4
Kindly send the information and documents to me at the above address within 25 days.

Sincerely,

Defendant, pro se

APPENDIX K-4
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF _______________________

---------------------------------------------------------------X

Plaintiff,

-against-

Defendant.

---------------------------------------------------------------X

PLEAS TAKE NOTICE that, pursuant to Article 31 of the New York Civil Practice Law and Rules, Defendant ________________ (“Defendant”), hereby requests that Plaintiff produce for inspection and copying the documents hereinafter described at Defendant's address: __________________________________________________, within twenty days of service hereof.

DEFINITIONS

As used in this Request, the following terms shall have the meanings set forth below, unless otherwise specifically indicated.

1. “Document” and “documents” mean each and every permanent or semipermanent, physical or tangible embodiment of information or of communication which is in the actual or constructive possession, custody, care or control of Plaintiff or its attorney or other person acting in their behalf, including but not limited to all drafts and copies of any and all written, printed or graphic matter such as correspondence, e-mail, telegrams, telex or telecopier printouts, notes, internal or external memoranda, minutes, records, or recordings of any type of personal or telephone conversations or of meetings or conferences, contracts, phone conversations or of meetings or conferences, contracts, agreements, bills, books of account,
calculations, invoices, bank checks, vouchers, work orders, reports, lists, press releases, studies, analyses, charts, graphs, plans, working papers, schedules, files, diaries, logs, desk pads, appointment books, calendars, notebooks, forms, movie and/or still photographs, video tape recordings and/or surveillance tape recordings, and any other documents, however produced or reproduced (excepting those documents prepared by legal counsel solely for the conduct of this litigation), whether prepared by you for your own use or transmittal, or received by you, and wherever located.

2. A document is deemed to be in the “control” of Plaintiff if Plaintiff has the right to secure the document or a copy thereof from another person or public or private entity having actual physical possession thereof.

3. The words “relating to” mean in whole or in part, and directly or indirectly: referring to, concerning, connected with, commenting on, responding to, showing, describing, analyzing, reflecting, regarding, constituting, mentioning, evidencing, received by, prepared by or written by.

4. The word “and” means and/or.

5. The word “or” means or/and.

6. “Person” includes a natural person, firm, association, organization, partnership, business, trust, limited liability company, corporation, or entity.

7. “You” or “your” means Plaintiff to whom this request is directed, as well as any officers, directors, managers, employees, agents, independent contractors or other persons acting on Plaintiff’s behalf.

Appendix K-5
INSTRUCTIONS

8. If any document designated below is withheld on the basis of any claim of privilege, please state in writing with respect to each document so withheld (1) the name and position of each author of the document, (2) the name and position of each person who received, read or saw the document, (3) the date of the document, (4) the subject matter of the document and (5) the grounds for claim of privilege.

9. In the event that any document called for has been destroyed, that document is to be identified as follows: whether original or draft, manner of recording or reproduction, addressor, addressee, author, indicated or blind copies, date, subject matter, number of pages, attachments or appendices, all persons to whom distributed, shown or explained, date of destruction, manner of destruction, reason for destruction, person authorizing destruction, person destroying the document and custodian of the document on the date and time of destruction.

10. In the event that any document called for is no longer in the possession of Plaintiff, that document is to be identified as follows: whether original or draft, manner of recording or reproduction, addressor, addressee, author, indicated or blind copies, date, subject matter, number of pages, attachments or appendices, all persons to whom distributed, shown or explained, present custodian and reason for transfer from Plaintiff to its present custodian.

11. If your response or production is qualified or limited in any particular manner, please set forth the details and specifics of such qualification or limitation.

12. This First Request for Production of Documents and Things is a continuing request that requires supplemental responses. If any document that is within the scope of this request is not now known, identifiable or available but becomes known, identifiable or available at some future time, Plaintiff shall forthwith so notify Defendant in writing and,
unless otherwise agreed, shall produce a true copy thereof at Defendant’s address, within 20 days of such notice.

13. If a requested document is on a computer or computer diskette, produce a printout of the document together with the copy of the document on a 3½ inch double-sided diskette in WordPerfect or MS Word format or in some other readable format.

14. With respect to the documents produced, you shall produce them as they are kept in the usual course of business, labeling them to correspond with each numbered paragraph of this request in response to which such documents were produced.

15. Each request should be construed independently. No request should be construed by reference to any other request for the purpose of limiting the scope of response to such request.

REQUESTS FOR PRODUCTION

1. All documents relating to the purchase and assignment of said account.

2. All documents and correspondence relating to the application for and approval of account at issue.

3. All documents relating to the approval procedure for providing said account.

4. The executed agreement(s) containing the terms and conditions governing the use of said account.

5. All documents relating the service used on said account.

6. All documents relating to the interest rates, charges, fees and any other costs on the account.

7. All account statements that were sent to the account-holder for said account.

8. All documents relating to any dispute relating to the validity of said account.
9. All documents relating to your compliance with your rights or obligations under N.Y.C. Admin. Code § 20-490.

10. All documents relating to said account and any credit reporting agencies.

11. All documents relating to any alleged payment or settlement agreement between plaintiff and defendant regarding the account at issue in this case.

Dated: _______________, New York
        _______________, 201_

Respectfully submitted,

Defendant:
Defendant's address:

To: Attorney for Plaintiff:
   Address:
DEFENDANT’S FIRST
SET OF INTERROGATORIES

PLEASE TAKE NOTICE that, pursuant to Article 31 of the New York Civil Practice Law and Rules, Defendant ____________________ ("Defendant"), directs the following interrogatories to Plaintiff and requests that in no later than 20 days, Plaintiff provide verified responses to the undersigned.

DEFINITIONS

1. "COMPLAINT" means the Complaint in this action.

2. "ACCOUNT" or "SAID ACCOUNT" means the Retail Charge Account alleged to belong to Defendant and at issue in this action.

3. The term "DOCUMENT" is used in the broadest sense consistent with the Civil Practice Law and Rules of the State of New York. The term includes, without limitation, any written, recorded, transcribed, taped photographic or graphic matter, any electronically, magnetically or digitally stored information, including, without limitation, voice mail, electronic mail, software, source code, object code or hard or floppy disc files, any other tangible things, and all copies of any of the foregoing that are different in any way from the original.

4. "PERSON" includes a natural person, firm, association, organization, partnership, business, trust, limited liability company, corporation, or entity.
5. “IDENTIFY” means the following:

(a) When used with respect to a person, state the full name, present (or last known) address, present (or last known) phone number, and, when used with respect to a natural person, the person’s job title, job duties, and employer.

(b) When used with respect to a document, state the document type (i.e., whether it is a letter, fax, email, memorandum, etc.), date, author, and recipients.

(c) When used with respect to a location, state the name and address of the location. When the location requested is within a building, identify the approximate location within that building.

(d) When used with respect to images, state the media the image appeared in, describe the image, and the date that the image appeared in the media.

6. “CONCERNING” means referring to, relating to, describing, evidencing or constituting.

7. “COMMUNICATIONS” refer to all documents reflecting any verbal or written communication.

8. “YOU” or “YOUR” means the Plaintiff, as well as any officers, directors, managers, employees, agents, independent contractors or other persons acting on the Plaintiff’s behalf.

9. “AND” and “OR” shall be construed conjunctively or disjunctively as necessary to make the disclosure requests inclusive rather than exclusive; use of a singular noun shall be construed to include the plural noun and use of a plural noun shall be construed to include the singular noun; the use of a verb in any tense shall be construed as the use of that verb in all other tenses whenever necessary to bring within the scope of the disclosure request documents or information that might otherwise be construed to be outside its scope.
INSTRUCTIONS

1. Responses to these interrogatories shall be supplemented and/or amended to the extent required by the Civil Practice Law and Rules of the State of New York. These interrogatories shall be deemed to impose a continuing duty to properly serve supplemental and/or amended responses as you acquire additional knowledge and/or information relating to these interrogatories.

2. These interrogatories are intended to cover any and all information, documents, and things in your global charge and/or possession as well as those subject to your custody and/or control, whether in your possession, at the office of your attorneys, and/or at any other place and/or in the possession of any other person and/or entity subject to your control.

3. If your answer refers to or incorporates a document, produce that document for inspection and copying.

4. If you object to a particular interrogatory, you are requested to state the precise grounds upon which your objection rests.

INTERROGATORIES

Interrogatory No. 1

Describe the process by which you purchased and received assignment of the account at issue in this case. Provide the date of such purchase and assignment.

Interrogatory No. 2

Describe your rights and obligations and the rights and obligations of the assignor under this agreement.

Interrogatory No. 3

Identify when Defendant allegedly applied for said account. Describe the application process and the assignor’s rules and procedures to determine whether to approve the provision of said account.
Interrogatory No. 4

Describe the terms and conditions governing the use of said account, including terms of payment and reasonable attorney fees.

Interrogatory No. 5

Identify each charge, including the date of the charge, the party to whom the charge was made, the amount of the charge, made by the account-holder equaling the sum demanded in the complaint. Explain the basis for demanding interest as alleged in the complaint.

Interrogatory No. 6

Identify the Annual Percentage Rate charged to the account month by month for the life of the account.

Interrogatory No. 7

Describe your rights or obligations under N.Y.C. Admin. Code § 20-490, identify your license number under N.Y.C. Admin. Code § 20-490, if any, and the expiration date of that license number.

Interrogatory No. 8

Identify any individuals, including every individual’s job title, who spoke with defendant about the account at issue. Identify the date and time each individual spoke to defendant. Describe the information given to defendant regarding the status of the account and/or litigation at issue for each conversation or correspondence.

Interrogatory No. 9

Identify the date of the last payment made by the Defendant on this account.

Dated: ________________, New York
______________________, 201_

Respectfully submitted,

Defendant
Defendant’s Address:

To: Attorneys for Plaintiff:
Address:

Appendix K-6
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

PLAINTIFF,

AGAINST-

DEFENDANT(S).

INDEX NUMBER
FILE NO. C515153

NOTICE TO ADMIT TRUTH OF FACTS

SIRS, PLEASE TAKE NOTICE, that pursuant to CPLR §3123 you are hereby requested to furnish to the undersigned, within twenty (20) days after the service of this notice, a written admission of the truthfulness of the following facts.

Dated: Woodbury, New York
May 1, 2013

Cohen & Slamowitz, LLP
By: Mitchell Pastkin, Esq.
Attorneys for Plaintiff
199 Crossways Park Drive
Woodbury, New York 11797
Phone No. (516) 364-6006
Fax No. (516) 364-2776

To:
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

PLAINTIFF,

-AGAINST-

DEFENDANT(S).

INDEX NUMBER
FILE NO. C315153

FACTS TO BE ADMITTED OR DENIED

1. Defendant (hereinafter the "Defendant") requested a credit card account (the "Account") from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.

A.

2. Defendant received a credit card application (the "Application") from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.

A.

3. Defendant signed the Application.

A.

4. Defendant delivered to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. the executed Application.

A.

5. Defendant received a cardmember agreement from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.

A.

6. Defendant received a credit card from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.

A.

APPENDIX L
7. Defendant utilized the credit card received from Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A.

A.

8. Defendant obtained credit on account number [redacted] from Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A.

A.

9. Defendant charged various goods and services to the Account.

A.

10. Defendant received periodic billing statements from Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A.

A.

11. Defendant did not dispute any of the periodic billing statements sent by Plaintiff.

A.

12. The last statement received by Defendant stated an outstanding balance of $5,970.19.

A.

13. Defendant has made no payments towards the outstanding debt after receiving the last statement from Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A.

A.

Dated: ____________________________

APPENDIX L
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

PLAINTIFF,

-AGAINST-

DEFENDANT(S).

---------------------------------------------X

FILE NO. C515153

NOTICE TO PRODUCE

Plaintiff, by its attorneys, Cohen & Slamowitz, LLP, demands that Defendant serve to the undersigned at their office within twenty days of the service upon Defendant a response to the following Notice to Produce pursuant to section 3120 of the New York State Civil Practice Law and Rules:

1. Provide a copy of a telephone, electric, gas, cable, internet service provider bill, lease, bank statement, mortgage statement or deed showing Defendant’s residence for the last five years preceding the date of this Notice to Produce.

2. Provide a copy of all emails, letters, faxes and other written communications Defendant or his/her agent sent Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. regarding any attempt by Defendant to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. to modify or alter the interest, Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. charges on the credit card account, the amount due on the credit card account, the payment terms on the credit card account or any other term or provision of the agreement between Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. and Defendant.

3. Provide a copy of all emails, letters, faxes and other written communications Defendant or his/her agent received from Plaintiff regarding any attempt by Defendant to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. to modify or alter the interest, Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. charges on the credit card account, the amount due on the credit card account, the payment terms

APPENDIX M
on the credit card account or any other term or provision of the agreement between Plaintiff's predecessor-
in-interest, CHASE BANK USA, N.A. and Defendant.

4. If Defendant claims that Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. did not credit
Defendant for any payment Defendant made towards the balance due on the credit card account,
provide proof of the payments made and not credited

5. Provide a copy of the statements for all of Defendant's bank accounts for the last five years preceding
the date of this Notice to Produce (Defendant may redact any portion of a statement that has no
relation to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. and still be considered
as having complied with this demand.).

6. Provide a copy of Defendant's check registers or lists or databases maintained regarding all checks
written and payments made by Defendant for the last five years preceding the date of this Notice
to Produce (Defendant may redact any portion of a statement that has no relation to Plaintiff's
predecessor-in-interest, CHASE BANK USA, N.A. and still be considered as having complied
with this demand.).

7. Provide a copy of all credit card account statements possessed by Defendant regarding Defendant's
credit card account with Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.

8. Provide a copy of all agreements, statements of terms and conditions and amendments, changes or
revisions to the agreements and statements of terms and conditions, including but not limited to any
change in interest rates, possessed by Defendant regarding Defendant's credit card account Plaintiff's
predecessor-in-interest, CHASE BANK USA, N.A.

9. Provide a copy of the document Defendant sent to Plaintiff's predecessor-in-interest, CHASE BANK
USA, N.A. to apply for a card account with Plaintiff's predecessor-in-interest, CHASE BANK
USA, N.A. or to respond to an offer by Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.
to Defendant to open a credit card account for Defendant.

10. Provide a copy of any offer by Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. to
Defendant to open a credit card account for Defendant.

11. Provide a copy of Defendant’s driver’s license or other government issued ID.

12. For each Affirmative Defense and Counterclaim set forth in Defendant’s Answer, provide any and all documents which support each Affirmative Defense and Counterclaim specifying the Affirmative defense or Counterclaim to which each document applies.

13. For each allegation in the Complaint which Defendant did not admit, provide any and all documents which support or provide a basis for not admitting the allegation specifying the allegation to which each document applies.

14. Provide a copy of all documents which Defendant intends or may use at any trial of this action or in defense of any summary judgment motion in this action other than the documents already provided in response to one of the demands in this Notice To Produce.

15. If there came a time when there was a changed to the credit card account number on the credit card account Defendant had with Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A., provide a copy of any and all documentation or notices Defendant received from Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A. regarding this change?

16. For each dispute or objection, if any, made by the defendant regarding the periodic billing statements sent by Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A. provide:

   a. a copy of each and every communication, including any emails, from the defendant to the Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A.,

   b. a copy each and every communication, including any emails, from the which Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A. to the defendant including any emails,

   c. a copy of each periodic billing statement containing a disputed item, and

   d. a copy each and every communication, including any emails, to and from any person or entity other than Plaintiff’s predecessor-in-interest, CHASE BANK USA, N.A.
17. Provide a copy of any communication, if applicable, that your credit card account was sold or assigned.

18. Provide a copy of any communications Defendant sent each time Defendant received a communication that Defendant's credit card account was sold or assigned and that you owed an outstanding balance.

19. If Defendant made payments in response to receiving communications that your credit card account was sold or assigned and that you owed an outstanding balance, provide a copy or other proof of each payment.

20. If you are disputing that you had an account with the Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A., provide proof of your residence for each of the last 8 years.

Dated: May 1, 2013

Mitchell L. Pashkin
Cohen & Slamowitz, LLP
Attorneys For Plaintiff
199 Crossways Park Drive
Woodbury, NY 11797
516-564-6006
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

PLAINTIFF,

AGAINST

DEFENDANT(S).

INDEX NUMBER
FILE NO. CS15153

INTERROGATORIES

The plaintiff, by its attorneys, Cohen & Slamowitz, LLP, demands that the defendant serve to the undersigned at their office within twenty days of the service upon the defendant a response to the following Interrogatories pursuant to section 3130 of the New York State Civil Practice Law and Rules:

1. Did Defendant apply for a credit card account Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. in writing, by telephone or via the internet?

2. If Defendant applied for a credit card account Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. in writing, did Defendant sign and return the application Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

3. How did Defendant come to have a credit card account with Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

4. How did Defendant apply for or request Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. to open a credit card account in Defendant's name?

5. What documents did Defendant sign to apply for or Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. to open a credit card account in Defendant's name?

6. Did Defendant receive a credit card or credit card account Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. as a result of applying for a credit card account from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. or responding to an offer from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. for Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. to open

APPENDIX N
7. Did Defendant use the credit card or credit card account it received from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

8. If Defendant used the credit card account, describe how Defendant used the credit card account?

9. Did Defendant authorize or allow someone besides themselves to use the credit card or credit card account?

10. If Defendant authorized or allowed someone besides themselves to use the credit card or credit card account, describe how the credit card or credit card account was used?

11. Did there come a time when Defendant received from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. amendments, changes or revisions to the agreement or statement of terms and conditions it had with Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A., including but not limited to any change in interest rates?

12. If there came a time when Defendant received Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. amendments, changes or revisions to the agreement or statement of terms and conditions it had with Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A., including but not limited to any change in interest rates, what action did Defendant take in response to receiving each amendment, change or revision?

13. Did Defendant receive billing or account statements from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

14. How did you receive the billing or account statements from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

15. At what intervals did you receive the billing or account statements from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

16. What did you do in response to receiving the billing or account statements Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?
towards the balance due on the credit card account, provide the date and amount.

19. Describe each way Defendant made a payment to with Plaintiff's predecessor-in-interest, CHASE USA, N.A. towards the balance due on the credit card account?

20. Did Defendant stop making payments to Plaintiff's predecessor-in-interest, CHASE USA, N.A.?

21. When did Defendant stop making payments to Plaintiff's predecessor-in-interest, CHASE USA, N.A.?

22. Was there a balance due on the credit card account at the time defendant stopped making payments to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

23. What was the amount owed on the credit card account at the time defendant stopped making payments to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

24. Provide in detail all the reasons you stopped making payments to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?

25. Did the final account statement Defendant received from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. reveal an outstanding balance of $5,970.19?

26. If the final account statement Defendant received from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. did not reveal an outstanding balance of $5,970.19, what outstanding balance did it reveal?

27. Did Defendant make payments to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. towards the outstanding balance revealed on the final account statement Defendant received from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.?
28. If Defendant made payments to with Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. towards the outstanding balance revealed on the final account statement Defendant received from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A., provide the date and amount of each payment?

29. Did you receive documents from with Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. besides the account or billing statements when you first opened the credit card account?

30. Provide the name or the description of the documents you received Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. besides the account or billing statements when you first opened the credit card account?

31. Other than the documents identified in response to the above question,
   a. did you receive other documents from Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. besides the account or billing statements?

   b. provide the name or the description of the documents?

32. Provide a list of all addresses at which you lived or received mail during the past 15 years?

33. For each dispute or complaint or objection, if any, made by Defendant Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. regarding the account set forth in the Complaint in this lawsuit or the account statements regarding this account, provide:
   a. a detailed description of the substance of the dispute,

   b. each date the dispute was communicated to Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.,

   c. the manner in which the dispute was communicated Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. on each of the dates,

   d. the name of each person who Defendant communicated with on behalf of Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. regarding the
dispute on each of the dates,

e. a detailed description of the substance of each communication regarding the
dispute,

f. a list of all other actions Defendant took to attempt to get Plaintiff's
predecessor-in-interest, CHASE BANK USA, N.A. to resolve the dispute, and
g. the results of the dispute including the extent to any which the dispute
remains unresolved

34. If Defendant believes Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. breached
its agreement with Defendant or failed to provide proper services to Defendant, provide:

a. a detailed description of each service not provided,

b. for each service not provided, the exact provision of the agreement Plaintiff's
predecessor-in-interest, CHASE BANK USA, N.A. and Defendant which required
the provision of the service and the date of the agreement which contains the
provision,

c. for each service not provided, a list of all actions the Defendant took to
attempt to get Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A.
to provide the service and Plaintiff's predecessor-in-interest, CHASE BANK
USA, N.A. response to each action including the date of each action by
Defendant and the date of each response by with Plaintiff's predecessor-in-
interest, CHASE BANK USA, N.A. and

d. for each service not provided, a description of the damages suffered by the
defendant as a result of the failure to provide the service

35. If Defendant Plaintiff's predecessor-in-interest, CHASE BANK USA, N.A. did not
provide a proper accounting, provide in reasonable detail:

APPENDIX N
a. the manner in which there was a failure to provide a proper accounting,
b. the exact provision of the agreement between Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. and Defendant which required the accounting,
c. a list of all actions Defendant took to attempt to get with Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. to provide the proper accounting Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. response to each action including the date of each action by Defendant and the date of each response Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. and
d. description of the damages suffered by Defendant as a result of the failure to provide the proper accounting.

36. For each term of the agreement Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. allegedly unilaterally, without notice or consent, changed, provide:
   a. the exact term of the agreement and the date of the agreement which contained the term,
   b. the date on which Defendant learned of each change,
   c. list of all actions Defendant took regarding each change and Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. response to each action including the date of each action by Defendant and the date of each response by Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. and
   d. description of the damages suffered by Defendant as a result of each change.

37. Provide the exact amount of money owed by Defendant Plaintiff's predecessor-in-interest, CHASE BANK USA,N.A. regarding the account specified in this lawsuit
and a detailed explanation for the reasons, if any, between the differences between
the amounts claimed in the lawsuit and the amount Defendant believes it owes.

38. For each Affirmative Defense and Counterclaim set forth in Defendant’s Answer,
provide a detailed explanation and recitation of facts which support each Affirmative
Defense and Counterclaim specifying the Affirmative defense or Counterclaim to which
the explanation and recitation applies.

39. For each allegation in the Complaint which defendant did not admit, provide a detailed
explanation regarding the reasons defendant did not admit the allegation

40. Did there come a time when there was a change to the credit card account number on
the credit card account Defendant had with Plaintiff’s predecessor-in-interest, CHASE
BANK USA, N.A.?

41. If the answer is yes to the above question, how many times did it change, what were
each of the new account numbers and what was the reason for each change?

42. Are you aware that your credit card account with Plaintiff’s predecessor-in-interest,
CHASE BANK USA, N.A., if applicable, was sold or assigned to Plaintiff?

43. Are you aware that your credit card account, if applicable, was sold or assigned to any
other entity prior to being sold or assigned Plaintiff’s predecessor-in-interest, CHASE
BANK USA, N.A.?

44. For each time that you became aware that your credit card account was sold or assigned,
if applicable, how did you become aware of it?

45. Did you receive any communications regarding any sale or assignment of your credit
account, if applicable; and if so, from whom did you receive the communications
on each occasion it was sold or assigned?

46. For each time that you received any communication that your credit card account was

APPENDIX N
sold or assigned, did the communication include information regarding the amount you owed?

47. What actions did you take in response to each communication you received that your credit card account was sold or assigned and that you owed an outstanding balance?

48. If Defendant made payments in response to receiving communications that your credit card account was sold or assigned and that you owed an outstanding balance, provide the date and amount of each payment?

49. Provide the month and year during which you last received a statement or bill from Plaintiff.

50. Set forth the number of months between the time you last received a statement or bill from Plaintiff and the time you received the lawsuit.

51. Provide the month and year during which you last received a statement or bill from Plaintiff.

52. Set forth the number of months between the time you last received a statement or bill from 's predecessor-in-interest, CHASE BANK USA, N.A. and the time you received the lawsuit.

53. Provide the month and year during which you last received a statement or bill from 's predecessor-in-interest, CHASE BANK USA, N.A.

Dated May 1, 2013

Mitchell L. Pashkin
Colen & Slamowitz, LLP
Attorneys For Plaintiff

APPENDIX N
§ 3103. Protective orders

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

HISTORY:

NOTES:
Practice Insights:

COMPARING STAYS OF DISCLOSURE
By David L. Ferstendig, Law Offices of David L. Ferstendig, LLC
General Editor. David L. Ferstendig

INSIGHT
Under CPLR 3103, a motion for a protective order only stays the particular discovery in dispute. In contrast, a CPLR 3214 (b) stay of disclosure, which applies to the service of a motion to dismiss or for summary judgment, is a complete stay, with a limited exception relating to a service defense. It stays all discovery in the action, "unless the court orders otherwise," thereby abrogating the stay. Unfortunately, over the years, attorneys have used the automatic stay provision...
NEW YORK CONSOLIDATED LAW SERVICE
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*** This section is current through 2013 released chapters 1-383 ***

CIVIL PRACTICE LAW AND RULES
ARTICLE 31. DISCLOSURE

Go to the New York Code Archive Directory

NY CLS CPLR R 3120 (2013)

R 3120. Discovery and production of documents and things for inspection, testing, copying or photographing.

1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:

   (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served; or

   (ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

2. The notice or subpoena duces tecum shall specify the time which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity.

3. The party issuing a subpoena duces tecum as provided hereinafter shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof.

4. Nothing contained in this section shall be construed to change the requirement of section 2307 that a subpoena duces tecum to be served upon a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof, requires a motion made on notice to the library, department, bureau or officer, and the adverse party, to a justice of the supreme court or a judge of the court in which the action is triable.

HISTORY:

APPENDIX O
§ 3123. Admissions as to matters of fact, papers, documents and photographs

(a) Notice to admit; admission unless denied or denial excused. At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial, a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry. Copies of the papers, documents or photographs shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. If the matters of which an admission is requested cannot be fairly admitted without material qualification or explanation, or if the matters constitute a trade secret or such party would be privileged or disqualified from testifying as a witness concerning them, such party may, in lieu of a denial or statement, serve a sworn statement setting forth in detail his claim and, if the claim is that the matters cannot be fairly admitted without material qualification or explanation, admitting the matters with such qualification or explanation.

(b) Effect of admission. Any admission made, or deemed to be made, by a party pursuant to a request made under this rule is for the purpose of the pending action only and does not constitute an admission by him for any other purpose nor may it be used against him in any other proceeding; and the court, at any time, may allow a party to amend or withdraw any admission on such terms as may be just. Any admission shall be subject to all pertinent objections to admissibility which may be interposed at the trial.

(c) Penalty for unreasonable denial. If a party, after being served with a request under subdivision (a) does not admit and if the party requesting the admission thereafter proves the genuineness of any such paper or document, or the correctness or fairness of representation of any such photograph, or the truth of any such matter of fact, he may move at or immediately following the trial for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or the refusal otherwise to admit or that the admissions sought were of no substantial importance, the order shall be made irrespective of the result of the action. Upon a trial by jury, the motion for such an order shall be determined by the court outside the presence of the jury.
APPENDIX O

HISTORY:

NOTES:

Expert Analysis:

Richard F. Griffin

This Rule permits the service of a notice requiring a party to admit or deny certain facts about which the party requesting the admission reasonably believes there can be no substantial dispute at the trial. The party receiving the notice must respond with a specific denial or explanation of why the matter cannot be fairly admitted (e.g., privileged information) and if there is no response, the matter is deemed admitted. If admitted, the fact is established for the purpose of the pending action only. If denied without good reason, the Court may order the party to pay the expense incurred in making the proof at the trial of the facts, including reasonable attorney's fees. The purpose of the Rule is to avoid the time and expense involved in calling witnesses to prove facts over which there can be no reasonable dispute.

Only Basic Facts Not in Dispute Should be Subject of Notice to Admit

The subject matter of a motion to admit should be an uncontested fact. The Rule uses the test, "No substantial dispute at the trial, of the accuracy of the facts of statement." Most often the motion to admit is used to authenticate documents and to establish that they are business records: "Defendant is requested to admit the following: (1) the exhibits attached to this notice (A through M) were prepared by an employee of the defendant whose name appears thereon; (2) exhibits A through M were prepared in the regular course of the business of the defendant; (3) the preparation of such reports is part of the regular course of the defendant's business; (4) the information contained in the reports was obtained and the report prepared, reasonably concurrent with the events which are recorded." Although this is the most common use for a notice to admit, this disclosure device should not be limited to documents and can be used effectively to establish a wide range of basic undisputed facts, such as ownership of property or vehicles; employment status; dates when acts were committed; oral statements; notice: absence of objection to activities.

Matters of opinion are not the proper subject for a notice to admit (see, e.g., Harroche v Harroche (1972, 2d Dept) 38 AD2d 957, 331 NYS2d 466.) In Harroche, the notice to admit sought the husband's admission of the necessity for and reasonableness of the dental treatment furnished by a dentist to the parties child. The court held that the matters of expert opinion, such as this, were not proper subject matter for request for admissions.

In Washington v Alco Auto Sales (1993, 1st Dept) 199 AD2d 156, 605 NYS2d 271, the court cautioned that notices to admit which for the most part repeated the allegations of a complaint, improperly demanded that defendants concede many matters that are in dispute or clearly denied, and that a motion to admit is to be used only for disposing of uncontested questions of fact or those that are easily provable.

General discovery devices can not be replaced by a notice to admit. Lewis v Hertz Corp. (1993, 1st Dept) 192 AD2d 470, 597 NYS2d 366. In Lewis, the First Department held that the purpose of a notice to admit is to eliminate from the litigation factual matters, which will not be in dispute at trial, not to obtain information in lieu of other discovery devices.

Sworn Statement Required When Fact is Denied or Qualified Response is Given

A party has twenty (20) days in which to respond to the notice and to deny the truth of the statements or to qualify the response. The Rule requires a sworn statement if there is to be a denial or a qualified response. If the matter is clearly not accurate, there may be a specific denial. If the party cannot fairly admit the matter without some material qualification or if the matter constiutes a trade secret or privileged matter, the party, in lieu of a statement of denial, may serve a sworn statement with the reasons. If there is need for qualification or explanation, the matters which do not require the qualification or explanation are to be admitted.
Notice May be Served Up to 20 Days Before Trial

Sub (a) permits the notice requesting admissions to be served not later than twenty (20) days before trial. Because a notice to admit is generally not regarded as a discovery device, the filing of a statement of readiness will not necessarily preclude later use of a notice for admission upon the eve of trial. The court, however, has discretion to decide whether a notice demanding admissions is in fact being used as a discovery device and regard discovery as being closed based upon the certificate of readiness.

In *Hodes v New York* (1991, 1st Dept) 165 AD2d 168, 566 NYS2d 611, the court permitted a notice to be served just before trial because, although the certificate of readiness had been filed, the notice is not truly a discovery device but a method of "crystallizing issues." According to the court, such methods are not subject to the court rules prohibiting notices of discovery after the filing of the certificate.

Procedure for Recovery for Unreasonable Denial

Subsection (c) sets out the procedure for recovering expenses and attorney's fees for an unreasonable denial. After proving the facts which were the subject of the notice—e.g., a bank employee is called to authenticate records—the party must move at the trial or immediately following the trial for an order requiring the other party to pay reasonable expenses and attorney's fees. The order may be made irrespective of the results of the action.

In *Ruthbone v Mion* (1961, 3d Dept) 15 AD2d 392, 221 NYS2d 783, the Appellate Division affirmed the trial court's order directing the payment of the reasonable expenses incurred by the plaintiff in proving certain facts at the trial which defendants had refused to admit. The court held that this was an apportionment of the cost of litigation stating that if a party does not admit a fact useful to his adversary's case he merely runs the risk of paying to prove it.

Richard E. Griffin is a partner and member of the Trial Department of Phillips, Lytle, Hitchcock, Blaine & Huber with offices in Buffalo, Rochester, New York, Jamestown, and Fredonia, New York. A 1957 graduate of the Law School of the University of Buffalo, Mr. Griffin is a Fellow in the American College of Trial Lawyers. He was Note Editor of the Buffalo Law Review and has often written and lectured on the subject of discovery. Mr. Griffin is one of the contributing editors of "Preparing and Trying the Civil Lawsuit" published in 1977 by the New York State Bar Association. He has served as President of the Bar Association of Erie County and the National Association of Railroad Trial Counsel. Mr. Griffin has been active in Commercial and Federal Litigation Section of the New York State Bar Association. He concentrates his practice in the field of general litigation including personal injury, commercial, utilities, estates, product liability, and transportation. Mr. Griffin acknowledges the assistance of Alexander Korotkin, an *ex aequo* graduate of the State University of New York at Buffalo Law School, where he was a member of the Buffalo Law Review. Mr. Korotkin is an attorney with the firm of Phillips, Lytle, Hitchcock, Blaine & Huber in Buffalo, New York. His practice is concentrated in civil litigation work. He is an active member of the New York Bar Association and the Erie County Bar Association.

Advisory Committee Notes

This section is similar to CPA § 322. Excision of the word "action" makes the procedure applicable to special proceedings as well as actions. If the hearing in a special proceeding is held before the time to respond has elapsed the court can decide whether a response is needed. Cf. 7 NY Jud Council Rep 514-15 (1941).

There has been some complaint about the former section, which did not permit an application before trial to determine whether a request or a refusal to admit was justified. The Judicial Council was aware of the problem but decided not to allow such applications. 7 NY Jud Council Rep 318-19 (1941). In one case brought to the advisory committee's attention the response to a request to admit was the following: "That it cannot admit the matters set forth in said notice to admit for the reason that it is informed and believes that said matters are those upon which the plaintiff has the burden of proof and are not properly subject to a notice to admit." Such a response should be treated by the trial court as an admission. Where this is typical of a party's attitude towards disclosure, the provisions of the new CPLR afford protection by an application under §§ 3103(a), 3104 and 3126.

The time periods have been changed from not later than ten to not later than twenty days before the trial for service of the notice, and from "a period designated in the request, not less than eight days after the service thereof" to a flat
§ 3126. Penalties for refusal to comply with order or to disclose

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

HISTORY:

NOTES:

Practice Insights:

PENALTIES AFTER KIHL
By David Paul Horowitz, Law Office Of David Paul Horowitz
General Editor, David L. Fenstadig, Law Offices of David L. Fenstadig, LLC

INSIGHT
A party that has not received disclosure called for in a disclosure demand or court order may move to compel compliance or a response pursuant to CPLR 3124, and a court may impose penalties as set forth in CPLR 3126. Due to its limited jurisdiction, the Court of Appeals rarely addresses disclosure issues. However, in an opportunity presented itself when two judges in the Appellate Division dissented on a non-disclosure issue in a case before them. This led to a hearing by
the Court of Appeals, which addressed non-compliance with disclosure orders. The Court of Appeals' affirmation of the dismissal of the plaintiff's complaint - the ultimate penalty provided for in CPLR 3126 - signaled a warning to the bar, and provided strong language for parties seeking disclosure penalties to utilize in disclosure motions.

ANALYSIS

Plaintiff's complaint dismissed due to failure to comply with prior disclosure order.

In *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87, 722 N.E.2d 55 (1999), a preliminary conference order, providing for interrogatories to be responded to within thirty days of receipt, was entered into by all parties. The plaintiff failed to respond to the defendant's interrogatories, and the defendant moved to strike the complaint or compel a response. The plaintiff opposed the motion, serving its answers to interrogatories at the same time. The defendant persisted with the motion, claiming the interrogatory responses were inadequate, and the trial court entered an order granting the defendant's motion to dismiss unless the plaintiff served a further response to certain interrogatories within twenty days of service of a copy of the order. An issue arose over when the defendant had served the order, and this issue ultimately resulted in two dissents in the First Department, leading to the Court of Appeals' review. Thereafter, the court granted defendant's motion to dismiss the plaintiff's complaint.

Compliance with court orders requires both timely and meaningful response.

The Court of Appeals in *Kihl* clarified what was required for compliance with a court's disclosure order: "[W]e underscore that compliance with a disclosure order requires both a timely response and one that evidences a good-faith effort to address the requests meaningfully." *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87, 722 N.E.2d 55, 58 (1999). Consequently, a party must make certain to respond within the time set by the court for compliance, and must ensure that the responses answer the demands in a meaningful way.

If party fails to comply with court order and thereby frustrates disclosure, it is within trial court's discretion to dismiss complaint.

Citing an earlier Court of Appeals' decision, in which the Court of Appeals found that "plaintiff, through delays and other strategies, engaged in a course of conduct designed to yield one-sided disclosure in his favor, culminating in his disregard of an order compelling him to answer [defendant's] interrogatories," the *Kihl* court stated "Regrettably, it is not only the law but also the scenario that is all too familiar." *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 722 N.E.2d 55, 58; 700 N.Y.S.2d 87, 90 (1999) (citing *Zinman v. Petwayson*, 87 N.Y.2d 711, 713, 499 N.Y.S.2d 933, 489 N.E.2d 832 (1986)). The *Kihl* court continued: "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a court may make such orders as are just," including dismissal of an action. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87, 90, 722 N.E.2d 55, 58 (1999).

MOTIONS FOR POST-NOTE OF ISSUE DISCLOSURE

By David Paul Horowitz, Law Office Of David Paul Horowitz
General Editor, David L. Ferstenberg, Law Offices of David L. Ferstenberg, LLC

INSIGHT

Litigants are often placed in the uncomfortable position of having to file a note of issue and certificate of readiness before all necessary disclosure has been completed, as a result of deadlines the Differentiated Case Management System has imposed. If the note of issue is not filed within the court's deadline, litigants risk dismissal of the case. Among the many problems arising from Differentiated Case Management is whether a party filing a note of issue under CPLR 3126 may seek a penalty post-note of issue for a party's failure to provide disclosure that was due to be disclosed before the note of issue was filed. Although the CPLR 3126 penalty may be sought in First and Fourth Departments post-note of issue, in the Second Department, the filing of a note of issue and certificate of readiness bars seeking to enforce a discovery sanction post-note of issue.
ANALYSIS

Differentiated Case Management imposes strict disclosure schedules.

With the advent of Differentiated Case Management (referred to as "DCM") in 1959, courts began to impose uniform guidelines for the completion of Article 31 disclosure. See 22 NYCRR § 202.21. Litigants must complete disclosure within set deadlines, and courts require the filing of a note of issue on or before a certain date or the plaintiff risks dismissal of the action. A certificate of readiness, certifying that disclosure is complete, must accompany the note of issue.

Plaintiff faces choice between filing note of issue while still owed disclosure or risking dismissal for failure to file.

Often a plaintiff fails to receive disclosure, due before the deadline for filing the note of issue, pursuant to either notice or court order. The plaintiff faces significant risks in this situation. If the plaintiff files the note of issue while still owed disclosure, the plaintiff faces the considerable danger that he or she will be held to have waived any right to the disclosure. On the other hand, if the plaintiff moves to compel disclosure, and simultaneously seeks to extend the deadline for filing the note of issue, the plaintiff assumes the risk that court will deny the motion, and the note of issue will then not have been timely filed. At best, the motion will be granted, but often at a significant cost in time and effort, and with the attendant delay in calendaring the case and moving forward to trial.

CPLR 3126 penalty may be sought in First and Fourth Departments post-note of issue.

The First Department has held that a "motion for disclosure sanctions, which is made after [the filing of] a note of issue but was based upon notices and orders that predated the note of issue, was not precluded by 22 NYCRR § 202.21(d), since the relief sought was not in the nature of disclosure." Hug v. The City Of New York, 242 A.D.2d 239, 652 N.Y.S.2d 18 (1st Dep't 1997). Accord Hill v. Sneeken, 154 A.D.2d 912, 545 N.Y.S.2d 868 (4th Dep't 1989). Accordingly, under this line of cases, the sanction of striking the answer of a defendant for failure to comply with a discovery order is available post-note of issue.

CPLR 3126 penalty may not be sought post-note of issue in Second Department.

In the Second Department, the filing of a note of issue and certificate of readiness bars seeking to enforce a discovery sanction post-note of issue. See, e.g., Siragusa v. Teal's Express, Inc., 96 A.D.2d 749, 463 N.Y.S.2d 321 (2d Dep't 1983).

Advisory Committee Notes

This section is based on Federal rule 37(b). Under CPA § 299, if a party ignores a notice, his pleading might have been stricken on motion. Under this section the court will, on motion, make a conditional order that if the party does not appear or does not answer certain questions the penalties in (1) to (3) will automatically be visited upon him. No separate treatment of nonparty witnesses is required since the general contempt power applies to them. Cf. CPA §§ 299, 325; RCP 137; Note, 7 Vand L Rev 272 (1954).

1993 Recommendations of Advisory Committee on Civil Practice

The substitution of the clause "this article" for "notice duly served" would make it clear that a willful failure to disclose information within the meaning of section 3126 includes a willful failure to amend or supplement a response to a disclosure request as required under new subdivision (b) of section 3101.

Derivation Notes

Earlier statutes and rules: CPA §§ 299, 325; RCP 9-a, 137. CCP §§ 808, 874; Code Proc § 388; 2 RS 200, § 26; 2 RS 393, § 10; Gen Rules Pr 17.
CLARO BASIC TRAINING

Monday, June 4, 2018
3:00 PM – 6:00 PM

Fordham Law School
150 W 62nd St, New York, NY 10023, Room 3-01

APPENDICES – Part III

P. New York City CLARO Program Volunteer Fact Sheet

Q. CLARO Referral Sheets

R. Selected Court Decisions

S. Daniel Schlanger – “Assisting the Consumer Debtor – Parts I to III”
<table>
<thead>
<tr>
<th></th>
<th>Partners</th>
<th>Location and Hours</th>
<th>Contact</th>
</tr>
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<tbody>
<tr>
<td><strong>Bronx</strong></td>
<td>Bronx County Bar Association; NYU Debtors’ Rights Project; Feerick Center for Social Justice</td>
<td>Thursdays 3-6pm Bronx County Supreme Court, 851 Grand Concourse Room B128A</td>
<td>Wilma Tamayo-Abreu Program Coordinator, Feerick Center for Social Justice 212-636-7671 <a href="mailto:wtamayoabreu@law.fordham.edu">wtamayoabreu@law.fordham.edu</a></td>
</tr>
<tr>
<td><strong>Brooklyn</strong></td>
<td>Brooklyn Bar Association Volunteer Lawyers Project; Brooklyn Law School</td>
<td>Thursdays 2:30-4:30 pm AND 6:00-8:00 pm Kings County Civil Court, 141 Livingston St. Room 403</td>
<td>Sidney Cherubin Supervising Attorney Brooklyn Bar Association Volunteer Lawyers Project 718-624-3894 <a href="mailto:info@brooklynvlp.org">info@brooklynvlp.org</a></td>
</tr>
<tr>
<td><strong>Manhattan</strong></td>
<td>New York County Lawyers Association; Fordham Law School Consumer Law Advocates; Feerick Center for Social Justice</td>
<td>Thursdays 6-8pm Manhattan Civil Court 111 Centre St., Room 105</td>
<td>Lois Davis Director of Pro Bono Programs, NYCLA 212-267-6646 ext. 217 <a href="mailto:lDavis@nycla.org">lDavis@nycla.org</a></td>
</tr>
<tr>
<td><strong>Queens</strong></td>
<td>Queens County Bar Association Volunteer Lawyers Project</td>
<td>Fridays 2-4pm Queens County Civil Court 89-17 Sutphin Blvd Room 116</td>
<td>Mark Weliky Executive Director Queens Volunteer Lawyers Project 718-739-4100 <a href="mailto:mweliky@qcba.org">mweliky@qcba.org</a></td>
</tr>
<tr>
<td><strong>Staten Island</strong></td>
<td>Richmond County Bar Association; Staten Island Women’s Bar Association; Wagner College</td>
<td>First Tuesday and second Thursday of every month Richmond County Civil Court 927 Castleton Ave, 2nd Floor</td>
<td>347-927-3417 <a href="mailto:statenislandclaro@gmail.com">statenislandclaro@gmail.com</a></td>
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BRONX CLARO Referral Resources

<table>
<thead>
<tr>
<th>New York Legal Assistance Group</th>
</tr>
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<tbody>
<tr>
<td>NYLAG accepts a wide variety of cases, based upon an analysis of many factors, including financial status. NYLAG handles some of the same types of cases as NYCLA's Pro Bono Programs and the City Bar hotline. General Telephone: (212) 750-0800</td>
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<th>Volunteer Lawyer for the Day Project</th>
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<tr>
<td>Safe Horizon Corporate Address and Telephone Number</td>
</tr>
<tr>
<td>2 Lafayette Street, 3rd Floor</td>
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<tr>
<td>New York, NY 10007</td>
</tr>
<tr>
<td>Tel.: 212.577.7700</td>
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</tr>
<tr>
<td>New York City Financial Justice Hotline</td>
</tr>
<tr>
<td>121 W. 27th Street</td>
</tr>
<tr>
<td>Suite 804</td>
</tr>
<tr>
<td>New York, NY 1000</td>
</tr>
<tr>
<td>Tel.: (212) 925-4929</td>
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<th>MFY Consumer Rights Project Hotline</th>
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<tr>
<td>Debt collection harassment / credit card lawsuits / identity theft / purchasing schemes / credit report issues / access to financial services / fraud</td>
</tr>
<tr>
<td>Telephone Intake: Thursday, 10:00am – 2:00pm</td>
</tr>
<tr>
<td>Tel.: (212)-417-3881</td>
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<td>Tel.: (212)626-7383</td>
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<td>Help Centers in Manhattan, the Bronx, Brooklyn and Queens are open Mondays through Fridays from 9:30 A.M. until 5:00 P.M. to assist litigants in landlord-tenant cases. All Help Centers are closed between 1:00 and 2:15 for lunch.</td>
</tr>
<tr>
<td>Bronx Housing: Monday, Tuesday, Wednesday, and Friday, 9:30 A.M. until 5:00 P.M., Thursday, 9:30 A.M. until 7:00 P.M.</td>
</tr>
<tr>
<td>1118 Grand Concourse, Room 250</td>
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<tr>
<td>Bronx, NY 10456</td>
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<tr>
<th>Project FAIR - Fair Hearing Assistance, Info, and Referral</th>
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<tr>
<td>Location: 199 Water Street, 3rd Floor</td>
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<tr>
<td>New York, NY 10025</td>
</tr>
<tr>
<td>Phone: 212-613-5060</td>
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<th>Legal Aid Society - Bronx</th>
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<tr>
<td>Bronx Neighborhood Office</td>
</tr>
<tr>
<td>260 E. 161st Street</td>
</tr>
<tr>
<td>Bronx, New York 10451</td>
</tr>
<tr>
<td>Tel.: (718) 991-4600</td>
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<tr>
<td>Bronx Housing Court Office</td>
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<tr>
<td>1118 Grand Concourse</td>
</tr>
<tr>
<td>(at 166th Street)</td>
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<tr>
<td>Bronx, NY 10451</td>
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<tr>
<td>Tel.: (718) 681-8712</td>
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<tr>
<th>Legal Services NYC - Bronx</th>
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<tr>
<td>This organization is dedicated to assisting low-income residents of the Bronx protect their legal rights. Areas of Priority and Special Projects Include: Housing, Public Benefits, Disability Law, Family Law, Education Law, Consumer Law, Employment Law, Elder Law, Low Income Taxpayers Clinic, Immigration, Social Work</td>
</tr>
<tr>
<td>(Main Office)</td>
</tr>
<tr>
<td>349 East 149th St.</td>
</tr>
<tr>
<td>10th Floor</td>
</tr>
<tr>
<td>Bronx, NY 10451</td>
</tr>
<tr>
<td>718-928-3700</td>
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<tr>
<td>(Courthouse Office)</td>
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<tr>
<td>1118 Grand Concourse, 2nd Floor</td>
</tr>
<tr>
<td>Bronx, New York 10456</td>
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<tr>
<td>Tel.: (718) 928-3700</td>
</tr>
<tr>
<td>Fax: (718) 590-1129</td>
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Appendix P
(Housing Unit Office)
329 East 149th Street, 3rd Floor
Bronx, New York 10451
Tel: (718) 928-3700
Fax: (718) 292-2857

Foreclosure Prevention Services
Tel. 718-841-7001

GET HELP

Our Citywide Legal Assistance Hotline is open Monday through Friday from 10am to 4pm. Call 917-661-4500 to speak to an intake officer in any language.

Bankruptcy

To consult with a bankruptcy attorney contact your local bar association, or:

- The Brooklyn Bar Association Volunteer Law Project,
  Phone: 718-624-3894
- MFY Low-Income Bankruptcy Project
  Telephone Intake: Wednesday, 2:00 pm – 4:00 pm call 212-417-3799
- The New York City Bankruptcy Assistance Project at LS-NYC, Phone: 646-442-3630

New York City Office of Financial Empowerment (OFE)
Telephone: Call 311 to make an appointment at this Financial Empowerment Center
Site Hours: Monday-Friday, 9 a.m. - 5 p.m.

Legal Services NYC – Assistance with Student's Loans

Legal Services NYC is dedicated to helping New York residents with student loan debt. Free legal assistance may be available for you and your family.

Call the Citywide Legal Assistance Hotline (917)-661-4500

South Brooklyn Office
105 Court Street (4th Floor)
Brooklyn, NY 11201
Manhattan CLARO Referral Resources

New York Legal Assistance Group

NYLAG accepts a wide variety of cases, based upon an analysis of many factors, including financial status. NYLAG handles some of the same types of cases as NYCLA's Pro Bono Programs and the City Bar hotline.

General Telephone: (212) 750 - 0800

Volunteer Lawyer for the Day Project

The New York State Access to Justice Program and NYLAG launched the Consumer Debt Volunteer Lawyer for the Day for unrepresented litigants in the Bronx, Queens and Staten Island.

Bronx Civil Court
851 Grand Concourse
Bronx, NY
Monday – Thursday
9am to 1pm

Queens Civil Court
89-17 Sutphin Boulevard
Jamaica, NY
Mondays and Thursdays
9am to 1pm

Staten Island Civil Court
927 Castleton Avenue
Staten Island, NY
Tuesdays
9am to 1pm

Safe Horizon Mediation Center

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New York City Financial Justice Hotline
121 W. 27th Street
Suite 804
New York, NY 1000
Tel.: (212) 925-4929

MFY Consumer Rights Project Hotline

Debt collection harassment / credit card lawsuits / identity theft / purchasing schemes / credit report issues / access to financial services / fraud

Telephone Intake: Thursday, 10:00am – 2:00pm
Tel.: (212)-417-3881

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The Legal Hotline is available:
Monday through Thursday from 9:00 am to 5:00 pm and on Friday from 9:00 am to 1:00 pm
Tel.: (212)626-7383

New York County Lawyers' Association Lawyer Referral Service

Tel.: (212) 626-7373

Refer litigants not eligible for free legal services (generally, those whose income is $20k+ and have no children) to this organization. The Lawyer Referral Service assists litigants in finding an attorney to provide counsel on a particular legal problem. Currently, a litigant can consult with an attorney for $35 for a 30 – minute session.

Housing Court Resource Center

Help Centers in Manhattan, the Bronx, Brooklyn and Queens are open Mondays through Fridays from 9:30 A.M. until 5:00 P.M. to assist litigants in landlord-tenant cases. All Help Centers are closed between 1:00 and 2:15 for lunch.

Harlem Community Justice Center
170 E. 121st Street, Room 104
New York, NY 10035

New York County Housing Court
111 Centre Street, Room 104
New York, NY 10013

Project FAIR - Fair Hearing Assistance, Info, and Referral

Location:
199 Water Street, 3rd Floor
New York, NY 10025
Phone: 212-613-5060

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<tr>
<td>230 E. 106th Street</td>
<td><strong>South Brooklyn Office</strong></td>
</tr>
<tr>
<td>New York, NY 10029</td>
<td>105 Court Street (4th Floor)</td>
</tr>
<tr>
<td>Tel.: (212) 426-3000</td>
<td>Brooklyn, NY 11201</td>
</tr>
<tr>
<td><strong>Lower Manhattan Neighborhood Office</strong></td>
<td>44 Court Street, Suite 1206</td>
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<tr>
<td>199 Water Street</td>
<td>Brooklyn, New York 11201</td>
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<tr>
<td>New York, NY 10038</td>
<td>Cross Streets: Remsen and Joralemon</td>
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<tr>
<td>Tel.: (212) 577-3300</td>
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<tr>
<td>Fax: (212) 509-8761</td>
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| Locations: | |
| 1 West 125th Street | |
| 2nd Floor | |
| New York, NY 10027, Phone: 646-442-3100 | |
| 40 Worth Street | |
| Suite 606 | |
| New York, NY 10013, Phone: 646-442-3100 | |

| Tenant Rights Campaign | |
| East Harlem Office | |
| 2272 Second Avenue | |
| New York, NY 10035 | |

| Bankruptcy | |
| To consult with a bankruptcy attorney contact your local bar association, or: | |
| • The Brooklyn Bar Association Volunteer Law Project, 718-624-3894 | |
| • The New York City Bankruptcy Assistance Project at LS-NYC, 646-442-3630 | |
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| Telephone Intake: Call 212-417-3799 on Wednesday, 2:00 pm – 4:00 pm | |

| New York City Office of Financial Empowerment (OFE) | |
| Telephone: Call 311 to make an appointment at this Financial Empowerment Center | |
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General Telephone: (212) 750 - 0800

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Staten Island Civil Court
927 Castleton Avenue
Staten Island, NY
Tuesdays
9am to 1pm
Phone/Fax:
General Info. / Civil (646) 386-5700
Housing (646) 386-5750
Small Claims (718) 675-8460
Hours: Hours (entrance to building):
9 a.m. - 3:45 p.m. (to 5 p.m. for emergency applications only)

Safe Horizon Mediation Center
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646-442-3630
The New York City Bankruptcy Assistance Project of Legal Services NYC

APPENDIX Q
Citywide Legal Services Providers That Represent Consumers

CAMBA
2211 Church Avenue, Suite 301, Brooklyn, NY 11226
Consumer Law: (718) 940-6311
Housing Number: (718) 287-0010
Accepts clients who earn up to 250% of poverty line and live in New York City. Provide assistance on both consumer and housing matters.

MFY Consumer Rights Project Hotline
Call Thursdays between 10am and 2pm at (212)-417-3881

MFY’s Low-Income Bankruptcy Project
Call Wednesdays between 2pm and 4pm at (212)-417-3799

NEDAP
Call the NYC Financial Justice Hotline 212-925-4929
Handles questions regarding debt and financial services. Serves low-income New York City residents.
Hotline is open:
- Tuesdays, 12pm-3pm
- Wednesdays, 12pm-3pm
- Thursdays, 12pm-2pm

Urban Justice Center – Community Development Project
- Conducts monthly legal clinics at University Settlement / Project Home
- Accepts clients with consumer debt cases, student loan matters, credit reporting errors, and unfair debt collection issues
- To schedule an appointment, please call 212-505-1995;
- Clinics open to New York City Residents

98-10614

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT


September 15, 1999, Submitted October 25, 1999, Decided

PRIOR HISTORY: [**1] In a negligence action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Queens County (Weiss, J.), dated October 8, 1998, as denied her motion to strike the answer of defendant City of New York for willful noncompliance with a notice to admit.

CASE SUMMARY:

PROCEDURAL POSTURE: In a negligence action to recover damages for personal injuries, plaintiff appealed from an order of the Supreme Court, Queens County (New York), which denied her motion to strike the answer of defendant, City of New York, for willful noncompliance with a notice to admit.

OVERVIEW: The trial court denied plaintiff's motion to strike the answer of defendant for willful noncompliance with a notice to admit. The court held that the trial court properly determined that plaintiff's notice to admit sought an admission which went to the heart of the matter at issue, which was constructive notice of a defect, and was thus improper. In any event, defendant properly responded to the notice to admit by denying receipt of the letter at issue, and by providing the reasons for its denial. Should the plaintiff prove at trial defendant's receipt of the letter, she can then seek the appropriate relief at that time, N.Y. C.P.L.R. 3123[c]. Contrary to plaintiff's claims, N.Y. C.P.L.R. 3123 was self-executing, and the penalties embodied in N.Y. C.P.L.R. 3126 did not apply.

OUTCOME: Order affirmed; the court held that the trial court properly determined that plaintiff's notice to admit sought an admission which went to the heart of the matter at issue, which was constructive notice of a defect, and was thus improper.


OPINION

[*168] Ordered that the order is affirmed insofar as appealed from, with costs.

The Supreme Court properly determined that the plaintiff's notice to admit sought an admission which went to the heart of the matter at issue, i.e., constructive notice of a defect, and was thus improper (see, DaSilva v. Rosenberg, 236 AD2d 308; Ashkenazi v. City of New...

In any event, the City of New York properly responded to the [**2] notice to admit by denying receipt of the letter at issue, and by providing the reasons for its denial. Should the plaintiff prove at trial the City's receipt of the letter, she can then seek the appropriate relief at that time (see, CPLR 3123 [c]). Contrary to the plaintiff's claims, CPLR 3123 is self-executing, and the penalties embodied in CPLR 3126 do not apply (see, Matter of T.F. Children, 165 Misc 2d 333, 334; Spawson v Strates Shows, 75 Misc 2d 813, 815).

Santucci, J. P., Altman, Friedmann and H. Miller, JJ., concur.
The Hawthorne Group, LLC, Appellant v. RRE Ventures et al., Respondents.

3587

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

May 11, 2004, Decided
May 11, 2004, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff limited liability company (LLC) sued defendants, a limited partnership, its general partner, the managing members and partner of the general partner, and an umbrella entity, alleging, inter alia, breach of contract and fraudulent inducement. The Supreme Court, New York County (New York), dismissed several of the LLC’s claims in whole or in part and denied the LLC’s motion to compel discovery. The LLC appealed.

OVERVIEW: The general partner in a limited partnership that was formed as an investment fund hired an LLC to locate investors for the fund. The LLC pursued institutional investors and their gatekeepers, and claimed that it persuaded two public pension funds and a university pension fund to invest in the limited partnership, but that it was not paid for its services. The LLC sued the limited partnership, seeking payment, but the trial court dismissed several of its claims in whole or in part and denied its motion to compel discovery. The appellate court held that (1) the trial court properly dismissed the LLC’s claims seeking recovery for breach of an implied duty of good faith and fair dealing and quantum meruit because the LLC could not obtain recovery under those theories while maintaining its claim alleging breach of contract; (2) the trial court erred when it found that the LLC was bound by a carve-out list the limited partnership offered as an addendum to the parties’ contract, and claims which were dismissed on the basis of that finding had to be reinstated; and (3) on remand, the LLC should be entitled to conduct discovery on claims the appellate court was reinstating.

OUTCOME: The appellate court affirmed the trial court’s judgment dismissing the LLC’s claims seeking recovery for breach of an implied duty of good faith and fair dealing, quantum meruit, and fraudulent inducement, but reversed the trial court’s judgment dismissing the LLC’s claims alleging breach of contract and tortious interference with a contract, and ruled that the LLC should be allowed to conduct discovery on the claims that were reinstated.

CORE TERMS: investor, carve-out, notice, cause of action, admit, discovery, summary judgment, finder’s questions of fact, exercise of discretion, negotiation, offenses, fair dealing, improvident, tortious interference, general partner, reinstated, gatekeeper, blank, matter of law, contract claim, action in quantum meruit, duty of good faith, material issues, ultimate facts, full trial, misrepresented, uncontroverted, intrinsically.

LexisNexis(R) Headnotes

APPENDIX R
Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN1] A cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract.

Torts > Business Torts > Fraud & Misrepresentation > General Overview
[HN2] In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to a contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform.

Contracts Law > Remedies > Equitable Relief > General Overview
[HN3] The existence of a valid contract claim bars a cause of action in quantum meruit.

Civil Procedure > Discovery > Methods > Admissions > General Overview
[HN4] A notice to admit, pursuant to N.Y. C.P.L.R. 3123(a), is to be used only for disposing of uncontested questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial.

HEADNOTES

[***1] Judgments--Summary Judgment.--In dispute over finder's fee agreement, neither party was entitled to summary judgment since there was issue of fact as to which version of attachment listing identity of potential investors to be included on list of prohibited offerses, called "curve out list," was valid; furthermore, construction of agreement that would result in contract with no prohibited offerses was undermined by evidence of parties' careful negotiations on criteria for curve-out list--for same reasons, cause of action for tortious interference with contract must be reinstated.

Pleading--Sufficiency of Pleading--Breach of Implied Duty of Good Faith and Fair Dealing--Cause of action for breach of implied duty of good faith and fair dealing was properly dismissed since alleged breach was intrinsically tied to damages allegedly resulting from breach of contract.

Pleading--Sufficiency of Pleading--Fraud.--Fraudulent inducement claim was properly dismissed since alleged misrepresentation was not one of then-present fact, extraneous to contract and involving duty separate from or in addition to that imposed by contract, but merely that defendant misrepresented intent to perform.

Contracts--Quantum Meruit.--Existence of valid contract claim barred cause of action in quantum meruit.

Disclosure--Demand for Admission.--Striking of plaintiff's notice to admit and related discovery devices was proper since notice to admit, pursuant to CPLR 3123(a), should be used only for disposing of uncontested questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after full trial.

COUNSEL: Arkin Kaplan LLP, New York (Michelle Rice of counsel), for appellant.


JUDGES: Concur--Tom, J.P., Andrias, Saxe, Sullivan, Marlow, JJ.

OPINION

[*321] [**274] Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered October 6, 2003, which granted defendant's summary judgment dismissing the second, fourth and fifth causes of action in the complaint entirely and the first and third causes of action in part, denied plaintiff's cross motion for summary judgment, granted defendants a protective order striking plaintiff's notice to admit and corresponding interrogatories and document requests, denied plaintiff's cross motion for an order compelling discovery except to direct defendants' production of items 7, 10 and 13 in plaintiff's September 2002 document request and the scheduling of depositions, and imposed a discovery-related $1,000 sanction on plaintiff, unanimously modified, on the law, the facts and in the exercise of discretion, defendants' motion for summary judgment denied [***2] entirely with respect to the first and third causes of action, plaintiff's cross motion for an order compelling responses to its September 2002 document request granted to the further extent of requiring defendants to respond to items 1, 2, 3, 4, 5, 6, 8, 11, 12, 15, 16, 21 and 25, except that defendants' response to item 6 may be confined to the 10 investors listed therein, and otherwise affirmed, without costs.

APPENDIX R
This is a dispute over a finder's fee agreement. Defendants constitute a limited partnership formed as an investment fund, its general partner, the managing members and partner of the general partner, and an umbrella entity. The general partner contracted plaintiff to act as a finder, inviting investors for the limited partnership. The record shows that with the enthusiastic support of defendants and their employees, plaintiff pursued institutional investors and their "gatekeepers" (consultants retained to research and approve investments for the institutional funds).

Plaintiff claims to have procured two investors, both public pension funds serving New York City public employees and represented by a prominent West [*275] Coast gatekeeper. Although the evidence shows considerable [*323] contact between the principals of plaintiff and defendants concerning these two investors and others represented by the gatekeeper, defendants have refused to pay commissions to plaintiff for these placements and one other involving a university pension fund in the State of Washington.

[*322] The key issue in this case involves the document that served as exhibit A to the parties' finder's agreement. The agreement precluded plaintiff from compensation for procuring investment from certain entities to be listed on this exhibit A. Defendants claimed—and the motion court agreed—that plaintiff was bound by a version of exhibit A annexed to defendants' papers in support of their motion for summary judgment. Plaintiff disputes the genuineness of this exhibit, offers its own version of exhibit A (which is blank except for the heading), and argues that defendants improperly seek to modify the blank exhibit, which, according to plaintiff, was the version attached to the agreement when it was executed in late May 2001. In finding for defendants, the motion court treated the valid and controlling nature of the version of exhibit A proffered by defendants as a given, when, in fact, its contents [*334] are hotly disputed.

The identity of the potential investors to be included on a list of prohibited offers comprising exhibit A, which the parties colloquially called the " carve-out list," was the subject of discussion as early as April 2001. As noted, plaintiff contends that when the finder's agreement was signed on May 29 or 30 of that year, exhibit A was blank. At the same time, the parties and their attorneys clearly understood that the carve-out list was to be the subject of a process continuing even after the effective date of the agreement. The evidence shows a so-called White Board of prospective investors was maintained while negotiation of the agreement was underway, and affidavit evidence not factually countered by the defense suggests that plaintiff may have been instructed by representatives of RRE to disregard the draft carve-out list then extant. Affidavit evidence, supported by copies of e-mails and not contradicted by any evidence submitted by defendants, suggests that the pursuit by plaintiff of the two institutional investors in question continued after the agreement was executed, with the frequently expressed approval of defendants' key personnel. The record does [*335] not show when, if ever, there was a meeting of minds among the parties as to the contents of a final carve-out list.

We reject plaintiff's argument for entitlement to judgment as a matter of law, since the record shows that its principals understood that exhibit A, whichever version is established, was not the final word on the subject. Furthermore, a construction of the agreement that would result in a contract with no prohibited offers is undermined by evidence of the parties' careful negotiations on criteria for the carve-out list (see Yol-Lee Realty Corp. v 175th St Realty Assoc., 208 A.D.2d 185, 190, 526 N.Y.S.2d 61 [1990]).

[*336] On the other hand, the record does not support treating defendants' version of exhibit A as final. Even if there were evidence that the parties reached a meeting of minds on exhibit A in the summer of 2001, it would show that plaintiff's pursuit of the two institutional investors was a matter of record during the time that exhibit A was under negotiation, and evidence in the record would allow a factfinder to conclude that defendants had pointedly encouraged plaintiff to depart from whatever carve-out list was in existence.

The contents of the carve-out [*337] list on which the parties agreed, if any, is a question [*276] of fact requiring trial. In any event, there is need for more discovery evidence on the existing record (see "Anonymous" v Straitford, 172 A.D.2d 440, 568 N.Y.S.2d 946 [1991]).

There is likewise a question of fact as to whether defendants should be estopped from relying on the statute of frauds in seeking to enforce their purported version of exhibit A (cf. Zaveri v Rossy Blue, Inc., 4 A.D.3d 116, 771 N.Y.S.2d 517 [2004]). A factfinder could also conclude that there was partial performance unequivocally referable to a modification of defendants' version of the carve-out list (cf. Rose v Spa Realty Assoc., 42 N.Y.2d 338, 343-344, 366 N.E.2d 1270, 397 N.Y.S.2d 922 [1977]).

For the same reasons, the third cause of action, for tortious interference with contract, must be reinstated. The motion court's order allows plaintiff to pursue contract and tortious interference claims as they concern the university investor. There is no reason to treat the claims concerning the two New York City investors differently as a matter of law.

APPENDIX R
Because plaintiff’s causes of action should be reinstated to the above-indicated extent, its permissible document discovery should [***?] be expanded correspondingly. Defendants’ responses to the September 2002 notice for production of documents must be modified to the extent indicated. Denial of discovery as to the remaining items on that notice was not an improvident exercise of discretion.

Dismissal of plaintiff’s second, fourth and fifth causes of action was proper. [HN1] A cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is “intrinsically tied to the damages allegedly resulting from a breach of the contract” (see Constar v Jones Constr. Co., 212 A.D.2d 432, 433, 622 N.Y.S.2d 730 [1995]), [HN2] In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract (see Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 88 N.Y.2d 954, 956, 502 N.E.2d 1065, 510 N.Y.S.2d 88 [1986]), and not [*324] merely a misrepresented intent to perform (see Smart Egg Pictures v New Line Cinema Corp., 213 A.D.2d 302, 305, 624 N.Y.S.2d 150 [1993]). [HN3] The existence of a valid contract claim also bars a cause of action in quantum meruit (see e.g., Steffer v Shenkman Capital Mgt., 291 A.D.2d 295, 737 N.Y.S.2d 609 [2002]). [***8] Plaintiff’s pleadings run afoul of all of these principles.

The striking of plaintiff’s November 2002 notice to admit and related discovery devices was not an improvident exercise of discretion. [HN4] A notice to admit, pursuant to CPLR 3123 (a), is to be used only for disposing of uncontested matters, and not for the purpose of compelling the admission of fundamental and material issues or ultimate facts which are not only resolvable after a full trial (see Meadowbrook-Richman, Inc. v Citiciello, 273 A.D.2d 6, 709 N.Y.S.2d 521 [2000]). A review of the 302 requests to admit at issue here shows that even after a judicial directive to reduce the number of items to 25, plaintiff attempted to use the notice to admit in the prohibited manner. The monetary sanction was not an improvident exercise of discretion.

Concur—Tom. J.P., Andrias, Saxe, Sullivan and Marlow, JJ.

1048

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT


June 1, 2000, Decided
June 1, 2000, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed from an order of the Supreme Court, New York County (New York), which granted plaintiff's motion for partial summary judgment to the extent of granting it summary judgment on its cause of action for unjust enrichment.

OVERVIEW: Plaintiff brought an action for unjust enrichment, conversion, and breach of contract to recover excess commission payments to defendant. Plaintiff served defendant with a notice to admit that she received and did not return the excess payments. Four months later, plaintiff moved for partial summary judgment on the unjust enrichment cause of action essentially on the ground that defendant had not responded to the notice to admit. Defendant submitted a response in which she denied all of the statements in the notice to admit. Finding defendant's four-month delay in submitting a response inexcusable, the trial court granted plaintiff's motion. Reversing the trial court, the court held that a notice to admit pursuant to N.Y. C.P.L.R. §123(a) was to be used only for disposing of uncontested questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that could only be resolved after a full trial. Because plaintiff's notice to admit improperly demanded that defendant concede matters that were in dispute, defendant had no obligation to furnish admissions in response to plaintiff's notice.

OUTCOME: The court reversed the trial court's order and denied plaintiff's motion for partial summary judgment, because plaintiff improperly used a notice to admit for the purpose of compelling the admission of fundamental and material issues or ultimate facts that could only be resolved after a full trial.

CORE TERMS: notice, admit, summary judgment, partial, unjust enrichment, cause of action

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > Admissions > General Overview
Civil Procedure > Summary Judgment > Notices.
Civil Procedure > Summary Judgment > Partial Summary Judgments

[HNI] A notice to admit pursuant to N.Y. C.P.L.R. §123(a) is to be used only for disposing of uncontested questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial.
COUNSEL: [***] For Defendant-Appellant: Gregg D. Minkin.

JUDGES: Concur--Rubin, J. P., Andrias, Saxe, Buckley and Friedman, JJ.

OPINION

[*6] [**522] Order, Supreme Court, New York County (Louis York, J.), entered June 7, 1999, which granted plaintiff's motion for partial summary judgment to the extent of granting it summary judgment on its cause of action for unjust enrichment, unanimously reversed, on the law, without costs, and the motion denied.

In this action for unjust enrichment, conversion and breach of contract to recover excess commission payments to defendant in the amount of $14,543, plaintiff served defendant with a notice to admit that she received and did not return such excess payments. Essentially repeating the allegations of the complaint. Four months later, plaintiff moved for partial summary judgment on the unjust enrichment cause of action essentially on the ground that defendant had not responded to the notice to admit.

In opposition, defendant submitted a response in which she denied all of the statements in the notice to admit. Finding both defendant's four-month delay in submitting a response and her failure to seek the court's permission for her ultimate submission [***2] inexcusable, the motion court granted plaintiff's motion.

Under the facts of this case, it was error to grant partial summary judgment to plaintiff. [HN1] A notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontested questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial (Washington v. Alco Auto Sales, 199 AD2d 165). Plaintiff's notice to admit improperly demanded that defendant concede matters that were in dispute. Thus, defendant had no obligation to furnish admissions in response to plaintiff's notice (see, Orellana v. City of New York, 203 AD2d 542, 543).

Moreover, despite defendant's failure to respond to plaintiff's notice within twenty days or to seek further time from the [*7] court, as required by CPLR 3123, it cannot be said that her four-month silence rose to the level of a deliberate refusal to disclose information so as to [***3] preclude a resolution of this action on its merits (see, Washington v. Alco Auto Sales, supra).

Concur--Rubin, J. P., Andrias, Saxe, Buckley and Friedman, JJ.

93-05312

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT


December 21, 1994, Submitted
January 17, 1995, Decided

PRIOR HISTORY: [***1] In an action to recover damages for personal injuries, etc., the plaintiffs appeal from so much of an order of the Supreme Court, Queens County (Price, J.), dated March 31, 1993, as failed to unconditionally grant their motion to strike the defendant's answer and instead conditionally granted the same unless the defendant complied with certain of their discovery demands within 30 days, and granted those branches of the defendant's cross motion which were for a protective order striking the second, fourth, and fifth items of the plaintiffs' second notice of discovery and inspection as overbroad and burdensome.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, including a police officer, sought review of an order from the Supreme Court, Queens County (New York), which granted their motion to strike defendant City of New York's answer to their personal injury complaint unless the City complied with certain of plaintiffs' discovery requests within 30 days and granted the City's cross-motion for a protective order striking several items of plaintiffs' notice for discovery and inspection.

OVERVIEW: The police officer slipped and fell on a horse blanket in the parking lot of the precinct building where he worked. Plaintiffs subsequently filed this negligence action and made numerous discovery requests, to which the City partially responded. Plaintiffs contended that the City willfully failed to respond to their discovery and that as a result they were entitled to strike the City's answer and obtain a default judgment or, alternatively, an order compelling the City to respond to all outstanding discovery. The court held that the lower court did not abuse its discretion in declining to strike the City's answer because there was no clear showing that the City's failure to comply with discovery demands was willful, contumacious, or in bad faith. On the contrary, the court found that the City had made good faith efforts to comply with a substantial number of plaintiffs' discovery requests. The court also held that the lower court properly struck certain of plaintiffs' discovery requests because they were overly broad and burdensome.

OUTCOME: The lower court's order conditionally granting plaintiffs' motion to strike and partially granting the City's motion for a protective order was affirmed.

CORE TERMS: discovery, deposition, disclosure, inspection, notice, protective order, discovery requests, burdensome, compliance, police officer, rulings

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview
The drastic remedy of striking an answer to a complaint is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith. N.Y. C.P.L.R. 3126.

COUNSEL: Edward W. Dooley, Huntington Station, N.Y., for appellants.


OPINION

Ordered that the order is affirmed insofar as appealed from, with costs.

The injured plaintiff, a police officer employed by the defendant, City of New York, allegedly slipped and fell on a negligently discarded horse blanket in the parking lot of the precinct building where he worked. In their ensuing personal injury action, the plaintiffs sought the depositions of certain witnesses and the disclosure of numerous records, documents, and other materials. The items demanded by the plaintiffs included, inter alia, the time and leave, personnel, roll call, and disciplinary records of the precinct custodian as well as the roll call and work assignment records of all police officers at the precinct on and prior to the date of the accident. After one of the requested depositions was conducted and the defendant produced some of the records, the plaintiffs renewed their discovery demands and also broadened them to include additional depositions and documents. The defendant again partially complied with the plaintiffs' discovery demands. Alleging that the defendant willfully failed to respond to their disclosure requests, the plaintiffs subsequently moved to strike the defendant's answer and for the entry of a default judgment in their favor or, alternatively, to compel the defendant to comply with all outstanding discovery and deposition demands. The defendant thereupon cross-moved for a protective order.

The Supreme Court granted the defendant's cross motion to the extent of striking three items of the plaintiffs' second notice for discovery and inspection as being overbroad and burdensome. The court further conditionally granted the plaintiffs' motion to the extent of directing the defendant to comply with the notices for discovery and inspection, as limited by the court, within 30 days. The plaintiffs now appeal, and we affirm.

It is well settled that [HN1] the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith (see, CPLR 3126; Lestigi v City of New York, 209 AD2d 384; Cruscitti v St. Mary's Hosp., 193 AD2d 579; Abron v City of New York, 175 AD2d 789). No such showing has been made in this case. Rather, the record supports the conclusion that the defendant made good faith efforts to comply with the plaintiffs' demands and had in fact complied with a substantial number of them. Accordingly, the court did not improvidently exercise its discretion in declining to strike the answer and in directing the defendant to comply with certain outstanding discovery demands.

Furthermore, [***4] we find unpersuasive the plaintiffs' contention that they should have been permitted to depose additional witnesses. The plaintiffs neither advised the court of the deposition requests in advance as required in the preliminary conference order, nor established the requisite factors to warrant the examination of the additional individuals (see, Colacello v City of New York, 181 AD2d 528; Ayala v City of New York, 169 AD2d 330; cf., Simon v Advance Equip. Co., 126 AD2d 632).

Finally, while the defendant's motion for a protective order was untimely (see, CPLR 3122), the Supreme Court nevertheless was entitled to determine whether the plaintiffs' disclosure demands were palpably improper (see, Lestigi v City of New York, supra). Given the overly broad and burdensome nature and the questionable relevance of the second, fourth, fifth and sixth items of the plaintiffs' second notice for discovery and inspection, the court properly struck those items (see, De Paolo v Wisoff, 94 AD2d 694; Zimbells v Nicholas, 92 AD2d 936).

Assisting the Consumer Debtor: Becoming Aware Of Potential Affirmative Claims

Most small firm lawyers and general practitioners get at least an occasional request from an individual client seeking help in dealing with creditors, whether it be the client who has just been sued on old credit card debt that he or she thought was long since resolved or forgotten, the client whose children have racked up significant debt for which the creditor now seeks to make the client responsible, the client who guaranteed someone else’s auto loan, the client who has been harassed by collectors for years, and wants your help in negotiating fair, enforceable settlements to put the matter behind him, etc.

Indeed, when I shifted from working on consumer-protection issues as a legal aid attorney to working on these issues in private practice, one of the big surprises was the large group of solvent, middle-class
individuals with significant, consumer-debt related problems who were in need of counsel and assistance. Indeed, putting aside the many individuals who are out of work, and/or currently “underwater” with regard to credit cards, auto loans, mortgages, etc., our office frequently receives calls from sophisticated, educated and employed potential clients who are involved in disputes or actual litigation regarding alleged personal debts.

The purpose of this three-part series is to share with New York practitioners in brief outline, a few successful techniques and strategies for helping clients with these types of problems, focusing in particular on the client facing collection/litigation regarding old credit card debt where, for a variety of reasons, bankruptcy is not desirable or appropriate. The good news is that the consumer debt collection industry is, for the most part, a sloppy, volume-based industry that works on the assumption that the debtor will neither know her rights nor obtain counsel. This reality, combined with fairly vigorous, fee-shifting federal statutes regarding unfair collection practices means that a debtor represented by knowledgeable counsel is often in a much stronger position than might otherwise be presumed. The reader will note that although many of these techniques and strategies are litigation-oriented, many are at least as useful in the context of negotiating settlement.

In Part I of the series (which you are reading), I focus on potential affirmative claims a debtor may possess. These types of claims are crucial inasmuch as they can radically change the relative bargaining positions of the parties, putting the debtor in a position to settle the debt for a fraction of what would otherwise be possible or even, in certain cases, allow the debtor to dictate a settlement in which creditor not only waives the obligation but pays the debtor, as well. These claims are also critical because the fee shifting nature of many of the federal statutes can be the deciding factor in whether any form of extended representation is financially feasible for the client and the firm. In Part II of the series, which will follow, I review potential defenses to state court collection actions. In Part III, I will review issues relating to the vacating of default judgments, focusing on judgments obtained through the routinely deficient service of process that has sadly become the norm in collection actions.

The Best Defense Is A Good Offense

A. Assess The Case For Potential Fair Debt Collection Practice Act Claims

Recognizing a colorable Fair Debt Collection Practice Act, 15 U.S.C. § 1692 et seq. (FDCPA) claim against the collector or the collection firm can radically improve the client’s bargaining position. It is not uncommon that the collector and/or its law firm, faced with defending a strong, fee shifting action in federal court to quickly conclude that even where the debtor’s case does not involve significant actual damages, it is in the debt collector’s best interest to agree to mutual releases, dismissal of the state court collection action, and an additional payment to the consumer including attorneys fees.

The FDCPA is a detailed, federal statute meant to prevent unfair and/or deceptive collection practices. It contains a multitude of extremely specific requirements—for example, dictating the types of disclosures that a collector’s first and subsequent written communication must contain, requiring that collector validate the debt upon request and cease contacting the consumer in the interim, requiring the collector to stop calling any consumer who requests to be contacted only in writing, prohibiting direct contact with represented consumer, prohibiting contact with third parties, such as the consumer’s employer or relatives, etc. The FDCPA also contains much more sweeping prohibitions against unfair and deceptive collection practices, e.g. making unlawful the “false representation of the character, amount, or legal status of any debt” (§1692e(2)(A)) and barring the “the collection of any amount (including interest, fee, charge, or expense incidental to the principal obligation) unless such amount is
expressly authorized by the agreement creating the debt or permitted by law”. §1692f(1).

Although it doesn’t cover the original creditor, entities that buy debts after default (e.g. most “debt buyers”), or who undertake collection activity on behalf of another (e.g. debt collection law firms) are covered under the statute. Although the $1,000 statutory penalty per action (plus actual damages) is fairly modest, the prevailing consumer is entitled to mandatory attorneys fees. § 1692k(3). Moreover, with a limited exception for certain bona fide errors, the collector operates under a strict liability standard, i.e. the consumer need not show any bad intent on the part of the collector (although it certainly never hurts!). Russell v. Equifax A.R.S., 74 F.3d 30 (2nd Cir. 1996).

Although a full review of the FDCPA is beyond the scope of this article, it bears noting that failure to include required written disclosures, inaccurate descriptions of the law or the debtor’s rights, threats to take legal action where no action is realistically contemplated, telephone harassment, failure to acknowledge prior payment, filing of time-barred debt, and failure to maintain licensure required by the New York City Department of Consumer Affairs, are all fairly common place and may constitute grounds for a successful FDCPA claim.

Because identification of a valid FDCPA claim can be a “game changer,” it is crucial that counsel to the debtor familiarize him or herself with the statute and get enough information from the client to recognize potential violations. Likewise, it is crucial that counsel be aware of the FDCPA’s One Year Statute Of Limitations.

B. Assess The Case For Potential Fair Credit Billing Act Claims

A full discussion of the federal Truth In Lending Act, 15 U.S.C. § 1601 et seq. (TILA), an inordinately complex and heavily litigated statute is not appropriate here but, particularly in the credit card context, the practitioner should be aware of a subsection of the TILA entitled the Fair Credit Billing Act, 15 U.S.C. § 1666-1666j (FCBA), which provides significant rights to credit card holders and which can often provide valid grounds for counterclaims or third-party claims that will greatly increase the debtor’s bargaining position. The statute is particularly likely to be applicable where the debtor has previously disputed the charges with the credit card company or where the client is currently in the midst of such a dispute.

In general, the FCBA imposes concrete obligations upon credit card companies vis a vis disputes with the credit card holder, including the requirement that upon timely notice from the credit card holder, the creditor “make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed . . . or send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement.” 15 U.S.C. 1666(a)(3)(B). The Act also limits the right of the creditor to report a disputed amount as delinquent, to close an account based upon a dispute, or to charge interest on the disputed amount. The statute has a two-year statute of limitations.

Like the FDCPA, the FCBA contains limited statutory damages, but also contains mandatory fee shifting provisions that are extremely useful in forcing resolution of disputes. Common violations include failure to conduct a credible investigation despite clear notice from the consumer, reporting of disputed balances to third parties (e.g. credit reporting agencies) and failure to segregate disputed portions of the bill from the portion upon which interest and fees can legitimately accrue.

C. Assess the Case for Potential Fair Credit Reporting Act Claims
The Fair Credit Reporting Act, 15 U.S.C. § 1681-1681x (FCRA), regulates both the Credit Reporting Agencies (e.g. TransUnion, Experian, Equifax, etc.) and the entities that provide the agencies with information, i.e. many, many creditors and debt collection companies. The statute is detailed and heavily regulated and the following serves only to flag a few pertinent points in order that the interested practitioner can investigate further on his or her own.

A basic familiarity with the statute is necessary for several reasons. First, if your client disputes the accuracy of a credit report entry with the agency, the agency is obligated to ask the provider of that information to investigate. Not only can the credit reporting agency be liable for continued listing of inaccurate information but crucially for purposes of this discussion, the confirmation of inaccurate information by the provider (who may well be the plaintiff or potential plaintiff in the collection action that prompts the consumer to arrive in your office) is actionable under the FCRA which, like the FDCPA and the FCBA, contains mandatory fee shifting provisions.

There is also a second, practical consideration: now more than ever, bad credit can have tremendously negative impacts on a client’s financial well-being, making it difficult or impossible to borrow money and, in some cases threatening job eligibility. Thus, it behooves the attorney representing the debtor to provide the consumer basic information on how to correct inaccuracies on their credit report that often accompany debt-collection related problems.

D. NY General Business Law Section § 349 (Deceptive Trade Practices Act)

Virtually every state has an unfair and deceptive practice (UDAP) statute, and New York is no exception. Unfortunately, New York’s UDAP law is not particularly strong, barring only deceptive conduct while leaving non-deceptive but nonetheless unfair acts and practices outside its purview. Rather NYGBL § 349(a) bars “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York”. Furthermore, the act contains no statutory penalty for violation, and caps punitive damages at $1,000. §349(h). The statute also does not provide for mandatory fee shifting, stating that “the court may award reasonable attorney’s fees to a prevailing plaintiff.” §349(h). Not surprisingly, Courts are most likely to exercise their discretion to award Plaintiff fees where the Court believes the victims of the deception to be vulnerable, the public interest to be highly implicated, and the defendant to have acted in bad faith. See, e.g. Independent Living AIDS, Inc. v. Maxi-Aids, Inc., 25 F.Supp.2d 127 (E.D.N.Y. 1998).

 Nonetheless, the act can be extremely useful in certain situations. For example, in cases where the client has suffered actual damages as a result of collection-related deception, it provides a basis for relief that does not require the practitioner to prove the elements of fraud, such as reliance and bad intent. Rather, the consumer need only show (a) that the alleged act is “consumer-oriented”; (b) that Defendant made a material misrepresentation; and (c) that the misrepresentation caused the consumer harm Sutman v. Chemical Bank, 95 N.Y2d 24, 29 (Ct. of Appeals 2000). Second, in absence of a counterclaim many New York Court’s, in practice, allow a plaintiff to discontinue an action without consent of the Defendant (the CPLR notwithstanding). This practice allows for unilateral dismissal without prejudice even after an answer has been put been it. Maintaining a counterclaim is thus useful to prevent unilateral dismissal without prejudice where counsel may be able to achieve dismissal with prejudice, monetary payment, credit report correction and/or other useful terms through negotiation. Third, § 349 covers entities such as original creditors who are not reachable under the Fair Debt Collection Practices Act.

E. Don’t Forget Your Common Law Claims
Depending upon the situation, the debtor may have valid claims under breach of contract, negligence, fraud or other common law theories of liability. Libel claims may be appropriate and viable in contexts where an entity on the creditor’s “side of the fence” (the creditor, a collection company, a collection firm) has transmitted false information about an alleged debt to a third party such as a credit reporting agency, a neighbor or an employer) subject “to such an action’s rigorous limitations, which require not only that the statement be false but that the agency was motivated by express malice or actual ill will or that the information in its credit report demonstrates wanton and reckless negligence” Zampatori v. United Parcel Service, 125 Misc.2d 405 (Ct. of Appeals, 1984). Likewise, invasion of privacy may be viable where there has been, for example, persistent telephone harassment. (Note however, that the degree to which the FCRA pre-empts state law claims for libel and invasion of privacy is unsettled. See, Fashakin v. Nextel Communications, 2006 WL 1875341 (E.D.N.Y., 2006).

Of course, one benefit of many common law claims is the potential availability of punitive damages. Another advantage is that like NYGBL § 349, but unlike claims under the FDCPA, FCBA and FCRA, the common law claims typically avoid the complex statutory coverage issues that may sometimes arise under the federal statutes.

F. Consider Third Party Liability

Often times, the client’s strongest claim will lie not against the named plaintiff in the state court collection suit that prompts the consumer to seek legal representation, but against the debt collection law firm that represents the Plaintiff and, more to the point, that is often responsible for all or much of the pre-litigation collection activity on the account. In this regard, the practitioner should be aware that most of the major collection law firms in New York have entire staffs of “account specialists” who manage all of the functions regularly associated with debt collection, e.g. pre-litigation phone calls, dunning letters, negotiations, etc. In this author's experience, the city and state courts (which process thousands upon thousands of default judgments every year) and the federal courts, as well, are aware of that the law firms involved provide an wide range of collection related services well beyond those traditionally associated with law firm. Perhaps for this reason, judges do not — in the author’s experience — have the traditional distaste for actions naming law firms as parties in the consumer protection context as they do in other settings.

Nor should practitioners assume that the party suing their debtor client is necessarily insulated from liability for a previous holder’s actions. Rather, as a general rule, “it is now beyond dispute than an assignee takes subject to all defenses or counterclaims which the mortgagor possessed against the assignor…”. Northern Properties, Inc. v. Kuf Realty Corp., 30 Misc. 2d 1, 3 (Westchester 1961)(emphasis added). In this regard, it is important to note that most plaintiffs other than the original creditor will have great difficulty meeting the requirements for establishing holder in due course status, because of the requirement that such a holder take “without notice that it is overdue or has been dishonored or of any defense or claim against it on the part of another” U.C.C. § 3-302(1).

The statutes and considerations discussed above are not by any means exhaustive. Indeed, there are numerous other potentially applicable state and federal statutes. Rather, this article is meant merely to flag some of potential claims a typical debtor may have which may not otherwise be apparent to the attorney who does not practice in this area with any regularity. Awareness of these claims can lead to significantly improved outcomes for clients and can transform otherwise financially unfeasible representation to representation that is worthwhile both for the small firm lawyer and for the client.

Finally, a cautionary note: The practitioner should not be surprised by potential clients who know just enough about the statutes listed above to be dangerous. In particular, the author notes the phenomena of
the client who based on "online research" becomes convinced that any perceived violation of these statutes, real or imagined, no matter how arguable, miniscule or hyper-technical should excuse the client from his or her liability for a genuinely incurred and otherwise valid debt. Although many of the debt collector or debt collection firm's obligations are in the nature of strict liability, common sense, judgment and real-world sense of the "equities" are always necessary.

The author, Daniel Schlanger, Esq. is a partner at Schlanger & Schlanger, LLP in White Plains, New York, and practices primarily in the area of consumer law. He is a graduate of Harvard Law School and a former clerk of the Honorable R. Lanier Anderson, III of the U.S. Court of Appeals, Eleventh Circuit.

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Assisting the Consumer Debtor, Part II: Defenses to Consumer Credit Claims

By Daniel Schlanger

This article is the second installment of a three-part series which aims to provide the general practitioner with a basic orientation on representing consumers in collection actions. Part I focused on identifying potential counterclaims and third-party claims, particularly those arising out of state and federal consumer protection statutes, such as the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq., the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., and New York General Business Law § 349.

In this installment, I focus on potential defenses to consumer collection actions. I note in this regard that the New York judiciary, in this author's experience, at something of a crossroads, with many jurists deeply concerned about the routinely sloppy and deficient pleadings churned out by the hundreds of thousands by a handful of collection firms (Justice Disserved, MFY Legal Services, Consumer Rights Projects, June 2008, available at http://www.mfy.org/Justice_Disserved.pdf), as well as the typical scarcity of admissible evidence of indebtedness. See, e.g., MBNA Am. Bank v. Nelson, 2007 WL 1704618, at *2 (Civ. Ct., Richmond Co.). Indeed, some judges have begun to review these pleadings more strictly even on motions for default. (The most notable of these, no doubt, is Judge Arthur M. Schack of Kings County Supreme Court, who has issued a string of widely reported, and increasingly scathing, decisions denying default judgments in foreclosure actions.) Other jurists, however, are more skeptical, and may be motivated by a view, articulated or not, that the consumer is "just trying to get out of it on a technicality."

What follows is not by any means meant to be an exhaustive list of possible defenses. Rather, I merely hope to flag a few key, potentially fruitful issues. One common thread throughout many of these defenses is that their potential stems from the predominant business model for collection of distressed accounts in the United States. Typically, an account that is classified as seriously delinquent is not held by the original creditor, but rather is bundled and sold (and re-bundled and resold) on the secondary market. Because these accounts are handled in bulk, are purchased for pennies on the dollar, and are often litigated by assignees focused on taking defaults without proving up claims, it is common for the plaintiff in a collection action to have only a bare minimum of information and even less documentary support at the time the suit is brought. In many instances, the plaintiff cannot access additional information and documentation when challenged. This business model also "sweeps up" large numbers of accounts with significant, substantive problems relating to the underlying account, such as prior payment, or identity theft.

1. Which Statute of Limitations Applies and Has It Run?

The typical consumer collection action is for breach of contract and/or account stated. Pursuant to CPLR 213, these causes of action both have a statute of limitations of six years. As obvious as it sounds, it is critical that the practitioner check with the client regarding the last date on which he or she made a purchase or payment. The practitioner will find that in a significant minority of cases, the claim is time-barred under New York's six-year statute of limitations. The practitioner should note this in regard that statements about "date of last activity," etc. made by the debt buyer or on credit reports are not always trustworthy. In particular, these dates often reflect merely the date the account was purchased by the most recent assignee, not the date that the client made a purchase or payment.

Moreover, practitioners should inquire into the circumstances of the last payment with an eye toward New York's limitations on construing partial payment as a toll on the statute of limitations. Specifically, "[a]s to part payment, the statute will be tolled if the creditor demonstrates that it was payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder," Erdheim v. Gelfman, 203 A.D.2d 714 (2d Dep't 2003) (citations omitted) (emphasis added).

If the debt is less than six years old, the next question is whether it is subject to CPLR 202, which provides that where a cause of action accrues outside of New York, a non-resident Plaintiff is bound by the shorter of New York's limitations period and limitations period in the state where the action accrued. Accrual is determined by the "place of injury" and, where the damage alleged is economic loss, "the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." Global Financial

Taken in combination with one another, these rules regarding application of CPLR 202 provide strong support for shortening the statute of limitations where, as will often be the case, the consumer collection plaintiff is incorporated and/or headquartered in states, such as Delaware, that have a three-year statute of limitations.3

Finally, the practitioner should keep in mind that pursuant to the UCC § 2-725, the statute of limitations for a sale of goods is four years, not six. Although this provision will not apply in the typical credit card cases, it may apply in a variety of other circumstances involving the direct sale of goods by a merchant who extends credit. Although the author is unaware of any New York authority directly on point, several courts around the country have applied the UCC’s four-year statute of limitations to store cards. Gimbal Bros., Inc. v. Cohen, 46 Pa. D. & C.2d 747 (Ct. Common Pl., Montgomery Co. 1969); May Co. v. Transmil, 54 Ohio App.2d 71, 375 N.E.2d 72 (1977). See also Globepak Ltd. v. E.D. & F. Man Coffee, Ltd., 123 Misc. 2d 902 (New York County 1984).

The courts have yet to fully grapple with the issue of how to apply this rule where the “store card” is set up through a related corporate entity rather than through the retail store that offers the card and provides the goods.4

2. Standing

As the Court of Appeals has famously noted, “If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress.” Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 (2003).

The practitioner should never assume that a Plaintiff other than the original creditor can prove its standing to bring suit. Many Plaintiffs are simply unable to produce any documentation evidencing a chain of title from the original creditor to themselves. See, e.g., Gemini Asset Recoveries, Inc./Cohen and Shumanovitz. LLP v. Portoff, 23 Misc.3d 139(A) (1st Dep’t 2009). Moreover, even where documentation is provided, it is very often sorely lacking. For example, of those Plaintiffs who are able to produce some documentation on this point, a large number will produce a generic assignment that refers to a list of accounts that is not attached, such that there is no evidence that the consumer’s account was actually one of those assigned. See LNV Funding, LLC v. Delgado, 24 Misc.3d 1230(A) (Nassau County 2009). In some cases, debt buyers that lack documentation will, when pushed on this issue, opt to dismiss their claims.

Nor is this issue merely a technical one of “making them prove it.” Rather, because of the repeated, mass-bundling and sale of consumer debts, failure to force a Plaintiff to prove its ownership of the debt leaves a consumer vulnerable to being sued on the same debt multiple times by different alleged “assignee.” For this reason, it is important in this author’s view to provide for some mechanism in any settlement (whether a hold harmless clause, a liquidated damages clause, etc.) that protects the consumer from future collection activity taken by another entity alleging an ownership interest in the debt.

3. Personal Jurisdiction


As a result, it is all too common that a potential client will not have been properly served and that the Affidavit of Service filed with the court is substantially false. Although this issue most frequently arises in the context of motions for vacatur/refi alm from judgment (the subject of the third and final installment of this series), it is also commonly arises in scenarios where the consumer gets actual notice via service made upon a relative or neighbor (or by mail only without affiliation to his door). See Saxon Marig. Services, Inc. v. Bell, 63 A.D.3d 1029 (2d Dep’t 2009) (“actual notice alone will not sustain the service or subject a person to the court’s jurisdiction when there has not been compliance with prescribed conditions of service”).

Proving service at an incorrect address is hardly an arcane art: The consumer’s attorney is looking to present as many convincing indices as possible of the consumer not having lived at the address where service was made (e.g., lease agreements or rent statements regarding the actual address of residence; utility bills; bank statements; etc.). Affidavits from others living at the actual or the served residence may also be useful, as are affidavits from property managers. Where service is alleged upon fictitious “persons of suitable age and discretion,” affidavits obviously are crucial.

Unlike most other defenses, simply raising the defense of lack of personal jurisdiction is not sufficient to preserve it throughout the proceeding. Rather, the Defendant who has raised this defense in its Answer must make a motion to dismiss on this basis within 60 days of filing the Answer pursuant to CPLR 3211(e).
(Of course, one may also file a motion to dismiss on this basis in lieu of filing an Answer).

With regard to personal jurisdiction, the practitioner should also be aware that pursuant to CPLR 306-b, an unsuccessful attempt at service does not result in an extension of the 120-day period between filing and service absent "good cause shown or in the interest of justice." Leader v. Murrey, Porzini, & Spencer, 97 N.Y.2d 96, 105 (2001). Plaintiffs who are determined by the court to have failed to serve a consumer thus have no assurance that they will be allowed to re-serve without also re-filing. The end result is that Plaintiff's claims, even if timely originally, may well be time-barred by the time the issue of service is litigated and the case refiled. Hafkin v. North Shore University Hospital, 279 A.D. 2d 68 (2d Dep't 2000). (Crucially, CPLR 205(a)'s tolling provisions explicitly exclude re-filing based upon failure to serve.) It is for this reason that the collection bar routinely asks litigants (including pro se litigants) to waive personal jurisdiction in return for any extension of time to answer or any other routine stipulation. For the reasons just described, there are real issues with personal jurisdiction, such a waiver implicates not only the defense of personal jurisdiction but also the defense of statute of limitations, and cannot be lightly agreed to.

4. Evidentiary Issues

Perhaps because the business model of the collection industry is based on the premise that the vast majority of claims will result in default judgment, creditors are routinely unprepared to prove up the debt. Indeed, with regard to debt buyers (as opposed to original creditors), a Plaintiff will—unless facing a counterclaim—sometimes simply dismiss when pushed for proof.

With regard to credit card collections, the creditor must prove by admissible evidence: "(1) Existence of an agreement between the defendant and the credit card issuer, (2) issuance of the credit card at the defendant's address, (3) Use of the credit card, and (4) Retention of monthly statements and payments on the account. [Although] even without a signed application, the absence of the underlying agreement would not relieve a defendant from his obligation to pay for goods and services rendered on credit." Worldwide Asset Purchasing, LLC v. Akron, 384 N.Y.S.2d 631 (N.Y. City Civ. Ct. 2009) summarizing Citibank v. Roberts, 301 A.D.2d 901 (3d Dep't 2003). If the credit card account has been assigned, the assignee must also produce competent proof of assignment. See, e.g., Citibank (S.D.) N.A. v. Martin, 11 Misc.3d 219, 807 N.Y.S.2d 284 (N.Y.Civ. Ct. 2005).

A collection action is, of course, subject to the same standards of admissibility as any other action. Of particular relevance is the standard applicable to the ubiquitous "record keeper" affiant found in most consumer creditor pleadings. These affiants will often have great difficulty alleging "personal knowledge of the operative facts" in any meaningful sense. David Grubert, Inc. v. Bank Leumi Trust Co., 48 N.Y.2d 354 (1st Dep't 1979). Nor will their statements typically be "specific, with concrete particulars, and not merely conclusory." Bickerstaff v. Vasser Oil, 196 F.3d 435, 452 (2d Cir. 1999).

Moreover, the affiant will routinely allege personal knowledge based on documents without "annex[ing] the documentary evidence to the affidavit," as required. Witt v. Mark Irish, 184 Misc.3d 413, 768 N.Y.S.2d 264 (Columbia 2000); Sales v. Lake of Luzerne, 265 A.D.2d 770 (3d Dep't 1999).

Crucially, in debt buyer cases, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (and thus subject to a hearsay exception). Rushmore Recoveries v. Skrohlick, 15 Misc. 3d 1139(A) (Nassau Co. 2007) (citing a fairly exhaustive list of evidentiary failures common to collection pleadings), quoting Standard Textile Co., Inc. v. National Equipment Rental, Ltd., 80 A.D.2d 911 (2nd Dep't 1981).

Although, as seen from the citations above, these sorts of evidentiary failings are most commonly found in cases involving assignees, original creditors are by no means immune. Indeed, these same sorts of evidentiary shortcomings have featured prominently in several recent decisions denying arbitration awards sought by the purported original creditor. For example, in MBNA Am. Bank v. Nelson, 2007 WL 1704618 (Civ. Ct., Richmond Co. 2007), after discussing why the proffered affidavit failed, the court stated that although it appreciated "the allure that a summary process such as arbitration provides to a large commercial entity that holds hundreds of thousands, if not millions, of contracts for revolving credit,...judicial economy...should not outweigh the alleged defaulter's right to due process." See also MBNA Am. Bank v. Strub, 12 Misc.3d 963 (Civ. Ct., N.Y. Cty. 2006).6

5. Offsets and Holder-in-Due-Course Status

In reviewing potential affirmative claims in Part I of this series, the reader may have noted that the most powerful federal statutes (e.g., FDCPA, TILA, and FCRA) have markedly short statutes of limitations. Notably, however, there is no statute of limitations regarding these or any other claims where they "arise from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends" and are made as offsets (i.e., for "recoupment"). CPLR 203(d). Although offsets are, by definition, limited to no more than the amount sought by the Plaintiff, this doctrine can still, at times, be a critical tool in defending consumer claims, especially against abusive debt collectors against whom the statute of limitations has already run.
In addition, as reviewed in Part I, a debt-buyer Plaintiff will typically not be shielded from either the defenses or counterclaims as a holder in due course, inter alia, because such a holder takes “without notice that [the obligation] is overdue or has been dishonored...” UCC § 3-302. The practitioner must therefore investigate the client regarding the entire history of the transaction, not only the client’s interactions with the entity currently alleging ownership of the debt.

6. Last but Not Least: Is It Really Your Client’s Debt?

In striving to determine whether or not more “exotic” defenses might apply, the practitioner should not forget to first carefully question the client as to whether he or she truly ever owed the debt. This involves asking the client to elaborate on the circumstances under which any obligation may have been incurred. Examples of substantive, non-liability may include: identity theft; unauthorized credit card use by a family member; unauthorized charges by a merchant; unauthorized charges by a credit card issuer; charges for items subsequently returned; charges for items never delivered, etc. While, as noted at the outset of this article, some jurisprudence is skeptical of the more “procedural” defenses elaborated above, very few are immune to the defense of, “This is not my debt.”

Finally, a related point. Just because the principal is owed does not mean that the balance sought by a creditor is proper. The overcharging of fees and interest is all too common. The diligent practitioner should investigate whether the interest rates, charges and fees assessed to the debtor are authorized by any alleged contract between the parties, as well as by law. On this latter point, see, e.g., NY Personal Property Law § 302(7) (the Motor Vehicle Installment Sales Act) (capping attorney’s fees at no more than 15% of the amount due) and NYPPL § 413(5) (the Retail Installment Sales Act) (capping attorney’s fees at 20% of the amount due, and excluding litigation costs from its list of permissible charges).

Conclusion

Plaintiffs in consumer collection actions are typically not expecting to face a significant and skilled defense. Indeed, as reviewed above, the industry’s basic business model is based on herding large numbers of cases through the default judgment process without opposition from counsel familiar with the substantive, procedural and evidentiary defenses reviewed above. Although there are many, many cases in which the size of the claim and/or the relative weakness of the consumer’s defenses will severely limit the consumer’s (and counsel’s) options, there are a large number of consumer collection claims that are feasible and cost-effectively attacked by the solo or small firm practitioner on a variety of grounds, including those reviewed above.

Endnotes

1. MPF Legal Services’ excellent report entitled examined lawsuits brought in New York City court’s by the seven biggest debt collection law firms in 2007 and reported astonishing findings. These seven collection firms filed 182,277 cases last year in New York City courts, constituting almost one-third of all the civil cases filed (excluding landlord/tenant and small claims). Notably, consumers only appeared in 36% of these cases.

2. The question of how to apply CPLR 202 where a non-resident Plaintiff alleging economic injury is headquartered in foreign state and incorporated in another is not settled, although sound policy considerations mitigate in favor of applying the shorter of the two non-New York limitations period implicated.

3. It is unassailable, however, to rely principally upon the Delaware choice-of-law provision found in many consumer credit agreements, as there is significant recent authority for the principle that for the majority of states, New York considers the statute of limitations to be a “procedural” issue not determined by contractual choice-of-law provisions. Portfolio Recovery Assoc., LLC v. King, 55 A.D. 3d 1074 (3d Dep’t 2008). The flipside of course, is that the same line of cases holds that a creditor is not entitled to rely on a contractual choice-of-law provision to gain the benefit of another state’s longer statute of limitations. Education Resources Institute, etc. v. Pizzuto, 17 A.D. 3d 313 (3d Dep’t 2009) (Plaintiff not entitled to use of Ohio’s 15-year statute of limitations despite contractual Ohio choice-of-law provision).

4. The practitioner should also be aware of the Federal Communications Act, which provides a much shorter, two-year statute of limitations for actions brought by carriers. 47 U.S.C. § 112(a).

5. The problems Plaintiffs face are even more severe as applied to cases involved the bundling and sale of mortgage-backed securities. A slew of New York cases have invalidated last ditch attempts by such Plaintiffs to meet the requirements of standing via “back dates” assignments, assignments executed without proper corporate authorization or power of attorney pursuant to RPL § 234(9), etc. See US Bank v. Merriam, 16 Misc. 3d 209 (Sup. Ct., Suffolk Co. 2007); US Bank v. Bernard, 18 Misc. 3d 1139(A) (Sup. Ct., Kings Co. 2009); US Bank v. Risik, 16 Misc. 3d 1133(A) (Sup. Ct., Suffolk Co. 2009); see also Deutsche Bank Nat’l Trust Co. v. Chodak, 811 N.Y.S.2d 75, 2007 WL 2709956; *4, Wells Fargo Bank, N.A. v. Farmer, 2008 WL 2599086 (Sup. Ct., Kings Co. 2008).

6. The Nelson court emphasized that a petitioner “must tender the actual provisions agreed to, including any and all amendments, and not simply a photocopy of general terms to which the credit issuer may currently disavow [or] disclaim,” Notice at 7. The court noted that the credit card agreement referenced by Petitioner lacked, not only a signature, but “any name, account number or other identifying statements which would connect the proffered agreement with the Respondent in this action,” id. at 8.

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Assisting the Consumer Debtor, Part III: Improper Service
By Daniel Schlanger

I. Introduction

This article is the third and final installment in a series which has sought to provide the general practitioner with a basic orientation to representing consumers in collection actions. Part I focused on identifying potential counterclaims and third-party claims, particularly those arising under state and federal consumer protection statutes, such as the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., the Truth In Lending Act, 15 U.S.C. § 1601 et seq., and New York General Business Law § 349.1 Part II (Winter 2009/2010) focused on potential defenses to consumer collection actions, including statute of limitations, standing, personal jurisdiction, evidentiary defenses, offsets and substantive non-liability.2

In this final installment, I expand on the subject of lack of personal jurisdiction mentioned previously, detailing the procedural and practical issues involved, and highlighting a variety of deficiencies and even fraudulent practices regarding service of process and submission of affidavits of service that can be successfully attacked by a general practitioner who knows what to look for. In some cases, these deficiencies are so significant and/or pernicious that they may also form the basis of counterclaims or third party claims.3

II. Basic Procedural Issues

The defense of lack of personal jurisdiction based upon failure to serve the debtor with process typically arises in one of two procedural postures: (A) post-default judgment and (B) pre-default judgment.

A. Post-Default: CPLR 5015(a)(4)

I regularly encounter potential clients who seek assistance of counsel only after a creditor has successfully attached the consumer’s bank account or garnished the consumer’s wages. The combined effect of losing access to bank funds, and having outstanding checks returned for insufficient funds (not to mention their own banking institutions levy-related fees and charges) can have grave, real-life consequences for even solidly middle-class or affluent families. This remains true despite the recent, marked improvements in the rules regarding bank attachments pursuant to New York’s Exempt Income Protection Act of 2009 (EIPA).4 In many instances, the consumer is not even aware that a lawsuit was filed and judgment obtained even after the bank attachment or garnishment has commenced, and desperately wants to know on what basis the creditor has been able to attach funds, garnish wages, etc.

Where the consumer was not properly served, the consumer is entitled to vacatur of the judgment as a matter of law pursuant to CPLR 5015(a)(4). Although there are other provisions of the CPLR—most notably § 5015(a)(1) and § 317—that provide for vacatur/relied from judgment based, in part, upon a showing of meritorious defense, a court need not reach the issue of whether the judgment debtor has meritorious defenses in granting a motion under § 5015(a)(4).

Rather, “a court must first resolve the nondiscretionary CPLR 5015(a)(4)’s lack of jurisdiction. If a court lacked jurisdiction to render the default judgment, the court must vacate the default even if no showing is made by a defendant of a reasonable excuse for the default or a meritorious defense. This vacatur mandate is imposed because the default judgment or order is deemed void for lack of personal jurisdiction over defendant, and thus any judgment or order entered is a nullity.” Cho v. Song, 166 Misc. 2d 129 (1995) (emphasis in original) (citing Cipriano by Cipriano v. Hank, 197 A.D.2d 295 (1st Dep’t 1994) and Maraziti v. Nolbach, 91 A.D.2d 604 (2d Dep’t 1982). Ortiz v. Santiago, 303 A.D. 2d 1, 523 (1st Dep’t 2003) (“[H]ad service been improper... there would have been a lack of jurisdiction over them and hence no need of a showing of reasonable excuse and meritorious defense.”) Indeed, the United States Supreme Court has held that to require a showing of meritorious defense prior to allowing a party who was not provided with service or notice runs afoul of the Due Process Clause under the Fourteenth Amendment. Peralta v. Heights Medical Center, Inc., 108 S. Ct. 896 (1988).

Creditor’s counsel routinely attempt to argue against vacatur under § 5015(a)(4) on grounds that any deficiencies in service did not “prejudice” the client who may have had at least actual notice. However, “actual notice alone will not sustain the service or subject a person to the court’s jurisdiction when there has not been compliance with prescribed conditions of service.” Saxon Mortg. Services, Inc. v. Bell, 63 A.D.3d 1029 (2d Dep’t 2009); Foley Machinery Co. v. Amaco Const. Corp. 126 A.D.2d 603 (2d Dep’t 1987).
Nor is a motion under § 5015(a)(4) for lack of service subject to the time limitations of a motion for vacation of judgment pursuant to § 5015(a)(1) (state limits here) or § 317 (motion must be brought within one year after she obtained knowledge of the entry of judgment on and not more than five years from the date the judgment was entered).

The case law on the applicability of the creditor’s defense of laches to a motion under § 5015(a)(4) is not entirely settled. In Foley Machinery Co. v. Amaco Const. Corp. 126 A.D.2d 605 (2d Dep’t 1987), a defendant was improperly served at his place of employment. The Second Department stated “[i]n re the defendant[s] application barred by the doctrine of laches because personal jurisdiction was not obtained,” but went on to state that “in any event, mere delay alone, without actual prejudice, does not constitute laches.” Id.

In contrast, in Allen v. Board of Assessors of Town of Mendon, 57 A.D.2d 1036 (4th Dep’t 1977), a tax grievance case, the court held that personal jurisdiction was subject to the doctrine of laches, stating that the appellant Town’s delays in asserting the defense of lack of personal jurisdiction amounted “to laches and a waiver by the Town, and, therefore, the Town is now estopped from raising the jurisdiction defense based on lack of service, if indeed there was such.” The facts of Allen appear particular to the tax assessment context in which a town provides imperfect or incomplete information regarding response procedures to a taxpayer grieving an assessment and then finds the court unsympathetic when it raises the taxpayer’s failure to follow the correct procedures as a basis for a finding of no personal jurisdiction. Fittingly, the cases citing Allen are limited exclusively to the tax grievance context.

B. Pre-Default: CPLR 3211(a)(8)

Where the consumer was not properly served but obtains actual notice and responds to the summons and complaint timely, the consumer must either include the defense in a pre-Answer Motion to Dismiss pursuant to CPLR 3211(a)(8) or, if opting not to file such a motion, may include it in the Answer.

Critically, the latter option of raising the defense in the Answer requires that the consumer must move to dismiss on this basis within 60 days of filing the Answer pursuant to CPLR 3211(e). In other words, simply raising the defense of lack of personal jurisdiction is not sufficient to preserve it throughout the proceeding. Moreover, serial Motions to Dismiss are sharply limited, as CPLR 3211(e) specifies a long list of defenses, including personal jurisdiction, that must be brought together as a basis for dismissal or not at all.

Although CPLR 3211(e) does provide that the court may “extend the time upon the ground of undue hardship,” courts have been extremely unforgiving regarding the 60-day rule, interpreting the hardship exception quite narrowly. E.g., Aretakis v. Tarantillo, 300 A.D.2d 160 (1st Dep’t 2002). As a result, practitioners who miss this deadline may have significantly prejudiced their clients. Indeed, even where the consumer is pro se, courts have sometimes enforced waiver. Compare, e.g., Bell v. Little, 250 A.D.2d 485 (1st Dep’t 1998) (enforcing waiver against pro se litigant) and Domen Limited v. Assenti, 2009 WL 2870645 (SDNY 2009) (same), with Local 875 I.B.T. Pension Fund v. Pollock, 992 F. Supp. 545, (EDNY 1998) (rejecting waiver of personal jurisdiction defense on grounds that [Defendant] is a foreign pro se defendant and leave to amend the answer would have been readily available) and Lipman v. Salsberg, 107 Misc. 2d 276 (New York Civ. Ct. 1980).

Moreover, even where asserted timely, personal jurisdiction is waived where the defendant interposes a counterclaim that is “unrelated” to Plaintiff’s claims, i.e., that would not be subject to collateral estoppel were it to be asserted in a later lawsuit. Textile Technology Exchange, Inc. v. Davis, 81 N.Y.2d 56 (Ct. of Appeals 1993).

As a result of these limitations, the debtor’s attorney must carefully map out how and when it plans to raise the personal jurisdiction defense and what other grounds for dismissal must be “piggy-backed” onto a Motion to Dismiss for lack of personal jurisdiction.

III. Attacking Personal Jurisdiction Over Defendant in a Consumer Collection Action

A. “I Don’t Live There”

The easiest lack of service cases are those in which the defendant can demonstrate through overwhelming documentary evidence that—at the time of service—he or she simply did not live at the address specified as the place where service was made in the process server’s affidavit. Our office routinely attaches the following as exhibits in order to establish what one might call the “I Don’t Live There” defense.

A. Apartment Lease
B. Cancelled Rent Checks
C. Rent Invoices
D. Mortgage or Property Records
E. Utility Bills
F. Cable Bills
G. Telephone Bills
H. Bank Documents
I. Tax Returns
J. Property Manager Affidavits
K. Pay Stubs Listing Home Address

NYSBA One on One | Spring/Summer 2010 | Vol. 31 | No. 2

APPENDIX S
We also routinely use non-party affidavits from housemates, property managers and next door neighbors. Faced with sufficient documentary evidence, most courts will hold that there is no personal jurisdiction over defendant without ordering a traverse hearing in which the court hears testimony from the defendant, the process server, etc. See, e.g., Discover Bank v. Miller, Index No. 1085/02 (Supreme Court, Sullivan County) Sept. 22, 2008;

Harvest Credit Management VII, LLC v. Constance M. Athas, Index No. 75446/08, Feb. 19, 2010 (NY Civil Ct. 2010). Avoiding a traverse hearing is desirable both in terms of avoiding additional time and expense on the part of the debtor and the debtor's attorney, and also because one avoids the risk of damaging admissions, poor impressions, and confusion of the issues that always arise when live testimony is taken. Indeed, some debt collectors will immediately offer to vacate judgment rather than attempt to oppose a well documented Motion to Dismiss for lack of personal jurisdiction and run up expenses with little prospect of success.

B. Annotated Affidavit of Service

In addition to the “I Don’t Live There” defense, there are a variety of other grounds upon which one can attack service. In the remainder of this article, we examine a typical collection action affidavit of service to illustrate these other issues. (See Appendix A, sample “Affidavit of Service” on page 9).

1. Does the Affidavit list the correct plaintiff and correct defendant? Is the court and index number listed correctly? While courts are often lenient regarding mere “scrivener’s errors” (e.g., Chatham Green Management Corp. v. AAPE Management Company, 2003 WL 22299083 (N.Y. City Civ. Ct. 2003), there are occasionally more significant problems. For example, it is not uncommon for a consumer to be sued on several accounts by the same debt buyer, resulting in multiple actions with similar captions, all handled by the same process server, leading to possible mis-service and/or misfiling. In addition to the correctness of the name, the practitioner should confirm that the process server alleges separate service of each defendant, even where the defendants are related and/or live together.

2. a. Is the process server duly licensed? Although there is no statewide licensure, some localities—most notably New York City—have local licensure requirements. Although NYC’s registry is not yet available online, the practitioner can typically get verbal confirmation over the phone from the NYC Department of Consumer Affairs (NYDCA). Written confirmation that a process server is not licensed is obtainable by FOIA request made to the NYDCA.

b. Does the process server have a history of misconduct? Complaint histories are available from the NYDCA via FOIA request. Another useful resource is the Complaint itself in Pfan v. Forster & Garbus, 2009-8236, Sup. Ct. Erie County, 2009, which details specific misconduct (e.g., claims to have served multiple people in disparate locations at the same time) by numerous individual process servers.

Process servers have been sued in federal court for misconduct, making Pacer a useful resource as well.

c. Is the name of the process server/affiant listed as in this opening line the same as the name under the signature block? In this particular affidavit, taken from a case handled by this author, the names are not the same. The affidavit of “Donald Wolfman” appears to be signed by “George Pressman.”

3. Is the date of service listed a weekend? See CPLR 308 (Process may be served on any day of the week (including holidays) except Sunday.) See N.Y. Gen. Bus. Law § 11.12

4. Was this the consumer’s address at the time service was alleged? In this particular case, the consumer had moved from Brooklyn to Florida many years prior and, in any event, the address listed was not one he had ever lived at. Charles v. Palisades Collection, LLC, Index No. 09-cv-0818 (M.D. Fla. 2009).13

5. Was service affixed to the door of the residence, or merely to a door in the public area of an apartment complex or other larger structure? Posting service in a lobby is only acceptable where entry past the lobby is restricted. F.I. DuPont, Glor Foron & Co. v. Chen, 41 N.Y.2d 794, 396 N.Y.S.2d 343 (1977) (Because the process server was not permitted to go beyond the lobby area by the doorman, the court found that the bounds of Defendant’s dwelling place extended to the building lobby where the process server’s attempt to effectuate service upon Defendant was impeded).

6. Do any of the dates of previous attempts fall on a Sunday? See (3), above. More importantly, although it appears to be almost universal practice in collection cases to perform “nail and mail” service (i.e., affixation of the summons and complaint to the door, followed by a copy sent via regular mail) on the third attempt at
service at the residence, it would appear that an affidavit that fails to allege more is, prima facie, insufficient. Specifically, several appellate courts have ruled that where the affidavit of service does not allege any inquiry "about the defendant's whereabouts and place of employment," the process server has not met CPLR 308(4)'s due diligence requirement and the Complaint is properly dismissed for lack of personal jurisdiction on this basis without a traverse hearing. McSorley v. Spear, 50 A.D.3d 652 (2d Dept. 2008); Schwier v. Margie, 62 A.D.3d 780 (2d Dept. 2009) (holding that the trial court committed reversible error by ordering a traverse hearing where the plaintiff "failed to show the existence of even a factual question as to whether the process server exercised the due diligence necessary to be permitted to serve someone under CPLR 308(4)") (citations omitted).

7. Is the mailing address correct? Typically it will be listed on the affidavit of service as identical to the physical address. Even where the client resides at the physical address listed, occasionally the client will have a P.O. Box and no onsite postal delivery, allowing a successful challenge to service for failure to mail a copy of the summons and complaint to defendant.

8. a. In a case involving alleged service upon a person of suitable age and discretion: Does the person exist? In one case the author handled, the court dismissed after Defendant submitted documents showing that the person of suitable age and discretion had died years prior to the alleged service date. The description of the person receiving service can often be helpful in this regard, as it can sometimes avoid questions about whether the person allegedly accepting service merely gave a false name, and allow the debtor, residents of the property, the landlord, neighbors etc. to state in an affidavit that no one fitting that description resides at the residence.

b. Is the person who allegedly accepted service truly of suitable age and discretion? See e.g., Room Additions, Inc. v. Howard, 124 Misc. 2d 19, 475 N.Y.S.2d 310 (N.Y. City Civ. Ct. 1984) (court vacated judgment and dismissed action as a nullity where eleven-year-old "accepted" service of summons and complaint); 50 Court Street Associates v. Mendelson and Mendelson, 151 Misc. 2d 87, 572 N.Y.S.2d 997 (N.Y. City Civ. Ct. 1991) (listing relevant case law and explaining that "the principle that emerges from these cases is that a person will be considered to be of suitable age and discretion where the nature of his/her relationship with the person to be served makes it more likely than not that they will deliver process to the named party.").

c. Was the process server at the "residence" at the time service was accepted on behalf of debtor? Note that Courts have held that a doorman only meets this requirement where access beyond the lobby was not permitted, such that the process server did not have the option of proceeding to the entrance of the debtor's actual apartment. See also Pickman Brokerage v. Bevona, 149 Misc. 2d 879, 568 N.Y.S.2d 287 (N.Y. Sup. 1991) (leaving of process with a janitor or office building maintenance employee in the lobby at 5 PM is insufficient as a matter of law for conferring jurisdiction pursuant to CPLR Sec. 308(2)); Colonial National Bank v. Jacobs, 188 Misc. 2d 87, 89 (NY Civil Ct. 2000) ("If a doorman is at the main entrance to a multi-unit building, however, he is not normally at a building resident's actual dwelling for purposes of service."). See supra, (4).

9. Military Service: The Federal and New York service member Civil Relief Acts "require that, prior to issuance of a default judgment, the plaintiff or petitioner must submit to the court affidavits establishing that any individual defendant or respondent is not in active military service." Palisades Acquisition, LLC v. Ibrahim, 12 Misc. 3d 340 (N.Y. Civil Ct. New York County 2006), citing 50 App. U.S.C.A. § 521, and N.Y. Military Law § 303(1) and § 306. Although this defect is not "jurisdictional" and thus does not render the judgment "void ab initio," numerous courts have refused to enter default judgments based on plaintiff's failure to submit a military affidavit holding that the court nonetheless has a duty to ensure compliance with the law. Palisades Acquisition, LLC v. Ibrahim, 12 Misc. 3d 340 (N.Y. Civil Ct. New York County 2006); MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148(A), 841 N.Y.S.2d 826, 2007 WL 1704618 (N.Y. City Civ. Ct. 2007); 3 Realty v. Booth, 12 Misc. 3d 1184(A) (Suffolk, 2006); Atrium Funding Corp. v. McRoberts, 10 Misc. 3d 1077 (Suffolk 2006). But see Department of Housing etc. v. West 129th Street Realty Corp., 9 Misc. 3d 61, 802 N.Y.S.2d 826 (1st Dept. 2005) (vacatur was improper where defendant made no "pretense of being on active military duty or being a military dependent at the time of his default").

NYSBA One on One | Spring/Summer 2010 | Vol. 31 | No. 2

APPENDIX S
10. Is the individual signing as a notary actually a notary with a valid license at the time of notarization? If not, the document submitted is unauthorized and therefore not an affidavit at all. The practitioner can search for this information at the New York Department of State’s Division of Licensing Services. Licensee ID Search page: http://appsse18.dos.state.ny.us/lcns_public/id_search_frm.

IV. Conclusion

Because many collection firms employ sloppy or even unethical process servers, service-related challenges to personal jurisdiction can provide a powerful defense for the consumer debtor. This article has aimed to highlight a plethora of common deficiencies regarding service of process, and to sharpen the general practitioner’s ability to recognize improper practices or, at least, fruitful avenues of inquiry, when examining a typical affidavit of service in a collection matter. In the most egregious cases, service-related deficiencies can even provide the basis for counter/third party claims.

Endnotes

1. “Assisting the Consumer Debtor: Becoming Aware of Potential Affirmative Claims,” Daniel A. Schlanger, Esq., NYSBA, One on One (Fall, 2009).

2. “Assisting the Consumer Debtor: Part II: Defenses to Consumer Credit Claims,” Daniel A. Schlanger, Esq., NYSBA, One on One (Winter 2010).


5. The interaction between lack of service and the statute of limitations defense stemming from CPLR 306-b, and the resulting inadversibility of waiving jurisdictional defenses, is discussed in Part II of this three-part series.

6. See also CPLR 2004.

7. Of particular interest to the consumer practitioner is the lack of clarity regarding whether the defense of no standing is best conceptualized as one of “lack of capacity to sue” (§ 3211(a)(3)) and is thus waived if not raised timely or not included in Defendant’s motion to dismiss for lack of personal jurisdiction, or whether the defense is “jurisdictional” (§ 3211(a)(2)) and thus entirety unwaivable even on appeal. See McKinney’s Practice Commentaries (Siegel), § 3211:13 citing, e.g., Glavin v. Abagnale, 235 A.D.2d 999 (2d Dept. 1997) and CPLR 3211(e) (limiting Defendant to one motion to dismiss based upon § 3211(a)(3) through (6)). Regardless of this author’s opinion that the latter view is correct, prudence dictates that standing be pleaded under both §§ 3211(a)(2) and (a)(3) alongside the practitioner’s motion for dismissal for lack of personal jurisdiction pursuant to § 3211(a)(8).

8. Obviously, various documents on this list must be redacted prior to submission to the Court in order to protect client confidentiality.


11. In Pfau v. Forster & Garbus, 2009-8236, Sup. Ct. Erie Co., 2009, the following individual process servers were singled out for gross misconduct: Raymond Bennett; Dunham Teddy Tyler; Gene Gagliardi; Drefel Grimmet; Bill Matz; John Hughes; Andrea D’Ambra; Greg Tereshko; Diana Lentz; Herb Katz; Bernard Holder; Ahman Omar; Annette Forest; Issam Omar; Dan Beck; Beth Eubank; Michelle Miller; Harry Marinelli; Michael Bazza; and Courtney Goldstein.

12. Exceptions to the prohibition on Sunday are found in N.Y. Jud. Law § 3 (injunctive orders) and N.Y. Gen. Bus. Law § 13 (Persons who are known to be Saturday Sabbath observers may not properly serve on Saturday). Although CRL § 13, on its face, addresses criminal liability for Saturday service, courts have found that the statute implicitly voids service made intentionally on the Jewish Sabbath (including Friday after sundown) and other Jewish Holidays on which work is forbidden where the Plaintiff knows that the Defendant is a religiously observant Jew. Hirsch v. Zel, 184 Misc. 2d 946 (Civil Cl. Kings Co. 2000); PTPK, LLC v. Paradise Pillows, Inc., 7 Misc. 3d 1125(A), 862 N.Y.S.2d 808 (N.Y. Civil Ct. Cl. 2005).

13. See also Palau v. Clarke, 85576-cv-2016 (N.Y.Civ. Ct. Kings Co. 2009). The author represented Defendant in this action, which was dismissed with prejudice prior to initiation of the above referenced federal FDCPA suit.

Daniel Schlanger, Esq. is a partner at Schlanger & Schlanger, LLP in White Plains, New York and Manhattan, and practices primarily in the area of consumer law. He is a graduate of Harvard Law School and a former clerk of the Honorable R. Lanier Anderson, III of the U.S. Court of Appeals, Eleventh Circuit. He may be reached at daniel@schlangerlegal.com or 914-946-1981. Additional information regarding the topics addressed in this series can be found at the firm’s consumer law website, www.newyorkconsumerprotection.com. Finally, the author wishes to acknowledge and thank associate Jeanne M. Christensen, Esq., for her significant research assistance on this article.
Affidavit of Service

CIVIL COURT OF THE CITY OF NEW YORK - COUNTY OF KINGS

Part:

PALIBADES COLLECTION, L.L.C

against

RAWLE CHARLES

Defendant(s) / Respondent(s)

Attorney: PAP
A.B. No: 0145431
Mailing:
Index: 055576/06
SBC Filed: 09/25/2006

STATE OF NEW YORK: COUNTY OF NASSAU: on:

DONALD L. WOLFMAN, BEING DULY EMPOWERED TO DO SO, SAYS: DEPOENNT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

First on 3/20/2006 at 6:34 AM at 850 MONROE ST # 3, BROOKLYN, NY, 11214/107, Defendant served the within Summons and Verified Complaint on RAWLE CHARLES, defendant therein named.

AFFIRMING TO DOOR, ETC. By affixing 1 true copy(s) thereof to the door of said premises, the same being the defendant's dwelling place within the State of New York.

PREVIOUS ATTEMPTS

Defendant had previously attempted to serve the above named defendant/respondent on the following: 7/31/06 AT 7:34 PM, 8/2/06 AT 12:22 PM.

MAILING

Defendant completed service under the last two sections by depositing 1 copy(s) of the above described papers in a post paid, properly addressed envelope in an official depository under the exclusive care and custody of the United States Post Office in the State of New York, on 3/20/2006 addressed to the defendant(s) served to the above address with the envelope bearing the legend "PERSONAL AND CONFIDENTIAL" and did not indicate on the outside thereof that the communication was from an attorney or concerned an action against the defendant(s).

Dependent describes the individual as follows:

Sex:

Approx. Age:

Approx. Height:

Approx. Weight:

Color of Skin:

Color of Hair:

Other:

Dependent asked the person whether the defendant and/or present occupant was presently in the military service of the United States Government or on active duty in the military service in the State of New York or a dependent of anybody in the military and was told defendant

and/or present occupant was not.

MALE RECIPIENT: Mr. BERNER, 3F

2003 NEW YORK / G: 17 AIL: 58

DANA GELLER
Notary Public, State of NEW YORK
No. 0160066277
Qualified to NASSAU
Commission expires 07/21/2007

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