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CIVIL COURT COMMITTEE
CONSUMER AFFAIRS COMMITTEE

COMMENTS ON PROPOSED REFORMS RELATING TO CONSUMER CREDIT CASES

These comments relate to the New York State Office of Court Administration's (OCA) proposed reforms for consumer credit cases. The proposals include adoption of statewide affidavit forms for use in seeking entry of default judgments, expansion of notice requirements to defendants, and adoption of pro se court forms currently used in New York City.

OCA's proposed reforms present a historic step in the fair administration of justice in consumer credit transactions in New York State and indeed the nation. These proposals are a statement that New York is governed by the rule of law in adjudicating claims that affect ordinary consumers. The reforms will make consumer credit actions more equitable and will help prevent the devastating impacts of improper and illegal debt collection practices for tens of thousands of New York State residents.

OCA's proposed reforms will help ensure that both original creditors and debt buyers submit the evidence legally required to prove ownership of the debt. The reforms will address the nefarious practice of default judgments based on illegal "robo-signed" affidavits. The enhanced notice requirement will ameliorate the negative effects of improper service of process by making certain more defendants know of lawsuits filed against them and preventing entry of default judgments against those whom plaintiffs improperly served. Statewide adoption of the proposed court forms will improve access to justice for tens of thousands of unrepresented consumers who must defend themselves. We applaud OCA and strongly support the reforms and provide some comments and suggestions below.

FEATURES OF THE PROPOSED STATEWIDE REFORMS

Key provisions of the proposed statewide reforms include the following:

1. The proposed rule amendments to 22 N.Y.C.R.R. §§ 208.14-a, 210.14-a, and 212.14-a set out form affidavits that creditors must complete in order to apply for a default judgment. These include affidavit forms for an original-creditor plaintiff, a debt-buyer plaintiff, a debt buyer in connection with the purchase and sale of an account and a debt buyer in connection with the chain of title of an account; and an affidavit of non-expiration of the statute of limitations for all actions.

2. OCA proposes expanding to courts outside of New York City 22 N.Y.C.R.R. § 208.6(h), which requires creditors to submit to the court an additional notice of a consumer credit action to be mailed by the court to the defendant at the address where process was served. The court will not enter a default judgment in any case where the additional notice is returned to the court because of a wrong or unknown address.

3. OCA proposes expanding to courts outside of New York City two forms to be available to unrepresented defendants in consumer credit actions: a check-off answer form and an affidavit form in support of an Order to Show Cause to vacate a default judgment.

REASONS FOR APPROVAL OF THE REFORMS AND RECOMMENDED CHANGES

I. The Proposed Affidavit Forms Address "Robo-Signing" and Ensure Compliance With Evidentiary and Other Requirements

The Committees believe the proposed affidavit forms and required proof for entry of default judgments in consumer credit actions will prevent "robo-signed" affidavits and ensure that creditors obtain default judgments based on non-hearsay evidence necessary to establish a *prima facie* case. We recommend the following changes to ensure that the proposed reforms achieve their intended purpose.

With regard to the "Affidavit of Facts by Original Creditor (Original Creditor Actions)," we recommend that paragraph 4 be amended to include the following proof of the existence of the debt or account and proof of terms and conditions:

> "[a] true and correct copy of the original agreement governing the account upon which the action is based, and any amendments thereto, *including or accompanied by supporting documents or statements containing evidence of the defendant's consent to the terms and conditions of the agreement governing the account.*"

With regard to the "Affidavit of Facts by And Sale of Account by Original Creditor (Debt Buyer Actions)", the Committees recommend that paragraph 5 be amended to include the following:

> "[a] true and correct copy of the original agreement governing the account upon which the action is based, and any amendments thereto, *including or accompanied by supporting documents or statements containing evidence of the defendant's consent to the terms and conditions of the agreement governing the account.*"

With regard to the "Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions), we recommend that paragraph 3 be amended to include the following: "True and correct copies of *the* written assignment of the Account are attached to this affidavit,

including the bill of sale and documents containing sufficient detail as to liability and damages." In order to comply with evidentiary requirements, we recommend that each debt buyer in the chain of title attach copies of the applicable written assignment of the account and the necessary supporting documents.

The Committees believe that, in a consumer credit action, the causes of action accrue in one state rather than multiple states. With regard to the "Affidavit of Non-Expiration of Statute of Limitations (All Actions)", we therefore recommend that paragraph 2 be amended as follows:

> "*The causes(s) of action accrued on _____ [date of default] in the state of _____. The statute(s) of limitations for the cause(s) of action asserted in the complaint is/are _____years in New York and _____years in _____ [state where cause of action accrued, if other than New York]. Based on my reasonable inquiry, I believe that the applicable statute(s) of limitations for the cause(s) of action asserted herein has/have not expired."*

In addition, because the calculation of the appropriate statute of limitations necessarily involves a legal analysis, we believe it would be more appropriate to require that the Affidavit of Non-Expiration of Statute of Limitations be completed in all cases by Plaintiff's legal counsel.

Finally, the Committees note that not everybody sued is, in fact, a debtor. Many people sued do not owe the alleged debt because they are victims of identity theft or mistaken identity, or they have previously paid, settled or discharged the debt in bankruptcy. For this reason, we recommend that the affidavits refer to the person sued as the "Defendant" and not the "Debtor."

II. The Proposed Statewide Notice Will Help Prevent Entry of Default Judgments Where Service of Process Involved An Incorrect Address

While Committee members have observed some improvements in service of process in New York City since local reforms went into effect in 2010, "sewer service" remains a significant concern.[1] The proposed expansion of New York City's 22 N.Y.C.R.R. § 208.6(h) notice to the entire state will prevent entry of default judgments where the process server claims service at an incorrect or outdated address. The impact of default judgments on consumers is devastating, and problems with improper service of process are continuing. This proposed reform extends to New Yorkers an effective and fair measure that protects defendants' procedural and due process rights. The Committees do not recommend any changes related to OCA's proposed notice.

[1] *See* New York City Bar Association, *Out of Service: A Call to Fix the Broken Process Server Industry* 4 (Apr. 2010), *available at* http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf; MFY Legal Services, *Justice Disserved* 2 (June 2008), *available at* www.*mfy*.org/wp-content/uploads/reports/*Justice_Disserved*.pdf.

III. The Proposed Statewide Answer and Order to Show Cause Forms Constitute Significant Measures to Improve Access to Justice for Tens of Thousands of Unrepresented Defendants and Will Facilitate the Fair Adjudication of Consumer Credit Actions

An overwhelming majority of defendants in consumer credit actions are unrepresented.[2] Moreover, given the skyrocketing of filings of consumer credit actions over the last decade[3] and the extraordinarily high rates of default, the Committees estimate a backlog of over 1 million default judgments in New York City Civil Court alone.[4]

In the experience of our members, the New York City forms benefit both the Civil Court and pro se litigants, but to varying degrees. The forms enable consumers to take two critically important steps: filing an answer or filing an order to show cause to vacate a default judgment. Both of these steps make it less likely that the consumer will either default entirely or forego the opportunity to assert potentially winning legal defenses.

Check-Off Answer Form. The proposed answer check-off form has been utilized effectively in New York City for many years. The Committees have two recommendations. Defense number 8 states: "The New York City Department of Consumer Affairs shows no record of plaintiff having a license to collect debt (only for cases filed in New York City)." Defense number 9 states: "Plaintiff does not allege a debt collector's license number in the Complaint (only for cases filed in New York City.") The City of Buffalo also has a licensing requirement for debt collectors[5] and other local governments may adopt licensing requirements in the future. The Committees recommend amending these defenses in the check-off form as follows:

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[2] According to data provided to the New York City Bar Association Civil Court Committee by the New York City Civil Court, in 2012, approximately 97% of consumers did not have counsel. A 2013 study of New York State consumer debt collection cases found that 98% of defendants were unrepresented. New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* 3 (June 2013), *available at* http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf.

[3] Consumer debt collection filings exploded in the last decade. In New York City Civil Court, filings peaked from 2006 to 2008, when debt collectors filed nearly 300,000 cases per year. The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* 6 (May 2010), *available at* http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf. Notably, filings have decreased in New York City since 2008 but still account for sizable dockets, reaching in 2013 well over 79,000 in New York City and over 100,000 in New York State.

[4] According to data provided to the New York City Bar Association Civil Court Committee by the New York City Civil Court, between 2009 and 2012, the New York City Civil Court alone entered 412,098 default judgments out of the 673,204 actions filed – averaging a default rate of 61% for the four-year period, which can be assumed to be primarily due to failure to file an answer as opposed to failure to comply with a stipulation. The Committees note that default judgment rates in New York City declined from 66% in 2009 to 49% in 2013. Between 2006 and 2008, creditors filed 1,036,468 documented cases in New York City Civil Court. Assuming the default rate for the three years was 70%, as reported by then-Administrative Judge, Justice Fern A. Fisher in 2008 for 2008, an additional 725,528 default judgments were entered. Justice Fisher has noted that the New York City Civil Court data for default judgments are not 100% accurate, but are sufficiently so that the statistics can be used reliably as an indication of default judgment rates.

[5] Code of City of Buffalo § 140-1 (2014) (debt collectors required to be licensed).

- For defense number 8: "*The city or local government shows no record of plaintiff having a license to collect debt (only for cases filed in Buffalo or New York City).*"

- For defense number 9: *"Plaintiff does not allege a debt collector's license number in the Complaint (only for cases filed in Buffalo or New York City).*"

Order to Show Cause Form. The proposed Order to Show Cause form to vacate a default judgment will certainly facilitate access to the courts for unrepresented New York State residents. The Committees, however, recommend several revisions.

First, the form should make more clear when defendants are seeking vacatur pursuant to C.P.L.R. § 5015(a)(4) based on lack of jurisdiction (typically personal jurisdiction in consumer credit actions) *and*, in the alternative, C.P.L.R. § 5015(a)(1) based on excusable default and meritorious defenses lack of jurisdiction (most frequently personal jurisdiction in consumer credit cases) versus C.P.L.R. § 5015(a)(1) alone.[6] Moreover, established precedent requires courts to consider the C.P.L.R. § 5015(a)(4) jurisdictional basis first.[7] We recommend adding "CPLR 5015(a)(4)" under "Service" and "CPLR 5015(a)(1)" under "Excusable Default".

Second, whether seeking vacatur of the default judgment pursuant to either provision, where the defendant asserts that she was not served properly the court affidavit form needs to elicit detailed facts related to the review of the affidavit of service and the service of process. For example, some courts may reject "I did not receive the court papers" as conclusory and insufficient to refute the process server's assertions.[8]

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[6] Ideally, the form should also include the opportunity for the defendant to move pursuant to C.P.L.R. § 317 to vacate the default judgment. The form should elicit facts related to compliance with the provision, including for example that service of the summons was not by personal delivery and that the defendant has a meritorious defense or defenses. The proposed form, when read in conjunction with the affidavit of service, meets these requirements.

[7] *See* Roberts v. Anka, 45 A.D.3d 752, 846 N.Y.S.2d 280 (2d Dept. 2007); Marable v. Williams, 278 A.D.2d 459, 718 N.Y.S.2d 400, N.Y.A.D. (2d Dept., 2000). *See also* 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).

[8] A very recent court decision illustrates this issue well. The court stated as follows:

> The process server's affidavit established, prima facie, that defendant had been properly served pursuant to CPLR 308 (2). In support of his motion to vacate, defendant stated that the summons and complaint had not been properly served and that he had never received any court papers. Inasmuch as defendant's jurisdictional claim was wholly conclusory, he failed to establish that the court lacked personal jurisdiction over him (see CPLR 5015 [a] [4]).

Pinpoint Tech., LLC v Egan, NY Slip Op 50356 (App. Term, 2d Dept. Feb. 28, 2014), *available at* http://law.justia.com/cases/new-york/appellate-term-second-department/2014/2014-ny-slip-op-50356-u.html. *See also* Roberts v. Anka, 45 A.D.3d 752, 846 N.Y.S.2d 280 (2d Dept. 2007) (rejecting as insufficient defendant's refutation that a relative did not "reside" in the premises, because the relative could nonetheless have accepted process); Cavalry SPV I, LLC v. Cele, 2014 WL 1757480 (Sup. Ct. Bronx Cty. Mar. 21, 2014) (denying application for vacatur where process server claimed service pursuant to C.P.L.R. 308(2) because defendant did not specifically

Furthermore, in New York City, due to budget cuts, defendants who file an order to show cause to vacate a default judgment must wait weeks and months before gaining access to the court file and affidavit of service. Currently, some defendants are penalized with denial of orders to show cause for failure to dispute the allegations of the affidavit of service with sufficient specificity, even though the lack of specificity is directly related to their inability to access to the court file or their lack of knowledge that such a thing as an affidavit of service exists, let alone that they must respond to it in their papers. This is particularly unfair when these litigants are facing the adverse impact of judgments such as wage garnishment, bank restraints, denial of credit, and adverse employment and housing decisions.[9] Delays in access to court files (and the repercussions that flow from these delays) present a major due process concern.

To address these concerns, the Committees recommend the addition of the following to the "Service" section of the form:

__ c) I have read the Affidavit of Service, and I disagree with it because: _____

__ d) I requested the Affidavit of Service from the court, but it was not available.

The Committees also respectfully recommend that OCA remind trial and appellate judges that it is not equitable to penalize defendants whose first opportunity to review the affidavit of service is in creditors' opposition papers by refusing to allow them to contest the affidavit of service in their reply papers.[10]

In addition, the Committees believe that some of the reasons included in the "Excusable Default" section would not be accepted by many courts, including: number 5, "I don't owe the money"; and number 11, "I receive exempt income." We recommend deletion of these sections.

Finally, with regard to the "Order to Show Cause Information Sheet on Defenses," defenses 9 and 10, relating to licensure of debt collectors and inclusion of the license number in the pleadings, we make the same recommendations as with the check-off answer form noted above.

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deny receipt of summons and complaint by mail and because defendant did not specifically refute the process server's claim of delivery to a third party by stating that no person matching the third party's description was present at the premises on the date service was alleged to have been effected).

[9] See Pinpoint Tech., LLC v Egan, NY Slip Op 50356 (stating that "[w]e note that any matter improperly raised for the first time in reply papers will not be considered").

[10] *See, e.g.*, Palisades Collection, LLC v. Castrellon, NY Slip Op 50358(U) (App. Term, 2d Dept. Feb. 28, 2014) (stating that "[w]e note that we have not considered the new facts which defendant improperly set forth for the first time in his reply papers" (citation omitted)), *available at* http://law.justia.com/cases/new-york/appellate-term-second-department/2014/2014-ny-slip-op-50358-u.html; Pinpoint Tech., LLC v Egan, NY Slip Op 50356 (App. Term, 2d Dept. Feb. 28, 2014) (stating that "[w]e note that any matter improperly raised for the first time in reply papers will not be considered").

CONCLUSION

The Committees applaud OCA for undertaking the critically important proposed reforms relating to consumer credit collection actions. Taken together, the proposed reforms will help ensure that plaintiffs meet the required evidentiary requirements for entry of default judgments and will facilitate the fair administration of justice in these cases by improving access to the courts for unrepresented defendants.

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May 2014