



NEW YORK  
CITY BAR

COMMITTEE ON CIVIL COURT

June 11, 2015

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**Re: Proposed Solutions to the File Access Problem in New York City Civil Court**

Dear Mr. McConnell:

At the February 25th meeting of the New York City Bar Association's Council on Judicial Administration ("CJA"), you were kind enough to listen to our concerns about a file access problem in the New York City Civil Court (Civil Court). The problem affects consumer debt collection cases, and most heavily burdens *pro se* consumer defendants who 1) discover default judgments against them in old cases and 2) are sued in recent cases for which the affidavit of service is unavailable.

Litigants face protracted delays in obtaining affidavits of service of process ("AOS"s), in both old cases in storage and in newly filed cases. Far from minor ministerial grievances, these long delays (7 to 16 weeks) in getting old files deprive consumer defendants of timely relief from wage garnishments and other effects of ill-gotten default judgments. Delayed access to AOSs also prevents defendants from challenging improper service in newer cases, knowing whether they are alleged to have been served, and knowing the correct calculation of time to answer.

You acknowledged at the meeting that the Court is too short-staffed to keep up with the filing demand. Since we last spoke, the Honorable Fern Fisher, Deputy Chief Administrative Judge, New York City Courts, issued an Advisory Notice, AN-17, implementing changes aimed at ameliorating the present situation.<sup>1</sup> Similarly, Chief Clerk Carol Alt issued Chief Clerk's Memorandum CCM-203, which initiated additional protocols.<sup>2</sup> We believe that these initiatives represent important steps, and we are grateful to Judge Fisher and Chief Clerk Alt for taking action. We now write to propose long-term solutions that would require little to no additional

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<sup>1</sup> See Appendix A: Advisory Notice (AN-17): Unavailable Files in Consumer Debt Cases.

<sup>2</sup> See Appendix B: Chief Clerk's Memorandum (CCM-203): Unavailable Files in Consumer Credit Matters.

resources, and to urge the Office of Court Administration (“OCA”) to implement them to alleviate the problem.

## BACKGROUND

Data obtained from OCA consistently show that over 40% of consumer debt collection cases in Civil Court result in default judgments.<sup>3</sup> In 2011, debt collection cases accounted for 80% of all default judgments entered in New York State courts.<sup>4</sup> Many of these judgments are likely the result of “sewer service”; cases like *Pfau v. Forster & Garbus*<sup>5</sup> and *Sykes v. Mel Harris & Associates, LLC*<sup>6</sup> have revealed the rampant and systemic use of fraudulent service by law firms and process servers in consumer debt collection cases. Indeed, systemic abuses in the service of process have long plagued lawsuits that affect low- and moderate-income litigants in New York State, most notably in consumer debt collection and landlord/tenant matters.<sup>7</sup>

The pervasive problem of sewer service has led to reforms by regulators, including OCA itself. In 2008, the New York City Department of Consumer Affairs (“DCA”) held an exploratory hearing on process service practices in New York City, which led to the

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<sup>3</sup> In 2008, 79% of consumer debt cases resulted in default judgments. New York City Bar Association, Out of Service: A Call to Fix the Broken Process Server Industry 2 (April 2010), *available at* <http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf>. In 2009 and 2010, the citywide default rates were 66% and 58%, respectively. New York City Bar Association, Written Testimony of the Civil Court Committee to the Department Of Consumer Affairs Public Hearing on the Proposed Amendments To Rules Regarding The Licensing Of Process Servers 1 (June 13, 2011), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072136-TestimonybeforetheDepartmentofConsumerAffairsreprocessservers.pdf>. In 2013, based on statistics provided by Hon. Fern Fisher at a Civil Court Committee meeting, the default rate stood at approximately 55% (on file with authors).

<sup>4</sup> New Economy Project, The Debt Collection Racket in New York, 3 (June 2013), *available at* <http://www.neweconomy.nyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf>.

<sup>5</sup> Press Release, Office of the Attorney General of New York, Cuomo Announces Guilty Plea Of Process Server Company Owner Who Denied Thousands Of New Yorkers Their Day In Court (Jan. 15, 2010), *available at* [http://www.ag.ny.gov/media\\_center/2010/jan/jan15a\\_10.html](http://www.ag.ny.gov/media_center/2010/jan/jan15a_10.html); Press Release, Office of the Attorney General of New York, Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation (July 23, 2009), *available at* [http://www.ag.ny.gov/media\\_center/2009/july/july23b\\_09.html](http://www.ag.ny.gov/media_center/2009/july/july23b_09.html).

<sup>6</sup> *Sykes v. Mel Harris & Associates, LLC*, 285 F.R.D. 279, 284 (S.D.N.Y. 2012), *aff'd sub nom. Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70 (2d Cir. 2015) (“Records maintained by defendants reveal hundreds of instances of the same process server executing service at two or more locations at the same time.”).

<sup>7</sup> *See Barr v. Dep’t of Consumer Affairs*, 70 N.Y.2d 821, 822-23 (1987) (noting that improper service of process is most often associated with low-income defendants in consumer debt collection and landlord/tenant litigation); *see also* N.Y. Attorney General, N.Y. City Dep’t of Consumer Affairs, N.Y. City Dep’t of Investigation, A Joint Investigative Report into the Practice of Sewer Service in New York City (1986) (detailing abuses in the service of process in New York City); Frank M. Tuerkheimer, Service of Process in New York City: A Proposed End to Unregulated Criminality, 72 Colum. L. Rev. 847 (1972) (discussing an investigation of improper service of process conducted by federal prosecutors in 1968).

promulgation of city-wide rules to reduce the prevalence of abusive practices.<sup>8</sup> In 2011, the Civil Court followed suit, instituting a requirement that additional notice of pending lawsuits be mailed to debtor-defendants.<sup>9</sup> In 2014, OCA adopted this rule to cover consumer debt cases throughout the State.<sup>10</sup>

While these efforts have reduced the number of default judgments in consumer debt collection cases, many older, fraudulently obtained judgments remain in force. Far too often, defendants' first notice of a lawsuit is a wage garnishment or bank account restraint due to a default judgment – *years* after the judgment was entered. *Pro se* defendants who attempt to vacate old judgments find their problems exacerbated by extraordinary delays in gaining access to their court files – files which contain the very AOSs they must address in their motions to vacate. For example, in New York County, due to off-site warehousing, it takes a *minimum of 14 weeks, and up to 16 weeks*, to obtain a file for a case commenced before 2011.

Unfortunately, defendants who, despite defective or lack of service, manage to discover they have been sued (for example via the notice from the Court or by searching e-courts) find that plaintiffs' AOSs are missing from their files. Often, plaintiffs' mass filings of AOSs leave overburdened clerks with insufficient time to file the AOSs in the court files at the time of submission. Thus, a defendant who has been improperly served, or not served at all, often cannot get the AOS to address the service allegations in a timely motion to dismiss, or to know whether he or she even has to answer.<sup>11</sup>

For several reasons, it is critical that consumers have an ability to meaningfully challenge default judgments. First, in our “Scored Society,” judgments and other public information are aggregated and used to evaluate an individual's qualifications for a number of opportunities, including employment, a car loan, insurance, housing, and a mortgage.<sup>12</sup> Second, many debt collection lawsuits are brought by debt buyers, who often lack sufficient evidence to prove their

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<sup>8</sup> In June, 2011, the Commissioner of the New York City Department of Consumer Affairs promulgated and adopted rules and amendments to existing rules regarding service of process, including updated rules regarding record-keeping requirements for licensed process servers in New York City. See THE CITY RECORD, Volume CXXXVIII Number 147, 1789, available at <http://www.nyc.gov/html/dcas/downloads/pdf/cityrecord/cityrecord-8-1-11.pdf>.

<sup>9</sup> Uniform Civil Rules for the New York City Civil Court § 208.6(h)(2011). If the notice is returned as undeliverable, the clerk denies the plaintiff's application for entry of default judgment. *Id.*

<sup>10</sup> See <https://www.nycourts.gov/rules/ccr> and [https://www.nycourts.gov/PRESS/PDFs/pr14\\_06.pdf](https://www.nycourts.gov/PRESS/PDFs/pr14_06.pdf).

<sup>11</sup> See CPLR § 3211(e) (“[A]n objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.”). See also CPLR § 320(a) (“An appearance shall be made within twenty days after service of the summons, except that if the summons was served . . . pursuant to section 303, subdivision two, three, four or five of section 308 . . . the appearance shall be made within thirty days after service is complete.”).

<sup>12</sup> See Danielle Keats Citron, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014).

alleged claims when contested.<sup>13</sup> This is particularly a problem for cases filed prior to the OCA adopting rules to prevent debt buyers from obtaining default judgments using “robo-signed” affidavits based on hearsay in debt collection cases.<sup>14</sup> Finally, default judgments have a discriminatory impact on people of color. OCA data show that there is a higher rate of default judgments against New York City residents who live in predominantly non-white neighborhoods than against those who live in other neighborhoods.<sup>15</sup>

## **PROPOSALS FOR ADDRESSING THE PROBLEM**

The improvements initiated by Judge Fisher and Chief Clerk Alt attempt to alleviate this widespread problem. Given the scope and depth of this problem, as well as the limited resources available to address the issues, we have devised a few additional proposals that can be implemented at little or no cost, separately or in tandem, to address the situation.

### **Additional Short-Term Measures: Notification to Court Personnel, Amendment to OTSC Form**

1. **Instruct the clerks**, when a defendant seeks to answer and the AOS is unavailable, to **affix on the Answer this stamp: “AFFIDAVIT OF SERVICE IS UNAVAILABLE AT THIS TIME.”** This would inform the Court, both upon submission and on the return date of a later motion to dismiss, that the AOS was unavailable when the answer was filed through no fault of the defendant.
2. **Instruct the clerks**, when a plaintiff files its AOS with the court, to make an entry in the court’s database system indicating the date when the affidavit has been filed. That would allow a defendant to know whether an answer is due and to calculate the time by which the answer must be filed even if the AOS is not in the file. In addition, if possible, it would be helpful if the e-courts database were updated to include information about whether and when an AOS has been filed.

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<sup>13</sup> A report by New Economy Project found that in nine of ten cases, an employee of the debt buyer with no connection to the original creditor fraudulently testified to facts that only the original creditor could possibly have known. The Debt Collection Racket, *supra* note 3, at 4. The Federal Trade Commission has also criticized the debt buying industry for filing lawsuits without sufficient evidence to support a judgment. Federal Trade Commission, The Structure and Practices of the Debt Buying Industry, (Jan. 2013) available at <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>.

<sup>14</sup> See Press Release, Office of Court Administration, NY Court System Adopts New Rules to Ensure A Fair Legal Process in Consumer Debt Cases, September 16, 2014, available at [https://www.nycourts.gov/PRESS/PDFs/pr14\\_06.pdf](https://www.nycourts.gov/PRESS/PDFs/pr14_06.pdf).

<sup>15</sup> See the chart and map attached as Appendix C.

## Scanning; Statutory and Regulatory Amendments

1. **Implement Scanning and Electronic Record Keeping for both Backlogged and Newly Filed Consumer Debt Cases:** Several court systems around the country, including King County Superior Court (Seattle)<sup>16</sup> and the Cook County Circuit Court (Chicago),<sup>17</sup> have implemented electronic record keeping for both old and newly filed cases. Obtaining a scanner for each clerk's office and setting up a dedicated file destination would allow for easy access by the clerks to backlogged files at a minimal cost. Additionally, once the scanning system is set up, Plaintiffs bringing new cases could be required to scan their Affidavits of Service at the clerk's office, ensuring that Defendants vacating default judgments or making motions to dismiss will have access to complete paper files.
2. **Mandate e-filing in Civil Court for no-fault insurance cases** and shift resulting clerical resources to address the filing backlog in consumer debt cases and improve future maintenance of consumer debt collection court files. No-fault cases comprised 36% of Civil Court cases in 2014, and all parties are always represented by counsel, with the ability and resources to satisfy e-filing requirements. Moving to e-filing in no-fault cases would immediately reduce the burden on the clerk's office, freeing up existing resources to ensure that case files in consumer debt cases are available and contain AOSs. We believe that such a proposal would find support from the Deputy Chief Administrative Judge for New York City Courts.
3. **Amend CPLR 3211(e)** to eliminate the 60-day time limit by which a party must move to dismiss for lack of personal jurisdiction after the defense is raised in the answer. *See* Proposed Amendment Appendix D.<sup>18</sup>

\* \* \*

Thank you for your time and attention.

Respectfully,



Gina M. Calabrese  
Chair

### Attachments

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<sup>16</sup> *See* <http://www.kingcounty.gov/courts/Clerk/Records.aspx>

<sup>17</sup> *See* <http://www.cookcountyclerkofcourt.org/?section=CASEINFOPage&CASEINFOPage=2400>

<sup>18</sup> The amendment to C.P.L.R. 3211(e) as proposed in this letter mirrors the changes proposed by the Consumer Credit Fairness Act, A.4438 (N.Y. 2015), § 7 available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A04438&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A04438&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y).

**APPENDIX A**  
**Advisory Notice (AN-17): Unavailable Files in Consumer Debt Cases**

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 B**  
**Chief Clerk's Memorandum (CCM-203):**  
**Unavailable Files in Consumer Credit Matters**

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

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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**"

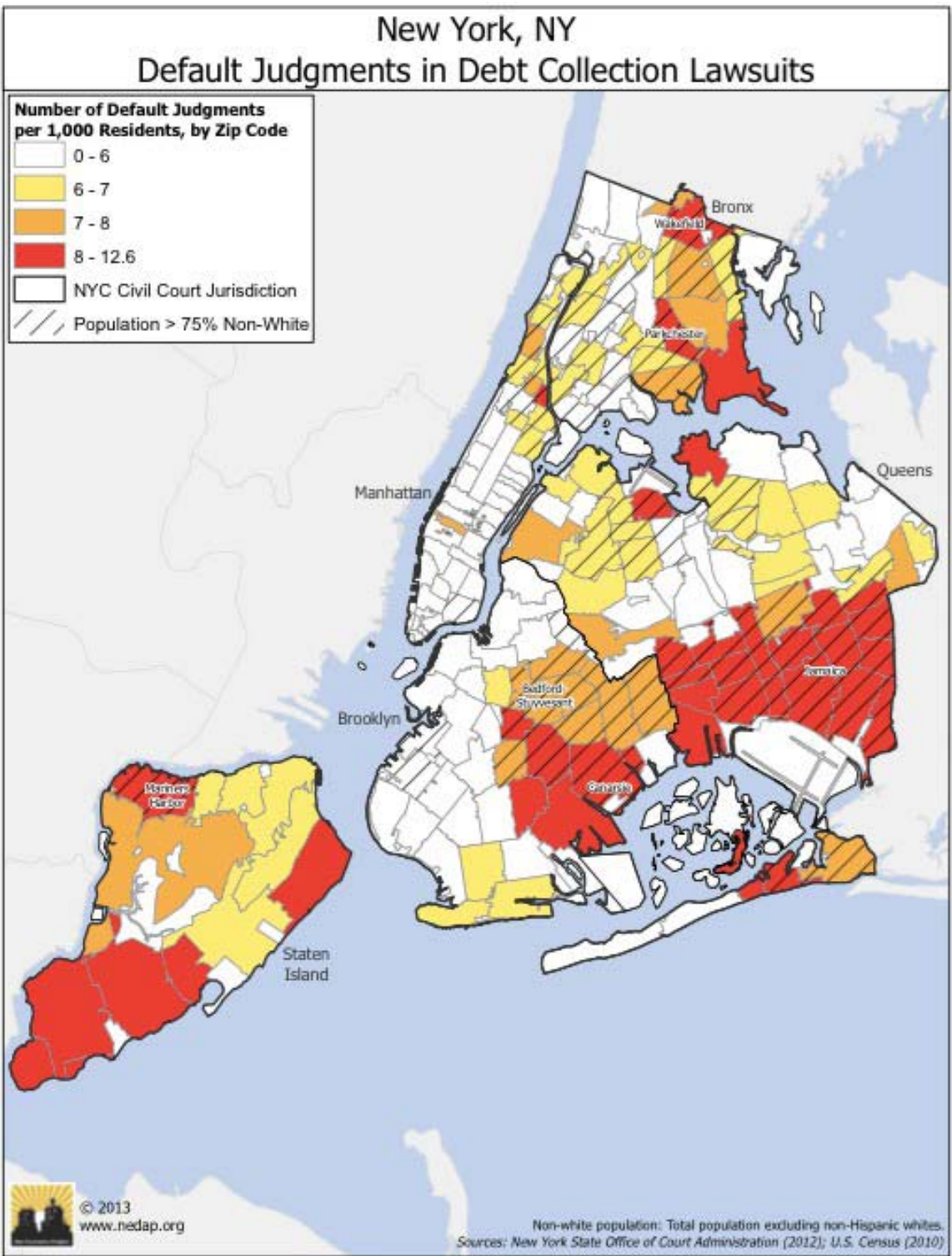
and

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

Dated: April 23, 2015

  
\_\_\_\_\_  
Carol Alt  
Chief Clerk

# APPENDIX C





## APPENDIX C

**Chart 1. NYS zip codes with highest concentrations of default judgments (per 1,000 residents)**

Rank	Zip Code	Neighborhood	% Non-White
1	12207	Greater South End, Albany	80%
2	14215	Kenfield, Buffalo	86%
3	11422	Rosedale, Queens	95%
4	12202	Arbor Hill, Albany	75%
5	11411	Cambria Heights, Queens	99%
6	11412	Jamaica, Queens	100%
7	14211	Schiller Park, Buffalo	84%
8	11434	Jamaica, Queens	99%
9	11420	South Ozone Park, Queens	93%
10	11413	Jamaica, Queens	99%

APPENDIX D  
**Proposed Amendment to C.P.L.R. 3211(e)**

Subdivision (e) of rule 3211 of the civil practice law and rules, as amended by chapter 616 of the laws of 2005, is amended to read as follows:

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) **of this rule**, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) **of this rule** is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) **of this rule** may be made at any subsequent time or in a later pleading, if one is permitted; in any action other than an action arising out of a consumer credit transaction where a purchaser, borrower or debtor is a defendant, an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) **of this rule** is waived if a party moves on any of the grounds set forth in subdivision (a) **of this rule** without raising such objection or if, having made no objection under subdivision (a) **of this rule**, he or she does not raise such objection in the responsive pleading.