

COMMITTEE ON CIVIL COURT

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EVAN DENERSTEIN SECRETARY 299 BROADWAY, 4TH FLOOR NEW YORK, NY 10007-1901 Phone: (212) 417-3700 Fax: (212) 417-3791 edenerstein@mfy.org Hon. Fern A. Fisher Deputy Chief Administrative Judge New York City Courts 111 Centre Street New York, NY 10013

Hon. Reginald A. Boddie Supervising Judge Civil Court of the City of New York, Kings County 141 Livingston Street Brooklyn, NY 11201

Hon. Anthony Cannataro Supervising Judge, Civil Court of the City of New York, New York County 111 Centre Street New York, NY 10013

March 18, 2016

Hon. Laura G. Douglas Supervising Judge, Civil Court of the City of New York, Bronx County 851 Grand Concourse Bronx, NY 10451

Hon. Joseph J. Esposito Supervising Judge, Civil Court of the City of New York, Queens County 89-17 Sutphin Boulevard Jamaica, New York 11435

Hon. Philip Straniere Supervising Judge, Civil Court of the City of New York, Richmond County 927 Castleton Avenue Staten Island, New York 10310

Re: Implementation of Advisory Notice 17 and Chief Clerk's Memorandum 203

Dear Judges Fisher, Boddie, Cannataro, Douglas, Esposito, and Straniere:

On behalf of the Civil Court Committee of the New York City Bar Association, I am writing to you regarding our Committee's concerns with the implementation of Advisory Notice 17 ("AN-17") and Chief Clerk's Memorandum 203 ("CCM-203). We also wish to address the Civil Courts' use of out-of-date *pro se* Order to Show Cause ("OTSC") forms to vacate judgments in consumer debt cases. Unfortunately AN-17 and CCM-203 ("the Policies") are not being implemented as written and are not having their intended effect.

To effectuate the changes intended by the Policies, the Committee recommends that the administration of each court take the following steps: ensure that clerks comply with CCM-203's requirement to mark OTSCs "file unavailable"; encourage judges to follow the recommendation in AN-17 that Plaintiffs be ordered to produce the Affidavit of Service on the return date for the OTSC; provide information to litigants regarding the opportunity to review the court file and Affidavit of Service and to state whether the Affidavit of Service was unavailable at the time the OTSC was filed; use only the new, updated Order to Show Cause form which provides the option not only to vacate and restore the case to the calendar, but also to vacate and dismiss for lack of personal jurisdiction; advise litigants, at the return date, of the opportunity to file a Supplemental Affidavit; and advise all court personnel to reduce the inefficiencies and delays created by the lack of access to case files.

As Your Honors are aware, due to the significant lack of court resources, defendants in consumer debt cases face protracted delays in obtaining affidavits of service of process ("AOS"s) from courts files, particularly in cases that are more than a few years old.¹ The problem most heavily burdens unrepresented consumer defendants who discover default judgments against them. These long delays (7 to 16 weeks) in getting old files deprive consumer defendants of timely relief from wage garnishments, bank account restraints, and other effects of ill-gotten default judgments. To ameliorate these problems, on April 23, 2015, the Honorable Fern Fisher, Deputy Chief Administrative Judge, New York City Courts, issued AN-17, which was accompanied by CCM-203.²

The new policies are a welcome innovation to address the problem which is itself attributable to the lack of sufficient staff to maintain court files. However, Committee members have observed that the new policies are not being fully implemented in all of the courthouses and thus, are not having their intended effect.

First, the majority of clerks' offices are not consistently following CCM-203 by marking Orders to Show Cause ("OTSC") with the stamp "file unavailable." In Queens, the OTSCs are sometimes marked "File ordered," which does imply that the file was unavailable, but even there the practice has not been consistent. In most cases in all the counties, there is no marking at all.

Second, clerks do not appear to be following CCM-203's requirement to "[e]nsure that the litigant includes in the affidavit that the file is unavailable." Committee members who assist litigants through Volunteer Lawyer for the Day are generally not seeing affidavits that include such statements.

Third, Section 2 of AN-17 directs that when a defendant raises the claim of lack personal jurisdiction, the Order to Show Cause should order Plaintiff's attorney to produce a copy of the AOS on the return date of the motion. We have observed no instance when a court has directed the plaintiff to produce the AOS. As stated in AN-17, the plaintiff's attorney is often the only source of the affidavit of service other than the court file. If the judge who signs the order to show cause specifically directs the plaintiff to produce the unavailable AOS, that production will result in a speedier resolution of the case as the court will not need to provide lengthy adjournment dates to wait for the file. Any plaintiff enforcing a judgment should have the AOS readily available to produce by the motion return date.

Fourth, the Committee has observed that most judges are providing litigants with adjournments to submit supplemental affidavits when the court file is unavailable. However, in the majority of instances the unrepresented litigant is generally given such an opportunity only after the litigant unambiguously requests the adjournment for that purpose. It is highly unlikely that an unrepresented litigant would be aware of his or her rights under a court advisory notice unless an attorney, advocate, or the court itself informs the person of the advisory notice. We suggest that judges inform litigants: 1) that to vacate the judgment based on lack of service requires an examination of the AOS; 2) that the litigant can have an opportunity to see the AOS and respond to it; and 3) that if the AOS is available on the court date, the litigant can fill out a Supplemental Affidavit that day or adjourn the case to have time to do this; OR if the AOS is not available, the court will adjourn the case to a date that will give

¹ Delayed access to AOSs also prevents defendants from challenging improper service in newer cases as well. There is a long delay in filing AOSs with the corresponding case file. This impacts the defendant's ability to bring a timely motion to dismiss.

² See Appendix: Advisory Notice (AN-17): Unavailable Files in Consumer Debt Cases and Chief Clerk's Memorandum (CCM203) (Unavailable Files in Consumer Credit Matters).

the litigant enough time to obtain the AOS and complete a Supplemental Affidavit, considering the actual time it takes to retrieve a file in that county. Most unrepresented individuals simply do not appreciate the legal standards applicable to a request to vacate a default judgment based on lack of personal jurisdiction. In this context, the court is the only stakeholder in a position to inform individuals of their options so that motions are decided fairly and on the merits.³

Fifth, the most notable problem identified by the Committee is that unrepresented litigants are simply not aware that there is even a file to request and that the litigant needs to refer to the AOS in rebutting the presumption of service. Once in court, litigants can face judges who strictly apply the presumption of service but, at the same time, do not provide the unrepresented individual with time to review the AOS so that the litigant can state with specificity the reasons why service did not occur. This opportunity can be provided by a second call of the case that will give the defendant time to review the file or the judge can adjourn the case so that the litigant can submit a supplemental affidavit rebutting the presumption of service.

Finally, AN-17 and CCM-203 are stop-gap measures at best. In practice, the lack of file access continues to cause protracted delays and inefficiencies that unduly burden litigants, their attorneys, and the court. Here is one example. Through VLFD, a Committee member assisted a low-income litigant whose bank account was restrained. The litigant's self-prepared Order to Show Cause sought to vacate the judgment and dismiss the case based on lack of service as well as to vacate and restore the case to the calendar. The file was not available on the court date, and the attorney ordered it that same day. The clerk stated that it would be available within five to seven court days. The plaintiff did not oppose or appear. The Court gave the litigant the option of a traverse hearing or vacatur of the judgment with 30 days to answer. In order to release her bank account, she opted for the latter. The VLFD attorney agreed to provide full representation, planning to move to dismiss for lack of service should the affidavit of service support such a motion. The attorney checked periodically, and was twice told that it had not yet been ordered, despite counsel's having previously requested it. It was finally available twenty-three days after it was requested, which was just one week (five business days) before a response to the complaint was due. This left very little time to meet with the client, review the complaint and affidavit of service, and prepare a motion. And although an answer could be prepared quickly, subject to a later motion to dismiss for lack of service, that is neither efficient nor an appropriate strategic choice. Had the AOS been available by the return date for the OTSC, the case might have been disposed of that same day.

Here is a summary of the Committee's suggestions:

- 1. Mark all Orders to Show Cause with "file unavailable" when the file is unavailable;
- 2. Ensure that litigants are instructed to state in their affidavits that the file is unavailable. This information could be given at the clerk's window or in the online forms.
- 3. If a defendant raises lack of personal jurisdiction, the judge signing the Order to Show Cause should order the Plaintiff to produce the AOS on the motion return date;

 $^{^{3}}$ A judge's assistance in this manner clearly is permissible. Rule 100.3(B)(12) of the Rules of the Chief Administrative Judge states, "It is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard."

- 4. Apprise defendants of the opportunity to review the court file and the importance of the AOS;
- 5. Direct that the Clerks' offices use only the new, updated Order to Show Cause form, which provides the option not only to vacate and restore the case to the calendar, but also to vacate and dismiss for lack of personal jurisdiction due to improper service of process.
- 6. Apprise defendants of the opportunity to submit a Supplemental Affidavit;
- 7. Increase awareness among judges, court attorneys, and other court staff of the inefficiencies and delays created by the lack of access to case files. Request that they take measures to reduce these delays.

Thank you for your time and attention to this important matter.

Respectfully, arese_

Gina M. Calabrese, Chair

APPENDIX

CIVIL COURT OF THE CITY OF NEW YORK

ADVISORY NOTICE	Class:	AN-17
Subject: Unavailable files in Consumer	Category:	GP-10
Debt cases	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

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

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Carol Alt Chief Clerk