

## CPLR 3022 & 3026: Remedy for Defectively Verified Pleading Is To Treat It as a Nullity; Plaintiff State Not Prejudiced Where Prosecution for Perjury is Precluded

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be discouraged, especially since an arbitrator's award is not subject to judicial review on the merits<sup>99</sup> and the arbitration agreement may provide for a ceiling on the amount recoverable which is unrelated to the damages sustained.<sup>100</sup> It is only hoped that *Stekardis'* liberalization of CPLR 1209 will not encourage courts, impressed with the time and energy already expended in preparation for arbitration, to more readily grant orders permitting arbitration without fully investigating to determine whether this avenue is truly the best method of settling the infant's claim.

#### ARTICLE 30 — REMEDIES AND PLEADINGS

*CPLR 3022 & 3026: Remedy for defectively verified pleading is to treat it as a nullity; plaintiff State not prejudiced where prosecution for perjury is precluded.*

According to CPLR 3022, a defectively verified pleading may be treated as a nullity provided notice with due diligence<sup>101</sup> is given to the adverse party. Such notice must specify the reasons for which the pleading is returned.<sup>102</sup>

In *State v. McMahon*,<sup>103</sup> New York State sought to recover, in a civil action, money which had been fraudulently procured by the defendant.<sup>104</sup> By verified complaint, plaintiff alleged that defendant entered into a conspiracy to, and did, forge and cash two lottery tickets in the amount of \$55,000, \$41,700 of which had already been recouped by plaintiff State. Defendant served an unverified answer, asserting his privilege against self-incrimination as the basis therefor.<sup>105</sup> By an order

<sup>99</sup> See *Raisler Corp. v. New York City Housing Auth.*, 32 N.Y.2d 274, 282, 298 N.E.2d 91, 94-95, 344 N.Y.S.2d 917, 923 (1973); *In re Wilkins*, 169 N.Y. 494, 496-97, 62 N.E. 575, 576 (1902).

<sup>100</sup> *Coughlin v. MVIAC*, 45 Misc. 2d 672, 674, 257 N.Y.S.2d 549, 552 (Sup. Ct. N.Y. County 1965) (dictum).

<sup>101</sup> See *Westchester Life, Inc. v. Westchester Magazine Co.*, 85 N.Y.S.2d 34 (Sup. Ct. N.Y. County 1948) where due diligence was held to require, *inter alia*, notice within 24 hours. Notice must be issued before trial, in any event, to permit cure of the defect by amendment. 3 WK&M ¶ 3022.03.

<sup>102</sup> *Westchester Life, Inc. v. Westchester Magazine Co.*, 85 N.Y.S.2d 34 (Sup. Ct. N.Y. County 1948). "It is well settled that a notice accompanying an answer returned for improper verification or lack of verification must state the defects relied upon specifically, and that a general statement is not enough." *Id.* Where insufficient notice is given to the adverse party, it is as if the pleading had not been returned at all. *Id.*; see 7B MCKINNEY'S CPLR 3022, commentary at 397 (1974); 3 WK&M ¶ 3022.03 ("[A] statement that the pleading failed to meet the statutory requirements is insufficient.").

<sup>103</sup> 78 Misc. 2d 388, 356 N.Y.S.2d 933 (Sup. Ct. Albany County 1974).

<sup>104</sup> Defendant and others were indicted for the forgery and cashing of two lottery tickets in the amount of \$55,000. Defendant pleaded guilty to forgery in the second degree in satisfaction of the indictment. *Id.* at 388, 356 N.Y.S.2d at 935.

<sup>105</sup> CPLR 3020(a) states that "where a pleading is verified, each subsequent pleading [with certain exceptions] shall also be verified." One exemption from the burden of verification is as to matter to "which the party would be privileged from testifying as a

to show cause, plaintiff wanted the court to direct defendant to serve a verified answer.

The Supreme Court, Albany County, questioning whether defendant in fact would be able to sustain the claim of privilege against self-incrimination,<sup>106</sup> nevertheless denied plaintiff's motion. While a defendant may seek an order compelling the plaintiff to accept an unverified answer,<sup>107</sup> a plaintiff, the court explained, has no right to compel the defendant to serve a verified answer.<sup>108</sup> The remedy of a party served with a defectively verified pleading, as contained in the plain language of CPLR 3022, is to treat the pleading as a nullity and pursue a default judgment.<sup>109</sup> The court observed, however, that in this regard the State failed to act with "due diligence" in serving the required notice on its adversary.<sup>110</sup> Moreover, the court categorized the notice's particularization of alleged defects in defendant's answer as "suspect."<sup>111</sup>

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witness." *Id.* See *Travelers Ins. Co. v. Mulligan*, 231 App. Div. 222, 247 N.Y.S.2d 85 (1st Dep't 1931); *Curran v. Pegler*, 17 Misc. 2d 345, 186 N.Y.S.2d 899 (Sup. Ct. N.Y. County 1959); 3 WK&M ¶ 3020.08.

<sup>106</sup> Plaintiff had contended that the privilege may not be asserted by defendant since, having effected a disposition of the entire indictment by pleading guilty to a count therein, he is no longer subject to criminal prosecution. 78 Misc. 2d at 389, 356 N.Y.S.2d at 935-36. In *Knight v. Maybee*, 44 Misc. 2d 152, 253 N.Y.S.2d 59 (Sup. Ct. Erie County 1964), discussed in *The Biannual Survey*, 39 Sr. JOHN'S L. REV. 406 (1965), plaintiff, demanding a verified answer, contended that the privilege against self-incrimination terminated with defendant's judgment of conviction. The court noted that as a general rule a judgment of conviction effectively removes the danger of further prosecution and consequently the privilege cannot be properly and legally asserted. 44 Misc. 2d at 154-55, 253 N.Y.S.2d at 62.

It is to be noted that waiver of the privilege in a different proceeding, as for example, a grand jury investigation or a coroner's inquest, does not constitute a waiver for verification purposes. *David Webb, Inc. v. Rosenstiel*, 66 Misc. 2d 29, 319 N.Y.S.2d 877 (Sup. Ct. N.Y. County 1970), *aff'd mem.*, 36 App. Div. 2d 691, 318 N.Y.S.2d 441 (1st Dep't 1971). In addition, verification may be excused only as to the privileged portion of the pleading. *Knight v. Maybee*, 44 Misc. 2d 152, 253 N.Y.S.2d 59 (Sup. Ct. Erie County 1964); 7B MCKINNEY'S CPLR 3020, commentary at 378 (1974).

<sup>107</sup> See, e.g., *Morris v. Fowler*, 99 App. Div. 245, 90 N.Y.S. 918 (1st Dep't 1904), where the court held that plaintiff's service of a defectively verified complaint entitled defendant to serve an unverified answer and compel plaintiff to accept it. *Accord*, *Crimmins v. Polhemus*, 189 Misc. 183, 68 N.Y.S.2d 819 (Syracuse Mun. Ct. 1947) (plaintiff compelled to accept defendant's unverified answer notwithstanding plaintiff's subsequent service of a properly verified complaint).

<sup>108</sup> 78 Misc. 2d at 389, 356 N.Y.S.2d at 936.

<sup>109</sup> *Id.* But see 3 WK&M ¶ 3022.04. The severe character of securing a default judgment where the opponent's pleading is treated as a nullity makes it clear that the court will allow the party in default to set the judgment aside and be given the opportunity to correct the defective verification. A better method of handling defective pleadings, as suggested, would be to permit the party, after giving notice of the defect and allowing a reasonable time for the adversary to cure, to move to strike the pleading. It is doubtful, however, that this manner is any more expeditious than the default judgment route. *Id.*

<sup>110</sup> Notice was issued 48 hours after receipt of the defective pleading and thus violated the 24-hour rule. 78 Misc. 2d at 389, 356 N.Y.S.2d at 936. See note 101 *supra*.

<sup>111</sup> 78 Misc. 2d at 389, 356 N.Y.S.2d at 936. The court found it unnecessary to discuss specific deficiencies in the notice since it was "unable to find any authority to support the motion." *Id.*

Additionally, the court invoked CPLR 3026 which grants pleadings a liberal construction absent prejudice to a party's substantial right and concluded that the plaintiff here suffered no such detriment.<sup>112</sup> It was determined that preclusion of the State from possible prosecution of defendant for perjury by permitting the service of an unverified pleading should not serve as a basis for a claim of prejudice.<sup>113</sup>

*McMahon* seems to have further illustrated that the CPLR is not to be regarded as a plethora of mere technicalities to be raised throughout various stages of the proceedings for the sole purpose of delay. CPLR 3026 is designed to streamline the mechanism of a civil lawsuit, not encumber it. Absent prejudice to a substantial right of a party, defects in pleadings must be ignored.<sup>114</sup> The *McMahon* court, in concluding that a liberal construction of the pleadings was warranted because precluding the plaintiff from subsequently prosecuting defendant for perjury did not constitute substantial prejudice, appears to have made a wise determination in not requiring verification of defendant's answer, especially since the issues had been adequately framed for trial.

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101(a)(4): Court of Appeals applies a strict interpretation to "special circumstances" requirement for obtaining disclosure from nonparty witness.*

Full disclosure of material and necessary evidence may be obtained from a nonparty witness under CPLR 3101(a)(4), provided "adequate special circumstances" are shown by the litigant seeking such disclosure.<sup>115</sup> Although the statute does not specify what may constitute ade-

<sup>112</sup> *Id.* at 389-90, 356 N.Y.S.2d at 936. See *Kreiling v. Jayne Estates, Inc.*, 51 Misc. 2d 895, 897, 274 N.Y.S.2d 291, 293 (Sup. Ct. Suffolk County 1966) wherein the court, pursuant to CPLR 3026, ignored defendant's allegedly defective verification on the ground that plaintiff had shown no prejudice to a substantial right. See also 3 WK&M ¶ 3022.04, at 30-523 to -524 ("Irregularities in the verification will rarely result in prejudice to a party or affect the substance of the litigation.")

<sup>113</sup> 78 Misc. 2d at 389-90, 356 N.Y.S.2d 936. See also 7B MCKINNEY'S CPLR 3022, commentary at 399-400 (1974) (prospect of perjury coming out of a civil pleading is remote).

<sup>114</sup> CPLR 3026; *Capital Newspapers Div. — The Hearst Corp. v. Vanderbilt*, 44 Misc. 2d 542, 543-44, 254 N.Y.S.2d 309, 311-12 (Sup. Ct. Albany County 1964); 3 WK&M ¶ 3022.04.

<sup>115</sup> CPLR 3101(a) provides in pertinent part that:

There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(4) any person where the court on motion determines that there are adequate special circumstances.

With respect to the remainder of CPLR 3101(a), paragraphs (1) and (2) apply to disclosure by parties to an action and assignors of an action, respectively. Disclosure by a person who is about to leave the state, resides outside the state, resides more than 100 miles from the place of trial, or is so ill as to reasonably suggest that he will be unable to attend the trial may be obtained under paragraph (3).