

## Opening of a Default Under CPLR 2004

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In *Stern v. Yasuna*,<sup>126</sup> Satozky, one of the co-defendant tortfeasors, paid the entire judgment after the appellate division had affirmed the liability of all the defendants. Two of the joint tortfeasors received permission to appeal to the court of appeals. While this appeal was still pending, co-defendant Satozky made his motion for contribution, which the court granted.

A prior case (apparently the only one in point) in the New York City Civil Court<sup>127</sup> had held that the co-defendant was required to await the outcome of the final appeal before seeking contribution. The court reasoned that had the legislature intended to permit the motion immediately, it would have been specifically provided for in the statute.

The court in the instant case concluded that the "movant is clearly entitled to the contribution," and added that the other defendants might apply to an appellate tribunal for the stay denied them at the trial level.

The practitioner must be aware that this area is still unsettled. The two lower courts each interpreted the legislature's failure to provide the "when" as they felt it should be interpreted. The sections are susceptible to either interpretation.

It is submitted that the reasoning in *Stern* seems sound, inasmuch as the defendants do have a remedy under CPLR 5519 to stay the enforcement of the judgment.

#### ARTICLE 20 — MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

##### *Opening of a default under CPLR 2004.*

In a recent case<sup>128</sup> involving a tort action against the City of New York, the plaintiff appealed from an order which granted defendant-city's motion to compel plaintiff to accept a tardy answer. The supreme court, appellate division, affirmed the order, but denied the imposition of costs against plaintiff.

Under CPLR 2004 the court in its discretion may extend the time in which pleadings are required to be served, even though the application for the extension is made after the expiration of the statutory period, and is thus, in effect, an application to open a default. Under this section the applicant must show "good cause" why he cannot, or could not, comply with the applicable time requirement. The court stated that in view of the nature of this tort action, it must have been apparent to the plaintiff's counsel that the City was not deliberately defaulting,

<sup>126</sup> 44 Misc. 2d 185, 253 N.Y.S.2d 439 (Sup. Ct. 1964).

<sup>127</sup> *Salvatore v. City of New York*, 184 Misc. 823, 55 N.Y.S.2d 463 (Civ. Ct. 1945).

<sup>128</sup> *Bermudez v. City of New York*, 22 App. Div. 2d 865, 254 N.Y.S.2d 420 (1st Dep't 1964).

and instead of placing an unnecessary burden on the courts, the matter should have "been disposed of by the exercise of simple courtesy between attorneys."<sup>129</sup> The imposition of an unnecessary burden upon the courts and the defendant's counsel would have warranted the imposition of costs against plaintiff-appellant had the City not failed "to make a more appropriate showing of a sufficient excuse and a meritorious defense. . . ."<sup>130</sup>

The court, in effect, held that the City had shown the "good cause"<sup>131</sup> required by CPLR 2004 to open a default, but had failed to make the "appropriate showing of a sufficient excuse" that would warrant the granting of costs to the City on this appeal.

In conclusion, attorneys should not attempt to take undue advantage of an adversary who inadvertently failed to serve a pleading within the applicable statutory period. Such matters should be disposed of by the exercise of professional courtesy between attorneys,<sup>132</sup> rather than by placing an unnecessary burden upon opposing counsel and the courts.

#### ARTICLE 30—REMEDIES AND PLEADING

##### *Defect in verification of a complaint, in action for injunction in labor dispute, excused.*

A verification of a pleading is a "statement under oath that the pleading is true to the knowledge of the deponent. . . ."<sup>133</sup> It uses the threat of perjury to achieve its purpose, the minimization of spurious claims. Its success is doubtful, though, since "with rare exceptions, district attorneys will not undertake to prosecute a perjury alleged to emanate from a civil pleading."<sup>134</sup>

Usually, a complaint need not be verified. It is required, however, under certain circumstances. One such circumstance is an action for an injunction in a labor dispute.

From CPLR 3022 it would appear that where a party is entitled to a verified pleading, and one is served without sufficient verification, the party may treat it as a nullity. However, the Supreme Court of Albany County, in *Capital Newspapers Division*

<sup>129</sup> *Id.* at 865, 254 N.Y.S.2d at 421.

<sup>130</sup> *Id.* at 865, 254 N.Y.S.2d at 422.

<sup>131</sup> "[T]he Corporation Counsel urged that due to the great volume of pleadings which were being processed in his office, there was inadvertent failure to seek an extension of time to answer." *Id.* at 865, 254 N.Y.S.2d at 421.

<sup>132</sup> See CPLR 2104 which states in part that "an agreement between parties or their attorneys . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney . . . ."

<sup>133</sup> CPLR 3020(a).

<sup>134</sup> 7B MCKINNEY'S CPLR 3020, *supp.* commentary 72 (1964).