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## Defect in Verification of Complaint Excused

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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).

—*The Hearst Corp. v. Vanderbilt*,<sup>135</sup> motivated by the liberal approach of the CPLR, as reflected in section 3026, and the manifest importance of time in the particular case, held that such defective verification was excusable under the circumstances.

In that case, plaintiff sought a temporary injunction against picketing pending trial of a claim for a permanent injunction. Defendant moved to dismiss on the ground that the complaint was defectively verified, *i.e.*, the attorney who verified did not have "actual knowledge of portions of the contents." The court acknowledged that "formal application" would require a dismissal and yet refused to dismiss. The court extended the liberal construction required of pleadings by section 3026 to the defective verification of a complaint, where there is no substantial prejudice to the defendant and where, as here, time is of the essence.

This court has further emasculated the already weak verification process. The value of this decision will not be assessed here since there is a plethora of information dealing with the virtues of verification.<sup>136</sup> Suffice it to note that now, in addition to the failure of district attorneys to prosecute for fraudulent verification, the courts, or at least the court in the instant case, will ignore a factor basic to verification—knowledge of the facts—and thus render verification little more than certification.

*Answer must be verified as to all but self-incriminatory matter when complaint has been properly verified.*

Another problem of verification arose in the Supreme Court of Erie County. In *Knight v. Maybee*<sup>137</sup> the action was one for damages arising from an accident between a truck, in which plaintiff was a passenger, and a car operated by defendant. Plaintiff's verified complaint alleged that defendant was driving while drunk and was found guilty of that crime in a criminal proceeding.<sup>138</sup>

Defendant's motion to strike out the paragraphs pertaining to his conviction was denied. He then served an unverified answer denying several allegations but remaining silent on those he found objectionable. Defendant moved to force plaintiff to accept his answer. In denying defendant's motion, the court indicated that the defendant must serve an answer verified as to those matters on which he "would not be privileged from testifying on the ground of self-incrimination."

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<sup>135</sup> 44 Misc. 2d 542, 254 N.Y.S.2d 309 (Sup. Ct. 1964).

<sup>136</sup> For a suggestion that all pleadings be verified see 6 N.Y. JUD. COUNCIL REP. 46 (1940), 7 N.Y. JUD. COUNCIL REP. 42-43 (1941). For an indication that verification has lost most of its value see 7B MCKINNEY'S CPLR 3020, *supp.* commentary 72 (1964).

<sup>137</sup> 44 Misc. 2d 152, 253 N.Y.S.2d 59 (Sup. Ct. 1964).

<sup>138</sup> In fact, defendant had an appeal pending from that conviction.