50th Anniversary: Mobilizing for Justice

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May 30, 2014

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RE: Proposed reforms relating to consumer credit collection cases.

MFY Legal Services, Inc. (MFY) welcomes the Office of Court Administration's (OCA) proposed reforms relating to consumer credit collection cases, and appreciates the opportunity to comment on them. MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for over 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice and representation to more than 8,500 New Yorkers each year. MFY's Consumer Rights Project assists low-income New Yorkers on a range of consumer problems, including debt collection lawsuits.

The proposed reforms are critically needed for our clients: on a regular basis we see the acute problems people face as a result of the routine entry of default judgments based on faulty information and robo-signed affidavits. Through our weekly hotline, we take calls from New York City's most vulnerable populations, many of whom are calling because their wages are being garnished or their bank accounts are frozen due to a default judgment that was entered against them on the basis of fraudulent affidavits. It is from this perspective that MFY applauds OCA for addressing the serious problems associated with default judgments in consumer cases. The purpose of the reforms is "to prevent unwarranted default judgments and ensure a fair legal process," and they will help even the playing field for defendants in debt collection litigation, the overwhelming number of whom appear *pro se*. The proposed amendments to the court rules serve to clarify what is already required under the CPLR and common law when seeking default judgments by both debt buyers and original creditors. The expansion state-wide of the additional notice requirement to consumers informing them that they have been sued will help address the continuing problem of "sewer

service" and will likely reduce default judgments. And making certain forms available to consumers across the state will provide *pro se* litigants with the basic tools they need to defend themselves in lawsuits. Although MFY fully supports the proposed reforms, we offer some suggestions for improving and clarifying certain points.

Overall Suggestion to Amend the Rules for Supreme Court

MFY notes that the proposal amends the rules regarding applications for default judgments for New York City Civil Court, the City Courts outside New York City, and the District Courts. We believe strongly that the rules for Supreme Courts should be amended as well. We are contacted regularly by consumers being sued in collection matters who are sued in Supreme Court who face the same hurdles as those sued in Civil Court. Strengthening the requirements solely in the courts of lesser jurisdiction will result in creditors seeking to file cases in Supreme Court, even with low amounts in controversy, simply to evade the requirements delineated by the rules. It will also mean two tiers of justice for consumers and will deny certain New Yorkers sued in Supreme Court the benefits of these important protections.

Suggestions for Affidavits

Implement standard affidavits in applications for default judgments is crucial to curbing the rampant abuse of the court system by creditors and debt buyers, especially because these applications are typically reviewed by clerks rather than judges. Overall, we suggest changing the references from "debtor" to "defendant" throughout the affidavits to more accurately describe the consumer (who may not actually owe a debt, and instead may be a victim of identity theft, for example) and to make the language consistent with the use of the word "plaintiff." For each affidavit of facts, we also suggest requiring that, in addition to the underlying Agreement, any documents or statements demonstrating liability and the precise calculation of damages be attached as well. (Specifically, we refer to paragraph four of the Affidavit of Facts by Original Creditor, paragraph five of the Affidavit of Facts and Sale of Account by Original Creditor, and paragraph three of Affidavit of Purchase and Sale of Account by Debt Seller.)

Page 5 of 9: Affidavit of Facts by Original Creditor

In paragraph one, we suggest moving the reference to "("Account")" to the following sentence, after the account number is provided, to make it absolutely clear which account is the subject of the action. In paragraph three, we suggest that the affiant be required to attest to sending the *final* account statement as well as the date the final account statement was sent. We also suggest that the plaintiff be required to attach a true and correct copy of the referenced account statements to the affidavit.

Page 6 of 9: Affidavit of Facts and Sale of Account by Original Creditor

In paragraph four we suggest that the affiant be required to attest that he or she actually reviewed the records referenced and that he or she has actual knowledge of how the records were created and of the procedures in place *at the time the records were created*.

Page 7 of 9: Affidavit of Purchase and Sale of Account by Debt Seller

Debts are sometimes sold and purchased numerous times, usually without any references to specific accounts, save for a spreadsheet that contains a list of consumers' most basic identifying information. These spreadsheets are often conveyed in a form that can be edited and manipulated. Therefore, it is critical— both legally and practically—that the court ensure that plaintiffs actually own the debts being sued on. Accordingly, in paragraph three, we suggest that

the word "preserved" be added to the last sentence to read: the records had been "preserved or created and maintained." Also, we strongly suggest that a copy of the assignment be attached to *this* affidavit, instead of attached to the Affidavit of Facts by Debt Buyer, as proposed. Furthermore, the language in this affidavit should be modified to include references to the actual account in question and should require that attachments and exhibits be attached.

Page 8 of 9: Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff

As explained above, the assignment referenced in paragraph three should be attached to the debt *seller's* affidavit.

Page 9 of 9: Affidavit of Non-Expiration of Statute of Limitations

We are contacted often by consumers who are sued on debts that are beyond the applicable statute of limitations for the state in which they accrued, which is unfair and a violation of the Fair Debt Collection Practices Act. Thus, we believe this proposal is very important. However, the language in this affidavit as written is confusing and implies that two different statutes of limitations may apply. Therefore, we propose that paragraph two be changed to say that "The cause of action for _____ [describe cause of action] in this case accrued on _____ [date of default] in the state of _____. The statute(s) of limitations for the cause(s) of action asserted in the complaint is _____ [years]. Based on my reasonable inquiry, I believe the applicable statute(s) of limitations for the cause(s) of action asserted herein have not expired." Furthermore, because a determination as to the applicable statute of limitations is a legal conclusion that should not be determined by a layperson, we believe this form should be an affirmation from the plaintiff's attorney.

Suggestion for Exhibit B: Proposed Rule Relating to Additional Notice of Consumer Credit Action

As stated above, this additional notice requirement is crucial to combating the prevalent problem of consumers not being served with a summons and complaint or receiving notice of the lawsuit, as is their due process right. However, the Rule should clearly specify that if the additional notice is returned as undeliverable to the court, no default judgment should be processed in accordance with CPLR § 3215(a). Although this point is referenced in the description of the proposal in the accompanying Memorandum, which says, "The court will not enter a default judgment in any case where the additional notice is returned to the court because of a wrong or unknown address," this critical language is missing from the text of the proposed rule.

Suggestion for Exhibit C: Proposed *Pro Se* Forms

With tens of thousands of cases filed each year, representation of all defendants is impossible. Ninety-eight percent of consumers appear *pro se*, so the proposed forms are welcome additional assistance that will help them navigate the court system. Overall, because the forms apply to courts statewide, the captions of the forms and the language included should not be Civil Court or New York City specific. For example, the Answer form should not only refer to the "Civil Court" and the Order to Show Cause form should not only refer to the "Marshal or Sherriff of the City of New York."

Written Answer Consumer Credit Transaction

Although having an answer form with a check-off list of defenses is a vast improvement, we suggest that "I do not owe this debt" be added to the list of defenses and that defenses eight

and nine pertaining to debt collection licensure be clarified to include the City of Buffalo as well. Because we often see consumers sued in the wrong county or locale and out-of-state consumers sued in New York, we also suggest that "Wrong venue" be added to the list of defenses.

Exhibit C: Order to Show Cause

As with the Answer form, uniform order to show cause forms will certainly help *pro se* litigants who lack access to representation and legal guidance. However, because of differences in court procedures and practices, a single Order to Show Cause form may not be applicable to every court; for example, courts that do not operate a *pro se* calendar may not be able to "restore a case" to said calendar.

In addition, the caption as written does not seem to contemplate dismissing a case for lack of personal jurisdiction, although the text of the Order does include an option for dismissing the action. The most common basis for vacating default judgments under CPLR Rule 5015 that we see is pursuant to 5015(a)(4), lack of personal jurisdiction because of improper service, and alternatively, pursuant to CPLR Rule 5015(a)(1), based on an excusable default and meritorious defense. Too often, courts overlook *pro se* litigants' personal jurisdiction basis, even though the jurisdictional question should be addressed first. *See, e.g.*, *Shaw v. Shaw*, 97 A.D.2d 403, 404 (App. Div. 2d Dep't 1983) ("Absent proper service, a default judgment is a nullity, and, once it is shown that there was no service, the judgment must be unconditionally vacated"). This problem could be rectified in part if the forms made the distinction explicit and did not automatically contemplate vacating the judgment and allowing the case to proceed.

Finally, the Order to Show Cause should specify that it is permissible for service of the papers to be made by the *pro se* Defendant, and does not have to be done by a third party.

Exhibit C: Affidavit in Support of Order to Show Cause

New York City, and possibly elsewhere in the state, has seen a severe delay in obtaining court files from archives, as well as a backlog of filing and updating case files, including, importantly, affidavits of service. Without reviewing the affidavits of service, defendants cannot dispute them with the specificity required by the law; yet, defendants often require immediate relief from enforcement measures and cannot wait until the court file is procured before moving to vacate. Therefore, we suggest amending this Affidavit by deleting "(a) I was not served in the right way as required by the law with a summons and complaint in this action" and adding another subsection that would say: "I have/have not had an opportunity to review the affidavit of service." The form should also include space to specifically dispute the content of the affidavit of service for cases in which it is available. When the affidavit is not available, the form should provide an opportunity to request that the plaintiff include the affidavit of service in its opposition, and that the consumer be allowed to supplement his or her papers upon reviewing the affidavit of service or be given the opportunity to attest on the return date as to how service was improper in narrative form.

Also, we recommend that, in paragraph three, pertaining to the defendant's excuse for not appearing previously in court, the excuse "I was not notified of the court date" be added as an option. We also suggest that the section labeled "Other Explanation" be changed to "Additional or Other Explanation." In addition, instead of requiring the consumer to fill in the defenses by hand, the form should instruct the consumer to fill out a proposed answer by marking off his or her applicable defenses and to simply attach it to the affidavit. Finally, in paragraph six, the sentence pertaining to seeking permission to serve the papers in person should be changed to clarify that the defendant seeks permission to be the person who serves the papers (not that the papers be served personally).

Thank you again for the opportunity to comment on these important and groundbreaking initiatives. If you have any questions about our suggestions, please feel free to reach out to us to discuss them further.

Sincerely,
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