February, 2015

Drafting NY Civil-Litigation Documents: Part 39—Motions to Vacate a Default Judgment Cont'd

Gerald Lebovits

NEW YORK STATE BAR ASSOCIATION

Journal

FEBRUARY 2015
VOL. 87 | NO. 2

More War Stories From the New York Courts

by Harold Lee Schwab

Also in this Issue

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XXXIX — Motions to Vacate a Default Judgment Continued

In the last issue, the *Legal Writer* discussed motions to vacate default judgments. Specifically, the *Legal Writer* discussed when a party might default. It also discussed the overlap between CPLR 317 and 5015(a) in moving to vacate a default. The *Legal Writer* discussed the first ground under 5015(a) — excusable default — to moving to vacate a default judgment. We continue with excusable default and the remaining grounds under CPLR 5015(a).

The CPLR 5015(a) grounds are not exhaustive: "In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice."[1]

Grounds to Vacate a Default Judgment Under CPLR 5015(a) Continued

Excusable Default: CPLR 5015(a)(1). In the last issue, the *Legal Writer* explained that a court has the discretion in vacating a default to consider a party's default for law-office failure.

If the basis of your motion to vacate is law-office failure, don't be "conclusory and perfunctory" in your motion papers.[2] Explain in detail how your law-office failure led to the default.[3]

A court won't be persuaded by your law-office excuse if you allege that you overbooked court cases or didn't keep track of your court appearances.[4] Also, a court won't be persuaded if you allege only that an associate left your firm and didn't tell you about the adjourned date of your case.[5]

If counsel's law-office failure "was, in fact, a dilatory tactic as part of a pattern of willful default and neglect . . . . the default is not excusable under CPLR 5015(a)(1)."[6] A court will likely deny your motion if you've waited too long to move to vacate after you knew about your default and did nothing about it.[7]

A court might find an excusable default "if the default was inadvertently due to clerical errors made by the court or defendant."[8]

Courts have found that an insurance carrier's office failure may be "akin to 'law office failure' and may constitute an excusable default to support the vacatur of a default judgment."[9]

A party's or a party's attorney's disability or hospitalization might be a valid excuse to vacate a default.[10] But the party or attorney must have had "insufficient warning of the disability's onset."[11]

A court will consider the length of the defaulting party's delay. The court measures the length of the delay between (1) the defendant's default (the act that constitutes the default) and the entry of the default judgment and (2) the entry of judgment and the defendant's motion to vacate the default judgment.[12] If the plaintiff enters judgment quickly[13] or if the defendant moves quickly to vacate the default,[14] a court will consider that in vacating the default.[15]

In determining whether a reasonable excuse for the default exists, a court will consider several factors, "including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits."[16]

Newly Discovered Evidence: CPLR 5015(a)(2). You may move to vacate a default judgment under 5015(a)(2) if you have "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404."

> A court may vacate a default judgment in the interests of substantial justice.

The key word, according to one scholar, is "probably."[17] You must persuade the court that the new evidence would probably change the result; "[a] mere showing of possibility is insufficient."[18] Also insufficient is "a showing that the new evidence is merely cumulative, or relevant only to a witness's credibility."[19]

You may move under CPLR 5015(a)(2) if a key witness to the event who appears post-judgment was "unknown or of or unlocatable earlier in spite of [your] diligent effort."[20]

No time limit arises if you're moving under CPLR 5015(a)(2): "The law implies a reasonable time, and what is reasonable is determined sui generis."[21]

Continued on Page 52

Continued from Page 64

The newly discovered evidence must be competent evidence, "although occasionally even incompetent evidence may be allowed to do it if it tends 'dramatically' to undermine the original judgment."[22] Some judges might disagree and not consider incompetent evidence on your motion to vacate.

An additional requirement under CPLR 5015(a)(2) is that the newly discovered evidence could not have been discovered in time to move for a new trial under CPLR 4404. A motion under CPLR 4404 must be made within 15 days after the decision or verdict.[23] If you discover the evidence within 15 days of the decision or verdict, move under CPLR 4404, not CPLR 5015(a)(2). The 15-day period under CPLR 4404 is not a statute of limitations and is thus "presumably subject to discretionary extension by the court."[24] A court might treat a CPLR 5015(a)(2) motion as an excusably late CPLR 4404 motion.[25] If the evidence you discover is really late — months, or even years, after the entry of a default judgment — move under CPLR 5015(a)(2).

In your motion papers, give the court proof that the evidence was "'in existence and hidden at the time of the judgment.'"[26]

Be diligent: You must show that even after exercising due diligence, you couldn't have discovered the new evidence before the default judgment was entered.[27]

Fraud, Misrepresentation, or Other Misconduct: CPLR 5015(a)(3). If your adversary engaged in fraud, misrepresentation, or other misconduct, you may move under CPLR 5015(a)(3).[28]

Persuade the court, in your motion papers, that the adverse party's conduct "could have affected the outcome" of the case.[29]

Fraud may be extrinsic or intrinsic. Determining whether the fraud is extrinsic or intrinsic is difficult. Extrinsic fraud is "conduct which deprives a party of a full trial, or has the effect of preventing a party from fully presenting [the party's] case."[30] Intrinsic fraud is fraud that leads to "[a] judgment based on a fraudulent instrument . . . or perjured testimony, or any other item presented to and acted on by the court, whatever its fraudulent component."[31] As one scholar explains, "conduct which in effect denies a hearing is extrinsic while conduct that injects fraud into the hearing is intrinsic."[32]

If the fraud is intrinsic, you may act on it "only by direct attack, which means on direct appeal or by a motion to vacate the judgment made to the court that rendered it."[33]

If the fraud is extrinsic, you may act on it by direct attack or by collateral attack, meaning that you may bring "a separate action to enjoin its enforcement, or a refusal by some other court to recognize the judgment when its validity arises in some context before that court."[34]

If a party or a party's counsel obtained a default judgment through extrinsic fraud, you needn't show, in your motion to vacate under CPLR 5015(a)(3), that you have a meritorious defense or cause of action.[35]

CPLR 5015(a)(3) applies whether the plaintiff or the plaintiff's counsel commits the fraud, misrepresentation, or misconduct.[36]

No fraud, misrepresentation, or misconduct exists if the "proof against nondefaulting defendants at trial differs somewhat from the proof offered by way of an affidavit or verified complaint at the beginning of litigation offered in support of an order of default against the defaulting party."[37]

No statutory time limit exists if you're moving under CPLR 5015(a)(3). The court will determine only whether you brought your motion within a reasonable time. The "court determin[es] reasonableness on a sui generis basis."[38]

A court has "inherent power to vacate orders and judgments obtained by misrepresentation or fraud."[39]

Lack of Jurisdiction: CPLR 5015(a)(4). Move to vacate a default judgment under CPLR 5015(a)(4) if subject-matter or personal jurisdiction is absent.

You needn't show a meritorious defense if you're moving under CPLR 5015(a)(4).[40] A default judgment obtained without jurisdiction is a "'nullity, irrespective of the question of merit.'"[41]

If a court vacates a judgment under CPLR 5015(a)(4), it must do so without imposing terms or conditions on the vacatur.

You never waive the defense of subject-matter jurisdiction.[42]

No time limit exists if you're moving under CPLR 5015(a)(4).[43]

If the court didn't have jurisdiction when it "rendered the default judgment, the court must unconditionally grant defendant's motion to vacate."[44]

Move under CPLR 5015(a)(4) if the court didn't have personal jurisdiction over the defendant when it rendered the default judgment. Move under 5015(a)(4) to vacate the default judgment if you were never properly served with the summons and complaint.[45] Move to vacate under this ground if "the default judgment was a nullity due to insufficient proof or notice."[46] Move to vacate under this ground if the "judgment was granted for relief beyond what [plaintiff] sought in the [default] application."[47]

If a court vacates a judgment under CPLR 5015(a)(4), it must do so without imposing terms or conditions on the vacatur.[48]

You waive personal jurisdiction if you move to vacate but fail to raise the personal-jurisdiction ground under 5015(a)(4).[49] You waive personal jurisdiction if you make payments on the judgment "for a considerable time after it[] [was] rend[ered."[50]

If you believe that jurisdiction is lacking, move to vacate a default for lack of jurisdiction. At the same time,

move to dismiss the action on that basis.[51]

You may also move under alternative grounds. Move to vacate the default for lack of jurisdiction and also to dismiss the action. Alternatively, move to vacate the default and defend the action on the merits if the court finds that jurisdiction exists.[52] For more information, see "Overlap of Rules," below. Even though you needn't allege a meritorious defense if you're moving under 5015(a)(4), it's a good practice to do so if you're moving under alternative grounds.[53] "Thus, in the event the court finds jurisdiction, the court may still vacate the default and permit [you] to defend the action."[54]

The court might find that a traverse hearing is necessary to determine whether personal jurisdiction exists over the defendant.[55] The court might vacate the default judgment and schedule the case for a traverse hearing. Or, the court might hold your motion to vacate the default judgment in abeyance pending the outcome of the traverse hearing.

Reversal, Modification, or Vacatur of a Prior Judgment or Order: CPLR 5015(a)(5). Use CPLR 5015(a)(5) if a sibling state or foreign-country judgment — judgment one — has been converted into a New York judgment — judgment two — and the sibling state or foreign-country judgment has been undermined in some way, such that it was reversed, modified, or vacated.[56] In your 5015(a)(5) motion, ask that the New York judgment — judgment two — be vacated or modified.

CPLR 5015(a)(5) also applies when judgment one is a New York judgment.[57]

No time limit exists when moving under CPLR 5015(a)(5).

Vacatur on "Terms as May Be Just." CPLR 5015(a) authorizes a court to vacate a default judgment on just terms. The court may grant costs and disbursements, attorney fees, "and such other sums as would defray actual expenses to which the other side has been put."[58]

A court may condition vacatur of the judgment by having the judgment stand as security pending the outcome of the trial.[59]

A court may also require a defendant to post a bond in the amount of "all or part of the judgment."[60] A court might not require the defendant to post a bond if the default was inadvertent or if posting the bond would be burdensome.[61]

A court may not, however, impose conditions when your motion to vacate the judgment is based solely on want of prosecution, under CPLR 5015(a)(4).[62] Thus, the court may not require a defendant's appearance or require the defendant to waive a defense.

On Application to an Administrative Judge: CPLR 5015(c)

An administrative judge has the authority under CPLR 5015(c) to bring a proceeding before a judge other than the administrative judge to relieve, on such terms as may be just, a party or parties from the terms of default judgments that were

> obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves.

CPLR 5015(c) is sometimes referred to as "Thompson's Law" after Justice Edward Thompson, a former New York City Civil Court administrative judge who "paved the way" for this codification.[63]

CPLR 5015(c) "allows the courts to prevent misuse of process by the unscrupulous."[64]

Restitution: CPLR 5015(d)

The court has the discretion to grant restitution.[65] Under CPLR 5015(d), you — the judgment debtor — might be entitled to restitution from the judgment creditor if you've already paid, either voluntarily or involuntarily (through an execution), in whole or in part, the judgment you're moving to vacate. You needn't bring a separate plenary action to seek restitution. Move instead under CPLR 5015(d).

The court's order "directing restitution is the equivalent of an ordinary money judgment."[66] But the court's order isn't "ordinarily enforceable through the contempt punishment" procedure.[67]

Overlap of Rules

You may move to vacate under several alternative grounds.[68] For example, you may move under both CPLR 5015(a)(1) and 5015(a)(4). Practitioners often overlap CPLR 5015(a)(3) with other grounds. Practitioners also overlap CPLR 5015(a)(2) and 5015(a)(3) because the "fraudulent conduct now uncovered . . . likely . . . qualif[ies] as 'newly-discovered evidence' as well."[69]

Raising alternative grounds helps you: "[A]sserting alternative grounds maximizes your chances of obtaining a vacatur. Keep in mind, however, that you must submit the papers required to support each ground."[70] Even if the court disagrees with one of your grounds, the court might rule for you on your alternative grounds.

Motion Papers

In the last issue, the *Legal Writer* discussed notice requirements when moving to vacate a default judgment. The *Legal Writer* explained that CPLR 5015(a) suggests that you move by order to show cause. Consult the last issue for more information.

To demonstrate a meritorious defense, provide in your moving papers an affidavit from an individual who has personal knowledge of the facts and defense(s).[71] If you submit an affidavit from someone who lacks personal knowledge, a court will likely deny your motion to vacate. An attorney's affirmation has no probative value unless the attorney personally knows about the transaction or incident.[72]

A verified answer that "does not offer much in the way of affirmative facts will not likely suffice as an affidavit of merit."[73]

You may provide a verified complaint instead of an affidavit.[74]

To prove that the default was excusable because of law-office failure, provide an attorney's affirmation "if the excuse is within counsel's personal knowledge."[75]

Consult each of the grounds under CPLR 5015(a), above, and CPLR 317, explained in the last issue, to determine what you must demonstrate in your moving papers.

To preserve all the issues in your case for trial, address in your motion papers all the issues that'll be determined at trial.[76]

Opposing a Motion to Vacate a Default Judgment

Oppose a motion to vacate a default judgment by submitting opposition papers.

Provide in your opposition papers an affidavit that refutes the facts in your adversary's moving papers.

Attach in your exhibits documentary proof that refutes the facts in your adversary's moving papers. If your adversary attacks service of the summons and complaint, attach proof of service.

Attack any procedural defect in your adversary's moving papers.[77]

In your opposition papers, point out the "factual gaps or defects" in your adversary's proof.[78]

Point out in your opposition papers whether your adversary delayed, engaged in dilatory tactics, or engaged in improper conduct when it defaulted.[79]

Discuss delays: Tell the court how long your adversary waited to move to vacate the default.[80]

Demonstrate whether you'll be prejudiced if the court were to vacate the judgment.[81] Explain what the prejudice would be.

If your adversary contests service, consider whether to consent to a traverse hearing. Explain in your opposition papers whether you consent to a traverse hearing. If you don't consent, explain how your adversary's factual showing doesn't warrant a traverse hearing.

Tell the court about the costs you incurred for having to respond to your adversary's motion to vacate.[82]

In the next issue of the *Journal*, the *Legal Writer* will discuss post-trial motions. ■

Argue in your opposition papers whether your adversary delayed, engaged in dilatory tactics, or engaged in improper conduct when it defaulted.

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, NYU, and NYLS law schools. He thanks court attorney Alexandra Standish for her research.

1. *Woodson v. Mendon Leasing*, 100 N.Y.2d 62, 68, 760 N.Y.S.2d 727, 731, 790 N.E.2d 1156, 1161 (2003).

2. David L. Ferstendig, New York Civil Litigation, § 11.10[2][b], at 11-32 (2014) (quoting *Pichardo-Garcia v. Josephine's Spa Corp.*, 91 A.D.3d 413, 414, 936 N.Y.S.2d 27, 28 (1st Dep't 2012) ("[W]e reject the claim of law office failure as 'conclusory and perfunctory.' Counsel explained that the failure to appear was due to a conflict between scheduled appearances in this action and in an unrelated action. However, he did not state that he took any steps to resolve or alleviate the conflict or that he was unaware of the conflict. Counsel's 'overbooking of cases and inability to keep track of his appearances' does not constitute a reasonable excuse for the failure to appear.")).

3. *Id.* § 11.10[2][b], at 11-38 (citing *Kouzios v. Dery*, 57 A.D.3d 949, 949, 871 N.Y.S.2d 303, 304 (2d Dep't 2008) ("[D]efendant's conclusory, undetailed, and uncorroborated claim of law office failure did not amount to a reasonable excuse."); *Staples v. Jeff Hunt Developers, Inc.*, 56 A.D.3d 459, 460, 866 N.Y.S.2d 756, 757 (2d Dep't 2008) ("Here, the plaintiff's bald and unsubstantiated claim of law office failure was insufficient to explain the five-year delay in moving for leave to enter a default judgment."); *330 Wythe Ave. Assoc., LLC v. ABR Constr., Inc.*, 55 A.D.3d 599, *2, 864 N.Y.S.2d 314, *2 (2d Dep't 2008) ("It is within the Supreme Court's discretion to accept the plaintiff's excuse of law office failure, as it was supported by a 'detailed and credible' explanation of the default."); *Piton v. Cribb*, 38 A.D.3d 741, 742, 832 N.Y.S.2d 274, 274 (2d Dep't 2007) ("[A] conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse.")).

4. *Id.* § 11.10[2][b], at 11-32.

5. *Id.* § 11.10[2][b], at 11-36 (citing *47 Thames Realty, LLC v. Robinson*, 61 A.D.3d 923, 924, 878 N.Y.S.2d 752, 753 (2d Dep't 2009) ("[T]he Supreme Court did not improvidently exercise its discretion in rejecting counsel's proferred excuse that the associate who scheduled the compliance conference had left his firm and had not told him about the compliance conference.")).

6. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 39:381, at 39-39 (2006; Dec. 2009 Supp.) (citing *Holloman v. City of New York*, 52 A.D.3d 568, 569, 861 N.Y.S.2d 356, 357 (2d Dep't 2008); *Wainwright v. Elbert Lively & Co., Inc.*, 99 A.D.2d 490, 491, 470 N.Y.S.2d 433, 435 (2d Dep't 1984)); Ferstendig, *supra* note 2, § 11.10[2][b], at 11-34 (citing *Youni Gems Corp. v. Bassco Creations Inc.*, 70 A.D.3d 454, 455, 896 N.Y.S.2d 315, 317 (1st Dep't 2010) ("'[B]are allegations of incompetence on the part of prior counsel cannot serve as the basis to set aside a [default] pursuant to CPLR 5015.'")); Ferstendig, *supra* note 2, § 11.10[2][b], at 11-35 (citing *Davidson v. Valentin*, 65 A.D.3d 1075, 1076, 886 N.Y.S.2d 425, 426 (2d Dep't 2009) (noting that law-office failure will be excused but a "'pattern of willful default and neglect should not be excused.'")).

7. Ferstendig, *supra* note 2, § 11.10[2][b], at 11-32 (citing *Pichardo-Garcia*, 91 A.D.3d at 414, 936 N.Y.S.2d at 28 ("[P]laintiff made no attempt to vacate the default until almost a year after being served with the notice of entry.")); *id.* § 11.10[2][b], at 11-34 (citing *Youni Gems Corp.*, 70 A.D.3d at 455, 896 N.Y.S.2d at 317 ("[C]ounsel was aware of the scheduled date of the inquest before he underwent surgery, and yet did not seek an adjournment prior to that date. . . . Moreover, defendants made no attempt to vacate their default until almost a year later when plaintiffs sought to enforce the judgment.")).

8. Barr et al., *supra* note 6, § 39:381, at 39-39 (citing *Quenqua v. Turtel*, 146 A.D.2d 686, 686, 536 N.Y.S.2d 1018, 1018 (2d Dep't 1989); *Curtis v. Town of Clinton*, 138 A.D.2d 445, 445, 526 N.Y.S.2d 18, 19 (3d Dep't 1988) (finding that town clerk failed to notify town officials of pending action)).

9. *Id.* (citing *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 877, 800 N.Y.S.2d 613, 614 (2d Dep't 2005); *Hayes v. R.S. Maher & Son, Inc.*, 303 A.D.2d 1018, 1018, 746 N.Y.S.2d 811, 811–12 (4th Dep't 2003); *Parker v. I.E.S.I. N.Y. Corp.*, 279 A.D.2d 395, 395, 720 N.Y.S.2d 59, 59 (1st Dep't 2001); *contra Lemberger v. Congregation Yetev Lev D'Satmar, Inc.*, 33 A.D.3d 671, 672, 822 N.Y.S.2d 597, 599 (2d Dep't 2006) ("[A] general excuse that the default was caused by delays occasioned by the defendants' insurance carrier is insufficient.")).

10. *Id.* § 38:383, at 39-40 (citing *Lafata v. Broder*, 162 A.D.2d 250, 250, 556 N.Y.S.2d 555, 556 (1st Dep't 1990) ("Counsel for plaintiff, having affirmed the fact of her contemporaneous hospitalization and inability to work during the period of extension, has set forth a meritorious excuse for the default.")); Ferstendig, *supra* note 2, § 11.10[2][b], at 11-36 (citing *Zaidi v. New York Bldg. Constr., Ltd.*, 61 A.D.3d 747, 748, 877 N.Y.S.2d 381, 383 (2d Dep't 2009) ("The

defendants presented a reasonable excuse for their default based upon their principal's inability, due to the terminal illness and death of his wife, to retain new trial counsel after former counsel was relieved.")).

11. Barr et al., *supra* note 6, § 39:383, at 39-40 (citing *Teachers Ins. & Annuity Ass'n of Am. v. Code Beta Group, Inc.*, 204 A.D.2d 193, 193, 612 N.Y.S.2d 124, 124–25 (1st Dep't 1994) ("Defendants' attorney was aware of complications in his recovery from eye surgery more than a month before trial was set to begin on February 24, 1992, but failed to arrange for substitute counsel as the court had directed on December 16, 1991, the originally scheduled trial date that was adjourned at the request of defendants' attorney because of his then impending eye surgery. Failure to seek substitution of other counsel was not excusable given these circumstances.")).

12. *Id.* § 39:384, at 39-40.

13. *Id.* (citing *LaFata*, 162 A.D.2d at 250, 556 N.Y.S.2d at 556) (vacating default because, among other things, judgment was entered one day after date of service of responsive pleading)).

14. *Id.* (citing *First Nationwide Bank v. Calano*, 223 A.D.2d 524, 525, 636 N.Y.S.2d 122, 123 (2d Dep't 1996) ("[H]er inexcusable delay of nearly one year in seeking to vacate her default, together with the detriment to the Schiavones caused by the delay, warrants application of the doctrine of laches.")).

15. *Id.*

16. *Harcztark*, 21 A.D.3d at 877, 800 N.Y.S.2d at 614.

17. David D. Siegel, New York Practice § 428, at 753 (5th ed. 2011).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. CPLR 4405.

24. Siegel, *supra* note 17, § 428, at 754.

25. *Id.*

26. 1 Byer's Civil Motions § 23:07 at 260 (Howard G. Leventhal 2d rev. ed. 2006; 2013 Supp.) (quoting *In re Commercial Structures v. City of Syracuse*, 97 A.D.2d 965, 966, 468 N.Y.S.2d 957, 958 (4th Dep't 1983) ("Here, although the sale of the subject premises was closed more than a year and a half after trial and more than eight months after entry of judgment, the record fails to disclose any facts relating to negotiations for the sale and the time of their commencement, or of the date and content of the contract of sale. Thus, we cannot determine whether there was "in existence and hidden at the time of the judgment" evidence which may properly be viewed as newly discovered.")).

27. *Id.* (citing *Litras v. Litras*, 271 A.D.2d 578, 578, 707 N.Y.S.2d 340, 341 (2d Dep't 2000)).

28. Barr et al., *supra* note 6, § 39:390 at 39-40 (citing *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 603–04, 419 N.Y.S.2d 908, 912, 393 N.E.2d 982, 986 (1979) ("[W]e hold that the default judgment against Hancock must be vacated, for the record is clear that Oppenheimer was guilty of misconduct, if not fraud, in at least two ways. . . . The withholding of that information from the court was, therefore, clearly misconduct, if not fraud, warranting vacatur of the judgment."); *In re Felix v. Herman*, 257 A.D.2d 900, 900-901, 684 N.Y.S.2d 62, 63–64 (3d Dep't 1999) (finding that petitioners failed to notify co-conservator before action was taken on behalf of conservatee); *Tonawanda Sch. Employees Fed. Credit Union v. Zack*, 242 A.D.2d 894, 894, 662 N.Y.S.2d 885, 885 (4th Dep't 1997) ("When defendant was notified that a default judgment had been entered against her, she immediately moved to vacate it. She averred that, after she was served with the summons and complaint, she telephoned plaintiff's attorney, who told her that, if she provided information concerning the whereabouts of Zack, no further action would be taken against her. She provided the requested information and, according to defendant, plaintiff's attorney told her that she could ignore the summons and complaint. Plaintiff's attorney submitted an affirmation denying defendant's allegations.")).

29. Siegel, *supra* note 17, § 429, at 754.

30. *Id.*; Byer's Civil Motions, *supra* note 26, § 23:08, at 260 (citing *Tamini v. Tamini*, 38 A.D.2d 197, 204, 328 N.Y.S.2d 477, 484 (2d Dep't 1972) ("Upon the undisputed testimony in this case the plaintiff was 'robbed' of her opportunity to make her defense in the Thai court by reason of the defendant's fraud and misrepresentation that he would discontinue the action which he had instituted against her. Therefore, since she never had an opportunity to litigate the question determined in the Thai court, the judgment there obtained against her is not a bar to this action under the theory of those cases which prevent the relitigation in other states of issues already adjudicated.")).

31. Siegel, *supra* note 17, § 429, at 754; Byer's Civil Motions, *supra* note 26, § 23:08, at 260 (citing *Carbone v. Alverio*, 89 A.D.2d 553, 554, 452 N.Y.S.2d 121, 122 (2d Dep't 1982) ("The wife's alleged misrepresentations of her financial status are 'in essence no different from any other type of perjury committed in the course of litigation,' and thus constitute intrinsic fraud.")).

32. Siegel, *supra* note 17, § 429, at 754.

33. *Id.*; Byer's Civil Motions, *supra* note 26, § 23:08 at 260 (citing *Vinokur v. Penny Lane Owners Corp.*, 269 A.D.2d 226, 226, 703 N.Y.S.2d 35, 36 (1st Dep't 2000) ("A litigant's remedy for alleged fraud in the course of a legal proceeding 'lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action.'")).

34. Siegel, *supra* note 17, § 429, at 754.

35. Byer's Civil Motions, *supra* note 26, § 23:08 at 260-61 (citing *Shaw v. Shaw*, 97 A.D.2d 403, 403, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) ("In our opinion, a movant seeking relief from a judgment under this paragraph, at least on the ground of extrinsic fraud, need not show that he has a meritorious defense or cause of action."); *Tamini*, 38 A.D.2d at 203, 328 N.Y.S.2d at 483)).

36. Barr et al., *supra* note 6, § 39:390, at 39-40.

37. *Id.* (citing *Woodson*, 100 N.Y.2d at 70, 760 N.Y.S.2d at 733, 790 N.E.2d at 1162 ("In light of our determination that plaintiff was consistent and had personal knowledge of the accident, it also follows that, as a matter of law, ATIC has failed to show that plaintiff procured the default judgment through 'fraud, misrepresentation, or other misconduct.'")).

38. Siegel, *supra* note 17, § 429, at 755.

39. Byer's Civil Motions, *supra* note 26, § 23:08, at 261 (citing *In re Kisloff v. Covington*, 73 N.Y.2d 445, 450, 541 N.Y.S.2d 737, 740, 539 N.E.2d 565, 568 (1989); *Lockett v. Juviler*, 65 N.Y.2d 182, 186, 490 N.Y.S.2d 764, 768, 480 N.E.2d 378, 381 (1985)).

40. Barr et al., *supra* note 6, § 39:403, at 39-41 (citing *Laurenzano v. Laurenzano*, 222 A.D.2d 560, 560, 635 N.Y.S.2d 668, 669 (2d Dep't 1995)).

41. Siegel, *supra* note 17, § 430, at 756 (quoting *Shaw*, 97 A.D.2d at 404, 467 N.Y.S.2d at 234).

42. Barr et al., *supra* note 6, § 39:401, at 39-41.

43. Siegel, *supra* note 17, § 430, at 755.

44. Barr et al., *supra* note 6, § 39:402, at 39-41 (citing *Shaw*, 97 A.D.2d at 404, 467 N.Y.S.2d at 233).

45. *Id.* § 39:400, at 39-41.

46. *Id.* (citing *Woodson*, 100 N.Y.2d at 67, 760 N.Y.S.2d at 731, 790 N.E.2d at 1160).

47. *Id.* (citing *McGuire v. McGuire*, 29 A.D.3d 963, 965, 816 N.Y.S.2d 158, 159 (2d Dep't 2006)).

48. Byer's Civil Motions, *supra* note 26, § 23:09, at 261 (citing *Hitchcock v. Pyramid Ctrs. of Empire State Co.*, 151 A.D.2d 837, 838, 542 N.Y.S.2d 813, 815 (3d Dep't 1989); *McMullen v. Arnone*, 79 A.D.2d 496, 499, 437 N.Y.S.2d 373, 376 (2d Dep't 1981)).

49. Barr et al., *supra* note 6, § 39:400 at 39-41 (citing *Boorman v. Deutsch*, 152 A.D.2d 48, 52, 547 N.Y.S.2d 18, 21 (1st Dep't 1989), *lv. dismissed*, 76 N.Y.2d 889, 561 N.Y.S.2d 550, 562 N.E.2d 875 (1990)).

50. Siegel, *supra* note 17, § 430, at 756 (citing *Star Credit Corp. v. Ingram*, 71 Misc. 2d 787, 788, 337 N.Y.S.2d 245, 247 (Civ. Ct. N.Y. County 1972)).

51. *Id.* § 108, at 203.

52. *Id.*

53. *Id.* § 430, at 756.

54. Ferstendig, *supra* note 2, § 11.10[2][e], at 11-45.

55. *See* Gerald Lebovits, *The Legal Writer*, *Drafting New York Civil-Litigation Documents: Part XVIII — Motions to Dismiss Continued*, 84 N.Y. St. B.J. 64, 64 (Sept. 2012).

56. Siegel, *supra* note 17, § 431, at 756.

57. *Id.* at 757 (citing *Feldberg v. Howard Fulton St., Inc.*, 44 Misc. 2d 218, 219–20, 253 N.Y.S.2d 291, 293 (Sup. Ct. Kings County 1964), *aff'd*, 24 A.D.2d 704, 704, 261 N.Y.S.2d 1012, 1012 (2d Dep't 1965)).

58. *Id.* § 432, at 757.

59. *Id.*

60. *Id.*

61. Barr et al., *supra* note 6, § 39:427, at 39-44.

62. Siegel, *supra* note 17, § 432, at 757.

63. *Id.* § 427, at 753 n.13.

64. Oscar Chase & Robert A. Barker, Civil Litigation in New York, § 20.03, at 798 (6th ed. 2013).

65. Byer's Civil Motions, *supra* note 26, § 23:12, at 262.

66. Siegel, *supra* note 17, § 433, at 757.

67. *Id.*

68. Barr et al., *supra* note 6, § 39:404, at 39-41.

69. Siegel, *supra* note 17, § 429, at 754–55.

70. Barr et al., *supra* note 6, § 39:404, at 39-41.

71. *Id.* § 39:421, at 39-42.

72. *Id.*

73. *Id.*

74. *Id.* at § 39:404, 39-43 (citing *Saks v. New York City Health & Hosp. Corp.*, 302 A.D.2d 213, 213, 753 N.Y.S.2d 377, 377 (1st Dep't 2003) ("The motion was properly denied on the ground that a complaint verified by counsel who does not claim personal knowledge of the facts is insufficient to support a default judgment."); *contra Goldman v. City of New York*, 287 A.D.2d 482, 483, 731 N.Y.S.2d 212, 214 (2d Dep't 2001) ("[W]e note that we have previously accepted an answer verified by counsel as sufficient to demonstrate a meritorious defense.").

75. Barr et al., *supra* note 6, § 39:404, at 39-43.

76. *Id.*

77. *Id.* § 39:422, at 39-43.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*