Outside Counsel

Font Size:

Out-of-State Affidavits - CPLR §2309(c)

Jeffrey K. Levine
New York Law Journal | May 05, 2010


Jeffrey K. Levine

Anticipating the ebb and flow of the law, how adversaries and we will wield it and, of course, how judges will rule so that we can best navigate and advise clients is the cornerstone of what we do. Live and paper trials warrant checklist reviews to determine whether evidence is or is not in "admissible" form for consideration by the court. Such checklists are used by proponents to make sure each submission will be considered. and by non-movants to determine whether evidence is objectionable. We all know that evidence ruled to be inadmissible can make or break a case and, thus, checklists that we each develop are crucial to helping our clients by knowing the likelihood of admissibility.

Of course, clients want to know with certainty the outcome of their cases and without a crystal ball the best we can offer are reasonable expectations based on our respective experiences, etc. I often take the extra step and educate clients of the "legality versus reality" syndrome in any given situation—that being sometimes courts do not rule as we would expect. Of course, the hope is they do but the technically correct legal answer is not always the reality of how courts decide issues.

CPLR §2309(c) is an interesting case in point. This little known but important statute deals with the admissibility of out-of-state oaths and affirmations. When supporting or opposing a motion for summary judgment, for example, in-state clients, witnesses and the like will appear before a New York notary public during which time they are supposed to be sworn by the notary and thereafter duly execute their name at the end of the affidavit. Only after the notary properly administers the oath, is satisfied with the identification proof supplied by the affiant, and has reviewed and filled out the proper sections of the affidavit will he or she then notarize the affidavit after the acknowledgment section.

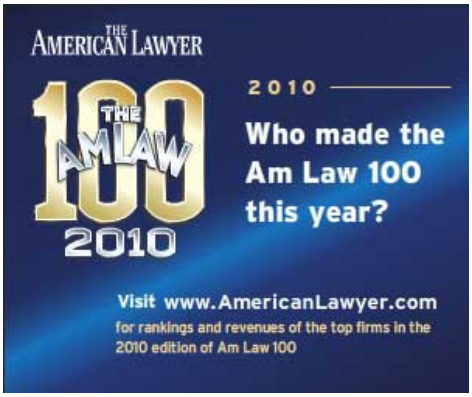
Our Legislature decided that out-of-state oaths and affirmations are to

ADVERTISEMENT

MOST POPULAR HEADLINES

1. New York Firms Outperform Others in Am Law 100 Report
2. *Howard S. v. Lillian S.*
3. Candidates Have Little Time to Make Cases
4. News In Brief
5. News In Brief

ADVERTISEMENT



lawjobs.com
TOP JOBS
TRIAL ATTORNEY (APPELLATE)
U.S. Department of Justice, U.S. Trustee Program
Washington, District of Columbia

Associates
Milber Makris Plousadis & Seiden, LLP
Woodbury, New York

MORE JOBS >>
POST A JOB >>

ADVERTISEMENT

Our Legislature decided that out-of-state oaths and affirmations are to be treated differently than those sworn to and executed in-state and for that reason §2309 is on my evidentiary checklist. Section 2309(c) creates an extra step when either submitting or opposing out-of-state affidavits intended to be admissible. Compliance with this more stringent evidentiary checklist requires, inter alia, a "certificate of conformity" so a New York court can operate under the belief that the out-of-state notary public duly followed and conformed their notarial duties to meet a certain threshold of acceptability and accountability.

An out-of-state witness must present to their local County Clerk who, upon proper proof, should certify that the notary did indeed follow or conform to the laws of that local jurisdiction. It would be unduly burdensome and outside the scope of a court's purview to undertake an analysis whether a particular out-of-state notary complied with the laws of that state, and County Clerk certifications provide a level of acceptability to our Legislature. Thus, when the certificate of conformity from an out-of-state County Clerk is absent, an "affidavit" is deemed unsworn and inadmissible here in New York.

This rather simple certification formality is set forth in §2309(c) and must be followed in order for an out-of-state affidavit to be treated as admissible in New York and requires "such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state." Undertaking these extra steps when presenting out-of-state documents is necessary not just in summary judgment motions but in filing deeds and entering judgments; thus, affidavits are but one of many different out-of-state documents that require review and certification by out-of-state clerks or judges. To be sure, our Legislature did not just create this extra work without precedent as I have been confronted with similar requests when submitting documents out-of-state.

A separate but related requirement is a "certificate of authentication" such as triple seal or exemplified document needed for considering New York documents, affidavits and judgments when presented to out-of-state clerks and courts. New York courts and clerks have a mirror authentication requirement, see CPLR §§4540, 4542 and RPL §311, but New York courts have become flexible with that requirement in the absence of prejudice, *Matapos v. Compania*, 68 A.D.3d 672 (1st Dept. 2009) and *Smith v. Allstate*, 38 A.D.3d 522 (2d Dept. 2007). Notwithstanding, authentication serves the purpose of verifying the genuineness of the document through additional formalities regarding the authority and identity of the out-of-state notary.

Distinguishably, however, a certificate of conformity certifies that the manner in which the acknowledgement or proof was taken conformed with the laws of the appropriate jurisdiction, see *Ford Motor Credit Co. v. Prestige*, 748 N.Y.S.2d 235, 236 (N.Y.City Civ.Ct., 2002), and Real Property Law §299-a. RPL §299-a, titled "Acknowledgment to conform to law of New York or of place where taken; certificate of conformity." It states and requires:

> The acknowledgment or proof, if taken in the manner

> prescribed by such state…must be accompanied by a certificate to the effect that it conforms with such laws.

Section 2309(c) essentially requires that out-of-state affidavits necessarily observe New York's formalities which would permit a deed to be recorded; thus, the minimal need for a certificate of conformity. Other requirements exist for compliance with deed recordation in New York and by extension admissibility for out-of-state affidavits. For example, RPL §309-b(1), titled "Uniform forms of certificates of acknowledgement or proof without this state," modeled the form by which acknowledgments at the end of an affidavit must substantially conform and therefore should be included:

> ss.:
>
> On the ——— day of ——— in the year ——— before me, the undersigned, personally appeared ———————, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Court Rulings

Our courts have two principle rulings regarding §2309(c)—the first, failure to provide the requisite certificate and other formalities is waivable if not timely objected to, see *CBS v. Beifeld*, 15 Misc.3d 1104(A) (2007) and *Discover v. Williamson*, 14 Misc.3d 136(A) (2007). This is consistent with all of our general rules of evidence regarding the preservation of objections, see "Evidentiary Objections in Motions: Law of the Case?" Jeffrey K. Levine, NYLJ, Feb. 6, 2006. Thus, not objecting to an opponent's §2309(c) violation would be a lost opportunity to preclude the use of an out-of-state affidavit lacking in formalities and reason enough to make sure §2309(c) is on your checklist.

When a §2309(c) objection is timely preserved, what are the consequences to the affiant and the party on whose behalf the affidavit was submitted? Our jurisprudence is well settled that cases should be decided on the merits and not be overly entangled in formalities or rules. It is not surprising, therefore, that even when confronted with a §2309(c) objection, our case law affords the affiant an opportunity to responsively remedy his deficiency, nunc pro tunc, in reply, *Moccia v. Carrier Car Rental Inc.*, 40 A.D.3d 504 (1st Dept 2007).

Case law has reported this remediation as viable in reply papers and presumably sur reply if the objection was first raised in reply. The responsive inclusion of a certificate of conformity, proper acknowledgement, etc., merely allows the court to consider the affidavit as if it were a New York affidavit and does not vitiate other meritorious objections such as hearsay.

An interesting twist to §2309(c) and specifically the absence of a

certificate of conformity was recently handed down by the Appellate Division, Second Department, in *Betz v. Conti*, 69 A.D.3d 545 (2d Dept. Jan. 5, 2010), in which the author represented the plaintiff. At the trial level, defendants submitted an out-of-state engineer's affidavit in support of their motion for summary judgment. Plaintiff opposed and preserved her §2309(c) objection for, inter alia, failure to submit a certificate of conformity and proper acknowledgement. In reply defendant submitted a certificate of licensure setting forth that the notary before whom the engineer appeared was a licensed notary in the State of New Jersey. The trial court properly ruled that the attempt to correct the deficiency was insufficient and the "affidavit" precluded because it was to be considered unsworn and not in admissible form. The motion was denied for failure to establish defendant's prima facie burden and the absence of their expert affidavit was a contributing factor.

On appeal the *Betz* court upheld the lower court ruling that defendant did not comply with §2309(c). However, and in reliance on *Smith*, supra (the absence of a certificate of authentication was not fatal) and CPLR §2001 ("…invoked by the courts 'to the end that slight mistakes or irregularities not affecting the merits or the substantial right of a party shall not become fatal in their consequences,'" 2007 Practice Commentaries by Vincent Alexander), the court felt the absence of a certificate of conformity and acknowledgment resulting in an unsworn statement submitted in summary judgment did not prejudice plaintiff.

Legality Versus Reality

Although denial of the motion was upheld on appeal, the Second Department reversed the lower court's evidentiary finding and deemed the New Jersey affidavit admissible. Herein lies the conundrum many lawyers and their clients face, the legality versus reality—our CPLR and case law says the out-of-state affidavit was unsworn and should be inadmissible. This is analogous to when chiropractors submit affirmations instead of affidavits and because of non-compliance with the CPLR their submissions are inadmissible, see CPLR §2106 and *Casas v. Montero*, 48 A.D.3d 728 (2d Dept. 2008). In this example the difference between affirmations and affidavits are only of formality and not substance and can in no way be reasonably argued to prejudice the opposing party.

So why is one class of (un)sworn statements treated differently than another where the CPLR says neither is admissible? *Betz* seems to be the first appellate case holding that the missing certificate of conformity from defendant's motion for summary judgment and the unsuccessful attempt to remedy his §2309(c) deficiency in reply to plaintiff's objection was not prejudicial. Curiously, however, a missing certificate of authentication case was relied upon by the court to extend this new rule and abrogate the CPLR.

Absence of a certificate of conformity, certificate of authentication, proper acknowledgment, affirmation versus affidavit or frankly even having a notary stamp at the end of a document might not prejudice the opposing side, but like hearsay or other rules regarding (in)admissibility

we have procedures that should be adhered to, and I would submit the difference between a sworn and unsworn statement is not "minor" but does affect a substantial right of a party.

Courts have also held that the default of a party to include a certificate of conformity can be easily remedied, but when that party nevertheless defaults in that regard, under what circumstances should the continued unsworn statement be admissible? The predictability of how these issues will be ruled upon, particularly upon invocation of §2001, is next to impossible for us to share with clients.

While legality and reality should be aligned, uniform in application and therefore consistent, in scenarios like §2309(c) they are not necessarily, particularly in light of what may be a rogue ruling like in *Betz*, supra. Nevertheless, I for one will continue to keep §2309(c) on my evidentiary checklist and adhere to our CPLR requirements, object to violations of the CPLR and trust that clients will understand when legality is at odds with reality. Stay tuned for Part 2, CPLR §3101(d).

Jeffrey K. Levine *is a sole practitioner in Manhattan. He was of counsel to plaintiff at the trial and appellate levels in 'Betz v. Conti.' He can be reached at NYadvocate@aol.com.*

Subscribe to New York Law Journal

Print Share Email Reprints & Permissions Write to the Editor

terms & conditions | privacy | advertising | about nylj.com

About ALM | About Law.com | Customer Support | Reprints
Copyright 2010. ALM Media Properties, LLC. All rights reserved.

If the article is not showing, please click here

ALM
An Integrated Media Company