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The Consequences of Verified Pleadings By Jeffrey K. Levine

Generally speaking, a verified pleading is where the party or his attorney represents under penalty of perjury that the information stated in a complaint or answer is true.

CPLR §§ 3020, 3021, 3022 and 3023 are the applicable rules governing verified pleadings. New York practitioners should have at least two boilerplate forms in their word processors that comply with language contained in CPLR § 3021.

The first should be a client affidavit, which is typically used for a domestic corporation [§ 3020(d)(1)] or when the individual client resides within the county where the attorney has a law practice [§ 3020(d)].

The second form is for when the attorney of record executes a verification in lieu of a party affidavit, pursuant to CPLR § 3020(d)(3), where the client resides outside of the county in which the law firm has an office.

The CPLR is clear on this longstanding area of procedure and evidence, yet problems arise from time to time requiring careful review and sometimes judicial intervention.

Verified pleadings have a long-established history in New York, and CPLR § 3022 is a crucial section of the state's procedural laws. It should not be overlooked by prudent practitioners.

Essentially, CPLR § 3022 authorizes the recipient of an improperly or unverified pleading to treat it as a "nullity" provided that notification be sent with "due diligence" to the serving party.

Due Diligence

In *Miller v. Board of Assessors*, 91 N.Y.2d 82, the Court of Appeals stated that failure to respond with due diligence specifying one's intention to treat the pleading as a nullity acts as a waiver to said objection. The Court also acknowledged that various courts have held that due diligence means notification of nullity within 24 hours of receipt.

So, in a situation where a complaint has been verified, thus entitling a plaintiff to a responsive and verified pleading, the absence of receiving same and preserving an objection with due diligence leaves the defendant(s) in default as the answer is a nullity. Conversely, service of an unverified or improperly verified complaint to which a defendant is entitled is tantamount to serving a defective complaint, one which may similarly be objected to as a nullity or alternatively an unverified answer may be interposed.

Where can this situation arise in practice? Often a complaint or answer may be entitled "verified," but do not be fooled as even a cursory review may reveal no verification at all or a verification executed by an attorney when it should have been the party, thus triggering the right to interpose a nullity objection.

Another example is when a law firm has multiple offices in multiple counties. A plain reading of the CPLR would suggest that the Legislature did not want an individual to be unduly inconvenienced by traveling to the lawyer's office outside of his or her own county in order to verify a pleading. Travel seems to be operative, else in this day and age of mail and e-mail, simply forwarding the proposed pleading would otherwise be sufficient.

Therefore, in a situation where a law firm has multiple offices and a client resides in the same county as just one office, then good practice would be to have the party drop by the local office to verify his or her pleading. Again, failure to properly verify the pleading triggers a due diligence obligation to timely object to same.

Historic Cases

In 1855, a New York court in *Williams v. Riel* (11 How. Pr. 374, 5 Duer 601, 12 N.Y.Super.Ct. 601), held that a verified answer was not owed when the complaint itself was improperly verified, thus the judgment entered against the defendant for default, granted after plaintiff's counsel rejected the unverified answer, was reversed.

Similarly, in 1871, in *Sexauer v. Bowen* (10 Abb.Pr.N.S. 335, 3 Daly 405), a unanimous court held that the verification included with the answer was insufficient:

As the complaints were duly verified, the answers should also have been properly verified, and as such was not the case, the plaintiffs' attorney had a perfect right to return them as he did, and enter up judgments as for want of answers. It appears that said judgments were regularly entered, the judge at special term was right in denying the motions to set the same aside for irregularity, and the orders appealed from should be affirmed.

Consistent with these positions, in 2000, the First Department held in *Peterson v. New York City Police Department* (270 A.D.2d 184), that a pleading was a nullity, and, absent a verification, said pleading could not stand and was properly disallowed. In fact, a trial court in *Morgan v. Maher* (60 Misc.2d 642, 303 N.Y.S.2d 575), held that where an answer was not verified, no other reason was necessary in order to strike same.

As a matter of evidence, having a verified pleading, particularly one that is sworn to by a party, may be a powerful tool at the time of trial for, among other uses, impeachment. And, of course, that reasoning helps explain the original rationale for verifying pleading in the first place: to assure that the parties set forth, under the threat of perjury, what they truly and knowingly believe to be meritorious claims or defenses.

Conclusion

While no system is perfect, the American system of justice is predicated on the idea that both sides to an action are evenly matched, neither having a particular advantage over the other until a verdict is handed down.

Before a jury, each witness is sworn to tell the truth under the penalties of perjury. Verified pleadings can also be considered as evidence based upon the same principles for truth and veracity in which a party would be prejudiced if he were deprived the opportunity to have sworn pleadings when entitled. He would be deprived the right to cross-examine or further and properly rely upon an unverified pleading as it was absent the foundation necessary to introduce said document into evidence before a trier of fact.

There can be little doubt that it was the Legislature's goal, through inter alia the verification process, to keep the bar and litigants at accepted levels for bringing meritorious actions by doing so under penalties of perjury. To deviate from that goal is to compromise, at a minimum, a standard that our justice system has enjoyed for centuries.

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