SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

VACATING DEFAULTS IN FORECLOSURES

Presenter

CHARLES WALLSHEIN, ESQ.
Melville, NY

DECEMBER 11, 2014
SCBA CENTER - HAUPPAUGE, NY

VACATING DEFAULTS IN FORECLOSURE

Presented by Charles Wallshein Esq.,
For the Suffolk County Academy of Law
CLE December 11, 2014

§ 3215. Default judgment

Currentness

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

(b) Procedure before court. The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in amount or

differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.

(c) Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

(d) Multiple defendants. Whenever a defendant has answered and one or more other defendants have failed to appear, plead, or proceed to trial of an action reached and called for trial, notwithstanding the provisions of subdivision (c) of this section, upon application to the court within one year after the default of any such defendant, the court may enter an ex parte order directing that proceedings for the entry of a judgment or the making of an assessment, the taking of an account or proof, or the direction of a reference be conducted at the time of or following the trial or other disposition of the action against the defendant who has answered. Such order shall be served on the defaulting defendant in such manner as shall be directed by the court.

(e) Place of application to court. An application to the court under this section may be made, except where otherwise prescribed by rules of the chief administrator of the courts, by motion at any trial term in which the action is triable or at any special term in which a motion in the action could be made. Any reference shall be had in the county in which the action is triable, unless the court orders otherwise.

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been

levied on the property of the defendant, describe the property and state its value. Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(g) Notice. 1. Except as otherwise provided with respect to specific actions, whenever application is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial.

2. Where an application for judgment must be made to the court, the defendant who has failed to appear may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assessment by a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally.

3. (i) When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence.

(ii) The additional notice may be mailed simultaneously with or after service of the summons on the defendant. An affidavit of mailing pursuant to this paragraph shall be executed by the

person mailing the notice and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant to receive the additional notice shall not preclude the entry of default judgment.

(iii) This requirement shall not apply to cases in the small claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property, except residential mortgage foreclosure actions.

4. (i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

(ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.

(iii) This requirement shall not apply to cases in the small claims part or commercial claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property.

(h) Judgment for excess where counterclaim interposed. In an action upon a contract where the complaint demands judgment for a sum of money only, if the answer does not deny the plaintiff's claim but sets up a counterclaim demanding an amount less than the plaintiff's claim, the plaintiff upon filing with the clerk an admission of the counterclaim may take judgment for the excess as upon a default.

(i) Default judgment for failure to comply with stipulation of settlement. 1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a

specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

2. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment dismissing the action, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with the pleadings or a concise statement of the facts on which the claim and the defense were based.

3215 (c) Sufficient Cause/Reasonable Excuse

3215(c) is very much like CPLR 5015 and CPLR 3012(d). In cases where the non-defaulting party fails to move within 1 year to take a default that party must show a reasonable excuse and demonstrate that the action has merit. The two requirements cut both ways. The public policy behind this rule is to induce litigants to refrain from wasting time.

"take proceedings" . *Portfolio Recovery Assoc., LLC v. Ploski*, 36 Misc.3d 186, 947 N.Y.S.2d 769 (Sup.Ct., Westchester County; April 10, 2012),

"sufficient cause" *Giglio v. NTIMP, Inc*, 86 A.D.3d 301, 926 N.Y.S.2d 546 (2nd Dept. 2011) Judge Spinner was affirmed:

> The Supreme Court properly granted that branch of the plaintiffs' cross motion which was pursuant to **CPLR 3215**(c) to *307 dismiss Napper Tandy's counterclaim against Robert Sr. **CPLR 3215**(c) provides that:
> "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."
> While counterclaims are not specifically mentioned anywhere in **CPLR 3215**, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to

> those set forth in complaints (*see* 5 N.Y. Adv. Comm. Rep. A–476 [Advance Draft 1961]; 7 Weinstein–Korn–Miller, Civ. Prac. § 3215.08). **CPLR 3215**(c) has, in fact, been applied to parties asserting unanswered counterclaims (*see Clemente v. Clemente*, 50 A.D.3d 514, 857 N.Y.S.2d 78; *Iovine v. Caldwell*, 256 A.D.2d 974, 977, 682 N.Y.S.2d 288; *Mint Factors v. Goldman*, 74 A.D.2d 599, 424 N.Y.S.2d 513). The policy behind **CPLR 3215**(c) is to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims (*see Stocker v. City of New York*, 72 Misc.2d 63, 64, 338 N.Y.S.2d 18; *Employers Liab. Assur. Corp. v. Zolfo Merchandising*, 62 Misc.2d 872, 311 N.Y.S.2d 471).

"application to appoint a referee is the first step in taking a default judgment" *Klein v. Cyprian Properties*, 100 A.D.3d (2nd Dept. 2012).

> In September 2008, when the plaintiff took the preliminary step toward obtaining a default judgment of **foreclosure** and sale by moving for an order of reference (*see* RPAPL 1321[1]), he initiated proceedings for entry of the default judgment of **foreclosure** and sale within one year of the defendant's default and, thus, did not abandon the action (*see* **CPLR 3215**[c]; *Pisciotta v. Lifestyle Designs, Inc.*, 62 A.D.3d 850, 852, 879 N.Y.S.2d 179; *Icon Equip. Distribs. v. Gordon Envtl. & Mech. Corp.*, 272 A.D.2d 579, 709 N.Y.S.2d 426; *Home Sav. of Am., F.A. v. Gkanios*, 230 A.D.2d 770, 646 N.Y.S.2d 530).

3215(f) Proof of Facts

Not filing a proper "proof of facts" is not a jurisdictional defect. *Manhattan Communications v. H & A Locksmith* 21 NY3d 200 (Ct. App, 2013).

Araujo v. Aviles 33 A.D.3d 830 (2nd Dept. 2006):

> Even if the plaintiff failed to comply with CPLR 3215(f), which requires a party seeking a default judgment to file, inter alia, "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due," such noncompliance would not warrant excusing the defendant's default or permitting him to interpose a late answer. Had the defendant opposed the plaintiff's motion for leave to enter a default judgment on this sole ground, and if the objection under CPLR 3215(f) had merit, a point we need not decide, the motion would have properly been denied with leave to the plaintiff to renew on proper papers (*see Matone v. Sycamore*

Realty Corp., 31 A.D.3d 721, 818 N.Y.S.2d 463; *Blam v. Netcher,* 17 A.D.3d 495, 496, 793 N.Y.S.2d 464; *Hazim v. Winter,* 234 A.D.2d 422, 651 N.Y.S.2d 149). This alleged defect would not render the default judgment a nullity nor, in the absence of a reasonable excuse and meritorious defense, entitle the defendant to vacatur of his default (*see Coulter v. Town of Highlands,* 26 A.D.3d 456, 809 N.Y.S.2d 466; *Harkless v. Reid,* 23 A.D.3d 622, 806 N.Y.S.2d 214).

In *Deutsche Bank Trust v. McCoy,* 29 Misc 3d 1202(A) (Supreme Court, Suffolk County), the Court found the affidavit of merit deficient because the affiant did not demonstrate personal knowledge of the facts contained in the affidavit.

> The Court's December 4, 2008 Order also specifically stated that "[w]ith regard to any future applications ... plaintiff's papers shall include ... evidentiary proof of compliance with the requirements of CPLR § 3215(f), including but not limited to a proper affidavit of facts by the plaintiff [or by plaintiff's agent, provided there is proper proof in evidentiary form of such agency relationship], or a complaint verified by the plaintiff and not merely by an attorney or non-party, such as a servicer, with no personal knowledge." See also *Monahan v. Fiore*, 71 A.D.2d 914 (2nd Dept. 1979). [emphasis added]

The Court in *McCoy* recognized that the affirmant [attorney] had no personal knowledge of the facts underlying the plaintiffs' claims. An affidavit of merit must be made by a **party**. In this case, the affirmation of Plaintiff's counsel, [redacted], relative to Plaintiff's standing and the merit of Plaintiff's case is hearsay and of no probative value. Any case where the loan servicer's statement is used to take a default and not the statement of a party, the affidavit fails.

3215(g)(3) & RPAPL 1320; Notice in Foreclosures

CPLR 3215, the default judgment statute, provides for an extra notice in CPLR 3215(g), but with some exceptions. One exception to the requirement of extra notice, contained in paragraph (iii) of CPLR 3215(g)(3), was the action affecting title to real property, which includes mortgage foreclosure. That was deemed too broad an exception, however, in instances of foreclosure on residential properties of not more than three units, where the presumably unsophisticated mortgagor didn't realize from

the original notice, clear as it might have been, that a default could result in the foreclosure of the mortgage and the loss of his residence.

An amendment of paragraph (iii) by Chapter 458 of the Laws of 2007 therefore makes an exception to this exception, making the additional notice requirement applicable to mortgage foreclosures on such residences. The amendment took effect on August 1, 2007.

Another part of the amendment added § 1320 to the Real Property Actions and Proceedings Law, in the mortgage foreclosure article, elaborating on this additional notice requirement. It mandates that the mortgagee in all such foreclosure actions include a boldface notice in the summons reciting, "NOTICE. YOU ARE IN DANGER OF LOSING YOUR HOME", and that the summons elaborate the consequences of ignoring it. More specifically, it directs the mortgagor to speak to an attorney or go to the court for more information on how to protect herself; advises that the mortgagor must respond by filing her answer with the court and serving a copy of it on the plaintiff's lawyer; and warns that at this point "[s]ending a payment to your mortgage company will not stop this foreclosure action".

CPLR 3012(d) Motion to compel acceptance of a pleading.

Used to vacate a default in answering. Under, 3012(d) there is no order or judgment that the defaulted party is seeking to vacate. The defaulting party simply did not answer.

(a) Service of pleadings. The complaint may be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.
(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

The reference to CPLR 3012(d) is designed to clarify that when it is an extension of time to appear or plead that the party is seeking, that party must still show a "reasonable excuse" for its "delay or default."

Courts may consider law office failures as excuses and must still make a determination of whether the overall conduct that caused the delay or default is "reasonable." Such failures may now be part of the foundation, but the overall adequacy of the foundation is still for the court to assess.

Numerous cases exist where attorneys or foreclosure defense and modification outfits take defendant's money and promise to answer but never actually serve an answer.

In *Remote Meter Technology of N.Y. v. Aris Realty Corp.* 83 A.D.3d 1030 (2nd Dept. 2011) the Court stated:

> [t]he court has the discretion to accept law office failure as a reasonable excuse (*see* CPLR 2005) where the claim of law office failure is supported by a "detailed and credible" explanation of the default or defaults at issue (*Henry v. Kuveke*, 9 A.D.3d 476, 479, 781 N.Y.S.2d 114; *see Gironda v. Katzen*, 19 A.D.3d 644, 645, 798 N.Y.S.2d 109).

Under any circumstances the practitioner must make a detailed demonstration of the law office failure and the good faith of the borrower. The use of "law office failure" to excuse default would be when the defendant states that they hired their attorney to answer and the attorney did not answer or appear in the action. In this case the burden of proof is on the defendant to demonstrate that they acted in good faith and can substantiate their belief that their attorney did not cause their default.

The reference to CPLR 5015(a), which contains the list of grounds for vacating orders and judgments, has a different purpose. We should first point out that the reference intended is not to the five paragraphs in subdivision (a) generally, but to paragraph 1 of subdivision (a) specifically. If an order or judgment has already been rendered on the party's default, CPLR 5015(a)(1) would apply and the several requirements it contains would have to be met before the default could be vacated: the default would have to be "excusable," as 5015(a)(1) says, and its stated outer time limits would generally have to be met.

<u>If no order or judgment was entered on a default, CPLR 3012(d) would govern.</u>

Because the CPLR §3408 conferences can take months to conclude, and motion practice is suspended during the settlement conference phase, Plaintiffs sometimes cannot make their motion to appoint a referee [RPAPL §1321] until after one year has lapsed. This is where CPLR §3408 creates prejudice to the defendant who participates in the settlement process. Under any circumstances the trial Court judge has broad but not unlimited discretion to allow a late answer.

The issue in *LAFAZAN* involved a motion to answer late more than one year after the default in answering. Two recent cases *HSBC v. Lafazan,* 115 A.D.3d 647 (2nd Dept. 2014 & *Chase v. Minott* 115 A.D.3d 634 (2nd Dept. 2014), indicate that the Second Department will closely scrutinize the facts of what constitutes "reasonable excuse" where the defendant physically appears in court at the §3408 conferences but fails to serve a timely answer.

HSBC v. Lafazan, 115 A.D.3d 647 (2nd Dept. 2014):

> To compel the plaintiff to accept an untimely **answer** as timely, a defendant must provide a **reasonable excuse** for the delay and demonstrate a potentially meritorious defense to the action" (*Ryan v. Breezy Point Coop., Inc.*, 76 A.D.3d 523, 524, 904 N.Y.S.2d 910; *see Community Preserv. Corp. v. Bridgewater Condominiums, LLC,* 89 A.D.3d 784, 785, 932 N.Y.S.2d 378). "The determination of what constitutes a **reasonable excuse** lies within the sound discretion of the Supreme Court" Here, the appellants' appearance and participation, along with their counsel, at settlement conferences required for certain residential mortgage **foreclosure** actions (*see* 22 NYCRR 202.12–a) evinced a desire to save their home. However, such appearances do not provide a **reasonable excuse** for their delay in **answering**. At the time the first conference was held, approximately 261 days had passed since the appellants' time to **answer** the complaint had expired (*see* CPLR 3012[a]). Under the circumstances of this case, the appellants' purported reliance on settlement discussions and their contention, in effect, that the plaintiff's counsel should have advised them that they were in default, do not constitute a **reasonable excuse.** Moreover, these assertions are belied by the content and warning contained in the specialized summons served in this action to foreclose a residential mortgage (*see* RPAPL 1320). Since the appellants failed to offer a **reasonable excuse**, it is unnecessary to consider whether they sufficiently

demonstrated the existence of a potentially meritorious defense (*see U.S. Bank N.A. v. Stewart*, 97 A.D.3d 740, 948 N.Y.S.2d 411).

Chase v. Minott 115 A.D.3d 634 (2nd Dept. 2014):

Here, Minott's claims that she "did not know that [she] needed to submit an **answer**," and that she relied on the advice of her real estate broker instead of consulting an attorney, do not constitute a **reasonable excuse** for her default (*see U.S. Bank N.A. v. Slavinski*, 78 A.D.3d 1167, 1168, 912 N.Y.S.2d 285; *Yao Ping Tang v. Grand Estate, LLC*, 77 A.D.3d 822, 823, 910 N.Y.S.2d 104; *Dorrer v. Berry*, 37 A.D.3d 519, 520, 830 N.Y.S.2d 277). This is especially so in view of the fact that the summons which was served upon Minott contained the specific language mandated by RPAPL 1320 warning her that she should "[s]peak to an attorney or go to the court," and that she "must respond by serving a copy of the **answer**" or risk the loss of her home (*see HSBC Bank USA, N.A. v. Lafazan*, 115 A.D.3d 647, —— N.Y.S.2d —— [decided herewith]). Moreover, although Minott alleges that she responded to the court notices to attend **foreclosure** settlement conferences in 2012, this does not **excuse** her preceding multi-year failure to **answer** the complaint. In addition, she has not demonstrated that the invocation of a court's inherent power to vacate a judgment in the interest of substantial justice is warranted in this case.

CPLR 5015(a)(1) Reasonable Excuse & Meritorious Defense

To Vacate an Order or Judgment. 50521 applies to vacating defaults (motions etc) after issue has been joined. The one exception is where the Plaitnif has engaged in **extrinsic** fraud to procure judgment.

The Second Department's definitions of what constitute a reasonable excuse are: found in cases involving CPLR 5015(a).

I. Relief from Judgment or Order, CPLR §5015(a)
    1. Reasonable Excuse
        i. Excusable Default Within One Year
            1. Law Office Failure
            2. Disability of a Party
    2. Newly Discovered Evidence
    3. **Fraud & Misrepresentation**
        i. Intrinsic & Extrinsic Fraud
    4. Lack of Jurisdiction to Render Judgment
    5. Vacatur of a Prior Judgment or Order
    6. Meritorious Defense – None Needed

Rule 5015. Relief from judgment or order

Currentness

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. 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; or

3. fraud, misrepresentation, or other misconduct of an adverse party; or

4. lack of jurisdiction to render the judgment or order; or

5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

(b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

(c) On application of an administrative judge. An administrative judge, upon a showing that default judgments 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, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.

(d) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

Under §5015(a)(1) the most common and most successful "reasonable excuses are law office failure and disability of a party.

In *Zaidi v. New York Building Contractors*, 61 A.D.3d 747 (2nd Dept., 2009) the Court held:

> To vacate their default in appearing at the trial and inquest, the defendants were required to demonstrate both a reasonable excuse for the default and a meritorious defense to the action (*see* CPLR 5015[a][1]; *Vasquez v. New York City Hous. Auth.*, 51 A.D.3d 781, 782, 859 N.Y.S.2d 195; *Conserve Elec., Inc. v. Tulger Contr. Corp.*, 36 A.D.3d 747, 831 N.Y.S.2d 185; *Zeltser v. Sacerdote*, 24 A.D.3d 541, 808 N.Y.S.2d 286). Although determining what constitutes a reasonable excuse generally lies within the sound discretion of the Supreme Court, reversal is warranted if that discretion is improvidently exercised.

In *Zaidi*, defendant Zaidi's wife was terminally ill and subsequently died from her illness. Defendant failed to appear at inquest and defaulted. The record reflected that the terminal illness of defendant's wife at the time of the inquest caused Defendant a disability sufficient to excuse his default. The trial court refused to vacate the default. The Second Department reversed on the grounds that the trial court abused its discretion.

> In this case Defendant's excuse for [redacted] default in answering is that [redacted] was diagnosed with [redacted] at the very same time that [redacted] was served with the summons and complaint. A detailed account of the facts and circumstances involving [redacted] diagnosis, prognosis and treatment is contained in [redacted] supporting affidavit annexed hereto. The affidavit contains documentary record of the physicians by whom Defendant is being treated. Defendant's "Explanation of Benefits" from [redacted] health insurance provider is annexed hereto as (**Exhibit "C"**).

When a defaulting party demonstrates an illness or disability with specificity and supporting evidence of the disability or illness, Courts will exercise their discretion to vacate the default. This is true not only when the defaulting party is the litigant but also when the reason for the default is law office failure attributed to the illness or disability of the attorney representing the client.

A party seeking to vacate a default based upon a disability must demonstrate the factual basis for the disability or the Court will most likely be abusing its discretion in vacating the default.

Gregory v. Gibb, 88 A.D.2d 988 (2nd Dept. 1982).

> The plaintiffs failed to establish that the delay in complying with appellant's notice dated July 27, 1976 and the order dated January 6, 1977, and the failure to oppose three separate motions, all based upon the plaintiffs' failure to comply with the July 27, 1976 notice, was attributable to the poor health of plaintiffs' counsel through September 9, 1981, when plaintiffs moved to **vacate** the **default** judgment. The failure to seek assistance or substitution of other counsel during the period of counsel's extended **illness**, approaching five years, is in fact a law office failure and not a reasonable excuse

Under §5015(a)(3) "fraud, misrepresentation, or other misconduct of an adverse party" is the ground for vacating a judgment or order.

The fraud involved may qualify as "intrinsic" or "extrinsic". The purpose of deciding which it is has to do with where the motion may be made. As a general rule, if the fraud qualifies as "intrinsic", it can be raised only by a "direct attack", which means on direct appeal or by a motion to vacate made to the court that rendered the judgment. If it's "extrinsic", it can also be the basis of a "collateral attack". This means that another court before which the question of the validity of the judgment arises can refuse to recognize it, or perhaps even enjoin its enforcement. It is difficult and sometimes impossible to draw a fine line between the two categories of fraud.

Extrinsic fraud is conduct that deprives a party of a full trial, or has the effect of preventing a party from fully presenting its case. Examples would be where there have been false representations that the action has been discontinued, or that judgment will be taken only for X relief, prompting a default by the opposing party, upon which the defrauder then takes judgment for more than was conceded.

A judgment based on a fraudulent instrument, on the other hand, or perjured testimony, or any other item presented to and acted on by the court, whatever its fraudulent component, may be just an intrinsic fraud and hence vacatable only on a direct attack. However, intrinsic fraud can only be raised if issue is joined and the fraud involves an act by the person committing the fraud during the adversarial proceedings.

Presumably, another way of distinguishing the two concerns jurisdiction. Conduct that deprives the court of jurisdiction is "extrinsic". If a defaulting [in answering] litigant can substantiate a claim that he or she was fraudulently induced not to answer or appear in the foreclosure by the Plaintiff or its agent, that would constitute extrinsic fraud because the foreclosure defendant was denied their day in court via plaintiff's false representations.

It is difficult to distinguish intrinsic from extrinsic fraud. For example; is a false affidavit of service extrinsic fraud? What constitutes jurisdiction and what does not? The best bet for the party who wants to undo the judgment is to attack it directly, as by a motion to vacate to the very court that rendered it. In the cases where issue was never joined the defaulting party must prove that their default in answering was caused by plaintiff's fraudulent inducement to not serve a formal answer. Doing that dispenses with any need to find the "trinsic" category that the attack falls under.

There is also disagreement about whether an excuse for the default is necessary at all when the motion is based on CPLR 317 instead of CPLR 5015(a).

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal. This section does not apply to an action for divorce, annulment or partition.

Often documents that are fraudulent on their face are annexed as exhibits to Plaintiff's motions for default judgments or motions for summary judgment. If the defendant answered and raised standing as a defense, or moved to amend their answer pursuant to CPLR 3025(b) to include standing as an affirmative defense the fraudulent document could be considered relevant o the defense. However, if the defendant does not answer any substantive defense is waived including standing.

JPMorgan Chase v. Hayles, 113 A.D.3d 821 (2nd Dept. 2014):

Hayles contends that the action should be dismissed insofar as asserted against her for lack of standing because the plaintiff was not the holder of the underlying note and mortgage when it commenced the action (*see Homecomings Fin., LLC v. Guldi,* 108 A.D.3d 506, 507, 969 N.Y.S.2d 470; *Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532). The Supreme Court properly rejected this claim because Hayles waived it by failing to challenge the plaintiff's standing in her answer or in a pre-answer motion to dismiss (*see Deutsche Bank Natl. Trust Co. v. Hussain,* 78 A.D.3d 989, 990, 912 N.Y.S.2d 595; *see also* CPLR 3211[e]; *CitiMortgage, Inc. v. Rosenthal,* 88 A.D.3d 759, 761, 931 N.Y.S.2d 638).

A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (*see Wells Fargo Bank v. Malave,* 107 A.D.3d 880, 968 N.Y.S.2d 127). As Hayles failed to demonstrate any potentially meritorious defense to the foreclosure action or a reasonable excuse for her default in opposing the plaintiff's motion for summary judgment, the Supreme Court properly denied that branch of her motion which was to vacate the judgment of foreclosure and sale pursuant to CPLR 5015(a)(1).

VACATING THE JUDGMENT OR ORDER – PLAINTIFF LACKS PERSONAL JURISDICTION OVER THE DEFENDANT- DISMISSING THE ACTION FOR LACK OF SERVICE

I. Defaults in Answering:
    1. Plaintiff Lacks Jurisdiction Over the Person
        i. CPLR §308
        ii. CPLR §3211(a)(8)
        iii. Traverse Hearing: Rebutting the Affidavit of Service
            1. Particularity as to Matter Asserted.

§ 308. Personal service upon a natural person

Currentness

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of **suitable age and discretion at the actual place of business, dwelling place or usual place of abode** of the person to be served and by either mailing the summons to the person to be

served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. **where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode** within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.
6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

CPLR §308(4) Due Diligence requirement

The due diligence component of CPLR 308(4) underscores the preference for personal delivery under 308(1) & (2). It has been said that "[t]he due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received." *McSorley v. Spear*, 2008, 50 A.D.3d 652, 653, 854 N.Y.S.2d 759, 760-61 (2d Dep't), quoting *Gurevitch v. Goodman*, 2000, 269 A.D.2d 355, 702 N.Y.S.2d 634 (2d Dep't).

The due diligence inquiry obviously is case-specific. In general, courts focus on the quality of the prior attempts to make service pursuant to CPLR 308(1) or (2), not the quantity or frequency of such attempts. *McSorley v. Spear*, supra; *Maines Paper & Food Service, Inc. v. Boulevard Burgers Corp.*, 2008, 52 A.D.3d 1150, 1151, 861 N.Y.S.2d 808, 809 (3d Dep't). Some guidelines that have emerged from the cases include the need to attempt delivery on multiple occasions on various days of the week and at times of the day when the defendant or some other person of suitable age and discretion reasonably would be expected to be present at the particular location. The extent of inquiry by the process server concerning defendant's whereabouts is a factor.

The Second Department requires that in order for service to be lawful pursuant to CPLR §308(4) Plaintiff must exercise "due diligence" in its attempts to personally serve the person to be served pursuant to CPLR §308(1) or (2). Section 308(1) describes personal delivery of the summons and complaint upon the person to be served at their place of residence or their place of business. CPLR § 308(2) describes personal service by delivery to a person of suitable age and discretion at their place of residence or their place of business.

In this case the affidavit of service of the process server, [redacted], states that she allegedly made seven (7) attempts at personal delivery upon

Defendants [redacted] at their residence located at [redacted]

The alleged times of attempted service by personal delivery pursuant to CPLR §308(1) or (2) were December 30, 2009 at 7:54 AM; January 4, 2010 at 7:40 AM; January 6, 2010 at 7:42 PM: January 8, 2010 at 12:36 PM; January 12, 2010 at 6:46 PM; January 14, 2010 at 2:12 PM; and finally at January 15, 2010 at 10:02 AM.

The affidavit further states that the process server verified Defendants' address with the neighbor at [redacted]. The process server does not give the neighbor's name or a description of the person with whom the address was verified.

The process server states that she allegedly affixed the summons and complaint to Defendants' door on January 15, 2010 at 10:02 AM for each defendant.

The process server states that she allegedly completed service by mailing a copy of the summons and complaint to Defendants at [redacted]t on January 19, 2010 by first class mail in an envelope marked "personal and confidential".

Defendant [redacted] denies that anyone came to the personal residence on any of the days above stated to attempt service. [redacted] also denies that she received mail containing a copy of the summons and complaint or that there was any other indication that service of the summons and complaint had been attempted.

Defendant [redacted] denies that anyone came to the personal residence on any of the days above stated to attempt service[redacted] also denies that she received mail containing a copy of the summons and complaint or that there was any other indication that service of the summons and complaint had been attempted.

Defendant [redacted] also denies that personal service was attempted upon him at his place of business. [redacted] maintains a law office in the Town of [redacted] located at [redacted], NY.

Defendants swear in their affidavits that they were either both at home or at least one person was at home at the times when the process server attempted personal delivery.

Defendant [redacted] swears that his mortgage application contained the address of his place of business, to wit, his law offices located at [redacted].

While Defendants were at their vacation home in Florida, their son, also an attorney visited Defendants' home every two to three days from about January 14, 2010 to mid-March 2010 to check that the heat was working and to pick up the mail. Defendants' son states in his affidavit that he routinely opened his parents' mail and that there was no communications from the process server or from Plaintiff's counsel

regarding a notice of foreclosure or a summons and complaint. He also states that there was no summons and complaint affixed to Defendants' door on or after January 15, 2010.

"Due diligence" is not defined as such in the statute. However, a process server's level of "due diligence" must be considered by the Court to determine whether alternate service by "nail and mail" was warranted. Courts have routinely held that there is a "reduced likelihood" that a summons [and complaint] will be received by the defendant where substitute "nail and mail" service is used. In *Guerevitch v. Goodman,* 269 A.D.2d 355 (2nd Dept. 2003), the Court stated;

> It is well settled that service pursuant to CPLR 308(4) may only be used in those instances where service under CPLR 308(1) and (2) cannot be made with "due diligence". The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (*see, Moran v. Harting,* 212 A.D.2d 517, 622 N.Y.S.2d 121; *Walker v. Manning,* 209 A.D.2d 691, 619 N.Y.S.2d 137; *McNeely v. Harrison,* 208 A.D.2d 909, 617 N.Y.S.2d 879; *Scott v. Knoblock,* 204 A.D.2d 299, 611 N.Y.S.2d 265).

The reduced likelihood that the summons will be received requires that the person attempting to effectuate service must make a concerted effort to locate the person[s] to be served. In *Sanders v. Elie,* 29 A.D. 3d. 773 (2nd Dept. 2006) the Court reversed the trial court and found that the process server did not make sufficient inquiries as to the defendant's whereabouts to satisfy the due diligence requirements of the statute.

> The Supreme Court should have granted the appellant's motion to dismiss the complaint for lack of personal jurisdiction because the plaintiffs failed to meet the "due diligence" requirement for so-called "nail and mail" service under CPLR 308(4). Moreover, there is no indication that the process server made any attempt to locate the appellant's business address or to effectuate personal service thereat (*see Earle v. Valente,* 302 A.D.2d 353, 754 N.Y.S.2d 364; *Annis v. Long,* 298 A.D.2d 340, 751 N.Y.S.2d 370). [emphasis added]

In this case, Defendant, [redacted] business address was easily ascertainable by a search of the yellow pages, the internet, and by records in the possession of the Plaintiff itself. Plaintiff's process server was simply too preoccupied to conduct the due diligence required by the statute and corresponding case law. Plaintiff knew or should have known that it could have personally delivered the summons to [redacted] because of its actual knowledge of the location of Defendant's place of business.

If in fact service was attempted at [redacted] law office service to a person of suitable age and discretion" pursuant to CPLR §308(2) could have been made upon his [redacted] who practices law with Defendant or one of the four members of [redacted] law office staff.

Sufficient cause appearing therefore the Court must conduct a hearing whereat the process server's testimony will be heard on the issue of [redacted] due diligence regarding her efforts to serve Defendant by personal delivery and her efforts to locate the Defendant at his place of business.

CPLR §317 Defense by person to whom summons not personally delivered

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal. This section does not apply to an action for divorce, annulment or partition.

When process is served by some method other than personal delivery (or delivery to an agent designated by CPLR 318), the possibility exists that the defendant will not actually receive it. The potential for nonreceipt of process is especially high with respect to expedient service by court order (CPLR 308(5)) and publication (CPLR 315). Even with a mailing plus delivery (CPLR 308(2)) or affixation to the defendant's front door (CPLR 308(4)), circumstances may arise in which the process does not reach the defendant. A default judgment is the inevitable result in such cases. CPLR 317 addresses the problem by giving the defendant an opportunity to open the default by showing that she failed to receive actual notice of the action in time to defend it and she has a meritorious defense. The second condition is based on the common sense notion that opening the default would be a futile gesture if no issue exists as to the plaintiff's right to recover.

Four requirements must be met:

First, the defendant must show that service was made in a manner other than personal delivery (or delivery to an agent designated under CPLR 318).. Service by any other method makes CPLR 317 potentially available as a means of opening a default

judgment. With respect to corporate defendants, personal delivery means in-hand delivery to a corporate representative such as an officer, director or managing agent. See CPLR 311(a)(1). Delivery to the New York Secretary of State, who must then forward a copy by certified mail to the corporation pursuant to N.Y.Bus.Corp.Law § 306, is not considered personal delivery to the corporation. *Fleetwood Park Corp. v. Jerrick Waterproofing Co.*, supra.

Second, the defendant must show that he or she did not receive actual notice of the process in time to defend the action. See, e.g., *Aloi v. Firebird Freight Service Corp.*, 1998, 251 A.D.2d 608, 675 N.Y.S.2d 107 (2d Dep't). In a case in which part of the service consists of a mailing to the defendant (e.g., CPLR 308(2) & (4)), the defendant's unsubstantiated denial of receipt will be insufficient to rebut the presumption that a properly mailed letter was received by the addressee. See, e.g., *Cavalry Portfolio Services, LLC v. Reisman*, 2008, 55 A.D.3d 524, 865 N.Y.S.2d 286 (2d Dep't).

On the other hand, deliberate efforts to avoid the receipt of notice or indifference to the issue will preclude resort to CPLR 317. A vivid example is *Paul Conte Cadillac, Inc. v. C.A.R.S. Purchasing Service, Inc.*, 1987, 126 A.D.2d 621, 511 N.Y.S.2d 58 (2d Dep't). There, the corporation moved its principal office but failed to so inform the New York Secretary of State. Service was made on the Secretary, who mailed the process to the defendant's former address, but the process was returned marked "addressee unknown." The resulting default judgment was opened pursuant to CPLR 317.

The Court of Appeals stressed in *Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co.*, 1986, 67 N.Y.2d 138, 501 N.Y.S.2d 8, 492 N.E.2d 116, that relief pursuant to CPLR 317 lies in the trial court's discretion. The Court seemed favorably inclined toward the opening of default judgments that are the result of a wrong address on file with the Secretary of State. In any event, the Legislature has sought to reduce default judgment in such situations. In a 1990 amendment to CPLR 3215, subdivision (f)(4) was added to require the plaintiff, as a condition to entering a default judgment where service was made under N.Y.Bus.Corp.Law § 306, to mail an additional copy of the summons to the corporate defendant by first-class mail to the corporation's "last-known address." Presumably, this address is the one that plaintiff is familiar with, not that which may be on file with the Secretary of State. See David D. Siegel, Practice Commentaries on CPLR 3215, at C3215:19B.

The third requirement of CPLR 317 is the showing of a meritorious defense. This is accomplished with an "affidavit of merit" from an individual with personal knowledge of the relevant facts. The affidavit must contain factual detail, not mere conclusory or

vague assertions. *Peacock v. Kalikow*, 1997, 239 A.D.2d 188, 658 N.Y.S.2d 7 (1st Dep't).

Finally, the defendant has a one-year time limit for the making of a motion under CPLR 317, running from the receipt of knowledge of entry of the default judgment with an outside time limit of five years from such entry. See, e.g., *Caba v. Rai*, 2009, 63 A.D.3d 578, 581, 882 N.Y.S.2d 56, 59 (2d Dep't) (motion untimely when made over three years after receipt of credit report showing judgment). Occasionally, however, courts have forgiven tardiness in the making of motions for the opening of default judgments. See, e.g., *Girardo v. 99-27 Realty, LLC*, 2009, 62 A.D.3d 659, 878 N.Y.S.2d 401 (2d Dep't); *Machnick Builders, Ltd. v. Grand Union Co.*, 1976, 52 A.D.2d 655, 381 N.Y.S.2d 551 (3d Dep't). CPLR 2004 provides sufficient statutory authorization for an extension of time "upon good cause shown." See, e.g., *Hunter v. Enquirer/Star, Inc.* 1994, 210 A.D.2d 32, 619 N.Y.S.2d 268 (1st Dep't). It should be noted that no time limit whatsoever applies to a motion to vacate a default judgment that is void for lack of jurisdiction. CPLR 5015(a)(4). See, e.g., *In re H. v. M.*, 2008, 47 A.D.3d 629, 850 N.Y.S.2d 480 (2d Dep't).

SAMPLE PLEADINGS

MOTION TO DISMISS PURSUANT TO CPLR 3215(c) PLAINTIFF'S TIME TO TAKE A DEFAULT JUDGMENT HAS EXPIRED

1. Plaintiff did not move for default within the one year as required by CPLR §3215(c) and did not move for the appointment of a referee pursuant to RPAPL §1321.
2. In foreclosure actions a plaintiff's application for an order of reference is considered the first step in a taking a default judgment. *Klein v. St. Cyprian Properties,* 100 A.D.3d 711 (2nd Dept. 2012).
3. Pursuant to CPLR 3215(c), Plaintiff must move to take a judgment by default within one year of Defendant's default in answering, moving or appearing. Since no judgment of foreclosure can be rendered without a confirmed referee's report, Courts interpret the rule to allow foreclosure plaintiffs to "begin" the default process with a motion to appoint a referee.

> **(c) Default not entered within one year.** If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action. [emphasis added]

4. Failure to move for a default judgment within one year is fatal to Plaintiff's case. In *Perricone v. City of New York*, 62 N.Y. 2d 282 (N.Y. Ct.App. 1984), the Court held:

> As to the Appellate Division's dismissal of plaintiff's complaint against the City of New York for failure to move for entry of a default judgment, we find no legal error in that determination. CPLR 3215 (subd. [c]) provides that if the plaintiff "fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

5. The Second Department interprets the rule to require mandatory dismissal to the present day with one exception. In *Giglio v. NTIMP*, 86 A.D.3d 301 (2nd Dept. 2011), the Court stated:

> The one exception to the otherwise mandatory language of **CPLR 3215(c)** is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if "sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]). This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious. [emphasis added]

Other Second Department decisions involving motions for a default and motions to appoint a referee interpret CPLR §3215(c) as requiring mandatory dismissal by the court. The exception to this rule is when the defaulting party opposes the mandatory dismissal and shows cause for reasonable excuse for the delay and a demonstration of a meritorious cause of action. (*Myers v. Slutsky* 139 A.D. 709 (2nd Dept. 1988); *County of Nassau v. Chmela*, 45 A.D.3d at 72; *Keyes v. McLaughlin*, 49 A.D.2d 974; *Di Carlo v. Bravo Tours*, 129 A.D.2d 552; *Perricone v. City of New York*, 96 A.D.2d 531, 532, *affd.; Shepard v. St. Agnes Hospital*, 86 A.D.2d 628).

6. In this respect the shoe then goes on the other foot. When foreclosure plaintiffs are dilatory in moving for a default judgment [or by bringing a motion for the appointment of a referee] it is the Plaintiff who has the burden of demonstrating reasonable excuse and a meritorious action *U.S. Bank National Association V. Solorin*, 34 Misc.3d 292 (Supreme Court, Queens County, 2011).
7. If the court determines that Plaintiff has a reasonable excuse the court would then have to consider the Plaintiff's prima facie case. In this case Plaintiff's case is based upon a legal conclusion that it is entitled to enforce the note as a "holder" and that the mortgage automatically follows the note into foreclosure.
8. In this case [redacted] statements are legal conclusions without a basis in law and are made without a prima facie statement of truthful facts as required by CPLR §3215(f).
9. The record reflects that over two years elapsed since Defendant filed a notice of appearance. The action was commenced in July 2010. To date, Plaintiff has not moved for a default judgment or to appoint a referee. Based upon the facts alleged by Defendant herein, Plaintiff's only reason for not moving for a default judgment or to appoint a referee is that in order to do so, it would have to make knowing misrepresentations of fact and knowingly rely on false documents.
10. In addition, CPLR §3215(f) requires a demonstration of proof by the party seeking the default judgment that its action has merit.
11. The statute states that except for matrimonial actions it shall not be necessary to conduct and take formal findings of fact in entering a judgment by default. However, the words "no findings of fact shall be necessary" in §3215(b) may be construed as to give the Court the ability to consider the proof required for the judgment sought.

THE CPLR §3408 CONFERENCE STATUTE AND PROCESS CAUSED DEFENDANT UNDUE PREJUDICE

1. Physical appearance at the settlement conferences should be construed as a formal appearance as defined in CPLR §320. Defendant [redacted] appeared at fifteen (15) §3408 settlement conferences between April 8, 2011, and June 26,

2013. Defendant physically appeared at the Supreme Court building with the express intent of settling the foreclosure by obtaining a modification of the terms of her mortgage.

2. Defendant was served with the summons and complaint on July 28, 2010.
3. Defendant did not file a formal answer in this action by serving same upon Plaintiff within the time frame prescribed by law. Instead, through counsel she served and filed a notice of appearance.
4. As of the date of the instant motion to compel acceptance of the answer late Plaintiff has not advanced the case.
5. In 2008, the legislature enacted CPLR §3408. The statute provides for mandatory settlement conferences in foreclosure actions between banks [and loan servicers] appearing as the entities that have the presumptive authority to settle the foreclosure via a modification of the terms of the note and mortgage, and homeowner-defendants.
6. In this particular case, Defendant states that she did not know nor was she made aware by her former attorney that her failure to formally serve her first responsive pleading after her attorney served the notice of appearance would result in her inability to defend the action on the merits in the absence of the Court compelling Plaintiff to accept her answer.
7. Defendant also states that that she did not know nor was she made aware that her failure to answer and raise standing as a defense to the action was waived.
8. Defendant did not know nor was she made aware until she retained present counsel any of the facts relating to the entity that appears in this action as the plaintiff. The facts of the case as appear in the evidentiary record are on their face so defective that same are sufficient to permit this Court in its discretion to deny Plaintiff the relief it seeks and to vacate Defendant's default in formally answering.
9. CPLR §3408 operated here to allow Defendant to believe that the presumptive lender not only would enter into good faith negotiation with her to modify the loan, but also had the authority to do so. This is consistent with §3408(f). NYCRR 202.12a(c)(7) states that motions be "held in abeyance" while settlement conferences are being held pursuant to this section.

10. The statute and the rules of court are unclear as to what appearance method is required or acceptable in mortgage foreclosure actions. A defendant can appear by answering or by moving to dismiss. NYCRR 202.12a states that pre-conference motions are held in abeyance. Therefore, a defendant's only means of appearing pre-conference is by formally serving and filing a written answer.
11. The NYCRR requirement that motion practice be held in abeyance deprives a defendant from moving to dismiss on the basis of lack of standing. This gives a defendant the following choices: defendant can answer, raises lack of standing as a defense and continue with the conferences to modify a loan with an entity it believes has no authority to modify the loan; or, defendant can refuse to negotiate the modification with an entity that it believes has no authority to modify the loan.
12. If defendant refuses to negotiate with the plaintiff, the case is released to IAS to litigate without the opportunity to actually modify the loan with the entity that has the authority to do so.
13. To remedy this situation administrative orders were put in place to ensure that Plaintiffs'' counsel affirm the facts of the case such that the proper party in interest was the owner of the loan with authority to modify the loan and foreclose on the loan.
14. The administrative orders did not contemplate nor did the §3408 statute require that plaintiffs make an affirmation as to their authority to negotiate to modify the loan a threshold to participate in the conferences. In retrospect, one could say that the legislature took for granted that every foreclosure Plaintiff actually had the authority to negotiate a settlement and/or foreclose the mortgage. The legislature did not make standing a threshold issue in the foreclosure conferences. Nevertheless, when standing is raised as an affirmative defense, the burden shifts to Plaintiff to prove its prima facie case that it owned the note and mortgage at the time of the commencement of the action.
15. In this case Defendant then physically appeared at 15 conferences pro se without filing a responsive pleading.
16. Nobody ever explained to the Defendant what an “appearance” actually meant. Nobody ever explained that her 15 appearances did not matter; and if the bank did

not offer a settlement of the case by offering a modification of the mortgage, she would have waived her ability to answer and raise standing as a defense.

17. Article 17 of the Judiciary Law prohibits a Court from giving legal advice. It is understood that the role of a court is not to counsel litigants. However, in the CPLR §3408 scenario, the court is not an impartial trier of fact but rather a mediator. The Court's role as a mediator allows the Court to ensure that both parties are negotiating in good faith. In this respect, this pro-se defendant was quasi "represented" by the court appointed referee.
18. However, the court appointed referee has no power or authority to ensure that the plaintiff has the legal authority to negotiate a settlement or question or compel the plaintiff to actually offer a reasonable modification of the mortgage. The Second Department has held, and correctly so, that to do so would be to interfere with contract and would therefore be unlawful. Also, the Court does not require Plaintiff to establish its authority to modify the loan.
19. The end result is that the mediation part has no power to render judgment or decide on the merits of a case. The mediation part does not require a Plaintiff to establish that it is the proper party in interest in the action or that it is the party that is aggrieved by nonpayment of the note.
20. The part was created for one purpose and one purpose only, to mediate settlements and assist homeowner defendants in the modification process.
21. In this particular case Defendant's time to file a responsive pleading has lapsed by almost four years. Defendant's time to bring its motion to appoint a referee pursuant to CPLR §3215(c) and RPAPL §1321 has lapsed by almost three years.
22. It would be unconscionable for the Court to preclude Defendant from filing its first pleadings while simultaneously allowing Plaintiff to move for the appointment of a referee.
23. Any interpretation of CPLR §3408, NYCRR 202.12a and CPLR §3215(c) must reconcile these rules within the context of the foreclosure conferences and the role the Court plays in its dual function as mediator and as the impartial trier of fact after the case is released to IAS.

24. Once the State of New York becomes a part of the mediation process it induced this Defendant to rely on the judicially and legislatively sanctioned mandatory "fairness" and "good faith" of the process. When mediation fails, the State cannot then discard Defendant to the default heap.
25. CPLR §3408 was enacted to assist borrowers in foreclosure. In this instance, Plaintiff seeks to have the statute operate to achieve the exact opposite result. Refusing to allow Defendant to assert defenses to the action after her good faith appearance before this Court on 15 separate occasions is contrary to the intent of the §3408 statute and contrary to the interests of justice.

THE INTERESTS OF JUSTICE

26. The law is not so rigid that judges are bound to follow statute to the letter of the law. Defendant is aware that a narrow reading of certain cases may direct this Court to vacate the default in answering only if Defendant can demonstrate reasonable excuse and a meritorious defense.
27. There is no judgment here to vacate. Therefore, the Court may limit its inquiry and analysis to CPLR §3012(d) motion to answer late.
28. Even if there is no judgment to vacate, the Court is within its discretion to vacate a default in answering where the interests of justice warrant. In *Pettinato v. Sunscape at Bay Shore*, 97 A.D.2d 434 (2nd Dept. 1983), the Court recognized the lower Court's discretion to vacate the defendant's default in answering in the interests of justice. The Court recognized the amendments to the CPLR (Sections 2005 & 3012(d)) and the abandonment of *Barasch & Eaton* reasoning. (*Barasch v. Micucci*, 49 N.Y.2d 594; *Eaton v. Equitable Life Assur. Soc. of U.S.*, 56 N.Y.2d 900). The Court in *Pettinato* stated:

> . . . and empowered the courts to exercise their discretion to excuse such delays "in the interests of justice" where the circumstances are otherwise deemed appropriate. . . .Applying this legislative mandate to the case at bar, we have reached the conclusion that Sunscape Associates' default is excusable and that the matter should be determined upon the merits. In so concluding, we have taken cognizance of the shortness of the delay in answering, the existence of on-going settlement negotiations, the lack of any

> demonstrable prejudice to the plaintiffs, and the apparent existence of a meritorious defense as warranting our exercise of discretion in Sunscape Associates' favor.

29. To turn a blind eye to the underlying facts of the case already admitted by Plaintiff would be to defeat the evidentiary requirements of CPLR §3215 and the plain language intent of the §3408 statute.
30. The core purpose of the judicial system is to ensure that justice is done without prejudicing the rights of litigants and simultaneously assure finality of judgments, decisions and orders whether taken by stipulation, default or by judgment after hearing.
31. Defendant can only raise lack of standing if Defendant answers. Lack of standing is deemed waived if it is not raised in the Defendant's answer. Lack of standing is not grounds to vacate a default in answering. However, Defendant's failure to file a written answer should be excusable within the context of the §3408 conference process.
32. Defendant was "invited" to physically appear at the conference. Defendant was led to believe that the Court was acting as a mediator in the §3408 process. Her failure to appear would not have allowed the Court to take any action whatsoever except to refer the case to IAS whereat the case would then be "litigated".
33. If Defendant knew that she had to serve an answer independent of her physical appearance at the §3408 conferences she states that she would have. Even if Defendant answered and did not raise standing as a defense in her answer CPLR §3025(b) allows pleadings to be freely amended so long as the amendment is not palpably insufficient and does not prejudice the opposing party.
34. The §3408 statute is drafted in such a way that it encourages lay people not to file formal written answers. A reasonable comparison could be made to small claims appearances, family court and landlord tenant actions. In those types of actions the Court sends the notice to the defendant- respondents with a date to appear in court. In these cases no formal answer is required. Rather, the courts hold mediation conferences or conduct a summary proceeding. If the litigants do not settle the case, the case is placed on the trial calendar. If the litigants do not appear they are not in

default. If they do appear they are not in default. This is the common experience of most lay people.

35. The §3408 conferences are designed to allow pro se litigants to settle these cases under circumstances that they believe to be pre-litigation despite the fact that an action was commenced and a summons and complaint served.

36. In this sense, this defendant and a majority of other foreclosure defendants are being "double tracked". The §3408 and 202.12a rules encourage settlement while simultaneously allowing the default clock to continue to tick in Plaintiff's favor. The statute should be amended to not only hold motions in abeyance but should also toll the time to file an answer until the case is released from the settlement part to IAS. At that point, the borrower should be carefully counseled by an officer of the court wherein a clear warning should be given that a failure to answer will result in a default judgment.

37. The State has expended tens of millions of dollars to ensure that settlement conferences are conducted in an environment of good faith and fair dealing.

38. However, the end result is that the §3408 conferences cause people who have no intent of defaulting in appearing in the action or abandoning their defenses to default in answering and waiving all their defenses. In this sense, the application of CPLR §3408 often produces a result completely opposite from the result intended by CPLR §3408.

39. CPLR §3408 was enacted to provide a level playing field for foreclosure litigants where the parties have an opportunity to have their settlement negotiations monitored and mediated by the Court.

40. This Court may interpret these statutes so that the rule of law operates in the spirit in which it was enacted. In *Allstate v. Libow,* 106 A.D.2d 110 (2nd Dept. 1984, the Second Department reviewed a motor vehicle insurance statue within the parameters of its legislative intent. The Court held;

> Further, where a statute is clear on its face and its words are possessed of a definite and precise meaning, resort to extrinsic matter, such as legislative history, is inappropriate . . . However, there are limits to literalism; "[i]n the exposition of a statute, the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter" (*Sanders v. Winship,* 57 N.Y.2d 391, 396, citing Kent's Comm. [13th ed], p. 462; see *Motor Vehicle Acc.*

> *Ind. Corp. v. Eisenberg,* 18 N.Y.2d 1, Courts will not blindly construe statutes or the rules or regulations of an administrative agency in a manner which thwarts the obvious legislative intent and reaches unreasonable, absurd and unexpected consequences (see *Matter of Chatlos v. McGoldrick,* 302 N.Y. 380,; *Matter of Friedman-Kien v. City of New York,* 92 A.D.2d 827, affd. 61 N.Y.2d 923, *Williams v. Williams,* 23 N.Y.2d 592.

41. Notwithstanding same, there is no person who would argue that the statute's clear intent was not to benefit homeowners in foreclosure but rather to facilitate homeowners' default in answering.
42. Defendant put forth much more effort to appear 15 times in Court than she would have if she had simply denied the allegations in the complaint in simple letter format and mailed it to Plaintiff. Whether Defendant raised standing as a defense or not, she could have up to this point of the litigation hired an attorney and amended her answer to include affirmative defenses and counterclaims involving standing and quiet title.
43. In foreclosure actions involving securitized mortgages with multiple assignments of the mortgage and multiple transfers of the underlying debt, it would be unreasonable to believe that the framework of the Real Property Actions and Proceedings Law would not encourage Courts to examine the proof offered and ensure that the involuntary transfer of title to real property [via RPAPL Art. 13] preserved the marketability of title.
44. The RPAPL is followed to the letter of the law. The provisions are followed as bright line rules to ensure that marketability of title to real property is uncompromised and that all necessary parties to the action are given notice that their rights may be extinguished. The core principal concerning standing in foreclosure actions is that a judgment of foreclosure and sale based upon fraudulent documents is not "final". Rather, it invites future litigation in the form of quiet title actions because the real party in interest that should have been the Plaintiff in the foreclosure action did not in fact ever appear in the action. It is also highly likely that the entity to which the debt is owned is not even aware the loan is in default. These are the perils of the secondary mortgage market business model where loans are pooled by the thousands and the responsibility and liabilities connected with originating loans,

storing loans, servicing loans and foreclosing loans have been severed and segregated from the persons and entities that have the right to receive the income from those loans and are in fact the true "owners" of the loans.

45. In this particular instance, it is within the Court's discretion pursuant to the equitable nature of foreclosure action to require a determination of the case on the merits especially when the marketability of title to real property is affected.

Presented by:
Charles Wallshein Esq.,
115 Broadhollow Road, Suite 350 Melville, NY 11747
631 824 6555
cwallshein@wallsheinlegal.com