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# CPLR 3020: Action Dismissed on the Ground of Defective Verification

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guage seems correct, the practitioner is advised to approach this case with caution. The court made no mention of the significance of the fact that the tender of the fees was made by check.[95] The law is well settled that a check is not legal tender when it is refused on the express ground that it is not the accepted mode of payment.[96] The practitioner is advised to tender cash at the time of service regardless of the holding in the instant case.

### ARTICLE 30 — REMEDIES AND PLEADING

*CPLR 3020: Action dismissed on the ground of defective verification.*

Since 1965, RPAPL section 741 has required verification of complaints served in summary proceedings. Presumably, the purpose of this requirement is to subject the affiant to prosecution for perjury[97] if he willfully misstates the facts. However, "[w]ith rare exceptions, district attorneys will not undertake to prosecute a perjury alleged to emanate from a civil proceeding."[98]

In *46 Downing Street Corp. v. Loren*,[99] the defendant-tenant moved to dismiss a summary holdover proceeding on the ground that verification of the petition was defective. It was discovered that the signature of the landlord's agent was not genuine. In dismissing the action under CPLR 3020,[100] Judge Lane addressed himself to the pernicious practice under which city marshalls complete standard petitions and notices of petition in summary proceedings in lieu of the plaintiff or his attorney. While acknowledging that this procedure is not illegal, he stressed its inherent dangers.[101] Specifically, he warned

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95 While a valid tender must ordinarily be made in money, a tender by check is valid if not objected to on that ground. *E.g.*, Mitchell v. Vermont Copper Mining Co., 67 N.Y. 280, 282 (1876); Murphy v. Mahoney, 187 Misc. 316, 63 N.Y.S.2d 912 (Sup. Ct. Broome County 1946).

96 *In re* Collyer, 124 App. Div. 16, 108 N.Y.S. 600 (2d Dep't 1908). It appears that one who is subpoenaed as a witness would succeed on a motion to quash the subpoena on the ground that payment of the witness fees were tendered by check where such tender was refused for the stated reasons that payment in cash is desired and that a check is not legal tender. Grussy v. Schneider, 50 How. Pr. 134 (Sup. Ct. N.Y. County 1875), *aff'd*, 55 How. Pr. 188 (1st Dep't 1876).

97 N.Y. PENAL LAW art. 210 (McKinney 1967).

98 7B MCKINNEY'S CPLR 3020, commentary at 200 (Supp. 1971).

99 67 Misc. 2d 737, 324 N.Y.S.2d 932 (N.Y.C. Civ. Ct. N.Y. County 1971).

100 *Id.*, *citing* Sandy Mark Realty Corp. v. Creswell, 67 Misc. 2d 630, 324 N.Y.S.2d 504 (N.Y.C. Civ. Ct. N.Y. County 1971).

101 Marshalls may make incurable jurisdictional errors or use improper forms, necessitating recommencement of actions. 67 Misc. 2d at 738, 324 N.Y.S.2d at 933, *citing* Kings East v. Crowell, 161 N.Y.L.J. 113, June 11, 1969, at 17, col. 4 (Sup. Ct. N.Y. County). In the latter case, the petition did not state that the apartment in issue was decontrolled, as required by RPAPL § 741. This defect was deemed jurisdictional, and the court warned of the danger in merely "filling in the blanks on a printed form." *Id.*

that a marshall would commit perjury if he signs for a landlord's agent, as was apparently done in this case.[102]

The lamentable reluctance of our district attorneys to prosecute those who commit perjury in civil actions is in significant part responsible for the practice so rightfully condemned in the instant case. Judge Lane is to be commended for his righteous indignation about this blatant misuse of the judicial process.

## ARTICLE 31 — DISCLOSURE

*CPLR 3101(d): Discovery limited to reports received prior to rejection of claim.*

While "all evidence material and necessary in the prosecution or defense of an action"[103] is subject to disclosure, material prepared for litigation need not be disclosed unless: (1) it can no longer be duplicated, and (2) failure to disclose will cause undue hardship.[104] The scope of this conditional immunization has been a source of extensive litigation, especially in regard to insurance companies' investigative reports.[105] At what point do reports prepared by independent investigators for an insurance company become entitled to the conditional protection of CPLR 3101(d)?

At issue in *Millen Industries, Inc. v. American Mutual Liability Insurance Co.*,[106] was whether such reports concerning dishonest acts of employees of a policyholder were protected. The Appellate Division, First Department, determined that: (1) the business of the defendant included payment or rejection of claims, and (2) reports which aided in such determinations were made in the ordinary course of business rather than in preparation for litigation. Subsequent reports, however, were held to be within the ambit of CPLR 3101(d).[107]

*CPLR 3120(a): Discovery of defendant hospital's non-medical records relating to non-party.*

In *Mayer v. Albany Medical Center Hospital*,[108] the Appellate Division, Third Department, approved disclosure of non-medical information concerning a patient who had assaulted a visitor in the de-

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102 67 Misc. 2d at 738, 324 N.Y.S.2d at 933, *citing* N.Y. PENAL LAW art. 210 (McKinney 1967).

103 CPLR 3101(a).

104 CPLR 3101(d).

105 3 WK&M ¶ 3101.50b.

106 37 App. Div. 2d 816, 324 N.Y.S.2d 930 (1st Dep't 1971) (per curiam).

107 *Id.*, 324 N.Y.S.2d at 931.

108 37 App. Div. 2d 1011, 325 N.Y.S.2d 517 (3d Dep't 1971) (mem.).