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Summarizing recent significant New York appellate cases

When a party in New York seeks to enter a default judgment against a non-appearing defendant, they must file with the court an affidavit attesting that, after investigation, the defaulting defendant is not an active military servicemember. When a default judgment is entered in the absence of the required non-military affidavit, however, the Second Department recently held that a defendant is not entitled to vacatur of the default judgment merely because the non-military affidavit was not filed. Rather, the defendant must also establish that they are actually an active servicemember to obtain vacatur of the default judgment as of right. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

SECOND DEPARTMENT

CIVIL PROCEDURE, DEFAULT JUDGMENT, NON-MILITARY AFFIDAVIT

***Tri-Rail Designers & Bldrs., Inc. v Concrete Superstructures, Inc.*, 2025 NY Slip Op 06209 (2d Dept Nov. 12, 2025)**

Issue: **Where a default judgment was entered in the absence of the requisite affidavit stating that the defaulting party's failure to appear is not due to active military service, is that defendant entitled to vacatur of the default judgment as of right?**

Facts: After the defendant failed to complete a multi-million-dollar project, the plaintiff sued defendant and its president for breach of contract. The defendants failed to appear, and plaintiff then moved for leave to file a default judgment. Supreme Court granted the motion, and entered a default judgment against defendants for $946,001.86. Defendants thereafter moved to vacate the default judgment, arguing, "in effect, that the plaintiff's failure to support its motion . . . with a non-military affidavit as to [defendant's president] warranted vacatur of their default . . . The plaintiff conceded that it did not provide a non-military affidavit as to [defendant's president], but maintained that such a failure is not a basis to vacate the defendants' default, particularly where, as here, [the president] was personally served and did not claim to be an active member of the United States military. In an order entered January 19, 2024, the Supreme Court denied the defendants' motion."

Holding: The Appellate Division, Second Department ultimately modified the judgment and directed an inquest on damages, but affirmed Supreme Court's refusal to vacate defendant's default. The Second Department noted, "a motion for leave to enter a default judgment must be supported by what has been colloquially termed a 'non-military affidavit.' This requirement is not mandated by the CPLR but rather is derived from federal law. The Servicemembers Civil Relief Act . . . provides various protections for persons in the uniformed services while on active military duty. Passed by an act of the United States Congress in 1918, the purpose of the Soldiers' and Sailors' Civil Relief Act is to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves."

Practically speaking, the Court explained, "[a] non-military affidavit must be based upon some kind of investigation and the affiant must provide specific facts to support the conclusion stated. The affidavit also must be based upon the affiant's personal knowledge and not on conclusory statements or upon 'information and belief.' Moreover, the required investigation cannot be conducted merely after the commencement of an action or proceeding but must be conducted after the party's default in appearance. While there is no singular manner of investigation, often in practice non-military affidavits are supported by signed statements from the Department of Defense Manpower Data Center, which typically indicate whether a person is on active military service at the time of the investigation." New York's statutory requirements are substantially the same, and the failure to provide the non-military affidavit is a sufficient basis for the Court to deny leave to enter the default judgment.

Where a valid default judgment has already been entered, however, "the failure to provide a non-military affidavit does not automatically warrant vacatur of an otherwise validly entered default judgment," the Court held. The Court reasoned that the federal Act provides an explicit carve out that allows a servicemember to reopen a judgment entered upon their default due to active military service, but that "this remedy is limited to applications made "by or on behalf of the servicemember" and "for the purpose of allowing the servicemember to defend the action" under certain circumstances. The statutory text does not support the defendants' assertion that any person may seek to vacate a default judgment based on a failure to comply with the Act. Therefore, we hold that a movant's failure to provide a non-military affidavit does not entitle a defendant to vacatur of an otherwise validly entered default judgment as of right. Where, as here, the defaulting party has made no assertion of being on active military duty at the time of his or her default, he or she falls outside of the protection afforded by the Act.

We warn that such a holding must not be read as altering a movant's initial burden on motions for leave to enter a default judgment. A non-military affidavit is required and failure to provide such an affidavit warrants denial of the motion. However, where, as here, a default judgment was improperly entered, in order to be afforded the protection of the Act, a defendant seeking vacatur must establish as part of their initial burden that this remedy is sought 'by or on behalf of the servicemember.' To hold otherwise and to grant any defendant the right to challenge a default judgment would permit civilians to take advantage of those protections that were specifically afforded to our servicemembers and would belie the purpose of the Act. What was intended by the legislature as a shield should not be used permissively as a sword."

THIRD DEPARTMENT

ADMINISTRATIVE LAW

***Matter of County of Rockland v New York State Dept. of Envtl. Conservation*, 2025 NY Slip Op 06231 (3d Dept Nov. 13, 2025)**

Issue: **Did the New York State of Environmental Conservation rationally decline to rescind its 2018 notice of complete application for Rockland County's SPDES permit so as to allow the County to amend the application to include a proposed diffuser project to mitigate the draft permit's effluent limits for ammonia?**

Facts: In May 2013, Rockland County applied to the DEC to renew its SPDES permit. After 5 years of review, the DEC issued a notice of complete application and advised the County that it had commenced a technical review. "DEC also prepared a draft permit, which imposed more stringent water quality based effluent limits (hereinafter effluent limits) for ammonia and residual chlorine (see 6 NYCRR 750-1.11 [a] [5] [i]). Petitioner and the District, in its capacity as petitioner's administrative arm, challenged the draft permit in ensuing discussions with DEC. Following these discussions, the District informed DEC that, to address the new effluent limits, it was contemplating a diffuser project and DEC replied that if the District provided certain technical documents prior to a specified date, it would issue a revised draft permit incorporating the design and adjusting the effluent limits accordingly. Upon receiving a portion of the requested documents, DEC instructed the District that it was also required to submit a permittee-initiated modification request by October 31, 2019. In response, the District requested that, instead of requiring the submission of a permittee-initiated modification, DEC change the status of the 2013 SPDES renewal application to incomplete and begin the review process anew, with consideration of the District's proposed diffuser project. DEC declined the requested approach and issued a final permit, effective in March 2021."

In response, the County requested an adjudicatory hearing on the permit limits, but the ALJ determined that "there were no issues warranting adjudication regarding the permit conditions, DEC's effluent limits for ammonia, or actions by DEC during the permitting process." The DEC Commissioner rejected the County's administrative appeal, and Supreme Court dismissed the County's ensuing Article 78 proceeding, holding that DEC's determinations were rational.

Holding: The Appellate Division, Third Department affirmed, holding that DEC's refusal to reopen the permit process for the County's "speculative, proposed diffusor project" was rational in light of the significant passage of time following the expiration of the County's prior SPDES permit. The Court explained, "in May 2020, the District submitted a written request to DEC to rescind the 2018 completeness determination and recommence the application process, including environmental impact review, in consideration of its proposed diffusor project. Given the significant passage of time since the expiration of the prior SPDES permit — nearly eight years — and the uncertain timeline for the District's diffusor planning and completion, DEC declined to rescind its 2018 completeness determination and instead devised a compliance schedule under the permit that afforded the District three years to develop plans for compliance with the new effluent limits on ammonia and total residual chlorine under the permit. Petitioner's contention that it should not have been required to submit a permittee-initiated modification request misses the mark, as its failure to do so renders its argument tantamount to asking DEC to leave resolution of the SPDES application in limbo while awaiting the District's potential submission of definitive plans to address the very real underlying environmental concerns. Under these circumstances, we find that DEC rationally declined the District's request to rescind its completeness determination and further delay the issuance of a final SPDES permit, thereby addressing the need for regulatory certainty while facilitating the District's ability to pursue its proposed diffusor project through the implementation of an enforceable, yet generous, schedule of compliance."

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