

A NULLITY OR NOT?—THE STATUS OF A DEFAULT
JUDGMENT ENTERED ABSENT COMPLIANCE WITH CPLR
3215(F)

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Default judgments are an integral part of civil practice. Attractive because they provide parties with the spoils of successful litigation without the hassle of actually litigating controversies, default judgments are a desired commodity.¹ CPLR 3215

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¹ In New York, a default judgment can be enforced to the same extent as a judgment rendered on the merits, and a default judgment is generally entitled to res judicata treatment. DAVID D. SIEGEL, NEW YORK PRACTICE §§ 293, 451, at 478, 759–60 (4th ed. 2005) [hereinafter SIEGEL, NEW YORK PRACTICE]; see David D. Siegel, *Practice Commentaries*, C3215:26, in N.Y. C.P.L.R. 3215 (McKinney 2005) [hereinafter Siegel, *Practice Commentaries*] (“New York follows the rule that a judgment by default is entitled to the same res judicata (claim preclusion) effect as a judgment after a disputed trial. The judgment bars relitigation between the same parties or their privies of any fact that necessarily underlies the judgment. The underlying fact can be ascertained by reference to the judgment itself, the pleadings, the affidavits, and any other item in the record of the case.”); *Lazides v. P & G Enters.*, 58 A.D.3d 607, 609, 871 N.Y.S.2d 357, 359 (App. Div. 2d Dep’t 2009) (“[R]es judicata applies to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior action.” (internal quotation marks and brackets omitted)); *Santiago v. Lalani*, 256 A.D.2d 397, 398, 681 N.Y.S.2d 577, 578 (App. Div. 2d Dep’t 1998) (“The doctrine [of res judicata] is applicable to a judgment taken by default which has not been vacated, as well as to defenses which were or could have been raised in the action.”); *Trisingh Enters. v. Kessler*, 249 A.D.2d 45, 46, 671 N.Y.S. 2d 70, 71 (App. Div. 1st Dep’t 1998) (“The doctrine of res judicata or claim preclusion prohibits a party from relitigating any claim that could have been or that should have been litigated in a prior proceeding. The doctrine bars further litigation between the same parties on the same cause of action, and is applicable to a judgment taken by default that has not been vacated.” (citation omitted)); see also *Parker v. Hofer*, 2 N.Y.2d 612, 616, 142 N.E.2d 194, 196, 162 N.Y.S.2d 13, 16 (1957) (“[A] judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion, even if obtained upon default.”). Whether collateral estoppel (issue preclusion) effect will be afforded to issues underpinning a default judgment is a difficult question. See *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456–457, 482 N.E.2d 63, 68, 492 N.Y.S.2d 584, 589 (1985) (noting both that collateral estoppel effect will only be given to matters “actually litigated and determined” in a prior action and that where a default judgment has been entered issues have not been “actually litigated”); *In re Abady*, 22 A.D.3d 71, 85, 800 N.Y.S.2d 651, 661 (App. Div. 1st Dep’t 2005) (“[C]ollateral estoppel may be properly applied to default judgments where the party against whom preclusion is sought

establishes the procedure that a plaintiff² must follow to procure a default judgment; one component of the plaintiff's application for a default judgment is "proof . . . of the facts constituting the claim."³ What if the plaintiff seeking the default judgment fails to submit proof of the facts of its claim, but a default judgment is nonetheless rendered against the defaulting defendant? Is that judgment void and therefore a nullity, allowing the defendant to have it vacated at any time simply on request? Or, can the plaintiff's failure to submit proof of the facts of its claim be overlooked?

Whether a plaintiff's failure to submit sufficient proof of its claim on its application for a default judgment renders the judgment a nullity has important consequences in practice, yet this issue is unsettled: A split exists among the departments of the appellate division as to whether a default judgment entered in the absence of proof of the claim is a nullity, and the Court of Appeals has yet squarely to resolve the point. This article reviews the default judgment statute; examines the requirement that a plaintiff submit proof of the facts of its claim; and surveys the case law regarding the consequences of a plaintiff's failure to submit sufficient proof of its claim.

I. CPLR 3215—THE DEFAULT JUDGMENT STATUTE

CPLR 3215 permits a plaintiff to seek a default judgment against

appears in the prior action, yet willfully and deliberately refuses to participate in those litigation proceedings, or abandons them, despite a full and fair opportunity to do so."); *Watrous v. Autera*, 284 A.D.2d 792, 793, 726 N.Y.S.2d 595, 596 (App. Div. 3d Dep't 2001) ("Collateral estoppel may only be accorded to litigated judgments, not to default judgments."); *Summa Envtl. Serv., Inc. v. Fifth Ave. Partners*, 176 A.D.2d 664, 665, 575 N.Y.S.2d 317, 318 (App. Div. 1st Dep't 1991) ("Where the party against whom collateral estoppel is being asserted defaulted in the prior action, as in the present case, there cannot be an identity of issue that was actually litigated."); SIEGEL, *NEW YORK PRACTICE*, *supra*, § 451, at 759–60.

A default judgment may not be entered for anything other than the relief demanded in the complaint or in the CPLR 305(b) notice accompanying the summons. Siegel, *Practice Commentaries*, *supra*, C3215:10. Thus, if the action is for damages, the default judgment cannot exceed the amount demanded in the complaint or 305(b) notice, or be entered for any form of relief other than money. *Id.*

² Although any party in an action may seek a default judgment against another party who has defaulted, this article will focus on the most common scenario—a plaintiff seeking a default judgment against a defendant based upon the defendant's failure to appear in the action. SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 293, at 476 ("In several situations the defendant's conduct (or non-conduct) amounts to a default and entitles the plaintiff to take a default judgment. The most common situation is where the defendant does not respond to the summons within the requisite time."); N.Y. C.P.L.R. 3215(a) (McKinney 2005); *see infra* note 4.

³ N.Y. C.P.L.R. 3215(f).

a defaulting defendant,⁴ but requires the plaintiff to do so within one year of the default.⁵ Where “the plaintiff’s claim is for a sum certain or for a sum which can by computation be made certain,” the plaintiff’s application for a default judgment may be made to the clerk of the court.⁶ Only a narrow class of claims may be submitted to the clerk. In this regard, the statute contemplates “a situation in which . . . there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments.”⁷ Thus,

⁴ N.Y. C.P.L.R. 3215(a) (“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.”). Although the most commonly encountered situation in the case law is a plaintiff seeking a default judgment against a defendant, any party in an action may seek a default judgment against another party to the action who has defaulted. *See supra* note 2.

⁵ N.Y. C.P.L.R. 3215(c) (“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.”); *see* SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 294; Siegel, *Practice Commentaries, supra* note 1, C3215:11; *see also* Butindaro v. Grinberg, 57 A.D.3d 932, 871 N.Y.S.2d 317 (App. Div. 2d Dep’t 2008); Jones v. Corley, 35 A.D.3d 381, 825 N.Y.S.2d 534 (App. Div. 2d Dep’t 2006); Kay Waterproofing Corp. v. Ray Realty Fulton, Inc., 23 A.D.3d 624, 804 N.Y.S.2d 815 (App. Div. 2d Dep’t 2005).

⁶ N.Y. C.P.L.R. 3215(a).

⁷ Reynolds Sec., Inc. v. Underwriters Bank & Trust Co., 44 N.Y.2d 568, 572, 378 N.E.2d 106, 109, 406 N.Y.S.2d 743, 746 (1978); Gibbs v. Hoot Owl Sportsman’s Club Inc., 257 A.D.2d 942, 684 N.Y.S.2d 359 (App. Div. 3d Dep’t 1999); Jannon v. Van Buskirk, 227 A.D.2d 844, 642 N.Y.S.2d 402 (App. Div. 3d Dep’t 1996); Pine v. Town of Hoosick, 56 A.D.2d 692, 391 N.Y.S.2d 738 (App. Div. 3d Dep’t 1977); *see* SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 293, at 477 (“Anything that prevents mere arithmetic from reducing the claim to a sum certain requires that the application be made to the court.”); Siegel, *Practice Commentaries, supra* note 1, C3215:2 (“The ‘sum certain’ category would include actions on money judgments and on contract claims whose damages are clear-cut by the terms of the contract itself, such as an action to recover the agreed price of items which are shown to have been delivered. Of course, not all contract claims fall into the ‘sum certain’ category. If the claim is by the buyer for non-delivery of goods, for example, the damages must be established by extrinsic proof, a situation in which an application to the court would be required. Similarly, a claim in quantum meruit requires application to the court.”); *see also* Congregation Chaim Barucha v. Friedman, 62 A.D.3d 933, 879 N.Y.S.2d 565 (App. Div. 2d Dep’t 2009); Geer, Du Bois & Co. v. O. M. Scott & Sons Co., 25 A.D.2d 423, 266 N.Y.S.2d 580 (App. Div. 1st Dep’t 1966).

causes of action seeking unliquidated damages—such as torts⁸—or equitable relief⁹ do not fall within that reserved class. If the complaint (or summons with notice) asserts any claim other than one for a “sum certain,” the plaintiff’s application for a default judgment must be made to the court.¹⁰

The plaintiff must, regardless of the type of claim involved, submit the following on its application for a default judgment: (1) proof of service of the initiatory papers on the defendant; (2) “proof of the facts constituting the claim” and, if damages are sought, the amount due; and (3) proof of the default.¹¹ As to items one and three, the process server’s affidavit demonstrates proof of service of the summons and complaint or summons with notice,¹² and the

⁸ SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 293, at 477 (“This of course means that in that most numerous category [of claims], the personal injury action, and for that matter almost all tort actions, the application must go to the court rather than to the clerk.”).

⁹ Siegel, *Practice Commentaries*, *supra* note 1, C3215:2 (“When the action is not for money only, the clerk cannot enter a default judgment. This would apply to all of the equitable actions and to those law actions that seek relief other than money only, such as ejectment and replevin.”); *cf.* *Time Warner City Cable v. Tri State Auto, Inc.*, 5 A.D.3d 153, 153, 772 N.Y.S.2d 512, 513 (App. Div. 1st Dep’t 2004) (“By waiving its equitable claims and retaining only its contract cause of action, plaintiff met the sum-certain requirement for default judgment under CPLR 3215(a).”).

¹⁰ SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 293, at 477; *see* *White v. Weiler*, 255 A.D.2d 952, 680 N.Y.S.2d 784 (App. Div. 4th Dep’t 1998); *Geer, Du Bois & Co.*, 25 A.D.2d 423, 266 N.Y.S.2d 580. If the application is being made to the court, the plaintiff should make a motion returnable before the court. *See* N.Y. C.P.L.R. 3215(e) (“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.”).

¹¹ N.Y. C.P.L.R. 3215(f) (“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.”). In certain circumstances, a plaintiff is required to give a defaulting defendant advanced notice of an application for a default judgment. *See* N.Y. C.P.L.R. 3215(g). As to that notice requirement, *see* SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, §§ 295, 296.

¹² SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 295, at 479–480 (“Note with respect to the first requirement that if the affidavit of service does not reveal that either the complaint or notice went with the summons, the clerk will not accept it for filing and neither court nor clerk will entertain a default application. Proof of service usually takes the form of an affidavit by the process server. Its contents are dictated by CPLR 306, which today purports

proof of the default should be supplied by the plaintiff's attorney because the attorney, rather than the client, generally has firsthand knowledge of the default.¹³

As to item two, proof of the claim *must* be supplied by someone with personal knowledge of the facts underlying the claim.¹⁴ The individual providing the firsthand factual account of the claim should submit an affidavit (or, where appropriate, an affirmation)¹⁵

to require even a physical description of the person served." (citations omitted); see *Trini Realty Corp. v. Fulton Ctr. LLC*, 53 A.D.3d 479, 861 N.Y.S.2d 743 (App. Div. 2d Dep't 2008); *Azim v. Saidazimova*, 280 A.D.2d 566, 720 N.Y.S.2d 561 (App. Div. 2d Dep't 2001); see also N.Y. C.P.L.R. 306 (McKinney 2005) (governing proof of service of initiatory papers).

¹³ SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 295, at 479–480 ("The third requirement on the application is proof of the default. Here the affidavit of the plaintiff's lawyer is not just acceptable, but ideal. A literal reading of CPLR 3215(f) suggests that the affidavit of the plaintiff's attorney may be used to establish the defendant's default only when a verified complaint has been served. In fact, it is almost always the attorney's affidavit that proves the defendant's default, whether a verified complaint is used or not. It is upon the plaintiff's attorney that the defendant's notice of appearance, answer, or motion must be served. The failure of this service is therefore known at first hand by the plaintiff's lawyer rather than by the plaintiff proper—to whom, indeed, it would be mere hearsay." (citations omitted)); see *Gross v. Kail*, 70 A.D.3d 997, 893 N.Y.S.2d 891 (App. Div. 2d Dep't 2010); *599 Ralph Ave. Dev. v. 799 Sterling Inc.*, 34 A.D.3d 726, 825 N.Y.S.2d 129 (App. Div. 2d Dep't 2006).

¹⁴ N.Y. C.P.L.R. 3215(f) ("On any application for judgment by default, the applicant shall file . . . proof of the facts constituting the claim . . . and the amount due by affidavit made by the party Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due"); see also SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 295, at 481. Where, however, the State of New York is the plaintiff, an affidavit by an attorney from the attorney general's office can be used to provide proof of the facts of the state's claim. N.Y. C.P.L.R. 3215(f).

¹⁵ N.Y. C.P.L.R. 2106 (McKinney 1997) ("The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit."); see also SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 205, at 340 ("Certain professionals have been authorized by CPLR 2106 to make written statements by mere affirmation by including words to the effect that their averments are 'true under the penalties of perjury'. Such statements are the equivalent of affidavits without the need of a swearing ceremony or a notary's signature. The persons allowed merely to affirm in this way are New York attorneys, doctors, and dentists who are not parties to the action." (citation omitted)). Professor Alexander has explained the history and rationale behind permitting certain individuals to utilize an affirmation:

CPLR 2106 was an innovation that was intended to ease the burdens of attorneys who, as a prerequisite to the submission of their own sworn written statement in an action, were required under prior law to find a notary public to administer an oath. The drafters of the CPLR determined that the attorney's professional obligations and the possibility of prosecution for making a false statement provided sufficient safeguards to dispense with the need for an appearance by the attorney before a notary public. Thus, the attorney is authorized by CPLR 2106 to simply sign his or her own statement and to affirm its truth subject to the penalties of perjury. Such affirmation has the same effect as an affidavit sworn to before a notary public.

Similar considerations of convenience led to an amendment of the statute in 1973 to extend the same right of affirmation to physicians, osteopaths and dentists, whose affidavits are also frequently required in civil litigation.

that, along with any other evidence submitted in support of the application for the default judgment, demonstrates “enough facts to enable a court to determine that a viable cause of action exists.”¹⁶ Stated differently, the plaintiff must provide firsthand confirmation of facts establishing each element of the claim and make a prima facie showing that the defaulting defendant is liable.¹⁷ In gauging the sufficiency of the plaintiff’s proof on an application for a default judgment, the court must keep in mind that (1) where the defendant defaulted in appearing or answering the action, the plaintiff has not had the benefit of discovery, and (2) “defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.”¹⁸ Where the plaintiff commenced the action using a complaint that the plaintiff itself verified, that pleading can serve as an affidavit.¹⁹ Beware of a complaint verified by the plaintiff’s attorney. Unless the attorney has firsthand knowledge of the facts underlying the claim, which the attorney rarely will have, a complaint verified by the attorney is generally inadequate to establish proof of the claim.²⁰

Vincent C. Alexander, *Practice Commentaries*, in N.Y. C.P.L.R. 2106 (McKinney 1997) [hereinafter Alexander, *Practice Commentaries*]. Professor Alexander also highlights several important considerations that a party should review before deciding to have a witness utilize an affirmation. *Id.* (“The substitution of an affirmation for a sworn affidavit is allowed only when the attorney, physician, dentist or osteopath: (1) is licensed in New York; (2) is not a party in the action in which the affirmation is submitted; and (3) actually signs the statement. A printed or stamped signature will not suffice.”).

¹⁶ *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 790 N.E.2d 1156, 1162, 760 N.Y.S.2d 727, 733 (2003); see *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, 890 N.E.2d 179, 180, 860 N.Y.S.2d 417, 418 (2008).

¹⁷ See *State v. Williams*, 44 A.D.3d 1149, 1151–52, 843 N.Y.S.2d 722, 724–25 (App. Div. 3d Dep’t 2007); *Feffer v. Malpeso*, 210 A.D.2d 60, 61, 619 N.Y.S.2d 46, 47 (App. Div. 2d Dep’t 1994); see also *333 Cherry LLC v. N. Resorts, Inc.*, 66 A.D.3d 1176, 1179, 887 N.Y.S.2d 341, 344 (App. Div. 3d Dep’t 2009); *Silberstein v. Presbyterian Hosp.*, 95 A.D.2d 773, 774, 463 N.Y.S.2d 254, 256 (App. Div. 2d Dep’t 1983).

¹⁸ *Woodson*, 100 N.Y.2d at 71, 790 N.E.2d at 1162, 760 N.Y.S.2d at 733.

¹⁹ N.Y. C.P.L.R. 105(u) (McKinney 2003); N.Y. C.P.L.R. 3215(f); *Reynolds Sec., Inc. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 572 n.2, 378 N.E.2d 106, 109 n.2, 406 N.Y.S.2d 743, 746 n.2 (1978); cf. David D. Siegel, *Inadequate Affidavit of Merits Makes Default Judgment “Nullity,”* 197 SIEGEL’S PRAC. REV. 3, 4 (May 2008) (“There may be the temptation to assume that a statement of merits that would suffice in a complaint would ipso facto satisfy as an affidavit of merits on a default application. Since so little is required today to satisfy as a pleading, however, the assumption doesn’t hold. A number of the default cases indicate that more is needed in a merits affidavit than is needed for a pleading. All practitioners should keep that in mind.” (citation omitted)).

²⁰ See *New South Ins. Co. v. Dobbins*, 894 N.Y.S.2d 912 (App. Div. 2d Dep’t 2010); *Brown v. Rosedale Nurseries, Inc.*, 259 A.D.2d 256, 686 N.Y.S.2d 22 (App. Div. 1st Dep’t 1999); *Feffer v. Malpeso*, 210 A.D.2d 60, 619 N.Y.S.2d 46 (App. Div. 1st Dep’t 1994); *Mullins v. DiLorenzo*, 199 A.D.2d 218, 606 N.Y.S.2d 161 (App. Div. 1st Dep’t 1993); *Joosten v. Gale*, 129 A.D.2d 531, 514 N.Y.S.2d 729 (App. Div. 1st Dep’t 1987); see also SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 295, at 480 (“The second requirement, proof of the claim itself, is

Default judgments are sometimes rendered absent compliance with CPLR 3215(f), i.e., a plaintiff occasionally obtains a default judgment against a defendant despite the absence of sufficient proof of the facts of the plaintiff's claim. A determination as to whether a plaintiff has adduced sufficient proof of its claim involves the exercise of legal judgment and judicial discretion.²¹ Thus, where a default judgment is rendered on a claim for a "sum certain" by the clerk, who has no authority to perform judicial functions,²² the sufficiency of the facts of the claim will not have been determined prior to entry of the judgment.²³ Where the claim does not involve a

usually made by the plaintiff's own affidavit, buttressed, if need be, by additional affidavits of others having knowledge. The affidavit of the plaintiff's lawyer, unless the lawyer happens to have complete first-hand knowledge of the claim, should not be used to fulfill this requirement A verified complaint . . . if it accompanied the summons, may serve as an affidavit of the claim, but not if the verification was made by the attorney." (citations omitted); cf. *Martin v. Zangrillo*, 186 A.D.2d 724, 589 N.Y.S.2d 180 (App. Div. 2d Dep't 1992) ("[W]here . . . the plaintiffs' attorney has personal knowledge of the facts constituting the claim, the complaint [verified by the attorney] is sufficient to satisfy the affidavit requirement of CPLR 3215 (e) (now subd [f])." *But see* *Goldman v. City of N.Y.*, 287 A.D.2d 482, 731 N.Y.S.2d 212 (App. Div. 2d Dep't 2001).

²¹ *Dyno v. Rose*, 260 A.D.2d 694, 698, 687 N.Y.S.2d 497, 501 (App. Div. 3d Dep't 1999).

²² See N.Y. C.P.L.R. 2102(c) (McKinney 1997 & Supp. 2010); Alexander, *Practice Commentaries*, *supra* note 15 (Supp. 2010) ("Subdivision (c) of CPLR 2102 strips clerks of the authority to reject papers for filing except where they have been 'specifically directed to do so' by legislation, rules or court orders. The purpose is to shift the question of a paper's sufficiency from the clerk to the court, to be resolved through motion practice."); see also N.Y. COMP. CODES R. & REGS. tit. 22, § 202.5(d)(1) (2008) ("In accordance with CPLR 2102(c), a County Clerk and a chief clerk of the Supreme Court or County Court, as appropriate, shall refuse to accept for filing papers filed in actions and proceedings only under the following circumstances or as otherwise provided by statute, Chief Administrator's rule or order of the court: (i) The paper does not have an index number; (ii) The summons, complaint, petition, or judgment sought to be filed with the County Clerk contains an 'et al.' or otherwise does not contain a full caption; (iii) The paper sought to be filed with the County Clerk is filed in the wrong court; or (iv) The paper is not signed in accordance with section 130-1.1-a of the Rules of the Chief Administrator."); see generally, *Gehring v. Goodman*, 25 Misc. 3d 802, 884 N.Y.S.2d 646 (Sup. Ct. 2009); cf. *Reynolds*, 44 N.Y.2d at 572, 378 N.E.2d at 109, 406 N.Y.S.2d at 746 (noting that when the clerk enters a default judgment involving a cause of action for a "sum certain" the clerk is "function[ing] in a purely ministerial capacity"). *But see* David D. Siegel, *Three Cheers for the Meddlesome Clerk: Intrusive Acts Can Save the Plaintiff's Case at Commencement Time (Part 1)*, 89 SIEGEL'S PRAC. REV. 1 (Nov. 1999), and David D. Siegel, *Three Cheers for the Meddlesome Clerk: Intrusive Acts Can Save the Plaintiff's Case at Commencement Time (Part 2)*, 90 SIEGEL'S PRAC. REV. 1 (Dec. 1999) (noting that the inquisitive court clerk can assist the practitioner in identifying mistakes in papers being submitted to court).

²³ *Dyno*, 280 A.D.2d at 698, 687 N.Y.S.2d at 501 ("The legal conclusions to be drawn from the applicant's complaint and factual allegations are reserved for the court's determination, and the court retains the discretionary obligation to determine whether the applicant has met the burden of stating a prima facie cause of action." (citations omitted)); *Green v. Dolphy Const. Co.*, 187 A.D.2d 635, 636, 590 N.Y.S.2d 238, 239 (App. Div. 2d Dep't 1992) ("Although all allegations contained in the complaint have been admitted because of the defendants' default, the legal conclusions to be drawn from such proof are reserved for the court's determination." (citations omitted)).

“sum certain” and the application is addressed to the court, the court can (and should) review the sufficiency of the plaintiff’s evidence regarding the proof of the claim before granting an application for a default judgment.²⁴ To be sure, when the application for a default judgment is addressed to the court, the entry of the judgment is not a ministerial act,²⁵ and the court must avoid the temptation to merely rubber stamp a proposed default judgment.²⁶ Sometimes, however, a court will misgauge the sufficiency of the proof (or not gauge it at all) and render a default judgment on a claim that the plaintiff failed to show was viable.²⁷ Thus, regardless of whether the clerk or the court granted the application for the default judgment, the question of whether the plaintiff demonstrated sufficient proof of its claim may not be settled by entry of the default judgment.

II. CONSEQUENCES OF ABSENCE OF PROOF OF THE CLAIM

Where a default judgment is entered despite the plaintiff’s failure to submit sufficient evidence demonstrating the proof of its claim, a critical question arises: Does the plaintiff’s failure to submit that evidence render the judgment void (and thus a nullity) or merely voidable? If the judgment is void, the defendant can seek to have it vacated at any time without having to make the standard two-part showing for vacating a default judgment on the ground of excusable

²⁴ See *Joosten v. Gale*, 129 A.D.2d 531, 535, 514 N.Y.S.2d 729, 732–33 (App. Div. 1st Dep’t 1987) (“We note that defendant, in opposing the motion for a default judgment, did not bring the defective verification to Special Term’s attention. This circumstance does not preclude a review of that defect and a reversal of Special Term’s order. If plaintiff had made his motion for a default judgment without notice to defendant, as he contends he could have done, or if defendant had chosen to ignore the notice that plaintiff did give her of the motion, it still would have been incumbent upon Special Term to review the motion papers for compliance with CPLR 3215. That defendant chose to oppose the motion on the ground of lack of jurisdiction should not be deemed a waiver of proof of the facts constituting the claim. Defendant should not be put in a worse position for having chosen to oppose the motion than she would have been in had she not opposed it.”).

²⁵ *Resnick v. Lebovitz*, 28 A.D.3d 533, 534, 813 N.Y.S.2d 480, 481–82 (App. Div. 2d Dep’t 2006); *Gagen v. Kipany Prods. Ltd.*, 289 A.D.2d 844, 846, 735 N.Y.S.2d 225, 228 (App. Div. 3d Dep’t 2001); *Dyno*, 260 A.D.2d at 698, 687 N.Y.S.2d at 501.

²⁶ *Joosten*, 129 A.D.2d at 535, 514 N.Y.S.2d at 732 (“CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown.”); *Lloyd’s of London v. Bellettieri, Fonte & Laudonio, P.C.*, No. 07/10015, 2008 WL 2150121, at *6 (Sup. Ct. Apr. 28, 2008) (“Default judgments are not to be rubber-stamped once jurisdiction and failure to appear are shown.”).

²⁷ See, e.g., *Joosten*, 129 A.D.2d 531, 514 N.Y.S.2d 729.

neglect under CPLR 5015(a)(1)²⁸—a reasonable excuse for the default and a potentially meritorious defense.²⁹ If the judgment is not void, however, the defendant must move under CPLR 5015(a)(1) to vacate the judgment, and will be put to the task of making an evidentiary showing to have the judgment vacated. Note, too, that a defendant seeking relief under CPLR 5015(a)(1) is generally constrained to do so within one year after service upon that party of a copy of the judgment with written notice of entry.³⁰

The Court of Appeals has yet to address directly whether a default judgment entered despite the plaintiff's failure to comply with CPLR 3215(f) is a nullity.³¹ Thus, a defendant against whom a default judgment has been entered must consult the law of the department of the appellate division in which the default judgment was entered when preparing its motion to vacate the judgment.

In the Second Department, the judgment is not void and a defendant seeking to vacate the judgment is required to move within one year of service upon it of a copy of the judgment with notice of entry, and, on that motion, make the dual showing of a reasonable excuse for the default and a potentially meritorious defense.³² That rule (and the rationale for it) was articulated in the

²⁸ N.Y. C.P.L.R. 5015(a)(1) (McKinney 2007) (“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 . . . 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 . . .”).

²⁹ *E.g.*, *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141, 492 N.E.2d 116, 118, 501 N.Y.S.2d 8, 10 (N.Y. 1986); *Fid. & Deposit Co. of Md. v. Arthur Andersen & Co.*, 60 N.Y.2d 693, 695, 455 N.E.2d 1259, 1260, 468 N.Y.S.2d 464, 465 (1983); *see* *Rugieri v. Bannister*, 7 N.Y.3d 742, 744, 853 N.E.2d 231, 232, 819 N.Y.S.2d 861, 862 (2006); *see generally* John R. Higgitt, *Laxness Dismissal Survival Guide: Restoring Actions*, N.Y. L.J., Nov. 1, 2006, at 4.

³⁰ N.Y. C.P.L.R. 5015(a)(1). The one-year period, however, is not a statute of limitations and a court has discretion to consider a motion to vacate a default judgment in the interest of justice after that period has expired. *See* Siegel, *Practice Commentaries, supra* note 1, C5015:6.

³¹ *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 790 N.E.2d 1156, 1162, 760 N.Y.S.2d 727, 733 (2003) (“We leave for another day the issue of whether noncompliance with CPLR 3215(f) renders a default judgment a ‘nullity.’” (citation omitted)); *see* *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 829, 890 N.E.2d 179, 180, 860 N.Y.S.2d 417, 418 (2008) (“In our Court, Safway contends that CPLR 3215(f) renders the judgment a nullity. Safway—who was represented throughout by counsel, and offered no valid reason for ignoring the discovery demands and court orders—failed to raise this argument in its prior motions.”).

³² *See* *Neuman v. Zurich N. America*, 36 A.D.3d 601, 828 N.Y.S.2d 169 (App. Div. 2d Dep’t 2007); *Araujo v. Aviles*, 33 A.D.3d 830, 824 N.Y.S.2d 317 (App. Div. 2d Dep’t 2006); *Coulter v. Town of Highlands*, 26 A.D.3d 456, 809 N.Y.S.2d 466 (App. Div. 2d Dep’t 2006); *Roberts v. Jacob*, 278 A.D.2d 297, 718 N.Y.S.2d 201 (App. Div. 2d Dep’t 2000); *Bass v. Wexler*, 277 A.D.2d 266, 267, 715 N.Y.S.2d 873, 873 (App. Div. 2d Dep’t 2000) (“To the extent that our

lead case from that court on the subject—*Freccia v. Carullo*.³³

In *Freccia*, a default judgment was entered against a defendant who failed to answer the complaint. The plaintiff's application for the default judgment, which was presented to the clerk because the claim was for a "sum certain," did not contain an affidavit of the facts underlying the plaintiff's claim prepared by a person with firsthand knowledge. Rather, to establish the facts constituting her claim, the plaintiff relied upon the affirmation of her attorney, who did not have personal knowledge of the facts of the claim. Approximately three years after the default judgment was entered, the defendant moved to vacate the judgment, arguing, among other things, that it was "jurisdictionally defective because plaintiff's attorney submitted an affidavit of claim, instead of plaintiff."³⁴ The defendant asserted that the default judgment was jurisdictionally infirm and therefore void, and its motion to vacate, which was made long after its time to seek relief under CPLR 5015(a)(1) had passed,³⁵ was not time-barred because she was entitled to relief under CPLR 5015(a)(4),³⁶ a provision with no stated time limit.³⁷

The Second Department rejected the defendant's arguments and affirmed the order of the trial court denying the defendant's motion to vacate the default judgment, concluding that: (1) only errors that deprive a court of subject matter jurisdiction over an action render a judgment null and void; (2) a court only lacks subject matter jurisdiction over a matter when the court lacks the competence to entertain an action; and (3) a plaintiff's failure to submit proof of

decisions in *Hazim v. Winter*, 234 A.D.2d 422, 651 N.Y.S.2d 149 and *Goodyear v. Weinstein*, 224 A.D.2d 387, 638 N.Y.S.2d 108 described each of the default judgments therein as a 'nullity' and subject to vacatur as such, they should not be followed." (citation omitted); see also David D. Siegel, *Papers on Default Application: Conflict on Whether Omission of Affidavit of Merits Renders Default Judgment Void*, 180 SIEGEL'S PRAC. REV. 2 (Dec. 2006) [hereinafter Siegel, *Papers*] ("From the Second Department, a warning to the defendant: if you notice an affidavit of merits missing from the plaintiff's default papers, don't assume you can automatically get the judgment vacated whenever you please. You will still have the usual burden of excusing the default, and now it must be you who includes an affidavit of merits, this one attesting that you have a good defense. If you fail to make those showings, the motion to vacate will likely be denied.").

³³ 93 A.D.2d 281, 284–90, 462 N.Y.S.2d 38, 40–44 (App. Div. 2d Dep't 1983).

³⁴ *Id.* at 282, 462 N.Y.S.2d at 39.

³⁵ See *supra* note 30.

³⁶ N.Y. C.P.L.R. 5015(a)(4) ("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 . . . lack of jurisdiction to render the judgment or order").

³⁷ *Caba v. Rai*, 63 A.D.3d 578, 580, 882 N.Y.S.2d 56, 58 (App. Div. 1st Dep't 2009); Siegel, *Practice Commentaries*, *supra* note 1, C5015:3; see *N.Y. Higher Educ. Servs. Corp. v. Sparozic*, 35 A.D.3d 1069, 1070, 826 N.Y.S.2d 493, 494 (App. Div. 3d Dep't 2006).

the facts of her claim goes only to the substance of her claim—a “procedural element” of her right to enter a default judgment—and not to the competence of the court to adjudicate the claim.³⁸

Consequently, in the Second Department, a defendant cannot obtain vacatur of a default judgment under CPLR 5015(a)(4),³⁹ which requires a court to vacate a judgment at any time where the court lacked subject matter jurisdiction over the action or personal jurisdiction over the defaulting defendant, simply because the plaintiff failed to submit proof of the facts of its claim. Rather, the defendant, in accordance with CPLR 5015(a)(1), must move to vacate the judgment within one year of service upon it of a copy of the judgment with notice of entry and make the required dual showing of a reasonable excuse for the default and a meritorious defense.

The court’s rationale in *Freccia* was founded, in principal measure, on the Court of Appeals’s decision in *Lacks v. Lacks*.⁴⁰ In *Lacks*, the plaintiff husband commenced a matrimonial action seeking a separation. After a judgment dismissing the husband’s complaint was reversed by the appellate division and remanded for a new trial, the husband, relying on then-recent changes to the state’s divorce law, amended his complaint to seek a divorce. The husband was granted a judgment of divorce, which the appellate division affirmed; the wife’s motions to the appellate division and Court of Appeals requesting leave to appeal to the Court of Appeals were denied.

Approximately two years after her motion for leave to appeal was denied by the Court of Appeals, the wife moved to vacate the judgment of divorce on the ground that the trial court lacked subject matter jurisdiction over the divorce action because the husband had failed to plead and prove that he was a resident of the state during the year immediately preceding the commencement of the matrimonial action, a statutory precondition to obtaining a divorce.⁴¹ Thus, the wife argued that the judgment of divorce was a

³⁸ *Freccia*, 93 A.D.2d at 288–89, 462 N.Y.S.2d at 42–43.

³⁹ *Supra* note 36; *see generally Caba*, 63 A.D.3d at 580, 882 N.Y.S.2d at 58 (App. Div. 1st Dep’t 2008) (“If the defaulting defendant asserts that the court lacked personal jurisdiction over him or her, the defendant should seek dismissal of the action under CPLR 5015(a)(4).”).

⁴⁰ 41 N.Y.2d 71, 359 N.E.2d 384, 290 N.Y.S.2d 875 (1976).

⁴¹ *See* N.Y. DOM. REL. LAW § 230 (McKinney 1999). That statute provides that:

An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce or separation may be maintained only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year

nullity that the court was obligated to vacate under CPLR 5015(a)(4). The supreme court accepted this argument and vacated the judgment, but the appellate division rejected it and reinstated the divorce judgment.

On the wife's appeal to the Court of Appeals, the Court thoroughly reviewed the issue of which defects affect a court's subject matter jurisdiction over an action (defects that the court noted can be raised at any time and may not be waived)⁴² and the instances in which a judgment may be vacated under CPLR 5015(a)(4) on the basis that the court lacked such jurisdiction. While acknowledging the elasticity of the word "jurisdiction" and the number of contexts in which it was previously invoked in the case law,⁴³ the Court concluded that only the absence of competence, i.e., legal authority, to entertain an action deprives the court of subject matter jurisdiction to render a valid judgment.⁴⁴ The Court stressed that the "[a]bsence of competence to entertain an action deprives the court of subject matter jurisdiction; absence

immediately preceding, or

2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or

4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or

5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.

⁴² *Lacks*, 41 N.Y.2d at 76, 359 N.E.2d at 387, 390 N.Y.S.2d at 878.

⁴³ *Id.* at 74, 359 N.E.2d at 386, 390 N.Y.S.2d at 877 ("The confusion, if there be confusion, starts with a line of decisions dating back to the last century and continuing into the present in which this court has said with less than perfect meticulousness that 'jurisdiction' of New York courts in matrimonial cases is limited to the powers conferred by statute. Jurisdiction is a word of elastic, diverse, and disparate meanings. A statement that a court lacks 'jurisdiction' to decide a case may, in reality, mean that elements of a cause of action are absent. Similarly, questions of mootness and standing of parties may be characterized as raising questions of subject matter jurisdiction. But these are not the kinds of judicial infirmities to which CPLR 5015 (subd. (a), par. 4) is addressed." (citations omitted)).

⁴⁴ *Id.* at 76, 359 N.E.2d at 387, 390 N.Y.S.2d at 877-78; see *Ballard v. HSBC Bank USA*, 6 N.Y.3d 658, 663, 848 N.E.2d 1292, 1295, 815 N.Y.S.2d 915, 918 (2006) ("The question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it." (quoting *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 718, 680 N.E.2d 578, 580, 658 N.Y.S.2d 205, 207 (1997))); *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 166, 225 N.E.2d 503, 506, 278 N.Y.S.2d 793, 798 (1967) ("Subject matter jurisdiction has been defined as the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question." (citations and internal quotation marks omitted)).

of power to reach the merits does not.”⁴⁵ Therefore, errors of law or fact committed during the course of an action do not deprive a court of subject matter jurisdiction;⁴⁶ “[t]hat a court has no ‘right’ to adjudicate erroneously is no circumscription of its power to decide, rightly or wrongly.”⁴⁷ The Court determined that CPLR 5015(a)(4), which “is designed only to preserve objections so fundamental to the power of adjudication of a court that they survive even a final judgment or order,”⁴⁸ does not provide a party with a means to challenge collaterally a judgment or order on the basis that a substantive element of the prevailing party’s cause of action was not satisfied.⁴⁹

Under this framework, the Court affirmed the order of the appellate division reinstating the divorce judgment rendered in the husband’s favor. The Court noted that, to obtain a judgment of divorce, “the existence of at least one of the connections with the State set forth in section 230 of the [Domestic Relations Law] is . . . essential,”⁵⁰ but found that the requirements of that statute:

go only to the substance of the divorce cause of action, not to the competence of the court to adjudicate the cause. Hence, a divorce judgment granted in the absence of one of the specified connections with the State, even if erroneously determined as a matter of law or fact, is not subject to vacatur under CPLR 5015 (subd [a], par 4).⁵¹

Stated differently, the subject matter jurisdiction of the trial court to render a valid divorce judgment did not depend upon a correct determination that the husband satisfied the statutory durational residence requirements.⁵² The supreme court had jurisdiction over matrimonial actions, and was therefore competent to decide all substantive issues in the action.⁵³

The Second Department’s view that a plaintiff’s failure to comply with CPLR 3215(f) does not render the default judgment a nullity is not followed by the court’s sister departments. The First and Third Departments have concluded that a default judgment entered

⁴⁵ *Lacks*, 41 N.Y.2d at 75, 359 N.E.2d at 387, 390 N.Y.S.2d at 877–78 (internal quotation marks omitted).

⁴⁶ *Id.* at 77, 359 N.E.2d at 388, 390 N.Y.S.2d at 879.

⁴⁷ *Id.* at 76, 359 N.E.2d at 387, 390 N.Y.S.2d at 878.

⁴⁸ *Id.* at 74–75, 359 N.E.2d at 386, 390 N.Y.S.2d at 877.

⁴⁹ *Id.* at 77, 359 N.E.2d at 388, 390 N.Y.S.2d at 879.

⁵⁰ *Id.* at 73, 359 N.E.2d at 385, 390 N.Y.S.2d at 876.

⁵¹ *Id.*

⁵² *Id.* at 74, 359 N.E.2d at 386, 390 N.Y.S.2d at 877.

⁵³ *Id.* at 77, 359 N.E.2d at 388, 390 N.Y.S.2d at 879.

despite the plaintiff's failure to adduce sufficient "proof of the facts constituting the claim" is a nullity, and concomitantly that the defendant can move at any time to vacate the judgment without the burden of making any evidentiary showing.⁵⁴ None of the decisions of the First or Third Departments expressly state that a plaintiff's failure to submit proof of the facts of its claim deprives the court of jurisdiction over the action (or the defendant), but these decisions seem to be based on the premise that it does.⁵⁵ After all, only mistakes and errors that go to a court's subject matter jurisdiction over an action or a court's personal jurisdiction over a defendant can render a default judgment void and therefore a nullity.⁵⁶

⁵⁴ *Natradeze v. Rubin*, 33 A.D.3d 535, 822 N.Y.S.2d 541 (App. Div. 1st Dep't 2006); *Beltre v. Babu*, 32 A.D.3d 722, 821 N.Y.S.2d 69 (App. Div. 1st Dep't 2006); *Francisco v. Soto*, 286 A.D.2d 573, 729 N.Y.S.2d 889 (App. Div. 1st Dep't 2001); *Zelnik v. Bidermann Indus. U.S.A.*, 242 A.D.2d 227, 662 N.Y.S.2d 19 (App. Div. 1st Dep't 1997); *Wolf v. 3540 Rochambeau Assoc.*, 234 A.D.2d 6, 650 N.Y.S.2d 161 (App. Div. 1st Dep't 1996); *Feffer v. Malpeso*, 210 A.D.2d 60, 619 N.Y.S.2d 46 (App. Div. 1st Dep't 1994); *Mullins v. DiLorenzo*, 199 A.D.2d 218, 606 N.Y.S.2d 161 (App. Div. 1st Dep't 1993); *State v. Williams*, 44 A.D.3d 1149, 843 N.Y.S.2d 722 (App. Div. 3d Dep't 2007); *Hann v. Morrison*, 247 A.D.2d 706, 668 N.Y.S.2d 764 (App. Div. 3d Dep't 1998); *Torian v. Allstate Insur. Co.*, 92 A.D.2d 1042, 461 N.Y.S.2d 553 (App. Div. 3d Dep't 1983); see *Siegel, Papers, supra* note 32, at 2 ("From the First and Third departments, a warning to the plaintiff: don't omit an affidavit of merits on the assumption that it might get past the clerk, or that the defendant will in any event waive the objection by not moving to vacate the judgment promptly. Those departments consider the judgment a 'nullity,' which stamps the defect as jurisdictional. And if it's jurisdictional, then there is no time limit on a motion to vacate the judgment."); see also *Gagen v. Kipany Prods. Ltd.*, 289 A.D.2d 844, 845, 735 N.Y.S.2d 225, 228 (App. Div. 3d Dep't 2001) ("[I]t is well settled that a party seeking to vacate a default judgment on the ground of excusable default pursuant to CPLR 5015(a)(1) must establish a reasonable excuse for the default, a meritorious defense to the underlying action and the absence of willfulness. Our review of the record reveals no reasonable excuse was proffered for defendant's default in appearing at the two pretrial conferences, and we find Supreme Court did not abuse its discretion in denying defendant's motion to vacate the default judgment. However, in the exercise of our inherent power to grant appropriate affirmative relief to an appealing party in the interest of justice, we find the record does reveal that plaintiff failed to demonstrate to Supreme Court that he had a prima facie cause of action, and the default judgment was improvidently granted in the first instance." (citations and internal quotation marks omitted)). The Fourth Department appears to share the view of the First and Third Departments on this issue. See *Westcott v. Niagara-Orient Agency, Inc.*, 122 A.D.2d 557, 505 N.Y.S.2d 19 (App. Div. 4th Dep't 1986); see also *Natemeier v. Heim*, 81 A.D.2d 1008, 440 N.Y.S.2d 101 (App. Div. 4th Dep't 1981).

⁵⁵ See *Siegel, Practice Commentaries, supra* note 1, C3215:16; *Siegel, Papers, supra* note 32, at 2; *supra* note 54.

⁵⁶ See *Lacks*, 41 N.Y.2d at 71, 359 N.E.2d at 387, 390 N.Y.S.2d at 878; *Royal Zenith Corp. v. Cont'l Ins. Co.*, 63 N.Y.2d 975, 977, 473 N.E.2d 243, 244, 483 N.Y.S.2d 993, 994 (1984) ("A court is without power to render a judgment against a party as to whom there is no jurisdiction, and a judgment rendered without jurisdiction is subject to collateral attack. Because the attachment had no validity as a basis for personal jurisdiction over [the party], it follows that the default judgment against [that party] is a nullity . . ." (citations omitted)); *Pearson v. 1296 Pac. St. Assocs., Inc.*, 67 A.D.3d 659, 660, 886 N.Y.S.2d 898, 898 (App. Div. 2d Dep't 2009) ("In the absence of proper service of process, the resulting default judgment entered against 1296 Pacific was a nullity, and the complaint was properly dismissed insofar as asserted against that defendant . . ." (citations omitted)); *Gov't Employees Ins. Co. v.*

Nevertheless, one principal rationale for the position of the First and Third Departments appears to be that proof of the facts of the plaintiff's claim is a necessary precondition to entry of a default judgment because such proof serves to make a default judgment "less susceptible" to collateral attack under CPLR 5015(a)(4) or CPLR 317.⁵⁷ Another rationale of the rule of the First and Third Departments is that cases should generally be decided on their

Basedow, 28 A.D.3d 766, 767, 816 N.Y.S.2d 106, 108 (App. Div. 2d Dep't 2006) ("Any default judgment or order against a party over which the court lacks jurisdiction is a nullity." (citations omitted)); *Wilber Nat'l Bank v. F & A Inc.*, 301 A.D.2d 706, 707, 753 N.Y.S.2d 209, 211 (App. Div. 3d Dep't 2003) ("Absent proper service of process, a default judgment is a nullity." (citations omitted)); *DeMartino v. Rivera*, 148 A.D.2d 568, 569, 539 N.Y.S.2d 38, 38 (App. Div. 2d Dep't 1989) ("It is well settled that where service of process has been improperly effected, any resulting default judgment is a nullity. This is so even where the defendant had actual notice of the lawsuit, and no meritorious defense, for in such a case, the court never had personal jurisdiction over the defendant." (citations omitted)); *2837 Bailey Corp. v. Gould*, 143 A.D.2d 523, 524, 533 N.Y.S.2d 34, 35 (App. Div. 4th Dep't 1988) ("Absent proper service to achieve jurisdiction, the default judgment is a nullity and must be vacated." (citations omitted)); *Cnty. State Bank v. Haakonson*, 94 A.D.2d 838, 839, 463 N.Y.S.2d 105, 106 (App. Div. 3d Dep't 1983) ("Personal jurisdiction not having been acquired, the subsequently granted default judgment was a nullity and Special Term's attempt to exercise discretion pursuant to CPLR 5015 was ineffectual, for it was without authority to take any action other than to dismiss the complaint." (citations omitted)); *McMullen v. Arnone*, 79 A.D.2d 496, 499, 437 N.Y.S.2d 373, 375 (App. Div. 2d Dep't 1981) ("It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void. Such a defect is not cured by the defendant's subsequent receipt of actual notice of the suit, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court. It follows that a judgment entered in the course of the proceedings, even though entered on default, is a nullity and binds no one. The person purportedly served may ignore the judgment, resist it or assert its invalidity at any and all times." (citations and internal quotation marks omitted)); *see also* *Gershel v. Porr*, 89 N.Y.2d 327, 330, 675 N.E.2d 836, 838, 653 N.Y.S.2d 82, 84 (1996) ("Under the new [commencement-by-filing] system, service of process without first paying the filing fee and filing the initiatory papers is a nullity, the action or proceeding never having been properly commenced."); *see generally supra* notes 36 and 39.

⁵⁷ *Dyno v. Rose*, 260 A.D.2d 694, 698, 687 N.Y.S.2d 497, 501 (App. Div. 3d Dep't 1999); *Zelnik*, 242 A.D.2d at 228, 662 N.Y.S.2d at 20; *see* 7 HON. JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, *NEW YORK CIVIL PRACTICE: CPLR* ¶3215.29 (David L. Ferstengdig ed., 2d ed. 2009) ("The minimal requirement of an affidavit or verified complaint in all cases assists the court in ascertaining whether there is a proper jurisdictional basis for the action as well as whether the cause of action is in fact valid, thereby rendering default judgments less susceptible to attack under CPLR 5015(a)(4) (lack of jurisdiction) and CPLR 317 (which requires a meritorious defense)."). *See* N.Y. C.P.L.R. 317 (McKinney 2005) ("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."); *see also* Alexander, *Practice Commentaries, supra* note 15, C317:1; SIEGEL, *NEW YORK PRACTICE, supra* note 1, § 108.

merits,⁵⁸ a policy that could be undercut if a plaintiff were permitted to obtain a default judgment without showing that its claim had merit.

The precedents underpinning the case law of the First and Third Departments warrant examination. The case law of both departments⁵⁹ can be traced to the Third Department's decision in *Georgia Pacific Corp. v. Bailey*.⁶⁰ In *Georgia Pacific*, the plaintiffs brought actions against the defendants for breach of contract.⁶¹ After the defendants failed to answer, the plaintiffs obtained default judgments against the defendants.⁶² The trial court denied the defendants' motions to vacate the default judgments, and the defendants appealed.⁶³ The Third Department reversed the orders and vacated the judgments because "the affidavits of the facts constituting the claims were made by plaintiffs' attorney and not by [plaintiffs], as required by the statute [i.e., CPLR 3215(f)]. Under these circumstances, each of the judgments is a nullity and must be vacated."⁶⁴

The only case cited by the court in *Georgia Pacific* was *Union National Bank v. Davis*,⁶⁵ in which the Third Department affirmed an order vacating a default judgment entered against the defendant because the affidavit in support of the plaintiff's application for the default judgment was proffered by the plaintiff's attorney.⁶⁶ The court observed that "where a default judgment is entered without compliance with the [statutory] requirements . . . that judgment is a nullity."⁶⁷

The *Union National Bank* court cited one case in support of the "nullity" proposition—the Fourth Department's decision in *Red*

⁵⁸ See generally *Santora & McKay v. Mazzella*, 211 A.D.2d 460, 620 N.Y.S.2d 395 (App. Div. 1st Dep't 1995); *Elemery Corp. v. 773 Assoc.*, 168 A.D.2d 246, 562 N.Y.S.2d 483 (App. Div. 1st Dep't 1990); *Lang v. French & Co., Inc.*, 48 A.D.2d 641, 368 N.Y.S.2d 25 (App. Div. 1st Dep't 1975); *Mitchell v. Mid-Hudson Med. Assoc. P.C.*, 213 A.D.2d 932, 624 N.Y.S.2d 70 (App. Div. 3d Dep't 1995).

⁵⁹ The First Department "nullity" case law traces back to *Mullins v. DiLorenzo*, 199 A.D.2d 218, 220, 606 N.Y.S.2d 161, 162 (App. Div. 1st Dep't 1993), which cited *Georgia Pacific Corp. v. Bailey*, 77 A.D.2d 682, 429 N.Y.S.2d 787 (App. Div. 3d Dep't 1980) and *Income Property Consultants, Inc. v. Lumat Realty Corp.*, 88 A.D.2d 582, 449 N.Y.S.2d 799 (App. Div. 2d Dep't 1982) (citing *Ga. Pac. Corp.*, 77 A.D.2d 682, 429 N.Y.S.2d 787; *Union Nat'l Bank v. Davis*, 67 A.D.2d 1034, 413 N.Y.S.2d 489 (App. Div. 3d Dep't 1979)).

⁶⁰ 77 A.D.2d 682, 429 N.Y.S.2d 787.

⁶¹ *Id.* at 682, 429 N.Y.S.2d at 788.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 67 A.D.2d 1034, 413 N.Y.S.2d 489 (App. Div. 3d Dep't 1979).

⁶⁶ *Id.* at 1034, 413 N.Y.S.2d at 490.

⁶⁷ *Id.*

*Creek National Bank v. Blue Star Ranch, Ltd.*⁶⁸ In *Red Creek*, the plaintiff obtained a default judgment before the defendant's time to answer had expired.⁶⁹ The court, therefore, affirmed the supreme court's order vacating the default judgment, and permitted the defendant to interpose an answer. The court, citing the Second Department's 1931 decision in *Contractors' Trading Co. v. Henney Contracting Corp.*,⁷⁰ commented that "where a default judgment is entered without compliance with the necessary requirements therefor, that judgment is a 'nullity' and must be vacated."⁷¹

The court in *Contractors' Trading* reversed an order denying the defendant's motion to vacate a default judgment rendered against it, finding that the complaint did not contain allegations demonstrating that the county court, which rendered the default judgment, had jurisdiction to hear the action.⁷² The court cited a number of decisions holding that the county court is a court of limited jurisdiction in civil cases and that a complaint in an action in that court must allege sufficient facts to establish that the court has subject matter jurisdiction over the action.⁷³

As the foregoing review of the lineage of the First and Third Departments' nullity precedents reveals, the historical root of the case law of those departments is *Contractors' Trading*. But this ancestor did not address the issue of whether a plaintiff's failure to submit proof of its claim on its application for a default judgment renders the judgment a nullity. Rather, *Contractors' Trading* dealt with a situation where the factual allegations in the complaint failed to demonstrate that the court of limited jurisdiction that rendered the default judgment had subject matter jurisdiction over the plaintiff's claim.⁷⁴ That decision, therefore, stands for the proposition that the submissions on a plaintiff's application for a default judgment must demonstrate that the court has subject

⁶⁸ 58 A.D.2d 983, 396 N.Y.S.2d 936 (App. Div. 4th Dep't 1977).

⁶⁹ *Id.* at 983, 396 N.Y.S.2d at 937.

⁷⁰ 232 A.D. 829, 248 N.Y.S. 643 (App. Div. 2d Dep't 1931).

⁷¹ *Red Creek Nat'l Bank*, 58 A.D.2d at 984, 396 N.Y.S.2d at 937.

⁷² *Contractors' Trading Co.*, 232 A.D. at 829, 248 N.Y.S. at 644.

⁷³ *Id.* ("The judgment from which the defendant appealed was entered against it in the County Court of Nassau county by default. The judgment roll consists of the summons and complaint and proof of default. The complaint contains no allegation of the necessary jurisdictional facts. The judgment therefore must be vacated and set aside." (citing *Meyers v. Am. Locomotive Co.*, 201 N.Y. 163, 94 N.E. 605 (1911); *Wachtel v. Diamond State Eng'g Corp.*, 215 A.D. 15, 213 N.Y.S. 77 (App. Div. 2d Dep't 1925); *Henneke v. Schmidt*, 121 A.D. 516, 106 N.Y.S. 138 (App. Div. 2d Dep't 1907))).

⁷⁴ 232 A.D. at 329, 248 N.Y.S. at 643-44.

matter jurisdiction over the action.⁷⁵ Yet each of the First and Third Department cases discussed above succeeding *Contractors' Trading* dealt with the sufficiency of the evidence supporting a plaintiff's claim,⁷⁶ or the timing of the procurement of a default judgment,⁷⁷ not whether the respective court in which the default judgment was entered had the competence to entertain and decide the respective action.⁷⁸ Accordingly, while *Contractors' Trading* is consonant with the *Lacks* Court's conclusion that only errors relating to the competence of a court to entertain an action deprive the court of subject matter jurisdiction to render a valid judgment,⁷⁹ the "nullity" case law succeeding *Contractors' Trading* may be in tension with the *Lacks* Court's observation that matters that go only to the substance of a cause of action do not affect a court's subject matter jurisdiction.⁸⁰

III. WILSON V. GALICIA CONTRACTING & RESTORATION

As indicated above,⁸¹ the Court of Appeals has not expressly decided whether a default judgment entered in the absence of proof

⁷⁵ In New York State court practice, controversies as to whether a court has subject matter jurisdiction over an action are infrequent because the New York State Supreme Court has broad subject matter jurisdiction. *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 718, 680 N.E.2d 578, 580, 658 N.Y.S.2d 205, 207 (1997) ("In our State court system, Supreme Court is a court of original, unlimited and unqualified jurisdiction and is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed." (citations and internal quotation marks omitted)); SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 12, at 16 ("[The Supreme Court is] the state's only court of 'general' jurisdiction. This refers to original jurisdiction and means that the court has almost all of the jurisdiction the state can confer. The word 'almost' is used because a qualification is necessary. Although usually juxtaposed with 'limited', 'general' in this context does not mean 'unlimited'. There are two broad categories of original jurisdiction that the supreme court lacks: cases of which exclusive jurisdiction has been conferred by Congress on the federal courts, and actions against the state, of which the New York Legislature has conferred exclusive jurisdiction on the court of claims." (citations omitted)); *see also* *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 166, 225 N.E.2d 503, 506, 278 N.Y.S.2d 793, 798 (1967) ("The Supreme Court is a court of general jurisdiction, and it is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed."); *Dickerson v. Thompson*, slip op. 02052, 2010 WL 959930, at *3 (App. Div. 3d Dep't 2010). Thus, a party must be sensitive to subject matter jurisdiction issues if the default judgment will be sought in any court other than supreme court. *See supra* note 73. As to the jurisdiction of New York's other trial courts, *see* SIEGEL, NEW YORK PRACTICE, *supra* note 1, §§ 14–17, 19–22.

⁷⁶ *See supra* note 54.

⁷⁷ *Red Creek Nat'l Bank v. Blue Star Ranch, Ltd.*, 58 A.D.2d 983, 984, 396 N.Y.S.2d 936, 937 (App. Div. 4th Dep't 1977).

⁷⁸ *Lacks v. Lacks*, 41 N.Y.2d 71, 75, 359 N.E.2d 384, 387, 390 N.Y.S.2d 875, 877–78 (1976).

⁷⁹ *Id.*

⁸⁰ *Id.*; *Thrasher*, 19 N.Y.2d at 166, 225 N.E.2d at 506, 278 N.Y.S.2d at 798.

⁸¹ *Supra* note 31.

of the plaintiff's claim is a nullity. In its 2003 decision in *Woodson v. Mendon Leasing Corp.*, the Court expressly left "for another day the issue of whether noncompliance with CPLR 3215(f) renders a default judgment a nullity."⁸² To date, the Court has not yet answered the question it left open in *Woodson*. Yet, the Court's discussion of CPLR 3215(f) in its recent decision in *Wilson v. Galicia Contracting & Restoration Corp.*⁸³ is interesting and potentially telling of how the Court will ultimately resolve this point.

In *Wilson*, the plaintiffs alleged that the infant plaintiff was struck in his left eye by a piece of material that fell from a scaffold assembled by defendant Safway Steel Products.⁸⁴ Although the infant plaintiff told personnel at the hospital at which he was treated that he thought he had been struck by a piece of broken glass, surgeons removed a small piece of metal from his injured eye.⁸⁵ The plaintiffs (the infant plaintiff and his mother) commenced an action against numerous defendants to recover damages for the injuries the infant plaintiff sustained to his left eye.⁸⁶ After Safway failed to comply with the plaintiffs' disclosure demands and a preliminary conference order directing Safway to provide the plaintiffs with certain disclosure, supreme court "issued a self-executing conditional order" striking Safway's answer unless Safway provided the plaintiffs with specified disclosure by a certain date.⁸⁷ Safway failed to comply with the conditional order and its answer was stricken, leaving unrebutted the plaintiffs' assertion that Safway's negligence caused the infant plaintiff's injuries.⁸⁸

Shortly after Safway's answer was stricken, the plaintiffs produced at the request of another defendant to the action the object that surgeons had removed from the infant plaintiff's eye.⁸⁹ "[T]hat defendant's expert [witness] opined that the object appeared to be a lead air-gun pellet that was fired into [the infant plaintiff's injured] eye . . ."⁹⁰ The plaintiffs then discontinued their claims against all defendants in the action except Safway.⁹¹ Safway

⁸² 100 N.Y.2d 62, 71, 790 N.E.2d 1156, 1162, 760 N.Y.S.2d 727, 733 (2003) (citations and internal quotation marks omitted).

⁸³ 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (2008).

⁸⁴ *Id.* at 828, 890 N.E.2d at 179, 860 N.Y.S.2d at 417.

⁸⁵ *Id.*

⁸⁶ *Id.* at 828, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

⁸⁷ See generally Patrick M. Connors, *CPLR 3126 Conditional Orders Requiring Disclosure "Can't Get No Respect,"* 73 ALB. L. REV. 853 (2010).

⁸⁸ *Wilson*, 10 N.Y.3d at 829, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

subsequently made several motions “to vacate the order striking its answer,” each of which was denied.⁹² An inquest was held and a judgment in the plaintiffs’ favor was entered against Safway. The appellate division affirmed the judgment after reducing the damages awarded by the court at the inquest.⁹³ The Court of Appeals granted Safway’s motion for leave to appeal⁹⁴ and affirmed the order of the appellate division.⁹⁵

The Court of Appeals began its analysis by addressing Safway’s argument that the plaintiffs failed to comply with CPLR 3215(f) and that the default judgment entered against it was therefore a nullity.⁹⁶ The Court wrote:

In our Court, Safway contends that CPLR 3215(f) renders the judgment a nullity. Safway—who was represented throughout by counsel, and offered no valid reason for ignoring the discovery demands and court orders—failed to raise this argument in its prior motions. As we have previously made clear, the requirement of preservation is not simply a meaningless technical barrier to review. Here, for example, had defendant earlier raised CPLR 3215(f), plaintiff might well have filed the documents referenced in that section; the affidavit or verified complaint specified in CPLR 3215(f) need only allege enough facts to enable a court to determine that a viable cause of action exists. Today, nearly a decade after the incident, and years after dismissal of all codefendants with prejudice, the potential harm to plaintiff from reversing the consequence of Safway’s counseled course of action is manifest.⁹⁷

The Court went on to note that because its answer was stricken, “Safway was deemed to admit all traversable allegations in the [plaintiffs’] complaint, including the basic allegation” that Safway was liable for the infant plaintiff’s injuries.⁹⁸

At first blush, *Wilson* appears innocuous. After all, the Court determined that Safway’s “nullity” argument was not preserved for the Court’s review because Safway failed to raise it before supreme

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Wilson v. Galicia Contracting & Restoration Corp.*, 9 N.Y.3d 808, 875 N.E.2d 893, 844 N.Y.S.2d 174 (N.Y. 2007).

⁹⁵ *Wilson*, 10 N.Y.3d at 828, 890 N.E.2d at 179, 860 N.Y.S.2d at 417.

⁹⁶ *Id.* at 828–29, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

⁹⁷ *Id.* at 829–30, 890 N.E.2d at 180, 860 N.Y.S.2d at 418 (citations and internal quotation marks omitted).

⁹⁸ *Id.* at 830, 890 N.E.2d at 181, 860 N.Y.S.2d at 419 (internal quotation marks omitted).

court, and the High Court therefore did not pass on that argument. But, as discussed above,⁹⁹ only mistakes and errors that go to a court's subject matter jurisdiction over an action or a court's personal jurisdiction over a defendant can render a default judgment void and therefore a nullity. If a plaintiff's failure to comply with CPLR 3215(f) is a defect that touches on the court's subject matter jurisdiction, and concomitantly renders a default judgment a nullity, a court should reach the issue regardless of whether it was raised by the defendant. Critically, when a court perceives that a question exists regarding subject matter jurisdiction, the court is obligated to address it even if the matter was not raised by the parties; both trial and appellate courts are required to address *sua sponte* questions relating to subject matter jurisdiction.¹⁰⁰

In *Wilson*, the Court identified the "nullity" issue raised by Safway, but stated that the issue was not preserved for the Court's review and refused to address it directly. If the Court of Appeals viewed the "nullity" issue as potentially affecting the supreme court's subject matter jurisdiction over the action and ability to render a valid default judgment, then the Court could have reached it regardless of whether it was preserved. Therefore, it appears that the Court does not view a plaintiff's failure to comply with CPLR

⁹⁹ See *supra* note 56.

¹⁰⁰ *Fin. Indus. Regulatory Auth., Inc. v. Fiero*, 10 N.Y.3d 12, 17, 882 N.E.2d 879, 881, 853 N.Y.S.2d 267, 269 (2008) ("Although the issue of subject matter jurisdiction was not raised in the lower courts, a court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may, *ex mero motu* on its own motion, at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action." (citations, internal brackets and quotation marks omitted)); *In re Grand Jury Subpoenas*, 72 N.Y.2d 307, 311, 528 N.E.2d 1195, 1197, 532 N.Y.S.2d 722, 724 (1988) ("Although neither petitioners nor respondent contends that the appeal is moot, mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court *sua sponte* . . ."); *Prospect v. Cohalan*, 65 N.Y.2d 867, 870 n.*, 482 N.E.2d 1209, 1211 n.*, 493 N.Y.S.2d 293, 295 n.* (1985) ("Although the parties have not urged nonjusticiability, since the issue implicates subject matter jurisdiction, we raise the issue on our own motion." (citation omitted)); *Davis v. State*, 64 A.D.3d 1197, 1197, 882 N.Y.S.2d 623, 624 (App. Div. 4th Dep't 2009) ("A court's lack of subject matter jurisdiction is not waivable, and we conclude that the court properly dismissed the claim *sua sponte* . . ." (citations and quotation marks omitted)); *Signature Health Ctr., LLC v. State*, 42 A.D.3d 678, 679, 840 N.Y.S.2d 191, 192 (App. Div. 3d Dep't 2007) ("A court may, *sua sponte*, raise issues regarding its subject matter jurisdiction . . ."); *cf. Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 718, 680 N.E.2d 578, 580, 658 N.Y.S.2d 205, 207 (1997) ("If strict compliance with the filing system were deemed a requirement of subject matter jurisdiction, we would conclude that Supreme Court properly dismissed the proceeding *sua sponte* because a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action . . ." (internal quotation marks and brackets omitted)).

3215(f) as a defect affecting a court's subject matter jurisdiction. This interpretation, if correct, supports the Second Department's position that a default judgment entered despite the plaintiff's failure to submit proof of its claim on its application for a default judgment is not a nullity and cannot be vacated under CPLR 5015(a)(4) for want of jurisdiction. Of course, this is only an interpretation of *Wilson*; the Court of Appeals has not expressly endorsed (or rejected) the Second Department's approach.

IV. CONCLUSION

The resolution of the issue of whether a plaintiff's failure to submit proof of the facts of its claim on its application for a default judgment renders the judgment void will, in turn, determine when a defendant must seek to vacate the judgment and what the defendant must show to persuade the court to vacate it. In light of the split of authority on this issue, a practitioner must carefully consult the law of the department of the appellate division in which the case is venued before either seeking a default judgment or moving to vacate one.