

CIVIL COURT OF THE CITY OF NEW YORK

Legal/Statutory Memorandum
Subject: Non-Military Affidavits

Class: LSM 152B
Category: GP-20, LT-20
Eff. Date: May 27, 2010

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The sections of law dealing with what is commonly known as “Non-Military Affidavit” are:

- United States Code, Title 50, War and National Defense, 50 App USCA §§ 501 et seq., referred to as the Servicemembers Civil Relief Act (SCRA) (specifically Sections 521 and 531),
and
- New York State Military Law, Article XIII, Soldiers and Sailors Civil Relief Act, Sections 300 to 327.

Unless otherwise specified, the rules provided in this LSM apply to all actions and proceedings in Civil Court, including all HP proceedings.

1) **GENERAL**

In any action or proceeding where the defendant or respondent has defaulted in answering, the plaintiff or petitioner shall file an Affidavit setting forth facts showing that the defendant or respondent is not in military service before a default judgment may be entered. An Affidavit as to military status must be filed in reference to every individual natural person against whom the entry of a judgment based on that individual’s failure to answer is sought. In a summary proceeding, this will include any undertenants as well as the primary tenants. In an action or proceeding in which a Non-Military Affidavit is required, and both an individual and a corporation, partnership, association, etc. are defendants or respondents, a military status Affidavit must be filed in reference to the individual. The present policy of accepting one Non-Military Affidavit when there are multiple defendants or respondents is to continue. However, each person must be individually identified. For example, if the defendants or respondents are John and Mary Smith, the Non-Military Affidavit must say that neither John nor Mary Smith are in the military, and in the case of summary proceedings, or dependent on someone in the military (see section 5).

In any action or proceeding in which issue has joined and a default judgment is sought based upon the defendant or respondent’s failure to appear, the procedure set forth herein shall be followed. In an action or proceeding in which a Judge has held an inquest and made a finding that the defendant or respondent is not in military service in accordance with this Memorandum, the filing of an additional Affidavit shall not be required by the Clerk.

“John and Jane Doe” Affidavits

A Non-Military Affidavit is required for all persons listed by pseudonym, such as “John or Jane Doe.” In summary proceedings, the sufficiency of the factual basis for the Affidavit shall

be referred to a Judge for determination.

2) **TIME LIMITATIONS**

Case law, all of it dating back to the 1940's, stresses that the military investigation must be "contemporaneous" to the entry of the judgment. Because of the terrorist act of September 11, 2001, the subsequent call-up of reserves and the present troops in Iraq, the time limitations set forth herein will be in effect until further notice. This directive will be reviewed upon the cessation of the current situation.

Any application to the Clerk for the entry of judgment based on defendant or respondent's failure to answer will require a military investigation no older than 30 days prior to the filing of the application. If the investigation was carried out more than 30 days from the date that the application is filed with the Court, the Clerk is to reject it and return it to the plaintiff or petitioner indicating that a current investigation and affidavit of military status is required.

The military laws are concerned with preventing a default judgment from issuing against a defendant or respondent without their knowledge or at a time they are unable to defend themselves. Given today's times, it is possible that a defendant or respondent involved in a pending lawsuit could be called into active duty or enlist and be shipped out in a relatively short period of time. Under such circumstances, the defendant or respondent may not be in a position to properly defend themselves when a judgment may be sought against them. Therefore, in cases where issue has joined and the defendant or respondent is pro se, any application for a judgment based upon the defendant or respondent's failure to appear, must be put before a Judge for an inquiry and determination of military status when more than 30 days have passed since the defendant or respondent's last appearance in court. The Judge may require the submission of a current Non-Military Affidavit. No further military inquiry will be required where a defendant or respondent represented by counsel fails to appear, since these defendants and respondents have someone who can raise the military laws on their behalf.

Where a case is set for inquest, the presiding judge should inquire as to the military status of the defendant or respondent and note it in the decision. If the inquest is submitted following 22NYCRR 208.32, the plaintiff must submit a Non-Military Affidavit no older than 30 days from the date of the filing of the Notice of Inquest.

3) **INVESTIGATION/PROOF**

An investigation carried out for the purpose of discovering a person's military status may be carried out at any time after the commencement of the actual action or proceeding. The investigation may take place at any time subsequent to the filing of the originating papers and prior to the entry of the failure to appear/answer judgment. To be perfectly clear, the Non-Military Affidavit may be filed together with the Affidavit of Service and originating papers, or anytime thereafter up to and including the application for the default judgment.

Who May Investigate

The investigation may be carried out, and the Affidavit sworn to, by any of the following:

- a) The Plaintiff/Petitioner or his/her attorney.
- b) Anyone requested to do so by the Plaintiff/Petitioner or his/her attorney.
- c) Anyone hired for that purpose by the Plaintiff/Petitioner or his/her attorney.
- d) An employee of the Plaintiff/Petitioner or his/her attorney.

Fact(s):

The Non-Military Affidavit must give facts as to the basis for the affiant's personal knowledge that the defendant or respondent is not in the military service. In summary proceedings the affidavit must also give facts as to the basis for the affiant's personal knowledge that the respondent is not dependent on someone in the military (see section 5). "Facts" requires more than a simple conclusory statement that the defendant or respondent is not in the military service. A bare statement to that effect is to be considered inappropriate and may be rejected by the Clerk as insufficient.

An affidavit should be made by someone with personal knowledge of the military status of the defendant/respondent and should state the reason(s) for the affiant's belief (see Tracey Towers Associates v. Doris Cobblah 2010 NY Slip Op 50061 (U)).

Possible reasons might be:

- a) Asked defendant/respondent personally.
- b) Spoke to neighbors who know defendant/respondent personally.
- c) Spoke with employees of landlord who work in the building and are acquainted with defendant/respondent.
- d) Spoke to defendant/respondent's employer or co-workers.
- *e) Looked up defendant/respondent's record: Example: having application which must be updated as to military status by law. The Investigator looked up records of defendant/respondent. The records indicated that the defendant/respondent is not in the military. The records must be identified.
- *f) Proof from the Defense Manpower Data Center (DMDC). 50 App USCA § 582 allows a certificate signed by the Secretary of the DMDC to be used as prima facie evidence as to the status of a person. See CCM 158A for details.
- g) Defendant/respondent is elderly (approximate age).
- h) Defendant/respondent is infirm (wheelchair, crutches, etc.).
- I) Person giving information works with defendant/respondent.
- j) Defendant/respondent receives public assistance.
- k) Telephone conversation, provided that the person who did the investigation establishes that s/he knows and has a basis to know, the voice of the conversant. For example: "I spoke to the respondent's neighbor _____ on the telephone and I know it was the respondent's neighbor because I have collected rent from her in person in the past and I recognized her voice."
- l) Any other type of investigation is possible, but must be outlined in a manner similar to the above examples.

***These reasons cannot be used to establish dependency as required in section 5.**

Persons

The person(s) spoken with in order to determine the status of the defendant or respondent must be identifiable. A name is the best identification, but if the person refuses to give a name, the investigator may style him/her as "John/Jane Doe," provided that a description is supplied. An example is as follows: "I spoke to 'John Doe' who refused to give me his name. Mr. Doe resides in Apt. 2 at _____. He is a white male, 5' 10" tall, black hair, approximate age 40."

Location

There must also be a description of the location where the investigation was carried out. Possible examples are:

- a) The defendant/respondent's premises.
- b) The building where defendant/respondent resides.
- c) The defendant/respondent's place of business.
- d) The plaintiff/petitioner's place of business.
- e) Any other place where the investigation was carried out.

The point of all of the above examples is that there should be some reason for the Court to accept the affiant's reliance on the information which s/he has received from the person who was questioned.

4) **REJECTION**

There are some instances in which a Clerk should reject a Non-Military Affidavit. They are as follows:

- a) Inability to determine who the investigator was.
- b) Investigation carried out prior to the filing of the originating papers.
- c) No facts as to the basis for the investigator's beliefs.
- d) The report is not accompanied by evidence demonstrating what information was provided to the DMDC.
- e) No location as to where the investigation took place.
- f) No dependency clause (in a Summary Proceeding).
- g) Affidavit is not sworn to or affirmed.
- h) The Affidavit is stale (more than 30 days old). In such cases, the Clerk is to inform the plaintiff or petitioner that a new military investigation must be carried out and a Non-Military Affidavit must be filed.
- i) The Affidavit states that the defendant or respondent is in the military service.
- j) Other irregularities should be flagged for the attention of the Judge.

5) **DEPENDENTS IN SUMMARY PROCEEDINGS**

In general, a person who is a dependent of someone in the military service is eligible for some protection. [See 50 App USCA § 538.] 50 App USCA § 531 extends coverage to persons who are dependents of someone in the military service when the case deals with "eviction or distress" although it limits the protection to rents under \$2,400 per month, as adjusted for inflation pursuant to 50 App USCA § 531(a)(2). New York State Military Law § 309 contains the same coverage and has no dollar limit.

For our purposes, in any case in which an eviction is a possible outcome, the Non-Military Affidavit must have a dependency clause, and any non-military inquiry should address this question, as well. In summary proceedings the Non-Military Affidavit must include and give facts as to the basis for the affiant's personal knowledge that the respondent is not dependent on someone in the military and should state the reason for that belief. This applies to any undertenants as well.

6) **PROCEDURE WHERE DEFENDANT/RESPONDENT IS IN THE MILITARY**

Any civil or housing action or proceeding in which the non-military investigation or inquiry finds that the defendant or respondent, or dependent of a respondent where applicable, is in the military, should be assigned to the appropriate Military Part. The Clerk is to notify both sides of the court date.

7) **COSTS**

In a summary proceeding, Civil Court Act, Section 1906-a allows the addition of \$5.00 as costs for each Non-Military Affidavit filed. If the petitioner chooses to submit one Affidavit covering more than one individual, the petitioner will be awarded just \$5.00 in costs.

In a civil action or proceeding, no costs of any kind are permitted for the filing of a Non-Military Affidavit.

8) **PRIOR NON-MILITARY LSM's**

This LSM supersedes all prior Non-Military directives and/or Legal/Statutory Memoranda.

9) **POSTING**

This LSM should be posted in the courthouses and posted on the internet and should be made available to litigants so as to allow them to be informed of its requirements.

5/26/10

Dated



Fern A. Fisher
Deputy Chief Administrative Judge
New York City Courts