

STATE OF NEW YORK
UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
TEL: (212) 428-2150
FAX: (212) 428-2155

A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

January 14, 2013

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed adoption of 22 NYCRR § 202.5-c, relating to proof of service by mail through attorney affirmation.

The Advisory Committee on Civil Practice has recommended a new rule, 22 NYCRR §202.5-c, to clarify the required language in attorney affirmations of service of papers pursuant to CPLR 2103(b)(2) and 2106 (Exhibit A). In Peter-MacIntyre v. Lynch Intl., Inc., 52 A.D.3d 351 (1st Dept. 2008), the Court found that an attorney's affirmation of service was defective where it did not specifically state that the affiant personally mailed the papers (Exhibit B). The Committee proposal would require attorney affiants to aver that they "caused the paper to be mailed by regular office procedures generally used for mail service of papers" to cure this fault.

Persons wishing to comment on this proposal should e-mail their submissions to OCArule202-5-c@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004.

Comments must be received no later than March 1, 2013.

EXHIBIT A

6. Allowing Proof of Service by Mail under CPLR 2103(b)(2) by Affirmation that the Attorney Caused the Paper to be Mailed (22 NYCRR 202.5-c)(new)

The Committee recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 200 *et seq.*) be amended to add a new rule 202.5-c to allow CPLR 2103(b)(2) proof of service by mail to a party's attorney to include an affirmation of an attorney, authorized under CPLR 2106, that the attorney caused the paper to be mailed under the regular office procedures generally used for mail service of papers. While inspired by an analysis of the decision in Peter-MacIntyre v. Lynch Intern., Inc., 52 A.D.3d 424, 862 N.Y.S.2d 351(1st Dept. 2008), the Committee also believes that this new rule is necessary to correct the widespread use of affidavits that are not technically correct in New York practice. Because current law is unclear as to what is needed to be able to demonstrate that a paper was mailed, affidavits used today can be imprecise as to the facts or may not be sufficient to meet legal requirements. This proposal will make clear exactly which facts need to be recited to comply with the statute. The new section 202.5-c does not preclude the execution of a separate affidavit of mailing by a person, other than the attorney, who may be responsible for placing the paper in the custody of the United States Postal Service. However, the new 202.5-c is limited in scope to the mail service of papers to a party's attorney to avoid any use of such an affirmation by a process server.

Proposal

§ 202.5-c. Proof of Service by Mail. Proof of service by mail under paragraph 2 of subdivision (b) of CPLR 2103 may be made by affirmation in accordance with CPLR 2106 that the attorney making such affirmation caused the paper to be mailed by the regular office procedures generally used for mail service of papers.

EXHIBIT B

52 A.D.3d 424, 862 N.Y.S.2d 351, 2008 N.Y. Slip Op. 05802

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Briefs and Other Related Documents

****1** Francoise Peter-MacIntyre, Appellant

v

Lynch International, Inc., Respondent.

Supreme Court, Appellate Division, First Department, New York

June 26, 2008

CITE TITLE AS: Peter-MacIntyre v Lynch Intl., Inc.

HEADNOTE

Motions and Orders

Motion to Vacate Default

Smith Dornan & Dehn P.C., New York (Eamonn Dornan of counsel), for appellant.
 Laurel A. Wedinger, Staten Island, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 5, 2007, which, insofar as appealed from, granted defendant's motion to vacate its default in opposing a prior motion by plaintiff to reargue a prior order vacating defendant's default in appearance, upon condition that defendant pay plaintiff \$250, and, upon vacatur, sub silencio denied plaintiff's prior motion to reargue, unanimously affirmed, without costs. ***425**

In support of defendant's motion to vacate its default in opposing plaintiff's January 10, 2007 motion to reargue the December 5, 2006 order vacating defendant's default in appearance, defendant's attorney represented that she did not know about the January 10, 2007 motion, purportedly served by mail on January 10, 2007, or the notice of entry of the January 30, 2007 order granting that motion, purportedly served by mail on February 6, 2007, until February 12, 2007, when she happened to call plaintiff's attorney about the case. On the merits of plaintiff's prior motion to reargue, defendant's attorney argued that the motion merely repeated the arguments that plaintiff had previously made unsuccessfully in opposing vacatur of defendant's default in appearance, and thus would not have been granted had there been opposition. In opposition, plaintiff's attorney argued that affidavits of service by mail raised a presumption of receipt that defendant's attorney's allegations of nonreceipt failed to rebut. We reject plaintiff's argument because the January 11, 2007 "Affirmation of Service" on which she relies as proof of the alleged January 10, 2006 service of the January 10, 2007 motion to reargue is defective. That affirmation states that "I caused a copy of plaintiff's motion for leave to reargue to be sent by first class mail to [defendant's attorney] at the following address." Such affirmation is defective because it does not specifically state that the affiant, who is plaintiff's attorney, himself mailed the motion (*Metzger v Esseks*, 168 AD2d 287, 287 [1990]; *Gigante v Arbucci*, 34 AD3d 425, 425 [2006]). Plaintiff's argument that defendant's original motion to vacate its default in appearance should have been denied for lack of a reasonable excuse and meritorious defense is ****2** not properly before the Court since plaintiff did not appeal the December 5, 2006 order; in any event, it appears that the default was properly vacated. Concur—Lippman, P.J., Tom, Andrias and Saxe, JJ.

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NY,2008.


Peter-MacIntyre v Lynch Intl., Inc.

52 A.D.3d 424, 862 N.Y.S.2d 351, 2008 N.Y. Slip Op. 05802

Briefs and Other Related Documents ([Back to top](#))

- [2008 WL 5770526](#) (Appellate Brief) Plaintiff-Appellant's Reply Brief (May 21, 2008)  [Original Image of this](#)

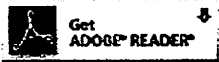
Document (PDF)

• [2008 WL 5770525](#) (Appellate Brief) Brief for Defendant-Respondent (May 13, 2008)  [Original Image of this Document \(PDF\)](#)

• [2008 WL 5770524](#) (Appellate Brief) Plaintiff-Appellant's Brief (Mar. 17, 2008)  [Original Image of this Document \(PDF\)](#)

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