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You're Sure You've Looked? The Use of Jackson Affidavits and Efforts to Locate Discovery Materials

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Among the discovery tools available to New York courts and litigants is a so-called *Jackson* affidavit, which requires a party to provide a sworn explanation of its efforts to locate requested documents. This article explores the origins, the requirements, and recent examples of *Jackson* affidavits, including in the New York Supreme Court's Commercial Division.

Jackson affidavits derive their name from *Jackson v. City of New York*, 185 A.D.2d 768 (1st Dep't 1992). There, the plaintiff sought certain maintenance records for a building owned by the City of New York in connection with her personal injury claims. *Id.* at 768. Despite discovery requests and multiple orders mandating compliance, the city repeatedly failed to produce the requested maintenance records. *See id*. at 768-69.

Lara Flath

Gaby Colvin

Ultimately, the trial court issued a conditional order striking the city's answer unless it provided "an affidavit from the person who had conducted the search for the missing records

LARA FLATH *is a complex litigation and trials partner in Skadden, Arps, Slate, Meagher & Flom, representing clients in complex commercial, securities and antitrust litigation in federal and state courts.* GABY COLVIN *is an associate with the firm,* ELENI C. PAPPAS*, law clerk with the firm, assisted with the preparation this article*

stating that the records could not be located and stating what efforts had been made to locate them." *Id*. at 769. A month late, the city ultimately produced a two-sentence affidavit stating that an employee searched two files but was unable to identify any responsive documents. *Id*. at 769.

The plaintiff moved for summary judgment on the grounds that the city triggered the conditional order. The court granted the city's cross motion to deem the affidavit timely and denied plaintiff's motion for summary judgment. *Id*. at 769. On appeal, the First Department upheld the consideration of the affidavit and accepted the city's representation that it had not located the requested documents but held the "affidavit provided the court with no basis to find that the search had been a thorough one or that it had been conducted in a good faith effort." *Id*. at 770.

This level of detail reflects the affidavit's dual purposes: demonstrating a comprehensive search and ensuring that the opposing party is not prejudiced by missing information.

Thus, the First Department imposed sanctions pursuant to CPLR 3126 for the city's "willful failure to comply" with its discovery obligations. *See id. at* 769-70. What is more, the First Department resolved the issue of notice of the defective condition in favor of the plaintiff and precluded the city from raising any issue with respect to notice, emphasizing that a party's negligent failure to locate relevant records should not benefit it. *Id.* at 770.

Thirty years later, *Jackson* affidavits continue to be employed by both parties and the courts and are not just limited to personal injury tort cases.

Any litigant who claims that they cannot produce missing or otherwise unavailable documents can leverage this procedural mechanism to convey that thorough and good faith search efforts were used in the search for responsive records—particularly if those efforts are challenged. *See, e.g.*, *People v. Austin*, 83 Misc. 3d 1249(A), 2024 N.Y. Slip Op. 50946(U), at *3 (Sup. Ct. N.Y. Cnty. July 23, 2024) (ordering that "[t]o the extent that no responsive document or information is found, then an affidavit to that effect shall be provided in accordance with *Jackson*"); *Tsung Tsin Ass'n, Inc. v. Zhu*, No. 651584/2023, 2023 N.Y. Slip Op. 34083(U), at *3 (Sup. Ct. N.Y. Cnty. Nov. 16, 2023) (referring to the court's prior order to provide a *Jackson* affidavit as "the usual way" to handle "a party that appears willing to flout court orders with impunity absent any consequence").

At a minimum, the affiant must explain "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found." *Bd. of Managers of 252 Condo. v. World-Wide Holdings Corp.*, No. 652387/2022, 2024 N.Y. Slip Op. 31420(U), at *3-4 (Sup. Ct. N.Y. Cnty. Apr. 13, 2024); *see also Phillips*

Auctioneers LLC v. Grosso, No. 651782/2020, 2024 N.Y. Slip Op. 33906(U), at *8 (Sup. Ct. N.Y. Cnty. Oct. 31, 2024) (ordering the defendant to "supplement his document production and file a *Jackson* affidavit").

This level of detail reflects the affidavit's dual purposes: demonstrating a comprehensive search and ensuring that the opposing party is not prejudiced by missing information.

If ordered to produce a *Jackson* affidavit, the consequences of failing to provide a proper affidavit (or neglecting to produce one altogether) can be severe, including in the Commercial Division. For example, in *Citizen Watch Co. of America, Inc. v. Zapco 1500 Investment, L.P.*, No. 655565/2020, NYSCEF No. 61 (Sup. Ct. N.Y. Cnty. Jan. 14, 2022), Justice Masley entered a conditional order striking the defendant's answer unless it complied with specific discovery demands, including the production of relevant documents prior to 2016 or alternatively a *Jackson* affidavit from a person with knowledge as to why such a production was not possible. *Id.* at 1.

But litigants who cannot comply with document requests to locate certain documents should not despair.

But the *Jackson* affidavit, submitted by the defendant's vice president, claimed relevant records from 2014 were unavailable but lacked details about search efforts. Moreover, the affidavit was contradicted by previously produced documents from 2014.

Accordingly, Justice Masley found that defendant's explanations were not compliant with *Jackson* and fell short of showing a reasonable excuse for the failure to produce the requested items. *See* Order, *Citizen Watch Co. of America, Inc. v. Zapco 1500 Investment, L.P.*, No. 655565/2020, NYSCEF No. 74 at 2-3 (Sup. Ct. N.Y. Cnty. July 5, 2022).

Masley proceeded to strike the defendant's answer, and the First Department affirmed. *See Citizen Watch Co. of Am., Inc. v. Zapco 1500 Inv., L.P.*, 216 A.D.3d 562, 562 (1st Dep't 2023); *see also Tsung Tsin Ass'n*, 2023 N.Y. Slip Op. 34083(U), at *4 (striking defendant's answer, awarding attorney's fees, and permitting plaintiff to file a motion for default judgment); *Lynx Cap. Partners of NJ, LLC v. Bayes Cap. LLC*, 217 A.D.3d 571 (1st Dep't 2023) (affirming the lower court's decision to strike defendants' answer, enter a default judgment in favor of plaintiff, and award attorneys' fees because the defendants repeatedly failed to furnish discovery responses and violated the trial court's explicit order to produce *Jackson* affidavits).

But litigants who cannot comply with document requests to locate certain documents should not despair. In fact, *Jackson* affidavits can provide an opportunity to demonstrate their good faith efforts to comply with discovery obligations, despite the absence of requested documents. For example, in *Patel v. Patel*, No. 655348/2018, 2023 N.Y. Slip Op. 32809(U) (Sup. Ct. N.Y. Cnty. Aug. 11, 2023), Justice Cohen recognized that the defendant's production was, "in some ways, deficient,"

but did not impose sanctions because the defendant, "provided context in a [*Jackson*] affidavit." *Id.* at *3.

There, the defendant attested that it had completed an additional search and requested the entity's former accountant and counsel to produce the documents in question. *See id.* at *2. Cohen found the affidavit to be "a sufficient start towards demonstrating efforts to comply with its discovery obligations" and ordered the defendant to conduct a further search and produce a supplemental *Jackson* affidavit. *Id*. at *4, *6.

Similarly, in *TSFV Holdings, LLC v. Mulberry Development, LLC*, No. 652865/2016, 2020 N.Y. Slip Op. 32739(U) (Sup. Ct. N.Y. Cnty. Aug. 21, 2020), Justice Reed declined to impose sanctions after concluding that the defendants' supplemental affidavits satisfied *Jackson*. *Id.* at *2.

At a deposition, a defendant testified to communications and documents that he admittedly had not searched for nor produced despite explicit document requests. *Id.* at *1. Consequently, the plaintiff demanded production of the documents. *Id.*

The defendants conducted a subsequent search and submitted supplemental *Jackson* affidavits explaining that the documents could not be located. *Id*. The affidavits swore that a thorough search was conducted across the corporation's books and records, servers, and cloud storage, that all relevant documents were maintained in those locations, and that no documents had been destroyed. *Id.* at *2.

Despite the "inconsistency" between the defendant's deposition testimony and the results of the searches, Reed found the affidavits demonstrated that the search was conducted in good faith. *Id.* at *2; *see also Trade Expo Inc. v. Sterling BankCorp.*, No. 160214/2013, NYSCEF No. 257 at *6 (N.Y. Sup. Ct. Jul. 5, 2018) (clarifying that *Jackson* does not require a "roadmap" to missing documents, only a sufficient explanation for their absence) *aff'd*, 171 A.D.3d 634, 635 (1st Dep't 2019).

For counsel and their clients, the takeaway is clear. In cases where relevant documents are difficult or impossible to find, *Jackson* affidavits provide an opportunity for that party to explain its efforts and search process and may even serve as an offensive tool to protect that process.

But for those affidavits to be useful to a court and aid that party in avoiding sanctions, they should include concrete details about the search process that gives the court confidence that the party is not using obfuscation to prejudice its opponent. In doing so, parties can navigate discovery disputes with more confidence, protect their interests, and secure judicial trust.