

NY CLS CPLR R 4521

Current through 2025 released Chapters 1-207

New York

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Civil Practice Law And Rules (Arts. 1 — 100) >
Article 45 Evidence (§§ 4501 — 4551)

R 4521. Lack of record

A statement signed by an officer or a deputy of an officer having legal custody of specified official records of the United States or of any state, territory or jurisdiction of the United States, or of any court thereof, or kept in any public office thereof, that he has made diligent search of the records and has found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry, provided that the statement is accompanied by a certificate that legal custody of the specified official records belongs to such person, which certificate shall be made by a person described in rule 4540.

History

Formerly § 4521, add, L 1962, ch 308; amd, L 1962, ch 315, § 1; L 1964, ch 388, eff Sept 1, 1964.

Annotations

Notes

Prior Law:

Earlier statutes: CPA §§ 366, 398—a, 1129; CCP §§ 921, 1734; 2 RS 533 § 65; 2 RS 552 § 12.

Advisory Committee Notes:

This rule is the same as former § 398-c except that the statement is made prima facie evidence of lack of record. Minor language changes have also been made. In view of the scope of this provision, § 366, covered certificates of search for a paper as evidence, is not required.

Notes to Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

2.Generally

3.Annual report of corporation

4.Foreign certificates

5.Rebuttal of presumption

I. Under CPLR

1. Generally

In proceeding to revoke letters of administration issued to second husband of decedent, second husband's evidence that first marriage had been dissolved by divorce, consisting of uncertified divorce decree and second husband's uncorroborated testimony that he accompanied decedent to place where divorce allegedly took place, did not outweigh evidence by first husband that no such divorce occurred, in form of certified statement by officer having legal custody of records in county where divorce allegedly took place, to effect that diligent search had failed to locate divorce decree in question; first husband's evidence sufficed to support finding that presumption

in favor of validity of second marriage had been rebutted. In re Estate of Brown, 40 N.Y.2d 938, 390 N.Y.S.2d 59, 358 N.E.2d 883, 1976 N.Y. LEXIS 3111 (N.Y. 1976).

Negative report of motor vehicle bureau as to ownership of vehicle was only prima facie proof under this rule even if in proper form and would not support summary judgment. Monko v Cicoria, 46 Misc. 2d 565, 260 N.Y.S.2d 70, 1965 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1965).

Where absence of public record is element of offense, oral testimony of custodian as to lack of public record is hearsay at common law, and information alleging such element is insufficient unless People comply with certification provisions of CLS CPLR § 4521. People v Ebrahimha, 157 Misc. 2d 222, 1993 N.Y. Misc. LEXIS 103 (N.Y. City Crim. Ct. 1993).

Police officers' allegations in their supporting depositions regarding licensing status of defendant, who was charged with being unlicensed general vendor, were properly corroborated by supporting depositions from representatives of Department of Consumer Affairs, each of whom stated that she was authorized to access and report on contents of licensing division's records and after diligent search of license records found that defendant did not have general vendor's license on critical date, even though supporting depositions did not contain official certifying seal as required by CLS CPLR § 4521, since they recited evidence which would be admissible at trial under common-law exception to hearsay rule. People v Niang, 160 Misc. 2d 500, 609 N.Y.S.2d 1017, 1994 N.Y. Misc. LEXIS 76 (N.Y. City Crim. Ct. 1994).

II. Under Former Civil Practice Laws

2. Generally

Upon the trial of an action by a creditor against a stockholder of a corporation, to recover upon the ground that the capital stock was not all paid in and a certificate filed, etc., the certificate of the county clerk was produced, to show the failure to file. Held, that it was insufficient, because it

did not state that diligent examination for the paper had been made. *Briggs v Waldron*, 83 N.Y. 582, 83 N.Y. (N.Y.S.) 582, 1881 N.Y. LEXIS 32 (N.Y. 1881).

Until rebutted, presumption from fact that no record is found of a paper in the office where it should be if it existed is evidence that such paper never existed. *Deshong v New York*, 176 N.Y. 475, 68 N.E. 880, 176 N.Y. (N.Y.S.) 475, 14 N.Y. Ann. Cas. 169, 1903 N.Y. LEXIS 827 (N.Y. 1903).

3. Annual report of corporation

The certificate of the secretary of state that a corporation has filed no annual report in his office is sufficient evidence of that fact. *Buck v Barker*, 5 N.Y. St. 826.

4. Foreign certificates

Certificates of clerks of courts of another state, that they had examined the records covering a certain period, and failed to find any declarations of defendant's intention to become a citizen, were not made competent in this state by CPA § 366. *People v Bromwich*, 135 A.D. 67, 119 N.Y.S. 833, 1909 N.Y. App. Div. LEXIS 3913 (N.Y. App. Div. 1909), *aff'd*, 200 N.Y. 385, 93 N.E. 933, 200 N.Y. (N.Y.S.) 385, 1911 N.Y. LEXIS 1421 (N.Y. 1911).

5. Rebuttal of presumption

Presumptions of nonexistence and non-filing of decision of fence viewers in town clerk's office were rebutted by testimony of one of fence viewers who stated that their decision was forthwith filed with town clerk. *Bromley v Mollnar*, 39 N.Y.S.2d 424, 179 Misc. 713, 1942 N.Y. Misc. LEXIS 2337 (N.Y. County Ct. 1942).

Research References & Practice Aids

Federal Aspects:

Lack of record, USCS Court Rules, Federal Rules of Civil Procedure, Rule 44(b).

Absence of public record as exception to hearsay rule in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 803(10).

Court record lost or destroyed, 28 USCS § 1734.

Court record lost or destroyed where United States is interested party, 28 USCS § 1735.

Jurisprudences:

29 NY Jur 2d Courts and Judges § 459. .

57 NY Jur 2d Evidence and Witnesses § 109. .

58 NY Jur 2d Evidence and Witnesses §§ 500., 506. .

2 Am Jur Trials 409., Locating Public Records.

Law Reviews:

Evidence symposium. 52 Cornell L.Q. 177.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4521, Lack of Record.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 37.04.

Matthew Bender's New York Practice Guides:

Matthew Bender's New York Practice Guides:

LexisNexis AnswerGuide New York Civil Litigation § 10.08. Admitting Record Under Exceptions to Admission Requirements.

Matthew Bender's New York Evidence:

8 Bender's New York Evidence § 29.04. Proof of marriage.

1 Bender's New York Evidence § 118.04. Authentication of Public and Official Documents Dealing with Real Property.

3 Bender's New York Evidence § 149.02. Scope of the Business Records Rule.

Matthew Bender's New York Checklists:

Checklist for Introducing Documents and Information into Evidence LexisNexis AnswerGuide New York Civil Litigation § 10.05.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4521:1 et seq.

LexisNexis Forms FORM 75-CPLR 4521:1.—Statement of Search and Lack of Record and Certificate of Legal Custody.

LexisNexis Forms FORM 75-CPLR 4521:2.—Clerk's Certificate of Search for Paper.

Texts:

2 New York Trial Guide (Matthew Bender) § 31.20; 3 New York Trial Guide (Matthew Bender) §§ 40.50, 40.52.

Hierarchy Notes:

NY CLS CPLR, Art. 45

Forms

Forms

Form 1

Certificate of Clerk That a Certain Paper is Not on File

[Nature of paper and

[Title of court and cause]

Index No. _____ [if assigned]

[Date]

I, _____, clerk of the County of _____, State of New York, do hereby certify that I have made diligent examination in my office for [state paper as, the notice of pendency of the above entitled action], and that such [notice of pendency] cannot be found.

Witness my hand and official seal the day and year aforesaid.

[Signature of clerk]

[Print signer's name below signature]

[Seal]

Form 2

Certificate of Clerk That a Certain Paper Is Not on File—Another Form

R 4521. Lack of record

Certificate

[Title of court and cause]

Index No. _____ [if assigned]

I, [title of office, as, Chief Deputy Clerk] of the County of _____ State of New York, do hereby certify that as part of my official duties I have legal custody of the official records of the [set forth nature of records] for the County of _____, that I have made diligent search of the said records of my office, and I have not found therein any record or entry of [set forth record for which search was made].

In Witness Whereof, I have hereunto set my hand and the seal of my office at _____, on _____, 20 _____.

[Signature, with name printed underneath]

[Title of officer]

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