

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2010

Order Promulgating Amendments to the Vermont Rules of Civil Procedure

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 80.1(b)(4) of the Vermont Rules of Civil Procedure be added to read as follows (new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

* * * * *

(b) **Complaint; Process; Certificate of Service.**

* * * * *

(4) Certificate of Service. All papers filed after the complaint shall be served on all parties who have appeared in the case. The party serving and filing any paper shall file a certificate that identifies the motion or other filing and shows when and how it was served on each party in accordance with Rule 5.

Reporter's Notes—2010 Amendment

Under Rule 5, parties to every civil action are required to serve all appearing parties with all pleadings, motions, notices, and other papers filed, but are not required to file a certificate of service to show that they have done so except under Rule 5(d) with respect to discovery items not filed with the court. Experience has shown that plaintiffs' lawyers (or their staff personnel) often do not remember to serve motions and other filings on defendants who have appeared but have been defaulted based on no valid defense. Because there is no requirement for filing a certificate of service, the court usually cannot tell whether or not a defendant was served with motions and other papers such as affidavits. Similarly, the court cannot tell whether pro se defendants have met their obligations to send copies of filings to plaintiffs' counsel.

The amendment requires the filing of a certificate of service in foreclosure cases, so that all parties are clearly required to fulfill the service requirement, and so that the court is able to determine from the case record whether or not parties have received notice of the filings of others.

2. That Rule 80.1(c) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

* * * * *

(c) **Summary Judgment; Default.** If within the time allowed under Rule 12(a) a party defendant files an answer supported by affidavits, disclosing facts alleged to constitute a defense to plaintiff's claim, plaintiff may within 10 days after service of the answer move for summary judgment. The complaint shall be treated as though supported by affidavit and the matter shall proceed as provided in Rule 56. The clerk shall enter a default, if within the time allowed under Rule 12(a) a party defendant fails to file an answer, plaintiff may move for a default judgment against that defendant in accordance with Rule 55(ab), against any defendant who fails to file such answer. Any motion filed under this section shall be accompanied by an affidavit as to the amount due. Prior to any entry of summary judgment or judgment by default, the court shall consider whether alternative dispute resolution shall be required

Reporter's Notes—2010 Amendment

Rule 80.1(c) requires that an answer be verified or supported by affidavit(s) and disclose facts alleged to constitute a defense, and provides that the matter proceed as a Rule 56 summary judgment motion if such an answer is filed, or for entry of default by the clerk if "such answer" is not filed. While the reason for such a rule is rational, in practice the rule as written creates inequities and promotes inconsistent results.

Nearly all defendants in the voluminous number of current foreclosure cases are not represented by attorneys. Since Emergency Rule 80.1(b)(3) went into effect on January 1, 2009, more defendants are filing notices of appearance or answers and seeking assistance, which is beneficial, but a problem of fairness often arises when a motion for summary judgment or default is filed by plaintiff. Pro se defendants rarely file answers that are verified or supported by affidavit. Often they acknowledge liability but want to do a workout, or sometimes they describe facts that would be a defense (e.g., they received no letter of acceleration, or they have already reached an agreement with plaintiff's workout department). Plaintiffs' attorneys often want the clerk to enter a default on the grounds that the answer is unverified, whether or not valid grounds for a defense are described.

First, the amendment takes the clerk out of the process altogether, making clear that it is the judge who responds with a ruling on a motion for default or summary judgment. Clerks should not be considered to have responsibility for deciding whether or not an answer sets forth facts that constitute a defense. That decision calls for legal analysis and should be made by the judge. Second, the requirement is not understood by pro se defendants, yet foreclosures are equitable proceedings in which people may lose their homes. Judges are put in the position of choosing whether to observe the requirement even when it does not appear to be consistent with equitable principles, or following the rule as written. The amendment seeks to standardize practices so that all litigants who are similarly situated receive fair and equal treatment; this outcome is best promoted by eliminating the rule mandating that an answer be verified. A judge can always give a defendant who presents a defense in an unverified statement additional time to file an affidavit and proceed on summary judgment, but elimination of the verification requirement in the rule is intended to promote equality of treatment. Otherwise Defendant A, who responds without verification, is subject to entry of default by the clerk or a judge, whereas Defendant B, who writes the same substantive response but has it notarized, is treated as a full party.

This leads to the second problem: the rule does not distinguish between the two types of “default”: failure to respond in any way to the summons and complaint, and failure to present a defense. In the second type, which is common (and even more common under Emergency Rule 80.1(b)(3)), a defendant may file an appearance and want an opportunity to receive all motions, affidavits, etc. and generally be a party to the case in order to follow its progress and check amounts requested in the judgment, but in many cases, both plaintiffs’ lawyers and clerks have treated that person as having “defaulted,” with the result that the defendant is not served with motions or affidavits by plaintiffs, and may not be sent copies of rulings and notices of hearings by the court. The judiciary is addressing the court staff training issue, but matters are clarified if the rule does not by its terms overlay the concept of failing to present a valid defense with the concept of failing to respond to a summons at all. The proposed amendment uses the same concept for default as applies to all other types of civil litigation.

Rules 80.1(c) and (d) are amended simultaneously to require the court in a mortgage foreclosure action to consider whether to require the use of alternative dispute resolution (ADR). Amended subdivision (c) applies prior to the entry of summary judgment or judgment by default. Subdivision (d) would apply before adjudication of claims raised by the defendant “necessary to formulate a judgment of foreclosure.” Several judges have begun on their own to consider ADR in foreclosure actions.

Preliminary evidence indicates that consideration of ADR is resulting in more workouts or other forms of settlement. The amended rule does not limit the court's decision whether to require ADR to the standard contained in V.R.C.P. 16.3(a)(3) or to the ADR methods specified in V.R.C.P. 16(c)(2)(A).

3. That Rule 80.1(d) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

(d) Adjudication of Claims. The court shall adjudicate all claims of party defendants necessary to establish a redemption schedule, or otherwise necessary to formulate a judgment of foreclosure, and consider whether alternative dispute resolution shall be required, prior to the entry of such judgment.

Reporter's Notes—2010 Amendment

Rule 80.1(d) is amended simultaneously with the amendment of Rule 80.1(c) to require the court to consider requiring ADR before adjudication of claims raised by the defendant "necessary to formulate a judgment of foreclosure." *See* Reporter's Notes to amendment of Rule 80.1(c).

4. That Rule 80.1(f) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

* * * * *

(f) Accounting; Attorney's Fees. ~~If default has been entered as provided in subdivision (c) and the parties have not agreed upon the sum due and included it in a form of judgment, the clerk, upon request of the plaintiff accompanied by an affidavit as to the amount due and upon six days' notice to all parties who have appeared,~~ shall proceed to take an accounting based on the adjudications under subdivision (d) on motions filed under subdivision (c), and find shall set forth the amount of principal liability, interest to date, and costs due. ~~Such accounting shall be made upon forms furnished by the state. If defendant is an infant or incompetent person, a plaintiff entitled to judgment by default shall proceed as provided in Rule 55(b)(2). If the entry is not by default~~ Alternatively, an accounting shall be taken at such time and in such manner as the court may order. Reasonable attorney's fees claimed by the plaintiff under the mortgage or other instrument evidencing indebtedness in an amount not exceeding two percent of the total of principal, interest, and costs due, or in a greater amount expressly agreed upon in the mortgage or other instrument, shall be allowed and included in the amount found due to the accounting without hearing, unless defendant objects, or plaintiff claims a higher fee in the demand for judgment. Upon such objection or claim, attorney's fees shall be set by the court after notice and hearing.

Reporter’s Notes—2010 Amendment

Rule 80.1(f) implies that unless a stipulated judgment is submitted that specifies an agreed-upon sum due, the accounting is prepared by the clerk. In practice, with all the provisions that are currently in use in lengthy note and mortgage forms, there is a multiplicity of items for which a mortgagor may be liable to a mortgage holder, but there are also expenses that a mortgage holder may incur with respect to a property that are discretionary, and for which mortgagor may have no contractual liability. It can be (and often is, in practice) inferred from the current rule that it is the clerk’s role to sort out what items included in the affidavit of amounts due (often taken off an institutional spreadsheet by a mortgage servicing company’s employee unfamiliar with the property or the documents) should or should not be included in the judgment, and in what amounts.

The amendment makes clear that the clerk’s role is the clerical one of mathematical computation, whereas it is the role of the judge to make decisions as to what items and amounts requested by plaintiff have been shown to be items for which the mortgagor is liable under the loan documents.

5. That Rule 80.1(g)(2) of the Vermont Rules of Civil Procedure be added to read as follows (new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

* * * * *

(g) Form of Judgment; Motions After Entry of Judgment.

* * * * *

(1) Form of Judgment. Plaintiff shall file and serve... . [remainder of present (g) unchanged].

(2) Motions After Entry of Judgment. Any party who seeks a modification of any term in a judgment pursuant to Rule 59(e) or 60(b) shall, at the time of filing a motion for modification, file a certificate showing when and how service of a copy of the judgment and the motion was made under Rule 5 on all defendants whose interest may be affected by the modification, whether or not a particular defendant had entered an appearance in the case prior to judgment. The court may, in its discretion, require service under Rule 4, after consideration of the nature of the modification requested.

Reporter’s Notes—2010 Amendment

Motions are sometimes filed after the entry of judgment seeking changes in terms of the judgment: e.g., to vacate a judgment and dismiss a complaint when the defendant refinanced with the plaintiff, or to stay the time for a judicial sale based on a bankruptcy filing or forbearance agreement, or to amend the amount of liability prior to a judicial sale in order to include in the redemption amount expenditures made after the accounting date, or to reinstate a foreclosure action that was previously dismissed without prejudice based on a workout plan that subsequently failed. Where a party defendant did not appear in the original case, plaintiffs frequently simply file such motions with the court without showing service of either the judgment or the motion on the defendant, apparently on the theory that, consistent with Rule 5(a), since there was an original default, there is no requirement of notice.

Sometimes, however, it is clear from the record that a non-appearing defendant has been in direct contact with the plaintiff despite not having entered an appearance in court—for example, when the plaintiff previously dismissed the case based on a workout agreement, which subsequently failed—or that the modification requested is significant in relation to what a defendant might have reasonably expected based on the original complaint.

The amendment is intended to assure, as principles of notice and due process require, that prior to the filing of such motions the plaintiff be required to serve a copy of the judgment and the motion on all parties to the original action who will be affected by the terms of any proposed modification. The final sentence is consistent with the provision of Rule 5(a) that “pleadings asserting new or additional claims for relief against them shall be served upon [parties in default for failure to appear] in the manner provided for service of summons in Rule 4.”

6. That these rules, as adopted or amended, are prescribed and promulgated to become effective on _____, 2010. The Reporter's Notes are advisory.

7. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2010.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice