VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 21-CV-02643

Mountain View Estates Cluster I, Inc. v. Estate of Debra Michelle

ENTRY REGARDING MOTION

Title: Motion to Set Aside Judgment (Motion: 5)
Filer: Thomas P. Aicher
Filed Date: June 21, 2023

This is a motion by the Estate of Debra Michelle to set aside a March 2022 judgment on the grounds that the now-deceased former defendant, Ms. Michelle, could not be subject to default pursuant to Rule 55(c).[1] That rule provides in relevant part that (1) a court may not enter a default judgment against an incompetent person unless that person is represented by a guardian, conservator or other representative, and (2) that when filing such a motion, the moving party "must state in an affidavit whether . . . [he/she] has any knowledge as to the competency of the opposing party." Attorney Steven Kantor represents Plaintiff; Attorney Thomas Aicher present the Estate.

Discussion

A motion for default judgment was filed in this case on March 21, 2022. The affidavit submitted with the motion stated: "To the best of my knowledge, Defendant is not an infant or an incompetent person." Affidavit of Scott Michaud, ¶ 3 (Feb. 4, 2022). However, earlier filings in the case made clear that Plaintiff and its counsel were both

[1] The Estate was recently substituted for Ms. Michelle, who died after issuance of the default judgment.

aware that Ms. Michelle had serious mental health issues. For example, the complaint states that on one occasion the police "sent two community mental health outreach workers" to speak to Michelle, and that counsel had himself reached out to the "Vermont Commissioner of Mental Health and the Vermont Attorney General's office to inform them of the Defendant's bizarre behavior, . . . and to request that the State arrange to provide Defendant with appropriate mental health services" and, on another occasion, reported to them that she "appeared to be detached from reality and in serious need of inpatient mental health treatment." Complaint ¶¶ 10(c), 10(e), 13. The complaint also states that Michelle "was found in serious mental deterioration in her condo bedroom, lying on the bed, eyes closed, screaming the words 'SPELL BLOW' over and over and over again," and that she was then admitted to the emergency room at the hospital. Id. ¶ 11.

Plaintiff argues that despite all this, it had no obligation to raise the issue of competency when it filed for default, because it was not aware of any preexisting court determination of incompetency. This is highly disturbing to the court. Lawyers routinely advise the court when there is any *hint* of a mental health issue, even when the evidence is as little as a note that service was made at a nursing home known to serve dementia patients. The court cannot agree that the obligation to raise the issue arises only if the plaintiff or its counsel knows the defendant has been formally found to be incompetent by a judge. The Reporter's Notes make this clear: ""the party seeking a default judgment . . . must disclose *any information in that party's possession on the issue of competency*." V.R.C.P. 55, Reporter's Notes—2020 Amendment (emphasis added). The

purpose of the rule is obviously to make sure that someone who may not be able to understand the proceedings or represent themselves in a legal proceeding due to mental health issues does not have a judgment issued against them without the court assessing the situation to determine whether the defendant is competent. While the rules are unclear as to the standard for incompetency, and whether it is the same as in criminal proceedings, that is an issue for the judge to resolve, not counsel.

Just as in criminal court, where any party raises any concern that party *might* be incompetent, the court must assess the question of competency before proceeding with the case. *See, e.g.*, Betts v. Keogh, Docket No. 1034-12-18 Cncv (Chittenden Superior, Sept. 13, 2019) (Toor, J.); Clark v. Delpha, Docket No. 191-3-13 Rdcv (Rutland Superior, Jan. 24, 2017)(Toor, J.)(copies attached). Rule 17 provides that if the court then finds a lack of competency, the court "shall appoint a guardian ad litem . . . or shall make such other order as it deems proper for the protection of the . . . incompetent person." V.R.C.P. 17(b). While the judge who granted the default motion arguably should have been alerted to the issue by the earlier filings in the case, judges cannot be expected to review the entire file when ruling on each motion. The duty under Rule 55 was counsel's to alert the judge of the issue at the time of filing the motion. The motion should have disclosed the possibility of incompetency.[2]

Equally disturbing, the affidavit of the administrator of the Estate asserts that Attorney Kantor knew within days of filing the default motion that Ms. Michelle had

[2] The better practice, which other attorneys have used, is to ask the court to determine competency early in the case.

been hospitalized due to her mental health issues, that she was unlikely to be released, and that the hospital was filing a petition for involuntary treatment. She concludes:

> My sister was known by Plaintiff and Plaintiff's counsel to have been in psychiatric distress and hospitalized for the entirety of the thirty (30) day response window for Plaintiff's Motion for Default Judgment. Furthermore, both Plaintiff and Plaintiff's counsel were fully aware that my sister was not going to be released from Rutland Regional Medical Center as of April 12, 2022 and that there was no way for her to respond to the Motion for Default Judgment against her.

Affidavit of Kimberly Smith, ¶¶ 22-30. Ms. Smith asserts that despite direct conversations with him on these issues, at no time did Attorney Kantor advise her of the pending default motion. Attorney Kantor does not dispute these assertions, but suggests that telling Ms. Smith's lawyers of the judgment after it was issued somehow excuses this. The court does not agree.

Finally, the undisputed evidence submitted with the motion for relief from judgment includes an April 25, 2022, finding of the undersigned, sitting in the Rutland court at the time, that Ms. Michelle required involuntary hospitalization. Ex. K to Smith Affidavit. While Plaintiff is correct that this does not itself constitute a determination of incompetency for all purposes—see 18 V.S.A. § 7706—it is about as strong evidence as one could have that the issue needed to be assessed by the court before a default judgment can issue. Whether Plaintiff and counsel knew of that ruling at the time is not the issue. The description of her condition in that ruling makes clear that at the time the default motion was under advisement and ruled upon, Ms. Michelle almost certainly was not competent.

Plaintiff argues that this motion nonetheless should be denied because (1) it fails to contest the merits, and (2) it comes more than one year after the judgment. *See* LaFrance Architect v. Point Five Dev. S. Burlington, LLC, 2013 VT 115, ¶ 20, 195 Vt. 543; V.R.C.P. 60(b). On the first point, the reply memorandum notes that the Estate wishes to contest the amount of damages, as well as the appropriateness of the attorney's fees. As to the second point, Rule 60 permits the court to set aside a judgment when the motion is filed more than one year later for "fraud upon the court." V.R.C.P. 60(b). The court considers the failure to disclose that there was a serious potential issue regarding competency to meet that definition. *Accord,* E. Fin. Corp. v. JSC Alchevsk Iron & Steel Works, 258 F.R.D. 76, 88-89 (S.D.N.Y. 2008) (finding fraud upon the court where omission in default motion "caused this Court not to perform in the usual manner its impartial task of adjudging cases.").

Order

The default judgment should not have been issued here without an assessment of the then-defendant's competency. It is therefore vacated, and a status conference shall be scheduled to discuss next steps.

Electronically signed on August 4, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge