VERMONT SUPERIOR COURT
RUTLAND UNIT
CIVIL DIVISION

USAA CASUALTY INSURANCE CO., Plaintiff v. JESSE EUBER, Defendant	FILED NOV 18 2016 VERMONT SUPERIOR COURT RUTLAND	Docket No. 181-4-16 Rdcv

RULING ON MOTION FOR DEFAULT JUDGMENT

This is a subrogation action. Plaintiff, USAA Casualty Insurance Company, comes to this court, for the third time, asking for default judgment against Defendant, Jesse Euber. USAA alleges that it paid out a policy to its insured, Carolyn E. Palmer, because of a traffic collision allegedly caused by Euber's negligence. USAA, as Palmer's insurer, has stepped into her place as plaintiff to recover the amount paid under the policy. Euber was served but failed to file an answer. USAA moved for default judgment twice, and this court (Harris, J.) dismissed each of those motions for failure to provide sufficient evidence to support the claim of liability. USAA supplemented its pleadings, and moves for default judgment again. USAA is represented by Ilerdon S. Mayer, Esq.

Discussion

Under our rules, the clerk is to "enter the party's default" when a defendant fails to answer a complaint. V.R.C.P. 55(a).[1] The judge must then rule on a motion for default judgment. Id. 55(b). The judgment is not to be issued "until the filing of an affidavit made on personal knowledge and setting forth facts as to liability and damages." Id. 55(b)(1). In support of its motion for default

[1] In practice, this is not always done, and the rule may be outmoded in this regard. That, however, is an issue for another day.

judgment, USAA brings an affidavit by Scott Southers, a USAA agent, swearing to its payment to Palmer, and (in one of the earlier motions) a police report detailing what a trooper learned of the accident after the fact. Were this the evidence presented at trial, it would be insufficient. Southers' affidavit establishes only that USAA paid out money to Palmer. The police report is hearsay and could not be used to establish liability or damages. Vt. R. Evid. 803(8)(B)(i). While defendant's alleged admission of liability to the officer would be admissible at trial as a party admission if the officer were to testify to it, the officer would still need to testify to it to get it into evidence.

The issue before the court is what level of proof is required to support a default judgment. Certainly if Euber had answered and challenged the allegations that she was negligent in the underlying collision, USAA would have to present direct evidence of her negligence, such as through testimony of a witness to the collision, or the police officer. *See* 73 Am. Jur. 2d Subrogation § 141 ("If the alleged facts, on which the right of subrogation depends, are put in issue, they must be established by proof *as in any other civil action.*") (citing Zuellig v. Hermerlie, 53 N.E. 447 (Ohio 1899); Cooper v. Sagert, 223 P. 943 (Or. 1924)) (emphasis added). In addition, there would have to be evidence as to the damages for which the insurance payment was made. The question here is whether an affidavit based upon hearsay with regard to the underlying negligence, and a mere allegation as to the amount of the insurance payment, is sufficient when the defendant does not put the facts in issue.

The total proof required to support a default judgment varies by jurisdiction. Some jurisdictions assume, from the defendant's failure to appear, that the defendant has admitted liability, and thus require only proof of damages.[2] *See, e.g.*, Anderson v. Gallman, 99 A.2d 560,

[2] Presumably, the court nonetheless has discretion to require more evidence if there is something untoward or suspicious about the allegations, even when the defendant has not challenged them. A court surely cannot be required to grant a money judgment for a claim that little green men came out of a spaceship and attacked the plaintiff, or that

561 (D.C. 1953) ("Failure to answer admitted the truth of the allegations of the complaint except the amount of damages claimed.");Pruitt v. Taylor, 100 S.E.2d 841, 843–44 (N.C. 1957) (holding that if defendant "remains silent and files no answer, it is by law a confession of liability on the cause of action asserted in the complaint"); Chappel v. Smith, 156 S.E.2d 572 (Va. 1967) (holding that a defendant in default "does not concede the amount of damages on an unliquidated claim"). Others require at least some proof that would establish the defendant's liability. *See, e.g.*, Scott v. Scott, 462 A.2d 614, 617 (N.J. Super. Ct. 1983) ("Although the entry of a default precludes defendant from offering testimony in defense, it does not obviate the obligation of plaintiff to furnish proof on the issues."); Thompson v. Goetz, 455 N.W.2d 580, 583 (N.D. 1990) ("[T]he trial court erred, as a matter of law, in granting default judgment on the question of liability without requiring the production of any supporting evidence."); Conti v. Geffroy, 486 A.2d 579, 581 (R.I. 1985) ("Since the affidavit in proof of claim was insufficient to support a judgment by default, the entry thereof by the District Court was erroneous.").

The former appears to be the majority view. "Generally, upon default all the material allegations of the plaintiff's complaint are to be taken as true, so that a judgment by default can be properly rendered without proof of the plaintiff's claim, except as may be required to establish damages." 46 Am. Jur. 2d Judgments § 292 (Supp. Nov. 2016) (footnotes omitted)[3]; *see also* Anderson, 99 A.2d at 561 ("[I]t has become a general rule that where the damages sought are unliquidated a default by the defendant admits plaintiff's right to recover but does not admit the amount of damages claimed."); Heimbach v. Mueller, 550 A. 2d 993, 995 (N. J. App. Div. 1988)

Beyonce promised her multimillion dollar fortune to the plaintiff one night in a bar, merely because the defendant did not respond to the complaint.

[3] This commentary adds that "[a]ccording to other authority, however, in order to obtain a default judgment, a plaintiff must establish the elements of a prima facie case with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant." Id.

(describing this as the "majority rule"); Annotation, Necessity of Taking Proof as to Liability Against Defaulting Defendant, 8 A.L.R.3d 1070 (1966) ("The great weight of authority is to the effect that such proof is unnecessary, since the default is said to admit the truth of the allegations of the complaint.").

As early as 1844, our Supreme Court appears to have adopted the majority approach. *See* Webb v. Webb, 16 Vt. 636, 638–39 (1844). In Webb, the Court described the rule as follows: "Where a defendant suffers judgment to go by default, he admits the cause of action . . . the defendant only admits *something* to be due; and, as the demand is uncertain, *the plaintiff must prove the debt before the jury.*" Id. at 639 (emphasis in original) (quoting Greene v. Hearne, 3 T.R. 301). The Court seemingly reaffirmed the common law rule in recent years, albeit only in dicta. Dubaniewicz v. Houman, 2006 VT 99, ¶ 22, 180 Vt. 367 (quoting Webb's statement that "the defendant only admits *something* to be due," and saying that "the plaintiff must still prove to the jury the amount of damages") (internal quotation marks omitted).

However, despite this common law principle that the facts alleged as to liability are admitted by a defaulting defendant, one must also look at rules of procedure. *See* 8 A.L.R.3d 1070 ("The issue of whether it is necessary for the plaintiff to produce proof of the defendant's liability in order to obtain a judgment following a default by the defendant is a matter generally controlled by statutes and rules of civil procedure."). Vermont's rules of procedure were amended in 2009 to require that an affidavit be provided to support the allegations of the complaint. The affidavit must be "made on personal knowledge and set[] forth facts *as to liability and damages*." V.R.C.P. 55(b)(1) (emphasis added). The Reporter's Notes explain: "The purposes of the amendment are to give greater assurance that the party is entitled to a default judgment and to reduce the need to set aside default judgments. . . ." Id., Reporter's Notes – 2009 Amendment. Thus, the defaulting

defendant loses the right to contest liability, but the court must still have some evidentiary basis for awarding the judgment.

The court sees nothing to suggest that evidence inadmissible at trial, such as the hearsay presented here, is sufficient to support a default judgment under Rule 55(b)(1). Thus, Plaintiff must submit admissible evidence (such as an affidavit of an eyewitness or the police officer) to support its claim of Defendant's negligence, and evidence (such as an affidavit from the insured and medical bills or other invoices) to support the amount of damages claimed to have resulted from the collision. Alternatively, if Plaintiff believes there is authority to support the proposition that the current affidavit is adequate, it may submit a memorandum on the issue of whether an affidavit containing evidence of liability that would be inadmissible at trial—such as the hearsay presented here—is sufficient to satisfy Rule 55.

ORDER

USAA may submit a memorandum of law on or before December 15 on the issue of the evidence required to support a claim for liability in a default judgment, as discussed above. Otherwise, it must submit by December 30 adequate proof of Defendant's negligence or the case will be dismissed with prejudice for lack of prosecution.

Dated at Rutland this 17th day of November, 2016

Helen M. Toor
Superior Court Judge