

STATE OF VERMONT
VERMONT SUPREME COURT
_____TERM, 2019

Order Amending Rules 55 and 80.1 of the Vermont Rules of Civil Procedure

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

1. That Rule 55 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 55. DEFAULT

(a) **Entry Motion for Default Judgment.** When a party against whom a judgment for affirmative relief is sought by complaint, cross-claim, counterclaim, or other pleading has failed to plead or otherwise defend, ~~as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default~~ the party seeking the affirmative relief may file a motion for a default judgment.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) ~~*Application; Affidavits Required.*~~ The party entitled to a judgment by default shall apply to the court therefor. No judgment by default shall be entered against a party who has not appeared in the action until the filing of an affidavit made on personal knowledge and setting forth facts as to liability and damages. No judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, conservator, or other such representative who has appeared therein. The moving party must state in an affidavit whether the opposing party is over 18 years of age, and whether the moving party has any knowledge as to the competency of the opposing party.

(2) ~~*By the Clerk When Claim Is for a Sum Certain and Defendant Has Not Appeared.*~~ If the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, ~~the clerk, upon order of the Presiding Judge issued without notice or hearing and upon affidavit of the amount due, the judge may shall~~ enter judgment for that amount and costs against the defendant, if the defendant has ~~been defaulted for failure~~ failed to appear and is not an infant or incompetent person.

(3) ~~*By the Court When Defendant Has Not Appeared and Claim Not for a Sum Certain, or by the Court for Other Reasons.*~~ If the defendant has not appeared in the action and the claim is not for a sum certain, or if it is otherwise necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(4) ~~By the Court~~ *When the Defendant Has Appeared.* If the party against whom judgment by default is sought has appeared in the action judgment may be entered after hearing, upon at least 5 7 days' written notice served by the clerk.

(5) *Affidavits Required by Servicemembers Civil Relief Act.* Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit as required by section 201(b)(1) of the Servicemembers Civil Relief Act, 50 U.S.C. app. 521, stating whether or not the defendant is in military service and showing necessary facts to support the affidavit or, if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. If it appears that the defendant is in military service, the court shall take appropriate action as provided in that Act.

(6) *Failure to Appear at Trial.* In those cases in which a defendant has appeared in the action but has failed to appear at a duly noticed trial on the merits, the plaintiff may either waive trial and move for a default judgment or proceed to trial. If plaintiff obtains judgment based on evidence submitted at trial, that judgment shall be deemed a default judgment solely for the purposes of Rule 55(c), Rule 62(b) and Vermont Rule of Appellate Procedure 4. If plaintiff chooses to file a motion for default judgment, a hearing shall be scheduled on the motion pursuant to paragraph (4).

(7) *Credit Card Debt.* In actions based on a credit card debt, the motion for a default judgment shall include a copy of the contract or other documentary evidence of the original debt, which must contain a signature of the defendant. If no such signed writing evidencing the original debt ever existed, then a copy of the last statement generated when the credit card was actually used for purchase or other competent evidence of the existence of the debt must be included. The motion must also contain a copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain at least the last four digits of the original account number of the debt purchased or other identifying information uniquely associated with the account and must show the debtor's name associated with that account number.

(c) **Setting Aside ~~Default or~~ a Default Judgment.** The court may set aside ~~an entry of default~~ its order granting a motion for a default judgment for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) **Plaintiffs, Counterclaimants, Cross-Claimants.** The provisions of this rule apply whether the party ~~entitled to~~ seeking the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment Against the State.** No judgment by default shall be entered against the State of Vermont or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Reporter's Notes—2019 Amendment

Rule 55 is amended to reflect the needs of current practice.

The requirement of subdivision (a) for a separate entry of default by the clerk is eliminated in favor of a provision allowing the party seeking relief to file a motion for default judgment to initiate the process. The provision for entry of default as originally adopted in 1971 from Federal Rule 55(a) was intended to facilitate the provision of what was then Rule 55(b)(1) requiring the clerk on the plaintiff's request and affidavit of the amount due to enter judgment when the amount was, or could be computed to be, a sum certain. Federal Rule 55(a) and (b)(1) retain those provisions with minor modifications. Vermont Rule 55(b), however, was substantially modified in 1972 to its present form requiring, in new paragraph (b)(1), a formal application for any default judgment and providing, in paragraph (b)(2), for the clerk to enter judgment for a sum certain "upon order of the Presiding Judge issued without notice and hearing." The practice under former paragraph (b)(1) was deemed to impose "an undesirable responsibility upon clerks who may lack the necessary legal or fiscal training to carry it out." Reporter's Notes to 1972 Amendment. Thus, the formal entry of default is both unnecessary and superfluous.

Rule 55(a) has been further amended to follow the federal rule by the deletion of "as provided by these rules," so that an indication of an intent to defend, even if not in compliance with the rules, does not trigger the rule.

The first sentence of Rule 55(b)(1) requiring an application to the court for a default judgment is deleted because it is superfluous in light of the provision for a motion added to subdivision (a). The sentence added to paragraph (1) makes clear that the party seeking a default judgment has the burden on the issue of minority and must disclose any information in that party's possession on the issue of competency.

Rule 55(b)(2) is amended to eliminate the formal reference to entry of judgment by the clerk—language carried over from the original 1971 text of the rule. The time for notice in Rule 55(b)(4) has been changed from five to seven days to allow for increasing slowness in the mail. Rule 55(b)(6) has been amended to make clear that there must be a motion and a hearing under paragraph (b)(4). Other minor verbal amendments are made in Rules 55(b)(3)-(7) for consistency with the preceding amendments.

Rule 55(c) has been revised for consistency with the amendment of Rule 55(a). The amendment preserves the distinction presently noted in Vermont cases between setting aside the Judge's ruling on a motion for default and setting aside a final judgment of default.

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 a verified answer or answer supported by affidavits, disclosing facts alleged to constitute a defense to plaintiff's claim, plaintiff may within 14 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~~ The plaintiff may file a motion for default judgment, in accordance with Rule 55(a), against any defendant who fails to file such answer.

Reporter's Notes—2019 Amendment

Rule 80.1(c) is amended for consistency with the simultaneous amendment of Rule 55(a). See Reporter's Notes to that amendment.

3. That these rules as amended are prescribed and promulgated effective _____, 2019. The Reporter's Notes are advisory.

4. 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 _____, 2019.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice