

Dispositive Motions: A Collection Case Example

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When is it appropriate to issue judgment on the merits without a trial?

- Default - Rule 55
- Dismissal - Rule 12(b)(6)
- Summary Judgment - Rule 56



Karma Debt Collection v. Evans



I Saw that.
~Karma

Default
Judgment:
Rule 55

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NC SUPERIOR COURT JUDGES' BENCHBOOK
School of Government, The University of North Carolina at Chapel Hill, Wiley Hall 303A

Default Judgment (Rule of Civil Procedure 55)
Go to Default Judgment (Rule of Civil Procedure 55)

NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK

DEFAULT JUDGMENT (RULE OF CIVIL PROCEDURE 55)
Ann M. Anderson, School of Government (May 2014)

I. **Introduction.** After being properly served with the complaint and summons in a civil action, the defendant has a certain amount of time—typically thirty days—in which to respond or request an extension. N.C. Civ. P. 55(a). If the defendant fails to do so, the plaintiff may obtain judgment for “affirmative relief” against the defendant by default pursuant to a two-step process requiring (1) the entry of default and (2) the subsequent entry of a default judgment. *Mohrwalke v. Williams*, 155 N.C. App. 426, 428 (2002). Rule of Civil Procedure 55 governs this two-step process. See N.C. Civ. P. 55 (appendix A) (Rule 55). Default applies not only to initial claims, but also to counterclaims, cross-claims, and third party claims. Rule 55(b). The law heavily favors resolution of disputes on their merits, however, and, apart from technical default, as the requirements of Rule 55 must be carefully followed. In certain circumstances, defendants may obtain relief from entry of default and/or default judgment at the trial court level, as discussed below.

II. **Entry of Default.** The first step in obtaining default judgment is the entry of default. Entry of default is an interlocutory motion in the record made on plaintiff's motion. To obtain a party against whom a judgment for affirmative relief is sought has failed to

Consumer Protections in Collection Cases

1. Servicemembers Civil Relief Act – 50 USC App. 501 *et seq.*
2. Pleading/attachment requirements – GS 58-70-145; 58-70-150
3. Default prerequisites for “debt buyers” - GS 58-70-155 (summary judgment, too!)
4. Attorney fee prerequisites for debt buyers- GS 6-21.2



SM Civil Relief Act

50 USC App. 501 *et seq.*



Before any default may be taken, SCRA requires plaintiff to sign and file an affidavit with the court stating that the defendant is not in military service. (Should attach DOD printout showing no military status.)



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Pleading/Attachment Requirements

GS 58-70-145:

- Must allege that plaintiff is licensed as collection agent and contain name and number of license and issuer



58-70-150:

- Must attach (1) contract for original debt and docs generated when card used; and (2) docs establishing plaintiff now owns the debt (showing unbroken chain).



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Default/Summary Judgment Prerequisite

GS 58-70-155: *To prove “amount and nature of the debt”, must file authenticated records of:*

- Original account number
- Original creditor
- Original debt amount
- Itemization of charges/fees claimed
- Charge-off balance or calculation of balance
- Itemization of additions
- Date of last payment
- Amount of interest claimed and basis for it



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<http://sogpubs.unc.edu/electronicversions/pdfs/ajob1102.pdf>

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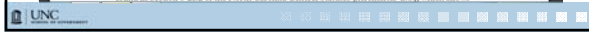
Attorney Fee Provisions in North Carolina Contracts

Ann M. Anderson

The long-standing rule in North Carolina is that, unless a statute provides otherwise, the parties to litigation are responsible for their own attorney fees. "It is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879." This rule applies even when a party has agreed in a contract to reimburse another party's attorney fees incurred in an enforcement action.

Even in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority thereto.

A key statutory exception to the rule against enforcing contractual attorney fee provisions is found in Section 6-21.2 of the North Carolina General Statutes (hereinafter GS), which allows



Attorney Fee Prerequisites

GS 6-21.2: To collect the fee allowed in the card agreement, must file:

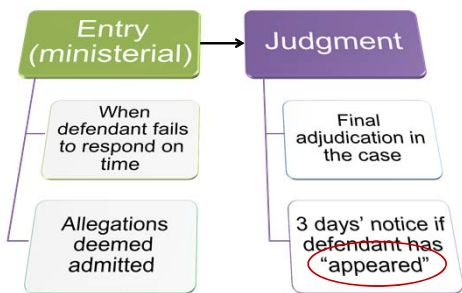
- a. contract for original debt and docs generated when card used; and
- b. Copies of doc showing proof of ownership of debt (must show unbroken assignment chain)
 - Each assignment must show original account # and debtor's name associated with the #



Karma Debt Collection v. Evans Exercise 1



Default



"Appearance"

- Some presentation or submission to the court
 - Rule 12 motion
 - Letter to the court
 - Letter to opposing counsel *copied* to the court (Roland, 32 N.C. App. 288 (1977))
- Negotiation or settlement meeting or correspondence with opposing counsel/party about the action. (Stanaland, 89 N.C. App. 111 (1988))



Setting Aside Default

Entry	Judgment
• “Good cause shown”	• Rule 60(b)

Setting Aside Default *Judgment*

3 most common bases:

60(b)(1) “Excusable neglect” <ul style="list-style-type: none">• Excusable neglect• Meritorious defense (Motion must be made within 1 year.)	60(b)(4) Void judgment (Lack of notice, court lacked authority, no proof of personal jurisdiction)	60(b)(6) “Any other reason...” <ul style="list-style-type: none">• Extraordinary circumstances• Ends of justice require it• Meritorious defense
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“Excusable neglect”

“What, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to the case.”

“Excusable neglect”

- Not excusable:
 - Failure to respond 2 months after obtaining extension. *Monaghan*
 - Failure to receive notice because failed to keep current registered agent on file with Secretary of State. *Partridge; Anderson*
 - Neglecting to respond in hopes that attorney that formerly represented defendant would respond. *Galbrunner*
 - Relying on insurance company or attorney to handle the complaint or failing to obtain attorney when there was ample time. *Atwater Motor; Hayes* (“imputation rule”)
- Excusable:
 - Defendant “deficient in his usual mental processes, disabled, and depressed due to prescription drugs preventing a “sound mind.” *Soderquist*



Setting Aside Default



“Good cause shown”

- Abuse of discretion standard
- Much looser than “excusable neglect” and does *not* look at merits of the case
- General guidance:

“(1) was defendant diligent in pursuit of th[e] matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action?”



“Good cause shown”

- Good cause *not* shown:
 - D’s general correspondence with his counsel did not show “intent to address the matter.” *Lewis*
 - D company received papers but took no action because D had never been sued before. *Old Salem*
 - D gave papers to insurer but never inquired further. *Cabe, Howell*
 - D cited ignorance of legal process and relied on co-defendant husband. *Cannon*
- Good cause shown:
 - 97-year old nursing home resident who had given POA to another defendant. *Boykin*
 - D quickly referred complaint to carrier, but lost in mail; default obtained quickly; motion to set aside filed quickly. *Atkins*
 - Delay caused entirely by carrier/counsel and did not prejudice P. *Moore, Vares*



Rules 12(b)(6) & Summary Judgment (56)



Karma Debt Collection v. Evans Exercise 2



12(b)(6) and Summary Judgment Comparison

Motion to Dismiss for Failure to State a Claim (12(b)(6))

- Only tests whether complaint states a claim "upon which relief can be granted"
- Assumes allegations of complaint are true; *does not look beyond complaint (and incorporated attachments)*

Motion for Summary Judgment (56)

- Looks to *all the materials* before the court to determine if there "is any issue of material fact." (Will there be anything for a jury to decide?)
- Examines the evidence in light most favorable to non-movant



12(b)(6)

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12(b)(6)

Motion to Dismiss for Failure to State a Claim (12(b)(6))

Allegations:

- insufficient as matter of law (usually fraud, Ch. 75)
- Allege a claim not recognized in NC law
- Defeat the claim themselves
- Show D has immunity
- Show SOL has run
- Show lack of standing/real party in interest



12(b)(6)

Motion to Dismiss for Failure to State a Claim (12(b)(6))

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Narrow exception: Court may consider an unattached copy of an "instrument [contract] upon which plaintiffs are suing" if referenced in the complaint. -Coley, 41 N.C. App. 121 (1979); Oberlin, 147 N.C. App. 52 (2001).

Karma Debt Collection v. Evans Exercise 3



12(b)(6) and Summary Judgment Comparison

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Summary Judgment

“[A]dverse party may not rest upon the mere allegations or denials of his pleading, but...” must set forth specific facts showing that there is a genuine issue for trial.”

56(e)



Summary Judgment



Adverse party allowed to serve opposing affidavits *no later than 2 days before hearing*. Rule 56(c).



Summary Judgment

If party’s affidavit shows he cannot “present by affidavit facts essential to justify his opposition”, the court may:

- *order a continuance* to permit affidavits, depositions or discovery; or
- Make “any other order as is just.”

-Rule 56(f)



Summary Judgment

- If affidavits served out of time, court may:
 - Continue hearing for reasonable time to allow a response;
 - Proceed with the matter w/out considering affidavits; *or*
 - “Take any other action as the ends of justice require.” 56(c)



Rule 43(e) Evidence on Motions

“[T]he court may hear [a] matter on affidavits..., but the court may direct that the matter be heard partly on oral testimony or depositions.”



- In summary judgment hearings:*
- Oral testimony permitted, but in court's discretion.
 - Permitted, but shouldn't be *main* source of evidence regarding merits of case.
 - Intended for efficiency and administration of justice rather than as a substitute for general practice of using affidavits.