CHAPTER 55
DEFAULT
Text of Rule

2-55 North Carolina Civil Procedure Rule 55

Rule 55 Default

(a) Entry. – When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

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

(1) *By the Clerk*. – When 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 request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) *By the Judge*. –

a. In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish

the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as the judge deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

b. A motion for judgment by default may be decided by the court without a hearing if:

1. The motion specifically provides that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion; and
2. The party against whom judgment is sought fails to serve the response in accordance with this sub-subdivision.

(c) Service by Publication. – When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) Setting Aside Default. – For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) Plaintiffs, Counterclaimants, Cross-claimants. – The provisions of this rule apply whether the party entitled to 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).

(f) Judgment against the State of North Carolina. – No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence.

CHAPTER 60
RELIEF FROM JUDGMENT OR ORDER
Text of Rule

2-60 North Carolina Civil Procedure Rule 60

Rule 60 Relief From Judgment or Order

(a) Clerical Mistakes. – Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. – On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) Judgments Rendered by the Clerk. – The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law.

CHAPTER 12
DEFENSES AND OBJECTIONS
WHEN AND HOW PRESENTED -- BY PLEADING -- OR MOTION --
MOTION FOR JUDGMENT ON PLEADING
Text of Rule

1-12 North Carolina Civil Procedure Rule 12

Rule 12 Defenses and Objections –

(a) (1) When Presented. – A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits;

b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

(2) Cases Removed to United States District Court. – Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded. If it shall be finally determined in the United States courts that the action or proceeding was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the action or proceeding to the State court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the proceedings to remove not been instituted, shall have 30 days after the filing in such State court of a certified copy of the order of remand to file motions and to answer or otherwise plead.

(b) How Presented. – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue or division,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. Obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. – After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. – The defenses specifically enumerated (1) through (7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for more definite statement. – If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the judge is not obeyed within 20 days after notice of the order or within such other time as the judge may fix, the judge may strike the pleading to which the motion was directed or make such orders as he deems just.

(f) Motion to strike. – Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses in motion. – A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses. –

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

CHAPTER 56
SUMMARY JUDGMENT
Text of Rule

2-56 North Carolina Civil Procedure Rule 56

Rule 56 Summary Judgment

(a) *For Claimant*. – A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party*. – A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon*. – The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case Not Fully Adjudicated on Motion*. – If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in

the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of Affidavits; Further Testimony; Defense Required*. – Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits Are Unavailable*. – Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith*. – Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees.

CHAPTER 1A
RULES OF CIVIL PROCEDURE
§ 1A-1. RULES OF CIVIL PROCEDURE
ARTICLE 6. TRIALS

N.C.G.S. § 1A-1, RULE 43 (2013)

Rule 43 Evidence

(a) *Form*. – In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.

(b) *Examination of hostile witnesses and adverse parties*. – A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

(c) *Record of excluded evidence*. – In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.

(d) *Affirmation in lieu of oath*. – Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) *Evidence on motions*. – When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

CHAPTER 1A
RULES OF CIVIL PROCEDURE
§ 1A-1. RULES OF CIVIL PROCEDURE
ARTICLE 3. PLEADINGS AND MOTIONS

N.C.G.S. § 1A-1, RULE 15 (2013)

Rule 15 Amended and Supplemental Pleadings

(a) *Amendments*. – A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence*. – When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments*. – A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

(d) *Supplemental pleadings*. – Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

CHAPTER 6. LIABILITY FOR COURT COSTS
ARTICLE 3. CIVIL ACTIONS AND PROCEEDINGS

N.C.G.S. § 6-21.2 (2013)

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

(1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.

(4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

(5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party

sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

(6) If the attorneys' fees are for services rendered to an assignee or a debt buyer, as defined in G.S. 58-70-15, all of the following materials setting forth a party's obligation to pay attorneys' fees shall be provided to the court before a court may enforce those provisions:

a. A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.

b. 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 the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by G.S. 25-9-609, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the outstanding balance.

CHAPTER 24. INTEREST
ARTICLE 1. GENERAL PROVISIONS

N.C. G.S. § 24-5 (2013)

§ 24-5 Interest on judgments

(a) *Actions on Contracts*. – In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate. For purposes of this section, "after judgment" means after the date of entry of judgment under G.S. 1A-1, Rule 58.

(a1) *Actions on Penal Bonds*. – In an action on a penal bond, the amount of the judgment, except the costs, shall bear interest at the legal rate from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied.

(b) *Other Actions*. – In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

CHAPTER 8. EVIDENCE
ARTICLE 4. OTHER WRITINGS IN EVIDENCE

N.C.G.S. § 8-45 (2013)

§ 8-45 Itemized and Verified Accounts

In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a **verified itemized statement** of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Legal and Legislative Services Division
Peter E. Powell
Legal and Legislative Administrator

PO Box 2448, Raleigh, NC 27602
T 919 890-1300 F 919 890-1914

MEMORANDUM

TO: Senior Resident Superior Court Judges
Superior Court Judges
Chief District Court Judges
District Court Judges
Clerks of Superior Court

FROM: Pamela Weaver Best
Legal and Legislative Services

DATE: November 28, 2011

RE: **Aid in Execution and Ex parte Orders—NC Supplemental Proceedings**[1]

Issue Presented: Whether an order "in aid of execution" can be heard or issued ex parte.

Response: There is no authority to hear a motion on or issue an order to seize property of the debtor that is being held by another ex parte.

Facts Presented: Attorney for judgment creditor (creditor) files a motion and presents a proposed order requesting aid in execution. The attorney does this ex parte and the judgment debtor (debtor) has no notice of the motion or the hearing. The attorney explains this must be done ex parte to prevent the debtor from disposing of the property.

Law and Analysis: Supplemental Proceedings: Under North Carolina law "aid in execution" proceedings are called supplemental proceedings.[2] The applicable statutes are found in Supplemental Proceedings, Art. 31, Chapter 1 of the North Carolina General Statutes.

I. Authority to Institute Supplemental Proceeding
   a. A supplemental proceeding is an action brought after a judgment is entered, execution has been issued to the Sheriff, and the execution is wholly or partially unsatisfied. Any time after the return of the execution and within three years from the time of issuing the execution the creditor:

[1] Much of this memorandum is based on documents provided by and conversations with Judge J. Stanley Carmical, Chief District Court Judge, District 16B. I thank him for his time and valuable insight.
[2] This memorandum is not intended to address all available supplemental proceedings. For more detailed information about other avenues available to creditors, please see Article 31 of Chapter 1 of the North Carolina General Statutes and for clerks, the Supplemental Proceedings chapter in the Clerks' Manual.

i. Is entitled to an order from the court requiring the debtor to appear and answer questions about the debtor's property. G.S. §1-352. The place to appear must be the defendant's county of residence. G.S. §1-361;
ii. May prepare and serve interrogatories on the debtor concerning the debtor's property. G.S. §1-352.1;
iii. File a motion before a clerk or judge and upon good cause shown the court may:
    1. Order the debtor, his agent or anyone having possession or control of property or records of or pertaining to the debtor, to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, all tax records, letters, objects or tangible things, not privileged, constituting property, or being evidence of property, of the debtor and which are in his possession and custody, or subject to his control; or
    2. Order the debtor or anyone acting for or on his behalf to permit entry upon designated land or other property, real or personal, in his possession or control or subject to his control for the purpose of inspecting, measuring, surveying, appraising, copying, or photographing the property of the debtor.

    Prior notice of the motion, together with a copy thereof, shall be served on the debtor as provided by the Rules of Civil Procedure. Upon the hearing, the order entered shall specify the time, place, and manner for compliance therewith and may prescribe such terms and conditions as are just. G.S. §1-352.2

Debtors of Judgment Debtor: After the creditor has discovered assets belonging to the debtor pursuant to the methods set forth above creditors will frequently file a motion with the court asking for debtors of the judgment debtor (e.g., banks) to be summoned to appear and answer whether it is indebted to the debtor in the amount of $10 or more. G.S. §1-360. In lieu of appearance, the person or corporation believed to be holding $10 or more may respond by verified answers to interrogatories or by affidavit.

After the clerk of superior court determines that the debtor of the judgment debtor is indebted in the amount of $10 or more the clerk shall issue execution against the bank upon payment of the appropriate fees. G. S. §1-360.1. Execution can only be issued to a person or corporation found by the court to be indebted to the debtor, it cannot be issued to just any bank or used as a fishing expedition to find assets. The methods to discover assets are as set forth in G.S. §§ 1-352, 352.1 & 352.2.

Protecting Debtor and Providing Some Relief to Creditor: Supplemental proceedings are a method to reach property of a debtor when all other efforts to enforce a judgment have failed. Understandably the creditor does not want the debtor to know of the creditor's plans to take money from the debtor's bank accounts. However, under North Carolina law the debtor is entitled to notice.

How then does the court and the creditor ensure the funds do not disappear while at the same time providing the debtor notice and opportunity to be heard? At the time of filing the supplemental proceeding the creditor can request the court to issue an order forbidding the debtor from disposing

of the assets (order to freeze accounts) pending a hearing on the motion. G.S. §1-358. The motion, notice of hearing and order freezing accounts or prohibiting the disposition of assets can be served on the debtor at the same time.

If the debtor disposes of the assets before the hearing, after being served with the order forbidding disposition or freezing the account, the court can determine if the debtor is in contempt of court and if so, punish the debtor for contempt in accordance with the provisions of G.S. 1-368.

A Word of Caution: If the asset is a bank account it may be the debtor's sole source of funds, so consideration should be given to the impact freezing the account could have on the debtor's ability to pay bills or non-sufficient charges that may be assessed if a check or automatic draft is affected. The debtor's earnings from 60 days prior to the order cannot be applied to payment on a judgment. G.S. §1-362. This includes future earnings. *Harris v. Hinson*, 87 N.C.App. 148, 360 S.E.2d 118 (1987); *Motor Finance Co. v. Putnam,* 229 N.C. 555, 50 S.E.2d 670 (1948). The debtor will need to provide evidence (i.e., pay stubs, bank statements) to the court that the funds are in fact earnings.

The hearing should be set promptly for hearing, and most court officials set them for hearing within two to five days after the order to freeze the account is entered. If the debtor contacts the court--usually the clerk's office -- the debtor should be told to call the attorney for the creditor to arrange a repayment schedule. If the debtor asks that he or she be heard on the motion sooner than the scheduled date most collection law firms are willing to appear within a day's notice.

Filing and Costs: All supplemental proceedings documents are filed in the underlying civil case file and in the county in which the judgment was entered. G.S. §1-361. The filing fee for each separately brought supplemental proceedings is set forth in G.S. § 7A-308 under "proceeding supplemental to execution".

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

_____

_____

Plaintiff

vs.

ORDER DENYING MOTION
FOR ORDER IN AID
OF EXECUTION

_____

Defendant,

THIS CAUSE, coming on to be heard, and being heard, before the Honorable H. William Constangy, District Court Judge presiding, and upon a review of the pleadings, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff has obtained a judgment against the Defendant.

2. Plaintiff is attempting to satisfy that judgment through execution by the Sheriff of Mecklenburg County.

3. Plaintiff had filed an ex parte written motion seeking an order in aid of the execution process or has merely submitted to the Court a proposed ex parte order in aid or supplement of the execution process without submitting a supporting motion seeking the issuance of the proposed order.

4. Plaintiff alleges, either by motion or by findings set out in the proposed order, that the Defendant may have accounts in one or more banks in Mecklenburg County or in other North Carolina counties.

☐ 5. Plaintiff seeks the issuance of a blanket order authorizing the Sheriff of Mecklenburg County to levy on any and all bank accounts that the Defendant may have in North Carolina.

OR

☐ 5. Plaintiff seeks the issuance of an order directing a bank to surrender money held in accounts for the Defendant to the Sheriff of Mecklenburg County.

6. Plaintiff has neither furnished any notice of the motion or the submitted proposed order to the Defendant or any financial institution, nor has the Plaintiff requested that the matter be scheduled for a hearing in open court.

7. The requested order, if entered, would require any bank holding assets for the Defendant to freeze and surrender those assets to the Sheriff, up to the amount of the judgment, interest, costs, fees and any commissions.

☐ 8. That the proposed order would require any bank to which the order is presented to "cooperate" with the Sheriff and provide information to the Sheriff concerning any and all assets held for the benefit of the defendant.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. North Carolina General Statute §1-360 allows a judgment creditor to bring supplemental proceedings to summon persons who owe money to a judgment debtor to appear and answer whether they are indebted in an amount exceeding $10.00; that the Court can allow the person to answer by means of verified interrogatories in lieu of appearing in court.

2. North Carolina General Statute §1-362 allows the court to order the person who owes money to the judgment debtor to pay the money to the judgment creditor or to the Clerk so that it may be applied to the judgment, provided that those funds are not exempt from execution.

3. To bring a supplemental proceeding the judgment creditor must pay the costs set out in North Carolina General Statute §7A-308(a)(2) and serve notice on the bank and, in the discretion of the judge, serve notice on the judgment debtor.

4. Plaintiff has failed to comply with North Carolina statutes necessary for an order permitting the Sheriff to levy on a bank account.

5. Bank accounts are not among the types of property listed in North Carolina General Statute §1-315 that are subject to levy.

6. North Carolina General Statute §1-358 allows the court to forbid, by order, the transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution.

7. North Carolina General Statute §1-359 allows a bank to voluntarily pay a sheriff who is holding an execution, but if the bank refuses to voluntarily pay, the judgment creditor must file a supplemental proceeding to verify that those funds are not exempt from execution.

8. North Carolina General Statute §1-360 does not authorize broad orders to every bank in the county of the state; judgment creditor must sign an affidavit that a particular bank is indebted to the judgment debtor in an amount exceeding $10.00.

9. If the judgment creditor does not know where or if a judgment debtor has a bank account, then the creditor must bring a supplemental proceeding under North Carolina General Statute §1-352 to discover the debtor's assets and to verify that those funds are not exempt from execution.

10. Plaintiff has not complied with the express North Carolina statutory procedures to levy on bank accounts of the Defendant and is not entitled to the issuance of an order by the Court in aid of or in supplement to an execution by the Sheriff.

IT IS, THEREFORE, ORDERED that the Plaintiff's motion or request for an order in aid of execution is hereby **DENIED.**

This the _____ day of _____, 20 _____.

_____

H. William Constangy
District Court Judge Presiding