

Part 3 - Default and Discontinuance

Rule 8 - Default Judgment

Scope of Rule 8

- 8.01 (1)** A party who makes a claim against another party in an action may make a motion for default judgment, in accordance with this Rule.
- (2)** This Rule does not apply to an application, and an applicant may make a motion for summary disposal of an application in accordance with Rule 5.14 of Rule 5 - Application.

Default judgment by prothonotary

- 8.02 (1)** The prothonotary may grant default judgment, if all of the following apply:
- (a)** the party against whom judgment is sought is notified of the claim in accordance with Rule 31 - Notice;
 - (b)** the time for filing a defence is expired under Rule 31 - Notice;
 - (c)** no defence is filed;
 - (d)** the judgment is for damages only.
- (2)** A motion for a default judgment must be made in one of the following ways:
- (a)** if no demand for notice was filed by the party against whom judgment is sought, by filing a draft order for judgment, a bill of costs, and proof of notification, as provided in Rule 31 - Notice;
 - (b)** if a demand for notice was filed or the party seeking default judgment chooses to do so on notice, by making a motion to the prothonotary on notice in accordance with Rule 30 - Motion to Prothonotary.

Default judgment by judge

8.03 A judge may grant default judgment in any action on any claim, if the party against whom judgment is sought is notified in accordance with Rule 31 - Notice, the time for filing a defence is expired, and no defence is filed.

Judgment on one claim only

8.04 A party may have default judgment on an undefended claim against another party, and proceed to trial on another claim defended by that same party.

How terms of default judgment are determined

8.05 The terms of a default judgment may be determined on the basis that all pleadings in support of the claim have been admitted.

When amount is determined by prothonotary

8.06 A prothonotary must refer the assessment of the amount of a default judgment to a judge, unless the judgment is sought in an action brought by notice of action for debt, or the pleadings of the party who makes a motion for default judgment provide both of the following:

- (a) a claim in the same amount as in the default judgment or a claim for an amount to be calculated in accordance with a formula that leads to the same amount as in the proposed default judgment;
- (b) pleaded facts that, taken as admitted, clearly show that the amount is due, such as a liquidated demand pleaded in sufficient detail.

How amount is determined by prothonotary

8.07 (1) The prothonotary must assess the amount for judgment in an action brought by notice of action for debt, in accordance with the following formula:

- (a) the amount claimed for principal;
- (b) the dollar amount claimed for interest, if there is an express agreement for payment of interest;
- (c) calculated interest from the day stated in the notice of action for debt, if there is an express agreement for payment of interest;
- (d) if there is no claim for agreed interest but prejudgment interest is claimed, interest at four percent a year calculated simply from the day the debt came due according to the pleadings;
- (e) necessary and reasonable disbursements approved by the prothonotary, including the cost of giving notice and filing documents; plus

- (f) costs under Tariff D referred to in Rule 77 - Costs; less
 - (g) any credits to which the judgment debtor is entitled.
- (2) The prothonotary must allow disbursements, costs, and credits in an action the same as in an action brought by notice of action for debt, and must assess damages in accordance with the following formula:
- (a) the specific amount pleaded or specifically calculated; plus
 - (b) prejudgment interest, if it is claimed, at four percent a year calculated simply from the day the claim arose according to the pleadings; less
 - (c) any credits to which the judgment debtor is entitled.

Assessment or other remedy by judge

- 8.08** (1) A judge may assess damages, or grant any other remedy, on a default judgment.
- (2) The judge may defer the assessment of damages, or granting another remedy, in either of the following situations:
- (a) a claim on which damages are to be assessed is defended by another party and the amount is in issue;
 - (b) the judgment debtor is defending another claim of the judgment creditor in the same action, and facts to be found on assessment of damages, or for granting another remedy, are in issue in the defended claim.
- (3) Rule 70 - Assessment of Damages, including Rules 70.03 and 70.04 about notice, applies to a motion for an assessment or other remedy by a judge under this Rule.

Setting aside default judgment

- 8.09** A judge may set aside a default judgment issued by the prothonotary or made on an *ex parte* motion by a judge.

Judgment by sharp practice

- 8.10** (1) It is an abuse of the default judgment process to obtain a default judgment against a party without giving the party reasonable warning, if the party does any of the following:
- (a) in writing, advises the party making the claim that the party intends to defend it;
 - (b) to the knowledge of the party making the claim, makes or defends another

claim in the same action;

(c) in writing, advises that counsel has been retained in respect of the claim and gives information by which counsel may be contacted.

(2) An abusively obtained default judgment may be set aside under Rule 88 - Abuse of Process.

Rule 9 - Discontinuance

Right to discontinue or withdraw

9.01 A party who starts a proceeding may discontinue the proceeding, and a party advancing a claim or defence in a proceeding may withdraw the claim or defence, in accordance with this Rule 9.

Discontinuing a proceeding

- 9.02** (1) The party who starts one of the following kinds of proceedings may discontinue the proceeding before the following times:
- (a) an action, anytime before the day of the trial readiness conference;
 - (b) an application, anytime before the day of the hearing;
 - (c) an application for judicial review or an appeal, anytime before the day of the hearing.
- (2) A party may discontinue a proceeding at any time if a judge permits.
- (3) The party may discontinue a proceeding by filing a notice of discontinuance.
- (4) A notice of discontinuance must contain the standard heading, be entitled “Notice of Discontinuance”, be dated and signed, and include a statement that the party discontinues the proceeding.
- (5) If the proceeding is an action, the notice of discontinuance must also include a statement that a counterclaim, crossclaim, or third party claim in the discontinued proceeding is also discontinued unless the party who made the claim files a notice continuing the proceeding for the purpose of the counterclaim, crossclaim, or third party claim.
- (6) A notice of discontinuance may be in form 9.02.

Affect on counterclaim etc.

9.03 A counterclaim, crossclaim, or third party claim is discontinued ten days after the day the plaintiff files a notice of discontinuance, unless the party who made the counterclaim, crossclaim, or third party claim files a notice continuing the proceeding.

Mandatory discontinuance of action for debt

- 9.04 (1)** A plaintiff in an action brought by notice of action for debt must deliver a receipt to the defendant when the defendant pays the amount referred to in the notice except disbursements that are to be taxed.
- (2)** The receipt must contain the standard heading, be entitled “Receipt”, be dated and signed, and include both of the following:
- (a)** an acknowledgement of the amount paid;
 - (b)** a statement of whether disbursements remain to be taxed and, if so, the amount claimed.
- (3)** The action is discontinued when the receipt is filed, except the plaintiff may move for an order for judgment in the amount allowed on taxation for disbursements, if all of the following apply:
- (a)** the receipt states that disbursements are to be taxed;
 - (b)** the disbursements have been taxed;
 - (c)** the amount of the judgment is no more than the amount claimed in the receipt.
- (4)** A receipt may be in Form 9.04.

Withdrawing a counterclaim etc. or claim etc.

- 9.05 (1)** A party may, if a judge permits, wholly withdraw a counterclaim, crossclaim, or third party claim.
- (2)** A party may withdraw any of the following pleadings, at the following times:
- (a)** a claim or defence in an action, any time before a trial readiness conference;
 - (b)** a ground in a notice of application or notice of contest, any time before the hearing;
 - (c)** a ground of appeal, judicial review or contention, any time before the hearing.
- (3)** The withdrawing party may file one of the following documents:

- (a) a notice of withdrawal stating the party withdraws a counterclaim, crossclaim, or third party claim;
 - (b) a notice of withdrawal stating which of the party's claims, defences, or grounds are withdrawn;
 - (c) a consent to judgment stating the party withdraws all defences to a claim or all grounds contesting an application.
- (4) A notice of withdrawal, or a consent to judgment, must contain the standard heading, be entitled "Notice of Withdrawal" or "Consent to Judgment" as is applicable, be dated and signed, and include both of the following:
- (a) the applicable statement referred to in Rule 9.03(3);
 - (b) whether the party waives whatever notice the party is entitled to under Rule 31 - Notice.
- (5) A notice of withdrawal may be in form 9.05A, and a consent to judgment may be in form 9.05B.

Costs

- 9.06** (1) A party who files a notice of discontinuance, consent to judgment, or notice of withdrawal must, unless a judge orders otherwise, pay costs of the opposing party in an amount to be assessed.
- (2) A taxing authority who assesses costs must consider the stage of the proceedings at which the notice or consent was filed, among the other factors going to costs in accordance with Rule 77 - Costs.

Cause of action remains

- 9.07** (1) Discontinuance of a proceeding or withdrawal of a cause of action does not give rise to a defence in subsequent proceedings for the same, or substantially the same, cause.
- (2) A judge who allows a proceeding to be discontinued or a claim to be withdrawn may impose terms concerning a subsequent proceeding for the same cause against the same parties.
- (3) A subsequent proceeding that amounts to an abuse of process may be controlled under Rule 88 - Abuse of Process.