

FOR PUBLICATION

**SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PRL INCORPORATED,

PLAINTIFF,

v.

JOHN E. LOUISON,

DEFENDANT.

CASE No. SX-17-CV-427

ACTION FOR DEBT AND FORECLOSURE

Appearances:

SCOT F. MCCHAIN, ESQ.
ILP + McChain Miller Nissman
Christiansted VI 00820
For Plaintiff

MEMORANDUM OPINION

WILLOCKS, Administrative Judge

THIS MATTER was forwarded to chambers by the Clerk's Office for a determination as to the legal sufficiency of Plaintiff PRL Incorporated's (hereinafter "PRL") request for entry of default against Defendant John E. Louison (hereinafter "Louison"). For the explained stated below, the Court issues this opinion to direct the Clerk (or her deputy) to determine in the first instance whether default should be entered. *Accord FDIC v. Walcott*, 14 V.I. 504, 506 (Terr. Ct. 1978) ("Because of the importance of the issue raised, this Court has, *sua sponte*, removed the case *sub judice* from the able hands of the Clerk of the Court and has undertaken to write this opinion.").

FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint and the documents attached thereto, PRL, a Florida corporation, loaned Louison, a Virgin Islands' resident, \$100,000 and Louison in turn executed a promissory note to PRL which was secured by a mortgage on Plots No. 1A, Plot No. 1AA, and Plot No. 1AB, of Estate Carlton, Frederiksted, St. Croix, U.S. Virgin Islands. Louison agreed to repay \$984.74 a month (with 8.5% interest) until the loan was repaid. Louison stopped making payments and has not cured the

default. So, PRL brought this debt and foreclosure action against Louison in the Superior Court of the Virgin Islands.

The complaint was filed on December 6, 2017. Summons issued to Louison on December 16, 2017, at an address in Orange Grove, Christiansted, U.S. Virgin Islands.¹ Louison was served on January 9, 2018 at Pastry Hut, 1A Estate Carlton in Frederiksted. When Louison failed to answer or make an appearance, PRL filed a request for entry of default on March 13, 2018. The Clerk's Office forwarded the file to chambers "for a determination of legal sufficiency" on PRL's request. (Mar. 15, 2018 Clerk Entry (all caps in original)). Counsel for PRL subsequently submitted a letter to the Clerk's Office with two proposed orders: one for this case; the other for *PRL Incorporated v. John E. Louison*, case number SX-17-CV-426.² Both proposed orders include a line for "JUDGE OF THE SUPERIOR COURT" to approve the request and enter Louison's default.

DISCUSSION

Beginning in 2013, the Clerk of the Superior Court of the Virgin Islands instituted a new practice of forwarding requests and motions for entry of default to the judges and magistrate judge (hereinafter "judge") for a determination of legal sufficiency.³ The judge assigned to the case would review the motion (along with any papers attached thereto) and determine whether default should be entered. If default should be entered, the judge would notify the Clerk (or her deputy) that the request was sufficient and the Clerk (or her deputy) would then grant the motion and enter default. Upon further consideration, this Court holds that the practice the Clerk implemented in 2013, whereby responsibility was placed on the judge to determine in the first instance whether default should be

¹ The summons was signed by a court clerk on November 16, 2017, but docketed on December 16, 2017. Since summons is prepared by the parties and submitted to the Clerk's Office for signature, presumably listing "November" on the summons was just a scrivener's error the Clerk's Office overlooked. *Cf. Valerino v. Manning*, SX-15-RV-005, 68 V.I. ___, ___, 2018 V.I. LEXIS 28, *14 (Super. Ct. App. Div. Mar. 9, 2018) (clerks can correct obvious mistakes in pleadings and other papers like listing the wrong case number on a document).

² Case number SX-17-CV-426 was assigned to the Honorable Robert A. Molloy.

³ This practice was not formalized in writing or in a rule of the Superior Court. Hence, the Court must rely on its own experience. *Cf. In re: Holcombe*, 63 V.I. 800, 838 n.25 (2015) (noting that common experience and anecdotal reports may need to be relied on to explain a court practice).

entered, was not warranted under the rule in effect at that time. Superior Court Rule 47 provided that “[w]hen a party against whom affirmative relief is sought has failed to appear, plead or otherwise defend as provided by law or these rules, or has failed to appear at the time fixed for trial, *the clerk shall enter his default.*” Super. Ct. R. 47 (emphasis added), *repealed by In re: Amendments to the Rules Gov. the Super. Ct. of the V.I.*, ST-17-MC-19, 2017 V.I. LEXIS 60, *1 (V.I. Super. Ct. Apr. 6, 2017), *approved by* Prom. No. 2017-006, 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017). Judges may not set aside validly-adopted rules under the guise of affording additional due-process protections. *Cf. Henry v. Dennery*, S. Ct. Civ. No. 2012-0130, 2013 V.I. Supreme LEXIS 4, *5-6 (V.I. Jan. 11, 2013) (“The fact that the Appellate Division believed that proceeding in derogation of Rule 322 in this case would somehow benefit both parties by providing them with additional due process rights is simply no excuse for a single judge setting aside a mandatory court rule that was validly adopted by the Superior Court pursuant to its rulemaking authority.”). And since “[t]he use of the mandatory word ‘shall’ normally serves to create an obligation impervious to judicial discretion,” *Shoy v. People*, 55 V.I. 919, 927 (2011) (citation omitted), it was the Clerk’s obligation under Superior Court Rule 47 to enter default if default should have entered. The question now is whether the judge or the clerk should enter default in the first instance since the current rule now permits default to be entered by “the court or the clerk.” V.I. R. Civ. P. 55(a).

The Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure on March 31, 2017. *See In re: Adoption of the V.I. R. of Civ. P.*, Prom. No. 2017-001, 2017 V.I. Supreme LEXIS 22 (V.I. Apr. 3, 2017). PRL filed its complaint after the new rules went into effect. Therefore, Virgin Islands Rule of Civil Procedure 55 governs PRL’s request for entry of default. *See* V.I. R. Civ. P. 1-1(c)(1) (“These rules, and subsequent amendments, govern . . . proceedings in any action commenced after their effective date.”). Virgin Islands Rule of Civil Procedure 55(a) provides that, “[w]hen a party against whom a judgment for affirmative relief is sought has failed to

plead or otherwise defend, and that failure is shown by affidavit or otherwise, *the court or the clerk* must enter the party's default" (emphasis added). The reporter's note to the rule explains that

Rule 55 . . . reflects prior Virgin Islands practice in providing that a default will be "entered" where a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise. Subpart (a) of the Rule clarifies that the note of default may be made by the clerk or the court. V.I. R. Civ. P. 55 (rptr note).

"The notes of the reporter concerning the intent of rules are controlling absent precedent to the contrary." *Wilson v. Hess Oil V.I. Corp.*, 67 V.I. 523, 529-30 (Super. Ct. 2017) (citations omitted). There is no precedent addressing Rule 55(a) "court or clerk" language. Therefore, this is an issue of first impression.

"When a defendant is in 'default,' it simply means that 'the defendant has failed to plead or otherwise respond to the complaint within the time required by the . . . [r]ules.'" *Bach v. Mason*, 190 F.R.D. 567, 574 (D. Idaho 1999) (quoting Hon. William W. Schwarzer, Hon. A. Wallace Tashima & James M. Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 6:2 (1999 ed.)). But "default by itself . . . has no legal consequences. Until the default is entered by the court clerk, defendant can still appear in the action . . . [and] the clerk must accept for filing defendant's pleadings or motions although they are filed late." *Id.* (quotation marks and citations omitted). For this reason, "entering default is an important, but ministerial, task." *Goodwin v. Fawkes*, SX-11-CV-435, 67 V.I. 104, 128 n. 18 (Super. Ct. 2016); *accord Alycekay v. Hasko Constr. Co.*, 448 N.W.2d 43, 45 (Mich. Ct. App. 1989) ("The entry of a default is generally a ministerial act." (citation omitted)); *State ex rel. Harvey v. 2d Jud. Dist. Ct. of the State of Nevada*, 32 P.3d 1263, 1272 (Nev. 2001) ("A court clerk also acts in a ministerial capacity in entering a default." (footnote omitted)). Because the task is ministerial, and not discretionary, mandamus can issue if default is not entered. *See, e.g., Stewart v. Bechtel*, 61 A.2d 514, 515 (Pa. 1948) ("Mandamus is a proper remedy to compel the prothonotary, the court's clerk, to perform a ministerial duty."); *see also Todd v. Everett*, 55 Cal. Rptr. 382, 384 (Ct.

App. 1966) (mandamus granted against trial court clerk for failure to enter default); *Nemeth v. Shore*, 511 So. 2d 1118 (Fla. Ct. App. 1987) (reversing denial of petition for writ of mandamus against clerk who refused to enter default because only one day after time to appear had passed).

Since entering default is not necessarily a judicial act, those courts that have considered who should enter default in the first instance have unanimously held it's the clerk's duty. *E.g.*, *Alli v. United States*, 93 Fed. Cl. 172, 178 n.11 (Ct. Fed. Cl. 2010) ("Before the Clerk enters a default, she must examine the documents filed to determine whether they meet the requirements."); *Aguilar v. Recktenwald*, 3:13-cv-2616, 2014 U.S. Dist. LEXIS 57354, *4 (M.D. Pa. Mar. 17, 2014) ("Where the requirements of the rule are fulfilled, the entry of a default is a 'purely formal matter,' and the default should be entered by the clerk, without application to the court." (quoting *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir.1942))), adopted by 2014 U.S. Dist. LEXIS 56878 (M.D. Pa. Apr. 24, 2014); *Finley v. Kondaur Capital Corp.*, 909 F. Supp. 2d 969, 984 (W.D. Tenn. 2012) ("Under Rule 55 default should be entered by the clerk as of course without any application to the court, provided an appropriate affidavit is filed." (quoting *Fisher v. Taylor*, 1 F.R.D. 448, 448 (E.D. Tenn. 1940), parenthetically); *Santos v. Santos*, 2001 MP 12, ¶ 17 ("If the defendant has not appeared, then upon the plaintiff's application, the clerk of court may enter a default without requiring service of the application upon defendant." (citation omitted)); *Spitzer v. Spitzer*, 777 P.2d 587, 592 (Wyo. 1989) ("Entry of default is normally a clerical act which may be performed by the clerk of court, and it does not constitute a judgment."). The clerk's duty to enter default is not obviated when a determination must be made first, whether the request for entry of default should be granted. "It very often happens that a ministerial officer, before he is required to act, must determine whether or not some condition or particular fact upon which his official act is based exists." *Utah Ass'n of Credit Men v. Bowman*, 113 P. 63, 65 (Utah 1911). If the law imposes the duty upon the officer to act after determining that the condition or fact upon which he must act exists . . . then . . . his act is

ministerial, and not discretionary nor judicial . . . [and] the officer cannot excuse his refusal to act upon the ground that he had to exercise judgment in ascertaining the existence or nonexistence of the facts upon which his act is based.” *Id.*

That is not to say that a judge cannot enter default. Judges have always been able to enter default. *E.g., Fisher*, 1 F.R.D. at 448 (“[T]he court has power to enter an order of default and Rule 55 is not a limitation thereof.”); *see also United States ex rel. Fed. Hous. Admin. v. Jackson*, 25 F. Supp. 79, 79-80 (D. Ore. 1938) (“Under Rule 55 . . . default should be entered by the clerk as of course without any application to the court. However, since the court has power to enter an order of default and Rule 55 is not a limitation thereof, the court grants the motion and enters the default.”); *accord Rogers v. Lyle Adjustment Co.*, 372 P.2d 797, 799 (N.M. 1962) (“Entry of default by the clerk is merely a formal matter and is entered as a matter of course upon the default being called to the attention of the clerk. However, although the entry of default should normally be by the clerk, the court has power to do so.” (citations omitted)). But judges can also do many of the tasks clerks perform, such as administer oaths or affirmations. *See* 5 V.I.C. § 692 (“Every court, judge, clerk of court, district court commissioner, notary public, and every officer or person authorized to take testimony in any action or proceeding or to decide upon evidence, has power to administer oaths or affirmations.”). Clerks support judges by performing many such ministerial tasks and justice is delayed when the Clerk refers such tasks back to the judges.

The Clerk is an arm of the court and “a very vital part of the court organization. Without him [or her] there is no court. [The clerk] is required to perform numerous duties pertaining to judicial functions as well as many administrative matters of the court.” *Buzbee v. Hutton*, 52 S.W.2d 647, 648-49 (Ark. 1932); *accord Frankfort v. Triplett*, 365 S.W.2d 328, 331 (Ky. Ct. App. 1963) (“The clerk is an arm of the police court. He performs duties that would have to be done by the judge himself if he had no clerk.”); *State v. Wilson*, 657 N.E.2d 518, 520 (Ohio Ct. App. 1995) (“The clerk is an arm of

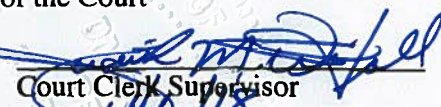
the court in these respects, doing acts which a judge of the court would otherwise do.”). Among other duties, the Clerk must “enter the party’s default,” V.I. R. Civ. P. 55(a), and may “enter judgment” “[i]f the plaintiff’s claim is for a sum certain or a sum that can be made certain by computation. V.I. R. Civ. P. 55(b)(1). However, because the reporter’s note could be construed as having sanctioned the practice adopted by the Clerk, *cf. In re: Alumina Dust Claims*, 67 V.I. 172, 194 n.15 (Super. Ct. 2017), this Court holds that Rule 55 did not change existing law because courts, meaning judges, could always enter default. However, because “entering default is an important, but ministerial, task,” *Goodwin*, 67 V.I. at 128 n. 18, the Clerk should determine whether default should be entered unless the determination involves a complicated question of law. “In future cases . . . where the requirements set out in the rule are fulfilled, the clerk will enter a default and no order will be entered by the court.” *Jackson*, 25 F. Supp. at 80; *cf. Liberty Mut. Ins. Co. v. Fleet Force, Inc.*, CV-09-S-773-NW, 2013 U.S. Dist. LEXIS 91716, *4 (N.D. Ala. July 1, 2013) (“A district judge’s decision about whether he or she should perform the ministerial function of entering default that is assigned to the clerk by the text of Rule 55(a) is vested within the judge’s sound discretion.” (citations omitted)).

CONCLUSION

For the reasons stated above, this Clerk should determine in the first instance whether default should be entered and enter default if appropriate. Accordingly, the Court returns this matter to the Clerk’s Office for the Clerk or her deputy to consider PRL’s request. An appropriate order follows.

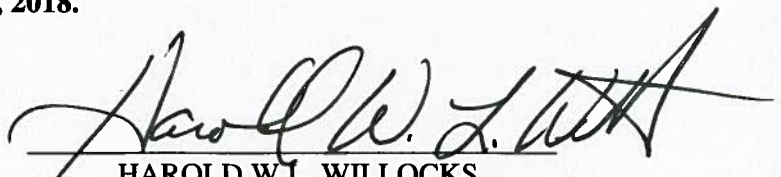
DATED this 5th day of April, 2018.

ATTEST:
Estrella H. George
Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 4/6/18


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court