

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2019

Order Promulgating Amendments to Rule 41 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 41(a) and (b) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action or claim may be voluntarily dismissed by the plaintiff without order of court ~~(i)~~ by filing a notice of dismissal ~~at any time before service by~~ in any case in which the adverse party ~~of~~ has not yet filed an answer or ~~of~~ a motion for summary judgment, ~~whichever first occurs, or (ii).~~

~~(2) *By Stipulation.* An action or claim may be dismissed by filing a stipulation of dismissal signed by all parties who have appeared in the action. A dismissal under this rule may be as to one or more, but fewer than all claims or parties. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.~~

~~(2) 3) *By Order of Court.* Except as provided in paragraph (1) and (2) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance ~~save~~ request except upon order of the court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this paragraph (3) is without prejudice.~~

~~(4) *Effect of Counterclaim.* If a counterclaim has been ~~pleaded by a defendant~~ filed prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. ~~Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.~~~~

~~(5) *Scope of Dismissal.* A dismissal under this rule may be as to all parties or claims, or as to only some parties or claims.~~

~~(6) *Adjudication on the Merits.* Unless otherwise stated in a voluntary notice of dismissal or a stipulation, the dismissal is without prejudice, except that a voluntary notice of dismissal~~

operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(b) Involuntary Dismissal: Effect Thereof.

(1) ~~*On-Court's Own Motion Dismissal by the Court.*~~ The court, on its own motion, after reasonable notice to all the parties, may dismiss any action, unless good cause is shown for continuance, when:

(i) ~~The action has been pending two years and has appeared on a trial list pursuant to Rule 40(a)(2);~~

(ii) ~~All parties against whom a judgment for affirmative relief is sought~~ defendants have been served but have failed to plead or otherwise defend as provided by these rules and the plaintiff has failed to request or apply ~~move~~ move for a default judgment within ~~six months~~ 60 days of the ~~filing of the action~~ last date to answer; or

(iii) ~~ii~~ ii ~~The plaintiff has not filed proof of s~~ Service has not been made on any the ~~defendant against whom the claim is asserted within six months~~ 90 days of the filing of the action, or within 90 days of any service deadline if it has been extended by the court. Where some defendants have been served and others have not, the court may dismiss the claims against those who have not been served.

(2) *On Motion of Defendant.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) *Effect.* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Reporter's Notes—2019 Amendment

Rule 41(a) and (b) are reorganized and amended at the request of the Civil Division Oversight Committee to conform to current practice and to eliminate outdated terminology.

Rule 41(a)(1) as amended retains, with some clarification of language, the provision of former Rule 41(a)(1)(i) that an action may be dismissed without order of court if a notice of voluntary dismissal is filed at any time before an answer or motion for summary judgment has been filed. The addition of “claim” makes clear that, as now provided in new paragraph (a)(5), one or more claims that have been joined in a single action may be dismissed without dismissal of the entire action.

Other provisions of former paragraph (a)(1) have been separated for

clarity and set forth in new paragraphs (a)(2)-(a)(6). New paragraph (a)(2) carries forward the provision of former Rule 41(a)(1)(ii) that a stipulation of dismissal signed by all appearing parties may be filed at any time. New paragraph (a)(3) carries forward the first and final sentences of former paragraph (a)(2) concerning dismissal by order of the court with a language clarification. New paragraph (a)(4) is the second sentence of former paragraph (a)(2) concerning counterclaims, with a language clarification. New paragraph (a)(5), permitting dismissal of some or all claims, is carried forward without change from former paragraph (a)(1)(ii). New paragraph (a)(6) carries forward the final sentence of former paragraph (a)(1)(ii) concerning adjudication on the merits.

Former Rule 41(b)(1)(i), providing for involuntary dismissal of an action on a trial list that has been pending more than two years, has been deleted. Former subparagraphs (b)(ii) and (iii) have been renumbered as (i) and (ii) with language clarifications. Their time periods have been shortened and made uniform to allow more expeditious elimination of stale actions. Language has been added in (b)(ii) to make clear that the shorter time periods may be extended by the court and that dismissal may be entered against defendants who have not been served, leaving the action pending against those who have been served.

2. That this rule as amended is prescribed and promulgated effective _____, 2019.
The Reporter's Notes are advisory.

3. 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