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Defendants' Burdens Under Fed. R. Civ. P. 55: Post-Answer Defaults and Jurisdictional Waivers in City of New York v. Mickalis Pawn Shop

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DEFENDANTS' BURDENS UNDER FED. R. CIV. P. 55: POST-ANSWER DEFAULTS AND JURISDICTIONAL WAIVERS IN *CITY OF NEW YORK V. MICKALIS PAWN SHOP*

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I. INTRODUCTION

Rule 55 of the Federal Rules of Civil Procedure governs default judgments.[1] This device allows a plaintiff to gain requested relief after a defendant has failed to take a required action within a certain timeframe.[2] Its purposes are to keep dockets current and to prevent dilatory defendants from impeding the speedy disposition of plaintiffs' claims.[3] The text of the rule provides: "When 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 clerk must enter the party's default."[4] The party seeking relief may then apply to the court for default judgment.[5] If the court enters default judgment, the litigation ends in a decisive victory for the plaintiff without regard to the merits of the plaintiff's claim.[6]

At a minimum, the threat of default judgment requires defendants to respond to the complaint in a timely fashion. However, Rule 55's language "plead or otherwise defend" is open to interpretation. Is it enough merely to respond to the complaint or file a motion to dismiss? Or must a defendant participate in the litigation all the way through to the final judgment? The defendant's burden in each case is vastly different. When only a responsive pleading or motion to dismiss is required, a defendant may be able to expend little effort and minimal costs in forcing a plaintiff to prove the case on the merits. In contrast, where the defendant must participate fully all the way through to the end of trial, the defendant can incur significant costs and burdens associated with complex and protracted litigation. Defendants who have meritorious defenses but are forced to withdraw from litigation due to

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1. FED. R. CIV. P. 55. All references to "Rule 55" and other rules throughout this Casenote will refer to the Federal Rules of Civil Procedure, unless otherwise noted.

2. 46 AM. JUR. 2D *Judgments* § 232 (2011).

3. *Id.*

4. FED. R. CIV. P. 55(a).

5. FED. R. CIV. P. 55(b)(2). Rule 55(b)(1) allows the clerk to enter judgment *sua sponte* in cases where the relief sought is a definite sum of money and where the plaintiff has submitted an affidavit showing the amount due.

6. *See* 46 AM. JUR. 2D *Judgments* § 232 (2011).

financial constraints have the most to lose under this approach.

In May 2011, the Second Circuit Court of Appeals in *City of New York v. Mickalis Pawn Shop, LLC*, highlighted a growing split among the federal circuit courts as to exactly what Rule 55 requires of defendants.[7] The defendant, a pawn shop from South Carolina, voluntarily withdrew from litigation almost two years after the filing of the complaint, seeking to conserve its limited resources to defend pending criminal charges.[8] Until then, Mickalis Pawn Shop had participated in discovery and filed numerous motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2).[9] In affirming the district court's entry of default judgment, the Second Circuit recognized a conflict between its own interpretation of Rule 55 and the interpretation embraced by the Fifth and Eleventh Circuits, which do not recognize a "post-answer default" under Rule 55.[10]

This casenote analyzes the Second Circuit's decision in *Mickalis Pawn Shop*. Part II provides a background on entry of default and default judgments under Rule 55. Part III analyzes the Second Circuit's opinion in *Mickalis Pawn Shop.* Part IV critiques the Second Circuit's application of the majority rule, arguing that application of the minority rule under the circumstances of the case is more consistent with the plain language, policy rationales, and history of Rule 55. Finally, Part V concludes by suggesting that the Second Circuit should have applied the minority rule's narrower interpretation and declined to enter default judgment against Mickalis Pawn Shop.

II. BACKGROUND

A. Default Judgments Under Rule 55

Rule 55 establishes a two-part process by which a plaintiff can seek default judgment. Rule 55(a) directs the clerk of court to enter a default against a defendant who has "failed to plead or otherwise defend" when

7. 645 F.3d 114 (2d Cir. 2011).

8. *Id*. at 122.

9. *Id*.

10. *Id*. at 31. This Casenote will use the phrase "post-answer default" to refer to defaults that occur after the defendant has answered the complaint, as discussed in further detail below. For the sake of simplicity, the Casenote will refer to defendants' burdens under Rule 55, although recognizing that in rare cases plaintiffs may also be held in default for failure to plead or otherwise defend against a defendant's counterclaim. *See, e.g*., Ringgold Corp. v. Worrall, 880 F.2d 1138, 1139 (9th Cir. 1989) (per curiam). Although the provisions of Rule 37(b)(2)(A)(vi), which provides for default judgment as a sanction for failure to comply with the discovery rules, could also be considered a form of post-answer default, this note will limit the discussion of post-answer default to the defendant's failure to plead or otherwise defend in the Rule 55 context.

that failure is shown "by affidavit or otherwise."[11] Default constitutes an admission of liability, but not of damages.[12] The court may set aside a default "for good cause."[13]

After the clerk has entered default, the party seeking relief must apply to the court for a default judgment.[14] The party against whom default judgment is sought must be served with written notice of the application at least seven days before the hearing if that party has appeared personally or by a representative.[15] At its discretion, the court may hold hearings to conduct an accounting, determine the amount of damages, establish the truth of allegations by evidence, or investigate other matters.[16] The court may then enter default judgment against the defaulting party.[17] The entry of default judgment converts this admission of liability into a final judgment, ending the litigation and awarding the plaintiff the damages to which the court decides the plaintiff is entitled.[18]

A defendant against whom a default judgment is entered may make a motion for relief from the judgment under Rule 60(b).[19] When deciding whether to relieve a party from default judgment under Rule 60(b), district courts ask: (1) whether the default was willful, (2) whether the defendant demonstrates the existence of a meritorious defense, and (3) whether, and to what extent, vacating the default will cause the non-defaulting party prejudice.[20] Alternatively, the defendant may appeal

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11. FED. R. CIV. P. 55(a).

12. *See Mickalis Pawn Shop*, 645 F.3d at 128.

13. FED. R. CIV. P. 55(c).

14. FED. R. CIV. P. 55(b)(2). In limited situations, Rule 55(b)(1) requires the clerk to enter judgment *sua sponte* in cases where the relief sought is a definite sum of money and where the plaintiff has submitted an affidavit showing the amount due. However, this subsection applies "against a defendant who has been defaulted *for not appearing*." *Id.* (emphasis added.)

15. FED. R. CIV. P. 55(b)(2).

16. FED. R. CIV. P. 55(b)(2)(A)–(D).

17. FED. R. CIV. P. 55(b)(2). Various sources emphasize that default judgment is entirely at the discretion of the district court; it is not an entitlement for the plaintiff. *See, e.g.*, Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977) ("[T]he entry of default judgment is committed to the discretion of the district judge."); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2685 (3d ed. 2011) ("[It is] clear that the party making the request is not entitled to a default judgment as of right."). The court's discretion to choose not to enter default judgment is justified by the "drastic nature of a default." 46 AM. JUR 2D *Judgments* § 236 (2011).

18. *See Mickalis Pawn Shop*, 645 F.3d at 128. FED. R. CIV. P. 54(c) limits the court's discretion in awarding damages—damages may not exceed the amount sought in the complaint, nor be of a different type.

19. Rule 60(b) lists the grounds upon which a court may relieve a party from final judgment. These include excusable neglect, voidness, or "any other reason that justifies relief." FED. R. CIV. P. 60(b).

20. S.E.C. v. McNulty, 137 F.3d 732, 738 (2d Cir. 2010). For examples of tests used by other circuits, see Info. Sys. & Networks Corp. v. United States, 994 F.2d 792, 795 (Fed. Cir. 1993) ("[A] court should consider three factors: (1) whether the non-defaulting party will be prejudiced; (2) whether

directly from the default judgment.[21]

Default judgment is "the most severe sanction which the court may apply."[22] Its main purposes are to enforce deadlines and to prevent dilatory defendants from inhibiting the speedy disposition of claims.[23] In determining whether default judgment is appropriate, courts balance a variety of factors, including: (1) the extent of the party's personal responsibility, (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery, (3) a history of dilatoriness, (4) whether the conduct of the party or the attorney was willful or in bad faith, (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions, and (6) whether the claim or defense is meritorious.[24]

As a sanction, default judgment is quite powerful, reducing the plaintiff's burden of proof on the merits of the claim to a mere formality. Although Rule 55 grants the court discretion to determine the factual basis for the plaintiff's claims and requested damages, ultimately the plaintiff is excused from the same burdens of production and persuasion that are required to avoid a Rule 12(b)(6) dismissal, defeat summary judgment, and win a case in front of a trier of fact.[25] In light of the

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the defaulting party has a meritorious defense; and (3) whether culpable conduct of the defaulting party led to the default."); Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1995) (moving party must show (1) "good cause" for the default; (2) quick action to correct the default; and (3) the existence of a meritorious defense). In *In re* Dierschke, 975 F.2d 181, 184 (5th Cir. 1992), the Fifth Circuit recognized additional factors, including the public interest, the financial loss to the defendant, and whether the defendant acted quickly to correct the default. Noting a circuit split over the factors to be considered, the court explained that the fundamental purpose of the test is to identify circumstances warranting "good cause" to set aside a default, "informed by equitable principles." *Id.*

21. *Mickalis Pawn Shop*, 645 F.3d at 128. The court describes direct appeals from default judgment as permissible but unusual. An appeals court reviewing a denial of a defendant's Rule 60(b) motion asks whether the trial court abused its discretion in refusing to set aside the judgment. When the defendant appeals directly from default judgment, the appeals court analyzes whether the trial court abused its discretion in granting the default judgment in the first place. *Id.*

22. *Id.* at 129; *see also* 46 AM. JUR. 2D *Judgments* § 235 (2011) ("The entry of a default judgment against a party litigant is a harsh and drastic action, invoked only in extreme situations."); H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) ("[D]efault judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party."). *Livermore* suggests that deterring intentional delay by defendants is a primary purpose of the threat of default: "the possibility of a default is a deterrent to those parties who *choose* delay as part of their *litigative strategy*." *Id.* (emphasis added).

23. 46 AM. JUR. 2D *Judgments* § 232 (2011). For additional use of default judgment as a sanction, see FED. R. CIV. P. 37(b)(2)(A)(vi), which also makes default judgments available when a party disobeys a discovery order, or fails to attend its own deposition, answer interrogatories, or respond to requests for inspection. *See*, *e.g.*, Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992).

24. Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

25. 46 AM JUR. 2d *Judgments* § 232 (2011) ("A default judgment is entered without regard to the merits of the plaintiff's claim."). FED. R. CIV. P. 55(d) establishes the burden of proof for a plaintiff who sues the United States government—in such cases, the plaintiff may obtain default judgment only "if the claimant establishes a claim or right to relief by evidence that satisfies the court." The deliberate

federal courts' preference for resolving disputes on the merits,[26] default judgment is a windfall to plaintiffs and a serious detriment to defendants. Due to the harshness with which the rule operates, defendants have an interest in the certainty of the rule's interpretation and application.

B. How the Courts of Appeals Have Interpreted and Applied Rule 55

The federal circuit courts have adopted different interpretations of Rule 55's exhortation to "plead or otherwise defend." Some circuits interpret this phrase narrowly, requiring the defendant to make attacks only on service of process or to file responsive pleadings.[27] As long as the defendant answers the complaint, the defendant is not in default, and the plaintiff must prove its case on the merits before judgment can be entered for the plaintiff. Other circuits require much more from the defendant, recognizing a post-answer default whereby the defendant cannot escape default merely by answering the complaint. These courts hold that a defendant who withdraws from the suit at any point has defaulted, and the plaintiff can then win a default judgment without having to prove its case on the merits.

1. The Broad Interpretation of "Plead or Otherwise Defend": The Majority Approach

Among the most common acts leading to post-answer default is failure to appear at trial. In *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*,[28] the First Circuit Court of Appeals affirmed default judgment against a defendant who failed to appear at trial. The plaintiff, a law firm, sued the defendant to recover unpaid legal fees. The defendant moved to dismiss the complaint for insufficient service of process and other Rule 12 defenses, and filed cross-claims and counterclaims.[29] The defendant failed to appear at the pretrial settlement conference. A few days before trial, the defendant informed the court it would not appear for trial, but did not request a continuance or provide

omission of this language from Rule 55(b) suggests an extremely low burden of proof for plaintiffs suing private defendants.

26. *Mickalis Pawn Shop*, 645 F.3d at 129; *see also* Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir.1970) ("The preferred disposition of any case is upon its merits and not by default judgment."); 46 AM. JUR. 2D *Judgments* § 235 (2011) ("Default judgments are not favored . . . [r]ather, courts generally favor the disposition of litigation on the merits rather than by default judgments.").

27. *See, e.g.*, Bass v. Hoaglund, 172 F.2d 205 (5th Cir. 1949).

28. Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 688 (1st Cir. 1991).

29. *Id.* at 688.

an excuse.[30] The court found the defendant in default when it failed to appear at trial.[31] After a bench trial on the question of damages, the court entered default judgment.[32] The First Circuit Court of Appeals upheld the entry of default judgment. It found that failure to appear at trial constituted a default, and that the plaintiff was not required to prove its case because "an entry of default against a defendant establishes the defendant's liability."[33]

Failure to respond to discovery or file pretrial memoranda can also lead to post-answer default. In *Hoxworth v. Blinder, Robinson & Co.*, the defendants failed to respond to discovery requests for witness lists and documents, and failed to file a pretrial memorandum as required by court order.[34] The defendants justified their actions by explaining that they were preoccupied with a bankruptcy proceeding in another court.[35] On the morning the trial was to begin, an attorney notified the court that he would be willing to enter an appearance on behalf of the defendants if a postponement were granted, telling the court that the main defendant was presently attending the bankruptcy proceeding.[36] The judge called the bankruptcy court, which informed him that the defendant had not been attending all of the sessions in the bankruptcy proceeding.[37] The court held the defendants in default and entered default judgment after a hearing to determine damages.[38] On appeal, the defendants argued that they could not be held in default because they had filed an answer and actively participated in discovery.[39] The Third Circuit stated that "the 'or otherwise defend' clause is broader than the mere failure to plead."[40] It explained that a defendant could be subject to default judgment for failing to appear at trial or meet other time schedules, as both these acts impede the progress of a case.[41]

30. *Id.*

31. *Id.*

32. *Id.*

33. *Goldman*, 982 F.2d at 693; *see also* City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 128 (2d Cir. 2011) ("The entry of default, while establishing liability, is not an admission of damages.").

34. 980 F.2d 912 (3d Cir. 1992).

35. *Id.* at 916–17.

36. *Id.*

37. *Id.* at 917.

38. *Id*.

39. *Id.*

40. *Id.* The Third Circuit's test for determining whether a defendant should be held in default asks (1) whether the plaintiff would be prejudiced by the defendant's conduct, (2) whether the defendant has a litigable defense, and (3) whether there is evidence of bad faith or dilatory motive. *See* Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000); Yadav v. Surtees, 87 Fed. App'x 271 (3d Cir. 2004); Limehouse v. Delaware, 144 Fed. App'x 921 (3d Cir. 2005).

41. *Hoxworth*, 980 F.2d at 918.

Intentional, bad-faith conduct can frequently lead to a post-answer default as well. In *Home Port Rentals, Inc. v. Ruben*, the parties agreed to dismiss the suit without prejudice.[42] In the consent agreement, the defendants agreed to submit to the court's jurisdiction and appoint an agent to accept service of process if the suit were re-filed within 180 days.[43] The plaintiff re-filed, and the defendants' attorney filed responsive pleadings in a timely fashion.[44] However, after the attorney had problems contacting the individual defendants at their new addresses, the attorney moved to withdraw as counsel.[45] The district court issued an order to show cause why the defendants should not be held in default, and the order was served at the defendants' last known addresses.[46] Neither the defendants nor their attorney appeared at the show-cause hearing, and the court granted the attorney's motion to withdraw.[47] The court held the defendants to be in default, conducted a hearing to determine damages, and granted default judgment.[48] The Fourth Circuit affirmed the default judgment, finding that the defendants intentionally made themselves unavailable in the time between the original dismissal and the default judgment.[49] The court also found that the defendants failed to "otherwise defend" the action by not appearing at the show-cause hearing and by failing to respond to the trial court's certified notices.[50]

When the defendant is a corporation, another frequent cause of post-answer default is the withdrawal of counsel, followed by the party's failure to obtain substitute counsel.[51] In *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, the plaintiffs brought suit for breaches of contract and warranty.[52] The defendants delayed discovery over a two-year period by submitting late or non-responsive discovery answers or by

42. Home Port Rentals, Inc. v. Ruben, 957 F.2d 128 (4th Cir. 1992).

43. *Id.*

44. *Id.*

45. *Id.* at 129.

46. *Id*.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 133.

51. Although 28 U.S.C. § 1654 (2006) permits parties to proceed pro se, the widely accepted interpretation of the statute holds that it does not apply to corporations. *See, e.g.*, Nat'l Indep. Theater Exhibitors, Inc. v. Buena Vista Distrib. Co., 748 F.2d 602, 609 (11th Cir. 1984) ("[C]orporations must always be represented by legal counsel."). The separate legal existence of a corporation prevents its directors, officers or other agents from acting pro se on the corporation's behalf. *Id.* Thus, failure to obtain substitute counsel following an attorney's withdrawal from representation can form the basis for a finding of default against a corporation.

52. Fingerhut Corp. v. Ackra Direct Mktg. Corp., 86 F.3d 852, 854 (8th Cir. 1996).

failing to produce requests entirely.[53] The defendants' counsel then moved to withdraw from representation, citing conflict of interest and defendants' failure to pay legal fees.[54] Defendants did not obtain substitute counsel and failed to produce any further discovery requests.[55] After the plaintiffs moved for default judgment, defendants filed affidavits opposing the motion and requesting a sixty-day continuance to obtain new counsel due to financial difficulties and pending lawsuits in a different state.[56] The court entered default judgment. The Eight Circuit affirmed the default judgment, explaining that default judgment is appropriate for "willful violations of court rules, contumacious conduct or intentional delays."[57] The court found that defendants' failure to comply with discovery orders, attend pretrial conferences, and obtain substitute counsel met this standard.[58]

Thus, the circuit courts that recognize post-answer defaults consider a wide range of conduct when deciding whether to impose default judgment. This conduct can include failure to respond to discovery requests, failure to file pretrial memoranda, failure to appear at pretrial conferences or trial, and failure to obtain substitute counsel. These cases suggest that conduct objectively demonstrating a lack of interest in participating or defending the suit can give rise to default after the complaint has been answered. Under this broad interpretation of Rule 55, the defendant must both answer the complaint *and* continue to participate fully to the end of the litigation, or else be held in default.

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53. *Id.*

54. *Id.*

55. *Id.* at 855.

56. *Id*.

57. *Id.* The court also explained that the existence of a meritorious defense is not sufficient to avoid default judgment when the defendant has engaged in willful misconduct. *Id.* at 856–57.

58. *Id.* The Ninth Circuit similarly found default judgment proper against a plaintiff for the plaintiff's failure to defend against a counterclaim, when the plaintiff repeatedly failed to attend pretrial conferences, or "otherwise participate in or remain informed about the litigation after its counsel withdrew. Ringgold Corp. v. Worrall, 880 F.2d 1138, 1139 (9th Cir. 1989) (per curiam). This case places the Ninth Circuit in company with those circuits who follow the majority rule in recognizing post-answer defaults. *But see* Pangelinan v. Wiseman, 370 Fed. App'x 818 (9th Cir. 2010). In *Pangelinan*, the Ninth Circuit found that the district court properly denied a plaintiff's request for entry of default against federal agents in a *Bivens* action because the defendants had filed timely motions to dismiss. The court then cited directly to the phrase "plead or otherwise defend" without distinguishing the case from *Ringgold* and other Ninth Circuit cases interpreting Rule 55(a). *See* Beatty v. Warner, 198 Fed. App'x 584 (9th Cir. 2006) (finding that the district court did not abuse its discretion in denying plaintiff's motion for default judgment because the defendants timely answered or filed responsive pleadings).

2. The Narrow Interpretation of "Plead or Otherwise Defend": The Minority Approach

The Fifth Circuit Court of Appeals decision in *Bass v. Hoaglund* is the leading case for the minority approach, which interprets Rule 55 much more narrowly.[59] Bass, a Texas resident, was sued in Kansas by a Kansas citizen for personal injuries.[60] Bass appeared by counsel and filed an answer. Bass's counsel then withdrew from the case, but did not withdraw the appearance or answer.[61] Bass claimed he was never notified of his attorney's withdrawal.[62] When the case went to trial, Bass never appeared, and plaintiff's counsel was the only person present.[63] The trial court found Bass in default and entered judgment for the plaintiff in the amount sought in the complaint.[64] Bass did not know about these proceedings until months later.[65]

On appeal to the Fifth Circuit, Bass argued that he had been deprived of his right to a jury trial in violation of the Seventh Amendment.[66] The Fifth Circuit agreed, explaining that while there is no right to a jury trial when a default occurs, Bass had not defaulted, because he had made an appearance and filed pleadings that were never withdrawn.[67] Analyzing Rule 55, the court explained that "otherwise defend" means that the defendant is not required to have a lawyer or be present when the case is called for trial.[68] It stated, "The words 'otherwise defend' refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits."[69] As a result, Bass was immune from default judgment when his attorney filed an answer—the failure to appear for trial did not result in default.[70] In such a situation, the plaintiff is required to prove his case.[71] The court found that Bass was entitled to notice of the default under Rule 55(b).[72] As Bass had no reason to think he was in default, did not know his counsel had withdrawn, and had no notice of

59. 172 F.2d 205 (5th Cir. 1949), *cert. denied*, 338 U.S. 816 (1949).

60. *Id.* at 207.

61. *Id.*

62. *Id.* at 208.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 208–09 (explaining that the withdrawal by Bass' counsel did not constitute a withdrawal by Bass himself, or a withdrawal of his pleadings).

68. *Id.* at 210.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

the pending default judgment, "to get such a judgment without evidence" was a violation of due process.[73]

In *Solaroll Shade & Shutter Corp. v. Bio-Energy Systems*, the Eleventh Circuit reached a similar conclusion.[74] Solaroll brought a trademark infringement suit against Bio-Energy, and the parties later settled.[75] Solaroll then filed a motion to reinstate the action, claiming that Bio-Energy had violated the settlement agreement.[76] Bio-Energy's counsel received copies of the motion and promised Solaroll's counsel to forward a proposed stipulation and motion for extension of time.[77] However, Bio-Energy never communicated with Solaroll or responded to the motion to reinstate.[78] As a result, the trial court granted Solaroll's reinstatement motion unopposed.[79] Bio-Energy filed a motion to vacate this order under Rule 60(b), arguing in part that the district court failed to comply with the notice and hearing provisions of Rule 55.[80] The district court denied the motion.

On appeal, the Eleventh Circuit affirmed. It stated that the district court was not required to comply with Rule 55, because by definition its reinstatement order could not have been a default judgment.[81] It explained that default judgment can be entered against a defendant who fails to appear or answer a complaint, because "in such circumstances the case never has been placed at issue."[82] However, "if the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment."[83] In such circumstances, the court may proceed to trial without the defendant, and

73. *Id.* The Fifth Circuit reaffirmed *Bass* in *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981), where the district court entered default judgment against the defendants for failure to appear at trial. Quoting *Bass*, the court explained that Rule 55 "does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for trial." *Seven Elves, Inc.*, 635 F.2d at 401, n.2. For examples of state courts that have followed or endorsed the *Bass* rule in interpreting local default judgment rules, see Coulas v. Smith, 395 P.2d 527, 529 (Ariz. 1964); Rombough v. Mitchell, 140 P.3d 202, 205 (Colo. App. 2006); Klein v. Rappaport, 90 A.2d 834, 835 (D.C. 1952); Sharp v. Sharp, 409 P.2d 1019, 1022 (Kan. 1966); Black v. Rimmer, 700 N.W.2d 521, 526 (Minn. App. 2005); Hous. Found., Inc. v. Beagle, 957 A.2d 405 (Vt. 2008).

74. 803 F.2d 1130 (11th Cir. 1986).

75. *Id.* at 1131.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1133. Those provisions require that a party that has appeared personally or by representative be served written notice of the application for default judgment at least seven days before the hearing. FED. R. CIV. P. 55(b)(2).

81. *Solaroll*, 803 F.2d at 1134.

82. *Id.*

83. *Id.*

the plaintiff can win a favorable judgment only if the plaintiff proves its case.[84] The court found that Bio-Energy had met its burden in the pleading stage, and the issue had been joined.[85] Thus, the Eleventh Circuit found that the lower court's order could not have been a default judgment, and therefore the reinstatement order could not be vacated under Rule 60(b).[86]

III. *CITY OF NEW YORK V. MICKALIS PAWN SHOP*

The May 2011 decision of the Second Circuit Court of Appeals in *City of New York v. Mickalis Pawn Shop, LLC* presents a post-answer default situation within the context of a defendant's challenge to personal jurisdiction. By finding that the defendants waived their right to challenge personal jurisdiction on direct appeal, by virtue of appearing and then defaulting, the Second Circuit illustrates the far-reaching effects of post-answer default on waiver of jurisdictional defenses, and demonstrates the powerful consequences that follow when courts apply the majority interpretation of "plead or othwerwise defend."

A. Facts and Procedural History

In May 2006, the City of New York brought suit in the Southern District of New York against fifteen licensed firearms dealers operating in Georgia, Ohio, Pennsylvania, South Carolina and Virginia.[87] The City's complaint alleged, inter alia, public nuisance, and sought injunctive relief.[88] It claimed that the dealers' sales practices facilitated illegal purchases of firearms, which then traveled through interstate commerce and were used to commit crimes in New York City.[89] Defendants Mickalis Pawn Shop and Adventure Outdoors operated single retails store in South Carolina and Georgia, respectively, from which they made only in-person sales.[90]

Four defendants, including Mickalis Pawn Shop and Adventure

84. *Id.*

85. *Id.* In addition, Bio-Energy's pleadings were still in effect at the time, and Solaroll never moved to strike Bio-Energy's pleadings.

86. *Id.* at 1135.

87. City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 118 (2d Cir. 2011).

88. *Id*.

89. *Id.*

90. *Id.* at 119. Adventure Outdoors also operated websites allowing customers from out-of-state to place deposits on firearms. However, customers using this method were required to visit the store in person to complete the sale and obtain the firearm. The store had never sold a firearm to a New York resident through this method. *Id.* at 119–20.

Outdoors, moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2).[91] These motions asserted that the requirements of New York's long-arm statute were not satisfied, that the defendants lacked minimum contacts with New York, and that they had never purposefully availed themselves of interstate commerce so as reasonably to foresee defending a lawsuit in New York.[92] These motions were all denied on the basis that the City had made a prima facie showing of personal jurisdiction; the final determination of personal jurisdiction was to be made at trial.[93] The court characterized the application of the New York long-arm statute to public-nuisance suits against nonresident firearms dealers as "a case of first impression."[94] The defendants' motion for leave to take interlocutory appeal was denied.[95] New York City amended its complaint to allege only two causes of action, public and statutory nuisance, and sought only injunctive relief.[96] The defendants made additional 12(b)(2) motions to dismiss, which were also denied.[97]

During the discovery phase of litigation in February 2008, almost twenty-one months after the complaint was filed, Mickalis Pawn Shop's owner Larry Mickalis was indicted by a federal grand jury in South Carolina for knowingly selling firearms to convicted felons.[98] Mickalis's motions to stay the litigation, pending resolution of the criminal case, were denied.[99] A week later, the three law firms representing Mickalis Pawn Shop moved to withdraw as counsel.[100] They explained that Mickalis wanted to concentrate his financial resources on defending the criminal charges.[101] However, the firms

91. *Id.* at 120–21.

92. *Id*. The New York long-arm statute, in relevant part, provides: "A court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent . . . (1) Transacts any business within the state or contracts anywhere to supply goods or services in the state; or . . . (3) commits a tortious act without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ." N.Y. C.P.L.R. 302 (McKinney 2008).

93. *Mickalis Pawn Shop*, 645 F.3d at 118. The trial court's order denying the motions stated that the City had demonstrated that the defendants knew that their reliance on interstate commerce would cause handguns to end up in New York City where they would be used by criminals to "terrorize significant portions of the city's population," which provided the requisite minimum contacts to satisfy N.Y. C.P.L.R. 302(a)(3)(ii). *Id.*

94. *Id.* at 121.

95. *Id.*

96. *Id*.

97. *Id.*

98. *Id.* The indictment was for violations of 18 U.S.C. §§ 922(d)(1), 924(a)(2) (2006). *Id.*

99. *Mickalis Pawn Shop*, 645 F.3d at 122.

100. *Id*.

101. *Id*.

specified that they were not waiving their personal jurisdiction defense and would continue to raise it.[102]

At a status conference in March, Mickalis confirmed his consent to his attorneys' withdrawal, and his attorneys also announced that Mickalis did not intend to defend the case further.[103] The court warned Mickalis that default would likely follow if he did not intend to defend the case further; Mickalis responded that he was aware of the consequences, but did not expressly consent to entry of default.[104] A week later, the magistrate judge granted the attorneys' motions for withdrawal, and after a formal request from the City, entered default against Mickalis Pawn Shop.[105] In June 2008, the City moved for default judgment, and the district court granted the motion, adopting the City's proposed findings of fact and conclusions of law as its own.[106] The court entered default judgment in March 2009 in the form of a permanent injunction.[107]

Adventure Outdoors proceeded through the close of discovery, and then moved for summary judgment based on lack of personal jurisdiction and preemption of the City's cause of action by the Protection of Lawful Commerce in Arms Act (PLCAA).[108] This motion was denied, and the trial court determined that it would proceed to a bench trial with an advisory jury.[109] During jury selection, Adventure Outdoors's counsel moved to withdraw from the case, referring to limited financial resources and the fact that it would not likely win in a bench trial.[110] The court denied the motions to withdraw because the trial was already underway.[111] The court advised counsel that refusal to proceed with jury selection and other proceedings would likely lead to default.[112] Adventure Outdoors's counsel confirmed that its client refused to go forward, but refused to give express consent to default.[113] The court noted Adventure Outdoors's default, and entered default judgment on the same day as the default judgment against Mickalis

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 123.

106. *Id.*

107. *Id.* The injunction provided for the appointment of a special master and remedial measures to abate the public nuisance caused by Mickalis' activities.

108. *Id.*; 15 U.S.C. §§ 7901–7903 (2006).

109. *Mickalis Pawn Shop*, 645 F.3d at 124.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Pawn Shop, over Adventure Outdoors's objections.[114]

Mickalis Pawn Shop and Adventure Outdoors appealed directly from the judgment, arguing that the district court abused its discretion by finding them in default by virtue of their withdrawal from the litigation.[115] Because they appeared in the litigation over several years and repeatedly moved to dismiss, filed answers, and "vigorously" defended in discovery, the defendants argued that they did not "fail[ ] to plead or otherwise defend" as Rule 55(a) requires.[116] They argued that, because Rule 55(a) was inapplicable, the City was required to prove its case on the merits by a preponderance of the evidence, including proof that the court had personal jurisdiction over the defendants under the state's long-arm statute and that its claim was not preempted by the PLCAA.[117] Thus, the defendants challenged the default judgment under Rule 55(b) on three grounds. First, "procedural irregularities" prevented them from receiving proper notice of the Rule 55 proceedings. Second, the trial court failed to make a finding by a preponderance of the evidence that it had personal jurisdiction over the defendants. Third, the City's claims were preempted by the federal statute.[118]

B. Opinion

In its discussion of the entry of default under Rule 55(a), the court noted that the case did not present a "typical" Rule 55 scenario where a defendant defaults by failing to file a timely answer.[119] Regardless, a district court may enter default against a defendant who has failed to

114. *Mickalis Pawn Shop*, 645 F.3d at 124.

115. *Id* at 128–29. Although the typical method of contesting a default judgment is by motion for relief from judgment or order under Rule 60(b), direct appeal from a default judgment is permissible. Rule 60(b) allows relief from a final judgment, order or proceeding under a variety of circumstances. The trial court's denial of the motion is then evaluated under an abuse of discretion standard on appeal. As the Second Circuit explained in *Mickalis Pawn Shop*, the issue on direct appeal from a default judgment is whether the trial court abused its discretion in entering default or default judgment in the first place. *Id.* at 128.

116. *Id.* at 128. The court agreed with Mickalis Pawn that it had "'appeared and defended vigorously' over the course of 'about two years of active litigation.'" *Id.* at 139–40.

117. 15 U.S.C. § 7901 (2006). The court found that both the defendants had waived their preemption arguments by not raising them on appeal. *Mickalis Pawn Shop*, 645 F.3d at 137.

118. *Mickalis Pawn Shop*, 645 F.3d at 131. In its argument regarding procedural irregularities, Mickalis Pawn argued that the Rule 55 proceedings were inconsistent with due process because it was no longer able to receive automatic notification of docket activity through the electronic case filing system after its counsel withdrew. In its opinion, the court responded that Mickalis Pawn actually participated in the Rule 55 proceedings regardless of its inability to receive automatic updates on docket activity. Therefore, the default judgment did not result from "a series of *ex parte* acts" (as Mickalis Pawn described it), and Mickalis Pawn had an adequate opportunity to be heard. *Id.* at 132.

119. *Id.* at 129.

"otherwise defend."[120] The court explained that it has embraced a "broad understanding" of the phrase "otherwise defend," which gives broad discretion to trial judges, to use default judgment to ensure "the orderly and expeditious conduct of litigation" by imposing default after the trial has begun.[121] Thus, entry of default is an appropriate response to a defendant's "obstructionist litigation tactics."[122]

The court found that the trial court did not abuse its discretion in entering default against either Mickalis Pawn or Adventure Outdoors. It found that the defendants had affirmatively expressed their intent to discontinue their participation in the lawsuit, even after they had been warned that default would likely result.[123] According to the court, entry of default was also proper because Mickalis Pawn had not obtained substitute counsel after its attorneys withdrew.[124] The court summarily rejected the defendants' arguments in reliance on *Bass*. Without addressing the merits of that decision, the Second Circuit merely stated, "[*Bass's*] interpretation of Rule 55 has not been embraced by this court . . . nor has it found favor in a majority of our sister circuits."[125]

The court addressed the defendants' arguments that the district court was required to find that it had personal jurisdiction over the defendants by a preponderance of the evidence, and that the district court's failure to do so constituted a *per se* abuse of discretion.[126] The Second Circuit declined to respond definitively to this argument, citing its own precedent which held that a district court "may first assure itself that it has personal jurisdiction over the defendant" before granting a motion for default judgment.[127] Emphasizing the discretionary language of this rule, the court explained that it would leave open the question of whether a district court *must* determine its personal jurisdiction over a defendant before entering default judgment. However, it recognized a split with its sister circuits on this issue.[128]

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120. *Id.*

121. *Id.* at 129.

122. *Id.*

123. *Id.* at 130.

124. *Id.*

125. *Id.* at 131.

126. *Id.* at 133.

127. *Id.* (quoting Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp., 619 F.3d 207, 213 (2d Cir. 2010)).

128. For cases where courts made a finding of personal jurisdiction mandatory before a court enters default judgment, see Mwani v. bin Laden, 417 F.3d 1, 6–7 (D.C. Cir. 2005); Sys. Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy, 242 F.3d 322, 324 (5th Cir. 2001); *In re* Tuli, 172 F.3d 707, 712 (9th Cir. 1999); Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 772 (10th Cir. 1997). Here, the Second Circuit cited to an earlier ruling where it did vacate a default judgment and remand to the trial court to determine whether the defendants had actually committed the acts which would have subjected them to the forum state's long-arm statute. Credit Lyonnais Sec. U.S.A., Inc. v.

The court then turned to an extensive discussion in which it found that the defendants had waived their personal jurisdiction defense, stating that "a district court should not raise personal jurisdiction *sua sponte* when a defendant has appeared and consented, voluntarily or not, to the jurisdiction of the court."[129] Although recognizing that forfeiture of personal jurisdiction generally occurs through failure to raise the defense in responsive pleadings, it explained that in some situations, a defendant may implicitly submit to the jurisdiction of the court involuntarily, based on conduct during the litigation.[130] The court found that Mickalis Pawn and Adventure Outdoors had forfeited their jurisdictional defenses by announcing to the court that they would cease defending although default would likely follow.[131] It rejected the defendants' argument that the district court should not have entered default judgment without determining that there was enough evidence in the record to sustain a finding of personal jurisdiction by a preponderance of the evidence.[132]

The court then addressed the defendants' argument that the default judgment was void for lack of personal jurisdiction. Restating its conclusion that the defendants had waived their jurisdictional defenses by appearing and then withdrawing, the court explained that the defendants could no longer challenge the default judgment for voidness based on lack of personal jurisdiction.[133] It explained:

Alcantra, 183 F.3d 151 (2d Cir. 1999). In *Credit Lyonnais*, the court explained that a trial court may initially deny a defendant's Rule 12(b)(2) motion "to the extent it attacks the plaintiff's theory of jurisdiction without conducting inquiry into the disputed jurisdictional facts, eventually it must determine whether the defendant in fact subjected itself to the court's jurisdiction." 183 F.3d at 154. The plaintiff has the burden of proving the jurisdictional facts at an evidentiary hearing or at trial before default judgment can be entered. The *Mickalis* court neither attempted to distinguish *Credit Lyonnais* from the facts in *Mickalis*, nor explain its conflicting rulings in both cases.

129. *Mickalis Pawn Shop*, 645 F.3d at 133 (quoting *Sinoying*, 619 F.3d at 213).

130. *Mickalis Pawn Shop*, 645 F.3d at 133. The court gave examples of defendants' conduct constituting forfeiture, including failing to actively litigate a personal jurisdiction defense until four years after initially raising it in its answer, or unsuccessfully raising a jurisdictional objection at the outset but later creating the impression that the defendant has abandoned the defense. *See* Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 60–62 (2d Cir. 1999); Rice v. Nova Biomed. Corp., 38 F.3d 909, 914–15 (7th Cir. 1994).

131. *Mickalis Pawn Shop*, 645 F.3d at 135.

132. *Id.* at 136. As authority, defendants relied on *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95 (2d Cir. 2006), where the defendants failed to answer the petition to confirm an arbitral award after removing the plaintiff's petition to federal court. The Second Circuit held that the district court was required to determine whether the plaintiff was actually entitled to the award it sought, regardless of the defendants' failure to answer, explaining that "[w]hen a court has before it [an extensive evidentiary] record, rather than the allegations of one party found in complaints, the judgment the court enters should be based on the record." *Id.* at 109. Here, the Second Circuit distinguishes *D.H. Blair* by arguing that that case involved a rare procedural posture brought up under the Federal Arbitration Act, and that Mickalis Pawn's case "[did] not concern a scenario in which a court is presented with a complete evidentiary record from a prior proceeding." *Mickalis Pawn Shop*, 645 F.3d at 136.

133. *Id.* at 138. Judge Wesley's concurrence highlights the importance of this finding of waiver.

> By submitting to the jurisdiction of the district court to decide the question of personal jurisdiction—but then withdrawing from the proceedings, rather than litigating the case to final judgment—the defendants failed to preserve their jurisdictional defense for review on appeal . . . [a]nd because they failed to preserve that defense, they acquiesced to the jurisdiction of the district court, and the resulting judgment of that court is not void.[134]

The court found that the defendants' default was a "deliberate tactic."[135] It stated that it was "not without sympathy," for the financial hardship imposed upon the defendants from being subjected to suit in New York, but declined to excuse what it believed to be a forfeiture of personal jurisdiction.[136]

IV. ANALYSIS

Mickalis Pawn Shop illustrates a post-answer default under a situation differing markedly from a "simple" default where a defendant fails entirely to answer the complaint.[137] In light of the language of Rule 55, the history and policy objectives of the rule, and the comparatively low culpability of Mickalis Pawn in withdrawing from the litigation, the district court should have applied the Rule 55 analysis advanced by the Fifth Circuit in *Bass* and *Solaroll* and should have used its discretion to deny the City of New York's motion for default judgment.

Post-answer defaults are inconsistent with Rule 55's plain language, history and policy rationales. By recognizing a post-answer default and requiring the defendants here both to "plead" *and* to "otherwise defend" the lawsuit to the very end, the Second Circuit—and other circuit courts

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Judge Wesley disagreed with the district court's reasoning on the personal jurisdiction issue and suggested he would not have found personal jurisdiction but for the default. *See infra* notes 158 to 160 and accompanying text.

134. *Mickalis Pawn Shop*, 645 F.3d at 140.

135. *Id*. The court also explained that its decision not to excuse the defendants' forfeiture of personal jurisdiction was also based on preserving the policy rationales of the final judgment rule, 28 U.S.C. § 1291 (2006) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."). It argued that the defendants had attempted to "short-circuit the normal litigation process by withdrawing, inducing a default judgment to be entered against them, and then obtaining de facto interlocutory review over otherwise non-appealable decisions." *Id.* at. 141. In the court's opinion, this would undermine "the policy against piecemeal litigation." *Id.* (quoting Shannon v. Gen. Elec. Co., 186 F.3d 186, 192 (2d Cir. 1999)).

136. *Mickalis Pawn Shop*, 645 F.3d at 141–42. The court vacated the injunctions, finding them to be vague and overbroad, and remanded the case to the district court for new injunctions.

137. In *In re Gober*, 100 F.3d 1195, 1205 (1996), the Fifth Circuit provided helpful terminology to distinguish between three types of defaults. One is "simple default," where the defendant fails to respond to the complaint. Another is "post-answer" default, where the defendant answers the complaint but does not appear at trial. The third type is the judgment *nihil dicit*, where the defendant has either entered a plea of a dilatory nature which fails to place the merits of the plaintiff's case at issue, or the defendant has placed the merits at issue in its answer but later withdraws that answer.

applying the majority interpretation of Rule 55(a)—misread the plain language of the rule. That rule finds a defendant in default for a "failure to plead *or* otherwise defend."[138] The minority interpretation of the phrase "otherwise defend," as advanced by *Bass*, suggests a broad range of filings and motions a defendant can make in addition to or instead of pleading to the merits—including "attacks on service, motions to dismiss, or motions for better particulars."[139] When viewed in conjunction with the word or in Rule 55(a), the phrase "otherwise defend" should be interpreted as suggesting responsive pleadings or other actions to be taken by the defendant in response to the initial complaint that may take the place of pleading. Thus, Rule 55(a)'s plain language does not demand that defendants both plead *and* defend the lawsuit to conclusion, as the Second Circuit seems to require. Because the federal courts prefer to use the plain language of the statute to determine its meaning,[140] the minority approach to interpreting Rule 55(a) more accurately reads the word "or" to actually mean "or." In contrast, the majority approach incorrectly reads the word "or" to mean "and," requiring defendants to file responsive pleadings and to litigate aggressively to the end. Rule 55(a)'s plain language does not support such an interpretation.

The minority view as advanced by *Bass* and *Solaroll* also has support from Charles A. Wright and Arthur Miller.[141] They explain that the phrase "otherwise defend" refers to "challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading."[142] Wright and Miller agree with *Solaroll* that "a defendant who has participated throughout the pretrial process and has filed a responsive pleading, placing the case at issue, has not conceded liability."[143] In such a situation, the plaintiff must present evidence supporting liability, in addition to damages, and can win a favorable

138. FED. R. CIV. P. 55 (emphasis added).

139. Bass v. Hoaglund, 172 F.2d 205, 210 (5th Cir. 1949).

140. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (explaining that where the "words by which the legislature undertook to give expression to its wishes . . . are sufficient in and of themselves to determine the purpose of the legislation . . . a court should follow their plain meaning," unless that meaning would lead to absurd or futile results).

141. WRIGHT & MILLER, *supra* note 17, § 2682. Wright (1927–2000) held the Charles Alan Wright Chair in Federal Courts at the University of Texas. Miller (1934–) is a University Professor at New York University, formerly Bruce Bromley Professor of Law at Harvard University.

142. WRIGHT & MILLER, *supra* note 17, § 2682. Moore's Federal Practice is also in agreement with this rule, stating that "a party precludes default by 'pleading' in response to a claim within the time allowed." 10-55 MOORE'S FEDERAL PRACTICE—CIVIL § 55.11(2)(a)(i) (2011). "Responsive pleadings" are those listed in FED. R. CIV. P. 7, which include an answer to the complaint, an answer to a counterclaim, an answer to a crossclaim, and a third-party answer to a third-party complaint. *Id.*

143. WRIGHT & MILLER, *supra* note 17, § 2682.

judgment only "if the evidence supports it."[144] Although a defendant cannot avoid default simply by appearing, "if defendant appears and *indicates a desire to contest the action*, the court can exercise its discretion and refuse to enter a default."[145]

The meaning of "plead or otherwise defend" is also informed by the history of Rule 55. The rule's text is based substantially on Rules 18 and 19 of the Equity Rules of 1912, governing decrees *pro confesso*.[146] Those decrees were granted for failure to appear within the required time, or once having appeared, failure to "plead, demur, or answer the bill within the time limited for that purpose; or if [the defendant] fail[ed] to answer after a former plea, demurrer or answer is overruled or declared insufficient."[147] Thus, the decree *pro confesso* was not available to the plaintiff if the defendant pleaded, demurred or answered within the required timeframe, in which case the litigation proceeded ex parte.[148] Thus, the emphasis of the Equity Rules was speedy disposition

144. *Id.* The requirement that the plaintiff prove its case in an ex parte proceeding absent a finding of bad faith default has its roots in English common law. If a defendant failed to appear the day of trial, "the plaintiff, notwithstanding the contumancy of the defendant, only obtained judgment in accordance with the truth of the case as established by an ex parte examination." Thompson v. Wooster, 114 U.S. 104, 110 (1885). This was a change from earlier common law, where failure to appear on the day of trial was deemed a "confession of the action," allowing the plaintiff to recover the amount specified in the complaint, regardless of whether it was reasonable. *See* WRIGHT & MILLER, *supra* note 17, § 2681.

145. WRIGHT & MILLER, *supra* note 17, § 2682 (emphasis added). This standard, requiring merely an intent to contest the action, is arguably an even lower standard than that found in *Bass* and *Solaroll*. However, it appears to be consistent with the 2007 amendments to Rule 55, which removed the phrase "as provided by these rules" after "failed to plead or otherwise defend." The Advisory Committee explains that this change was enacted in response to courts' erroneous interpretations requiring the defendant to perform an act linked to some other Federal Rule. The Committee explains, "Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule." FED. R. CIV. P. 55 Advisory Committee Notes, 2007 Amendments. In *H.F. Livermore Corp*., the D.C. Circuit also suggested that the defendant's intent to defend the suit is the basis for Rule 55(b)'s notice requirements, intended to "protect those parties who, although delaying in a formal sense by failing to file pleadings within the twenty-day period, have otherwise indicated to the moving party a clear purpose to defend the suit." 432 F.2d 689, 691 (D.C. Cir. 1970). For an application of this principle, see Bravado Int'l Grp. Merch. Servs., Inc. v. Ninna, Inc., 655 F. Supp. 2d 177 (E.D.N.Y. 2009) (describing a responsive pleading filed by pro se defendant in trademark infringement litigation that was held to be sufficient to avoid default, despite not meeting the requirements of a responsive pleading, because the document clearly indicated the defendant's intent to deny specific allegations in the complaint).

146. WRIGHT & MILLER, *supra* note 17, § 2681.

147. Thomson v. Wooster, 114 U.S. 104, 112 (1885).

148. FEDERAL EQUITY RULES OF 1912 154–57. Equity Rule 16 states, in relevant part: "It shall be the duty of the defendant, [unless a time extension has been granted], *to file his answer or other defense to the bill* in the clerk's office . . . in default thereof, the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*" (emphasis added). The Equity Rules, perhaps in accordance with equity's emphasis on fairness, provided liberal means by which defaulting defendants could redeem themselves; Rule 17, for example, allows the court to "set aside [the bill *pro confesso*], or enlarge the time for filing the answer, upon cause shown upon motion and affidavit," thereby allowing a defendant in default additional time to

of the claim; as long as a defendant's conduct did not prevent the litigation from moving forward, with or without the defendant's appearance, the Rules militated against using a bill or decree *pro confesso* to provide an automatic victory to the plaintiff.

A court's decision to grant default judgment after entry of default is highly discretionary, and thus the district court in *Mickalis Pawn Shop* was not required to do so. Because of the significant merit issues collateral to the public nuisance claim—including whether the City's claim was preempted by the PLCAA and whether the defendants' conduct was covered by New York's long-arm statute (an issue of first impression)—the district court should have required the City to prove its case on the merits. This is consistent with the federal courts' general policy preferring to resolve cases on the merits, especially when there is doubt over whether a default should be entered.[149]

A. Mickalis Pawn Should Not Have Been Found in Default

Prejudice to the non-defaulting party is a major factor the federal courts consider in determining whether a default judgment is an appropriate sanction.[150] Rule 55's objectives are to prevent a dilatory defendant from impeding a speedy disposition of the plaintiff's claims, and to keep cases moving forward.[151] Post-answer defaults implicate these objectives much less strongly than "simple" defaults. In a simple default situation, the case cannot move forward until the defendant files an answer. Therefore, default is an appropriate remedy to the potential problem of a defendant's continuous refusal to file an answer, whereby a defendant could make itself judgment-proof by simply refusing to acknowledge the existence of a lawsuit.

However, after an answer has been filed and the lawsuit has been set in motion, the risks of prejudice to the plaintiff caused by delay are less apparent. In *Mickalis Pawn Shop*, the case had already been through discovery and was scheduled for trial. With the defendants having fully participated in discovery and pretrial conferences, there was nothing left

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begin or resume active participation in the litigation. Similarly, Rule 17 "allowed for a setting aside of the decree *pro confesso* provided that the defendant "shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, *for the purpose of speeding the cause*." *Id.* (emphasis added).

149. WRIGHT & MILLER, *supra* note 17, § 2682; *see also* Davis v. Parkhill-Goode, 302 F.2d 489, 495 (5th Cir. 1962) ("Where there are no intervening equities any doubt should, as a general proposition, be resolved in favor . . . of securing a trial upon the merits.").

150. *See* S.E.C. v. McNulty, 137 F.3d 732, 738 (2d Cir. 2010); *see also* Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984) (enumerating the factors for considering the appropriateness of default judgment, including "prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery").

151. 46 AM. JUR. 2D *Judgments* § 232 (2011).

to prevent the City from fully presenting the merits of its case to the court ex parte.[152] Mickalis Pawn and Adventure Outdoors's withdrawal just before trial was the practical equivalent of making an appearance at trial but actually doing nothing to put on a defense. Unlike a simple default situation, the City of New York was not disadvantaged or prevented from obtaining its requested relief by the defendants' withdrawal. If anything, the City would have been advantaged by the defendants' refusal to participate actively in a trial—in an ex parte trial, the City's factual claims would not have been rebutted, and the lack of a defense would have possibly shortened the length of the trial and reduced expenses. Because the City was not materially disadvantaged by the defendants' refusal to participate, an entry of default and subsequent default judgment were not needed to keep the case moving forward to conclusion.

Courts considering default judgment also weigh the culpability of the defendant, and whether the defendant has acted in bad faith.[153] Mickalis Pawn's conduct in this case does not exhibit the same level of culpability displayed by other post-answer default defendants. In those cases cited by *Mickalis Pawn Shop* as examples of the majority rule, the defendants' failures to respond to discovery, attend pretrial conferences, file pretrial memoranda, provide valid mailing addresses for process agents, or obtain substitute counsel, were not justified by anything other than a bad faith motive to delay proceedings. In contrast, Mickalis Pawn's withdrawal from the suit was based primarily on Mr. Mickalis's desire to devote his limited remaining financial resources to the defense of his pending criminal charges in South Carolina. It is not unbelievable to think that a small business, forced to litigate for almost two years in a distant forum, would eventually find itself with dwindling financial resources, and it is not impossible to imagine this situation arising again. One is thus hard-pressed to characterize Mickalis Pawn's actions as "willful violations of court rules, contumacious conduct or intentional delays," justifying the severe sanction of default judgment.[154]

Finally, courts also consider whether the defendant has engaged in "a history of dilatoriness."[155] The defendants here did not cause delay to any proceedings—in fact, the court's opinion suggests that the defendants consistently filed timely motions to dismiss and complied with all discovery requests. In addition, because discovery had been completed and the case was about to go to trial, the defendant's

152. Hypothetically, had the defendants not cooperated in discovery, default judgment under Rule 37(b)(2)(A)(vi) would have been a more appropriate sanction than under Rule 55.

153. *See Poulis*, 747 F.2d at 868.

154. Fingerhut Corp. v. Ackra Direct Mktg. Corp., 86 F.3d 852, 856 (8th Cir. 1996).

155. *Poulis*, 747 F.2d at 868.

withdrawal did not create a possibility of delay, as the trial could have easily proceeded ex parte. Therefore, there was no basis for finding a history of dilatory tactics on the part of the defendants that would have justified a default judgment.

B. The City's Success in an Ex Parte Hearing Would Not Have Been a Foregone Conclusion.

Where a defendant has not appeared (or has withdrawn from trial), but has otherwise not been found in default, the plaintiff is not absolved of its burden of proof. Instead, the plaintiff must continue with its case and prove its claim on the merits, "just as if the defendant had been present at trial," before receiving a favorable judgment.[156] Requiring the plaintiff to prove its case on the merits under the same burden of proof that would be required of it at trial is not merely an academic exercise in the absence of the defendant. Although it would be admittedly easier for a plaintiff to prove its case in an ex parte hearing without an active adversary to rebut its factual arguments, the difference between the plaintiff's burden of proof in an ex parte hearing and the burden of proof needed to win a default judgment is substantial. Furthermore, "[t]he requirement that a party whose non-defaulting opponent fails to appear for trial must prove his case even in the absence of the opposing party reflects the basic nature of the burden of proof requirements in our trial system."[157]

Under the majority approach, a plaintiff with a case weak on the merits can obtain a favorable judgment while meeting a minimal burden. As long as the plaintiff's case is well-pleaded enough to avoid a Rule 12(b)(6) dismissal, the plaintiff can win the damages specified in the complaint without regard to the merits or strengths of the case. Rule 55(b) does not demand a factual hearing to determine the merits; rather, judges may exercise wide discretion in the hearings they hold. As the cases from the majority approach suggest, a hearing to determine the exact amount of damages may be held, but is not required.

Under the minority approach, plaintiffs do not win so easily. A defendant who has responded to the complaint has forced the plaintiff to

156. 46 AM. JUR. 2d *Judgments* § 263 (2011) ("The plaintiff must offer sufficient evidence to meet his or her burden of proof as if at trial.").

157. Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass'n., 502 N.E.2d 599, 602 (Ohio 1986). Adopting the *Bass* interpretation, the Ohio Supreme Court explained: "The sole responsibility of a defendant who has effectively contested the claimant's allegations by pleading is to refute the claimant's case *after* the latter has established a prima facie case by proper evidence. If the plaintiff cannot make out such a case, the defendant need not present *any* evidence at trial. Conversely, once a case is at issue, it is improper for a court to enter judgment against a defendant without requiring proof of the plaintiff's claim." *Id.*

win on the merits, with the same preponderance of the evidence burden of proof as the plaintiff would have at trial. Although proving a case on the merits is arguably much easier without active participation from a defendant, the difference between the minimal burden of proof under the majority and minority approaches is substantial.

In *Mickalis Pawn Shop*, a victory on the merits for the City was not a foregone conclusion, especially regarding the personal jurisdiction issue. Judge Wesley's concurrence contains a vehement rebuke of the district court's personal jurisdiction analysis and concludes that the lower court incorrectly applied New York's long-arm statute to find that Mickalis Pawn and Adventure Outdoors were subject to personal jurisdiction in New York.[158] In examining the "quality and nature" of the defendants' conduct, Judge Wesley determined that the defendants did not "transact any business within the state or contract[ ] . . . to supply goods . . . in the state," or commit any tortious act within the state; nor did they conduct or solicit any business in New York or "engage[ ] in any other persistent course of conduct or derive[ ] substantial revenue from goods used . . . in the state."[159] Nor was there any evidence to suggest that the defendants knew or should have known of the consequences of their conduct while deriving substantial revenue from interstate or international commerce.[160] Ultimately, Judge Wesley concluded that the defendants nonetheless waived the personal jurisdiction defense through pre-trial default.[161] However, this shows that had Mickalis Pawn and Adventure Outdoors not been held in default, the issue may have been decided differently at trial or reversed on appeal. Furthermore, whether the New York long-arm statute could be applied in public-nuisance suits against nonresident firearms dealers was an issue of first impression, which suggests that the case could have benefitted substantially from the additional fact-finding that would probably have occurred at an ex parte

158. City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 147 (2d Cir. 2011) (Wesley, J., concurring).

159. *Id.* at 148–49 (quoting N.Y. C.P.L.R. 302(a) (McKinney 2008)). Judge Wesley stated, "Here, it is indisputable that defendants' businesses are of a local character" and thus specifically outside the reach of the New York long-arm statute. *Id.*

160. *Mickalis Pawn Shop*, 645 F.3d at 148; *see also* Asahi Metal Indus. v. California, 480 U.S. 102, 112 (1987) ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."). Judge Wesley particularly took exception to the District Court's conclusion that the defendants' "cumulative parallel conduct" was a proper basis for finding personal jurisdiction. According to Judge Wesley's analysis, this standard would establish jurisdiction by showing that the defendants new that many others were engaged in "parallel" conduct, even if each individual defendant's conduct would be insufficient by itself to establish personal jurisdiction. Judge Wesley argued that neither the Second Circuit nor the New York Court of Appeals had ever interpreted New York's long arm statute to allow for personal jurisdiction based on the combined conduct of multiple defendants. *Mickalis Pawn Shop*, 645 F.3d at 149.

161. *Mickalis Pawn Shop*, 645 F.3d at 152.

hearing, but for the default.[162] Because the City of New York was required at the pleading stage to show only a "substantial likelihood that all the elements of jurisdiction could be established at trial,"[163] the City was absolved from meeting its burden of conclusively proving that all the elements of the long-arm statute had been met by a preponderance of the evidence.

V. CONCLUSION

Mickalis Pawn Shop exemplifies an atypical default judgment situation where the defendants litigated vigorously throughout the pretrial process before withdrawing in good faith. Under these circumstances, the defendants displayed no intent to obstruct or delay the proceedings. Following the minority rule and requiring the City of New York to proceed to prove its claim on the merits in an ex parte hearing by a preponderance of the evidence would not have caused delay or prejudice. The policy rationales of Rule 55—avoiding delay and ensuring speedy disposition of claims—were not implicated by the facts of this case.

Furthermore, in light of the federal courts' interest in deciding cases on the merits, the district court should have exercised its discretion to require the City to prove, by a preponderance of the evidence, that the defendants' conduct was covered by the New York long-arm statute, especially because this was an issue of first impression. By finding that the defendants had waived their jurisdictional defenses by defaulting, the Second Circuit compounded the district court's erroneous application of Rule 55 and avoided serious analysis of a meritorious defense by which the defendants could have possibly prevailed at trial or on appeal.

Mickalis Pawn Shop therefore illustrates the shortcomings of the majority interpretation of Rule 55. By not recognizing a post-answer default, the minority rule is more consistent with the plain language, history and policy objectives of Rule 55, as well as with the federal courts' preference for resolving cases on the merits. Federal courts must consider these factors as they continue to refine Rule 55's interpretation and apply it to situations where, as in *Mickalis Pawn Shop*, a defendant withdraws from litigation in good faith after responding to the complaint. Finally, the federal courts must consider how the uncertainty created by the circuit split affects defendants, and work towards achieving more uniformity in the rule's interpretation and application.

162. City of New York v. A-1 Jewelry & Pawn, Inc., 501 F. Supp. 2d 369, 374 (E.D.N.Y. 2009).
163. *Id.*