No. 47

MILITARY SERVICE—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940—DEFAULT JUDGMENT— AFFIDAVITS, Requirements of

Held: A. The plaintiff is the particular person designated under the Act cited to make the affidavit; and he, and no one else, can make it.
B. An affidavit merely stating defendant is not in military service is a mere conclusion and is insufficient for any purpose under the Act cited. The affidavit must set forth facts showing the defendant is not in military service.
C. An affidavit based on information and belief is insufficient for any purpose under the Act cited. The plaintiff must file in court an affidavit setting forth facts showing the defendant is not in military service. If unable to file such affidavit, plaintiff shall, in lieu thereof, file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service.

March 17, 1941.

Mr. Albert G. Harvey
County Attorney
Liberty County
Chester, Montana

Dear Mr. Harvey:

In regard to the Soldiers' and Sailors' Civil Relief Act of 1940, Chapter 888, Article II, Section 200 (1), you have asked the following questions:

A. Can the attorney for the plaintiff make the affidavit referred to in the Act, setting forth facts showing the defendant is not in miiltary service?
B. Is an affidavit merely stating defendant is not in military service sufficient to authorize the plaintiff to enter the default of a non-appearing defendant?
C. Is an affidavit based upon information and belief that a defendant is not in military service sufficient?

Article II, Section 200 (1) of the Selective Training and Service Act of 1940, reads as follows:

"(1) In any action or proceeding commenced in any court, if there shall be a default of an·appearance by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that

plaintiff is not able to determine whether or not defendant is in such
service. If an affidavit is not filed showing that the defendant is not
in the military service, no judgment shall be entered without first
securing an order of court directing such entry, and no such order
shall be made if the defendant is in such service until after the court
shall have appointed an attorney to represent defendant and protect
his interest, and the court shall on application make such appoint-
ment. Unless it appears that the defendant is not in such service the
court may require, as a condition before judgment is entered, that the
plaintiff file a bond approved by the court conditioned to indemnify
the defendant, if in military service, against any loss or damage that
he may suffer by reason of any judgment should the judgment be
thereafter set aside in whole or in part. And the court may make such
other and further order or enter such judgment as in its opinion may
be necessary to protect the rights of the defendant under this Act."

In determining question "A"—as to who may make the affidavit in
question—reference must always be had to the statutes and rules of court
governing the particular affidavit. Thus, where a statute specifically points
out who may make a certain affidavit, it can be made by no one other
than those specified. (2 C. J. 320, Sec. 9; see also Steinbach v. Leese, 27
Cal. 295.) Where it is prescribed by a statute or rule of court that an
affidavit shall be made by the party in person, no one else can make it.
See Davis v. John Monat Lumber Company, 2 Colo. A. 381, 31 Pac. 187,
wherein it was held that an affidavit of non-residence, made by the
attorney of the plaintiff, is insufficient as the basis of an order for the
publication of a summons, under Code 1887, Section 41, requiring such
affidavit to be made by a party to the action.

The Court said:

"The affidavit was made by an attorney in the suit, and not by
the plaintiff or one of the plaintiffs, or any such representative of the
corporation as is entitled under the law to act on its behalf."

See also Hadden v. Larned, 10 S. E. 278, 83 Ga. 636.

In answer to question "B," an affidavit which merely states the plain-
tiff is not in military service is no more than a conclusion which must be
supported by facts showing the defendant is not in military service. Sub-
division (1) of the Act is plain and unambiguous. It provides that, before
entering judgment, plaintiffs shall file in the court an affidavit setting
forth facts showing the defendant is not in military service.

In answer to question "C," there is no provision under the Act for an
affidavit made on information and belief. The plaintiff must file in court
an affidavit setting forth facts showing the defendant is not in military
service. If unable to file such affidavit, plaintiff shall—in lieu thereof—
file an affidavit setting forth either that the defendant is in the miiltary
service or that plaintiff is unable to determine whether or not defendant
is in such service.

It is therefore my opinion:

A. The plaintiff is the particular person designated under the Act above
cited to make the affidavit; and he, and no one else, can make it.

B. An affidavit merely stating defendant is not in military service is a
mere conclusion and is insufficient for any purpose under the Act
above cited. The affidavit must set forth facts showing the defendant
is not in military service.

C. An affidavit based on information and belief is insufficient for any
purpose under the Act above cited. The plaintiff must file in court an
affidavit setting forth facts showing the defendant is not in military
service. If unable to file such affidavit, plaintiff shall—in lieu thereof—
file an affidavit setting forth either that the defendant is in the military

service or. that plaintiff is not able to determine whether or not de-
fendant is in such service.

<div align="center">Sincerely yours,</div>

<div align="right">JOHN W. BONNER
Attorney General</div>