

Alabama Rules of Civil Procedure

VI. TRIALS

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 of this state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. 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 Alabama, or of the United States, or of any state, an action based on or including the same claim.

(2) BY ORDER OF COURT. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action may be dismissed but the counterclaim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal: Effect thereof.* 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. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision 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.

(c) *Dismissal of counterclaim, cross-claim or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to

paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(dc) *District court rule.* Rule 41 applies in the district courts, except that the references to Rule 23(e) and Rule 66 at Rule 41(a)(1) are deleted.

[Amended 5-16-83, eff. 7-1-83; Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

The rule is substantially the same as the corresponding federal rule. The second sentence of Rule 41(a)(2) has been altered to state unequivocally that a counterclaim interposed prior to dismissal of the action remains pending despite the dismissal. See also Rule 13(i). The similar portion of the federal rule is cryptically worded and at best states an exception which is needless in a state court of general jurisdiction, however necessary it may be in the federal courts where jurisdiction is limited.

The purpose of Rule 41(a) is to facilitate voluntary dismissals but to limit them to an early stage of the proceedings before issue is joined. *Harvey Aluminum Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.1953), cert. denied 345 U.S. 964, 73 S.Ct. 949, 97 L.Ed. 1383. Once issue has been joined, by answer or by motion for summary judgment, voluntary dismissal can only be upon court order, and the court is given broad powers to prevent harassment of or inconvenience to the defendant by an arbitrary dismissal at this advanced stage of the case.

Rule 41(b), F.R.C.P., as originally promulgated, applied to both jury and non-jury cases. By amendment, its function is clearly limited to non-jury cases. In a jury case, Rule 50 applies and the court is limited to a question of law (thereby preserving jury trial right) as to the sufficiency of plaintiff's prima facie case. In a non-jury case, the court, under Rule 41(b), as ultimate trier of fact, is free to weigh the evidence and the credibility of the witnesses. See *O'Brien v. Westinghouse Electric Corp.*, 293 F.2d 1 (3d Cir.1961) for a discussion of the confusion arising from the overlap that once existed. See, generally, 5 Moore's

Federal Practice, ¶ 41.13[3], at p. 1153 (2d Ed.1971). No present Alabama procedure permits such action in a non-jury trial.

A dismissal, whether voluntary or involuntary, may be set aside by the court, like any other judgment, on proper motion under Rule 60(b). A rehearing may be requested under Rule 59(a)(2) and amendments to the court's findings may be pursued under Rule 52(b).

**Committee Comments to October 1, 1995,
Amendment to Rule 41**

Subdivision (b). This amendment deletes the provision for dismissal by the court in a nonjury case for failure of proof. This matter is now covered by Rule 52(c).

**District Court Committee Comments
(Amended effective July 1, 1983.)**

For commentary as to the unavailability of Rule 23 ("Class Actions") and Rule 66 ("Receivers"), see the District Court Committee Comments applicable to those rules.

[Amended effective July 1, 1983.]