Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-395

MAY TERM, 2006

William F. Dixon and Sandra J. Dixon } APPEALED FROM:

}

}

v. } Windham Superior Court

}

Vincent J. Zimmitti }

} DOCKET NO. 216-5-05 Wmcv

Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Defendant appeals the superior court=s denial of his motion to set aside a default judgment requiring him to remove structures encroaching on plaintiffs= adjoining land. We affirm.

In 1994, after obtaining a zoning permit, defendant built a garage and addition on land adjoining plaintiffs= property. In August 2004, plaintiffs= attorney wrote defendant a letter stating that a survey showed that the garage and addition were not thirty-four feet from their property line, as represented in his zoning permit application, but rather encroached upon their property by more than eleven feet. The letter encouraged

defendant to retain an attorney so that all interested parties could obtain a satisfactory resolution of the matter. Defendant met with plaintiffs and their attorney on one occasion and then went to Florida, where he resided from late fall to late spring.

In February 2005, while residing in Florida, defendant received a copy of a summons and complaint alleging trespass and private nuisance. Shortly thereafter, plaintiffs= attorney telephoned defendant and asked him to sign and return the form acknowledging receipt of the summons and complaint. Defendant informed the attorney that he would not be signing anything until he returned to Vermont in the spring. Plaintiffs then had a deputy sheriff serve the complaint and summons on defendant. The return of service indicated that defendant was served on April 25, 2005. The serving officer wrote the following on the return-of-service form, which specified defendant by name and address as Aperson to be served@: ASubject inside house and refused to open door. Subject advised through door that papers would be left on table outside door.@

Defendant returned to Vermont in June 2005, but did not file a response to the complaint. On July 25, 2005, plaintiffs filed a motion for a default judgment, and sent a courtesy copy of the motion to defendant. On August 2, 2005, the court granted a default judgment to plaintiffs. On that same day, an attorney that defendant had just hired mailed the court his notice of appearance, but did not include an answer to the complaint. One week later, defendant filed a motion for relief from judgment. See V.R.C.P. 55(c) (AIf a judgment by default has been entered, the court may set it aside in accordance with Rule 60(b) and not otherwise.@). The motion stated without explanation that defendant had a meritorious defense and referred to defendant=s attached affidavit, in which defendant did not recall being served with any papers in Florida. The court denied the motion, stating that (1) defendant had still not filed an answer, even though it was due nearly four months earlier; (2) the serving officer=s affidavit, along with that of plaintiffs= attorney, made it clear that defendant should have received all the necessary paperwork, and if he did not, it was due to his own actions; and (3) there was no excusable neglect because defendant simply ignored the complaint until it was too late.

On appeal, defendant argues that the superior court abused its discretion by denying his motion to set aside the default judgment, given that he was never served by the deputy sheriff, and his only notice of the

complaint was the copy he received before the action was actually filed. According to defendant, there was excusable neglect because he thought that his son was handling the matter for him, and he did not become aware of the lawsuit until late July when he received a copy of the motion for default judgment.

As defendant acknowledges, even where default judgments are concerned, Arulings upon motions brought under Rule 60(b) are discretionary and will not be reversed unless abuse of discretion is demonstrated.@ Nobel/Sysco Food Servs., Inc. v. Giebel, 148 Vt. 408, 410 (1987). Because default judgments effectively deprive defendants of an opportunity to present a defense through the normal adversary judicial process, Awe have expressed a preference for relief from default judgments in the absence of culpable negligence or dilatory intent.@ Id. (emphasis added). Thus, even defendants challenging default judgments must show that they are entitled to relief pursuant to the reasons set forth in V.R.C.P. 60(b), such as mistake, inadvertence, surprise, or excusable neglect. Id. In considering whether to set aside a default judgment, the trial court should consider Awhether the failure to answer was the result of mistake or inadvertence, whether the neglect was excusable under the circumstances, and whether the defendant has demonstrated any good or meritorious defense to the plaintiff=s claims.@ Desjarlais v. Gilman, 143 Vt. 154, 157 (1983).

Here, the record supports the superior court=s finding of culpable neglect on defendant=s part. Defendant claims that the deputy sheriff never served him with the complaint and summons in Florida, but he does not argue that the return of service contained the wrong name or address, and the officer stated on the return of service that he advised the Asubject@ of that document through the door that he would leave the papers on the table outside the door. Defendant makes no argument that this manner of service failed to comply with V.R.C.P. 4. See Jones v. Jones, 217 F.2d 239, 242 (7th Cir. 1954) (in moving to set aside default judgment, defendant had burden Ato show that the judgment was void for lack of service and that she had no actual notice of the suit@). Further, defendant admits that he received a copy of the complaint and summons from plaintiffs= attorney and later spoke to the attorney about the papers. Thus, defendant had actual notice of the complaint. Defendant states that he told plaintiffs= attorney that he would hire an attorney when he returned to Vermont in the spring, but did not do so and did not answer the complaint. Not surprisingly, the superior court gave no credence to defendant=s claim that he neglected the matter for several months because he thought his

son was handling it.

Defendant also suggests that V.R.C.P. 55 required the superior court to hold a hearing on his motion for relief from judgment because plaintiffs were seeking injunctive relief rather than a fixed sum of money. This argument is unavailing. Under Rule 55, if a defendant fails to appear in an action not involving a claim for a sum certain, Athe court may conduct such hearings or order such references as it deems necessary and proper.@ V.R.C.P. 55(b)(3) (emphasis added). Similarly, although hearings on Rule 60(b) motions are preferred, the decision whether to hold a hearing remains within the discretion of the trial court, and a hearing is unnecessary when the grounds for the motion are totally lacking in merit or when the Acourt finds that the explanations offered by a party are unreasonable.@ Sandgate Sch. Dist. v. Cate, 2005 VT 88, & 12.

Here, although defendant stated that he had not been served by the deputy sheriff and that he had a meritorious defense to the complaint, he offered no explanation to support those claims and failed to identify any evidence he hoped to offer at a hearing to support those claims. Cf. Altman v. Altman, 169 Vt. 562, 565 (1999) (mem.) (plaintiff waived any right to hearing on his motion to set aside default judgment by failing to request hearing or to identify evidence he hoped to offer); Jones, 217 F.2d at 242 (where request to set aside judgment was submitted to court without any suggestion as to any evidence other than that contained in affidavits, court was justified in disposing of motion without hearing based on affidavits submitted by parties). Under the circumstances, given the record before it, the superior court acted within its discretion in ruling on defendant=s motion without holding a hearing. Finally, we find no indication in the record that anyone took unconscionable advantage of defendant because of his pro se status. See Vahlteich v. Knott, 139 Vt. 588, 590-91 (1981) (although we will not allow unfair imposition or unconscionable advantage to be taken of pro se litigant, A[t]his does not mean that pro se litigants are not bound by the ordinary rules of civil procedure@).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice