

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-124

AUGUST TERM, 2010

Leigh R. Isaacs	}	APPEALED FROM:
	}	
v.	}	Rutland Superior Court
	}	
Richard Rossi, Marie Rossi c/o	}	DOCKET NO. 329-6-06 Rdcv
Thomas Rossi, Robert Evegán and	}	
William Van Herwarde	}	
		Trial Judge: William D. Cohen

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

Plaintiff appeals from a judgment, based on a jury verdict, awarding him \$13,500 in damages against defendant Richard Rossi for improperly destroying trees on plaintiff's property located in the Town of Killington. Plaintiff contends the court erred in: (1) granting motions to set aside default judgments against defendants Richard and Marie Rossi; and (2) failing to award injunctive relief against defendant Richard Rossi in the final judgment. We affirm the court's decision to set aside the defaults, and remand for the trial court to address the issue of injunctive relief.

Plaintiff owns property adjacent to a lot owned by defendant Marie Rossi in Killington, Vermont. In September 2007, plaintiff filed an amended complaint against defendants Marie Rossi and her son Richard Rossi, alleging that they had trespassed against his property and destroyed a number of trees in the process.* When the Rossis failed to answer, plaintiff moved for default judgment, and an entry of default was entered by the court in July 2008. Plaintiff submitted a proposed judgment order the following month, but the trial court declined to enter judgment, observing that other defendants remained in the case, and that a hearing on damages was still required. Plaintiff continued to pursue discovery from defendants over the next year and a half.

Following a pretrial conference in early January 2010, Richard Rossi filed a pro se letter asking to set aside the default. Shortly thereafter, an attorney entered an appearance for defendant Marie Rossi and moved to set aside her default. Discovery continued throughout the following month, and trial was scheduled to commence on February 22, 2010. At a pretrial hearing to consider a number of pending motions, the trial court granted Marie Rossi's motion to vacate the earlier default, finding that it would not prejudice defendant, and citing the longstanding preference to adjudicate matters on the merits. At trial, the court also granted Richard Rossi's motion to vacate the default, observing that it would have no "effect on the [p]laintiff and how the

* The complaint also alleged that another neighbor, defendant William Van Herwarde, conspired with the Rossis to commit the trespass, and that defendant Robert Evegán trespassed by driving a septic tank over his property. No claims against either of these defendants is raised on appeal.

case has been presented,” that plaintiff had been able to adduce “[s]ignificant evidence . . . against Mr. Rossi,” and that “ultimately” his liability should be “for the jury to decide.” As noted, the jury found that defendant Richard Rossi had committed timber trespass, and the court awarded treble damages of \$13,500. This appeal followed.

A motion to vacate a default judgment is committed to the sound discretion of the trial court, and its ruling will be reversed only upon a showing of an abuse of that discretion. Dougherty v. Surgen, 147 Vt. 365, 366 (1986). Moreover, because default judgments deny defendants an opportunity to present a defense through the normal adversary process, “we have expressed a preference for relief from default judgments in the absence of culpable negligence or dilatory intent.” Nobel/Sysco Food Servs., Inc. v. Giebel, 148 Vt. 408, 410 (1987); accord Brady v. Brauer, 148 Vt. 40, 44 (1987) (“The denial of relief from a default judgment must have strong support, and a court ought to be indulgent in reopening judgments entered by default.”). Generally, “[w]hen no prejudice is apparent, courts naturally are favorably inclined toward setting aside a default entry or judgment.” 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2699, at 168 (2d ed. 1998).

Applying these standards, we find no basis to reverse the trial court’s rulings. Although defendants Marie and Richard Rossi—while acting pro se—were admittedly late in filing their responses to the amended complaint and in complying with discovery requests, the trial court found no prejudice to plaintiff from setting aside the defaults, and plaintiff has not demonstrated that the court abused its discretion in so ruling. Plaintiff argued below, and maintains on appeal, that he was prejudiced in two respects: First, in not seeking discovery in reliance on the defaults, and second, in being “deprive[d] . . . of his right to rely on the effect of [the] default.” In granting the motions to vacate, however, the court directed that plaintiff be afforded the discovery to which he was entitled, and the court subsequently observed at trial that plaintiff had been given ample opportunity to present significant evidence against defendants. Plaintiff has not shown that he was deprived of any necessary information, or that he was prejudiced at trial as a result. Indeed, the record shows that plaintiff obtained a favorable judgment on his claim of timber trespass and was awarded treble damages of \$13,500. As to plaintiff’s claim that he was deprived of the ability to rely on the defaults, courts have generally found “that the fact that plaintiff would have to try the case on the merits if relief is granted is not the kind of prejudice that should preclude relief.” 10A Wright, Miller & Kane, *supra*, § 2699, at 168. Therefore, we find no abuse of discretion, and no basis to reverse the judgment.

Plaintiff also argues that the trial court erred in failing to address his additional request for injunctive relief against Richard Rossi in the final judgment. Defendant Richard Rossi does not contest the assertion. Accordingly, the matter will be remanded to the trial court for the limited purpose of addressing the claim for injunctive relief.

The judgment is affirmed, and the matter is remanded to the trial court to address plaintiff’s claim for injunctive relief.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice

