

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-177

AUGUST TERM, 2003

	}	APPEALED FROM:
	}	
Daimler Chrysler Services North	}	Franklin Superior Court
America, LLC	}	
	}	
v.	}	DOCKET NO. 378-02 Fc
	}	
Margaret Sylvester	}	Trial Judge: Dennis R. Pearson
	}	
	}	

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

Plaintiff Daimler Chrysler Services North America, LLC appeals from the trial court= s denial of its V.R.C.P. 60 motion for relief from the trial court= s order dismissing its case for failure to prosecute. We reverse and remand.

In August 2002, plaintiff filed a complaint against defendant Margaret Sylvester for defaulting on a contract for the purchase of an automobile. Plaintiff filed a motion for summary judgment, which the court denied after concluding that questions of material fact existed as to the proper amount of damages. In its order dated January 13, 2003, the court indicated that the case would be set for a half-day trial. Plaintiff filed a motion for reconsideration, which the court denied. On January 6, 2003, plaintiff sent a letter to the court clerk indicating that he would be out of the state between March 13 and March 23, 2003. On February 28, 2003, plaintiff received notice that trial had been set for March 14, 2003. According to plaintiff, his secretary called the clerk regarding the conflict, and the clerk informed her that the case would be rescheduled. The case was not rescheduled, and when plaintiff failed to appear on March 14, 2003, the court dismissed the case with prejudice for failure to prosecute.

Plaintiff= s counsel then filed a Rule 60(b) motion, asking the court to set aside its order because he had provided advance notice to the court that he would be out of town on the date of the hearing, and he had been misinformed by the clerk that the case would be rescheduled. The court denied the motion, explaining that plaintiff had admitted receiving notice of the hearing, and it would be unfair to require defendant to prepare for another hearing and personal appearance after she had twice appeared in court. This appeal followed.

A The decision on a Rule 60(b) motion is committed to the sound discretion of the trial court and will stand on review unless the record clearly and affirmatively indicates that such discretion was withheld or otherwise abused.@ Bingham v. Tenney, 154 Vt. 96, 99 (1990). The party challenging the motion= s denial bears the burden of proving an abuse of discretion. Id. Although an evidentiary hearing should generally precede a decision on a 60(b) motion when facts are at issue, we have held that the court may deny a motion without a hearing when it finds the motion totally lacking in merit.@ Altman v. Altman, 169 Vt. 562, 564 (1999) (mem.).

Plaintiff argues that the trial court abused or withheld its discretion by denying its Rule 60(b) motion. We agree. Rule 60(b) allows the court to relieve a party from a final judgment for mistake, inadvertence, surprise, excusable neglect or any other reason justifying relief from the operation of the judgment. V.R.C.P. 60(b). While the rule A will not serve to relieve a party from its free, calculated and deliberate choices, it is invoked to prevent hardship and injustice and thus shall be liberally construed and applied.@ Tenney, 154 Vt. at 99. In this case, the trial court failed to identify a reasonable basis for denying plaintiff= s motion. The court= s first reason, that plaintiff had advance notice of the hearing, is immaterial here. Plaintiff does not dispute that it received notice of the hearing date. Instead, plaintiff argued

that it was entitled to relief under Rule 60(b) because counsel had informed the court that he would be out of town on the date of the hearing, and had been told that the hearing would be rescheduled. The court failed to address plaintiff's claim that he had rescheduled with the clerk. If plaintiff's understanding that the matter would be rescheduled was, in fact, true, then it would be an abuse of discretion to deny the motion simply because defendant would have to appear again. We thus conclude that the trial court abused its discretion in denying plaintiff's Rule 60(b) motion.

Reversed and remanded.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice