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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-269

NOVEMBER TERM, 2005

Bernadette A. Parker	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Richard Parker	}	
	}	DOCKET NO. F1031-12-96 Cndm
		Trial Judge: Helen M. Toor

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

Wife appeals from the family court=s order denying her request for relief from the parties= final divorce order. She argues that the court abused its discretion by failing to consider the equities of the situation, and by failing to find that she and her husband had intended to equally divide the equity in the marital home. Husband has not filed a brief despite an entry order directing him to do so. We reverse and remand.

Husband and wife were married in March 1990. They divorced in September 1997 pursuant to a stipulated final order and divorce decree. The marital estate consisted primarily of wife=s 401(k) account and the marital home. The parties agreed to liquidate the 401(k) account to pay off marital debts. The parties stipulated that the marital home had a fair market value of approximately $96,000, although they did not identify the amount of equity in the home. They agreed, however, that husband would have sole title, possession, and control of the home, and that in exchange, he would pay wife $3,000, which represented her Aequitable share of the equity@ in the home. Pursuant to the agreement, husband was required to secure a commitment from a bank to refinance the property within twelve months of the divorce order so that he could remove wife=s name from the mortgage and provide her with $3,000. When husband did so, wife would then be obligated to execute a quit claim deed. The order also provided that if husband did not refinance the property within twelve months, he would have to put the home on the market and, if the home sold, the parties would equally share the net proceeds.

Approximately eight years later, in June 2005, wife filed a motion for equitable relief from the final divorce order pursuant to V.R.F.P. 4(a) and V.R.C.P. 60(b)(6). She averred as follows. At the time of their divorce, the parties had $6,000 equity in the marital home, which they agreed to split. Husband did not refinance the property within twelve months, however, nor did he pay her $3,000; she did not execute a quit claim deed. Instead, approximately one year after their divorce, the parties reunited and began living together in the marital home. During this time, they shared the household expenses, including the mortgage payments. In September 2003, the home was appraised at $135,000, and shortly thereafter, the parties refinanced the home. They borrowed $87,636 and used some equity to pay credit card bills. They used the balance of the refinance to pay off their previous mortgage. In February 2005, wife moved out of the marital home. In light of these events, wife asked the court to modify the final divorce order to reflect her entitlement to half of the equity in the marital home.

Shortly after wife=s motion was filed, and before husband had filed a response, the court denied wife=s request. The court stated that the parties had expressly agreed to a $3,000 payment as wife=s share of the equity and there was no legal basis on which to reopen the divorce decree to modify that clear and precise term. This appeal followed.

Wife argues that the court abused its discretion in denying her request. According to wife, neither party performed his or her obligations under the divorce agreement, and it is manifestly unfair to allow husband to receive a windfall from the increased value of the property, particularly when wife helped pay the mortgage and household expenses during the period in which they lived together after the divorce. Wife maintains that the parties= divorce agreement clearly reflects their intent to share the equity in the home.

We agree that the court abused its discretion in denying wife=s request. See Bingham v. Tenney, 154 Vt. 96, 99 (1990) (holding that trial court=s decision will stand on review unless record clearly and affirmatively indicates that court withheld or otherwise abused its discretion). Rule 60(b) allows the court to relieve a party from a final judgment for Amistake, inadvertence, surprise, or excusable neglect,@ or Aany other reason justifying relief from the operation of the judgment.@ V.R.C.P. 60(b)(1) & (6). While the rule Awill not serve to relieve a party from its free, calculated and deliberate choices, it is invoked to prevent hardship or injustice and thus shall be liberally construed and applied.@

Bingham, 154 Vt. at 99. In this case, the family court erred by denying wife=s motion only ten days after it had been filed and before husband had filed an answer. We therefore reverse and remand the court=s order to allow husband to respond to wife=s motion. See Courtyard Partners v. Tanner, 157 Vt. 638, 639 (1991) (mem.) (stating that although trial court=s ruling on a Rule 60(b) motion is discretionary, this Court may remand case to prevent failure of justice when warranted by the circumstances); see also Altman v. Altman, 169 Vt. 562, 564 (1999) (mem.) (stating that an evidentiary hearing should generally precede the court=s decision on a Rule 60(b) motion when facts are in issue, although court may deny the motion without a hearing when it finds the motion Atotally lacking in merit@). If, on remand, the court credits wife=s assertion that the parties intended to evenly split the equity in the marital home, it must then exercise its discretion and grant the appropriate relief.

Reversed and remanded.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice