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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-474

AUGUST TERM, 2008

Housing Foundation, Inc.	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
	}	
Yolanda Beagle	}	DOCKET NO. 355-9-07 Bncv
		Trial Judge: David A. Howard

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

Tenant, Yolanda Beagle, appeals the superior court's order granting landlord, Housing Foundation, Inc., a default judgment. On appeal, tenant claims that the court erred by: (1) granting a default judgment without a hearing; (2) denying her motion for relief from judgment under Rule 60(b); and (3) failing to address tenant's defenses. We reverse and remand.

The parties do not dispute the basic facts. In November 2006, tenant purchased a mobile home situated in landlord's mobile-home park. Tenant claims that she was not aware that landlord required a deposit in addition to monthly rent. After tenant sent her first month's rent, landlord applied part of it to her security deposit and sent her a notice that her rent was past due. Tenant continued to be past due in her rent, and in March 2007, she received a termination letter for failure to pay rent. After tenant failed to cure the default, landlord filed an action for ejectment and possession. On September 18—the day tenant's answer was due—landlord filed a motion for default judgment. Tenant filed her answer on September 19, one day late, and in it, she acknowledged that she owed some rent, but disputed the amount due to landlord. She also answered landlord's requests to admit and interrogatories. On September 28, following landlord's request, the court entered an escrow order.[1] The same day the court entered an order giving tenant until October 12, 2007 to explain why a default should not be entered against her. Tenant never responded to this order, although on appeal, tenant claims that she believed her previously filed answer was sufficient.

[1] The court granted tenant's motion to amend this order for October so that she could submit her rental payment on October 5, instead of October 1. On October 5, tenant deposited her rent as ordered.

On October 25, 2007, the court entered a default judgment for landlord in the amount of $2917.18 and issued a writ of possession for landlord. On November 5, 2007, tenant filed a motion asking that the judgment be set aside and that a stay be granted. In her motion, tenant argued that the court had erred in granting default judgment without holding a hearing, as required by Vermont Rule of Civil Procedure 55(b)(4). In addition, for the first time, tenant raised defenses to landlord's eviction action, including claims that landlord had failed to provide her with a lease until March 2007 and that landlord violated the Housing Authority Rules by failing to provide potable water. The court denied the motion on November 27, 2007 and issued a writ of possession. In its order, the court explained:

> On 11/5/07, 24 days after the deadline set by the court and 11 days after judgment had issued, [tenant] finally filed her objection and explanation of her original late answer without any comment on why she was 24 days late in responding to the default judgment motion. The court finds this set of facts does not justify setting aside the default judgment. [Landlord] should not have to wait indefinitely until [tenant] decides to file despite court ordered deadlines. [Landlord] properly obtained a default judgment after the court waited an additional 13 days for [tenant] to object. To set aside would mean a wasted 2 month period to the prejudice of [landlord].

Tenant appeals the court's order denying her motion to set aside the default judgment.

"A motion to vacate a default judgment is addressed to the sound discretion of the trial court, and the denial of the motion will be reversed only upon a demonstration of an abuse of that discretion." Dougherty v. Surgen, 147 Vt. 365, 366 (1986). Although tenant has the burden of demonstrating that the court abused its discretion, the rules should be interpreted liberally to favor resolution of a case on the merits and to allow defendants to be heard in their own right. Id. "A default judgment issued without the opportunity to be heard is not favored over one rendered after full hearing, and relief ought not to be denied for insufficient reasons." Brady v. Brauer, 148 Vt. 40, 44 (1987).

Tenant contends that the court abused its discretion by granting landlord default judgment without holding a hearing, as required by the plain language of the rule. Rule 55 explains "[i]f the party against whom judgment by default is sought has appeared in the action judgment may be entered after hearing, upon at least 3 days' written notice served by the clerk." V.R.C.P. 55(b)(4). Landlord does not dispute that tenant appeared in this case. We agree that, by filing an answer, and subsequent other motions and responses, tenant appeared in this case. "Normally, appearance in an action involves some presentation or submission to the court." Port-Wide Container Co. v. Interstate Maintenance Corp., 440 F.2d 1195, 1196 (3rd Cir. 1971) (per curiam). This Court has found that where a party "filed a detailed answer to the complaint, asserted a counterclaim and obtained a dissolution of the attachment that plaintiff had obtained," the party had appeared for purposes of Rule 55. Dougherty, 147 Vt. at 367. In addition, most courts agree that filing an answer constitutes an appearance for purposes of Rule 55. See, e.g., Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949); Ohio Valley Radiology Assocs. v. Ohio

Valley Hosp. Ass'n, 502 N.E.2d 599, 602-03 (Ohio 1986) (party appears by filing a responsive pleading). We therefore conclude that tenant appeared in this case.

Despite tenant's appearance, landlord argues that the court did not err, because under Rule 55(b)(4), a hearing is discretionary and not mandatory. Landlord further contends that the court's September 28 show-cause order gave tenant adequate notice of the impending default, and thus, landlord postulates that the purpose behind the hearing requirement—to ensure that a party has notice prior to default—was met in this case.

We disagree with landlord that Rule 55 contains an advisory, rather than mandatory, directive to hold a hearing prior to issuing a default judgment against a party who has appeared in the case. The plain language of the Rule states that "[j]udgment may be entered after hearing, upon at least 3 days' written notice." V.R.C.P. 55(b)(4). We interpret this language as a mandatory directive to the trial court. This interpretation is consistent with the purpose of the Rule. The Rule was amended following this Court's decision Reuther v. Gang, wherein we held that "where the defendant has not appeared for trial, but has otherwise appeared and defended the action, an entry of a default judgment is improper." 146 Vt. 540, 542 (1986). The Rule was amended to clarify that, in all cases where a defendant has appeared, the court must provide notice and a hearing prior to default. Thus, the Reporter's Notes explain that, under the amended Rule, "whenever the defendant has appeared there must be a hearing prior to issuance of a default judgment." Reporter's Notes, 1988 Amendment, V.R.C.P. 55. Given that the court failed to hold a hearing prior to granting landlord default judgment, we conclude that the court abused its discretion in denying tenant's Rule 60(b) motion.

Tenant alleged an additional ground for her Rule 60 motion: a defense based on landlord's alleged failure to supply potable water. The trial court did not consider this argument in analyzing tenant's motion. If the superior court issues another default judgment at the hearing, the court must consider this alternative argument. Alternatively, if the court allows defendant's answer, the court must consider whether to allow tenant to amend her answer to include a potable-water defense.

Reversed and remanded for proceedings consistent with this opinion.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice