ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-326

FEBRUARY TERM, 2010

Trevor Evans	}	APPEALED FROM:
	}	
v.	}	Orleans Superior Court
	}	
Gerard Cote	}	DOCKET NO. 285-12-06 Oscv
		Trial Judge: Walter M. Morris, Jr.

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

Defendant Gerard Cote appeals from a superior court judgment denying his motion to vacate a default judgment in favor of plaintiff Trevor Evans. Cote contends the court erred in denying the motion because: (1) the default judgment violated due process and was therefore void, and (2) fairness and justice require a decision on the merits. We affirm.

This matter involves a longstanding boundary dispute between Evans and Cote, adjoining property owners in the Town of Derby, Vermont. In December 2006, Evans filed a complaint against Cote, seeking a declaratory judgment that a discontinued Town road dividing the two properties is part of Evans's property. Evans relied on a survey, municipal land records, and physical evidence on the ground to claim ownership of the road, and asserted that Cote had periodically trespassed on the property by placing logs across the road and removing trees and other materials.

Cote was served with the complaint in January 2007, and entered a pro se appearance in early February 2007, but filed no answer and had no communication with Evans or his attorney. Evans moved for default judgment on February 13, 2007, two months after filing the complaint. It is undisputed that Cote received notice of the motion for default judgment. The court's docket entries indicate that it was waiting for a memorandum in opposition, but none was filed. On February 26, thirteen days after the motion for default judgment was filed, the court granted the motion without a hearing. There is no dispute that Cote received notice of the default judgment, but filed no motion to vacate or other response, and the judgment became final. In March 2007, the court issued an order establishing Evans's ownership of the disputed property.

About a year and a half later, in August 2008, Evans moved to enforce the judgment through a motion for a nonpossessory writ of attachment and injunction. The following month, Cote filed an opposition and motion to dismiss, which the court treated as a motion for relief from judgment under Vermont Rules of Civil Procedure 60(b)(4) and 60(b)(6).[1] Cote maintained

[1] These sections provide that a court may relieve a party from a final judgment where "the judgment is void," V.R.C.P. 60(b)(4), or for "any other reason justifying relief from the operation of the judgment," V.R.C.P. 60(b)(6).

that the default judgment was procedurally invalid and void because it failed to conform to the requirements of Rule 55(b)(4), which provides that, where a "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." In a written order issued in November 2008, the court rejected this argument, concluding that, although Cote had sufficiently entered an appearance, the failure to hold a hearing did not deprive the court of subject-matter jurisdiction or render the judgment void as a violation of due process where Cote had indisputably received notice of the motion and the default judgment and had failed to file any opposition, motion to vacate, or appeal. The court also found that Cote had failed to demonstrate any "extraordinary circumstances" warranting relief under Rule 60(b)(6) or any valid excuse for the lengthy delay in challenging the final order. See, e.g., Adamson v. Dodge, 174 Vt. 311, 327 (2002) (noting that Rule 60(b)(6) "applies only in extraordinary circumstances"). Accordingly, the court denied Cote's motion to dismiss, granted Evans's motion for a nonpossessory writ of attachment (reducing the request from $58,000 to $20,000), and denied Evans's request for an injunction, finding insufficient evidence of any current or imminent trespass.

One month later, in December 2008, Cote moved to vacate the default judgment, raising essentially the same arguments which the court had addressed and rejected in its earlier ruling. In August 2009, the court denied the motion. Reaffirming its earlier ruling, the court concluded that the judgment was not void on due process grounds, noting that Cote had received proper notice of the motion and judgment, had been afforded sufficient opportunity to respond, and had waited more than a year to mount any challenge. Accordingly, the court denied the motion to vacate. This appeal followed.

The general rule is that a judgment is void "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright, Miller, & Kane, Federal Practice & Procedure § 2862 at 326-29 (2d ed. 1995). Many courts have held that a failure to provide notice of a motion for default judgment represents "a serious procedural error that may, in appropriate circumstances, constitute a due process violation that requires vacating a default judgment." First Nat'l Bank of Telluride v. Fleisher, 2 P.3d 706, 712 (Colo. 2000); accord, e.g., Leedy v. Thacker, 245 S.W.3d 792, 796 (Ky. Ct. App. 2008) ("A default judgment obtained without giving the notice required by the rule raises questions of due process rendering the judgment void . . . ." (quotation omitted)). Thus, in Dougherty v. Surgen, 147 Vt. 365 (1986), we vacated a default judgment where the defendants had not received notice of the motion. Id. at 367.

The instant case is distinguishable from these and others that have voided default judgments for lack of notice, inasmuch as it is undisputed here that Cote received notice of the motion and the ensuing judgment. That the court granted the motion without holding a hearing may have violated the rule, but rendered no conceivable prejudice to Cote where it is equally undisputed that he filed no opposition, no motion to vacate or appeal, and indeed virtually no challenge to the judgment for more than eighteen months after it was entered. See Fleisher, 2 P.3d at 714 ("Whether the judgment is void for failure to provide notice in compliance with [Rule] 55(b) depends on whether the factual circumstances surrounding the default proceeding indicate that the defaulting party was nonetheless aware that a default judgment was sought

against it and that the defaulting party had sufficient opportunity to be heard."). Accordingly, we conclude that relief is not compelled under Rule 60(b)(4).[2]

Relief under the catch-all provision of "Rule 60(b)(6) is intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time." Riehle v. Tudhope, 171 Vt. 626, 627 (2000) (mem.). Motions under this provision are committed to the sound discretion of the trial court, and its decision will not be disturbed "unless it clearly and affirmatively appears on the record that such discretion was withheld or abused." Adamson, 174 Vt. at 326 (quotation omitted). Apart from Cote's assertion that justice requires reopening the case to allow him to contest the claim on the merits and raise an adverse possession defense, he has made no showing of the extraordinary circumstances generally required to reopen a final judgment. See id. at 327 ("Interests of finality require that relief from a previous judgment should be granted only in extraordinary circumstances."). We find no basis, therefore, to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

[2] Our conclusion renders it unnecessary to address Evans's additional argument that Cote's notice of pro se appearance was insufficient to constitute an appearance under Rule 55(b)(4).