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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-298

OCTOBER TERM, 2006

Chittenden Trust Company d/b/a Mortgage Service Center	}	APPEALED FROM:
v.	}	Windham Superior Court
Harald T. Holm	}	DOCKET NO. 300-7-03 Wmcv

Trial Judge: Karen R. Carroll

John P. Wesley

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

Defendant Harald Holm appeals the superior court=s denial of his motion to set aside a default judgment in this foreclosure action resulting in the loss of his home. We reverse and remand the matter for an evidentiary hearing on defendant=s motion.

The procedural facts of this case are not in dispute. In January 2002, approximately one year after the death of defendant=s wife, plaintiff Chittenden Trust Company brought a foreclosure action against defendant because his homeowner=s insurance had lapsed and his mortgage payments were in arrears. In response, defendant reinstated his homeowner=s insurance and, with the help of the bank, set up an automatic withdrawal from his checking account to make his monthly mortgage payments. The homeowner=s insurance lapsed again the following year, however, when defendant failed to pay the annual premium of approximately $270. On July 3, 2003, Chittenden filed another foreclosure complaint, which indicated a payoff amount of approximately $80,000. On August 13, 2003, after several unsuccessful attempts to personally serve defendant, Chittenden obtained a court order allowing it to post notice of the complaint at his residence. See V.R.C.P. 4(d)(1) (if personal service cannot be made with due diligence, court may order service to be made by leaving copy of summons and complaint at defendant=s dwelling house or usual place of abode). Defendant did not file an answer to the complaint and did not enter an appearance.

Chittenden filed a motion for default judgment on September 8, 2003. Receiving no response from defendant, the superior court entered a default judgment order and decree of foreclosure on October 7, 2003. The order contained a provision stating that if defendant did not pay $77,343 with interest on or before April 7, 2004, he would be foreclosed and forever barred from all equity of redemption in the premises. Defendant did not respond to this order, and the court issued a certificate of redemption and writ of possession on April 9, 2004. On June 15, 2004, Chittenden sold defendant=s mortgage note and transferred the property to another lender, which, in turn, sold the property to third parties in October 2004 for $166,000. Meanwhile, defendant vacated the premises in July 2004 after the locks were changed. Apparently, defendant=s daughter learned of his circumstances in September 2004 and contacted an attorney.

On February 1, 2005, defendant, now represented by counsel, filed a motion under V.R.C.P. 60(b) for relief from the default foreclosure judgment. The motion alleged that defendant had been incompetent at the time of the default judgment and at all relevant times thereafter. Defendant did not request a hearing in his initial motion, but did so in his motion to amend that followed the court=s denial of his Rule 60(b) motion. On April 28, 2005, the superior court denied the motion without holding a hearing, stating on a motion-reaction

form that the grounds for defendant=s motion fit squarely within Rule 60(b)(1), and defendant had failed to file the motion within one year, as required under the rule. The court also stated that even if the grounds for the motion fit within the catch-all provision, Rule 60(b)(6), the motion was not filed within a reasonable time because, by his own admission, defendant knew of the foreclosure action eight months before he filed his motion, and because Chittenden had relied on the default judgment in the interim.

This Court initially dismissed the ensuing appeal for lack of jurisdiction, but then remanded the matter for the superior court to consider whether to allow defendant to appeal from the denial of his Rule 60(b) motion. On remand, the superior court granted permission to appeal. Defendant argues on appeal to this Court that the superior court abused its discretion either by not granting his motion to set aside the default foreclosure judgment, or, in the alternative, by not holding an evidentiary hearing to consider his Rule 60(b) motion.

We conclude that, under the facts and circumstances of this case, the superior court abused its discretion by not holding an evidentiary hearing to consider defendant=s motion to set aside the default foreclosure judgment. We recognize that a motion alleging Amistake, inadvertence, surprise, or excusable neglect@ must be filed Anot more than one year after the judgment,@ V.R.C.P. 60(b), and that a motion under the catch-all provision, Rule 60(b)(6), which is allowed within a reasonable time, Amay be invoked only when a ground justifying relief is not encompassed within any of the first five subsections of the rule.@ Olde & Co., Inc. v. Boudreau, 150 Vt. 321, 323 (1988). But we disagree with the superior court that defendant=s motion fit squarely within Rule 60(b)(1), so as to preclude its consideration under Rule 60(b)(6). The motion alleged that at all times relevant to the foreclosure proceedings, defendant had the financial resources to make home insurance and mortgage payments, but failed to do so because he was incompetent to handle his affairs. Alleging incompetency presents a unique circumstance that does not fit neatly into the normal concepts of mistake, inadvertence, or excusable neglect. See Black=s Law Dictionary 1055 (7th ed. 1999) (defining excusable neglect as failure to take proper step at proper time Abecause of some unexpected or unavoidable hindrance or accident@); see also V.R.C.P. 55(b) (Ano judgment by default shall be entered against an infant or incompetent person unless represented in the action@). As the Reporter=s Notes to Rule 60(b) recognize, the federal courts have used 60(b)(6) to avoid extreme hardship in cases Awhich might literally be thought to

be within the one-year limit of clauses (1)-(3),@ and the catchall provision is designed specifically Ato give the court the flexibility to see that the rule serves the ends of justice.@ Reporter=s Notes, V.R.C.P. 60; see Cliche v. Cliche, 143 Vt. 301, 306 (1983) (A[R]elief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus is to be liberally construed and applied.@).

The superior court also concluded, however, that defendant=s motion was unavailing under 60(b)(6) because it was not filed within a reasonable period of time. The court came to this conclusion without mentioning, let alone addressing, the issue of defendant=s alleged incompetency. The court necessarily made this determination as a matter of law based on the allegations in the pleadings, as there was no evidentiary hearing. The court=s statement that defendant had acknowledged his awareness of the foreclosure proceeding eight months before he filed his Rule 60(b) motion is an apparent reference to his statement that he was not aware he had lost his home until the locks were changed. That statement does not demonstrate that defendant was competent or otherwise aware of how he had come to lose his home. Indeed, the parties substantially dispute the facts concerning Mr. Holm=s alleged incompetency. There also appears to be some uncertainty regarding other facts that could impact a determination as to whether defendant=s motion was filed within a reasonable time, such as the claimed prejudice to Chittenden and the delay in filing the Rule 60(b) motion after defendant obtained counsel.

Under these circumstances, the court abused its discretion in not holding a hearing to address defendant=s motion and his alleged incompetency. See Goshy v. Morey, 149 Vt. 93, 99 (1987) (AAt least where there has been a dismissal by default or in the nature of nonsuit, we hold that the court deciding the Rule 60(b) motion must hold a hearing to allow oral argument and, if necessary, the taking of evidence.@). A hearing was necessary because the issue raised in the Rule 60(b) was not frivolous and had not been argued and considered in the underlying default proceedings. See Altman v. Altman, 169 Vt. 562, 564 (1999) (mem.) (reiterating that court need not hold hearing on Rule 60(b) motion that is Atotally lacking in merit@); Goshy, 149 Vt. at 99 (stating that no hearing on Rule 60(b) motion is required Awhere the issues have been fully argued, and evidence taken if applicable, in the ruling on the underlying dismissal or default@). Nor is Mr. Holm=s failure to explicitly request a hearing in his original motion controlling here. Cf. Altman, 169 Vt. at 565 (noting that Aplaintiff failed to request a hearing or to identify the evidence he hoped to offer@). Here,

defendant=s motion expressly raised the issue of competence, which was in dispute and required a factual determination. Further, defendant specifically requested a hearing in his timely motion to alter the court=s order denying his motion without a hearing.

Reversed and remanded.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice