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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-446

MAY TERM, 2006

Worcester Condominiums, Inc.	}	APPEALED FROM:
	}	
	}	
v.	}	Lamoille Superior Court
	}	
Bruno Roulleux	}	
	}	DOCKET NO. 231-11-04 Lecv

Trial Judge: Howard E. VanBenthuysen

Dennis R. Pearson

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

Defendant Bruno Roulleux appeals the superior court=s order denying his motion to set aside a default judgment in favor of plaintiff Worcester Condominiums, Inc. We affirm.

On June 30, 2004, defendant signed a one-year lease agreement to rent an apartment from plaintiff. The lease provided that it could be terminated during the lease period by mutual consent. On October 14, 2004, defendant wrote plaintiff a letter stating that he Awould vacate the apartment . . . as of the 30th of November 2004@ for professional reasons. On November 12, 2004, plaintiff wrote defendant a letter refusing to agree to his request to terminate the lease. On November 29, 2004, plaintiff had a town constable serve a summons and complaint on defendant=s girlfriend at the apartment that defendant was renting from plaintiff. On January 28, 2005, the superior court granted plaintiff=s motion for a default judgment. Approximately two weeks later, defendant filed a motion to set aside the default judgment. The court denied the motion on March 15, 2005 and entered an amended final judgment on September 22, 2005. Defendant appeals, arguing that: (1) the court=s judgment must be voided because he was not properly served with the summons and complaint; and (2) in the alternative, the court abused its discretion by refusing to vacate the default judgment.

Defendant first argues that because he had already left the apartment for good when the summons and complaint were dropped off with his girlfriend, the documents were not left Aat the individual=s dwelling house or usual place of abode,@ as required by V.R.C.P. 4(d)(1). According to defendant, plaintiff knew that he had already left the apartment, as evidenced by its statement in the complaint that he was Ain the process of moving to Chicago, Illinois to take up a new job.@ We find no merit to defendant=s argument. Defendant himself informed plaintiff in writing that he would be vacating the apartment as of November 30, 2004, the day after the complaint and summons were served upon his girlfriend at the apartment. A[T]he process of moving@ is not the same as having actually vacated the premises, and plaintiff averred, and defendant has not denied, that defendant=s possessions were still at the apartment at the time of service. Thus, defendant was properly served under Rule 4.

In the alternative, defendant argues that the superior court abused its discretion by refusing to set aside the default judgment. According to defendant, the court should have set aside the judgment because (1) he had already moved out of state before the complaint was served, and (2) he has a legitimate defense to the complaintCnamely, that plaintiff failed to mitigate its damages by getting another tenant to lease the apartment.

We find these arguments unavailing. As for defendant=s first point, we have already held that service of the complaint satisfied Rule 4, and the superior court noted that defendant failed to file a timely answer to the complaint even though he was aware that his girlfriend had been served. As for his second point, defendant=s attorney merely asserted in the motion to set aside the default judgment that plaintiff had failed to mitigate its damages, but did not attach an affidavit from defendant or indicate any other evidence to support a legitimate defense against the complaint. See Progressive Ins. Co. v. Wasoka, 2005 VT 76, & 27 (reliance solely upon affidavit of counsel is insufficient to articulate ground for relief under V.R.A.P. 60(b)). Given that defendant did not demonstrate either excusable neglect or a legitimate defense, the superior court acted well within its discretion in refusing to set aside the default judgment. See id. & 26 (decision on Rule 60(b) motion will stand on appeal unless record clearly and affirmatively indicates that discretion was withheld or otherwise abused; party challenging denial of motion to set aside judgment has burden to demonstrate abuse of discretion); see also Nobel/Sysco Food Servs., Inc. v. Giebel, 148 Vt. 408, 410 (1987) (courts should be indulgent in opening default judgments Ain the absence of culpable negligence or dilatory intent,@ but moving party must provide reasons that satisfy Rule 60(b) criteria); Desjarlais v. Gilman, 143 Vt. 154, 157 (1983) (in determining whether to set aside default judgment, trial court should consider Awhether the failure to answer was the result of mistake or inadvertence, whether the neglect was excusable under the circumstances, and whether the defendant has demonstrated any good or meritorious defense to the plaintiff=s claims@).

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice