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

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

APR 1 2010

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-427

MARCH TERM, 2010

John H. Bugbee and Jennifer Bugbee	}	APPEALED FROM:
v.	}	Chittenden Superior Court
Tri-State Flooring, Inc.	}	DOCKET NO. S1334-08 CnC
		Trial Judge: Helen M. Toor

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

Defendant appeals from denial of its motion for reconsideration following a default judgment in plaintiffs' favor. On appeal, defendant argues that the court erred in granting default without notice to defendant where defendant filed an answer but did not sign it, and abused its discretion in refusing to reopen the case. We vacate the default judgment and remand.

The basic facts are as follows. On September 30, 2008, plaintiffs served defendant with a complaint, alleging that defendant defectively installed hardwood flooring, tile, and carpeting in their new home. Plaintiffs asserted that they had contacted defendant and requested defendant to return to their home and repair the defects, but defendant refused to do so. Plaintiffs sought equitable relief to compensate for their damages. Plaintiffs also alleged that defendant's actions violated the consumer fraud statute and, under the statute, sought return of their consideration, attorney's fees, and exemplary damages. Plaintiffs' complaint contained defendant's business address, and the attached return of service listed the address of defendant's registered agent. On October 27, 2008, defendant filed a document with the Chittenden Superior Court entitled "Answers to the complaint," which confirmed that defendant's address and place of business were as alleged in the complaint. The filing also answered plaintiffs' allegations, and denied that defendant's workmanship was defective. The document was unsigned, undated, had no return address, and contained no indication of its author.

The superior court received and docketed defendant's filing, but apparently did not consider this a valid answer or an appearance by defendant. On April 3, 2009, the court clerk sent plaintiffs a letter, stating that no appearance had been filed on behalf of defendant and that plaintiffs were entitled to entry of default judgment upon the filing of the necessary affidavits under Rule of Civil Procedure 55(b)(5). Plaintiffs' attorney responded by reminding the court of defendant's October 27 submission. The court again wrote to plaintiffs' attorney instructing that defendant had not appeared or answered and that plaintiff should file for default or risk dismissal of the case. Since no entry of appearance had been filed on behalf of defendant, none of these documents were copied to defendant.

On June 25, 2009, plaintiff filed a motion for default judgment. Plaintiff attached the following: an affidavit from plaintiffs describing their damages, the invoice from defendant for the work done on plaintiffs' home, an estimate by a third party setting out the cost to fix the alleged defects, and an affidavit from plaintiffs' attorney regarding legal fees and costs. Based on these documents—and without notice to defendant or a hearing—the court entered default. The court issued a judgment order on July 8, 2009, granting plaintiffs damages, exemplary damages, attorney's fees, and costs. The judgment was served on defendant.

On August 24, 2009, defendant sent a pro se letter to the court, seeking to reopen the case. Defendant claimed that at all times plaintiffs' attorney knew how to contact defendant. Indeed, plaintiffs' attorney sent defendant a letter in April 2009 seeking to settle the matter. On August 29, 2009, the court denied defendant's request for reconsideration, concluding that the unsigned document was not a proper answer and default was properly granted. Defendant appeals this order.

"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); see V.R.C.P. 55(c) (party may seek to set aside entry of default "[f]or good cause shown"). Defendant has the burden of demonstrating an abuse of discretion, but "the denial of relief from a default judgment must have strong support, and a court ought to be indulgent in reopening judgments entered by default." Brady v. Brauer, 148 Vt. 40, 44 (1987). "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." Id.

Defendant argues that the trial court abused its discretion in denying the motion to reopen because default was improperly entered. Defendant contends that it was error for the court to grant default without notifying defendant and providing defendant with an opportunity to cure the errors of its pleading, especially because defendant was pro se.

Before reaching defendant's claims, we address defendant's filing that purported to be defendant's answer to plaintiffs' complaint. Although defendant does not address the issue directly, defendant appears to concede that the unsigned, undated, unaddressed submission did not meet the requirements for an answer. An answer, like any pleading, should be signed by a party or the party's attorney, and "shall state the signer's mailing address." V.R.C.P. 11(a). Rule 11 further states that "[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." In this case, defendant's submission contained no signature, date or identification of who filed the document, and we conclude that it did not meet the requirements for a proper answer. We also note that the lack of compliance was not "called to the attention of the party."

We agree with defendant that the court was required to notify defendant prior to entering default because defendant's answer, although defective, was sufficient to constitute an appearance in the proceeding. Rule 55 provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules . . . the clerk shall enter the party's default." V.R.C.P. 55(a). The rule sets out detailed instructions for entering default judgment depending on the circumstances. When a defendant has not appeared in an action, the court may enter default without notice to the defendant. V.R.C.P. 55(b)(2)-(3). In contrast, when a defendant has appeared, "judgment may be entered after hearing, upon at least 3 days' written notice served by the clerk." V.R.C.P. 55(b)(4). Thus, the procedure due to defendant in this case depends on whether defendant had appeared within the meaning of Rule 55.

The superior court ignored defendant's filing because it did not meet the technical requirements for an answer and concluded that because the answer was defective, defendant did not appear. Appearance need not be a formal procedure, however, and usually "involves some presentation or submission to the court." Port-Wide Container Co. v. Interstate Maint. Corp., 440 F.2d 1195, 1196 (3rd Cir. 1971) (per curiam); see Plant Equip., Inc. v. Nationwide Control Serv., Inc., 2003-Ohio-5395, ¶ 7, 798 N.E.2d 1202 (Ohio Ct. App.) (defining appearance as "some overt act" that is submitted to the court). In construing the meaning of appearance under the analogous federal rule, which also requires notice to a defendant who has appeared, F.R.C.P. 55(b)(2), "courts have not applied an overly technical definition." United States v. One 1996 Chevrolet Pickup Truck, 56 F.R.D. 459, 461 (E.D. Tex. 1972). Courts instead use a "more realistic inquiry" because the purpose of providing notice is "to protect those parties who, although delaying [the case] in a formal sense by failing to file pleadings within the twenty-day period, have otherwise indicated to the moving party a clear purpose to defend." Id. at 461-62 (quotation omitted). Thus, courts have found that filing a defective pleading is sufficient to constitute an appearance. See Operating Eng'rs Local 139 Health Benefit Fund v. Rawson Plumbing, Inc., 130 F. Supp. 2d 1022, 1023-24 (E.D. Wis. 2001) (appearance satisfied by defective pleading); Plant Equipment, Inc., 2003-Ohio-5395, ¶ 8; R.T.A., Int'l, Inc. v. Cano, 915 S.W.2d 149, 151 (Tex. App. 1996) (explaining that defective answer not a nullity and does not entitle plaintiff to default judgment).

Although defective as an answer, defendant's filing was, under the circumstances, sufficient to notify plaintiffs and the court that defendant submitted to the court's jurisdiction and intended to defend the case. This reading is particularly apt where, as here, the responses were in tune to the allegations in the complaint and were copied to plaintiffs' counsel. Once it was known to the court that the "answer" had also been sent to plaintiffs' attorney, the court could rightly consider it an appearance. Furthermore, although the submission did not contain an address, it confirmed that the address contained in plaintiff's complaint was correct. Thus, defendant's filing constituted an appearance in the case, and defendant was entitled to notice and a hearing prior to the court entering default judgment against it. See V.R.C.P. 55(b)(4).

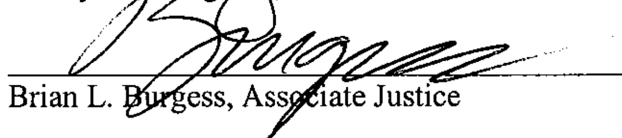
Given that the court failed to notify defendant of the pending default or to hold a hearing prior to granting plaintiff default judgment, we conclude that the court abused its discretion in denying defendant's Rule 60(b) motion. We vacate the default judgment and remand to the trial court for further proceedings. Having done so, we do not reach defendant's additional claims of error.

Default judgment is vacated and the matter is remanded.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice