Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-126

OCTOBER TERM, 2018

Stephen J. Craddock Trustee v. Birger Heffermehl, Sr. et al.*	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit, Civil Division
	}	
	}	DOCKET NO. 135-10-16 Oecv
		Trial Judge: Michael J. Harris

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

Plaintiff trustee filed this action to eject defendant Birger Heffermehl and all other occupants, including defendant's children, from trust property. The children are beneficiaries of the trust, and were minors at the time plaintiff filed this action. Defendant appeals an April 2018 order of the civil division of the Orange Superior Court that, among other things, declines to reconsider its February 2018 denial of defendant's motions for relief from a default judgment and for a stay of a writ of possession.[1] We affirm.

This case has a lengthy procedural history that is interrelated with a probate docket. In 2007, plaintiff was appointed successor trustee of the testamentary trust created under the will of Nancy H. Grayson, the grandmother of defendant's children. The children are beneficiaries of the trust, and defendant was their legal guardian when they were minors. The subject real property in Middletown Springs, Vermont was deeded to the trust in August 2009. Defendant and his two children had been living on the property before its transfer to the trust and continued to live there throughout these proceedings.

In January 2011, plaintiff trustee filed a petition in the probate division of the Washington Superior Court for appointment of a successor trustee, alleging in part that the trust was running out of cash to support the Vermont property. The probate division ordered plaintiff to file an accounting and a billing for unpaid trustee fees after defendant made allegations of waste and requested that his fiancée be named as successor trustee. The court denied the appointment of defendant's fiancée as successor trustee and refused to allow plaintiff to resign. In July 2012, plaintiff filed an eviction action against defendant and his family in the civil division, which dismissed the matter based on its conclusion that the probate division had exclusive jurisdiction over trust matters. In December 2012, plaintiff filed with the probate court a petition for instruction, in which he alleged that the trust had run out of

[1] Defendant's children, who are apparently no longer minors, have appealed the trial court's judgment in their own stead. We "consolidated" their appeals with defendant's. References to "defendant" refer to Birger Heffermehl, and references to "defendants" refer to all three. This judgment applies to all.

funds to pay bills and that the only asset left was the Vermont real estate occupied by defendant and his children. After much procedural wrangling, the probate court, in a lengthy January 2016 decision: (1) found insufficient evidence to support defendant's claims that plaintiff had breached his fiduciary duties as trustee; (2) approved in large part plaintiff's accounting of the trust; and (3) granted plaintiff's request for instructions authorizing him to sell the trust property if defendant declined to purchase it himself within a specified time. In May 2016, after defendant had not exercised his rights to purchase the subject property, the probate court granted plaintiff the authority to take any action, including an action for ejectment, to secure and sell the property.

Pursuant to that order, in October 2016, plaintiff filed this ejectment action in the civil division of the Orange Superior Court seeking once again to evict defendant and his two children from the subject property. In January 2017, after defendant failed to answer plaintiff's complaint, the civil division granted defendant a default judgment and a writ of possession. The following month, the court granted an amended judgment based on plaintiff's motion to correct the address of the subject property. In March 2017, the court granted plaintiff permission to serve the writ of possession by tack order.

In early April 2017, when the sheriff attempted to execute the writ, defendant filed a motion to stay execution of the writ and to vacate the default judgment. His motion to vacate was based on the facts that the original writ listed the wrong address (the listed street address was "688" instead of "668") and that in the underlying probate matter his children had allegedly been appointed a guardian ad litem who had not been served the pleadings in the case.

The civil division promptly granted a temporary stay of execution of the writ of possession to allow the parties to obtain more information related to the claimed defective service in the ejectment action and to deal with defendant's claim that his children, as beneficiaries of the trust that owned the property, had effectively appointed his fiancée as the successor trustee. The probate division of the Washington Superior Court subsequently ruled that the attempted substitution of a new trustee was ineffective, and that plaintiff remained the recognized trustee.

In February 2018, the civil division held a hearing and issued an order lifting the stay of the writ of possession and denying defendant's motion to vacate the default judgment and stay the writ of possession. Defendant appeared at the hearing but offered no evidence in support of his motion to vacate the default judgment, instead arguing that the matter should be decided in Rutland County, where the property lies. Regarding the latter argument, the court stated that venue may be proper if brought in the county where either party resides, even if the property is located in another county. See 12 V.S.A. § 402. Plaintiff indicated he was living in and administering the trust from the Town of Williamstown in Orange County. Regarding the lifting of the stay of the writ of possession, the court stated that the writ had been properly served on defendant and that it would be inequitable to have plaintiff serve the writ again, especially given that defendant's ultimately unsuccessful stay motion afforded him an additional ten months of occupancy at the property. The court indicated that the sheriff could proceed to execute the writ of possession or, in the alternative, plaintiff could seek a new writ. Plaintiff elected to proceed with a new writ of possession, as authorized by the court in a March 11, 2018 order.

On March 27, 2018, defendant filed a notice of appeal, and on April 10, 2018 he filed a motion for relief from judgment and to stay the writ of possession. In an April 12, 2018

decision, the civil division denied defendant's motion. The court noted that defendant was questioning the court's jurisdiction, alleging deficiencies in the 2017 writ of possession, and otherwise rehashing arguments previously rejected by that court and the probate court. Regarding defendant's claim of lack of jurisdiction, the court referred back to its earlier decision stating that an action could be brought where either party resides. The court further determined that any claimed deficiencies in the 2017 writ of possession were negated by the issuance of the more recent writ of possession. The court declined to re-examine its February 2018 order, stating that defendant had had an opportunity to provide evidence to support his motion for relief from the default judgment, but failed to do so, and that his motion, whether considered under Vermont Rule of Civil Procedure 59(e) or 60(b), was essentially a motion to reconsider that could not be used as a vehicle to introduce new evidence. The court further stated that defendant had not appealed any of the operative probate orders related to this matter, including the order giving plaintiff the authority to institute the eviction action and the order rejecting defendant's attempt to have his children appoint a successor trustee. The court reissued the writ of possession to allow for a newly established period of time to vacate the premises and granted plaintiff's motion for tack service. Finally, the court denied defendant's motion to stay the writ of possession, noting that the matter had been pending for eighteen months and that defendant had failed to show sufficient grounds for the court to grant the motion.

Defendant appeals that order, raising a host of issues, many of which involve underlying unappealed probate orders or other matters not directly germane to the order being appealed. In particular, defendant (and his now adult children) continues to claim that plaintiff breached his fiduciary obligation as trustee, and continues to war with the probate division's instructions authorizing plaintiff to eject defendant and his children and sell the trust property. Neither defendant nor his children appealed the final order of the probate division of the Washington Superior Court, so we will not review any challenges to the probate division orders. Instead, the subject matter of this appeal is limited to defendant's challenge to the final judgment of the civil division of the Orange Superior Court in the ejectment action, and its refusal to set aside the default judgment.

We have discerned three arguments focused on the trial court's refusal to set aside the default judgment in the ejectment action, rather than on the underlying probate case. First, defendant argues that service of the ejectment action was defective because a copy of the complaint was served on a person unknown to defendant. Second, he argues that by issuing new letters terminating the tenancies of defendant, his fiancée, and his children while this action was pending, plaintiff trustee waived the initial notice to quit upon which the ejectment judgment was based. Third, he argues that Orange Superior Court was not the proper venue for the ejectment action.

In reviewing a motion to set aside a default judgment, we have identified several factors a court should consider: whether the failure to answer the complaint "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 defenses to the plaintiff's claims." Desjarlais v. Gilman, 143 Vt. 154, 157 (1983).

With respect to his challenges to the service of the ejectment complaint, as the civil division stated, defendant had an opportunity to present evidence or argument at a February 2018 evidentiary hearing concerning his motion to set aside the default judgment. Although defendant was present at the hearing, he declined to present any evidence or make any argument as to why the default judgment should be vacated, other than claiming that the court

lacked jurisdiction to consider the matter. In the face of this record, or lack thereof, the trial court did not abuse its discretion in declining to vacate the default judgment. See Dougherty v. Surgen, 147 Vt. 365, 366 (1986) (stating that motion to vacate default judgment pursuant to Vermont Rule of Civil Procedure 60(b) "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"); Desjarlais, 143 Vt. at 157 (stating that trial court's ruling on Rule 60(b) motion seeking relief from judgment "will not ordinarily be disturbed unless it clearly appears from the record that such discretion was withheld or abused").

Defendant's later motion for reconsideration cannot overcome his failure to present evidence in support of his motion to vacate the default judgment. See Olde & Co. v. Boudreau, 150 Vt. 321, 324 (1988) (stating that "mere failure to provide evidence" does not provide "a basis for relief from judgment"); see also In re B.K., 2017 Vt. 105, ¶ 13 ("While the trial court has broad power under Rule 59(e) to reconsider issues previously presented, the rule does not contemplate reopening the evidence or creating a new record.").

We likewise conclude that the trial court did not err in asserting jurisdiction in this case. Defendants assert that the civil division lacked "subject matter jurisdiction" in the ejectment action because the probate record indicates that plaintiff administered the trust in Washington County, and not Orange County where he filed the eviction action. They further argue that because the eviction concerned real estate, plaintiff was required to pursue the action in the County in which the subject property lies, which is Rutland County. See 12 V.S.A. § 402(a) (providing that superior court action "shall be brought in the unit in which one of the parties resides, if either resides in the State," and that "[a]ctions concerning real estate shall be brought in the unit in which the lands, or some part thereof, lie").

We reject these arguments because defendant's challenge concerns venue, not subject-matter jurisdiction. See Page v. Newbury, 113 Vt. 336, 339 (1943) (stating that if trespass action was brought in wrong county, error was defect in process and did not affect general jurisdiction of court over subject matter). Accordingly, the trial court did not abuse its discretion in declining to set aside its judgment for ejectment even assuming venue in Orange County was improper.[2]

Defendants also argue that the superior court erred in concluding that defendant's fiancée and his two children did not have standing and thus were not parties in interest in the eviction proceeding. The civil division explained that defendant's fiancée did not have status as a trustee and that the children were minors at the time the probate court entered its orders authorizing plaintiff to evict defendant and the children from the trust property. The court further explained that any claimed rights of the children in their capacity as trust beneficiaries had to be recognized in the probate court, where they were represented by counsel, and that their status in the civil proceeding was as minor occupants of a household in which their parent became the subject of a lawful probate order authorizing their eviction from the premises in a civil division proceeding. Defendants fail to present any argument that undermines this

[2] We have construed the restrictive venue requirement concerning real property in § 402(a) to apply only to actions establishing or settling title in the subject property, and not actions in ejectment not involving a title dispute. See Bergeron v. Boyle, 2003 VT 89, ¶ 11, 170 Vt. 78 ("Where no party disputes title, real property actions—including those for ejectment—may properly be brought in the county where either party resides."). To the extent that defendant argues that the ejectment suit could only be filed in Rutland County, his argument fails for that reason as well.

analysis, and we have heard children's arguments on appeal. Children are subject to this ejectment order as well.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice