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. 2018-329

MAY TERM, 2019

Wells Fargo Bank, N.A. v.	}	APPEALED FROM:
Marjorie Johnston & Kamberleigh Johnston*	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 333-6-16 Rdcv
		Trial Judge: Samuel Hoar, Jr.

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

Defendant Kamberleigh Johnston appeals the trial court's denial of his motion for relief from judgment following a default judgment in the underlying foreclosure action. We affirm.

Plaintiff bank commenced a foreclosure action against defendants Marjorie Johnston and Kamberleigh Johnston[1] in June 2016. The complaint alleged that Marjorie Johnston had title to property, had executed a note in favor of plaintiff, and was in default on the note. The complaint included Kamberleigh Johnston as a defendant because he had recorded a perpetual lease agreement in the land records in December 2015. Plaintiff sought foreclosure and a deficiency judgment. Service on defendants was completed in September 2016. Both defendants entered notices of appearance. Defendants filed motions to extend time, for a more definitive statement, and to dismiss. In February 2017, the court ruled that defendants had not presented a legal basis for dismissal and denied the motion for a more definitive statement, explaining that it was not a mechanism for conducting discovery. The following day the court issued a supplemental order indicating to defendant that when a motion to dismiss is denied, the answer is due within ten days. On March 10, 2017, defendant Marjorie Johnston filed an answer. Defendant Kamberleigh Johnston filed a motion to reconsider, which the court subsequently denied. He did not file an answer within the time indicated in the court's February 2017 supplemental order.

In August 2017, plaintiff moved for default judgment against Kamberleigh Johnston on the ground that he had failed to answer or otherwise defend and for summary judgment against Marjorie Johnston. The motion for summary judgment alleged that Marjorie Johnston was in default on the note. In September 2017, the court granted the motions for default and for summary judgment, noting that no response had been filed. Both defendants filed motions. In resolving those motions, among other things, the court vacated the default judgment and set a hearing. See V.R.C.P. 55(b)(4) (stating that where party against whom default judgment is sought has appeared judgment can be entered after hearing). At the motion hearing, the court heard argument from both defendants. Defendant Kamberleigh Johnston argued that although he did not label any of

[1] When not specified, "defendant" as used in this decision refers to defendant Kamberleigh Johnston.

his filings as an answer, the motion for a more definitive statement was sufficient to be an answer. Defendant Kamberleigh Johnston challenged the amount of taxes due on the property and the court invited him to offer evidence in support of that statement. He submitted documents to support his argument that the parcel could not be taxed. The court asked if he had additional documents to submit and admitted exhibits.

Following the hearing, in a written order, the court concluded that the motions filed by defendant Kamberleigh Johnston were not equivalent to an answer and did not dispute the averments of the complaint. The court concluded that plaintiff was entitled to default against him. The court also granted defendant summary judgment against defendant Marjorie Johnston. The court resolved several other motions including denying defendant's request for an enlargement of time to file an answer, concluding that defendant had failed to show excusable neglect for failing to answer for over eight months.

The clerk's accounting was submitted on November 16, 2017 and defendants filed an opposition. The court directed plaintiff to file an affidavit with more detail. In March 2018, the court issued an order holding that plaintiff's submissions were supported and approving the accounting. The court then issued a foreclosure decree in March 2018. Defendants filed several motions, including a request for permission to appeal, which the court denied. Among other filings, defendant Kamberleigh Johnston filed a motion to stay and for an enlargement of time to file a motion to reconsider, which the court denied. In May 2018, defendant Marjorie Johnston filed a motion for relief from judgment under Vermont Rule of Civil Procedure 60(b)(5), which the court denied. In September 2018, defendant Kamberleigh Johnston filed a motion for relief from judgment. The court denied the motion the following day and warned that if defendant's behavior of filing meritless motions persisted he may face sanctions, citing Zorn v. Smith, 2011 VT 10, 189 Vt. 219.

Defendant filed a notice of appeal to this Court.[2] On appeal, defendant argues that the court erred in entering default and in denying his Rule 60(b) motion. Defendant contends that entry of default was in error because he had otherwise defended in the action by filing a motion to dismiss and for a more definitive statement. See V.R.C.P. 55(a) (explaining that default may be entered "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules").

Motions for relief from default judgment under Rule 60(b) are "addressed to the sound discretion of the trial court, and its ruling will not ordinarily be disturbed unless it clearly appears from the record that such discretion was withheld or abused." Desjarlais v. Gilman, 143 Vt. 154, 157 (1983). In exercising its discretion, the court should consider "whether 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." Id. Here, there was no abuse of discretion. Defendant did not argue that the failure to answer was the result of a mistake and has not submitted any good or meritorious defense to plaintiff's claims. Instead, he argues that his filing a motion to dismiss and for a more definitive statement was sufficient to avoid a default because he took steps to "otherwise defend" the action even though he did not file an answer.

[2] This Court denied plaintiff's motion to dismiss the appeal as untimely filed. See V.R.A.P. 4(b)(7) (providing that time to file notice of appeal tolled if Rule 60(b) motion is timely filed).

We conclude that even if he is right on this point—a question we do not reach—the trial court did not abuse its discretion in declining to set aside the "default judgment" against him pursuant to Rule 60(b) because it does not appear from the record that the court actually invoked defendant's default to prevent him from presenting evidence and making arguments with respect to matters in which defendant had a proper interest.

There is a distinction between the entry of default under Rule 55(a) and the default judgment. "First, the court, by the clerk or the judge, must enter a default and then, second, issue a judgment of default that contains the terms of the judgment." Hermitage Inn Real Estate Holding Co., LLC v. Extreme Contracting, LLC, 2017 VT 44, ¶ 38, 205 Vt. 93. The entry of default establishes the defaulting party's liability whereas the default judgment defines the amount of liability or nature of relief accorded. Spitzer v. Spitzer, 777 P.2d 587, 592 (Wyo. 1989); see 10A C. Wright et al., Federal Practice and Procedure § 2682 (4th ed. 2019) (describing entry of default under F.R.C.P. 55(a)). This framework is minimally helpful in this context. Plaintiff had no claim against defendant Kamberleigh Johnston in his capacity as a third-party junior lienholder, so, as the trial court acknowledged, the relief flowing from the default is minimal. The court acknowledged that by virtue of his perpetual lease, defendant Kamberleigh Johnston had a sufficient interest in the property to be heard as a party and advocate his interests in every subsequent stage of the process through to the end.

That defendant Marjorie Johnston defaulted on the note secured by the bank's mortgage was established by summary judgment and is not contested on appeal. Concerning the matters with respect to which defendant Kamberleigh Johnston, as third-party holder of an interest in the property, did have an interest, he was heard. The court entertained his evidence and argument and its final judgment reflects the court's responses to his challenges. The "default judgment" had no impact on the rest of the litigation.

In particular, the court heard and rejected defendant Kamberleigh Johnston's argument that there could be no default on the property due to nonpayment of taxes because no taxes were required to be paid for the parcel. The court gave defendant Kamberleigh Johnston the chance to argue about how much he would have to pay to redeem the property in the context of an objection to the accounting. And the court considered and rejected his arguments concerning the impact of his status as the holder of a perpetual lease (junior to plaintiff's mortgage interest). Given the relationship between defendant as a third-party lienholder and plaintiff bank, and that the court heard and resolved defendant's various claims on the merits with respect to his rights as a junior lienholder, we conclude that the court's determination that defendant Kamberleigh Johnston was in default in the foreclosure proceeding had no impact on defendant's interests. For that reason, the court did not abuse its discretion in declining to vacate the "default judgment."

Defendant asserts that the court erred by not holding a hearing on his Rule 60(b) motion. The court has discretion in deciding whether to hold a hearing on a Rule 60(b) motion, and hearings "are unnecessary where the grounds for the motion are frivolous or totally lacking in merit." Sandgate Sch. Dist. v. Cate, 2005 VT 88, ¶ 12, 178 Vt. 625 (mem.). Here, the court acted within its discretion in declining to hold a hearing on defendant's motion given the absence of any meritorious claim raised in the motion.

Defendant also argues that the court demonstrated a bias against self-represented litigants by refusing to allow defendant to provide sworn testimony at the hearing on October 13, 2018. The record does not support defendant's argument. The court allowed defendant an opportunity to raise arguments and to submit evidence at the hearing. Moreover, defendant has not indicated what additional evidence he sought to present or how it would have affected the result. See Nevitt

v. Nevitt, 155 Vt. 391, 401 (1990) (explaining that court does not have responsibility to offer help to self-represented litigant and party claiming error must show how prejudiced by court's conduct).

Finally, defendant claims that the court abused its discretion in threatening sanctions against him. Because no sanction was imposed, any discussion of the propriety of a sanction would amount to rendering an advisory opinion. See Kingsbury v. Kingsbury, 137 Vt. 448, 454 (1979) (explaining that where event is not certain to occur, discussing it amounts to advisory opinion). Therefore, we do not reach this issue.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice