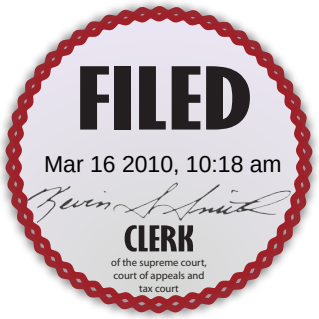

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IN THE
COURT OF APPEALS OF INDIANA

SYLVESTER HUNTER and FITZHUGH LYONS, SR.,	)	
Appellants/Defendants,	)	
vs.	)	No. 49A04-0908-CV-450
MINTON BUSINESS SERVICES, LLC,	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0709-PL-38377

March 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellants/Defendants Sylvester Hunter and Fitzhugh Lyons, Sr., appeal from the trial court's entry of default judgment in favor of Plaintiff/Appellee Minton Business Services, LLC. Appellants contend that the trial court erred in denying their motion to set aside the default judgment pursuant to Indiana Trial Rule 60(B). We affirm.

FACTS AND PROCEDURAL HISTORY

On October 27, 2006, Minton entered into a purchase agreement to sell commercial property in Indianapolis for 1.2 million dollars. The agreement was purportedly signed by an agent for Lyons and Hunter as buyers, although both later claimed that they knew nothing about the agreement at the time. A purported counteroffer at the same price was then made, which Minton accepted on October 29, 2006. Appellants failed to close by the closing date of January 29, 2007. Around this time, Lyons and Hunter became aware of a federal criminal investigation of one Beverly Ross, and Hunter, who knew Ross from "association with someone else through [an] investment program[,]" believed that Ross had forged his name on the purchase agreement. Tr. p. 38.

On April 17, 2007, Hunter, Lyons, and Ross executed an agreement with Minton, in which they agreed to pay a total of $50,000 in settlement of all claims arising from the aborted real estate transaction. On September 10, 2007, Minton brought suit against Hunter, Lyons, and Ross, contending that they had failed or refused to make monthly payments as detailed in the settlement agreement. Both Hunter and Lyons were aware of the lawsuit in late 2007, but neither responded. On February 28, 2008, the trial court entered default judgment in favor of Minton and against Hunter, Lyons, and Ross in the

amount of $196,869.92 plus post-judgment interest of eight percent. (Appellant's App. 5).

Minton initiated proceedings supplemental in order to collect its judgment, and in the summer of 2008, Appellants participated in a hearing related to those proceedings. On July 8, 2008, Appellants retained counsel, and, on March 6, 2009, filed a motion to set aside the default judgment. During a July 1, 2009, hearing on the motion, Lyons testified that he had been instructed by a United States Attorney "not to discuss or do anything about whatever comes up because it was in the hands of the Grand Jury[,]" and Hunter testified that "based upon information that I received from others that had been involved that no other conversations needed to be had unless it was from the Grand Jury." Tr. pp. 17, 39. On July 8, 2009, the trial court denied Appellants' motion to set aside the default judgment, concluding that the motion (1) was actually subject to Trial Rule 60(B)(1) and not 60(B)(8) as it was styled, (2) was untimely, (3) did not contains allegations that could amount to excusable neglect, and (4) failed to allege a meritorious defense.

DISCUSSION AND DECISION

Denial of Motion to Set Aside Default Judgment Standard of Review

> The decision whether to set aside a default judgment is given substantial deference on appeal. *Anderson v. State Auto Ins. Co.*, 851 N.E.2d 368, 370 (Ind. Ct. App. 2006). The trial court's discretion is broad in these cases because each case has a unique factual background. *Id*. This Court will not reweigh the evidence or substitute our judgment for the judgment of the trial court. *Id*. Generally, default judgments are not favored in Indiana, for it has long been the preferred policy of this state that courts decide a controversy on its merits. *Walker v. Kelley*, 819 N.E.2d 832, 837 (Ind. Ct. App. 2004). Any doubt of the propriety of a default

> judgment should be resolved in favor of the defaulted party. *Coslett v. Weddle Bros. Const. Co., Inc.*, 798 N.E.2d 859, 861 (Ind. 2003).

Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007).

Applicability of Trial Rule 60(B)

Appellants contend that the default judgment should be set aside due to extraordinary circumstances pursuant to Indiana Trial Rule 60(B)(8), while Minton contends that Appellants' claim should be governed by Rule 60(B)(1), which governs allegations of mistake, surprise, or excusable neglect. Rule 60(B)(1) requires that the motion for reinstatement be made within one year of the judgment, and Appellants moved for reinstatement one year and seven days after the cause was dismissed, which was not within the prescribed time period under Rule 60(B)(1).

So, the first question we must answer is whether the trial court abused its discretion in concluding that Rule 60(B)(1) governed this case. Rules 60(B)(1) and 60(B)(8) provide as follows:

> **(B) Mistake—Excusable neglect—Newly discovered evidence—Fraud, etc.** On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> ****
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).
>
> The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

"Trial Rule 60(B)(8) allows the trial court to set aside a judgment within a reasonable time for any reason justifying relief 'other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).'" *Brimhall v. Brewster*, 864 N.E.2d 1148, 1153 (Ind. Ct. App. 2007) (quoting T.R. 60(B)(8)), *trans. denied*. The trial court's residual powers under subsection (8) may only be invoked upon a showing of exceptional circumstances justifying extraordinary relief. *Id.* Among other things, exceptional circumstances do not include mistake, surprise, or excusable neglect, which are set out in Rule 60(B)(1). *Id.* Trial Rule 60(B)(8) has in the past been distinguished on the following grounds:

> [Trial Rule] 60(B)(8) is an omnibus provision which gives broad equitable power to the trial court in the exercise of its discretion and imposes a time limit based only on reasonableness. Nevertheless, under T.R. 60(B)(8), the party seeking relief from the judgment must show that its failure to act was not merely due to an omission involving the mistake, surprise or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively. This circumstance must be other than those circumstances enumerated in the preceding subsections of T.R. 60(B).

Id. (quoting *Ind. Ins. Co. v. Ins. Co. of N. Am.*, 734 N.E.2d 276, 279-80) (Ind. Ct. App. 2000)).

Appellants' contention here is essentially that they did not participate in this lawsuit because they were advised by federal authorities that they either could not or were not required to participate. In other words, Appellants' claim is essentially that their neglect was excusable as a result of being misinformed, a claim which is clearly covered by Trial Rule 60(B)(1). *See, e.g.*, *Summit Account & Computer Serv. v. Hogge*, 608 N.E.2d 1003, 1006 (Ind. Ct. App. 1993) ("Hogge contends that he was not represented by counsel; he was unaware of his legal rights; and he was misled as to his legal rights.

Hogge's motion more appropriately asserts allegations under T.R. 60(B)(1) for mistake, surprise, or excusable neglect, or possibly T.R. 60(B)(3) for misrepresentation."). Appellants have failed to demonstrate any extraordinary circumstances beyond the alleged excusable neglect. Consequently, Appellants' claim is subject to Rule 60(B)(1)'s one-year requirement, rendering their motion to set aside default judgment untimely. *See id*. ("Hogge cannot now circumvent the time limitations of T.R. 60(B)(1) or (3) by attempting to rely on T.R. 60(B)(8)."). The trial court did not abuse its discretion in denying Appellants' motion on the basis that it was untimely, and we need not address Appellants' contentions regarding the merits of their motion.

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.