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IN THE
COURT OF APPEALS OF INDIANA

UMAREX SPORTWAFFEN GMBH & CO KG;	)	
CARL WALTHER SPORTWAFFEN GMBH;	)	
GLOCK, INC. and HECKLER & KOCH, INC.,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 29A05-1001-PL-28
	)	
TOYRIFFIC, LLC D/B/A HOBBYTRON.COM,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0905-PL-627

September 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Umarex Sportwaffen GmbH & Co. KG, Carl Walther Sportwaffen GmbH, Glock, Inc., and Heckler & Koch, Inc., (collectively "Plaintiffs") appeal the trial court's order setting aside a default judgment granted on Plaintiffs' claim against Toyriffic, LLC d/b/a Hobbytron.com ("Toyriffic"). We affirm.

Issue

Plaintiffs raise one issue, which we restate as whether the trial court properly granted Toyriffic's motion to set aside the default judgment.

Facts

On May 14, 2009, Plaintiffs filed a complaint against Toyriffic for trademark infringement, trademark dilution, false advertising and trade dress infringement, unfair competition, conversion, forgery, counterfeiting, and deception. On May 19, 2009, Plaintiffs' process server, Thomas Newgent, attempted to serve Toyriffic's registered agent and general counsel, Jeffry Sax, in Los Angeles, California. The security guard attempted to reach Sax, but he was out of the office. The guard made contact with David Pourati, a lawyer who worked on the same floor at Sax, and Pourati came downstairs to talk to Newgent. Pourati took the summons and complaint and left them on Sax's chair in his office.

On May 26, 2009, Sax talked to Plaintiffs' counsel, Brian McGinnis, and informed McGinnis that he would forward the complaint to Toyriffic and that he wanted to try to resolve the claim. According to Sax, he also informed McGinnis that service had been improper. Sax and McGinnis corresponded again by email in early June regarding the

Plaintiffs' claims. Toyriffic did not respond to the complaint, and on June 16, 2009, the Plaintiffs filed a motion for default judgment. On June 25, 2009, the trial court granted Plaintiffs' motion for default judgment and entered judgment for Plaintiffs in the amount of $51,231.21.

On June 26, 2009, Toyriffic attempted to have the action removed to federal court, but on September 23, 2009, the federal court remanded the action back to the trial court. On November 4, 2009, Toyriffic filed a motion to set aside the default judgment. At the conclusion of a hearing on the matter, the trial court found that no proper service had occurred by giving the complaint and summons to Pourati. Additionally, the trial court went on to say that it "probably would come to the conclusion" that Sax had "constructive service or notice." Tr. p. 39. The trial court also questioned the veracity of Plaintiffs' claim in their motion for default judgment that Toyriffic had "received notice of this suit and has had an opportunity to defend this matter, but has chosen not to do so." App. p. 76. The trial court stated that, based upon the exhibits, "I have to come to the conclusion that that is at best inaccurate and at worse [sic] a lie." Tr. p. 39. After the hearing, the trial court entered a written order granting the motion to set aside the default judgment.

Analysis

On appeal, Plaintiffs argue that the trial court abused its discretion when it granted Toyriffic's motion to set aside the default judgment.[1] On appeal, a trial court's decision

[1] Toyriffic has failed to file an appellee's brief. When the appellee fails to submit a brief, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the

to set aside a default judgment is entitled to deference and is reviewed for abuse of discretion. Coslett v. Weddle Bros. Const. Co., Inc., 798 N.E.2d 859, 861 (Ind. 2003). "Though the trial court should do what is 'just' in light of the facts of individual cases, that discretion should be exercised in light of the disfavor in which default judgments are held." Id. (quoting Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001)). "Any doubt of the propriety of a default judgment should be resolved in favor of the defaulted party." Id. "Indiana law strongly prefers disposition of cases on their merits." Id.

Indiana Trial Rule 55(A) authorizes the entry of default judgment for failure to file a pleading. However, Indiana Trial Rule 55(C) allows the judgment to be set aside if grounds under Indiana Trial Rule 60(B) exist. Toyriffic sought to set aside the judgment pursuant to Indiana Trial Rule 60(B)(3) and (6). Indiana Trial Rule 60(B)(3) provides that a judgment may be set aside due to fraud, misrepresentation, or other misconduct of the adverse party, while Indiana Trial Rule 60(B)(6) provides that a judgment may be set aside if the judgment is void.[2]

On appeal, Plaintiffs focus on Indiana Trial Rule 60(B)(6). Ineffective service of process prohibits a trial court from having personal jurisdiction over a defendant.

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appellant. Hamiter v. Torrence, 717 N.E.2d 1249, 1252 (Ind. Ct. App. 1999). Rather, we may reverse the trial court if the appellant makes a prima facie case of error. Id. "Prima facie" is defined as "at first sight, on first appearance, or on the face of it." Id.

[2] Indiana Trial Rule 60(B) also requires a defendant to allege a meritorious defense if relief from the judgment is sought under Indiana Trial Rule 60(B)(1), (2), (3), (4), or (8). Thus, for relief under Indiana Trial Rule 60(B)(6), Toyriffic was not required to show a meritorious defense. However, for relief under Indiana Trial Rule 60(B)(3), Toyriffic was required to show a meritorious defense. Toyriffic argued to the trial court that it had meritorious defenses to Plaintiffs' claims. On appeal, Plaintiffs make no argument regarding Toyriffic's alleged meritorious defenses. Thus, we assume that Toyriffic has a meritorious defense, and we do not address the issue.

Thomison v. IK Indy, Inc., 858 N.E.2d 1052, 1055 (Ind. Ct. App. 2006). A judgment entered against a defendant over whom the trial court did not have personal jurisdiction is void. Id. The trial court concluded that service was not proper. Plaintiffs do not dispute that service was improper under Indiana Trial Rules 4.1 and 4.6.[3] However, Plaintiffs argue that setting aside the default judgment was improper due to Indiana Trial Rule 4.15(F), which provides: "No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond." Plaintiffs contend that, despite the improper service, Sax had actual knowledge of the complaint and still failed to respond in a timely manner. However, we need not address whether Sax's actual knowledge of the complaint precludes the setting aside of the default judgment because we find that Indiana Trial Rule 60(B)(3)'s misconduct provision is applicable here.

Although Sax admitted that he was aware of the complaint and summons, Sax alleged that he contacted Plaintiffs' counsel, McGinnis, on May 26, 2009. According to Sax, he informed McGinnis that he would investigate Plaintiffs' claims and also informed McGinnis that service of process had been improper. According to Sax, he told McGinnis "that it was not [his] practice to give people a hard time about service and that if [McGinnis] mailed [him] an acknowledgement form that was used in the Indiana State

[3] Plaintiffs state without citation to authority that: "All parties agree that the Complaint and Summons was hand-delivered to a licensed attorney that worked in some capacity with [Toyriffic's] registered agent." Appellant's Br. p. 6. To the contrary, Sax and Pourati submitted affidavits stating that, while they work on the same floor, Pourati is not Sax's employee, Pourati has his own independent law practice, and Pourati is not authorized to accept service for Sax. There is no evidence that Pourati "worked in some capacity" with Sax. Id.

Courts, [he] would sign it." App. p. 121. On June 3, 2009, McGinnis emailed Sax asking for an update, and Sax responded that they were still investigating. On June 25, 2009, Sax faxed a letter to McGinnis, which provided in part:

> I write as a follow up to our telephone conversation of about one month ago. During that conversation, I informed you that Toyriffic, LLC had not been properly served with the summons and complaint. I had told you that I needed to investigate the matter and would get back to you shortly. Since that time, I have left you no less than two telephone messages without a return call. Thus, this letter has become necessary.

Id. at 130. McGinnis responded the next day, June 26, 2009, challenging Sax's assertion that service was improper and stating: "As you are aware, we have asked the court to grant a Default Judgment in this matter in the amount of $51,231.21. Given your client's failure to defend the claims against it, we believe the court is likely to grant this motion for the full amount." Id. at 133. Sax was unaware of the motion for default judgment and "was shocked by this revelation." Id. at 123. Sax, who was also unaware that the motion for default judgment had been granted on June 25, 2009, immediately attempted to remove the action to federal court. Sax also alleged that he was not served with Plaintiffs' federal court motion to remand.

Our supreme court has held that a default judgment should be set aside for misconduct pursuant to Indiana Trial Rule 60(B)(3). Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999). In Smith, our supreme court held that "the overriding considerations of confidence in our judicial system and the interest of resolving disputes on their merits preclude an attorney from inviting a default judgment without notice to an opposing

attorney where the opposing party has advised the attorney in writing of the representation in the matter." Smith, 711 N.E.2d at 1261-62. The court emphasized that a default judgment "is an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants." Id. at 1264. The court held that a "default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter." Id. at 1262.

Similarly, in Allstate Ins. Co. v. Watson, 747 N.E.2d 545 (Ind. 2001), our supreme court held that a default judgment should be set aside under Indiana Trial Rule 60(B)(3) where the plaintiffs' attorney assured the defendant's counsel that they would not seek a default judgment during settlement negotiations. A deadline for accepting a settlement offer was set for March 31, 1999, but the plaintiff filed a motion for default judgment on March 18, 1999. The trial court granted the motion for default judgment and denied a motion to set aside the default judgment. On appeal, the court held that the defendant had "clearly established grounds" for setting aside the default judgment under Indiana Trial Rule 60(B)(3). Watson, 747 N.E.2d at 548.

Here, although Sax had knowledge of the complaint, he submitted an affidavit detailing that he had informed McGinnis of the lack of service and that he had offered to sign an acknowledgement of service. Additionally, although McGinnis was clearly aware that Toyriffic was represented by Sax, Sax did not receive notice of the motion for default judgment. Although the defendants dispute these assertions, our standard of

review requires that we resolve any doubt of the propriety of a default judgment in favor of the defaulted party. Further, at the hearing on the motion to set aside the default judgment, the trial court questioned the veracity of Plaintiffs' claim in their motion for default judgment that Toyriffic had "received notice of this suit and has had an opportunity to defend this matter, but has chosen not to do so." App. p. 76. The trial court stated that, based upon the exhibits, "I have to come to the conclusion that that is at best inaccurate and at worse [sic] a lie." Tr. p. 39.

Given the ongoing communications between Sax and McGinnis, Sax's claim of improper service, and Sax's failure to receive notice of the motion for default judgment, we conclude that the trial court properly set aside the default judgment.[4] Under these circumstances, we certainly cannot say that the trial court's decision to set aside the default judgment was an abuse of discretion, especially given our preference to decide issues upon their merits.

Conclusion

The trial court did not abuse its discretion by granting Toyriffic's motion to set aside the default judgment. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.

[4] We note that misconduct under Indiana Trial Rule 60(B)(3) may be either intentional or negligent. Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 73 (Ind. 2006). Thus, it is irrelevant whether the failure to serve Toyriffic's counsel with the motion for default judgment was negligent rather than intentional.