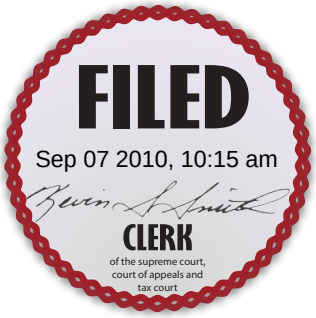

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IN THE
COURT OF APPEALS OF INDIANA

SALAHEDDIN A. ALFAQEER D/B/A TOBACCO ZONE,	)	
Appellant,	)	
vs.	)	No. 49A04-1003-CC-213
LOR CORPORATION,	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cynthia J. Ayers, Judge
Cause No. 49D04-0804-CC-18188

September 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Salaheddin Alfaqeer appeals the trial court's denial of his motion to set aside judgment. We reverse and remand.

Issue

The sole issue is whether the trial court abused its discretion in refusing to set aside a judgment obtained against Alfaqeer by LOR Corporation ("LOR").

Facts

Alfaqeer previously owned and operated a business called Tobacco Zone. In 2004, Alfaqeer agreed to rent property for his business in an Indianapolis shopping center owned by LOR. The lease was to run from September 1, 2004, to August 31, 2007. Alfaqeer also executed a personal guaranty for the lease.

In 2005, Alfaqeer decided he wanted to sell his business to Ahmed and Aicha Shaw. Alfaqeer and the Shaws met with LOR Vice President Suzanne Gammon to obtain her approval for the sale and assignment of the lease to the Shaws. In April 2005, the original lease was amended to add the Shaws as tenants and guarantors of the lease. Alfaqeer was not removed as a tenant or guarantor at that time. The sale of the Tobacco Zone business was completed on May 5, 2005.

On August 27, 2007, Aicha Shaw executed an addendum to the original lease, extending it for one additional year, beginning September 1, 2007. Alfaqeer did not sign and apparently was not aware of this addendum. Additionally, the addendum expressly removed Alfaqeer as a guarantor of the lease.

In March 2008, rent checks the Shaws paid to LOR were returned for insufficient funds, and they made no attempt to pay any rent thereafter. On April 10, 2008, LOR's attorneys sent a demand letter, addressed only to Aicha Shaw, seeking payment of the rent and threatening the commencement of legal proceedings if it was not paid. The Shaws did not respond to the letter.

On April 23, 2008, LOR filed suit against Alfaqeer and the Shaws. Apparently because of a change in address, Alfaqeer was not served with a copy of the complaint until March 5, 2009, when he happened to appear in the offices of LOR's attorneys in relation to another matter. Alfaqeer did not file an answer to the complaint and no attorney filed an appearance on his behalf.

On April 15, 2009, LOR moved for default judgment against Alfaqeer. Attached as an exhibit to the motion was an affidavit prepared by LOR's attorneys and signed by Gammon that contained the following paragraphs:

> 6. The initial term of the Lease commenced on September 1, 2004, and was to expire on August 31, 2007. However, on August 27, 2007, Alfaqeer exercised his option to renew the Lease for one (1) additional year, commencing on September 1, 2007 and ending on August 31, 2008 (the "Extended Term"). A true, exact and authentic copy of the Addendum executed by Alfaqeer, evidencing this renewal, is attached to Plaintiff's Complaint as Exhibit B.
>
> 7. By reason of Alfaqeer's failure to make payments when due, LOR has declared him to be in default under the terms of the Lease and has notified him of the default, but he has failed and refused to make payments (the "Default").

App. p. 96. On April 17, 2009, the trial court entered default judgment against Alfaqeer.

On May 26, 2009, Alfaqeer filed a motion to set aside the default judgment. At a hearing held on August 10, 2009, Alfaqeer pointed out that paragraphs six and seven of Gammon's affidavit were either misleading or outright false, as he did not execute the 2007 addendum to the lease and he had received no demand for payment of the rent prior to suit being filed. The trial court agreed that Alfaqeer appeared to have a meritorious defense to LOR's complaint but nonetheless denied his motion for relief from judgment because he had failed to demonstrate excusable neglect in failing to respond to the complaint. On August 20, 2009, Alfaqeer filed a motion to correct error, which the trial court denied. Alfaqeer now appeals.

Analysis

Alfaqeer challenges the trial court's refusal to set aside the default judgment against him. We note that LOR has not filed an appellee's brief. Thus, we do not undertake to develop an argument on LOR's behalf, and we may reverse if Alfaqeer has made a prima facie showing of reversible error. See Morton v. Ivacic, 898 N.E.2d 1196, 1199 (Ind. 2008). Prima facie error is defined as "at first sight, on first appearance, or on the face it." Id.

Our supreme court has described the standard of review for refusing to set aside a default judgment as follows:

> Upon appellate review of a refusal to set aside a default judgment, the trial court's ruling is entitled to deference and will be reviewed for abuse of discretion. The trial court should use its discretion to do what is "just" in light of the unique facts of each case. However, such discretion should

> be exercised in light of the disfavor in which default judgments are held. A default judgment is not generally favored, and any doubt of its propriety must be resolved in favor of the defaulted party.

Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001) (internal citations omitted). "Indiana law strongly prefers disposition of cases on their merits." Coslett v. Weddle Bros. Const. Co., 798 N.E.2d 859, 861 (Ind. 2003). "Furthermore, any considerations of judicial economy created by affirming a default judgment must yield to considerations of justice." Cherokee Air Prods., Inc. v. Burlington Ins. Co., 887 N.E.2d 984, 987-88 (Ind. Ct. App. 2008), trans. denied.

Additionally, the mere fact Alfaqeer failed to timely respond to LOR's complaint did not require the entry of default judgment against him, and LOR was not entitled to judgment as a matter of right. See Teegardin v. Maver's, Inc., 622 N.E.2d 530, 532 (Ind. Ct. App. 1993). This court has observed:

> On the one hand, a default judgment plays an important role in the maintenance of an orderly, efficient judicial system as a weapon for enforcing compliance with the rules of procedure and for facilitating the speedy determination of litigation. On the other hand, there is a marked judicial preference for deciding disputes on their merits and for giving parties their day in court, especially in cases involving material issues of fact, substantial amounts of money, or weighty policy determinations.

Green v. Karol, 168 Ind. App. 467, 473, 344 N.E.2d 106, 110 (1976) (citations and footnotes omitted).

On appeal, Alfaqeer asserts that the default judgment should be set aside pursuant to Indiana Trial Rule 60(B)(3). That rule permits relief from judgment if a defaulted party can demonstrate "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" and, in addition, the defaulted party can make a prima facie showing of a meritorious defense.[1] See Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 81 (Ind. 2006). Our supreme court has held that relief from default judgment under subsection (3) is warranted if the default judgment "was obtained by actions that were prejudicial to the administration of justice . . . ." Smith v. Johnston, 711 N.E.2d 1259, 1264 (Ind. 1999). "As an officer of the Court, every lawyer must avoid compromising the integrity of his or her own reputation and that of the legal process itself." Id. Additionally, "The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others." Fire Ins. Exchange v. Bell by Bell, 643 N.E.2d 310, 313 (Ind. 1994).

Here, as part of LOR's motion for default judgment, its attorneys prepared an affidavit, signed by Gammon, that contained two misstatements of fact that were highly

[1] Alfaqeer's original motion to set aside default judgment did not specify under which subsection of Trial Rule 60(B) he was seeking relief. However, "[a] litigant's failure to specify the exact paragraph under which he seeks relief will not defeat his request for relief from judgment or dismissal if he can make an adequate showing that there are sufficient grounds to support his motion." Greengard v. Indiana Lawrence Bank, 556 N.E.2d 1373, 1375 (Ind. Ct. App. 1990). On appeal, Alfaqeer invokes not only subsection (3) of Trial Rule 60(B), but also subsections (1) ("mistake, surprise, or excusable neglect") and (8) ("any other reason justifying relief from the operation of the judgment . . . ."). We need not address Alfaqeer's arguments under these other subsections.

relevant to the question of whether Alfaqeer was liable to LOR for the nonpayment of rent. Whether or not such misstatements were intentional, we observe that "[f]alse evidence, whether in the form of perjured testimony under oath in open court or in a pleading or affidavit admitted into evidence, is defined as intrinsic fraud." Glover v. Torrence, 723 N.E.2d 924, 932 (Ind. Ct. App. 2000). This false evidence gave the appearance that there were no material issues of fact in this case, when in fact there were significant issues related to whether Alfaqeer can or ought to be held liable for the Shaws' failure to pay rent to LOR.

We reiterate that Alfaqeer's failure to timely respond to LOR's complaint did not automatically entitle LOR to default judgment, and thus it was important for LOR to establish some basis for Alfaqeer's liability when moving for default judgment. It did so on the basis of a false affidavit. Under the circumstances, we believe it would be inequitable to permit the default judgment against Alfaqeer to stand, and LOR ought not to profit from its misrepresentations to the trial court. This is particularly true, given LOR's failure to participate in this appeal and the application of the prima facie error rule. Alfaqeer has established that the default judgment was obtained by fraud, misrepresentation, and/or misconduct by LOR. There being no question that Alfaqeer has made a prima facie showing of a meritorious defense, as found by the trial court, he has established both elements for relief from judgment under Indiana Trial Rule 60(B)(3).

Conclusion

We reverse the denial of Alfaqeer's motion for relief from judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.

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