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IN THE COURT OF APPEALS OF INDIANA

QWINCES LLC d/b/a QWINIQUE UNIQUE WOOD SURFACES, and DENIS BUCH, Individually,	)	
Appellants-Defendants,	)	
vs.	)	No. 17A03-1002-CC-102
VIKING HARDWOODS, INC., DON STEELE and CATHY STEELE, Individually,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Monte L. Brown, Judge
Cause No. 17D02-0807-CC-179

October 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Qwinces LLC, an Illinois limited liability company doing business as Qwinique Unique Wood Surfaces ("Qwinces"), and Denis Buch, an individual, appeal the trial court's default judgment and damages award in favor of Viking Hardwoods, Inc. ("Viking"), an Indiana corporation, and Don Steele and Cathy Steele ("the Steeles"), individuals. Qwinces and Buch raise two issues on appeal, which we restate as: whether the complaint states sufficient facts to support a default judgment against Buch individually, and whether the complaint states sufficient proof of conversion to support the trial court's treble damages award. Concluding the allegations of the complaint are not sufficient to support default judgment against Buch individually nor a treble damages award, we reverse and remand.

Facts and Procedural History

Don and Buch each owned another company prior to starting Qwinces together in 2006: Don owned Viking and Buch owned Qwinique. Both then agreed "their existing businesses may have to contribute to the start up and operating expenses of Qwinces." Appellant's Brief at 5. Neither signed a Qwinces operating agreement. In 2007, Don became unhappy with the business and indicated he would like to leave. Between June 2007 and October 9, 2007, the parties negotiated terms for Don's leaving Qwinces, but did not sign a written agreement of all negotiated terms.

In July 2008, Viking and the Steeles filed suit against Qwinces and Buch, alleging claims in the nature of breaches of contract regarding Qwinces. Specifically, the complaint alleged that in 2006 "the parties hereto negotiated" the division of responsibilities between

Viking and Qwinces, purchases and sales between Viking and Qwinces, Qwinces' compensation of Don, Qwinces' provision of accounting records to Don, Appellant's Appendix at 18, and the following:

> 11. Beginning on or about April 2007, Don requested a copy of corporate and/or limited liability company books from Buch and did not receive the same until on or about May 2007.
> 12. Don states within Qwinces' company books it states Qwinces was making a profit; however, Don never received compensation for his portion of the profit.
> 13. Plaintiff request [sic] compensation for the Inventory and Equipment due to the Defendant's Breach of Contract.
> 14. Plaintiff requests compensation for the Plaintiff's portion of the profit earned by Qwinces, plus prejudgment interest at the current statutory rate.
> 15. Plaintiff is entitled under [Indiana Code section] 34-24-3-1 to treble damages, costs of this action and reasonable attorney fees.

Id. at 19.

Because neither Qwinces nor Buch appeared nor filed an answer, Viking and the Steeles sought default judgment. The trial court granted default judgment in October 2008 and scheduled a hearing regarding damages.[1] Following the hearing, the trial court made findings of fact and conclusions of law, and entered judgment in favor of Viking and the Steeles and against Qwinces and Buch in the amount of $85,465.29 plus court costs.[2]

The trial court concluded Qwinces and Buch's "failure to pay Plaintiff's proportionate share to Plaintiff constitutes unauthorized control over property of Plaintiff and the evidence established that Defendant intended to deprive Plaintiff of any part of its value or use." Id. at

[1] Qwinces and Buch appeared prior to the damages hearing and filed a motion to dismiss for lack of personal jurisdiction, which the trial court denied.

[2] The trial court amended the amount in the original judgment after discovering a clerical error; the amendment is irrelevant to this appeal.

12. The trial court awarded treble damages, attorneys' fees, and travel expenses "by virtue of Defendant's conversion," id., pursuant to the Indiana Crime Victim's Relief Act. Qwinces and Buch now appeal.

Discussion and Decision

I. Individual Judgment Against Buch

Initially, we note that the appellate brief of Viking and the Steeles does not include a statement of the case or statement of facts, and does not explicitly accept Qwinces and Buch's statements. Indiana Appellate Rule 46(B)(1) permits their omission of these sections if they agree with the statements in Qwinces and Buch's brief, but requires them to expressly state such agreement. See J.R.W. ex rel. Jemerson v. Watterson, 877 N.E.2d 487, 488 n.1 (Ind. Ct. App. 2007). With no alternative, we presume the parties' agreement as to the facts. Buch argues the evidence is not sufficient to support the individual judgment against him because no allegation in the complaint refers to him and the trial court could not base its judgment on any fact not included in the complaint.

Viking and the Steeles make a single argument in response: Buch's appeal is precluded from appellate review because Buch did not file with the trial court a motion to set aside the default judgment. In support, Viking and the Steeles erroneously cite Trial Rule 60(B) and an 1899 Indiana supreme court case, Yorn v. Bracken, 153 Ind. 492, 55 N.E. 257 (1899). Trial Rule 60(B) provides for the trial court to grant relief from a judgment or order in enumerated circumstances, but the rule does not – aside from particular requirements for

motions under the rule – require a motion to set aside default judgment to be filed before an appeal may be taken.

In Yorn,[3] appellants from a default judgment claimed appellees were not entitled to recover on the contract at issue, and had appellants filed with the trial court a demurrer asserting insufficient facts to support a cause of action, the trial court would have ruled in their favor. Id. at 257. The Yorn court stated "[a] demurrer for want of facts is filed before judgment, and therefore raises no question as to the judgment, its validity or form, and, if the complaint entitles the plaintiff to any part of the relief prayed for against the party demurring, must be overruled." Id. The court referred to the issue on appeal as "the same question that would have been presented if said appellants had filed a demurrer for want of facts to the complaint in the court below, and had assigned the overruling of said demurrer as error on this appeal." Id. Accepting this procedural posture, the court addressed the question and concluded the complaint at least partly supported the causes of action to support denial of what might have been a demurrer, and it was unnecessary to decide whether the trial court's judgment was proper. Id.

The procedural posture of Yorn – as if an appeal denying a demurrer – is different from the posture of this case, where Qwinces and Buch appeal the judgment based on an insufficient complaint. The appellants in Yorn raised issue with the complaint; Qwinces and Buch raise issue with the default judgment because it is unsupported by the complaint.

[3] Viking and the Steeles' discussion and quotation of Yorn was taken out of context of what the supreme court intended through the entire opinion and its reliance on – as opposed to distinction from or criticism of – Old v. Mohler, 122 Ind. 594, 23 N.E. 967 (1890).

Viking and the Steeles also cite Migatz v. Stieglitz, 166 Ind. 361, 77 N.E. 400 (1906), and Adkins v. State, 234 Ind. 81, 123 N.E.2d 891 (1955), to support their argument that Buch's failure to file a motion to set aside the default judgment bars our appellate review. However, Migatz and Adkins both addressed the merits of the appeals, which is evidence of the supreme court's continued approval of appeals from default judgments without prior denial of a motion to set aside the default judgment.

Old v. Mohler – a case discussed in Yorn – stated "[a] judgment taken by default . . . is liable to be reversed on appeal, and it is not essential that there should have been a motion in the court below to set it aside." 122 Ind. 594, 595, 23 N.E. 967, 968 (1890). "A defendant is not bound to answer a complaint which, upon its face, states no cause of action against him. He may rely upon the court not to render an erroneous judgment against him, and, if such a judgment is rendered upon default, he may have it reversed upon appeal." Id.; see also Prime Mortg. USA, Inc. v. Nichols, 885 N.E.2d 628, 652 (Ind. Ct. App. 2008) (quoting Old, 122 Ind. 594, 23 N.E.2d at 968). It is therefore clear that an appeal of a default judgment does not require a prior motion to set aside the default judgment when arguing on appeal the complaint is insufficient to support that judgment.

We therefore review Buch's argument that there is insufficient evidence to support the default judgment against him. Viking and the Steeles make no argument in support of the judgment. Because they provide us with no facts and no argument, we review this issue as if they filed no brief.

We need not develop unarticulated arguments for an appellee. E & L Rental Equip., Inc. v. Gifford, 744 N.E.2d 1007, 1010 (Ind. Ct. App. 2001). Where appellees' arguments are unarticulated, we "apply a less stringent standard of review in which we may reverse the trial court if the appellant makes a prima facie showing of reversible error." Id. at 1010. "Prima facie in this context is defined as at first sight, on first appearance, or on the face of it." Id. (quotation omitted). The prima facie error rule "was established for the protection of the court so that we might be relieved of the burden of controverting the arguments and contentions advanced for a reversal where such burden properly rests upon the appellee." Metro. Bd. of Zoning Appeals of Marion County v. Weisfeld, 134 Ind. App. 428, 428-29, 189 N.E.2d 109, 110 (1963). The lack of argument, however, "in no way relieves us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required." E & L Rental, 744 N.E.2d at 1010 (quotation omitted).

A default judgment is "a confession of the complaint and it is rendered without a trial of any issue of law or fact." Davis v. Davis, 413 N.E.2d 993, 996-97 (Ind. Ct. App. 1980). "One who takes a judgment by default must . . . be content to stand upon his complaint as he makes it; for, in considering whether or not it is sufficient to support a judgment so taken, the court cannot assume that anything was proved beyond what was alleged in the complaint, nor can the complaint be considered as having been amended to meet the proof." Prime Mortg., 885 N.E.2d at 660 (quotation omitted). In other words, if Viking and the Steeles' complaint does not include allegations of facts sufficient to support the trial court's default judgment against Buch, we must reverse.

On its face, the complaint supports Buch's argument that there is insufficient evidence for default judgment against him individually. As to Buch, the complaint alleges little more than his contact information. The complaint alleges "the parties hereto" negotiated several enumerated items and "the parties hereto acted in accordance with their agreed terms or purchase." Appellant's App. at 18. These allegations are insufficient to hold Buch liable. "The parties hereto," in the subparagraphs that follow, refers by name to Viking, Qwinces, and Don – but not Buch. See id. Paragraph 11 of the complaint states Don requested a copy of corporate records from Buch in April 2007 and did not receive such until May 2007. Nowhere does the complaint allege Buch's duty to do so quicker or otherwise. Cf. id. ("Qwinces was to provide Don a current, accurate copy of their accounting books upon Don's request.") (emphasis added). Because the complaint does not allege facts sufficient to hold Buch liable as an individual, we reverse the trial court's default judgment as to Buch individually.

II. Damages Pursuant to the Indiana Crime Victim's Relief Act

Viking and the Steeles again do not provide facts or an argument to support the trial court's award under the Indiana Crime Victim's Relief Act. Viking and the Steeles repeat their contention that a motion to set aside the default judgment was required, and simply point to Qwinces and Buch's reference to paragraph 15 of the complaint, which states "Plaintiff is entitled under [Indiana Code section] 34-24-3-1 to treble damages, costs of this action and reasonable attorney fees." Id. at 19. Again, it is as if they filed no brief, and

again, "we may reverse the trial court if the appellant makes a prima facie showing of reversible error." E & L Rental, 744 N.E.2d at 1010.

The Indiana Crime Victim's Relief Act permits civil recovery up to three times one's pecuniary loss as a result of violation of certain criminal statutes. Ind. Code § 34-24-3-1. "A criminal conviction . . . is not a condition precedent to recovery in a civil action brought under" this Act, "[h]owever, all elements of the alleged criminal act must be proven by the claimant." Gilliana v. Paniaguas, 708 N.E.2d 895, 899 (Ind. Ct. App. 1999).

Although not specifically alleged in the complaint, Viking and the Steeles apparently – extrapolating from the complaint, the trial court's order, and their appellate brief – allege Qwinces and Buch committed criminal conversion, which would allow a treble damage recovery. "A person who knowingly or intentionally exerts unauthorized control over property of another person" who has suffered a pecuniary loss as a result commits conversion. Ind. Code § 35-43-4-3(a).

The trial court concluded, "Defendant's failure to pay Plaintiff's proportionate share to Plaintiff constitutes unauthorized control over property of Plaintiff and the evidence established that Defendant intended to deprive Plaintiff of any part of its value or use." Appellant's Appendix at 12. The trial court also concluded "by virtue of Defendant's conversion . . . Plaintiff is entitled to collect" damages under the Indiana Crime Victim's Relief Act. Id.

Qwinces and Buch argue, and we agree, the complaint's allegations appear in the nature of a breach of contract claim without sufficient allegation of mens rea to support a

conversion claim. Criminal conversion requires evidence of criminal intent, which "differentiates criminal conversion from the more innocent breach of contract or failure to pay a debt situation that the criminal conversion statute was not intended to cover." Gilliana, 708 N.E.2d at 899.

The trial court's conclusion that evidence established intent to deprive is without basis in the complaint, the only permissible evidence in a default judgment. See Prime Mortg., 885 N.E.2d at 660. We therefore reverse the trial court's erroneous treble damages award.

Conclusion

The complaint is insufficient to support the trial court's default judgment against Buch individually, and insufficient to support a treble damages award pursuant to the Indiana Crime Victim's Relief Act. We therefore reverse the trial court's award of damages against Buch in total and against Qwinces pursuant to the Indiana Crime Victim's Relief Act, and remand to the trial court with instructions to enter judgment in favor of Viking and the Steeles against Qwinces alone, consistent with this opinion.

Reversed and remanded.

MAY, J., and VAIDIK, J., concur.