IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 15, 2015 Session

**BILLY CARL TOMLIN ET AL. V. BETTY BAXTER ET AL.**

**Appeal from the Chancery Court for Williamson County**
**No. 40529 James G. Martin III, Judge**

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**No. M2014-01746-COA-R3-CV – Filed November 30, 2015**

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This appeal arises from a judgment for a post-foreclosure deficiency owing on a promissory note. The dispositive issue on appeal is whether the trial court erred in denying Defendants' motion for relief under Tenn. R. Civ. P. 60.02 from the final judgment. After Defendants filed an answer to the complaint, they subsequently failed to comply with orders of the court, and, upon motion of Plaintiffs, a default judgment on liability was entered in 2012. The hearing on damages, which was set to be heard four weeks later, was continued by agreement more than a dozen times over two years while the parties attempted to reach a settlement. No settlement was reached, and the hearing on damages was held in May 2014, during which Plaintiffs introduced evidence to establish their damages; however, neither Defendants nor their counsel appeared. Following the evidentiary hearing on damages, the court awarded Plaintiffs damages of $153,328.26, and a final judgment was entered. Three months later, Defendants filed a "Motion to Set Aside Default Judgment" under Tenn. R. Civ. P. 60.02, seeking to set aside the May 2014 order on the grounds of excusable neglect. The trial court denied relief. On appeal, Defendants contend the court erred in denying their motion because their failure to attend the damages hearing can be justified by confusion and lack of notice. They also contend the court erred in awarding default judgment because they filed a joint answer to the complaint. We conclude that the damages judgment Defendants sought to have set aside was not a default judgment, but was a final judgment following an evidentiary hearing. Further, the trial court did not abuse its discretion in denying Rule 60 relief from the damages judgment because Defendants failed to establish excusable neglect for not attending the 2014 hearing. We also hold that, although Defendants filed an answer to the complaint, the trial court did not abuse its discretion in entering a default judgment as to liability because Defendants failed to defend the claim in the time frame as ordered by the court. *See* Tenn. R. Civ. P. 55.01. Accordingly, we affirm the trial court in all respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Michael B. Schwegler; Earnest B. Williams IV; and John A. Bell, Jr., Nashville, Tennessee, for the appellants, Betty Baxter and Dean Baulding Baxter.

J. Timothy Street, Franklin, Tennessee, for the appellees, Billy Carl Tomlin and Roy Trice.

## OPINION

In November 2009, Betty Baxter and Dean Baulding Baxter (collectively "Defendants") executed a promissory note in favor of Billy Carl Tomlin and Roy Trice ("Plaintiffs") in the principal amount of $140,000.00 with an interest rate of 19% per annum. The note was secured by a deed of trust governing real property in Greene County, Tennessee, titled in the name of Betty Baxter.

After Defendants defaulted on the note, Plaintiffs foreclosed on the subject property. The sale proceeds were insufficient to satisfy the indebtedness; therefore, in January 2012, Plaintiffs commenced this action seeking a post-foreclosure deficiency judgment in the amount of $149.373.98, plus interest, attorney's fees, expenses, and court costs. Betty Baxter was served with process on March 1, 2012, and Dean Baxter was served with alias process on May 1, 2012; however, before he was served, Defendants filed a joint answer on April 4, 2012, through attorney Javier Michael Bailey of Memphis, Tennessee. Although Mr. Bailey filed the answer with the clerk's office, he failed to serve a copy of the answer upon Plaintiffs' counsel; thus, Plaintiffs' counsel was unaware that an answer had been filed.[1]

One month later, on May 2, 2012, Plaintiffs filed a Motion for Default Judgment against Betty Baxter, who had been served more than sixty days earlier. Following a hearing on the motion, the trial court granted a default judgment against Betty Baxter and a hearing on the issue of damages was set for June 18, 2012. On June 1, 2012, Plaintiffs filed a Motion for Default Judgment against Dean Baxter. A hearing on this motion was also set for June 18.

[1] Plaintiffs' counsel subsequently represented to the trial court that he did not receive a copy of the answer. The certificate of service on the answer lacked the name and address of Plaintiffs' counsel; it simply reads: "I, Javier Bailey, do hereby affirm that a true and correct copy of this Answer has been delivered to Counsel for the Plaintiffs on this 27th day of March 2012."

At the June 18 hearing, the trial court learned that Javier Michael Bailey, the attorney who filed the answer on behalf of Defendants, had recently been disbarred.[2] Accordingly, the judge set aside the default judgment against Ms. Baxter and entered an order on June 29, 2012, granting Defendants thirty days to obtain new counsel and for counsel to make an appearance, or for Defendants to notify the court that they intended to proceed pro se. The court order further specified that a default judgment would be entered if Defendants failed to comply with its order within the required time.

Betty Baxter retained attorney John A. Bell, Jr. who filed a Notice of Appearance on behalf of Betty Baxter, but not Dean Baxter, on July 30, 2012; however, he too failed to serve a copy of the notice on Plaintiffs' counsel.[3] Because Dean Baxter failed to comply with the June 29, 2012 order, and being unaware that Betty Baxter had retained an attorney or that her attorney had made an appearance, Plaintiffs filed a Motion for Default Judgment on August 24, 2012. The motion was served on both Defendants at their respective addresses. When the motion came on for hearing on September 24, 2012, the trial court granted Plaintiffs' motion.[4] The order granting a default judgment against Defendants was entered on October 30, 2012. A hearing on damages was set for November 12, 2012.

Before the damages hearing occurred, the parties requested a continuance of the hearing so they could negotiate a settlement agreement by which Defendants could repurchase the foreclosed property. Over the next sixteen months the damages hearing was continued by agreement no less than twelve times.[5]

In May of 2013, Dean Baxter filed a pro se petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Western District of Tennessee. In December of 2013, Betty Baxter filed a pro se petition for Chapter 13 bankruptcy in the Middle District of Tennessee. When the trial court was advised of the bankruptcy filings, it entered an order continuing the damages hearing indefinitely. In January and February of 2014, the Bankruptcy Courts dismissed Defendants' respective bankruptcy proceedings.

Upon learning of the dismissal of both bankruptcy actions, Plaintiffs filed a Notice of Hearing setting the damages hearing on May 5, 2014. The notice included an

[2] The trial court's order from the June 18, 2012 hearing states: "Since the filing of the Answer, Mr. Bailey has been disbarred by the Tennessee Supreme Court by Order entered April 26, 2012."

[3] The Notice of Appearance fails to provide any form of a certificate of service.

[4] The record does not indicate whether anyone appeared at the hearing on behalf of Defendants.

[5] The parties disagree as to the exact number of continuances in this case, with as many as nineteen being suggested. However, both parties agree that the case was continued at least twelve times, and the exact number of continuances is not relevant.

affirmative statement that both bankruptcy actions had been dismissed. Plaintiffs served the notice on Defendants' counsel at the address stated on Defendants' pleadings, the notices resetting the damages hearing[6], and the trial court's order dated January 21, 2014, which continued the case indefinitely due to the pending bankruptcies.

The final notice setting the damages hearing was mailed to Defendants' attorney on April 15, 2014, and the hearing occurred as scheduled on May 5, 2014. When no one appeared on behalf of Defendants, Plaintiffs established that Defendants were served with notice of the hearing and the court allowed the hearing to proceed. Plaintiffs introduced evidence to establish Defendants' obligations under the note. The court also heard testimony from Plaintiffs' real property appraiser as to the the value of the realty at the time of the foreclosure sale and other relevant proof to establish the deficiency owing, plus interest, costs and attorney's fees. The trial court entered an Order Granting Judgment against Defendants in which the court held that Defendants received notice of the damages hearing, the property securing the promissory note had a fair market value of $95,000 on the date of foreclosure, and Plaintiffs were entitled to a final judgment of $153,328.26.[7] The Order Granting Judgment of $153,328.26, entered on May 5, 2014, constituted a final judgment because it resolved all claims.

On August 8, 2014, which was more than three months after the final judgment was entered, Defendants filed a motion for relief under Rule 60.02 of the Tennessee Rules of Civil Procedure. Defendants alleged that the judgment resulting from the damages hearing should be set aside on the ground of excusable neglect due, in part, to confusion as to the number of times the damages hearing had been reset. Counsel for Defendants also stated that notice of the May 5, 2014 damages hearing was mailed to the wrong address.[8] He also stated that he was not counsel for either Defendant in the bankruptcy hearings, and he did not receive notice of the dismissal of his clients' bankruptcy petitions. The trial court denied Defendants' Rule 60.02 motion, and this appeal followed.

Defendants raise four issues on appeal. The dispositive issue is whether the trial court abused its discretion in denying Defendants' motion to set aside the final judgment. The other issues they raise are whether the trial court erred in granting a default judgment

[6] The record contains nine such notices, the most recent of which was served on December 13, 2013.

[7] The judgment consisted of: (1) a $104,373.98 post-foreclosure deficiency on the note; (2) $1,450.00 in expenses incurred in obtaining Plaintiffs' expert report; (3) $6,575.00 in attorneys' fees; and (4) $40,939.28 in pre-judgment interest at the rate set forth in the note.

[8] It appears that, prior to the May 5, 2014 damages hearing, Defendants' counsel moved office locations and the notice was sent to the prior office location. Defendants' counsel did not notify Plaintiffs or the court clerk of this change.

in 2012 when Defendants had filed an answer to the complaint; when it found that Defendants had notice of the May 5, 2014 damages hearing (the "May hearing"); and when it conducted a damages hearing without, *inter alia*, Defendants present and in the absence of proof as to the sales price.

## STANDARD OF REVIEW

In reviewing a trial court's decision to grant or deny relief pursuant to Tenn. R. Civ. P. 60.02, we give great deference to the trial court and we will not set aside the trial court's ruling unless the trial court has abused its discretion. *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003) (citing *Underwood v. Zurich Ins. Co*., 854 S.W.2d 94, 97 (Tenn. 1993)). "Abuse of discretion is found 'only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party.'" *Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012) (quoting *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)). Thus, the appellate court should "review a [trial] court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative dispositions." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524-25 (Tenn. 2010) (citations omitted).

## ANALYSIS

### I. DEFENDANTS' "MOTION TO SET ASIDE DEFAULT JUDGMENT"

Defendants contend the trial court abused its discretion in denying their Rule 60.02(1) "Motion to Set Aside Default Judgment."

Relief under Rule 60.02 is considered an exceptional remedy that is designed to strike a proper balance between the competing principles of finality and justice. *Furlough v. Spherion Atlantic Workforce, LLC*, 397 S.W.3d 114, 127 (Tenn. 2013); *DeLong v. Vanderbilt Univ.*, 186 S.W.3d 506, 511 (Tenn. Ct. App. 2005). "Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Welch v. Welch*, 195 S.W.3d 72, 75 (Tenn. Ct. App. 2005) (quoting *Thompson v. Firemen's Fund Ins. Co*., 798 S.W.2d 235, 238 (Tenn. 1990)). Due to the importance of the "principle of finality," however, the "escape valve" should not be easily opened. *Id*. (citing *Toney v. Mueller Co*., 810 S.W.2d 145, 146 (Tenn. 1991)). The party seeking relief under Rule 60.02 bears a heavy burden of proof to demonstrate that relief is appropriate in light of the equities of the case. *Id*. (citation omitted).

Nevertheless, Rule 60.02 motions are viewed "*liberally* when the movant seeks relief from *a default judgment*." *Pryor v. Rivergate Meadows Apartment Assocs. Ltd. P'ship*, 338 S.W.3d 882, 885 (Tenn. Ct. App. 2009) (emphasis added). A request to vacate a default judgment in accordance with Rule 60.02 should be granted "if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits."[9] *Henry*, 104 S.W.3d at 481 (citations omitted) (emphasis added). When a party seeks Rule 60.02 relief from a default judgment for mistake, inadvertence, surprise or excusable neglect, the court considers the following factors: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. *Id.*

Defendants contend their Rule 60.02 motion sought relief from a default judgment and, therefore, the liberal standard should apply. However, contrary to the title Defendants gave their "Motion to Set Aside Default Judgment," the order they seek to set aside, the 2014 final judgment, is not a *default judgment*.

It is important to realize that "[a] party's lack of attendance at trial does not convert a judgment into a default judgment." *Schrader v. Schrader*, No. E2005-02641-COA-R3-CV, 2007 WL 27118, at *5 (Tenn. Ct. App. Jan. 4, 2007). For example, in *Schrader*, we were asked to consider whether a judgment from which Rule 60.02 relief was sought was a default judgment. *Id.* In that case, when the husband did not appear at trial during a divorce action, the trial proceeded in his absence, evidence was presented by the wife, and a judgment was entered. On appeal the husband claimed that the trial court erred when it entered a "default judgment" against him. We rejected that argument, stating that a party's lack of attendance at trial does not convert a judgment into a default judgment. *Id*. We rejected a similar argument in *Sandalwood Properties, LLC v. Roberts*, stating "we were compelled to disagree with the Tenants' designation of the Circuit Court's judgment . . . as a 'default judgment.' It does not follow from the mere fact that the Tenants were absent from the hearing . . . that the judgment entered against them was

[9] As the court went on to explain in *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003):

> Both dismissals and default judgments are drastic sanctions. *See United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983); *Barish v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 627 S.W.2d 953, 955 (Tenn. Ct. App. 1981). Neither dismissals nor default judgments are favored by the courts. *See Barbee*, 689 S.W.2d at 866; *Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 864 (Tenn. Ct. App. 2000). Dismissals based on procedural grounds like failure to prosecute and default judgments run counter to the judicial system's general objective of disposing of cases on the merits. *See, e.g., Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991) (observing that "it is the general rule that courts are reluctant to give effect to rules of procedure ... which prevent a litigant from having a claim adjudicated upon its merits"); *Barbee*, 689 S.W.2d at 866 (stating that in the interests of justice, courts express a clear preference for a trial on the merits).

a default judgment." *Sandalwood Properties, LLC v. Roberts*, No. E2006-01163-COA-R3-CV, 2006 WL 3431939, at *3 (Tenn. Ct. App. Nov. 29, 2006); *see also Harper v. Harper*, No. E2002-01259-COA-R3-CV, 2003 WL 192151, at *4 (Tenn. Ct. App. E.S., filed January 29, 2003) ("Wife's absence at trial does not magically convert the final judgment into a default judgment. We reject Wife's argument that a default judgment was entered in this case.")).

Further, there is a difference between a default judgment and a judgment following a full evidentiary hearing, and the true nature of the judgment is not controlled by an incorrectly titled order. *See State, Dept. of Children's Services v. T.P.H.R.*, No. E2006-02670-COA-R3-PT, 2007 WL 2080939, *6 (Tenn. Ct. App. July 20, 2007). In *T.P.H.R.*, we considered whether the judgment from which Rule 60.02 relief was sought was a default judgment. *Id.* We concluded that the judgment was not a default judgment explaining:

> Mother's first issue is whether the Juvenile Court erred when it entered a "Default Judgment" against her and, if not, whether the Juvenile Court erred when it refused to set that judgment aside. The caption of the judgment entered by the Juvenile Court states: "Default Judgment" and "Termination of Parental Rights and Final Decree of Partial Guardianship." We believe the Juvenile Court incorrectly used the term "Default Judgment" on the heading of the final judgment. No default judgment was entered. This case was tried as scheduled, albeit without Mother being present.

*Id*. Moreover, in each of the cases referenced above, we concluded that the judgments entered were not default judgments; rather, they were judgments that were entered following an evidentiary hearing or trial. *See T.P.H.R.*, 2007 WL 2080939, *7; *Schrader*, 2007 WL 27118, at *6; *Harper*, 2003 WL 192151, at *4.

In this case, Defendants seek to set aside the 2014 final judgment. Although Defendants were not in attendance, this judgment followed the May hearing, which was an evidentiary hearing; therefore, it was not a default judgment. Accordingly, the trial court was not required to "liberally" review Defendants' Rule 60.02 motion. *See Pryor*, 338 S.W.3d at 885. Instead, Defendants' motion for Rule 60.02 relief was properly considered under the general Rule 60.02 standard, which recognizes that the relief being sought was "an exceptional remedy," an "escape valve" so-to-speak that should not be easily opened, and that Defendants, the parties seeking Rule 60.02 relief, bore a heavy burden of proof to demonstrate that relief was appropriate in light of the equities of the case. *See Furlough*, 397 S.W.3d at 127; *Welch*, 195 S.W.3d at 75; *Thompson*, 798 S.W.2d at 238; *Toney*, 810 S.W.2d at 146.

We shall now consider whether the trial court abused its discretion in denying Defendants' Rule 60.02(1) motion to set aside the 2014 final judgment.

## II. TENN. R. CIV. P. 60.02(1): RELIEF FROM A FINAL JUDGMENT

When a party fails to file a Tenn. R. Civ. P. 59.04 motion to alter or amend a final judgment within thirty days of its entry, the sole avenue for relief is in accordance with Rule 60.02. *Henry*, 104 S.W.3d at 480. Rule 60.02 provides relief from final judgments as follows:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

Tenn. R. Civ. P. 60.02.

As noted earlier, the burden is on the party seeking extraordinary relief pursuant to Rule 60.02 to establish facts explaining why such relief is justified. *Welch*, 195 S.W.3d at 75; *Wine v. Wine*, 245 S.W.3d 389, 397 (Tenn. Ct. App. 2007). In general, "the bar for attaining relief is set very high and the burden borne by the movant is heavy." *Furlough*, 397 S.W.3d at 128 (quoting *Johnson v. Johnson*, 37 S.W.3d 892, 895 n.2 (Tenn. 2001)). On appeal, we give great deference to the trial court's decision to grant or deny Rule 60.02 relief, and we will not set aside the trial court's ruling unless the trial court has abused its discretion. *Henry*, 104 S.W.3d at 481; *Underwood*, 854 S.W.2d at 97.

Here, Defendants seek relief from the final judgment based on "excusable neglect and inadvertent mistake." "When a party has no notice of a critical step in a court proceeding, the circumstances may make out a case of excusable neglect."[10] *Henry*, 104 S.W.3d at 480. Defendants, however, do not allege they had no notice of the May

[10] In *Henry v. Goins*, the Supreme Court held that a trial court abused its discretion in denying a plaintiff's Rule 60.02 motion on the grounds of excusable neglect when the plaintiffs were not personally at fault for the trial court's dismissal of their claims for failure to prosecute and had not been provided notice that the court was contemplating such action. *Henry*, 104 S.W.3d at 482; *see also Campbell v. Archer*, 555 S.W.2d 110, 112-13 (Tenn. 1997) (concluding that excusable neglect existed when the defendant's new attorney arrived late to trial because he was never advised by the defendant's former attorney or anyone else that the case had been set for trial); *Tenn. Dept. of Human Servs. v. Barbee*, 689 S.W.2d 863, 868 (Tenn. 1985) (concluding that excusable neglect existed for the defense attorney's failure to attend trial when the case was set for trial in open court before the attorney had entered an appearance for the defendant and the clerk failed to notify the attorney that the case was set).

hearing. They merely provide attendant information, and no verified facts, to justify their failure to attend the damages hearing on the grounds of confusion.[11] One confusing circumstance alleged by Defendants is the resetting of the damages hearing nineteen times, from September 24, 2012 to January 21, 2014, before it was finally set for May 5, 2014. They argue that these continuances caused confusion because "ordinary trial practice suggests that staying on top of so many continuances is difficult." The other justification is that "Defendants filed for bankruptcy during this period," Defendants' attorney, John Bell, was not involved in the bankruptcy proceedings, "Bell was under the impression that Defendants' bankruptcy matter was still on going when the new court date for this matter was set," and "Bell never received a certificate of service notifying that the bankruptcy matter was dismissed."

A very significant omission in the motion for extraordinary relief is that Defendants' failed to state whether their attorney had prior knowledge of the May hearing. Attorney Bell merely states that he was unaware of the *bankruptcy dismissals*; he does not state that he was unaware that the *damages hearing* had been set for May 5, 2014. Moreover, attorney Bell affirmatively states that he never received a certificate of service notifying that the bankruptcy matter was dismissed but he does not affirmatively state that he never received notice of the May hearing. We find these omissions most significant.

It is also significant that written notice of the May hearing was timely mailed to attorney Bell at the address he used in all of his court filings in this matter. Even though Mr. Bell moved his office at some time during the pendency of this action,[12] which can be problematic, litigants have an affirmative duty to notify the clerk of court, and counsel of record, of a new address if it changes during the course of litigation. *See Reynolds v. Battles*, 108 S.W.3d 249 (Tenn. Ct. App. 2003); *Schrader*, 2007 WL 27118, at *6. This applies to pro se litigants and attorneys of record, and a party or their attorney who fails to fulfill this obligation is "the author of his own misfortune and cannot be heard to complain that the trial court erred when it proceeded in his absence." *Schrader*, 2007 WL 27118, at *6.

For the foregoing reasons, Defendants have failed to establish a bona fide excuse for failing to attend the damages hearing on May 5, 2014. This conclusion is sufficient to affirm the trial court's denial of Rule 60.02(1) relief; nevertheless, we shall address other deficiencies in Defendants' claim for relief.

[11] Defendants did not file any affidavits to support their claims; the claims are mere assertions set forth in their two page motion.

[12] Mr. Bell does not state whether he notified the postal service to forward his mail. It is difficult to envision an attorney who would not notify the postal service to do just that. Moreover, he does not state when he moved his office.

Another essential factor in seeking relief from a judgment following an evidentiary hearing is that the defendant has a meritorious defense to the claim. *Henry*, 104 S.W.3d at 481. On appeal, Defendants argue that the 2012 order granting default judgment on the note was in error because an answer had been filed prior to the entry of that order. They also make conclusory representations that the award of damages would have been less had they participated in the damages hearing. Despite these arguments, we conclude that Defendants failed to show a bona fide defense to the claim that they were in default of the promissory note or that they have a defense to the amount of damages awarded.

As for the 2012 order granting a default on the note, Defendants are of the erroneous impression that the failure to file an answer is the only ground for a default judgment. A trial court may enter default judgment against a party that has "failed to plead *or otherwise defend*" the case. Tenn. R. Civ. Pro. 55.01 (emphasis added). More specifically, a default judgment may be appropriate when a defendant fails to obey a court's order to get replacement counsel. *See Yearwood, Johnson, Stanton & Crabtree, Inc. v. Foxland Dev. Venture*, 828 S.W.2d 412, 413-14 (Tenn. Ct. App. 1991).

Pursuant to a very specific court order, entered on June 29, 2012, Defendants were given thirty days to retain an attorney and for that attorney to make an appearance, otherwise Defendants were to notify the court they would be proceeding pro se. They were told that if they failed to comply, a default judgment may be entered. Betty Baxter retained attorney Bell, and he timely filed a Notice of Appearance on behalf of Betty Baxter (the notice did not mention Dean Baxter) with the clerk's office on July 30, 2012; however, like his predecessor, Mr. Bell failed to serve a copy of the notice on Plaintiffs' counsel.[13] As for Dean Baxter, he simply failed to comply with the June 29, 2012 order. Because Dean Baxter failed to comply with the order and Plaintiffs' counsel was unaware that Betty Baxter's new attorney had made an appearance, Plaintiffs justifiably filed a Motion for Default Judgment on August 24, 2012. It is undisputed that the motion was served on the defendants at their respective addresses, but not on Betty Baxter's new attorney.

The motion came on for hearing on September 24, 2012, at which time the trial court granted Plaintiffs' motion and an order granting a default judgment against both Defendants was entered on October 30, 2012. The hearing on damages was set for November 12, 2012. Based on these facts, the trial court acted within its discretion ruling

[13] The Notice of Appearance fails to provide any form of a certificate of service.

that Defendants were in default on the note. For the foregoing reasons, we find no error with the trial court's decision to grant the 2012 default judgment on the note.[14]

As for the damages that were awarded, Defendants contend the award was incorrect because a foreclosure sale of the subject property never actually took place and the trial court incorrectly added pre-judgment interest on the principal amount due under the face of the promissory note, instead of the amount due on the deficiency. When a party seeks relief from a final judgment pursuant to Rule 60.02, that party "must offer proof of the basis upon which relief is sought." *Henry*, 104 S.W.3d at 482. Furthermore, mere conclusory statements suggesting a meritorious defense are insufficient. "A conclusory statement, such as '[the movant] believes itself to have a good and valid defense,' is insufficient" to establish a meritorious defense. *Pryor*, 338 S.W.3d at 887; *see also Turner v. Turner*, 739 S.W.2d 779, 781 (Tenn. Ct. App. 1986) (finding that an affidavit, which stated "[m]y wife has taken a considerable amount of our property which I feel the court would have awarded to me if I could have been present at the hearing," did not assert a meritorious defense).

Here, Defendants set forth no specific facts, no proof, to support their arguments that they have a meritorious defense to the amount of damages awarded. As were the statements in *Pryor* and *Turner*, Defendants' stated defenses to the amount of damages awarded are merely conclusory; therefore, they are insufficient to establish a meritorious defense to the damages awarded. Accordingly, Defendants have failed to meet their burden of establishing a meritorious defense.

Defendants also argue that conducting another damages hearing would not prejudice plaintiffs. However, because the record supports the conclusion that Defendant's absence from the damages hearing was not justified by excusable neglect and that Defendants failed to provide a meritorious defense, we need not examine the additional argument of whether prejudice to the plaintiffs would arise. *See In re Justin A.H.*, NO. M2013-00292-COA-R3CV, 2014 WL 3058439, at *15 (Tenn. Ct. App. June 7, 2014) (citing *Discover Bank*, 363 S.W.3d at 494).

[14] There is another justifiable reason for denying Rule 60 relief from the 2012 order. "Rule 60.02 requires that a motion filed thereunder 'be made within a reasonable time.'" *Rogers v. Estate of Russell*, 50 S.W.3d 441, 445 (Tenn. Ct. App. 2001) (quoting Tenn. R. Civ. Pro. 60.02). The rule also provides that motions based on mistake, inadvertence, surprise or excusable neglect must be made "not more than one year after the judgment, order or proceeding was entered or taken." *Id*. (quoting Tenn. R. Civ. Pro. 60.02). Here, the order granting default judgment was entered on September 24, 2012, and Defendants never challenged the propriety of the default judgment until they filed the motion to set aside in August of 2014. Instead of challenging the default judgment in a timely manner, Defendants chose to pursue settlement negotiation while repeatedly delaying the damages hearing. Thus, Defendants strategic decision to delay challenging the propriety of the 2012 default judgment does not constitute excusable neglect.

For the foregoing reasons, we hold that the trial court did not abuse its discretion in declining to provide relief under Rule 60.02.

## IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Defendants.

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FRANK G. CLEMENT, JR., JUDGE