

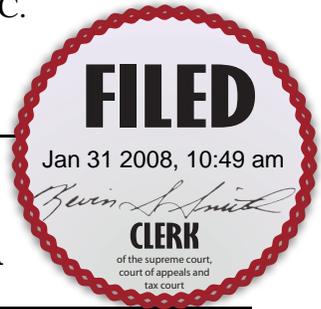
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

ELAINE FOSTER,)
DONALD FOSTER, et al.)

Appellants-Defendants,)

vs.)

FRANKLIN CREDIT MANAGEMENT)
CORPORATION,)

Appellee-Plaintiff.)

No. 71A03-0710-CV-477

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jenny Pitts Manier, Judge
Cause No. 71D05-0608-MF-856

January 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants-Defendants Elaine and Donald Foster appeal the trial court's denial of their motion for relief from judgment in favor of Appellee-Plaintiff Franklin Credit Management Corporation ("Franklin"). We affirm.

FACTS

On August 26, 1997, the Fosters executed a note in which they promised to pay Ford Consumer Finance Company ("Ford") \$31,644.61 in monthly installment payments of \$292.99 at a rate of interest of 10.55 percent. As security for the payment of this note, the Fosters executed a mortgage on their home at 1717 East Donald Street in South Bend. Ford subsequently assigned its interest in the note to Franklin. The Fosters defaulted on their loan, which is currently due for the October 2, 2002 payment.

On August 28, 2006, Franklin filed a complaint seeking to foreclose on the Fosters' mortgage. Following the Fosters' *pro se* answer filed September 5, 2006, Franklin moved for summary judgment. The trial court held a hearing on January 17, 2007, during which Franklin appeared telephonically, and the Fosters, who were unrepresented by counsel, appeared in person. After the hearing, the trial court entered judgment in favor of Franklin in the amount of \$46,605.53. On April 27, 2007, after the property had been sold at sheriff's sale in partial satisfaction of the judgment, the Fosters filed a motion for relief from judgment pursuant to Indiana Trial Rules 60(B)(7) and (8). Following a May 18, 2007 hearing, the trial court denied the Fosters' motion. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, the Fosters claim the trial court abused its discretion in denying their motion for relief from judgment. The decision of whether to grant or deny a Trial Rule 60(B) motion for relief from judgment is within the sound, equitable discretion of the trial court. *Stonger v. Sorrell*, 776 N.E.2d 353, 358 (Ind. 2002). We will not reverse a denial of a motion for relief from judgment in the absence of an abuse of discretion. *Id.* The trial court abuses its discretion where the judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Tardy v. Chumrley*, 658 N.E.2d 959, 961 (Ind. Ct. App. 1995), *trans. denied*.

Indiana Trial Rule 60(B) provides that a court may relieve a party from a final judgment if

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(8) any reason justifying relief from the operation of the judgment

A party seeking relief from judgment must affirmatively demonstrate some extraordinary circumstance to come within the purview of Trial Rule 60(B)(8). *Rissler v. Lynch*, 744 N.E.2d 1030, 1034 (Ind. Ct. App. 2001). In addition to establishing one of the grounds for relief under Trial Rule 60(B), a party seeking to set aside a judgment must make a *prima facie* showing of a good and meritorious defense. *Langdon v. Langdon*, 641 N.E.2d 673, 674 (Ind. Ct. App. 1994). A meritorious defense is one showing that if the case was retried on the merits, a different result would be reached. *Id.*

In seeking reversal on the grounds that relief from judgment is necessary to achieve an equitable result, we observe, as the trial court did, the particular circumstances allegedly involved in this case:

1. [The Fosters] were unrepresented by counsel;
2. At the hearing on [Franklin's] Motion for Summary Judgment, counsel for [Franklin] appeared by telephone and the [Fosters] appeared in person and pro se.
3. [The Fosters] are persons of limited financial means, are in poor health and have a disabled daughter.
4. [The Fosters] could not afford counsel.
5. [The Fosters] believe they have a meritorious defense.

Appellee's Appendix p. 42. The Fosters additionally point out that their predicament is illustrative of the larger foreclosure crisis particularly impacting Indiana residents.

While, as the trial court observed, the judgment from which the Fosters seek relief likely operated to their great detriment, they have failed to demonstrate pursuant to Rule 60 that it created an inequitable result justifying relief. The Fosters do not dispute that they have been in default on their payments dating back to October of 2002, nor do they dispute that the property used to secure their loan was 1717 East Donald Street. The Fosters participated in all proceedings, and unlike in *In re R.R.*, 587 N.E.2d 1341, 1343 (Ind. Ct. App. 1992), nothing from the record suggests any denial of due process.

Further, the above circumstances, while noteworthy, are not sufficiently extraordinary to justify relief from judgment. The fact that the Fosters were not represented by counsel is not highly remarkable, nor is the possibility that they were indigent and could not afford counsel. There is no indication from the record that the Fosters ever sought counsel prior to the summary judgment phase. *See Foster v.*

Adoption of Federspiel, 560 N.E.2d 691, 692 (Ind. Ct. App. 1990) (affirming denial of motion to vacate judgment and finding no due process violation where petitioner, who proceeded pro se, made no request for counsel). As to the Fosters' personal and financial circumstances, we are similarly unconvinced that they are sufficiently extraordinary to justify relief from judgment. Sadly, such limited financial means are not an unusual factor in foreclosure actions. We conclude that the trial court was within its discretion to conclude the facts in this case were not adequately extraordinary to warrant relief from judgment.

We further observe that, regardless of whether there were extraordinary circumstances here, the Fosters were also required to make a *prima facie* showing of a meritorious defense.¹ The record contains only general references to predatory lending and a foreclosure crisis in Indiana, and the Fosters introduced no evidence or documentation substantiating any such claims. While an affidavit providing only slight evidentiary support has been held to be sufficient to establish a *prima facie* showing of a meritorious defense, the Fosters have failed to provide even that. *See Allstate Ins. Co. v.*

¹ We reject the Fosters' argument, based upon *Baxter v. State*, 734 N.E.2d 642, 646 (Ind. Ct. App. 2000), that they were not required to make a showing of a meritorious defense. Although the *Baxter* court determined that a meritorious defense showing was unnecessary, the circumstances of that case involved the State's and the trial court's failing to inform the defendants that a default judgment was being entered against them. 734 N.E.2d at 646. Here there is no claim that the Fosters were not fully aware of the proceedings against them. We further reject the Fosters' argument, based upon *State Farm Mut. Auto. Ins. Co. v. Hughes*, 808 N.E.2d 112, 118 (Ind. Ct. App. 2004), that a meritorious defense can be established by the pleadings in this case. First of all, the answer and counterclaim which allegedly contain the necessary information to establish a meritorious defense were not included in the record. Additionally, in *State Farm* this court found that counsel's misconduct in obtaining a default judgment without notice to an interested party justified relief from judgment. *Id.* at 116. Here there are not allegations of misconduct, nor is there any indication that any proceedings occurred without the Fosters' full knowledge and participation.

Watson, 747 N.E.2d 545, 549 n.1 (Ind. 2001). Accordingly, we find no abuse of discretion on the part of the trial court in denying their motion to set aside judgment.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.