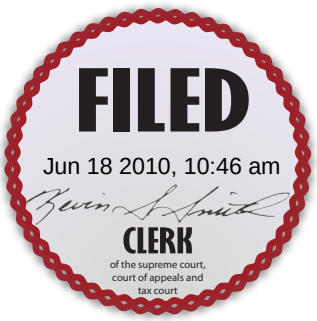

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTINA CISTERNINO,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A05-0912-CV-735
	)	
GRANT COMMUNICATIONS, INC.,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scherry K. Reid, Judge
Cause No. 49D14-0709-PL-40673

June 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Christina Cisternino appeals the dismissal of her complaint against Grant Communications, Inc. ("Grant") pursuant to Indiana Trial Rule 41(E).

We affirm.

ISSUES

1. Whether the trial court abused its discretion in dismissing Cisternino's complaint.

2. Whether the trial court abused its discretion in denying Cisternino's motion to reinstate her action.

FACTS

On September 17, 2007, Cisternino, by counsel, filed a complaint against Grant in Marion County Superior Court 13. According to the complaint, Grant employed Cisternino from August of 2005 until January 6, 2007, when Cisternino voluntarily left her employment. During her employment, Cisternino earned an hourly wage and was paid semi-monthly.

The complaint alleged that Grant violated Indiana's Wage Payment Statute by 1) failing to pay wages within the time period required "[f]or the pay periods starting August 1, 2005 thru March 30, 2006"; 2) failing to pay Cisternino for accrued paid time off ("PTO") "utilized between January 2, 2007 and January 5, 2007"; 3) failing to pay Cisternino the "agreed upon holiday wages" for January 1, 2007; and 4) failing to pay Cisternino for regular hours worked. (App. 20-21). The complaint further alleged that

Grant violated the Fair Labor Standards Act by failing to pay Cisternino "for all overtime hours that she worked during the course of her employment with [Grant]." (App. 22).

Grant filed its answer, affirmative defenses, and counterclaim against Cisternino on October 24, 2007. In its counterclaim, Grant alleged Cisternino's claims to be "frivolous, groundless, and unreasonable," (App. 18), for "demanding payment for time periods and days on which she did not and could not have worked"; and demanding PTO, contrary to Grant's existing policy. (App. 17). Accordingly, Grant sought attorney's fees and costs. Cisternino filed her answer and affirmative defenses on October 29, 2007.

On August 20, 2008, the trial court set a hearing for "call of the docket," pursuant to Indiana Trial Rule 41(E), for September 22, 2008. (App. 2). On September 19, 2008, three days before the scheduled hearing, Cisternino, by counsel, filed a motion to vacate the hearing set for September 22, 2008, which the trial court granted the same day.

On January 7, 2009, the first trial court transferred the case from Marion Superior Court 13 to Superior Court 14 and sent notice of the transfer to all parties. Approximately seven months later, on August 12, 2009, the second trial court set a hearing pursuant to Trial Rule 41(E) for September 24, 2009. Also on August 12, 2009, the trial court sent notice of the hearing to all parties.

On September 23, 2009, one day before the scheduled hearing, counsel for Cisternino filed, via facsimile, a motion to vacate the Trial Rule 41(E) hearing set for the next day. Counsel asserted that he was "currently going through written discovery responses to calculate damages and determine issues on which summary judgment can be

sought"; and he was "determining what further discovery needs to be taken via deposition or additional written discovery." (App. 11).

The trial court denied Cisternino's motion to vacate on September 24, 2009. None of the parties appeared for the scheduled hearing on September 24, 2009. Accordingly, the trial court, on its own motion, dismissed the case with prejudice pursuant to Trial Rule 41(E).

On October 28, 2009, Cisternino's counsel filed a motion to reconsider the order of dismissal, request for hearing, and pre-trial conference. Counsel asserted, and affirmed to, the following:

> 2. On September 23, 2009, [counsel] called and spoke to a clerk for Superior Court No. 14.
>
> 3. During this conversation, [counsel] asked if the Court would accept a faxed Motion to Vacate Trial Rule 41(E) and proposed Order to be followed by copies via regular mail, to which [counsel] was told "yes."
>
> 4. [Counsel] asked if he needed to do anything else regarding this hearing and was told "no."
>
> 5. Given that this is the process that [counsel] has previously used with this Court and other Marion County courts for Trial Rule 41(E) hearings, [counsel] believed that his Motion to Vacate would be granted.
>
> 6. [Counsel] was not told that the Court may not grant the Motion.
>
> 7. [Counsel] was not told that he should plan to attend the hearing regardless of the Motion.
>
> 8. Had [counsel] been told that the Motion may not be granted, then [counsel] would not have bothered to file the Motion and would have attended the hearing on September 24, 2009 at 11:00 a.m.

9. Based upon the foregoing, [counsel] was extremely surprised when he received the September 24, 2009 Order denying [Cisternino]'s Motion to Vacate Trial Rule 41(E) Hearing.

10. It is the understanding of [counsel] that this matter was dismissed for failure to appear at the Trial rule 41(E) hearing on September 24, 2009 as well.

11. [Cisternino] absolutely desires to continue to prosecute this matter.

12. [Cisternino] has been actively pursuing this matter.

13. Based upon the responses of [Grant] to written discovery requests served by [Cisternino], [counsel] has been attempting to determine what issues and/or claims are ripe for summary judgment and which will need to go to trial.

14. Additionally, [counsel] and [Cisternino] have been working to identify and locate potential witnesses with regard to claims that will need to be tried such as the FLSA overtime claim.

15. [Counsel] believes that [Cisternino] is nearly done with discovery.

16. On September 23, 2009, [counsel] served Request for Admissions, and four (4) additional Interrogatories which should be the last of the discovery needed by [Cisternino] in this matter.

17. To date, [Grant] has not performed any discovery in this matter.

(App. 8-9). The trial court "redocketed" the case on September 28, 2009, but did not set a hearing; and on November 23, 2009, denied Cisternino's motion to reinstate the case. (App. 3).

DECISION

We first note that Grant has not filed a brief.

When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf.

> Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. Prima facie error in this context is defined as, "at first sight, on first appearance, or on the face of it." Where an appellant is unable to meet this burden, we will affirm.

Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006) (internal citations omitted).

1. Trial Rule 41(E) Dismissal

Cisternino asserts that the trial court improperly dismissed her action for failure to prosecute pursuant to Trial Rule 41(E).

> We review dismissal of a cause of action under T.R. 41(E) for an abuse of discretion. In so doing, we consider whether the trial court's decision was against the logic and effect of the facts and circumstances; "'we will affirm the trial court if any evidence supports the trial court's decision.'"

Baker Machinery, Inc. v. Superior Canopy Corp., 883 N.E.2d 818, 821 (Ind. Ct. App. 2008) (internal citations omitted), *trans. denied*.

Trial Rule 41(E) provides, in relevant part, that "when no action has been taken in a civil case for a period of sixty [60] days, the court . . . on its own motion shall order a hearing for the purpose of dismissing such case." Furthermore, "[t]he court shall enter an order of dismissal . . . if the plaintiff shall not show sufficient cause at or before such hearing."

> The plain language of T.R. 41(E) requires the trial court to order a hearing once a party has moved to dismiss a case for failure to prosecute. However, when the court orders a hearing and notice of the hearing date is sent to the plaintiff, the hearing requirement of T.R. 41(E) is satisfied, regardless of whether the plaintiff or his counsel attends the hearing.

Metcalf v. Estate of Hastings, 726 N.E.2d 372, 374 (Ind. Ct. App. 2000).

Here, the trial court set a hearing on its motion to dismiss pursuant to Trial Rule 41(E), and Cisternino's counsel received notice of that scheduled hearing.[1] This was sufficient to satisfy the hearing requirement of Trial Rule 41(E). *See id.* Thus, we look next at whether the trial court properly dismissed the action.

In determining whether a trial court abused its discretion in dismissing an action for failure to prosecute, we consider several factors.

> These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part. The weight any particular factor has in a particular case depends on the facts of that case.

Olson v. Alick's Drugs, Inc., 863 N.E.2d 314, 319-20 (Ind. Ct. App. 2007), *trans. denied*. "'[A] lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay.'" *Baker*, 883 N.E.2d at 823 (quoting *Lee v. Pugh*, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004)).

A trial court's authority to dismiss a case pursuant to Trial Rule 41(E) "stems not only from considerations of fairness for defendants, but is also rooted in the

[1] We note that an "attorney acts on behalf of and in the name of the client" and is "the agent of the party employing him and in court also stands in his stead." *In re Adoption of Infant Female Fitz*, 778 N.E.2d 432, 437 (Ind. Ct. App. 2002).

administrative discretion necessary for a trial court to effectively conduct its business." *Baker*, 883 N.E.2d at 823. "The plaintiff bears the burden of moving the litigation and the trial court has no duty to urge or require counsel to go to trial, even where it would be within the court's power to do so." *Lee*, 811 N.E.2d at 885. In order to avoid dismissal under Trial Rule 41(E), "'a plaintiff must resume prosecution before the filing of the T.R. 41(E) motion.'" *Belcaster v. Miller*, 785 N.E.2d 1164, 1168 (Ind. Ct. App. 2003) (quoting *Benton v. Moore*, 622 N.E.2d 1002, 1005 (Ind. Ct. App. 1993)), *trans. denied*.

In this case, Cisternino filed her complaint on September 17, 2007, and her answer to Grant's counterclaim on October 29, 2007. She took no further discernible action for nearly two years. During this time, on August 20, 2008, the trial court set the matter for a hearing pursuant to Trial Rule 41(E) for September 22, 2008; Cisternino's counsel, however, waited until September 19, 2008 before responding by filing a motion to vacate the hearing, which was granted. Subsequently, on August 12, 2009, the trial court again set a hearing for September 24, 2009, pursuant to Trial Rule 41(E). On September 23, 2009, the day before the scheduled hearing on the trial court's Trial Rule 41(E) hearing, Cisternino's counsel filed a motion to vacate the trial court's hearing, which the trial court denied on September 24, 2009.

We cannot say that the trial court abused its discretion in dismissing the action, where Cisternino failed to take any action in the case for two years, after having been notified twice by the trial court of a failure to prosecute. Counsel for Cisternino also offered no just reason for the delay other than claiming in the motion to vacate that he

still was "going through written discovery responses"; and "determining what further discovery needs to be taken . . . " after two years. (App. 11). Counsel, however, offered no evidence of these actions, and apparently, provided no sufficient cause or excuse to the trial court for being dilatory in discovery. *See* Ind. Trial Rule 41(E) (providing that the plaintiff shall show sufficient cause for failure to take action either "at or before" a hearing on a motion to dismiss).

Finally, neither Cisternino nor her counsel attended the scheduled hearing on the trial court's motion to dismiss. Again, it was Cisternino's burden to prove that there was sufficient cause or excuse for delay in prosecution. *Lee*, 811 N.E.2d at 866 n.4; *Metcalf*, 726 N.E.2d at 374. Due to her or her counsel's failure to participate in the hearing, Cisternino clearly did not meet this burden. We therefore cannot conclude that the trial court abused its discretion when it denied Cisternino's motion to vacate the Trial Rule 41(E) hearing and dismissed Cisternino's complaint.

2. Motion to Reinstate

Cisternino's counsel also asserts that the trial court abused its discretion in denying Cisternino's motion to reinstate her complaint. Counsel argues that the trial court should be "equitably stopped" from dismissing the complaint as he "detrimentally relied upon the representations of a clerk from the Trial Court" that he "did not need to do anything further with regard to the Trial Rule 41(E) hearing other than fax and mail" the motion to vacate the hearing. Cisternino's Br. at 4.

"We review a trial court's denial of a motion to reinstate for an abuse of discretion." *Lee*, 811 N.E.2d at 887. Trial Rule 41(F) provides in pertinent part that "[a] dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)."[2]

Although counsel did not assert that Cisternino was entitled to relief pursuant to Trial Rule 60(B), we shall consider her motion to reinstate as a motion for relief from judgment pursuant to Trial Rule 60(B).

> We review a trial court's denial of a motion for relief from judgment for abuse of discretion. A trial court abuses its discretion when its denial is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. "On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just."

Z.S. v. J.F., 918 N.E.2d 636, 639 (Ind. Ct. App. 2009) (internal citations omitted). "Trial Rule 60(B) 'affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant.'" *Id.* (quoting *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002), *reh'g denied*).

Trial Rule 60(B)(1) provides that a trial court may relieve a party from a final judgment, including a judgment by default, for "mistake, surprise, or excusable

[2] Here, the trial court did not indicate that the dismissal was without prejudice. Thus, it is deemed to be with prejudice. *Brimhall v. Brewster*, 835 N.E.2d 593, 597 (Ind. Ct. App. 2005) ("[U]nless the trial court indicates that the dismissal is without prejudice, it must be deemed to be with prejudice."), *trans. denied*; *see also* Ind. Trial Rule 41(B) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under . . . subdivision (E) of this rule . . . operates as an adjudication upon the merits.").

neglect[.]"[3] T.R. 60(B)(1). "'A trial court's discretion in this area is necessarily broad because any determination of mistake, surprise, or excusable neglect turns upon the particular facts and circumstances of each case.'" *Z.S.*, 918 N.E.2d at 640 (quoting *Fitzgerald v. Cummings*, 792 N.E.2d 611, 614 (Ind. Ct. App. 2003)).

Fixed rules or standards for determining what constitutes mistake, surprise, or excusable neglect do not exist as the circumstances of each case differ. *Id.* "Thus, what constitutes 'surprise' depends on the particular facts and circumstances of each case." 918 N.E.2d at 640. "'In making its determination, the trial court must balance the need for an efficient judicial system with the judicial preference for resolving disputes on the merits.'" *Id.* (quoting 792 N.E.2d at 614).

Here, Cisternino's counsel offered no evidence of mistake, surprise, or excusable neglect in failing to prosecute Cisternino's action for two years, notwithstanding the trial court moving to dismiss pursuant to Trial Rule 41(E) in 2008. Also, despite receiving notice of the hearing on the trial court's motion to dismiss in 2009, and after filing a motion to vacate the hearing, counsel for Cisternino failed to follow-up on the motion; and neither he nor Cisternino appeared at the hearing.

Cisternino, however, argues that the trial court improperly dismissed her case for failure to appear and show cause as to why dismissal was not warranted "because she reasonably believed that the hearing had been vacated based upon the representations of

[3] In the motion, Cisternino's counsel asserted that he "believed" the motion to vacate would be granted and expressed "surprise[] when he received the September 24, 2009 Order denying Plaintiff's Motion to Vacate Trial Rule 41(E) Hearing." (App. 8).

the" trial court's clerk. Cisternino's Br. at 9. She maintains that the trial court therefore should be estopped from denying her motion to vacate the hearing or from dismissing her case.

> "Equitable estoppel applies if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his or her conduct in good faith and without knowledge of the facts." "The party claiming equitable estoppel must show its (1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially." "Where each party has equal knowledge, or means of knowledge, of all the facts, there is no estoppels." Finally, "[a]s a general rule, equitable estoppel will not be applied against governmental authorities. Our courts have been hesitant to allow an estoppel in those cases where the party claiming to have been ignorant of the facts had access to the correct information." "The party claiming estoppel has the burden to show all facts necessary to establish it."

Terra Nova Dairy, LLC v. Wabash County Bd. of Zoning Appeals, 890 N.E.2d 98, 105 (Ind. Ct. App. 2008) (internal citations omitted).

Citing *Story Bed & Breakfast v. Brown County Area Plan Comm'n*, 819 N.E.2d 55, 67 (Ind. 2004), Cisternino contends that the doctrine of equitable estoppel should be applied to the trial court as a governmental authority. In that case, however, the governmental authority was a party to the action. *See* 819 N.E.2d at 67 (finding that the plan commission was not estopped from enforcing the planned unit development conditions).

Here, the trial court was not a party to Cisternino's case. Thus, equitable estoppel does not apply to the trial court; we decline to apply the doctrine of equitable estoppel to the judiciary.

Even if we were to find that equitable estoppel applies to the trial court, Cisternino's counsel does not allege that the trial court's unidentified clerk represented that Cisternino's motion to vacate the hearing would be granted or that she did not have to appear at the hearing. Counsel only maintains that "[t]he clerk of the Trial Court answered in the negative" when asked whether "there was anything else that [Cisternino] needed to do regarding this hearing."[4] Cisternino's Br. at 2. Cisternino therefore has failed to carry her burden to establish estoppel based on the trial court clerk's statements.[5]

Finally, we cannot say that Cisternino's counsel reasonably relied on the motion to vacate being granted when he did not follow-up or inquire into its status or appear at the hearing. *Cf. Lake County Trust No. 3190 v. Highland Plan Comm'n*, 674 N.E.2d 626, 629 (Ind. Ct. App. 1996) ("It is patently impractical to fail to file a motion on the

[4] Cisternino presents no facts, such as the clerk's name, to support her assertion that this conversation took place. Also, it is just as reasonable to assume that the clerk was relaying that Cisternino needed to do nothing further in order to file her motion to vacate as it is to assume that the clerk was affirming that the hearing would be vacated.

[5] Regarding Cisternino's request that this court take "judicial notice that the statements of a clerk of a court have the same authority as the orders or directives of a judge," we decline to do so. Cisternino's Br. at 5. "A judicially-noticed fact must be 'one not subject to reasonable dispute' because it is 'generally known' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned.'" *Lutz v. Erie Ins. Exchange*, 848 N.E.2d 675, 678 (Ind. 2006) (quoting Indiana Rule of Evidence 201). Given that the statements of a trial court's unidentified clerk are "'subject to reasonable dispute,'" we cannot say that they are "the type of fact[s] appropriate for judicial notice." *See id.*

assumption that a requested ruling will be made."), *trans. denied*. Accordingly, we find no abuse of discretion in denying Cisternino's motion to reinstate.[6]

We therefore affirm the trial court's dismissal of the case, including both Cisternino's complaint and Grant's counterclaim.

Affirmed.

BAKER, C.J., and CRONE, J., concur.

[6] We note that Trial Rule 60(D) provides that "[i]n passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence . . . ." "However, where there is no 'pertinent evidence,' a hearing is unnecessary." *Benjamin v. Benjamin*, 798 N.E.2d 881, 889 (Ind. Ct. App. 2003). As we cannot say that neither equitable estoppel nor judicial notice apply, a hearing in this case would have been unnecessary. *See Public Serv. Comm'n v. Schaller*, 157 Ind. App. 125, 299 N.E.2d 625, 133-34 1973) ("If therefore, there is no evidence which could be pertinent to the allegations of the motion because such allegations, even if true, would not warrant the relief sought, a hearing would be a futile proceeding.").