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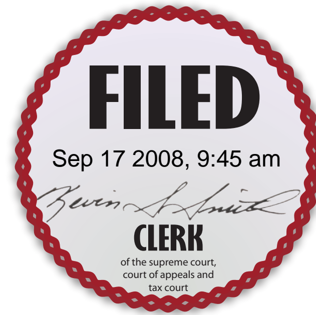


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# IN THE COURT OF APPEALS OF INDIANA

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| BRITTNEY GATES, ASHLEY GATES, MATTHEW GATES, and LARRY ROGGE, | ) | |
| Appellants-Plaintiffs, | ) | |
| vs. | ) | No. 82A01-0806-CV-263 |
| RONALD G. PIERSON, DEBORAH J. PIERSON, and GEORGE W. HOUSTON, III, | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl Heldt, Judge
Cause No. 82C01-0712-CT-669

**September 17, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellants-plaintiffs Brittney Gates, Ashley Gates, Matthew Gates, and Larry Rogge (collectively, the appellants) appeal the trial court's order setting aside a default judgment that had previously been entered against appellees-defendants Ronald G. Pierson, Debora J. Pierson, and George W. Houston, III (collectively, the appellees). The appellants argue that the appellees failed to establish that they did not receive adequate service of process and that the appellees have similarly failed to show that relief from the default judgment was warranted pursuant to Indiana Trial Rule 60(B). Finding no error, we affirm.

## FACTS

The appellants filed a complaint against the appellees on December 20, 2007. Initially, the appellants served the complaint through an attorney, Donald Fuchs, who was representing the appellees in a different matter. Fuchs, however, refused to accept the complaint, returning the documents to the appellants with a January 22, 2008, letter explaining that

> I am not an authorized agent for service for [the appellants]. Further, I have not been retained by [the appellants] to serve as their legal counsel in this cause of action. Accordingly, I do not find the enclosed to constitute service on [the appellants] and recommend that you serve [them] directly.

Appellants' App. p. 17. Subsequently, the appellants attempted to serve an alias summons on each of the appellants via certified mail on two occasions. Both times, however, the summonses were returned unclaimed.

On March 26, 2008, the appellants filed a motion for default judgment, representing to the court that service on the appellees had been achieved. Relying on that

representation, the trial court entered a default judgment against the appellees on March 31, 2008. On April 18, 2008, the pro se appellees wrote a letter to the trial court, explaining that "[a]t no time were we informed of any lawsuit being filed against us . . . . If we had received service pertaining to this matter we would have been more than happy to respond to the case at hand." Id. at 16. The appellees enclosed Fuchs's letter to show that he had not accepted service on their behalf. On May 14, 2008, the trial court set aside the default judgment and ordered the appellees to respond to the complaint within twenty days. The appellants now appeal.[1]

## DISCUSSION AND DECISION

As we consider the appellants' argument that the trial court should not have set aside the default judgment against the appellees, we observe that we afford substantial deference to a trial court's ruling on a motion to set aside a default judgment. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). The trial court's discretion is broad under these circumstances because each case has a unique factual background. Id. Additionally, we note that default judgments are not favored in Indiana

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[1] On June 3, 2008, the appellees filed a motion with the trial court to dismiss or transfer this litigation to other litigation pending before the Vanderburgh Superior Court. The appellees argued that the subject of the instant litigation is substantially the same dispute that was also being litigated in Superior Court. Appellants' App. p. 32. On August 5, 2008, the Honorable Judge Robert J. Pigman, who had been presiding over the litigation in Superior Court, granted the appellees' motion, transferred the cause to himself as Special Judge, and assumed jurisdiction.

The appellants filed the notice of appeal in this matter on May 20, 2008, and the notice of completion of the clerk's record was sent on June 12, 2008. Indiana Appellate Rule 8 provides that "[t]he Court on Appeal acquires jurisdiction on the date the trial court clerk issues its Notice of Completion of Clerk's Record." Thus, neither the Vanderburgh Circuit Court nor the Vanderburgh Superior Court had jurisdiction over this matter as of June 12, 2008, and Judge Pigman's August 5, 2008, order is void for lack of jurisdiction.

because of a general preference to decide a controversy on its merits; thus, any doubt as to the propriety of a default judgment should be resolved in favor of the defaulted party. Id.

To obtain relief from an entry of default, a party must establish that relief is warranted pursuant to Trial Rule 60(B). Relevant herein is Rule 60(B)(6), which provides that the trial court may set aside an entry of default if the judgment was void. A default judgment is void if it was rendered without personal jurisdiction over the defaulted party, which occurs when the defaulted party did not receive adequate service of process. King v. United Leasing, Inc., 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002).

Here, the scant record reveals that the appellants first attempted to serve the appellees through an attorney who was not their registered agent and who was not representing them in this litigation. The attorney explicitly refused to accept service on their behalf and recommended that the appellants serve the appellees personally. There is no evidence that Fuchs, the attorney, actually notified the appellees of the pending complaint or provided them with the summons and pleading. Subsequently, the appellants attempted to serve the appellees via certified mail, but the two sets of summonses were returned unclaimed. The appellants then sought a default judgment and represented to the trial court that service had been achieved when, in fact, it had not. See id. (holding that "[u]nclaimed service [via certified mail] is insufficient to establish a reasonable probability that the defendant received adequate notice and to confer personal jurisdiction").

Inasmuch as there is no evidence establishing that the appellees had actual notice of this lawsuit until the default judgment was entered or that adequate service of process on the appellees occurred, the trial court did not have personal jurisdiction over them at the time it entered the default judgment. Consequently, the judgment was void pursuant to Trial Rule 60(B)(6)[2] and the trial court did not abuse its discretion by setting aside the entry of default against the appellees.

Finally, the appellees request damages pursuant to Appellate Rule 66(E), which provides that we may assess damages if an appeal is frivolous or in bad faith. Nothing in the briefs or the record leads us to conclude that the appellants have brought a frivolous appeal or acted in bad faith. Consequently, we deny this request.

The judgment of the trial court is affirmed.

MATHIAS, J., and, BROWN, J., concur.

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[2] Although Trial Rule 60(B) requires that parties seeking relief under certain provisions allege a meritorious claim or defense, there is no such requirement included for relief under Rule 60(B)(6). Consequently, we need not consider the appellants' argument that the appellees failed to allege a meritorious claim or defense.