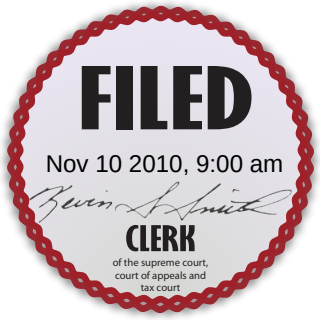

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IN THE
COURT OF APPEALS OF INDIANA

C & R REALTY, LLC,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 26A01-1007-PL-391
	)	
JERRY TOOLEY,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jeffrey F. Meade, Judge
Cause No. 26C01-0807-PL-00013

November 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

C & R Realty, LLC ("C & R") appeals from the trial court's denial of its motion to set aside a default judgment under Trial Rule 60(B). C & R presents one issue for our review, which we restate as whether the trial court abused its discretion when it denied C & R's motion to set aside the default judgment for excusable neglect as a result of a breakdown in communication.

We affirm.

Facts and Procedural History

C & R, whose principal owner is Roger Huebner ("Huebner"), owned certain real estate in Princeton, Indiana. Sometime during 2002 or 2003, C & R contracted with SPM Development, Inc. ("SPM") to build a house on the land. Construction was completed in 2003, and the real estate was transferred to Warren Lofton ("Lofton"). On January 25, 2005, Lofton transferred title to Jerry Tooley ("Tooley"), the plaintiff in this case.

In August 2006, Tooley's house began to exhibit structural problems related to the construction of the house. An independent inspection in May 2007 determined these deficiencies affected the house's habitability.

On July 28, 2008, Tooley filed suit against C & R and SPM, alleging that as vendor and builder, each was obligated to warrant the habitability of the home and breached that warranty; that C & R and SPM were required to follow building codes and failed to do so; and that C & R and SPM breached their duty of ordinary care by failing to follow building codes, thereby creating a defective or unsafe condition in the home. Tooley sought damages

arising from the costs of repair and replacement and from his loss of use of the house.

On August 7, 2008, the complaint was served by certified mail upon C & R; Geneva Huebner, Huebner's wife, signed for the complaint. At some point after service of the complaint, Huebner contacted SPM to discuss the complaint and developed the belief that SPM's insurer, which provided counsel to defend SPM, would provide counsel for C & R as well.

On September 25, 2008, SPM filed its answer; no answer was filed by or on behalf of C & R. On April 27, 2009, Tooley filed his Motion for Default Judgment against C & R. The court granted Tooley's motion on September 11, 2009, and awarded him damages of $112,163.10, post-judgment interest, and court costs of $136.00.

On May 10, 2010, counsel entered an appearance for C & R and filed C & R's Motion to Set Aside Default Judgment. A hearing was held on the motion on June 15, 2010, and the court took the matter under advisement. On July 12, 2010, the court denied C & R's motion.

This appeal followed.

Discussion and Decision

C & R moved the court to set aside the default judgment against it pursuant to Trial Rule 60(B). Default judgments are disfavored in Indiana in preference for disposition of cases on the merits, and the trial court's discretion in granting default judgments should be exercised in light of this disfavor. Comer-Marquardt v. A-1 Glassworks, LLC, 806 N.E.2d 883, 886 (Ind. Ct. App. 2004) (citations omitted). Because a "default judgment … is an extreme remedy," Smith v. Johnston, 711 N.E.2d 1259, 1264 (Ind. 1999), a trial court may

"relieve a party or his legal representative from a judgment, including a judgment by default, for…mistake, surprise, or excusable neglect." Ind. Trial Rule 60(B)(1). A party seeking relief under Rule 60(B)(1) must demonstrate not only that the grounds for relief in 60(B)(1) apply, but also must "allege a meritorious claim or defense" to the claims underlying the default judgment. T.R. 60(B).

We review a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. Whitt v. Farmer's Mut. Relief Ass'n, 815 N.E.2d 537, 539 (Ind. Ct. App. 2004). An abuse of discretion occurs when the court's denial of the motion is clearly against the logic and effect of the facts and inferences supporting the order. Id.

Here, C & R claims that its failure to respond to Tooley's complaint was the result of excusable neglect. There is no hard-and-fast rule for determining whether a default judgment should be set aside because of a party's excusable neglect. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). C & R claims that miscommunication with co-defendant SPM regarding the role of SPM's insurance company in providing counsel to C & R amounted to excusable neglect from a breakdown in communication. C & R draws our attention to two cases, Flying J, Inc. v. Jeter, 720 N.E.2d 1247 (Ind. Ct. App. 1999), and Whittaker v. Dail, 584 N.E.2d 1084 (Ind. 1992), for the proposition that "neglect becomes excusable when it is the result of a miscommunication between a third party and the defendant rather than an internal miscommunication." (Appellant's Br. 5.)

C & R's interpretation of Flying J and Whittaker is too broad. In Whittaker, Whittaker did not appear at trial and was defaulted. He had previously actively defended the

case, twice retaining attorneys. 584 N.E.2d at 1084-85. He had also contacted his insurer, Allstate, and a claims adjuster told him that Allstate would retain counsel to represent him at trial. Id. at 1086. Communications between Allstate and a law firm regarding Whittaker's case had occurred, but the law firm misunderstood its role in the matter. Id. at 1086-87. The Indiana Supreme Court ruled that this constituted excusable neglect from a breakdown of communication.

Similarly, in Flying J, Flying J's insurance adjuster received a courtesy copy of a slip-and-fall plaintiff's complaint and informed Flying J of the pending litigation. 720 N.E.2d at 1248. Even before being served with the complaint, Flying J instructed the adjuster to hire a specific law firm to defend the suit. Id. at 1249. The adjuster misunderstood the instructions and did not hire the requested firm; Flying J did not answer the complaint and was defaulted. Id. at 1249-50. "Similar to the breakdown in communication in Whittaker between the insurance company and the attorney it hired, the failure on the part of Flying J … was not the result of its 'foot dragging'" but was instead a result of a misunderstanding by Flying J's insurance adjuster. Id. at 1250.

Shane provides another example. In that case, a defendant contacted its insurer, which "mistakenly assigned the [defendant's] claim to an adjuster who had recently resigned from the company" so that "the complaint was 'inadvertently misplaced in the claims transfer process.'" Shane, 869 N.E.2d at 1234 (record citation omitted). As in Whittaker and Flying J, the defendant had relied upon its insurer, which had suffered a breakdown in communication internal to it but external to the defendant. Id. at 1236.

These cases differ from the facts in Smith v. Johnston, where Dr. Smith's mail was being handled by a scrub nurse, rather than the physician's office manager. Smith, 711 N.E.2d at 1262. The scrub nurse placed a summons on Dr. Smith's desk, but he did not see the summons until after the default judgment was entered. Id. at 1262. The Indiana Supreme Court did not agree "that the failure of Smith to read his mail amounts to a breakdown in communication sufficient to qualify as excusable neglect." Id. In prior breakdown of communication cases "the defendants did everything they were required to do" but misunderstandings in "the assignments given to agents" resulted in failures to appear. Id.[1]

Here, C & R contends that its relationship with co-defendant SPM is like that of the insureds in Whittaker, Flying J, or Shane to their insurers, rather than the failure to read or open mail in Smith. We cannot agree. In each of the cases on which C & R relies, the defaulted defendant produced evidence establishing a breakdown in communication internal to a third party—typically an insurance company—that was obligated to arrange for counsel for the defendant as the defendant's agent.

There is no evidence of such an obligation here.[2] Unlike the insurers in the cases on which C & R relies, C & R has produced no evidence other than Huebner's testimony. He testified that it was his "understanding" that co-defendant SPM's insurer would also defend C & R and that an answer to Tooley's complaint "was being handled." (Tr. 6.) There is no evidence of any communication between SPM and its insurer to that effect, nor is there

[1] The default judgment was eventually set aside as a result of the plaintiff's attorney's misconduct, not because of any excusable neglect on Dr. Smith's part. Smith, 711 N.E.2d at 1264-65.

[2] In some respects SPM's interests are adverse to C & R's since any liability assessed against C & R as a co-defendant might relieve SPM of some measure of liability.

evidence that SPM owed C & R any duty to arrange for counsel for C & R. See Shane, 869 N.E.2d at 1236; Flying J, 720 N.E.2d at 1250; Whittaker, 584 N.E.2d at 1086. Huebner's testimony does not establish that he could reasonably rely upon co-defendant SPM to procure representation for him or that he did everything he was required to do.

C & R also seeks refuge in its claim that its CEO, Heubner, had no personal knowledge or memory of seeing Tooley's motion for default judgment or the trial court's order. In this respect, C & R is much like the defendant in Smith. Huebner's testimony establishes that he simply did not know whether the motion for default judgment had been served, or whether his wife had received it and failed to pass it on: "I mean, I'm not saying we did not see it. But I didn't see it." (Tr. 6.) Huebner claimed he did not learn of the motion for default judgment until after judgment was entered against him. Likewise, Dr. Smith acknowledged that he received the summons but simply did not read it in time. Smith, 711 N.E.2d at 1262. Although Huebner neither admitted nor denied that the motion was served, during cross-examination he confirmed the address to which the motion for default judgment was mailed.[3] In light of Huebner's testimony, the trial court acted within its discretion when it denied C & R's motion to set aside the default judgment.

We recognize that default judgment is disfavored in Indiana. Comer-Marquardt, 806 N.E.2d at 886. Given the nature of C & R's claimed reliance upon a co-defendant's insurer to provide counsel and Huebner's testimony on C & R's internal handling of correspondence,

[3] C & R also objects that, though Tooley's attorney "certified he mailed the motion, there is no indication that C & R ever received" it or the order granting it because neither the motion nor the order was sent "via Certified Mail." (Appellant's Br. 5-6.) We note that Trial Rule 55, which governs the entry of default judgments, does not require service of such motions and orders by certified mail and that service by first class mail is appropriate under Trial Rule 5(B)(2).

we hold, in light of our deferential standard of review, that the trial court did not abuse its discretion in denying C & R's motion to set aside the default judgment. Because we resolve this case on the question of excusable neglect, we do not address whether C & R had a meritorious defense.

Affirmed.

RILEY, J., and KIRSCH, J., concur.