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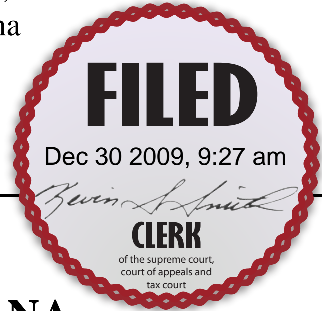

IN THE
COURT OF APPEALS OF INDIANA

BOBBIE SELLERS, Appellant-Defendant, vs. WELLS FARGO, INC., WELLS FARGO HOME MORTGAGE, WELLS FARGO & COMPANY, THOMAS P. SHIPPE, RICHARD KOVACEVICH, PETER A. VELDE, and KIGHTLINGER & GRAY, LLP, Appellees-Plaintiffs.	)	No. 02A03-0904-CV-170

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable David J. Avery, Judge
Cause No. 02-D01-0808-PL-401

December 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Bobbie Sellers, pro se, appeals the trial court's dismissal of his case against Wells Fargo, Inc., Wells Fargo Home Mortgage, Wells Fargo & Company, Thomas P. Shippe, Richard Kovacevich, Peter A. Velde, and Kightlinger & Gray, LLP (collectively "the Defendants"). Sellers presents several issues for our review, which we consolidate and restate as whether the trial court abused its discretion when it denied Sellers's motion for a default judgment against the Defendants and ultimately dismissed his complaint.[1]

We affirm.

Facts and Procedural History

For background purposes, we note that this is the third installment of a series of actions filed by Sellers all involving a loan made by Wells Fargo Home Mortgage ("Wells Fargo") to Sellers for the purpose of purchasing a house. From the loan proceeds, Wells Fargo withheld $830.00 for certain repairs. Wells Fargo made an agreement with a contractor to perform $830.00 of drywall and repair work. After the work was completed and the contractor was paid, Sellers filed a small claims action against the contractor seeking $6000.00 in damages. Sellers claimed that the contractor did not complete the work and left the property in an unclean manner. The small claims court entered judgment in favor of the contractor, and Sellers appealed. Another panel of this Court affirmed the small claims court

[1] To the extent that Sellers raises additional issues regarding attorney Velde, his arguments are incoherent and too poorly developed to be considered cogent for the purposes of appellate review. *See* Ind. Appellate Rule 46(A)(8)(a)(requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

by memorandum decision. *See Sellers v. House Doctors Handyman Serv.*, No. 02A05-0705-CV-256 (Ind. Ct. App. Dec. 11, 2007).

Thereafter, Sellers filed a pro se complaint against the magistrate judge who had ruled against him in the small claims court, the attorneys who represented the contractor, Wells Fargo, and one of Wells Fargo's employees. Attorney Peter Velde represented Wells Fargo and its employee in the action. The lawsuit was ultimately dismissed by the trial court. Sellers subsequently filed a notice of appeal. However, the appeal was dismissed with prejudice.

On August 29, 2008, Sellers filed his pro se complaint in the instant case seeking $75,000,000 in damages against the Defendants. The seventeen-page complaint purports to be a claim for "perjury, negligence and intentional and fraudulent activities." Appellees' Supp. App. at 14. It appears that the Defendants were separately served with the complaint on September 5, 8 and 9, 2008.[2] Attorney Velde and attorney Michael E. Brown entered appearances on behalf of the Defendants on October 2, 2008. On that same date, Velde and Brown also filed motions to dismiss Sellers's complaint pursuant to Indiana Trial Rule 12(B)(6).

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[2] The chronological case summary indicates that a summons was claimed by the respective recipients on each of those dates.

On October 20, 2008, Sellers requested that the trial court enter default judgment against the Defendants because the Defendants had failed to file an answer to his complaint. The trial court did not enter default judgment but, instead, on November 5, 2008, ruled that Sellers's complaint failed to state a claim upon which relief could be granted. The trial court ordered Sellers to file an amended complaint. The trial court also ruled that the Defendants need not file an answer until such amended complaint was approved by the trial court. Sellers again filed a motion for default judgment on November 7, 2008. The trial court denied his motion. As of December 23, 2008, Sellers had not filed an amended complaint. Thereafter, the trial court granted Sellers a final deadline of January 9, 2009, by which to file an amended complaint. Sellers did not file an amended complaint. Consequently, the trial court dismissed Sellers's complaint on January 15, 2009. The trial court made its order final on April 14, 2009. This appeal ensued.

Discussion and Decision

We begin by noting that Sellers chose to proceed pro se at both the trial and appellate level. It is well settled that a litigant who proceeds pro se is held to the same standard as trained counsel and is required to follow procedural rules. *Sumbry v. Boklund*, 836 N.E.2d 430, 432 (Ind. 2005); *Rickels v. Herr*, 638 N.E.2d 1280, 1283 (Ind. Ct. App. 1994). Our courts have never held that a trial court is required to guide pro se litigants through the judicial system. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. Indeed, one of the risks that a defendant takes when he decides to proceed pro se is that he will not know how to accomplish all the things that an attorney would know how to

accomplish. *Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), *trans. denied*. It is in this vein that we analyze Sellers's appeal.

Denial of Motions for Default Judgment

Sellers contends that the trial court abused its discretion when it denied his repeated motions for default judgment against the Defendants. Indiana Trial Rule 55(A) provides the basis for finding a party in default as follows: "When a party against whom judgment for affirmative relief is sought has failed to plead or otherwise comply with these rules and that fact is made to appear by affidavit or otherwise, the party may be defaulted." The decision whether to enter a default judgment is within the sound discretion of the trial court, and the trial court's discretion is considerable. *Prof'l Laminate & Millwork, Inc. v. B & R Enter.*, 651 N.E.2d 1153, 1156 (Ind. Ct. App. 1995). We will reverse the trial court's decision only upon a showing of a clear abuse of that discretion. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Morton-Finney v. Gilbert*, 646 N.E.2d 1387, 1388 (Ind. Ct. App. 1995), *trans. denied*.

Default judgments clearly are disfavored in Indiana. *Comer-Marquardt v. A-1 Glassworks, LLC*, 806 N.E.2d 883, 886 (Ind. Ct. App. 2004). Indeed, "Indiana law strongly prefers disposition of cases on their merits." *Coslett v. Weddle Bros. Constr. Co.,* 798 N.E.2d 859, 861 (Ind. 2003). A cautious approach to the grant of motions for default judgment is especially warranted in "cases involving material issues of fact, substantial amounts of money, or weighty policy determinations." *Mason v. Ault*, 749 N.E.2d 1288, 1290 (Ind. Ct. App. 2001), *trans. denied*.

Here, Sellers argues that the Defendants never filed an answer to his complaint and, thus, he was entitled to a default judgment as a matter of right. The record shows that although the Defendants did not file an answer to Sellers' complaint, the Defendants entered an appearance and filed a motion to dismiss pursuant to Trial Rule 12(B)(6) on October 2, 2008. While there is some dispute between the parties as to whether this response was timely, we need not resolve that dispute.[3] There is no question that at the time Sellers filed his first motion for default judgment, on October 20, 2008, the Defendants had already filed their motion to dismiss. A motion to dismiss for failure to state a claim is a proper responsive pleading. *See Morton-Finney*, 646 N.E.2d at 1388; *see also* Ind. Trial Rule 12(B)(6). As this court has stated, "any answer filed before the motion for default is sufficient to avoid default … even though the answer is untimely filed pursuant to [Trial Rule] 6." *Sportsman's Paradise, Inc. v. Sports Ctr., Inc.*, 424 N.E.2d 1073, 1075 (Ind. Ct. App. 1981). Under the circumstances, because the Defendants had in fact responded to the complaint prior to Sellers's first motion for default, it was clearly within the trial court's discretion to decline to enter a default judgment.

In addition, it is well settled that even where a defendant fails to timely respond to a complaint, while there may be a technical default, the nondefaulting party is not entitled to judgment by default as a matter of right. *Progressive Ins. Co. v. Harger*, 777 N.E.2d 91, 95 (Ind. Ct. App. 2002). Indiana Trial Rule 55(B) specifically permits the trial court to go

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[3] The Defendants claim that the record is unclear as to exactly when each of them was served with the complaint.

further in its investigation. *Id*. Specifically, the trial court may conduct a hearing "to establish the truth of any averment by evidence or to make an investigation of any other matter." *Id*. at 96. In other words, regardless of timeliness, it was within the trial court's discretion to consider the Defendant's motion to dismiss as well as the validity of the allegations in Sellers's complaint. "While default may allow for expedited entry of judgment, it is not its purpose to facilitate a judgment that would be based upon untrue allegations of fact or contrary to law." *Id*.

Sellers's complaint purported to seek $75,000,000 in damages from the Defendants. This is no small amount of money. It is naïve of Sellers to presume that, even if there was a technical default on the part of the Defendants, it would have resulted in a windfall in his favor. Appropriately, in an attempt to reach the merits of this case, the trial court ordered Sellers to amend his complaint in compliance with Indiana Trial Rule 8(A). Contrary to Sellers's argument, the trial court was not attempting to "trick" him or merely toll the statue of limitations when it ordered him to amend his complaint. The court was merely giving him the opportunity to sufficiently state a claim upon which relief could be granted. In short, we conclude that the trial court did not abuse its considerable discretion when it denied Sellers's repeated motions for a default judgment.

Dismissal

Having concluded that the trial court did not abuse its discretion when it declined to enter a default judgment in favor of Sellers, we now turn to the trial court's ultimate dismissal of his complaint. To state a claim for relief, a complaint need only contain (1) a

short and plain statement of the claim and (2) a demand for relief. *See* Ind. Trial Rule 8(A). A complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. *McDonald v. Smart Prof'l Photo Copy Corp.*, 664 N.E.2d 761, 764 (Ind. Ct. App. 1996). When reviewing the dismissal of a complaint for failure to state a claim under Trial Rule 12(B)(6), this Court views the pleadings in a light most favorable to the plaintiff and draws every reasonable inference in favor of the plaintiff. *Menefee v. Schurr*, 751 N.E.2d 757, 759-60 (Ind. Ct. App. 2001), *trans. denied*. A Trial Rule 12(B)(6) dismissal will be affirmed on appeal when a complaint states a set of facts and circumstances, which, even if true, would not support the relief requested. *See id*.

Here, Sellers's complaint contains seventeen pages of confusing and convoluted language. His sentences are vague and disjointed and nowhere can we find a short plain statement of what exactly his claim may be. Similar to the trial court, we are completely unable to discern what set of facts and circumstances, even if true, would entitle him to any type of relief, much less relief in the amount of $75,000,000. Although given ample time and instruction to do so, Sellers failed to file an amended complaint as ordered by the trial court. Accordingly, the trial court properly dismissed his complaint for failure to state a claim upon which relief could be granted.[4]

Affirmed.

RILEY, J., and VAIDIK, J., concur.

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[4] By separate order issued contemporaneously with our decision, we deny Sellers's request for oral argument and his motion entitled "Damages Against Appellant."