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**IN THE
COURT OF APPEALS OF INDIANA**

ERNESTINE WALDON and)
VIRGIE SMALL,)
)
Appellants-Defendants,)
)
vs.)
)
DONNA WILKINS, M.D.,)
HEALTH OFFICER, DELAWARE COUNTY,)
)
Appellee-Plaintiff.)

No. 18A04-0604-CV-199

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0509-MI-53

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Ernestine Waldon (“Waldon”) and Virgie Small (collectively “Defendants”) appeal the trial court order allowing the Delaware County Health Department to remove Defendants’ mobile home and personal property from a piece of Defendants’ real estate. Finding that Defendants waived their challenge to the trial court’s personal jurisdiction over them, that the trial court’s entry of judgment against Defendants did not violate Defendants’ due process rights, that the trial court did not abuse its discretion in entering a demolition order, and that the trial court’s order did not result from the misconduct of a party adverse to the Defendants, we affirm.

Facts and Procedural History

Defendants owned a mobile home located at 12220 North 600 West in Gaston, Delaware County, Indiana (“Property”). On August 29, 2005, the Delaware County Health Department posted two notices at that address. The first was captioned “**OFFICIAL NOTICE: ABATEMENT ORDER OF UNLAWFUL CONDITION.**” Appellee’s App. p. 1. The notice stated: “You are hereby notified that the Delaware County Health Officer, and her designated representative have determined that a condition exists on the [Property] which may transmit, generate or promote disease, pursuant to [Indiana Code §] 16-20-1-25.” *Id.* Specifically, the notice explained that “trash/debris must be removed & properly discarded,” that “inside home must be thoroughly cleaned & sanitized,” and that “[the Property] must be properly mowed & cleared of tall weeds.” *Id.* The notice gave Defendants until September 12, 2005, to rectify those conditions. Further, the document provided: “**Should you fail to respond**

to this order, an injunction will be filed in the Delaware Circuit Court to obtain a court order requiring you to comply with the above stated condition(s).” *Id.*

The second document was captioned **“NOTICE: ORDER TO DEEM STATED DWELLING AS UNFIT FOR HUMAN HABITATION.”** *Id.* at 2. The notice indicated that the Property suffered from a “[w]ant of repair” and the “[e]xistence on the premises of an unsanitary condition that is likely to cause sickness among occupants of the dwelling.” *Id.* The county deemed the Property unfit for human habitation and ordered the Property vacated by September 3, 2005.

On September 29, 2005, Donna Wilkins, M.D. (“Wilkins”), the health officer for Delaware County, filed a Complaint for Injunctive Relief and Declare Property a Public Nuisance and Request for Attorney Fees (“Complaint”) against the Defendants. Wilkins alleged that the situation that existed at the Property “may promote, transmit or generate disease to wit, that said residence contains excessive trash and debris and the outside property is unkempt.” Appellants’ App. p. 8. Wilkins asked the trial court to declare the Property a public nuisance and requested the abatement of the nuisance. Specifically, Wilkins asked for an order “permitting a health officer to take whatever means necessary to bring the property into compliance[.]” *Id.* at 9. On the same day, Wilkins filed a request for an emergency hearing in the matter. The trial court granted the request and set the matter for an emergency hearing on October 14, 2005. Copies of the Complaint, the summons, and the order setting the emergency hearing were delivered to the Property on October 4, 2005. The summons explained that the Defendants had twenty days to respond to Wilkins’ Complaint.

Two days before the scheduled hearing, on October 12, 2005, Waldon filed a handwritten request for a continuance, apparently because she needed more time to find an attorney and because her granddaughter was scheduled to have surgery on October 14. The trial court summarily denied Waldon's request the same day.

The emergency hearing was held as scheduled on October 14. The Defendants did not appear at the hearing, nor did anyone appear on their behalf. Joshua Williams, an employee of the Delaware County Health Department, testified as to his observations regarding the condition of the Property and produced photographs of the Property. When asked, "[I]s it suitable to be cleaned up or are you requesting for authority to have it removed?" Williams responded, "For removal." Tr. p. 4. The same day, the trial court entered judgment in favor of Wilkins, finding, in pertinent part:

1. That the [Property] violates the health codes of Delaware County and the Junk Car Ordinance of Delaware County.
2. That the Defendants have ten (10) days from the date of this Order to remove any personal property of value.
3. That after said ten (10) days, the Health Department shall be authorized to remove from the premises the modular building and all personal property and debris located on the real estate.
4. That the Plaintiff shall report to the Court the costs of said efforts which shall then be assessed as a judgment against the Defendants and the real estate.
5. That the Defendants shall also pay a reasonable attorney fee in the amount of Seven Hundred Fifty Dollars (\$750.00) to counsel for the Plaintiff . . . within 60 days from the date of this order.
* * * *
7. That the costs of removing the modular building and all personal property and debris from the premises and attorney fees shall constitute a judgment against the Defendants.

Appellant's App. p. 15-16. Waldon and her daughter went to the Property on October 26, 2005, to find that the mobile home had been demolished and that people were taking away the personal property that remained.

Nearly two months later, on December 21, 2005, the Defendants filed their Motion to Set Aside Default Judgment and Petition for Order Requiring Plaintiff to Return Defendant's Property, which the trial court denied. Defendants then filed a motion to correct error, which the trial court also denied. Defendants now appeal.

Discussion and Decision

On appeal, Defendants argue that "[t]he trial court erred when it failed to set aside the default judgment entered in the within cause pursuant to [Indiana] Trial Rule 60(B)(3) and (6)." Appellants' Br. p. 7. As an initial matter, we note that the trial court did not enter default judgment here. Wilkins did not request default judgment, and the trial court never mentioned default judgment or Indiana Trial Rule 55, dealing with default, in ruling in favor of Wilkins. Default judgment is rendered without a trial of any issue of law or fact. *Davis v. Davis*, 413 N.E.2d 993, 996-97 (Ind. Ct. App. 1980). Where neither the defendant nor his counsel appears at trial but the trial court hears the plaintiff's evidence and renders judgment thereon, such judgment is a judgment on the merits and not a default judgment. *Ed Martin Ford Co. v. Martin*, 173 Ind. App. 428, 430 n.1, 363 N.E.2d 1292, 1294 n.1 (1977). Here, the trial court heard Wilkins' evidence before entering judgment. As such, Defendants' arguments regarding default judgment are without merit.

Nonetheless, we will address the issues Defendants raise in their brief, which we have consolidated as follows: (1) whether Defendants are entitled to relief under Indiana Trial Rule 60(B)(6) because the trial court did not have personal jurisdiction over them because they were not served with the summons and complaint in accordance with Indiana Trial Rule 4.1; (2) whether the trial court's entry of the order authorizing the demolition of their house violated their due process rights; (3) whether the trial court abused its discretion in authorizing the demolition of their house because they were not given an adequate opportunity to remedy the conditions which justified the complaint; and (4) whether Defendants are entitled to relief from judgment under Indiana Trial Rule 60(B)(3) due to the misconduct of an adverse party. We address each issue in turn.

I. Personal Jurisdiction

First, Defendants argue they are entitled to relief from judgment under Indiana Trial Rule 60(B)(6) because the trial court's judgment is void. Specifically, they contend that the trial court lacked personal jurisdiction over them because Wilkins failed to properly serve them with the summons and the complaint in accordance with Indiana Trial Rule 4.1. We disagree.

We first note that Defendants have waived any challenge they may have had to the trial court's personal jurisdiction. Neither in their motion to set aside default judgment nor in their motion to correct error was personal jurisdiction raised. *See* Appellants' App. p. 17-21 (motion to set aside default judgment), 23-35 (motion to correct error). Indeed, Defendants raised the issue for the first time in their brief on appeal. A claim that the

trial court lacked personal jurisdiction is waived if raised for the first time on appeal. *Joyner v. Citifinancial Mortgage Co.*, 800 N.E.2d 979, 981 n.1 (Ind. Ct. App. 2003).

Waiver notwithstanding, we cannot agree that service of process was inadequate in this case. The strongest evidence that Defendants were properly served is the fact that they requested a continuance of the October 14th hearing. Clearly they had knowledge of the suit and the impending hearing. In addition, the return of service stamp indicates that copies of the summons and complaint were both served to Defendants' residence and mailed. *See* Appellee's App. p. 5. This fact is also reflected in the Chronological Case Summary. *See* Appellants' App. p. 1. Still, Defendants urge that this service was inadequate because service was made to the Gaston address, but when service occurred, they were living at an address in Redkey, Indiana. However, Waldon herself testified that she "continued to receive [her] mail at the Gaston address." Tr. p. 52. This evidence, taken together, is sufficient to support a finding of adequate service of process and, therefore, personal jurisdiction.

II. Due Process

Second, Defendants contend that the trial court's entry of judgment in favor of Wilkins violated their right to due process. Determining whether due process requirements have been satisfied requires us to consider three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

procedural safeguard would entail. *Starzenski v. City of Elkhart*, 659 N.E.2d 1132, 1138-39 (Ind. Ct. App. 1996) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), *trans. denied*. An assessment of these factors leads us to conclude that Defendants' due process rights have not been violated in this case.

The private interest to be affected is of constitutional dimension: Defendants' property interest in the mobile home. We agree with Defendants that this interest, protected by both the Fifth Amendment to the United States Constitution and Article I, § 21 of the Indiana Constitution, is significant and weighs heavily against the government action in this case.

The second factor we must consider is the risk of an erroneous deprivation of Defendants' interest through the procedures used and the probable value, if any, of additional or substitute safeguards. Defendants contend:

There is a tremendous risk that many people would suffer a loss of their homes and property if a Health Officer were able to simply say that a property is a nuisance, that the nuisance should be abated, that there is an emergency, with no specific factual allegation of the nature of such an emergency, and, upon that foundation, a court could legitimately conclude that a person's home could be demolished within fifteen days of the actual filing of a complaint to abate a nuisance and for injunctive relief, and without any opportunity for appeal.

Appellants' Br. p. 12. Defendants' account of the procedures used in this case is incomplete.

It is true that the trial court issued the demolition order just fifteen days after Wilkins filed her complaint. However, the county first notified Defendants of the problems on the Property on August 29, 2005, a full month *before* Wilkins filed her Complaint. Defendants were put on notice again on October 4, 2005, when they were

served with the Complaint and notified that an emergency hearing would be held on October 14, 2005. The Defendants had an opportunity to be heard at the hearing, but they failed to appear. The trial court then gave Defendants ten days to retrieve their personal property and, if they chose, to appeal the trial court's order. Defendants did neither. It was not until those ten days elapsed that demolition began. "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quotation omitted). Here, the deprivation of Defendants' property was preceded by notice and an opportunity to be heard. Defendants have not established a high risk of erroneous deprivation of their property interest through the procedures used.

The third and final factor to be considered is the Government's interest. Here, the county had an interest in remedying the conditions on the Property because those conditions had the potential to transmit, generate, or promote disease and because the Property had become unfit for human habitation. Importantly, the county's interest extends beyond those who may live on the Property to the health and property of other citizens in the community. Governmental units have a substantial interest in the health, safety, and welfare of their citizens. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

Defendants have established a significant property interest, but given the low risk of erroneous deprivation through the procedures employed in this case and the important

government interest in maintaining safe and healthy communities, we cannot say that Defendants' due process rights have been violated.

In a related argument, Defendants allege that Wilkins' Complaint did not adequately apprise them that Wilkins was seeking to have the mobile home demolished. While it is true that Wilkins' Complaint did not expressly refer to demolition, it does ask the court for permission "to take whatever means necessary to bring the property into compliance[.]" Appellants' App. p. 9. This prayer for relief is certainly broad enough to encompass demolition. Furthermore, Defendants would have known that Wilkins was seeking demolition if they had appeared at the hearing, where county employee Joshua Williams asked for authority to remove the home.

Defendants also contend that the trial court did not have the authority to grant a demolition order. We acknowledge that the procedure Wilkins followed here does not track the statutes on dwellings unfit for human habitation. Specifically, Indiana Code § 16-41-20-6 allows county health officers, such as Wilkins, to order the demolition of such dwellings. Indiana Code § 16-41-20-9 provides that an aggrieved person has ten days to seek judicial review of such an order. Defendants are correct, then, that there is no statutory provision for the entry of a demolition order by a trial court in the first instance. Nonetheless, whether the trial court grants a demolition order or merely affirms a county health officer's demolition order upon judicial review, the end result is the same. Here, instead of entering a demolition order and then waiting for Defendants to seek

judicial review, Wilkins went straight to the trial court and asked for a demolition order. This is an acceptable procedure.¹

III. Adequate Opportunity to Remedy Conditions

Third, Defendants assert that the trial court abused its discretion in entering the demolition order because the Defendants were not given adequate time to remedy the conditions that formed the basis of Wilkins' Complaint. In support of this claim, Defendants direct us to this Court's decision in *Kopinski v. Health & Hospital Corp. of Marion County*, 766 N.E.2d 454 (Ind. Ct. App. 2002). There, a home was damaged by fire on May 10, 2001, and an administrative hearing officer entered a demolition order on July 25, 2001. The homeowner appealed the demolition order to the trial court, and the trial court affirmed the order. We held that the trial court abused its discretion in affirming the order, reasoning that the homeowner was not given an adequate opportunity to repair the structure. *Id.* at 456. The vital distinction between the instant case and *Kopinski* is that the homeowner in *Kopinski* actually appeared in the trial court and presented evidence that she planned to repair and rebuild her home. We cannot say that the trial court in this case abused its discretion in entering the demolition order when Defendants failed to appear and there was absolutely no evidence to oppose the county's evidence and no indication that Defendants planned to remedy the conditions that led to Wilkins' complaint.

IV. Misconduct of an Adverse Party

¹ Defendants also contend that the demolition order violated their "substantive due process rights" under the United States Constitution. Appellants' Br. p. 22. Specifically, they claim that "the manner in which [Wilkins] and her agents proceeded under this order shocks the conscience." *Id.* Defendants' vague, two-paragraph argument in this regard is not supported by cogent reasoning or citation to relevant authority, and it is therefore waived. *See* Ind. Appellate Rule 46(A)(8)(a).

Fourth, Defendants argue that they were entitled to relief from the trial court's judgment under Indiana Trial Rule 60(B)(3), which provides that "the court may relieve a party . . . from an entry of default, final order, or final judgment . . . for . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]" Defendants allege that Wilkins failed to notify them of the issuance of the demolition order, and they contend that this constitutes misconduct of an adverse party. Trial Rule 60(B)(3) concerns fraud, misrepresentation, or misconduct in the *procurement* of orders and judgments. The misconduct Defendants allege has nothing to do with the procurement of the demolition order; rather, it concerns Wilkins' conduct after the entry of the order. Therefore, Defendants' claim under Trial Rule 60(B)(3) is without merit.

This does, however, lead us to several claims by Defendants regarding their personal property. They argue that they did not have adequate time to remove their personal belongings from the Property. They also contend that the taking of their personal property without just compensation violated the Fifth Amendment to the United States Constitution² and Article I, § 21 of the Indiana Constitution.³ Finally, Defendants urge that the demolition order violated their due process rights because it could be interpreted to allow the county to take Defendants' personal property, not just the mobile home, which was the target of the Complaint.

As Wilkins notes in her brief on appeal, to the extent that Defendants are entitled to any relief regarding their personal property, that relief must come by way of a lawsuit

² ". . . nor shall private property be taken for public use, without just compensation."

³ "No person's property shall be taken by law, without just compensation[.]"

against the individuals and entities involved with the execution of the order. Our task here was to review the *validity* of the order, which we have done. Determining whether Defendants' rights were violated in the *execution* of the order is the domain of Indiana's trial courts.

Affirmed.

CRONE, J., concurs.

BAKER, J., concurs in result with separate opinion.

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Appellants-Defendants,)

vs.)

DONNA WILKINS, M.C.,)
HEALTH OFFICER, DELAWARE COUNTY,)

Appellee-Plaintiff.)

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BAKER, Judge, concurring in result.

I reluctantly concur in the result reached by the majority. I am troubled by certain aspects of this case. Most critically, I am uneasy about the fact that the Defendants were never explicitly notified that a potential ramification of their failure to bring the Property into compliance with applicable health code regulations was the demolition of the mobile home and removal of their personal property. They failed to attend the hearing, presumably believing that the worst result would be a court order requiring either that they comply with the county's mandate or vacate the Property. Following the hearing,

however, they went to the Property to find, with great shock, that the mobile home had been demolished and that people were taking away their remaining personal property. Although, as I explain below, I believe that the trial court's order complied with the letter of the Defendants' right to due process, I do not believe that it complied with the spirit of that right. In the future, I caution the trial court and the Health Department to provide explicit warnings to residents when a possible consequence of a failure to comply with health code regulations is the final and drastic remedy of property demolition.

Wilkins's complaint, however, explicitly asked for an order permitting a health officer "to take whatever means necessary to bring the property into compliance," appellants' app. p. 8, and sought relief pursuant to a section of the Indiana Code that gives the Health Department the right to "remove[]" a dwelling or structure that a health officer has determined to be a public nuisance. Ind. Code § 16-51-20-6. Additionally, we know that the Defendants received, at the least, the complaint, summons, and notice setting the emergency hearing, inasmuch as Waldon requested a continuance of the hearing. Notwithstanding their receipt of those documents or the trial court's denial of the requested continuance, the Defendants failed to attend the hearing in person or by counsel. Finally, I note that it is clear from the record that the Defendants had, effectively, abandoned the Property. I feel compelled, based on the sum of these facts, to concur in the result reached by the majority, but I only do so with an unpleasant awareness of the bad taste left in my mouth.

Furthermore, I believe that this case highlights the importance of the retention of legal counsel as early as possible in legal proceedings. I appreciate that it is a far greater

challenge to do so for people of limited means than it is for people who have comfortable bank accounts. But in today's day and age, thanks in part to funding from the Interest on Lawyer Trust Account program, there are a wealth of options available to those who might not otherwise be able to afford or find adequate legal representation. I encourage anyone who might find him or herself in a situation similar to that encountered by the Defendants herein to be proactive and find a legal professional to represent his or her interests—in so doing, the litigant can have a modicum of confidence that she will not suddenly discover, to her great surprise and dismay, that her personal possessions have been taken and her home has been demolished.