MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

Roto-Rooter Services Company,
Appellant-Defendant,

v.

Nationwide Insurance Company of America a/s/o Eduardo and Dawn Manning Juarbe,
Appellee-Plaintiff.

November 4, 2022

Court of Appeals Case No.
22A-CT-760

Appeal from the
Hamilton Superior Court

The Honorable
David K. Najjar, Judge

The Honorable
P. Chadwick Hill, Magistrate

Trial Court Case No.
29D05-2107-CT-5011

Friedlander, Senior Judge.

[1] Roto-Rooter appeals the trial court's denial of its motion for relief from a default judgment. Concluding that Roto-Rooter failed to establish exceptional circumstances necessary to satisfy Trial Rule 60(B)(8), we affirm.

[2] Roto-Rooter presents three issues for our review, which we consolidate and restate as one: whether the trial court erred by denying Roto-Rooter's motion for relief from default judgment.

[3] Eduardo and Dawn Juarbe had a homeowners insurance policy with Nationwide. On July 16, 2021, Nationwide filed a subrogation action against Roto-Rooter alleging that in March 2020 the Juarbes contracted with Roto-Rooter to provide plumbing services at their home. Nationwide further alleged that Roto-Rooter breached its duty to use reasonable care in performing its services and caused damage to the Juarbes' residence. Pursuant to the Juarbes' insurance policy, Nationwide paid for the damages to their home and sought to recover that amount from Roto-Rooter as subrogee of the Juarbes. The certified mail receipt for service of the complaint was signed on August 4. No response was filed and no counsel appeared on behalf of Roto-Rooter.

[4] On December 2, Nationwide moved for default judgment, which the court granted. On January 4, 2022, Roto-Rooter moved for relief from the default judgment. The court held a hearing on Roto-Rooter's motion and subsequently denied the motion. Roto-Rooter now appeals.

[5] On appeal, a trial court's decision whether to set aside a default judgment is given substantial deference. *Huntington Nat'l Bank v. Car-X Assoc. Corp.*, 39

N.E.3d 652 (Ind. 2015). Our appellate review is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* Upon review, we will not reweigh the evidence or substitute our judgment for that of the trial court. *Id.*

[6] In order to be granted relief pursuant to Indiana Trial Rule 60(B)(8)[1] as Roto-Rooter seeks here,[2] the moving party must (1) move for relief from the judgment within a reasonable time, (2) allege a meritorious claim or defense, and (3) demonstrate some extraordinary or exceptional circumstances justifying equitable relief. *State v. Collier*, 61 N.E.3d 265 (Ind. 2016). Under Rule 60(B)(8), the burden is on the movant to demonstrate that relief is both necessary and just. *Huntington*, 39 N.E.3d 652.

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[1] Trial Rule 60(B)(8) provides:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:
>
> . . . .
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> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

[2] Although Roto-Rooter argued for relief under Trial Rules 60(A), 60(B)(1), and 60(B)(8) both in its motion for relief from judgment and at the hearing thereon, it abandoned its arguments concerning Rules 60(A) and 60(B)(1) on appeal. *See* Appellant's Br. pp. 26 n.7, 46 n.10.

[7] Applying the first factor of timely filing for relief from the judgment, we find that Roto-Rooter filed its motion for relief from judgment one month after the default judgment was entered.

[8] Factor two requires an allegation of a meritorious defense. While "mere conclusory statements will not suffice," a movant's allegations of a meritorious defense should state enough facts to give the court "'an opportunity to measure whether the [ ] defense has any potential.'" *See Logansport/Cass Cnty. Airport Auth. v. Kochenower*, 169 N.E.3d 1143, 1148-49 (Ind. Ct. App. 2021) (quoting 12 *Moore's Federal Practice*, § 60.24[1] (3d ed. 1997)). Here, Roto-Rooter alleges the homeowners signed a release of all claims and provided a copy of the release at the hearing.

[9] Finally, in order to be granted relief under Trial Rule 60(B)(8), Roto-Rooter must also demonstrate its failure to act was justified by some extraordinary or exceptional circumstances. This Court has explained that the party seeking relief from a judgment under Rule 60(B)(8) must show that its failure to act was not merely due to an omission involving a mistake, surprise, or excusable neglect. *RAB Performance Recoveries, LLC v. Knight*, 174 N.E.3d 228 (Ind. Ct. App. 2021) (citing *Brimhall v. Brewster*, 864 N.E.2d 1148 (Ind. Ct. App. 2007), *trans. denied*). Instead, some extraordinary or exceptional circumstances must be demonstrated affirmatively, and such circumstances must be other than those enumerated in the preceding subsections of Trial Rule 60(B). *Id.* Exceptional circumstances may include equitable considerations such as (1) whether the movant has a substantial interest in the matter at issue; (2) whether

the movant had an excusable reason for its untimely response; (3) whether the movant acted swiftly to set aside the default judgment once the case was discovered; (4) whether the movant will suffer significant loss if the default judgment is not set aside; and (5) whether the non-movant will suffer only minimal prejudice if the case is reinstated. *Innovative Therapy Sols. Inc. v. Greenhill Manor Mgmt., LLC*, 135 N.E.3d 662 (Ind. Ct. App. 2019) (citing *Huntington*, 39 N.E.3d 652).

[10] Roto-Rooter suggests a few grounds in support of its substantial interest in this matter, such as pursuing claims that discourage the "casual attitudes" of insurance companies toward subrogation claims and ensuring its service contracts "have meaning in the marketplace." Appellant's Br. p. 45. Nonetheless, we find nothing to indicate that Roto-Rooter's interest in this matter is different than the interest of any other similarly situated corporate litigant would be in such a situation. Our conclusion is the same with regard to Roto-Rooter's loss if the judgment is not set aside.

[11] Further, Roto-Rooter does not contend that it did not receive notice of the lawsuit. Indeed, at the hearing, Roto-Rooter's counsel acknowledged, "This case was filed, and there's no question that my client – an Answer was due. No Appearance or Answer was filed. No one's questioning that." Tr. Vol. 2, p. 5. As the reason for its untimely response, counsel for Roto-Rooter asserted at the hearing that, although it was well into 2021, "[t]his is a Covid situation. . . . It didn't get follow-up. We did not have the people there, and they didn't do what they should have done." *Id.* at 11. In its brief to this Court, Roto-Rooter

further explains that "the claim material" was "placed unnoticed on the desk of an Indianapolis employee who had been permitted to work remotely," and the "remote employee was the one responsible for sending suit papers to the Cincinnati corporate office for attention." Appellant's Br. p. 46.

[12] We presume that, having permitted the remote work situation, the Indianapolis Roto-Rooter office was aware of this particular employee's absence from the office due to his or her remote work status. Nevertheless, Roto-Rooter disregarded the complaint until five months after it was received by Roto-Rooter's registered agent in August 2021 and one month after the default judgment was entered. This preventable oversight on the part of Roto-Rooter does not constitute an exceptional or extraordinary circumstance that warrants relief under Rule 60(B)(8). *See, e.g.*, *Innovative Therapy Sols.*, 135 N.E.3d at 671 (determining that, where defaulted party did not contend it did not receive notice of lawsuit when it was served but rather alleged that complaint "slipped through the cracks," circumstance was entirely of party's own making and not exceptional circumstance warranting relief from judgment (quoting Appellee's Br. p. 22)).

[13] On appeal, Roto-Rooter alternatively claims that the default judgment lacks proof to support it and that such a situation is an extraordinary or exceptional circumstance making relief under Rule 60(B)(8) appropriate. Appellant's Br. p. 44. This argument completely misses the mark; the party seeking relief from a judgment under Rule 60(B)(8) must show that *its failure to act* was due to some

extraordinary or exceptional circumstances. *See RAB Performance Recoveries*, 174 N.E.3d 228.

[14] Even assuming Nationwide would suffer minimal prejudice if the default judgment were set aside, this equitable consideration together with Roto-Rooter's relatively quick filing of its motion for relief after entry of the default judgment, are insufficient to constitute exceptional or extraordinary circumstances that justify invoking the court's equitable power under Rule 60(B)(8). *See JK Harris & Co., LLC v. Sandlin*, 942 N.E.2d 875 (Ind. Ct. App. 2011) (trial court's equitable power under Rule 60(B)(8) may only be invoked upon showing of exceptional circumstances justifying extraordinary relief), *trans. denied*. Accordingly, we conclude the trial court did not abuse its discretion in denying Roto-Rooter relief from the default judgment.

[15] Judgment affirmed.

Vaidik, J., and Altice, J., concur.