

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

Dean White, Gwenivere, LLC,
and Etropal, LLC,
Appellants-Plaintiffs,

v.

John Moultrie,
Appellee-Defendant.

November 7, 2022

Court of Appeals Case No.
22A-MI-944

Appeal from the LaPorte Circuit
Court

The Honorable Thomas J.
Alevizos, Judge

Trial Court Cause No.
46C01-1711-MI-1959

Brown, Judge.

[1] Dean White, Gwenivere, LLC, and Etropal, LLC, (“Plaintiffs”) appeal the trial court’s January 20, 2022 order dismissing their action pursuant to Ind. Trial Rule 41(E) for failure to prosecute. We remand.

Facts and Procedural History

[2] On November 20, 2017, Plaintiffs filed a complaint under cause number 46C01-1711-MI-1959 (“Cause No. 1959”) against John Moultrie for damages related to loss of equipment, debts of a business, and appropriation of a Facebook page. On January 16, 2018, Moultrie filed an Answer as well as a document titled Counterclaims and Third Party Complaint. On February 5, 2018, Plaintiffs filed an Answer and Affirmative Defenses.

[3] On December 13, 2021, the court entered a “Motion to Dismiss per T.R. 41(E) and Hearing Notice” which stated that it, sua sponte, moved to dismiss the cause. Appellee’s Appendix Volume II at 8 (capitalization omitted). The court scheduled a hearing for January 20, 2022, and ordered that “Plaintiffs shall take notice that this matter will be dismissed if the Plaintiffs do not appear at the aforesaid hearing or otherwise fail to show sufficient cause” as to why the matter should not be dismissed. *Id.*

[4] On January 20, 2022, the court entered an order dismissing the cause pursuant to Ind. Trial Rule 41(E) for failure to prosecute. On January 21, 2022, Plaintiffs filed a Motion to Set Aside Rule 41 Dismissal Order asserting that counsel received email notice on January 21, 2022, of the order dismissing the matter, counsel could not find a notice of the hearing in his email, “[i]t is possible that

said notice was inadvertently deleted or not received,” and Plaintiffs “ha[d] been engaging in written discovery and follow-up written discovery” and wished to continue to prosecute the case. Appellants’ Appendix Volume II at 9-10. That same day, Moultrie filed an objection to the motion to set aside the dismissal. An entry dated January 31, 2022, in the chronological case summary states: “Motion is deemed denied pursuant to TR 53.4.”¹ *Id.* at 5.

[5] On February 17, 2022, Plaintiffs filed a Motion for Relief from Judgment which alleged that counsel never received notice of the January 31, 2022 docket entry indicating that the January 21, 2022 motion was denied and requested that the court set aside the dismissal order. On February 18, 2022, Plaintiffs filed a Motion to Correct Error[] which referenced the trial court’s January 20, 2022 dismissal and the court’s denial of the January 21, 2022 motion and alleged that counsel did not receive notice of the January 20, 2022 hearing, asserting that Plaintiffs had been actively engaged in discovery, and requesting that the court

¹ Ind. Trial Rule 53.4 provides:

(A) Repetitive Motions and Motions to Reconsider Ruling on a Motion. No hearing shall be required upon a repetitive motion or upon motions to reconsider orders or rulings upon a motion. Such a motion by any party or the court or such action to reconsider by the court shall not delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules.

(B) Effect of Court’s Delay in Ruling upon Repetitive Motion or Motion to Reconsider Ruling on a Motion. Unless such a motion is ruled upon within five (5) days it shall be deemed denied, and entry of service of notice of such denial shall not be required. This Rule 53.4 does not apply to an original motion for judgment on the evidence under Rule 50 after the jury is discharged, to amend or make additional findings of fact under Rule 52(B), an original motion to correct errors under Rule 59, or for correction of relief from judgments under Rule 60 or to the original motions to the extent expressly permitted or expressly designated as extending time under these rules.

reverse its dismissal. On March 7, 2022, Moultrie filed a Statement in Opposition to Plaintiffs' Motion to Correct Error as well as a Motion to Strike or Deny Plaintiffs' Repetitive Motion for Relief from Judgment Filed February 18, 2022. On March 17, 2022, the court scheduled a hearing on the motion for relief from judgment for September 15, 2022.

- [6] On April 26, 2022, Plaintiffs filed a notice of appeal of the January 20, 2022 order and indicated that the motion to correct error was deemed denied on April 4, 2022.

Discussion

- [7] We first address Moultrie's argument that the notice of appeal filed by Plaintiffs was untimely. Ind. Appellate Rule 9(A)(1) provides:

A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion is noted in the Chronological Case Summary or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

Ind. Appellate Rule 9(A)(5) provides that, "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2."

- [8] The trial court entered an order on January 20, 2022, dismissing the case pursuant to Ind. Trial Rule 41(E). On January 21, 2022, Plaintiffs filed a

Motion to Set Aside Rule 41 Dismissal Order. We treat this motion as a motion pursuant to Trial Rule 41(F).² See *Ind. Dep't of Nat. Res. v. Ritz*, 945 N.E.2d 209, 213 n.4 (Ind. Ct. App. 2011) (observing that a plaintiff's "motion to reinstate is properly viewed as a motion pursuant to Trial Rule 41(F) in accordance with Trial Rule 60(B)") (citing *Hoosier Health Sys., Inc. v. St. Francis Hosp. & Health Ctrs.*, 796 N.E.2d 383, 386 (Ind. Ct. App. 2003) ("Reinstatement following dismissal is governed by subsection (F)")), *reh'g denied, trans. denied*. On January 31, 2022, the court denied the motion. On February 18, 2022, Plaintiffs filed a Motion to Correct Error[]. Pursuant to Ind. Trial Rule 53.3, we agree with Plaintiffs that this motion was deemed denied on April 4, 2022.³ On April 26, 2022, Plaintiffs filed a notice of appeal. Under these circumstances, the notice of appeal was timely. See *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332, 337 (Ind. 1983) ("We hold the proper procedure in the Indiana Rules of Trial Procedure for setting aside an entry of default or grant of default judgment thereon is to first file a Rule 60(B) motion to have the default or default judgment set aside. Upon ruling on that motion by the trial court the

² Ind. Trial Rule 41(F) is titled "Reinstatement Following Dismissal" and provides: "For good cause shown and within a reasonable time the court may set aside a dismissal without prejudice. A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)."

³ Ind. Trial Rule 53.3 provides:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

aggrieved party may then file a Rule 59 Motion to Correct Error alleging error in the trial court's ruling on the previously filed Rule 60(B) motion. Appeal may then be taken from the court's ruling on the Motion to Correct Error."); *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 398 (Ind. Ct. App. 1997) (holding that appellants followed the procedure sanctioned by *Oxiderno* by first filing a Rule 60(B) motion seeking relief from the dismissal and timely filing a motion to correct error within thirty days of the denial of the motion for relief from judgment), *reh'g denied, trans. denied*.

[9] However, the lack of an order on the February 17, 2022 motion for relief from judgment and the court's scheduling of a hearing on that motion requires remand. The record reveals that Plaintiffs filed a Motion to Set Aside Rule 41 Dismissal Order on January 21, 2022, and the court denied the motion on January 31, 2022, without a hearing.⁴ Plaintiffs filed a motion for relief from judgment on February 17, 2022, which cited Ind. Trial Rule 60(B). Ind. Trial Rule 60(D) provides: "In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule." On March 17, 2022, the court scheduled a hearing on the motion for relief from judgment for

⁴ As noted above, Ind. Trial Rule 41(F) provides that "[a] dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)."

September 15, 2022.⁵ The scheduling of the hearing on the motion for relief from judgment occurred prior to the notice of appeal, which was filed on April 26, 2022. Under these circumstances, we remand for the trial court to hold a hearing and enter an order on the motion for relief from judgment.

[10] Remanded.

Altice, J., and Tavitas, J., concur.

⁵ Indiana's Odyssey Case Management System contains an entry dated September 15, 2022, under Cause No. 1959 which states: "Hearing (Judicial Officer: Alevizos, Thomas J) Location: LaPorte Circuit Court." Odyssey does not further specify whether this hearing was actually held or indicate any subsequent action by the trial court.