MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Terry Boyer,
Appellant,

v.

City of Westfield, Indiana,
Appellee.

October 21, 2022

Court of Appeals Case No. 22A-PL-627

Appeal from the Hamilton Superior Court

The Honorable J. Richard Campbell, Judge

The Honorable Darren J. Murphy, Magistrate

Trial Court Cause No. 29D04-2005-PL-3297

Bailey, Judge.

Case Summary

[1] Terry Boyer ("Boyer") appeals the trial court's denial of his motion to correct error, which challenged the denial of his motion for relief from judgment. The only issue he raises on appeal is whether the trial court abused its discretion when it denied his motion.

[2] We affirm.

Facts and Procedural History

[3] On May 8, 2020, the City of Westfield ("the City") filed a lawsuit against Boyer, seeking an order that he abate certain conditions on his property, which the City alleged were unsafe and/or a public nuisance, in violation of the Westfield municipal code and zoning ordinances. The City's complaint alleged that Boyer's property was located at "511 Main Street, Westfield, Indiana 46074," and the Certificate of Service stated that the City served a copy of the complaint to Boyer at that same address. *City of Westfield v. Terry Boyer*, No. 29D04-2005-PL-3297 ("Plaintiff's Action for Declaratory Judgment").[1] The summons also was mailed to Boyer at the street address "511 Main Street." App. at 24. A notice sent on May 14 from the trial court to Boyer at the street address "511 Main Street" was returned to the court on May 23 with the

[1] The City's complaint is not included in the Appendix on appeal. However, it is available to this Court via the Odyssey case management system and is a part of the record on appeal. *See* Ind. Appellate Rule 27.

notation "Return to Sender, Insufficient Address, Unable to Forward." *Id.* at 29. Boyer's actual address is 511 *East* Main Street, Westfield, Indiana, 46074.

[4] On October 29, 2020, the City filed a motion for a bench trial, and the Certificate of Service indicated that the City served the motion on Boyer at "511 Main Street." *Id.* at 31. On November 11, 2020, the trial court issued an order setting a bench trial for December 11, 2020, and mailed a copy of the order to Boyer at "511 Main Street." *Id.* at 32. However, neither the trial court record nor the CCS contains any indication that the copy of the order sent to Boyer was returned to the court as undeliverable. Boyer appeared at the December 11 hearing, but the City did not. The trial court entered an order vacating the December 11 hearing and, on December 14, issued a copy of that order to Boyer at "511 Main Street." *Id.* at 33, 34. The later order was returned to the trial court on January 12, 2021, with the notation "Return to Sender, Insufficient Address, Unable to Forward." *Id.* at 5, 34.

[5] On May 14, 2021, the City filed another motion for a bench trial and served a copy of that motion on Boyer at "511 Main Street." *Id.* at 6, 44-45. In an order dated May 18, 2021, the trial court set the matter for a June 23, 2021, bench trial. The order setting that trial date states: "Distribution: All parties of record." *Id.* at 49. The court sent that order to Boyer in an envelope post-marked May 19, 2021, and addressed to "511 Main Street." *Id.* at 50. On July 6, the order was returned to the trial court with the notation: "Return to Sender, Insufficient Address, Unable to Forward." *Id.*

[6] The City appeared for the June 23 trial, but Boyer failed to appear. The City presented evidence which included the testimony of Brandon Oliver ("Oliver"), a Community Development Coordinator for the City whose job included conducting inspections of properties for municipal code and/or ordinance violations. Oliver testified that he had inspected Boyer's property on April 21, 2021, and June 22, 2021. During the inspections, Oliver had taken photographs of the property, which were admitted into evidence as the City's exhibits. The photographs included pictures of a house that is the main building, several accessory buildings—including the garage in which Boyer was living—several vehicles, and various litter and debris.

[7] Oliver testified that the "main structure" on the property was "leaning" and "structurally unsafe." Tr. at 7, 8. He testified that the main structure was at risk of rodent infestation due to "structural points [being] exposed to the exterior." *Id.* at 8. Oliver also testified that there were several "abandoned" vehicles on the property. *Id.* at 7-8, 9, 10. He defined "abandoned vehicle" as "a vehicle 6 or more model years older[,] inoperable[,] and that has been sitting in a manner that can be viewed from public right away [sic]." *Id.* at 7-8. Oliver testified that Boyer's property was a "public nuisance" in that it violated the City's "nuisance laws." *Id.* at 11.

[8] On July 8, 2021, the trial court issued an order granting judgment to the City. The order noted that the property is located at "511 E. Main Street, Westfield, Indiana, Hamilton County." App. at 12. The court found the property contained an "unsafe building" and is a "public nuisance." *Id.* at 12-13. The

court ordered Boyer to "fully abate the property in accordance with all local and state laws" within forty-five days. *Id.* at 13. The order stated that, if Boyer failed to timely and fully abate the property, the City was authorized to enter onto the property and "fully abate" it. *Id.* The CCS notes regarding the order: "automated paper notice issued to parties." *Id.* at 7. The City sent a copy of the judgment to Boyer by certified mail, although the record does not disclose the address the City used in that certified mailing.

[9] On August 23, 2021, Boyer filed a form document entitled "Verified Motion to Set Aside Default Judgment"[2] in which he noted that he had "abated the municipal codes [he] recieved [sic]." *Id.* at 55. Under "valid legal defense to Plaintiff's claim," Boyer stated: "Didn't recieve [sic] the registered letter[,] it was returned due to wrong address. Was not notified [o]f court date[,] resulting in missing it." *Id.* A "CCS Entry" dated August 23 states: "The Clerk will please enter the following entry on the Chronological Case Summary. (This entry will not appear in the record of Orders and Judgments): address was wrong needs fixed [sic] 511 E. Main St. Westfield, IN. [sic] 46074." *Id.* at 57.

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[2] Although the form that Boyer completed and filed refers to a "default judgment," the July 8, 2021, order is not a default judgment but a judgment on the merits. *See McLean v. Trisler*, 161 N.E.3d 1259, 1270 (Ind. Ct. App. 2020) ("A default judgment has been defined as a confession of the complaint and it is rendered without a trial of any issue of law or fact." (citation and quotations omitted)), *trans. denied*; *Ed Martin Ford Co. v. Martin*, 173 Ind.App. 428, 430 n. 1, 363 N.E.2d 1292, 1294 n. 1 (1977) ("If after the issues have been formed the defendant or his counsel does not appear at trial, the court can hear the plaintiff's evidence at that time and render a judgment thereon. Such judgment would be a judgment on the merits and not a default judgment."). The parties do not assert otherwise on appeal.

[10] The court set Boyer's motion for a hearing on October 8; there is no indication in the trial court record or CCS that the copy of the order sent to Boyer was returned to the court as undeliverable. Both Boyer and the City appeared for the October 8 hearing on Boyer's August 23 motion. Boyer testified that the reason he did not appear for the June 23 hearing was because he did not receive notice of it, and the City admitted that it could not prove Boyer had received a copy of its request for the hearing as the City had sent it via regular U.S. mail rather than by certified mail.

[11] Boyer testified that he lives on the property at 511 East Main Street, but he lives in the building the City identified as a garage. Boyer admitted that the main house on the property was a residence in the past but is no longer "habitable." Tr. at 24. He stated that he now uses that building for storage. Boyer testified that he had "cleaned up" the "solid waste" and debris on the property, *id.* at 23, but admitted that there was an "abandoned" and "inoperable" vehicle still on the property, *id.* at 28, and that it had been on the property for more than thirty days.

[12] On December 27, 2021, the trial court issued an order denying Boyer's "Trial Rule 60(B) Motion for Relief from Judgment." App. at 14. The trial court found that Boyer's testimony "regarding lack of notice" was not "credible," and it found that Boyer "did not establish a meritorious defense to the litigation." *Id.* Boyer filed a Motion to Correct Error on January 27, 2022, and the trial court denied the motion on February 18, 2022. Boyer now appeals.

Discussion and Decision

[13] Boyer appeals the trial court's order denying his motion to correct error, which he filed after the court denied his Trial Rule 60(B) motion for relief from the judgment ordering him to abate his property. Our standard of review under either motion is the same: we review the order "for abuse of discretion and will reverse only where the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court has misinterpreted the law." *Cross-Roads Farms, LLC v. Whitlock*, 157 N.E.3d 555, 560 (Ind. Ct. App. 2020). We give a "trial court's decision with regard to a Trial Rule 60(B) motion… substantial deference on appeal[,]" and "[w]e will not reweigh the evidence or substitute our judgment for that of the trial court." *Ind. Bureau of Motor Vehicles v. Majestic Auto Body*, 128 N.E.3d 466, 469 (Ind. Ct. App. 2019).

[14] A party seeking to set aside a judgment under Indiana Trial Rule 60(B)(1)[3] must show "mistake, surprise, or excusable neglect." Because there is no general rule as to what constitutes excusable neglect, so as to allow relief from judgment, "each case must be determined on its particular facts." *Baker v. Paschen*, 188 N.E.3d 486, 491 (Ind. Ct. App. 2022) (internal quotations and citation omitted). "Faulty process, whereby a party fails to receive actual notice, may constitute

[3] Boyer does not specify under which subsection of Rule 60(B) his claim falls, although he cites in passing to "T.R. 60(B)(8)." Appellant's Br. at 11. Boyer's motion, which alleges a lack of notice, more appropriately falls under Rule 60(B)(1), which relates to "mistake, surprise, or excusable neglect," or Rule 60B)(8), pertaining to "any reason justifying relief" from judgment.

excusable neglect, mistake, or surprise." *Darling v. Martin*, 827 N.E.2d 1199, 1202 (Ind. Ct. App. 2005); *see also Baker & Daniels, LLP v. Coachman Indust., Inc.*, 924 N.E.2d 130, 141 (Ind. Ct. App. 2010) (holding failure to receive notice of a show cause hearing constituted "exceptional circumstances" justifying relief from judgment under Rule 60(B)(8)), *trans. denied*.

[15] In addition to the showing required under Rule 60(B)(1) or (8), the movant must also make a prima facie showing of a meritorious defense. T.R. 60(B) ("A movant filing a motion [for relief from judgment] for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense."); *Cross-Road Farms*, 157 N.E.3d at 561 (noting same); *cf. Morrison v. Prof. Billing Serv., Inc.*, 599 N.E.2d 366, 368 (Ind. Ct. App. 1990) (holding, where a judgment is void under Rule 60(B)(6) due to court's failure to acquire personal jurisdiction when there is no service *of process*, no showing of a meritorious defense is required). A "bald assertion" of a meritorious defense is not sufficient; rather, the movant must "make a showing that will prevail until contradicted or overcome by other evidence." *Cross-Road Farms*, 157 N.E.3d at 561. That is, the movant must "present evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the judgment to stand." *Baker & Daniels,* 924 N.E.2d at 141. The rationale for the requirement to show a meritorious defense is "to prevent the waste of time and resources in the performance of a useless ritual. If a movant for relief under T.R. 60(B)(1) has no case, then the granting of relief would result in yet another

judgment for the non-movant." *Anderson v. State Auto Ins.*, 851 N.E.2d 368, 371 (Ind. Ct. App. 2006).

[16] The evidence contained in the trial court's record establishes that Boyer's address is 511 *East* Main Street in Westfield and that the court sent the order setting the June 23 hearing date to Boyer at "511 Main Street"—i.e., an incorrect address. The record also establishes that the order setting the hearing date was returned to the court with the notation: "Return to Sender, Insufficient Address, Unable to Forward." App. at 50. Therefore, the trial court erred to the extent it concluded that Boyer[4] received notice of the June 23 hearing. And the lack of such notice potentially could constitute mistake, surprise, or excusable neglect under Trial Rule 60(B)(1), *see Darling*, 827 N.E.2d at 1202, or present other reasons justifying relief under 60(B)(8), *see Baker & Daniels,* 924 N.E.2d at 141.

[17] However, in order to receive relief under Rule 60(B)(1) or (8), Boyer was required to make an additional showing that he had a meritorious defense to the City's claims, and the trial court did not abuse its discretion when it held that Boyer failed to do so. Boyer's own testimony at the hearing on his motion

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[4] We note that Boyer has not challenged—either in the trial court or on appeal—personal jurisdiction; moreover, he could not do so at this point, given his appearance at the December 11, 2020, hearing, his subsequent motions to the trial court, and his failure to contest personal jurisdiction at any point. *See, e.g.*, *Parkview Hosp., Inc. v. Am. Fam. Ins. Co.*, 151 N.E.3d 1218, 1225 (Ind. Ct. App. 2020) ("A defendant, however, can waive the lack of personal jurisdiction and submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction."), *trans. denied*. Thus, this case is unlike cases such as *Morrison*, 599 N.E.2d at 368, where the defendant sought relief from judgment because he was never served with process such that the court never acquired personal jurisdiction.

for relief from the judgment was that the main house on his property was "not habitable," Tr. at 24, and that an "abandoned" and "inoperable" vehicle was on his property and had been for over thirty days, *id*. at 28. The Westfield municipal code prohibits unsafe buildings, public nuisances, and abandoned vehicles. Westfield Municipal Code § § 14-94, 58-295, https://library.municode.com/in/wesfield/codes/code_of_ordinances. The Westfield municipal code defines "unsafe building" as one where "a building or structure, used *or intended to be used* for dwelling purposes, because of inadequate maintenance, dilapidation, decay, damage, faulty construction or arrangement, inadequate light, air or sanitation facilities, or otherwise, is determined by any governmental official to be unsanitary, *unfit for human habitation*, or in such a condition that is likely to cause sickness or disease." Westfield Code § 14-96(15) (emphasis added).[5] The Westfield municipal code defines an "abandoned vehicle" as including "[a] vehicle that is six or more model years old and mechanically inoperable; and is left on private property continuously in a location visible from public property for more than 30 days." Westfield Code § 58-291.

[18] Thus, even if Boyer had made a prima facie showing through his October 8 testimony that he removed all the "solid waste" from the property and used

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[5] *See also* I.C. § 36-7-9-4(a)(1) (defining an "unsafe building" as one with "an impaired structural condition that makes it unsafe to a person or property"); I.C. § 32-30-6-6 (defining "nuisance" as including "[w]hatever is … injurious to health … so as essentially to interfere with the comfortable enjoyment of life or property").

only the garage building as a residence, he still failed to make any showing that the property did not contain an "unsafe building" and an "abandoned vehicle" as alleged in the City's complaint. Rather, he admitted that the main building was originally a residence but was no longer habitable, and that there was an abandoned vehicle on the property. The trial court did not abuse its discretion when it found that Boyer failed to establish a prima facie meritorious defense.

Conclusion

[19] The evidence establishes that Boyer did not receive actual notice of the hearing on the merits of the City's complaint. However, Boyer failed to make an additional prima facie showing of a meritorious defense to the City's claims, as required for relief under Trial Rule 60(B)(1) or (8). Therefore, the trial court did not abuse its discretion when it denied Boyer's motion for relief from the judgment.

[20] Affirmed.

Riley, J., and Vaidik, J., concur.