MEMORANDUM DECISION

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IN THE

COURT OF APPEALS OF INDIANA

Forty Acre Cooperative and Angela Dawson,

Appellants-Defendants,

v.

Rita Delliquadri; Larry Gambles; Milton Louis; Deborah L. McCullough; Telisa Sims, individually and in her capacity as the personal representative of the estate of Alton Sims, Sr.; and Brenda J. Thompson,

Appellees-Plaintiffs.

November 27, 2023

Court of Appeals Case No. 23A-PL-1119

Appeal from the Lake Superior Court

The Honorable John M. Sedia, Judge

Trial Court Cause No. 45D07-2211-PL-618

Memorandum Decision by Judge Bradford
Judges Vaidik and Brown concur.

Bradford, Judge.

Case Summary

[1] In 2019, Rita Delliquadri; Larry Gambles; Milton Louis; Deborah L. McCullough; Telisa Simms, individually and/or in her capacity as the personal representative of the estate of Alton Sims, Sr.; and Brenda J. Thompson (collectively, "Investors") invested, between them, a total of $850,000.00 in Forty Acre Cooperative ("Forty Acre"), an agricultural cooperative located in Minnesota. Angela Dawson is the president, director, and agent (registered with the Minnesota Secretary of State) for Forty Acre. Forty Acre did not make payments as required by the promissory notes that secured Investors' investments, and, in November of 2022, they filed suit against Forty Acre and Dawson (collectively, "Appellants"). Service was made on Dawson and Forty Acre by leaving a copy of the complaint and summons at Dawson's residence, which is also Forty Acre's address, and mailing the complaint and summons to the same address via first-class mail.

[2] In early December of 2022, Dawson e-mailed Investors' counsel and informed him that she had not yet retained counsel, and Investors' counsel responded by asking Dawson how long she expected that to take and informing her that the deadline for her to file a responsive pleading was that very day. Approximately two months later and with no responsive pleading from Appellants, Investors moved for default judgment, and, after the trial court granted the motion,

Appellants moved for relief from judgment, arguing that they had not been properly served and that the equitable doctrine of laches applied in any event. The trial court denied Appellants' motion for relief from judgment, and Appellants now contend that the trial court erred in so doing. Because we disagree, we affirm.

Facts and Procedural History

[3] Forty Acre is an agricultural cooperative located in Minnesota, and Dawson is its president, director, and registered agent. Between December 16, 2019, and December 31, 2019, Investors invested a total of $850,000.00 in Forty Acre and, in return, received promissory notes executed by Forty Acre. Forty Acre, however, failed to make any payments as required by the promissory notes.

[4] Investors filed suit against Appellants on November 4, 2022, asserting claims for breach of contract and breach of fiduciary duty and seeking an accounting. On November 15, 2022, Investors left a copy of the summons and complaint at 7196 Bald Eagle Lane, Rutledge, Minnesota 55795, which is Dawson's dwelling house or usual place of abode. Similarly, Forty Acre was served by posting a copy of the summons and complaint at 7196 Bald Eagle Lane, Rutledge, Minnesota 55795, also on November 15, 2022. That same day, the summons and complaint were mailed to Appellants via first-class mail at the same address.

[5] On December 7, 2022, Dawson personally e-mailed Investors' counsel, the first of several e-mail communications over the next month from Dawson to Investors' counsel. In her first e-mail, Dawson acknowledged that she had

received the summons and complaint in the mail on December 7 and stated that she was attempting to obtain legal counsel. The same day, Investors' counsel responded, "Under Indiana law, the response for Forty Acre and you to the lawsuit is due to be filed today. How long do you think you will need to retain counsel?" Tr. Vol. II p. 13. Dawson replied, "I think it's going to be difficult to find proper counsel but my hope is that I will have someone by the end of this coming week, but I will definitely keep you updated." In her e-mail to Investors' counsel on January 10, 2023, Dawson stated that she had "a meeting coming up next week around Jan 17 and hope[d] to have an update [regarding securing legal counsel] by the end of that week." Appellees' App. Vol. II p. 33. Dawson did not communicate with Investors' counsel the week of January 17, 2023.

[6] On February 3, 2023, Investors moved for default judgment against Appellants. On February 7, 2023, the trial court entered default judgment in favor of Investors and against Appellants. Later that same day, counsel for Appellants appeared and moved to vacate the default judgment, citing Indiana Trial Rule 60(B)(6) and (8) and implicitly invoking Trial Rule 60(B)(1). Specifically, Appellants argued that service was improper as to both Appellants, the default judgment was the result of excusable neglect, and the entry of default judgment was improper under the doctrine of laches.

[7] On May 1, 2023, the trial court held an evidentiary hearing on Appellants' motion. At the hearing, Dawson admitted that she had been aware of the lawsuit in early December of 2022 but had not notified the trial court in any

way until filing Appellants' motion to vacate the default judgment. On May 2, 2023, the trial court denied Appellants' motion. Specifically, the trial court concluded that Dawson had been served with a summons and complaint pursuant to Indiana Trial Rule 4.1(A)(3) by leaving a copy and sending it via first-class mail and that Forty Acre was served "in the same manner at the address [Dawson] designated to the Minnesota Secretary of State, which was the same address as her home, pursuant to T.R. 4.6(A)(1)." Appellants' App. Vol. II pp. 12–13.

[8] The trial court noted that Trial Rule 60(B) provides the mechanism for relief from judgment, but that Appellants asserted excusable neglect as their only justification without articulating any meritorious defense as required by Rule 60(B). Moreover, the trial court concluded that Appellants had not established excusable neglect, rejecting Appellants' contention that their failure to act was "because they were unsophisticated and believed they had time to negotiate with plaintiff's [*sic*] counsel and, moreover, fault plaintiff's [*sic*] counsel for not filing their Motion for Default Judgment sooner." Appellants' App. Vol. II p. 14. Relying on *Baker v. F.H. Paschen*, 188 N.E.3d 486 (Ind. Ct. App. 2022), *trans. denied*, the trial court concluded,

> If being a CPA during tax season and COVID-19 concerns are insufficient to overcome the burden to demonstrate entitlement to relief from judgment [as in *Baker*]; unsophistication, the plaintiffs allowing more time for Dawson and Forty Acre to respond and hire counsel, and the lack of articulation of a meritorious defense are certainly insufficient.

Appellants' App. Vol. II p. 14. The trial court denied Appellants' motion to vacate and set aside the default judgment.

Discussion and Decision

[9] A trial court's denial of a motion to set aside judgment under Trial Rule 60(B) is generally reviewed for an abuse of discretion. *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021). "An abuse of discretion occurs where the trial court's judgment is clearly against logic and effect of the facts and inferences supporting judgment for relief." *Summit Acct. & Comput. v. Hogge*, 608 N.E.2d 1003, 1005 (Ind. Ct. App. 1993) (citation omitted). If the trial court makes a determination about personal jurisdiction in deciding a Trial Rule 60(B) motion, the trial court's decision is reviewed *de novo*. *Thomison v. IK Indy, Inc.*, 858 N.E.2d 1052, 1055 (Ind. Ct. App. 2006). "[P]ersonal jurisdiction turns on facts, and findings of fact by the trial court are reviewed for clear error. Clear error exists where the record does not offer facts or inferences to support the trial court's findings or conclusions of law." *Grabowski v. Waters*, 901 N.E.2d 560, 563 (Ind. Ct. App. 2009) (citations omitted), *trans. denied*. Finally, a trial court's determination of the applicability of the defense of laches is reviewed for an abuse of discretion, which must be clearly demonstrated by the party asserting it. *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 879 (Ind. Ct. App. 2016) (citations omitted).

[10] Appellants sought at the trial court to set aside the default judgment entered against them pursuant to Trial Rule 60(B)(1), (6), and (8), arguing that the judgment was void because there was a lack of personal jurisdiction due to

improper service and the judgment should be set aside because of excusable neglect. Any factual findings the trial court made regarding service are reviewed for clear error, while the trial court's conclusions of law regarding personal jurisdiction are reviewed *de novo*. *See Thomison*, 858 N.E.2d at 1055; *Grabowski*, 901 N.E.2d at 563. In all other respects, review of the trial court's denial of Appellants' motion to set aside default judgment is reviewed for an abuse of discretion. *See Summit*, 608 N.E.2d at 1005; *Hannum Wagle*, 64 N.E.3d at 879.

[11] As mentioned, Appellants alluded to a meritorious defense below but neither presented one nor identified one on appeal. To the extent that Appellants argue that they are entitled to relief pursuant to Trial Rule 60(B)(1) or (8), they have waived these arguments. *See* T.R. 60(B) ("A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense."). We will therefore restrict our discussion to Appellants' contention that the trial court's default judgment is void for lack of personal jurisdiction over them. "[A] judgment that is void for lack of personal jurisdiction may be collaterally attacked at any time and […] the 'reasonable time' limitation under Rule 60(B)(6) means no time limit." *Stidham v. Whelchel*, 698 N.E.2d 1152, 1156 (Ind. 1998).[1]

[1] Investors correctly point out that Appellants do not cite to Trial Rule 60(B) in their brief and argue that they have therefore waived any argument they may have had based on that provision. Although the failure to cite Trial Rule 60(B) at all is noted, we are nonetheless able to discern the basis of Appellants' arguments and address them on the merits.

I. Dawson

[12] Trial Rule 4.1 provides that service upon an individual may be made by "leaving a copy of the summons and complaint at his dwelling house or usual place of abode," T.R. 4.1(A)(3), and a copy of the summons and complaint shall be sent via first-class mail to the person being served. T.R. 4.1(B). The trial court found that Investors had done just that: "Dawson was served with the Summons and Complaint on November 15, 2022 at her home […] pursuant to Trial Rule 4.1(A)(3) of the Indiana Rules of Trial Procedure by leaving a copy and sending via First Class mail." Appellants' App. Vol. II p. 12. The trial court's factual findings are subject to deferential review under the clear-error standard, and the record here offers more than adequate "facts or inferences to support the trial court's findings." *Grabowski*, 901 N.E.2d at 563 (citation omitted). First, Investors' affidavit of service establishes that Dawson was personally served by leaving the summons and complaint at 7196 Bald Eagle Lane, Rutledge, Minnesota 55795, and Dawson does not dispute that this is her "dwelling house or usual place of abode." Second, the evidence in the record supports the trial court's finding that the summons and complaint were sent via first-class mail, as required by Trial Rule 4.1(B) in that Investors' counsel's averment that he directed his staff to mail the summons and complaint certainly permits an inference that the mailing was, in fact, made. The trial court did not err in concluding that Investors properly served Dawson.

[13] Appellants argue that Investors were required to produce a return receipt for service on Dawson but have not done so, citing *Northwestern National Insurance*

Co. v. Mapps, 717 N.E.2d 947, 952 (Ind. Ct. App. 1999). Appellants' reliance on *Mapps* is misplaced, however, because that case dealt with the provisions of Trial Rule 4.1(A)(1), which provides for service by registered or certified mail and requires a return receipt, while this case concerns Trial Rule 4.1(A)(3), which does not. Appellants' reliance on *Chesser v. Chesser*, 168 Ind. App. 560, 343 N.E.2d 810 (1976), is also misplaced. In that case, service pursuant to Trial Rule 4.1(A)(3) was found to be deficient, in part, because "there [was] nothing on the return to show that a copy of the summons was sent to Leroy by first class mail, nor was there any evidence in the record that T.R. 4.1(B) was followed." *Chesser*, 168 Ind. App. at 562, 343 N.E.2d at 812. Here, while it is true that the return did not indicate that the complaint and summons had been mailed to Dawson, Investors' counsel filed a supplemental affidavit on February 21, 2023, in which he averred that he had directed his staff to mail the summons and complaint to Dawson on November 15, 2022. This is sufficient evidence to satisfy the requirements of Trial Rule 4.1(B) and distinguish this case from *Chesser*.

II. Forty Acre

[14] Indiana Trial Rule 4.6(A) governs service upon organizations and provides, in part, that service upon a foreign organization may be made "upon an executive officer thereof, or if there is an agent appointed or deemed by law to have been appointed to receive service, then upon such agent." Trial Rule 4.6(B) provides that service pursuant to subsection 4.6(A) is to be done "in the manner provided by these rules for service upon individuals," *i.e.*, Trial Rule 4.1. As mentioned,

Trial Rule 4.1(A)(3) allows for service by leaving a copy of the summons and complaint at the individual's dwelling house or usual place of abode and mailing the summons and complaint via first-class mail, as required by Trial Rule 4.1(B). The summons and complaint were posted at 7196 Bald Eagle Lane, Rutledge, MN, 55795 for Forty Acre and were mailed to Dawson, who is the president of and registered agent for Forty Acre, at that same address. Therefore, the trial court properly concluded that Forty Acre had been served in compliance with Trial Rule 4.6(A)(1).

[15] Appellants contend that Investors' posting of the summons and complaint was not in compliance with Trial Rule 4.6(C), which provides for leaving a copy of a summons and complaint at an organization's office "located within this state." Investors, however, did not serve Forty Acre pursuant to Trial Rule 4.6(C), but, rather, pursuant to Trial Rule 4.6(A). Appellants also assert that Investors argued at the hearing on Appellants' motion to vacate default judgment that they had satisfied the service requirements for Forty Acre by service on Harold Robinson. The record, however, demonstrates that Investors have never made this argument. Even if they had made this argument, it would not change the fact that Dawson, as registered agent of Forty Acre, *was* properly served.[2]

[2] Appellants also argue that the defects in service in this case are not correctible by Indiana Trial Rule 4.15, which provides that "[n]o summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond." Because we have already concluded that there were no defects in service, we need not determine if any were cured.

III. Laches

[16] Finally, Appellants contend that the trial court's entry of default judgment in favor of Investors should be vacated pursuant to the equitable doctrine of laches.

> The doctrine of laches may bar a plaintiff's claim if a defendant establishes the following three elements of laches: (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. [*SMDfund, Inc. v. Fort Wayne-Allen Cnty. Airport Auth.*, 831 N.E.2d 725, 729 (Ind. 2005)]. A mere lapse of time is not sufficient to establish laches; it is also necessary to show an unreasonable delay that causes prejudice or injury. *Id*. at 731. Prejudice may be created if a party, with knowledge of the relevant facts, permits the passing of time to work a change of circumstances by the other party. *Id*.

Angel v. Powelson, 977 N.E.2d 434, 445 (Ind. Ct. App. 2012). "The question of laches is one to be determined by the court in the exercise of its sound discretion." *Hannum Wagle*, 64 N.E.3d at 879 (citation omitted).

[17] Appellants have failed to establish that the trial court erred in concluding that laches did not apply in this case. At the very least, there is no indication that Investors, with knowledge of the relevant facts, permitted the passing of time to work a change of circumstances by the other party. Appellants point to no evidence that anything changed for them between December of 2022 and February of 2023, much less changed for the worse. Moreover, we see nothing in the record that could reasonably be characterized as an implied waiver of a known right by Investors. The only response to Dawson's e-mails in the record

informed her that the responsive pleading to the lawsuit was due on December 7, 2022, and inquired as to how long she thought it would take her to retain counsel. At most, this can be construed as an indication that Investors *might* be willing to allow Appellants some time to retain counsel as a courtesy; there is no assurance that Investors would not move for default judgment until Appellants retained counsel and responded, nor any indication that they would wait a particular amount of time before requesting a default judgment. Punishing Investors for granting Appellants an additional two months in which to respond to their complaint—when they were under no obligation to do so and when there is no evidence that Appellants were prejudiced thereby—would be anything but equitable.

[18] We affirm the judgment of the trial court.

Vaidik, J., and Brown, J., concur.