MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin Fitzpatrick d/b/a Wheel Pizza and/or Chop Shop,

Appellant-Defendant,

v.

Monster Digital Marketing,

Appellee-Plaintiff.

October 31, 2023

Court of Appeals Case No. 23A-SC-777

Appeal from the Monroe Circuit Court

The Honorable Catherine B. Stafford, Judge

Trial Court Cause No. 53C04-2202-SC-146

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Cynthia Hogan, d/b/a Monster Digital Marketing ("Monster"), filed a small claims action against Kilroy's on Kirkwood, LLC ("Kilroy's Kirkwood"), Kilroy's on Dunkirk, LLC ("Kilroy's Dunkirk"), Kilroy's Sports, LLC ("Kilroy's Sports") (collectively, the "Kilroy's LLCs"), and Kevin Fitzpatrick and Kevin Duffy, d/b/a Wheel Pizza/Chop Shop. Fitzpatrick and Duffy were members of the Kilroy's LLCs. The Kilroy's LLCs appeared in the small claims action via their corporate manager and entered into an agreed settlement. Fitzpatrick, however, failed to appear, and the small claims court entered default judgment against him.[1] Fitzpatrick later moved to set aside the default judgment, claiming that he was unaware that the manager, who represented the Kilroy's LLCs, did not also represent Fitzpatrick. The small claims court denied the motion to set aside, and Fitzpatrick appeals. We conclude that the small claims court did not abuse its discretion by denying Fitzpatrick's motion and affirm.

Issue

[2] Fitzpatrick presents one issue on appeal: whether the small claims court abused its discretion by denying Fitzpatrick's motion to set aside the default judgment entered against him.

[1] Duffy was deceased, and the claims against him were dismissed.

Facts

[3] Monster is an Indiana-based business that provides web services to other businesses. Fitzpatrick is a managing member of the Kilroy's LLCs. Kilroy's Kirkwood and Kilroy's Sports operate a bar and restaurants in Bloomington, Indiana. Kilroy's Dunkirk leased a multi-level building in Bloomington. The upper level housed an entertainment venue; the lower level housed a restaurant. The restaurant, first named Chop Shop, was later replaced by Wheel Pizza. Neither of these restaurants was registered as a business entity. According to Fitzpatrick, these businesses were operated by Kilroy's Dunkirk, which is no longer in business.

[4] In 2021, the Kilroy's LLCs hired Monster to perform work on their websites. Monster performed the work as requested and billed the Kilroy's LLCs for these services by sending several invoices. When these invoices went unpaid, Monster filed a small claims action against the Kilroy's LLCs, Duffy, and Fitzpatrick on February 11, 2022. Monster claimed breach of contract and unjust enrichment against each of the defendants.

[5] On September 27, 2022, the small claims court held a Zoom hearing on the matter and referenced the hearing on the chronological case summary as a "Small Claims Collection Hearing." Appellant's App. Vol. II p. 5. Ian Schilling Makins, the regional manager for the Kilroy's LLCs, appeared at the

hearing on behalf of the Kilroy's LLCs.[2] Fitzpatrick did not appear by counsel, nor did he designate Makins as his employee representative. Monster's counsel and Makins reached an agreed settlement. Kilroy's Kirkwood agreed to settle Monster's claims for $1,203, and Kilroy's Sports agreed to settle Monster's claims for $1,630. Monster agreed to dismiss the claims against Kilroy's Dunkirk and against the now-deceased Duffy. The small claims court entered a default judgment against Fitzpatrick in the amount of $4,665 with prejudgment interest of $695.51.

[6] On October 27, 2022, Fitzpatrick moved to set aside the default judgment. In his motion, Fitzpatrick stated: "Fitzpatrick is an executive of the two active Kilroy's defendants, Kilroy's on Kirkwood and Kilroy's Sports. He was also an executive of Kilroy's on Dunkirk and Wheel Pizza/Chop Shop when those entities were active." Appellant's App. Vol. II p. 51. Fitzpatrick claimed that he intended to have Makins represent all of the Defendants in the small claims action, including Fitzpatrick individually and argued:

> Fitzpatrick's failure to appear at the September 27, 2022 hearing was unintentional and was based on excusable confusion because of the 'd/b/a Wheel Pizza/Chop Shop' nature of the claim against him. Fitzpatrick thought Ian Schilling Makins would be permitted to represent him. Corporate entities are not required to be represented by counsel in Indiana Small Claims Courts if the claim is for less than $6,000. *See* Indiana Small Claims Court

[2] *See* Ind. Small Claims Rule 8(C)(3) (holding that corporate entities, including LLCs, may be represented in small claims cases by a "full-time employee of the corporate entity . . . if the claim does not exceed six thousand dollars ($6,000.00)").

> Rule 8(C)(2), (3). Monster Digital Marketing's claim against Fitzpatrick was for less than $6,000.

Id. at 52-53.

[7] The small claims court held a hearing on Fitzpatrick's motion on December 1, 2022. Fitzpatrick testified that he had spoken with Makins before the September 27 hearing; Fitzpatrick thought that each of the LLCs had a claim filed against them and that Makins would represent each of the LLCs at the hearing. Fitzpatrick also testified that, if he had known he was required to attend the initial hearing in person, he would have been there. The small claims court noted that Fitzpatrick had been properly served individually and that Fitzpatrick failed to designate Makins as his employee representative as required by the Small Claims Rules. The small claims court took the matter under advisement and, on March 9, 2023, issued an order denying Fitzpatrick's motion to set aside the default judgment. Fitzpatrick now appeals.

Discussion and Decision

A. Prima Facie Error

[8] We first note that Monster has not filed an appellee's brief. In such cases, we will not develop an argument for the appellees. *Atkins v. Crawford Cnty. Clerk's Office*, 171 N.E.3d 131, 138 (Ind. Ct. App. 2021) (citing *Salyer v. Washington Regul. Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020)). Instead, we will reverse the lower court's judgment if the appellant's brief presents a case of prima facie error. *Id*. (citing *Sayler*, 141 N.E.3d at 386). In this context, prima

facie means at first sight, on first appearance, or on the face of it. *Id*. (citing *Sayler*, 141 N.E.3d at 386). "This less stringent standard of review 'relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee.'" *Id*. (quoting *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014)). We are still obligated to correctly apply the law to the facts in the record to determine whether reversal is required. *Id*. (citing *Jenkins*, 17 N.E.3d at 352).

B. Motion to Set Aside Default Judgment

[9] Fitzpatrick claims that the small claims court erred by denying Fitzpatrick's motion to set aside the default judgment entered against him. Indiana Small Claims Rule 10(C) provides, in part: "Upon good cause shown the court may, within one year after entering a default judgment, vacate such judgment and reschedule the hearing of the original claim. . . ." *See also KOA Properties LLC v. Matheison*, 984 N.E.2d 1255, 1258 (Ind. Ct. App. 2013) (quoting S.C. R. 10(C)), *trans. denied*.[3] The party seeking to have the default judgment set aside bears the burden of showing grounds for relief from default—"good cause." *KOA Properties*, 984 N.E.2d at 1258 (citing *All Season Exteriors, Inc. v. Randle*, 624 N.E.2d 484, 485 (Ind. Ct. App. 1993)). "In order to obtain relief, the movant must ordinarily establish, by affidavit or introduction of evidence at a hearing, a factual basis for relief and a meritorious defense." *Id*. (citing *Sears v. Blubaugh*,

[3] If more than one year has expired, the defaulted party "may seek a reversal of the original judgment only upon the filing of an independent action, as provided in Ind. R. Tr. P. 60(B)." S.C. R. 10(C).

613 N.E.2d 468, 469 (Ind. Ct. App. 1993)). "Ultimately, the court's decision whether to set aside the default judgment is reviewed for an abuse of discretion, which will be found only where the court's action was clearly against the logic and effect of the circumstances or the court misinterpreted the law. *Id*. (citing *King v. United Leasing, Inc.*, 765 N.E.2d 1287, 1289-90 (Ind. Ct. App. 2002)).

C. Propriety of Default Judgment

[10] The party moving to set aside a small claims default judgment may meet his or her burden by showing that the default judgment should not have been granted in the first place. *KOA Properties*, 984 N.E.2d at 1258 (citing *Sears*, 613 N.E.2d at 469). Fitzpatrick argues that the small claims court should have set aside the default judgment because the default judgment should not have been entered against him in the first place.

[11] Small Claims Rule 10(B) governs default judgments in small claims cases and provides:

> **Default.** If the defendant fails to appear at the time and place specified in the notice of claim, or for any continuance thereof, the court may enter a default judgment against him. Before default judgment is entered, the court shall examine the notice of claim and return thereof and make inquiry, under oath, of those present so as to assure the court that:
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> (1) Service of notice of claim was had under such circumstances as to establish a reasonable probability that the defendant received such notice;

> (2) Within the knowledge of those present, the defendant is not under legal disability and has sufficient understanding to realize the nature and effect of the notice of claim;
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> (3) Either (a) the defendant is not entitled to the protections against default judgments provided by the Servicemembers Civil Relief Act, as amended (the "Act"), 50 U.S.C. appx. § 521, or (b) the plaintiff has filed with the court, subscribed and certified or declared to be true under penalty of perjury, the affidavit required by the Act (i) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (ii) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service; and
>
> (4) **The plaintiff has a prima facie case**.

(emphasis added). Because Indiana law strongly prefers disposition of cases on the merits, default judgments are generally disfavored, and the trial court's discretion in granting a default judgment should be exercised in light of this disfavor. *Coslett v. Weddle Bros. Const. Co.*, 798 N.E.2d 859, 861 (Ind. 2003).

[12] Fitzpatrick does not deny that he was properly served, nor does he claim he was under any disability or subject to the protections of the Servicemembers Civil Relief Act. Instead, Fitzpatrick argues that Monster did not establish a prima facie case for breach of contract. We disagree.

[13] The essential elements of a claim for breach of contract action are: (1) the existence of a contract, (2) the defendant's breach of that contract, and (3) resulting damages. *Berg v. Berg*, 170 N.E.3d 224, 231 (Ind. 2021) (citing *Fowler*

v. Campbell, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993)). Fitzpatrick argues that Monster never established that it had a contract with Fitzpatrick personally. In support of this argument, Fitzpatrick notes that the relevant invoices Monster attached to its small claims complaint were sent to "Wheel Pizza," and "Wheel Pizza/Chop Shop," and all included "Attention: Jared Clemens." Appellant's App. Vol. II pp. 37-45. Because the invoices did not name Fitzpatrick personally, Fitzpatrick claims that there is no evidence of the existence of a contract between him and Monster.

[14] This, however, overlooks that the claim filed against Fitzpatrick was against "Kevin Fitzpatrick . . . d/b/a Wheel Pizza and/or Chop Shop." Appellant's App. Vol. II p. 23. Fitzpatrick argues that Wheel Pizza and Chop Shop were never registered as business entities with the Indiana Secretary of State and are, therefore, non-entities.[4] This does not alter the fact that Monster filed suit against Fitzpatrick doing business as Wheel Pizza and Chop Shop. Monster submitted an Affidavit of Debt, which stated that "Kevin Fitzpatrick . . . individually and d/b/a Wheel Pizza and/or Chop Shop . . . has an unpaid balance of $4,665.00" for an "[a]ccount for services." *Id.* at 47. Given these

[4] Indiana Code Section 23-0.5-3-4(e) provides that, subject to exceptions not relevant here:

> [A] filing entity conducting business in Indiana under a name, designation, or title other than the name shown in its organic record shall file with the secretary of state a certificate stating the assumed name or names to be used and the full name and address of the entity's principal office in Indiana.

The failure to comply with this section is a Class B infraction. Ind. Code § 23-0.5-3-4(j).

facts, we cannot say that the small claims court erred by entering default judgment against Fitzpatrick when he failed to appear.

C. Good Cause to Set Aside Default Judgment

[15] Fitzpatrick also argues that, even if the default judgment was properly entered against him, this default should have been vacated because he met his burden under Small Claims Rule 10(C) by showing "good cause" to vacate the default judgment. S.C. R. 10(C).

[16] Fitzpatrick claims that Monster's own complaint evidences an understanding that Kilroy's Dunkirk, not Fitzpatrick, was responsible for the business operated as Wheel Pizza and Chop Shop. Fitzpatrick notes that Monster's complaint alleged that it sent Kilroy's Dunkirk invoices for services, but the invoices are addressed to "Kilroy's Recess," which was the under-twenty-one club operated by Kilroy's Dunkirk at 430 Kirkwood Avenue—the same address where Wheel Pizza and Chop shop operated. Fitzpatrick argues that "[i]t is inconsistent for Monster to argue that Kilroy's Dunkirk [] was responsible for paying an invoice sent to 'Kilroy's Recess' while at the same time arguing that Mr. Fitzpatrick was individually responsible for invoices sent to Wheel Pizza and Chop Shop." Appellant's Br. p. 14. Fitzpatrick argues that, if Kilroy's Dunkirk was responsible for the invoice sent to Kilroy's Recess, which operated at the same location as Wheel Pizza and Chop Shop, then Kilroy's Dunkirk must also be responsible for the invoices sent to Wheel Pizza and/or Chop Shop. We disagree.

[17] It is well settled that "[a] party may plead inconsistent, alternative claims or theories." *Liggett v. Young*, 877 N.E.2d 178, 185 (Ind. 2007) (citing Ind. Trial Rule 8(E)(2); *Reeder v. Harper*, 788 N.E.2d 1236, 1243 n.5 (Ind. 2003); *Cahoon v. Cummings*, 734 N.E.2d 535, 542 (Ind. 2000); *Foster v. Evergreen Healthcare, Inc.*, 716 N.E.2d 19, 28 (Ind. Ct. App. 1999)). Accordingly, the fact that Monster alleged that Kilroy's Dunkirk was responsible for the invoices sent to Kilroy's Recess, which happened to operate at the same location as Wheel Pizza and Chop Shop, is not fatal to Monster's claim that Fitzpatrick himself was responsible for the invoices sent to Wheel Pizza and Chop Shop. Monster alleged that Fitzpatrick was doing business under the names Wheel Pizza and Chop Shop and was therefore responsible for the invoices billed to Wheel Pizza and Chop Shop.

[18] Fitzpatrick also argues that he had a reasonable belief that Makins, the regional manager for the Kilroy's LLCs, would represent Fitzpatrick personally at the small claims hearing. Fitzpatrick claims that, under Small Claims Rule 8(C)(2), "Mr. Fitzpatrick could have been represented 'by a designated full-time employee of the business in the presentation or defense of claims arising out of the business, if the claim does not exceed six thousand dollars ($6,000.00).'" Appellant's Br. p. 15 (citing S.C. R. 8(C)(2)). Monster's claim against Fitzpatrick was for an amount under $6,000.

[19] Small Claims Rule 8(C)(2), as amended effective January 1, 2022,[5] provides:

> (2) *Sole Proprietorship and Partnerships*. A sole proprietorship or partnership may be represented by the sole proprietor or partner, owner, counsel, or by a designated full-time employee of the business in the presentation or defense of claims arising out of the business, if the claim does not exceed six thousand dollars ($6,000.00). However, claims exceeding six thousand dollars ($6,000.00) must either be defended or presented by counsel or pro se by the sole proprietor, partner, or owner.

[20] We note, however, that Small Claims Rule 8(C)(5) provides:

> *Full-Time Employee or Trustee Designations--Contents.* A corporate entity, sole proprietorship, partnership, LLC, LLP, or trust that wishes to designate an employee or trustee to represent it **must execute a certificate of compliance in each case expressly appointing the person as its representative** and must state by a duly adopted resolution in the case of a corporate entity, LLC or LLP; **or a document signed under oath by the sole proprietor or managing partner of a partnership**, or trustee that the entity shall be bound by the designated employee's or trustee's acts and agreements relating to the small claims proceeding, and shall be liable for assessments and costs levied by a court relating to the small claims proceeding, and that the corporate entity, sole proprietorship, partnership, LLC, LLP, or trust waives any claim for damages in excess of six thousand dollars ($6,000.00) associated with the facts and circumstances alleged in the notice of claim. . . .

(emphasis added).

[5] Prior to this amendment, this provision only applied to claims that did not exceed $1,500.

[21] Here, however, Fitzpatrick did not execute a certificate of compliance that expressly appointed Makins as his representative, nor did he sign a document under oath that he would be bound by the designated employee's agreements relating to the small claims proceeding. Since Fitzpatrick's mistaken belief that Makins could represent him was based on the language of Small Claims Rule 8(C), Fitzpatrick should also have known that, pursuant to this rule, he had to file the appropriate designation or certificate to expressly appoint Makins as his employee representative in the small claims action. His failure to do so does not demonstrate "good cause" for setting aside the default judgment.

[22] We find Fitzpatrick's citation to *Sears v. Blubaugh*, 613 N.E.2d 468 (Ind. Ct. App. 1993), to be unavailing. In that case, Blubaugh sued Sears in small claims court, and the summons stated that Sears did not need to have an attorney, which was (at the time) incorrect. Sears sent an employee to the small claims trial without an attorney. The small claims court then explained to the employee that Sears had to be represented by counsel. The employee requested a continuance to get an attorney, which the court denied, in part because Sears's employee had obtained one continuance before the trial date. The small claims court then entered default judgment against Sears.

[23] On appeal, Sears acknowledged the requirement to be represented by counsel per statute and per small claims rules. *Id*. (citing Ind. Small Claims Rule 8(C)).[6]

[6] At the time, Small Claims Rule 8(c) provided: "A corporation must appear by counsel or, in unassigned claims not exceeding seven hundred fifty dollars ($750), by a full-time employee of the corporation

Sears, however, claimed that it should have been afforded the opportunity to obtain counsel before suffering a default judgment. This Court agreed and noted that corporations must be given an opportunity to obtain counsel before suffering a default judgment. *Id*. at 470-71. We also noted that the summons erroneously instructed that Sears was not required to be represented by counsel. *Id*. at 471. We, therefore, held that the small claims court should have permitted Sears to obtain counsel before suffering dismissal. *Id*. Unlike the defendant in *Sears*, Fitzpatrick did not request a continuance to secure representation by counsel. Instead, he failed to appear.

[24] Fitzpatrick also cites *Multivest Properties v. Hughes*, 671 N.E.2d 199 (Ind. Ct. App. 1996), which we find readily distinguishable. In *Multivest*, the plaintiff in a small claims action failed to appear at a liability hearing, and the small claims court dismissed the claim with prejudice. The small claims court then denied the plaintiff's motion to set aside the dismissal. On appeal, we held that the trial court's dismissal was improper because Small Claims Rule 10(A) contemplates dismissal of a claim only when a claim has first been dismissed without prejudice, refiled, and the plaintiff again fails to appear.

[25] Here, however, Fitzpatrick is not a plaintiff in a small claims action, nor is dismissal of a case under Small Claims Rule 10(A) at issue. Instead, Fitzpatrick is the defendant in the small claims action brought by Monster; the issue is

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designated by the Board of Directors to appear as the corporation in the presentation or defense of claims arising out of the business of the corporation." S.C. R. 8(C) (1993).

whether the small claims court properly denied Fitzpatrick's motion to set aside the default judgment against him as permitted by Small Claims Rule 10(C), which, unlike Rule 10(A), does not require a defendant to fail to appear twice before permitting default judgment to be entered against him or her. Thus, we do not find *Multivest* to be controlling here.

Conclusion

[26] Monster sued Fitzpatrick and properly served him with notice that he was being sued along with the Kirkwood LLCs. Fitzpatrick failed to appear and failed to designate Makins as his employee representative under Small Claims Rule 8(C). Fitzpatrick may have believed that Makins could represent Fitzpatrick at the small claims hearing, and, had we been in the shoes of the small claims court, we might have concluded that Fitzpatrick showed good cause to set aside the default judgment. However, given our standard of review, we are unable to say that the small claims court abused its discretion when it found that Fitzpatrick failed to show good cause and denied Fitzpatrick's' motion to set aside the default judgment. Accordingly, we affirm the judgment of the small claims court.

[27] Affirmed.

Bailey, J., and Kenworthy, J., concur.