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IN THE
COURT OF APPEALS OF INDIANA

GREGORY C. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0510-CV-932
	)	
AMY E. HIGDON,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0403-CT-275

October 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Gregory C. Smith appeals the trial court's denial of his motion to set aside a default judgment against him in favor of Amy E. Higdon. Smith raises four issues, which we revise and restate as whether the trial court abused its discretion by denying Smith's motion to set aside the default judgment. In response, Higdon raises one issue, which we restate as whether she is entitled to appellate attorney fees due to Smith's substantive and procedural bad faith. We affirm.

The facts most favorable to the trial court's denial of Smith's motion to set aside default judgment follow. On March 31, 2004, Higdon filed suit against Smith, alleging damages stemming from various expenditures she incurred during the course of planning her and Smith's wedding. Specifically, Higdon claimed she relied upon Smith's promise to marry her and his express and implied promise to share responsibility for payment of those expenses when she expended funds related to the engagement and future marriage. In Higdon's complaint, she alleged counts of promissory estoppel and breach of contract.

At Higdon's request, the Hamilton County Clerk served Smith with a summons and complaint via certified mail at his last known address. The mail was then forwarded to the address Smith had on file with the post office and was subsequently signed and received by Smith's sister-in-law, Tracy Smith. The service, however, was later returned by Tracy Smith with an attached note stating, "person no longer lives with me and do not have new address." However, Higdon also sent a courtesy copy of the complaint to Smith's counsel, Lindsay T. Boyd. In response, Boyd sent a letter to Higdon's counsel acknowledging the filing of the suit against Smith.

On August 20, 2004, Boyd filed with the trial court his appearance on behalf of Smith and made a motion seeking an extension of time to answer or otherwise respond to Higdon's complaint. The trial court granted Smith's request, giving him until October 6, 2004, to answer or otherwise respond.

Smith failed to file an answer on or before October 6, 2004. Accordingly, on October 18, 2004, Higdon filed a motion for default judgment. On October 19, 2004, Smith filed his answer to Higdon's complaint and made motion for a change of venue, which the trial court denied.

On January 7, 2005, the trial court held a hearing to determine whether or not default judgment should be entered against Smith.[1] At that hearing, on three separate occasions, the trial court specifically asked Smith to address why default judgment should not be entered. Smith repeatedly failed to address the argument, as he believed the argument did not have to be made. Specifically, Smith believed that Higdon's cause of action failed to state a claim for which relief could be granted and that there was insufficient service of process. Accordingly, Smith, instead, motioned the trial court for judgment on the pleadings and Rule 11 sanctions and argued that his motions should be granted.

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[1] The filing of a delinquent answer after a motion for default under Ind. Trial Rule 55 has been filed does not cure the failure to file a timely answer, but provides the defaulting party with an "opportunity to appear and demonstrate to the court reasons why its discretion should be exercised in favor of proceeding to trial on the merits." Clark County State Bank v. Bennett, 166 Ind. App. 471, 478, 336 N.E.2d 663, 667 (1975).

On January 14, 2005, the trial court issued its order entering default in favor of Higdon and denying Smith's request for judgment on the pleadings and request for Rule 11 sanctions. Smith filed a motion to set aside default and, on June 3, 2005, a hearing was held in which he presented evidence of excusable neglect and attempted to make a prima facie showing of meritorious defenses to Higdon's cause of action.

In relation to his evidence of excusable neglect, Smith argued that his counsel was tending a critically ill parent and believed he had obtained continuances in all pending matters in which to provide additional time to answer Higdon's complaint. Additionally, Smith asserted the following meritorious defenses to Higdon's cause of action: (1) the action was barred by Ind. Code §§ 34-12-2-1[2] and 34-12-2-1[3] and thus, failed to state a claim for which relief could be granted; (2) Ind. Code § 32-21-1-1(b)(3) [4] requires claims arising out of a promise to marry to be in writing for them to be actionable; and (3) there was insufficient service of process and, thus, the trial court did not have personal jurisdiction over Smith.

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[2] Ind. Code § 34-12-2-1 provides: "(a) [t]he following civil causes of action are abolished: (1) Breach of promise to marry."

[3] Ind. Code § 34-12-2-2 provides: "(a) No act done after June 10, 1935, within Indiana operates to give rise, either within or outside Indiana, to any of the causes of action abolished by this chapter. (b) No contract to marry that is made after June 10, 1935, within Indiana operates to give rise, either within or outside Indiana, to any cause of action for breach of contract or promise to marry.

[4] Ind. Code § 32-21-1-1(b)(3) provides: "(b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: (3) An action charging any person upon any agreement or promise made in consideration of marriage[.]"

Thereafter, on June 3, 2005, the trial court entered its order denying Smith's motion to set aside default judgment.[5] The order stated in pertinent part:

> 8. The Court does not find the evidence regarding Defendant counsel's claim of excusable neglect to be compelling in order to overturn the default previously entered. Before the Court entered a finding of default, the Defendant was given the opportunity to address why a default should not be entered. Now that a default has been entered, the Defendant is attempting to relitigate the issue based upon the same claims raised by and available to the Defendant at the first instance. The Court is most disturbed that Defendant's counsel would aver in his MEMORANDA OF LAW IN SUPPORT OF T.R. 60 MOTION TO SET ASIDE DEFAULT JUDGMENT (filed with the court on February 9, 2005) that he was not given the chance on January 7, 2005 to submit all evidence with respect to whether a default should be entered. The Court, on at least two occasions, asked Defendant why the matter should proceed to trial without any response or testimony regarding excusable neglect. Unfortunately, the Court can afford little weight to the offered excuse for neglect. Based upon the circumstances presented, the Defendant's failure to timely respond to Plaintiff's Complaint will not be excused.

Appellant's Appendix at 195-196.

On appeal, Smith argues that the trial court abused its discretion in failing to set aside default judgment against him. Upon appellate review of a refusal to set aside a default judgment, the trial court's ruling is entitled to deference and will be reviewed for abuse of discretion. State Farm Mut. Auto. Ins. Co. v. Hughes, 808 N.E.2d 112, 116 (Ind. Ct. App. 2004). An abuse of discretion occurs when the trial court's judgment is

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[5] In Smith's February 9, 2005 motion to set aside default judgment, he attached several supporting documents, namely, the affidavits of Tracy Smith, Lindsay T. Boyd, Gregory C. Smith, and letters from Dubose and Evan and a letter from Boyd. See Appellant's Appendix at 143-154. On August 30, 2005, the trial court entered its order denying Smith's motion to set aside default. In that order, the trial court ordered those supporting documents stricken from the record. However, in the instant appeal, Smith includes the stricken documents in his Appendix, repeatedly refers to them in his recitation of the

clearly against the logic and effect of the facts and inferences supporting the judgment for relief. Swiggett Lumber Construction Co., Inc. v. Quandt, 806 N.E.2d 334, 336 (Ind. App. Ct. 2004) (quoting Morequity, Inc. v. Keybank, N.A., 773 N.E.2d 308, 313 (Ind. Ct. App. 2002), trans. denied). We may not reweigh the evidence or substitute our judgment for that of the trial court. Id. Indiana law strongly prefers disposition of cases on their merits. Coslett v. Weddle Bros. Const. Co., Inc., 798 N.E.2d 859, 861 (Ind. 2003), reh'g denied. Furthermore, upon a motion for relief from judgment, the movant has the burden to show sufficient grounds for relief under Ind. Trial Rule 60(B). Id.

Pursuant to Ind. Trial Rule 60(B), a party seeking to set aside default judgment must demonstrate that the judgment was entered as a result of mistake, surprise, or excusable neglect. Walker v. Kelly, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004). The trial court's discretion in this area is necessarily broad because any determination of mistake, surprise, or excusable neglect must turn upon the particular facts and circumstances of each case. Id. Because the circumstances of each case will be different, "no fixed rules or standards have been established" as to what constitutes mistake, surprise, or excusable neglect. Coslett, 798 N.E.2d at 861 (quoting Grecco v. Campbell, 179 Ind. App. 530, 386 N.E.2d 960, 961 (Ind. Ct. App. 1979)).

In addition to showing sufficient grounds for relief, the moving party must also make a prima facie showing of a meritorious defense in order to prevail on a motion to set aside a default judgment under Trial Rule 60(B). Id. at 837; see Ind. Trial Rule

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facts of this case, and relies, in large part, upon these documents in making his argument before this

60(B). A meritorious defense is one demonstrating that, if the case were retried on the merits, a different result probably would be reached. See Baxter v. State, 734 N.E.2d 642, 646 (Ind. Ct. App. 2000).

We first address the issue of whether the trial court erred in denying Smith's motion to set aside default judgment based on the evidence he presented to demonstrate excusable neglect. Specifically, Smith argues that during the hearing on his motion to set aside default judgment he presented evidence that his failure to answer Higdon's complaint in a timely fashion resulted from his attorney's unexpected departure from Indiana due to an ailing parent and that his attorney believed he had filed continuances in all pending matters. However, there is no evidence that Smith or Smith's counsel, at any time, submitted to the trial court a request for an extension of the October 6, 2004, due date of his answer to Higdon's complaint. Furthermore, contrary to Smith's belief, neither Higdon nor her counsel was ever contacted to request additional time in which to answer.

A well-established ground for relief from a default judgment is a "breakdown in communication" sufficient to establish mistake, surprise, or excusable neglect under T.R. 60(B)(1). Whittaker v. Dail, 584 N.E.2d 1084, 1087 (Ind. 1992) (finding an abuse of discretion in not setting aside a default judgment where a breakdown in communication between insurer and insured, which resulted in insured's failure to appear at trial, constituted excusable neglect, and where there was no evidence of "foot dragging" by

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Court.

defendant). Nevertheless, not all breakdowns in communication rise to the level of excusable neglect. See Smith v. Johnston, 711 N.E.2d 1259, 1262 (Ind. 1999) (holding breakdown in communication which resulted from defendant's failure to open his mail was neglect, but not excusable neglect).

Here, there was not a breakdown in communication as a result of Smith being misinformed as to when his answer was due, but rather Smith's counsel's mistaken belief that he had informed the trial court or Higdon that he was in need of an extension of time before leaving the state. Because there is no evidence of any sort that Smith tried to alert the trial court or Higdon of his circumstances, the trial court, in exercising its discretion, found his evidence of neglect to not be compelling. We note, the trial court's discretion whether to set aside default judgment is necessarily broad because any determination of excusable neglect must turn upon the particular facts and circumstances of each case. See Walker, 819 N.E.2d at 836. Furthermore, Smith was given adequate opportunity to present his evidence of excusable neglect to the trial court during the default hearing and failed to do so. Consequently, the trial court reasoned that little weight could be afforded to Smith's offered excuse for neglect presented later during the hearing on his motion to set aside the default judgment. Therefore, in the instant case, we must afford deference to the trial court's decision and conclude that the trial court did not abuse its discretion in denying Smith's motion to set aside default judgment based on his failure to demonstrate excusable neglect. See, e.g., Smith, 711 N.E.2d at 1262 (holding that the trial court had not abused its discretion in refusing to set aside a default judgment and emphasizing

"[t]he judicial system simply cannot allow its processes to be stymied by simple inattention.")

However, even if we were to find that Smith had demonstrated compelling evidence of excusable neglect, he fails to demonstrate a meritorious defense to Higdon's cause of action sufficient to set aside default judgment. First, Smith's contention that Higdon's complaint, as filed, is in violation of Ind. Code §§ 35-12-2-1 and 35-12-2-2 and therefore, fails to state a claim for which relief can be granted is mistaken. Indeed, Ind. Code §§ 34-12-2-1 and 34-12-2-2 abolished a specific cause of action, namely a claim based on breach of a promise to marry. However, Higdon states a claim for promissory estoppel, not a breach of a promise to marry founded upon contract. In the trial court's order entering default against Smith, the court highlighted the distinctions between the two causes of action, stating in pertinent part:

> The action for breach of a promise to marry was a common law action founded upon contract. Saxon v. Wood, 4 Ind. App. 242, 244; 30 N.E. 797, 798 (Ind. App. 1892). Consideration for the contract required the mutual promises of both parties to marry. Adams v. Byerly, 123 Ind. 368, 370; 24 N.E. 130, 131 (Ind. 1890). On the contrary, a party can recover on the theory of promissory estoppel in the absence of contract. First National Bank of Logansport v. Logan Mfg. Co., et al., 577 N.E.2d 949, 954 (Ind. 1991). Mutual promises and consideration are not required for promissory estoppel to succeed. The doctrine of promissory estoppel can act as a substitute for lack of consideration or lack of mutuality. First National, 577 N.E.2d at 954, citing Citizens State Bank v. Peoples Bank, 475 N.E.2d 324, 327 (Ind. App. 1985). Additionally, a promise to perform in the future can serve as the basis for recovery on the theory of promissory estoppel. Id., citing Reeve v. George-Pacific Corp., 510 N.E.2d 1378, 1382 (Ind. App. 1987).

Appellant's Appendix at 11-12. Secondly, Smith's contention that Ind. Code § 32-21-1-1(b)(3) requires claims arising out of a promise to marry to be subject to the statute of frauds for them to be actionable similarly fails. Smith failed to offer any evidence to show that the application of the statute of frauds would bar Higdon's claim or achieve a different result at trial. Lastly, Smith's contention that the trial court did not acquire personal jurisdiction over him due to insufficient service of process finds no merit. Smith submitted to the jurisdiction of the trial court and waived his claim of insufficient service of process when he appeared in this action, filed his answer, sought a change of venue, and later sought relief by filing his motion for judgment on the pleadings. Thus, Smith implicitly acknowledged the trial court's jurisdiction over him by appearing or by seeking affirmative relief. See State v. Omega Painting Inc., 463 N.E.2d 287, 290 (Ind. App. 1984). Therefore, the trial court did not abuse its discretion in failing to recognize Smith's alleged meritorious defenses to Higdon's cause of action.

We next turn our attention to Higdon's claim that she is entitled to appellate attorney fees due to Smith's substantive and procedural bad faith. Ind. Appellate Rule 66(E) provides that this court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to award attorney fees is limited to instances when an appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152 (Ind. 1987). Bad faith on appeal may be classified as "substantive" or "procedural."

Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002). To prevail on a substantive bad faith claim, the party must show the appellant's contentions and arguments are utterly void of all plausibility. Boczar v. Meridian Street Foundation, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001). Procedural bad faith "is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Wallace, 765 N.E.2d 201.

With respect to the substantive allegations, Higdon argues that Smith's claims are and have been utterly devoid of all plausibility. Smith's arguments were unpersuasive, however, because he supported his challenge to Higdon's claims with pertinent legal authority from which an argument could have been made, we do not find his contentions utterly devoid of all plausibility. See Taflinger Farm v. Uhl, 815 N.E.2d 1015, 1019 (Ind. Ct. App. 2004).

As for the procedural bad faith claim, Higdon is correct in her assertion that Smith's inclusion of materials that had been stricken from the record in his Appendix and reliance on the same in his brief was not in compliance with procedural rules. But to the extent that Smith did not strictly comply with our procedural rules, we conclude that those flaws do not rise to the level of egregiousness punishable under Appellate Rule 66(E). See Manous v. Manousogianakis, 824 N.E.2d 756, 768 (citing Ind. CPA Soc'y, Inc. v. GoMembers, Inc., 777 N.E.2d 747, 753 (Ind. Ct. App. 2002) (finding

shortcomings in party's brief were not "so flagrant or significant as to taint the appeal as vexatious")). Furthermore, we do not believe Smith's brief was written in a "manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." See Wallace, 765 N.E.2d 201. Therefore, Higdon's substantive and procedural bad faith claim must fail.

For the foregoing reasons, we affirm the trial court's denial of Smith's motion to set aside default judgment, and we deny Higdon's request for appellate attorney fees.

Affirmed.

MAY, J. and CRONE, J. concur