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IN THE
COURT OF APPEALS OF INDIANA

DAVID J. FOSTER,

Appellant-Defendant,

vs.

DARRYL K. ABLES and
RISA A. ABLES,

Appellees-Plaintiffs.

No. 53A01-0606-CV-239

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Mary Ellen Diekhoff, Judge
Cause No. 53C04-0507-PL-1414

December 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David J. Foster (Foster), appeals the trial court's denial of his Verified Motion to Set Aside Default Judgment upon the trial court's entry of a Default Judgment in favor of Appellees-Plaintiffs, Darryl K. Ables (Darryl) and Risa A. Ables (collectively, the Ables).

We affirm.

ISSUE

Foster raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion in refusing to set aside its Default Judgment.

FACTS AND PROCEDURAL HISTORY

On July 21, 2005, the Ables filed a Complaint for Damages against Foster alleging that pursuant to the terms of two stock purchase agreements Foster agreed to indemnify and hold Darryl harmless for a total amount of $51,589.08. That same day, a Summons was mailed to Foster by certified mail. The chronological case history indicates that on August 8, 2005, the trial court received the proof of certified mail which included Foster's signature on the receipt line. Thereafter, on September 14, 2005, the Ables filed their Motion for Default Judgment, which was granted by the trial court two days later.

On October 12, 2005, the Ables filed their Verified Motion for Proceedings Supplemental. On November 17, 2005, following failure to achieve notice by mail, the Ables filed a Motion to Request Summons by Sheriff. The trial court granted the Ables' Motion and ordered Foster to appear in court on December 12, 2005 for proceedings supplemental. Proof of Sheriff Service was filed on December 5, 2005 with the notation

"LEFT COPY." (Appellant's App. p. 42). On December 12, 2005, as Foster failed to appear for the hearing on the Motion for Proceedings Supplemental, the trial court entered a Writ of Attachment against him. Consequently, on January 6, 2006, Foster filed his Verified Motion to Set Aside Default Judgment. On May 3, 2006, after a hearing, the trial court entered its Order denying Foster's Verified Motion.

Foster now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Foster contends that the trial court abused its discretion by summarily denying its Verified Motion to Set Aside Default Judgment. Specifically, Foster now attempts to set aside the trial court's Default Judgment based on mistake or surprise in accordance with Ind. Trial Rule 60(B)(1). We have repeatedly held that a trial court's decision to set aside a default judgment is given substantial deference on appeal. *Walker v. Kelly*, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004). In reviewing the trial court's determination we will reverse its decision only for an abuse of discretion. *Id.* We will not reweigh the evidence or substitute our judgment for that of the trial court. *Id.*

Once entered, a default judgment may be set aside because of mistake, surprise, or excusable neglect, so long as the motion to set aside the default judgment is entered no more than one year after the judgment and the moving party also alleges a meritorious claim or defense. T.R. 55(C); T.R. 60(B). When deciding whether or not a default judgment may be set aside because of surprise or mistake, the trial court must consider the unique factual background of each case because "no fixed rules or standards have been established as the circumstances of no two cases are alike." *See Siebert Oxidermo,*

Inc. v. Shields, 446 N.E.2d 332, 340 (Ind. 1983). Though the trial court should do what is "just" in light of the facts of the individual cases, that discretion should be exercised in light of the disfavor in which default judgments are held. *Coslett v. Weddle Bros. Const. Co., Inc*., 798 N.E.2d 859, 861 (Ind. 2003), *reh'g denied*. Any doubt of the propriety of a default judgment must be resolved in favor of the defaulted party. *Comer-Marquardt v. A-1 Glassworks, LLC*, 806 N.E.2d 883, 886 (Ind. Ct. App. 2004). We find a default judgment to be an extreme remedy, available only where that party fails to defend or prosecute a suit. *Id.* It is not a trap to be set by counsel to catch unsuspecting litigants. *Id.*

Here, in support of his contention, Foster claims that he "has no recollection of ever seeing the Complaint prior to the entry of judgment." (Appellant's App. p. 30). Without submitting any further evidence to strengthen this allegation, Foster claims that the default judgment was entered by mistake and took him by surprise. We are unpersuaded. Our review of the record clearly reflects that on August 8, 2005, the trial court received proof of certified mail that Foster had received Ables' Summons. In particular, the certified receipt bears his signature, indicating that he accepted delivery of the Summons. Furthermore, the record is devoid of any evidence—and Foster does not submit any—establishing that service was not perfected or that the signature on the receipt is not his.

In *Smith v. Johnston*, 711 N.E.2d 1259, 1262 (Ind. 1999), our supreme court found that the trial court had not abused its discretion in refusing to set aside a default judgment when the excusable neglect alleged was that the defendant had not opened his mail. The

court stated, "[t]he judicial system simply cannot allow its processes to be stymied by simple inattention." *Id*. Likewise here, even though Foster alleges surprise and mistake, Foster simply chose to ignore the Summons and Complaint to his own detriment. Although we recognize that a default judgment is an extreme remedy and should only be used sparingly, the unique facts before us support that Foster failed to defend against the Ables' Complaint even though he had received it. *See Comer-Marquardt*, 806 N.E.2d at 886. Therefore, we conclude that it was within the purview of the trial court to sanction Foster by entering a default judgment against him. Thus, we affirm the trial court's Default Judgment.[1]

CONCLUSION

Based on the foregoing, we find that the trial court properly denied Foster's Verified Motion to Set Aside Default Judgment.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

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[1] Because we conclude that the trial court properly entered a Default Judgment and Foster was not taken by surprise, we need not review his assertion of a meritorious defense pursuant to T.R. 60(B).