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IN THE COURT OF APPEALS OF INDIANA

JAMES KINDRED, THOMAS KINDRED and SAM KINDRED,

Appellants-Plaintiffs,

vs.

BETTY TOWNSEND and HARMON CRONE,

Appellees-Defendants.

No. 60A04-1101-PL-42

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 60C01-1003-PL-123

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James, Thomas, and Sam Kindred ("the Kindreds") appeal the grant of Harmon Crone's[1] Motion for Relief from Judgment. We affirm.[2]

FACTS AND PROCEDURAL HISTORY

In March 2010, the Kindreds brought a complaint against Betty Townsend to quiet title to real estate the Kindreds claimed to have obtained by adverse possession. They amended the complaint to add Crone as a defendant. In May 2010, the Kindreds moved for summary judgment against both Townsend and Crone. In June, the Kindreds moved for entry of judgment against Crone because he had not responded in time to their summary judgment motion. The trial court entered judgment against Crone, finding Crone had not responded in time to the Kindreds' motion and the court therefore could not "consider any filings of defendant Crone in opposition to [Kindreds'] Motion for Summary Judgment."

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[1] Separate defendant Betty Townsend, by virtue of being a party below, is also a party to this appeal. Although no judgment was entered against her below, she filed briefs on appeal. The Kindreds moved to strike her brief and dismiss her cross-appeal because no negative judgment had been entered against her. The appealed judgment is one dated January 11, 2011, which orders summary judgment *against Crone* be entered as a final judgment, dismisses *Crone's* motion to correct error, then grants *Crone's* motion for relief from judgment and vacates the judgment "entered herein *against separate defendant, Harmon Crone*." (App. at 49) (emphasis added).

In her cross-appeal, Townsend presents as an issue whether the court abused its discretion in "granting summary judgment in favor of the Kindreds *against Crone*," (Br. of Appellee Betty Townsend at 11) (emphasis added), and whether the grant of *Crone's* motion for relief from judgment was error. As there was no appealable order against Townsend and she does not allege she was injured by the judgment against Crone, she lacks standing and cannot cross-appeal. *See Shand Min., Inc. v. Clay County Bd. of Com'rs*, 671 N.E.2d 477, 479 (Ind. Ct. App. 1996) (one defendant does not have standing to appeal a judgment rendered in favor of a co-defendant unless the defendant suffers some prejudice as a result of the entry of judgment in favor of the co-defendant).

In a separate order, we grant the Kindreds' motion.

[2] As we affirm the grant of Crone's motion for relief from judgment, we need not address Crone's arguments on cross-appeal that the underlying summary judgment against him was erroneously granted.

(App. at 167.)

Crone moved to correct error and for relief from judgment. In January 2011, the court ordered the summary judgment against Crone be entered as a final judgment, dismissed Crone's motion to correct error, then granted Crone's motion for relief from judgment and vacated the judgment "entered herein against separate defendant, Harmon Crone." (*Id*. at 49).

DISCUSSION AND DECISION

The decision whether to grant a Trial Rule 60(B) motion is left to the equitable discretion of the trial court and is reviewable only for abuse of discretion. *Shotwell v. Cliff Hagan Ribeye Franchise*, 572 N.E.2d 487, 489 (Ind. 1991). We find an abuse of discretion only when the trial court's action is clearly erroneous, that is, against the logic and effect of the facts before it and the inferences that may be drawn therefrom. *In re Paternity of P.S.S.*, 934 N.E.2d 737, 741 (Ind. 2010). We do not reweigh the evidence in conducting this review. *Shotwell*, 572 N.E.2d at 489.

The burden is on the movant to demonstrate that relief under T.R. 60(B) is both necessary and just. *Fairrow v. Fairrow*, 559 N.E.2d 597, 599 (Ind. 1990). Such motions are not a substitute for a direct appeal. *P.S.S.*, 934 N.E.2d at 740. Rather, they address only the procedural, equitable grounds justifying relief from the legal finality of a final judgment, not the legal merits of the judgment. *Id.*

A motion for relief from judgment may be granted for any of eight reasons:

On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

(2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;

(5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that

(a) at the time of the action he was an infant or incompetent person, and

(b) he was not in fact represented by a guardian or other representative, and

(c) the person against whom the judgment, order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) the motion alleges a valid defense or claim;

(6) the judgment is void;

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).
>
> The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

T.R. 60(B).

Crone did not specify in his motion the subsection of T.R. 60(B) on which he was relying, and the trial court did not indicate in its order which subsection was the basis for its decision. Crone did, however, allege in the motion he was entitled to relief because of mistake or excusable neglect, suggesting the motion must have been brought under subsection (1).

The Kindreds first assert the grant of Crone's motion for relief from judgment was "contrary to law," (Joint Br. of Appellants Kindred (hereinafter "Kindred Br.") at 10), and represents an improper attempt to "use Trial Rule 60(B) to circumvent the dictates of Trial Rule 56." (*Id*. at 14.) Both of the Kindreds' allegations of error are premised on their bald assertion the summary judgment against Crone "represented an interlocutory order," (*id*. at 10), so Crone should have filed for certification of an interlocutory appeal instead of bringing a motion for relief from judgment. *See Allstate Ins. Co. v. Fields*, 842 N.E.2d 804, 809 (Ind.

2006) ("Rule 60(B) applies to permit limited challenges *only to final orders or judgments*") (emphasis added), *reh'g denied*. However, as the trial court granted Crone's motion to enter the summary judgment against Crone as a final judgment before ruling on the T.R. 60(B) motion, the Kindreds' assertions as to the finality of the summary judgment order are moot.

In the alternative, the Kindreds argue that if the summary judgment was a final appealable order, then Crone was obliged to bring an appeal or a motion to correct error, rather than a motion for relief from judgment. The Kindreds offer no authority to support their apparent premise that a party who does not appeal a judgment is thereafter precluded from bringing a motion for relief from judgment, and we decline their invitation to so hold.

We acknowledge that a motion for relief from judgment is not a substitute for a direct appeal, *P.S.S.*, 934 N.E.2d at 740, as a T.R. 60(B) motion addresses only the procedural, equitable grounds justifying relief from the legal finality of a final judgment, not the legal merits of the judgment. *Id*. In *P.S.S.*, the substance of Father's claim was "a challenge to the merits of the trial court's order of dismissal." *Id*. at 741. In that situation, our Supreme Court "decline[d] to entertain this attempted but untimely appeal of the trial court's order." *Id*. In the case before us, by contrast, Crone argues he was entitled to relief from judgment because of a misunderstanding about whether an extension of time had been granted to him. This is an example of the type of "procedural, equitable grounds justifying relief from the legal finality of a final judgment," *id*. at 740, that permits a T.R. 60(B) motion. *See, e.g.*, *Smith v. Johnston*, 711 N.E.2d 1259, 1262 (Ind. 1999) (excusable neglect includes a

breakdown in communication that results in a party's failure to appear).

1. Mistake or Excusable Neglect

A default[3] judgment may be set aside under T.R. 60(B)(1) for mistake, surprise, or excusable neglect, such as a breakdown in communication that results in a party's failure to appear. *Id.* Where such a breakdown is established, T.R. 60 is met and a default judgment must be set aside. *Id.* Where there is any doubt as to the sufficiency of the showing of excusable neglect or inadvertence, the doubt should be resolved in favor of the application to set aside the judgment. *United Taxi Co. v. Dilworth*, 106 Ind. App. 627, 20 N.E.2d 699, 700 (1939).

The decision whether to set aside a default judgment is given substantial deference on appeal. *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1253 (Ind. Ct. App. 1999), *trans. denied*. The trial court's discretion is necessarily broad in this area because any determination of excusable neglect, surprise, or mistake must turn upon the unique factual background of each case. *Id.* No fixed rules or standards have been established because the circumstances of no two cases are alike. *Id.* The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. *Id.*

[3] The judgment against Crone was not designated by the trial court as a default judgment, but we believe the standards for determining whether neglect that led to a default judgment was excusable apply to the judgment entered against Crone because judgment was entered against him when he failed to respond to the Kindreds' motion for summary judgment. A default occurs when a party fails to appear in response to process or, having appeared, fails to obey a rule to answer and thereby confesses the allegations of the pleading. *Breitweiser v. Ind. Office of Envtl. Adjudication*, 810 N.E.2d 699, 702 n.2 (Ind. 2004). Judgment is then rendered without the trial of any issue of law or fact. *Id.*

The trial court entered summary judgment against Crone on the ground Crone did not respond in time to the Kindreds' summary judgment motion. That motion was brought May 24, 2010. On June 3, defendant Townsend moved for an extension of time to respond, and the court granted an extension until August 23. On June 29, the Kindreds moved for entry of summary judgment against Crone. Crone filed a response to the original motion for summary judgment on July 2, and the Kindreds moved to strike that response as untimely because only Townsend, and not Crone, had been granted an extension of time to respond.

In its order granting summary judgment for the Kindreds, the court indicated it had listened to a recording of its hearing on the motion for extension of time and determined the extension of time was granted only to Townsend. It concluded: "For the reason that the Court cannot consider any filings of defendant Crone in opposition to plaintiffs' Motion for Summary Judgment, the Court finds that the plaintiffs are entitled to entry of summary judgment on their Complaint against separate defendant, Crone." (App. at 167.)

At the hearing on Crone's motion to set aside the summary judgment, Crone argued both he and Townsend wanted an extension of time and that "both Counsels stood up in open Court and as officers of the Court said they believed that it applied to both." (Tr. at 21.) He noted the court's review of the audiotape of the hearing did not reveal the "body language," (*id.*), of the parties at the hearing. He asserts in his brief the court granted the extension "while looking at the table being shared by counsel for Townsend and counsel for Crone." (Br. of Appellee Crone at 12.) The court acknowledged "the confusion in this case," (Tr. at

27), some of which was caused by:

> the way rulings have been entered in regarding [sic] to hearings and in regard to filings. There – the filings in this case have been multitudinous and -- and -- and very rapid. . . . I agree with Crone's counsel -- the injustice to [the Kindreds] cannot overrule what could possibly happen in this case if it's not heard on the merits.

(*Id*.)

We cannot find an abuse of discretion in the trial court's determination Crone's neglect was excusable. In *Whittaker v. Dail*, 584 N.E.2d 1084, 1087 (Ind. 1992), our Indiana Supreme Court affirmed the trial court's decision to set aside a default judgment based on a breakdown in communication between an insurance company and its client. Whittaker did not appear at trial and the trial court entered default judgment against him. Several days later, two attorneys entered their appearance on behalf of Whittaker and moved to set aside the default judgment. Whittaker testified he told his insurer of the upcoming trial date and that it was his understanding the insurer would hire an attorney to represent him. An adjuster testified she had agreed to hire an attorney for Whittaker, and after discussing the case with attorneys from a law firm, she believed she had hired the firm to represent him. But an attorney from the firm testified he misunderstood the adjuster's request and believed he was being employed to file a declaratory judgment action against Whittaker and not to defend him.

The *Whitaker* Court found the trial court abused its discretion in denying Whittaker's motion to set aside the default judgment:

> [W]e hold that where the unchallenged credible testimony establishes a breakdown in communication which results in a party's failure to appear for trial, the grounds for setting aside a default judgment, as specified in Indiana Trial Rule 60, have been satisfied and the trial court should set aside such default judgment. The record here unequivocally reveals that, while this case had been pending for approximately three years, there was no evidence of any "foot dragging" on the part of Whittaker, other than his inability to continue to pay his attorneys to defend him. In view of the record, we hold that the trial court's denial of Whittaker's request to set aside the default judgment and to have a jury determine the facts of this case was an abuse of discretion.

Id. We note the Kindreds do not allege, nor does the record reflect, any "foot dragging" on Crone's part.

In *Flying J., Inc. v. Jeter*, 720 N.E.2d 1247, 1250 (Ind. Ct. App. 1999), we held Flying J's failure to answer Jeter's complaint was excusable neglect where it was not the result of "foot dragging" on the part of Flying J. Flying J's insurance adjuster received a courtesy copy of the complaint, forwarded it to Flying J, and told Jeter he would have to perfect service through Flying J's agent. A Flying J employee contacted the adjuster and asked him to employ a specific law firm to defend Flying J. The employee believed the adjuster would hire the firm immediately, but the adjuster thought he was to hire the firm after receiving notice from Flying J that it had received proper service. This misunderstanding led to Flying J's failure to file a timely answer. We found that Flying J's failure to answer was because of a misunderstanding between the adjuster and the Flying J employee, and we reversed the trial court's decision not to set aside the default judgment. *Id*.

Crone provided evidence of a misunderstanding about whether the grant of an extension of time applied to both defendants, and the trial court acknowledged "confusion in

this case," (Tr. at 27), related to "multitudinous" and "very rapid" filings. (*Id*.) As Crone's neglect was not attributable to "foot-dragging" but could be attributed to a breakdown in communication, we decline to find the trial court abused its discretion in so finding.

2. Meritorious Defense

To prevail on a motion to set aside a default judgment based on mistake, surprise, or excusable neglect, a party is required to show not only mistake, surprise, or excusable neglect, but also a good and meritorious defense to the cause of action. *Kmart*, 719 N.E.2d at 1258. A meritorious defense is one showing that, if the case was retried on the merits, a different result would be reached. *Id*. The movant need not prove absolutely the existence of a meritorious defense. *Id*. However, the movant must make a *prima facie* showing of a meritorious defense indicating to the trial court the judgment would change and the defaulted party would suffer an injustice if the judgment was allowed to stand. *Id*. On a motion for relief from judgment, the burden is on the movant to demonstrate relief is both necessary and proper. *Id*.

We hold Crone made a *prima facie* showing of a meritorious defense to the Kindreds' claim they had acquired Crone's land by adverse possession. In *Shanes v. Home Depot USA, Inc.*, 869 N.E.2d 1232 (Ind. Ct. App. 2007), we upheld the grant of a motion by the owner of a Home Depot store to set aside a judgment. We determined the store owner established a meritorious defense in the form of an affidavit from the store's counsel, which stated the store owner had identified several possible defenses based on photographs and medical

records that were attached as supporting exhibits. *Id*. at 1237. The Shanes objected to the admission of the exhibits, and the trial court granted their motion to strike them. The Shanes then contended counsel's affidavit alone did not satisfy the T.R. 60(B) requirement of alleging a meritorious defense because it did not "present at least one piece of admissible evidence of a meritorious defense, *e.g.*, a witness's affidavit, certified medical records, etc." *Id*. at 1237. We disagreed:

> To the extent that some cases suggest that the movant *must* present admissible evidence to satisfy the meritorious defense requirement of his motion to set aside judgment, we disagree. *See Ferguson v. Stevens*, 851 N.E.2d 1028, 1031 (Ind. Ct. App. 2006) (testimony of defendant was sufficient to satisfy meritorious defense requirement); *Whelchel v. Community Hosp. of Indiana, Inc.*, 629 N.E.2d 900, 903 (Ind. Ct. App. 1994) (affidavit stating that bill from plaintiff contained inappropriate billing was sufficient showing of meritorious defense in lawsuit to collect payment of the billed amount), *trans. denied; State DNR v. Van Keppel*, 583 N.E.2d 161, 164 (Ind. Ct. App. 1991) (in action for non-payment of fees, affirmative defense of absence of a contractual relationship, supported by contract that did not on its face disclose a contractual relationship, satisfied meritorious defense requirement), *trans. denied* (1992). *But see Sanders v. Kerwin*, 413 N.E.2d 668, 671 (Ind. Ct. App. 1980) (allegation that defendant received bill for $350 and paid $75 is sufficient showing of meritorious defense to claim for $475).
>
> In our opinion, it is well within the trial court's discretion to determine whether the amount and/or the nature of evidence presented in support of a motion to set aside judgment indeed satisfies the meritorious defense requirement of a *prima facie* showing. We emphasize that "*prima facie*" means "sufficient to establish a fact or raise a presumption unless disproved or rebutted." BLACK'S LAW DICTIONARY 1228 (8th ed. 2004). This is an appropriate burden, particularly because this type of hearing usually occurs during the initial stages of a case, making the acquisition and preparation of admissible evidence especially difficult. Furthermore, Trial Rule 60(B)(2) states that a party must "allege" a meritorious defense but provides no further guidance as to what constitutes a proper allegation under the rule. It is up to the trial court to determine on a case-by-case basis whether a movant has succeeded in making a prima facie allegation.

Id. at 1238. We noted counsel's affidavit was based on her review of photographs of the accident scene and the Shanes' medical records, the only documents available to her in the short time between her receipt of the case and the hearing. "With or without the admission of the documents referred to in the affidavit, the trial court acted well within its discretion in setting aside the default judgment against [the store owner]." *Id*. at 1238.

Crone points to a number of meritorious defenses to the Kindreds' adverse possession claims: in an affidavit Townsend asserts she transferred the land to Crone by warranty deed in March of 2010 and the trial court found Crone claims ownership by virtue of that deed; in his motion to correct error Crone states the Kindreds did not pay real estate taxes on the land, which negates their adverse possession claim; and Crone states in support of his motion for partial summary judgment that two of the three Kindred plaintiffs did not own land adjacent to Crone's land. These allegations were sufficient to permit the trial court to find Crone asserted a meritorious defense and was entitled to relief from the summary judgment entered after he did not respond to the Kindreds' motion.

The Kindreds do not challenge the quality or quantity of the evidence Crone offers, but instead argue it "is not admissible for purpose of establishing a meritorious defense," (Kindred Br. at 22), because he did not provide it along with a response to the Kindreds' summary judgment motion. (*See id*. at 23) (noting Crone, in his motion for relief from judgment, "asserted a meritorious defense that exclusively deals with evidentiary matters that could have been timely submitted under Trial Rule 56.").

As explained above, Crone's neglect in not responding was excusable. That holding would have no effect if, at the same time, we were to hold the failure to submit evidence in support of such missing response foreclosed the possibility of establishing a meritorious defense. We accordingly decline the Kindreds' invitation to so hold.

As the trial court did not abuse its discretion in finding Crone's neglect excusable and his defense meritorious, we affirm its grant of Crone's motion for relief from judgment.

Affirmed.

NAJAM, J., and RILEY, J., concur.