

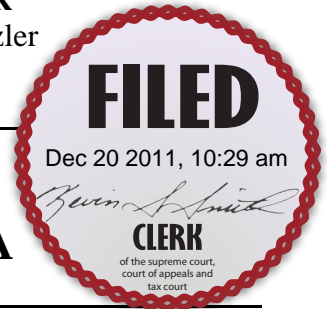
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JACK A. KRAMER
Tauber Westland & Bennett P.C.
Scherverville, Indiana

ATTORNEY FOR APPELLEE:

STEVEN W. ETZLER
Schreiner Malloy & Etzler
Highland, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

GREAT HOSPITALITY SERVICES, INC.,)
)
Appellant-Defendant,)
)
vs.)
)
KARL BAUER,)
)
Appellee-Plaintiff.)

No. 64A03-1107-CT-295

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0603-CT-2412

December 20, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Great Hospitality Services, Inc. (Great Hospitality) appeals from the trial court's denial of its motion to set aside the default judgment entered in favor of appellee-plaintiff Karl Bauer, on Bauer's personal injury complaint against Great Hospitality. Great Hospitality argues its former attorney's undiagnosed medical condition caused the default and amounts to excusable neglect sufficient to warrant setting aside the default judgment. Finding that Great Hospitality has failed to show excusable neglect, we affirm the trial court's denial of the motion to set aside the default judgment.

FACTS

On March 15, 2006, Bauer filed a complaint against Great Hospitality for personal injuries that arose during an altercation with a security guard employed by Ben Willy's, a bar in Valparaiso. Great Hospitality is the operator of the bar. Bauer asserted that Great Hospitality, through its security guard, was negligent and, therefore, liable for his injuries. Bauer served Great Hospitality with his complaint on April 13, 2006.

On May 11, 2006, Great Hospitality's attorney Bruce Lambka filed his appearance and a motion for additional time to answer. The trial court granted the motion that same day, and permitted Great Hospitality until June 9, 2006, to file its answer. On May 15, 2006, the trial court received and filed Bauer's motion for default judgment, which the court granted that same day.¹ Great Hospitality never filed an answer.

¹ Although Bauer claims to have sent the motion via certified mail on May 10, 2006, the Chronological Case Summary (CCS), CCS entry form, and motion all reflect that the motion was filed on May 15, 2006.

On March 6, 2007, Bauer filed a motion for case management conference, and the trial court held a status conference on April 24, 2007. Great Hospitality's attorney failed to appear, and the trial court had to call him on the phone so that he could participate in the conference. To reconcile the conflict in the orders entering the default judgment and granting Great Hospitality additional time to respond, the court issued an order granting Great Hospitality until May 16, 2007, to file any motions necessary to address the default judgment entered against it. Despite the additional time, Great Hospitality failed to file any motions addressing the default judgment.

Thereafter, on June 11, 2007, Bauer filed a renewed motion for default judgment. On June 12, 2007, the trial court held a hearing on the motion. Great Hospitality's attorney was present at the hearing, and when asked why he had failed to file anything in regards to the default judgment, he responded, "simply the press of other business. I thought I was going to clear up most of the problems with the election board after the election, and that didn't happen." Tr. p. 3. Following the hearing, the trial court issued an order granting Bauer's renewed motion for default judgment, denying the original motion for default judgment as moot, and barring Great Hospitality from requesting any relief from the default judgment pursuant to the applicable trial rules. The trial court also ordered that the issue of damages be tried to a jury.

At a damages hearing on April 10, 2008, neither a representative from Great Hospitality nor its attorney was present. To support his damages claim, Bauer provided his affidavit, medical bills, physician records, a wage loss summary, and a damages

summary. On May 12, 2008, the trial court entered judgment in favor of Bauer in the amount of \$87,875.17.

On August 6, 2008, Great Hospitality filed a verified motion to set aside judgment and requested a hearing. In that motion, Great Hospitality attorney Lambka stated that he is a solo practitioner, became ill in October 2007, and thereafter was not in his office for substantial periods. Lambka also asserted that, in mid-March 2008, he was diagnosed with diabetes and began treatment, but his condition only slowly improved. He claimed that, as a result, he was not aware of the damages hearing held on April 10, 2008. Lastly, attorney Lambka claimed that he returned to work in late July 2008 and only then found the notice of damages judgment that was entered on May 12, 2008. The trial court later granted the request for a hearing, but that hearing was continued generally.

On July 20, 2009, Lambka filed a motion to withdraw his appearance in this case, and attorney Jim Brown entered his appearance on behalf of Great Hospitality. On August 18, 2009, the parties notified the trial court that they agreed to postpone a hearing on the motion to set aside the default judgment pending the outcome of settlement negotiations. The negotiations failed, and, on January 11, 2011, attorney John Rupcich filed a substitution appearance on behalf of Great Hospitality. Then, Great Hospitality requested a hearing on its original motion to set aside the default judgment.

On April 12, 2011, the trial court held a hearing on the motion to set aside the default judgment, at which, Great Hospitality called attorney Lambka and owner Timothy Heidbreder to testify. Lambka testified that, beginning sometime in 2006 or 2007, he

became fatigued and, with increasing frequency, was absent from work. His condition continued to worsen, and, in March 2008, Lambka sought treatment and was diagnosed with diabetes. After diagnosis, Lambka's recovery was slow and he continued to be absent from his practice. Both before and after the diagnosis, Lambka never arranged to have his office mail forwarded to his home or have someone else tend to his practice. He never notified Great Hospitality of his illness and the impact it was having on him. Lambka also admitted that he failed to notify Great Hospitality of the motion for default judgment.

Heidbreder stated that he timely forwarded Bauer's complaint to attorney Lambka in April 2006. Lambka had been Heidbreder's attorney since 1990, and Heidbreder testified that Lambka had always diligently handled his legal affairs and had never given him any reason to doubt Lambka's competency. Heidbreder stated that he attempted to contact Lambka several times to discuss the case, but when Lambka failed to return Heidbreder's calls over the course of approximately a year and a half, Heidbreder retained attorney Brown sometime before Brown entered his appearance in July 2009.

On June 14, 2011, the trial court denied Great Hospitality's motion to set aside the default judgment. Great Hospitality now appeals.

DISCUSSION AND DECISION

Great Hospitality contends that the trial court abused its discretion when it denied Great Hospitality's motion to set aside the default judgment of June 12, 2007, because of attorney Lambka's excusable neglect. Specifically, Great Hospitality maintains that

attorney Lambka's neglect was excusable because his undiagnosed diabetes was a serious medical condition that impaired his ability to practice. Contrarily, Bauer argues that the neglect was inexcusable because Lambka had many opportunities to tend to this case, but knowingly failed to do so.

Once entered, a default judgment may be set aside because of mistake, surprise, or excusable neglect. Ind. Trial Rule. 55(C); 60(B)(1). Our standard of review of the denial of a motion to set aside a default judgment is limited to determining whether the trial court abused its discretion. Allstate Ins. Co. v. Love, 944 N.E.2d 47, 50 (Ind. Ct. App. 2011). An abuse of discretion occurs where the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. Id. The trial court's decision on a motion to set aside a default judgment is given substantial deference on appeal. Id. Therefore, absent a clear abuse of discretion, the trial court's judgment will not be lightly disturbed. Id.

Although we have found no Indiana case addressing whether an attorney's medical condition is excusable neglect, we believe that, in certain cases, facts presenting a severe medical condition that interferes with an attorney's ability to attend to his client's affairs might constitute excusable neglect sufficient to overturn the trial court's decision. This, however, is not one of those cases.

Here, attorney Lambka testified that he began to feel the effects of his undiagnosed diabetes as early as 2006, and, at that time, he was experiencing a loss in energy and began missing significant amounts of work. Tr. 31, 41. On May 11, 2006,

the trial court granted Great Hospitality until June 9, 2006, to file an answer, and Lambka failed to answer. Then, despite having realized sometime in 2007 the impact his health problems were having on his practice, Lambka neither notified Great Hospitality of his difficulties, reduced his caseload, nor sought assistance with his cases. Id. at 32, 41.

On April 24, 2007, the trial court told Lambka directly over the phone that Great Hospitality had until May 16, 2007, to file any motions addressing the default judgment. Appellant's App. p. 70. At that time, Lambka was well aware of his health problems and, presented with the opportunity, failed to notify the court of his health problems, have his mail forwarded to his home, or refer the case to another attorney. Despite the trial court's grant of additional time, he failed to file any motions challenging the original entry of default judgment.

Moreover, Lambka's statements to the court indicate that his health issues were not the sole cause of his failure to file any pleadings on behalf of Great Hospitality. At the hearing on the renewed motion for default judgment on June 12, 2007, Lambka personally appeared before the trial court. When questioned by the trial court, he made no mention of his health issues and, instead, attributed his failings to "simply the press of other business. I thought I was going to clear up most of the problems with the election board after the election, and that didn't happen." Tr. p. 3. This statement further indicates that his condition was not so debilitating that it would have prevented him from informing his client of his limitations or referring the matter to another attorney. And, when Lambka was finally diagnosed with diabetes in mid-March 2008, he still failed

notify Great Hospitality of his inability to represent it at the default judgment hearing on April 12, 2008. Id. at 35, 45.

The facts of this case reflect that, over more than one year, Lambka was aware of a physical limitation on his ability to practice law and had ample opportunity to act to protect Great Hospitality's interest and avoid the default judgment entered on May 12, 2008. Thus, on these facts, we will not find that the trial court erred when it did not find that Lambka's neglect was excusable. Finally, because an attorney can bind a client to a default judgment entered due to an attorney's neglect, we conclude that the trial court did not err when it denied Great Hospitality's motion to set aside the default judgment because of attorney Lambka's negligence. See Weinreb v. Tr. Developers, LLC, 943 N.E.2d 856, 867 (Ind. Ct. App. 2011) (noting the longstanding rule that a client is bound by his attorney's actions).

The judgment of the trial court is affirmed.

DARDEN, J., and BAILEY, J., concur.