ATTORNEYS FOR APPELLANT

Darren A. Craig
Christopher L. Bills
Frost Brown Todd, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Kevin D. Koons
Steven E. Runyan
Kroger Gardis & Regas LLP
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Biodynamic Extraction, LLC d/b/a Biodynamics Extract, LLC,

Appellant-Plaintiff,

v.

Kickapoo Creek Botanicals, LLC,

Appellee-Defendant.

April 22, 2022

Court of Appeals Case No. 21A-CT-2446

Appeal from the Marion Superior Court

The Honorable Heather Welch, Judge

Trial Court Cause No. 49D01-2011-CT-39360

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Biodynamic Extraction, LLC d/b/a Biodynamic Extract, LLC (BDX), appeals the trial court's denial of its motion to set aside the judgment pursuant to Indiana Trial Rule 60(B)(1), which affirmed the summary judgment in favor of Appellee-Defendant, Kickapoo Creek Botanicals (Kickapoo).

[2] We affirm.

ISSUE

[3] BDX presents this court with two issues on appeal, which we consolidate and restate as: Whether the trial court abused its discretion when it denied BDX's motion to set aside the judgment in favor of Kickapoo pursuant to Indiana Trial Rule 60(B)(1).

FACTS AND PROCEDURAL HISTORY

[4] On June 26, 2019, Kickapoo, a company engaged in the business of growing and selling hemp, entered into a Hemp Buy-Back Agreement (Agreement) with BDX, an Indiana limited liability company in the business of providing cannabinoid extraction services, pursuant to which Kickapoo would purchase hemp seeds and cultivate these seeds into plants. BDX retained the right of first refusal to purchase the plants according to an agreed-upon price schedule that was based on the percentage of cannabidiol (CBD) the matured plants produced. After BDX received the hemp from Kickapoo on December 9, 2019,

and performed its CBD analysis, it calculated the value of Kickapoo's cultivated hemp at $216,163.44. Ultimately, BDX never paid Kickapoo.

[5] On November 5, 2020, Kickapoo filed its Complaint against BDX and Biodynamic Ventures, LLC (Ventures)[1], seeking payment for the hemp shipped to BDX, and asserting breach of contract, unjust enrichment, and conversion. That same day, Kickapoo served the summons and Complaint on BDX's registered agent, Registered Agents, Inc., and on Ventures registered agent, John Bales (Bales). On December 7, 2020, Kickapoo filed a certificate of issuance of summons and attached the signed return receipts of each certified mailing. Three months later, after not receiving any responses from BDX and Ventures, Kickapoo filed a motion for summary judgment, seeking judgment on all Counts in the amount of $216,163.44, the value of the hemp delivered to and accepted by BDX. Kickapoo also served these filings on Registered Agents and Bales. Again, after not receiving any responses, the trial court, on March 26, 2021, granted summary judgment to Kickapoo. The trial court sent the summary judgment to Registered Agents and Bales.

[6] On April 1, 2021, Kickapoo filed a verified motion for proceedings supplemental and served it on Registered Agents and Bales. The trial court issued an order to appear, requiring BDX and Ventures to attend the hearing on

---

[1] Ventures is an Indiana limited liability company in the business of hemp genetics and the cultivation of hemp products for sale. The Agreement identifies BDX as a contracting party but also references Ventures in the signature block. Although Kickapoo filed its Complaint against both companies, only BDX responded after the trial court entered its final judgment against both companies.

June 21, 2021, which was mailed by certified mail to Registered Agents and Bales. After BDX and Ventures failed to appear at the hearing, the trial court issued an order to show cause requiring the parties to appear on September 9, 2021, which was served by certified mail on Registered Agents and Bales.

[7] On July 29, 2021, BDX filed a motion to set aside the default judgment entered against it pursuant to Indiana Trial Rule 60(B)(1). In its motion, BDX asserted excusable neglect, claiming that it had not received notice of the lawsuit, and raised a meritorious defense that it had not signed the Agreement. In support of its motion, BDX submitted two affidavits from BDX's members, Bales[2] and Ken Thieneman (Thieneman), who both affirmed that they "have never been served any documents or [been] notified of the existence of any documents regarding the above-captioned lawsuit by Registered Agents Inc. on behalf of BDX." (Appellant's App. Vol. II, pp. 67, 68). On October 5, 2021, after conducting a hearing on BDX's motion, the trial court denied the motion to set aside the judgment, concluding, in pertinent part:

> 30. It is undisputed that Kickapoo served BDX's registered agent, Registered Agents Inc. with a Complaint, and [s]ummons at the proper address. Kickapoo thus properly effectuated service against BDX.

[2] Bales is a member of BDX, as well as the founder and registered agent for Ventures. Ventures never appeared in the lawsuit and did not seek relief from the trial court's summary judgment entered against it. Ventures is not a party to this appeal.

31. BDX provided affidavits from Thieneman and Bales confirming that they did not receive the Complaint or [s]ummons from Registered Agents Inc. While they may not have received copies of the Complaint and [s]ummons for this lawsuit on behalf of BDX, their affidavit testimony alone is not sufficient to show that Registered Agents Inc. did not remit the documents at all.

32. There is no evidence or affidavit testimony from a representative of Registered Agents Inc. confirming that the Complaint and [s]ummons it received from Kickapoo were never remitted to the proper persons at BDX. Without any information from Registered Agents Inc. confirming its failure to remit documents specifically to BDX, the [c]ourt cannot find that Registered Agents Inc. was solely responsible for the alleged communication breakdown based only on the testimony from Bales and Thieneman that neither of them specifically received the Complaint or [s]ummons on behalf of BDX.

33. Second, and related, the [c]ourt has no bases to find that Thieneman's and Bales' failures to receive the Complaint and [s]ummons necessarily means that BDX was not provided notice of the lawsuit. While the [c]ourt understands that Thieneman's and Bales' positions as members of BDX would typically mean they receive notice of lawsuits delivered to BDX's registered agent, their failure to receive notice on this occasion does not necessarily foreclose the possibility that BDX was not provided notice at all. Their affidavits do not state that Bales and Thieneman are the only persons at BDX which would have received copies of the Complaint and [s]ummons from Registered Agents Inc. As Kickapoo notes in its Response, neither Thieneman nor Bales provide information about where Registered Agents Inc. was to direct the Complaint and [s]ummons received from Kickapoo.

34. BDX's excusable neglect argument rests on an implication that because neither Thieneman nor Bales received copies of the

> Complaint and [s]ummons, Registered Agents Inc. must not have delivered copies to BDX at all. The [c]ourt cannot rely on such an implied conclusion to overturn a settled summary judgment verdict. BDX would need to provide clear evidence that Registered Agents Inc. was solely responsible for BDX failing to receive notice of this lawsuit to constitute excusable neglect. The [c]ourt rules that BDX's evidentiary designations at this point fail to meet this evidentiary burden.

(Appellant's App. Vol. II, pp. 14-15).

[8] BDX now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

[9] BDX contends that the trial court abused its discretion in denying its motion to set aside the summary judgment based on BDX's excusable neglect pursuant to Indiana Trial Rule 60(B)(1). The decision whether to set aside a default judgment is given substantial deference on appeal. *Huntington Nat. Bank v. Car-X Assoc. Corp.*, 39 N.E.3d 652, 658 (Ind. 2015). Our standard of review is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* 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.* A cautious approach to the grant of motions for default judgment is warranted in "cases involving material issues of fact, substantial amounts of money, or weighty

policy determinations." *Id*. In addition, the trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. *Id*. Furthermore, reviewing the decision of the trial court, we will not reweigh the evidence or substitute our judgment for that of the trial court. *Id*. Upon a motion for relief from a default judgment, the burden is on the movant to show sufficient grounds for relief under Indiana Trial Rule 60(B). *Id*.

[10] As BDX proceeds under Ind. T.R. 60(B)(1), we note that under subsection (B)(1), a trial court may relieve a party from a default judgment for "mistake, surprise, or excusable neglect" if the party files a motion within one year of the judgment and alleges a meritorious claim or defense. Addressed to the trial court's equitable discretion, "[a] Trial Rule 60(B)(1) motion does not attack the substantive, legal merits of a judgment, but rather addresses the procedural, equitable grounds justifying the relief from the finality of a judgment." *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1254 (Ind. Ct. App. 1999). Because "[t]here is no general rule as to what constitutes excusable neglect under Trial Rule 60(B)(1)[,]" "[e]ach case must be determined on its particular facts." *Id*.

[11] Relying mainly on federal caselaw interpreting the federal counterpart of Indiana's T.R. 60(B)(1), BDX contends that Bales' and Thieneman's affidavits do not reflect a willful ignorance of the lawsuit after Registered Agents' failure to communicate the existence of the Complaint because as soon as BDX became aware of the existence of the trial court's summary judgment, it entered the proceedings. In *Coyote Logistics, LLC v. AMC Cargo Inc.*, 2017 WL 1862642

(N.D. Ill. May 9, 2017), the federal court vacated a default judgment based on excusable neglect. While AMC's registered agent was properly served, AMC did not receive notice of the lawsuit until the court had already entered the default judgment. *Id*. at *1-2. Reviewing the evidence, the court noted that AMC had not "intentionally failed to respond to the [c]omplaint." *Id*. at *2. Because AMC promptly responded to the court order, the federal court concluded that AMC merely showed "simple inadvertence," not "willful ignorance," and vacated the default judgment. *Id*. Similarly, in *Delgado v. I.C. System, Inc.*, 2020 WL 5253686, at *1 (N.D. Ill. Sept. 3, 2020), the court held that while I.C. System was bound by the deeds of its agent, this fact alone did not create "a bright-line, blanket rule saying that 'excusable neglect' . . . can never be based on a mistake by a party's registered agent." *Id*. at *2. Rather, the court focused on the evidence that I.C. System was unaware the complaint had been filed, and it did not "willfully ignore[]" the litigation or "willfully [choose] not to respond." *Id*.

[12] Even though it may be appropriate to look at federal authority where the rules of procedure are worded identically to its state counterpart,[3] Indiana cases suggest that rather than a 'willful ignorance' standard, an excusable breakdown in communication requires a party to affirmatively establish that it did everything it needed to do to avoid such a breakdown. *See, e.g., Outback*

[3] Although the Federal Rules of Civil Procedure 60(B)(1) includes an "inadvertence" prong, which is absent from its Indiana counterpart, the remainder of the Rule is identical to Indiana Trial Rule 60(B)(1).

Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 72 (Ind. 2006) (interpreting Indiana Trial Rule 60(B)(3), our supreme court noted that "[i]t is worded identically to Federal Rule of Civil Procedure 60(b)(3)" and therefore it was appropriate to "look to both Indiana and federal authority"). In *Car-X*, Car–X properly served Huntington's registered Indiana agent with the complaint and summons by certified mail, and because the Huntington employee who typically received service of process for the bank was away on maternity leave, Huntington's foreclosure supervisor received the complaint and summons in her stead, "but due to the volume of [his] regular duties" was unable to refer the service to counsel until Huntington's deadline to respond had expired. *Car-X*, 39 N.E.3d at 654. Our supreme court concluded that no excusable neglect occurred as Huntington's response to the service was "wholly attributed to [its] inattentiveness." *Id*. at 657. The court found that "[t]here was no true breakdown in communication between agents of the party that caused the party's failure to appear; rather, the party was subjected to a default judgment because, in the absence of the employee typically responsible for handling legal mail, another employee let the notice sit on his desk until the time to respond had past." *Id*. at 657-58.

[13] The *Car-X* court distinguished the situation before it from prior decisions finding excusable neglect for a breakdown in communication in which "the defendants did all that they were required to do but subsequent misunderstandings as to the assignments given to agents of the defendants resulted in the failure to appear." *Id*. at 657. One such case is *Boles v. Weidner*,

449 N.E.2d 288, 289 (Ind.1983), in which, due to an auto accident, a default judgment was entered against Weidner after he failed to respond to Boles' complaint and summons. Evidence was presented that Weidner had delivered the complaint and summons to his insurance agent, who was then supposed to notify the insurance carrier of the suit, but Weidner's carrier did not receive notice. *Id*. Weidner filed a motion to set aside the default judgment, contending that the breakdown in communication between his agent and carrier constituted excusable neglect. *Id*. Our supreme court agreed, concluding that excusable neglect existed and finding that "Weidner had done everything that apparently needed to be done" and it was the "breakdown in communications" between the agent and carrier that resulted in the failure to employ counsel and the ensuing entry of default judgment against Weidner. *Id*. at 291.

[14] A characterizing constant in Indiana's precedents is the explanation provided for the breakdown in communication—an explanation which guides the result in whether courts find excusable neglect and overturn a default judgment. The only evidence provided by BDX in this regard are Bales' and Thieleman's affidavits, which, in identical wording, affirmed that they "have never been served any documents or notified of the existence of any documents regarding the above-captioned lawsuit by Registered Agents Inc. on behalf of BDX." (Appellant's App. Vol. II, pp. 67, 68). These explanations simply aver that the Complaint and summons were never received by BDX but lack any explanation as to the nature or reason of the breakdown of communication between Registered Agents and BDX. As noted by the trial court, the affidavits did not

state that Bales and Thieneman are the only persons authorized to receive the Complaint and summons for BDX, nor did it explain why none of the other legal documents sent by Kickapoo and the trial court to Registered Agents appeared to have never been received by BDX either. BDX bears the burden of demonstrating it did everything that needed to be done and that it was Registered Agents who was responsible for the breakdown. *See Car-X*, 39 N.E.3d at 657-58.

[15] Any doubts about who is at fault are construed against the defaulted party, as it bears the risk of a communication breakdown between the registered agent and the defaulted company. *Precision Erecting, Inc. v. Wokurka*, 638 N.E.2d 472, 474 (Ind. Ct. App. 1994). Here, BDX's evidentiary designations are simply insufficient for this court to conclude that BDX has done everything that apparently needed to be done to prevent a breakdown in communication between the company and Registered Agents. *Car-X*, 39 N.E.3d at 657. Accordingly, as we cannot find excusable neglect, we affirm the trial court's judgment.[4]

[4] Because we affirm the trial court's Order based on a finding that no excusable neglect exists that permits setting aside the trial court's entry of summary judgment against BDX, we will not address BDX's argument that it has a meritorious defense against Kickapoo's claims pursuant to T.R. 60(B)(1).

CONCLUSION

[16] Based on the foregoing, we hold that the trial court did not abuse its discretion by denying BDX's motion to set aside the default judgement entered against it.

[17] Affirmed.

[18] May, J. and Tavitas, J. concur