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IN THE
COURT OF APPEALS OF INDIANA

Jeffrey D. Baker and Lafayette Rentals, Inc.,
Appellants-Defendants,

v.

F.H. Paschen, S.N. Nielsen & Associates, LLC,
Appellee-Plaintiff.

May 23, 2022

Court of Appeals Case No. 21A-PL-2018

Appeal from the Tippecanoe Circuit Court

The Honorable Sean M. Persin, Judge

Trial Court Cause No. 79C01-2012-PL-179

Molter, Judge.

[1] F.H. Paschen, S.N. Nielsen & Associates, Inc. ("Paschen") entered into a lease to rent property from Lafayette Rentals, Inc., which is owned by Jeffrey D. Baker. The lease term expired on November 30, 2020, but the parties were in negotiations to allow a holdover period so Paschen could move into its new premises. However, in early December 2020, Baker informed Paschen that Lafayette Rentals would no longer discuss a holdover period and that Paschen

must vacate the premises immediately without removing all of its property. Because Baker and Lafayette Rentals (together, "Defendants") refused to allow Paschen access to remove its property, Paschen filed a complaint against Defendants. Default judgment was entered against them after they failed to file an answer or appear for a hearing on a request for a preliminary injunction and the hearing on the motion for default judgment. Defendants filed a motion to set aside the default judgment, which was denied. On appeal, Defendants argue that the trial court abused its discretion in denying the motion. Finding no error, we affirm.

Facts and Procedural History

[2] Baker owns Lafayette Rentals, which is a business in Tippecanoe County, Indiana that owns and operates several rental properties. Paschen is an Illinois limited liability company, authorized to do business in Indiana with offices in Lafayette. Paschen entered into a lease with Lafayette Rentals, Inc., dated December 1, 2017 ("Lease"), under which Paschen leased the premises located at 50 Professional Court, Suite A, Lafayette, Indiana ("Leased Premises"). Appellee's App. Vol. II at 33, 37–48. Pursuant to the terms of the Lease, the Lease term expired on November 30, 2020. *Id*. at 33.

[3] As of November 30, 2020, Paschen and Lafayette Rentals were negotiating the terms of a holdover period to allow Paschen to move to its new location at 250 Main Street, Lafayette because the new lease did not commence until December 8, 2020. Paschen paid Lafayette Rentals $1,400.00, representing one month's rent in December 2020 for the holdover period.

[4] On December 3, 2020, Baker informed Paschen that Lafayette Rentals would no longer discuss a holdover period, that Paschen's employees must vacate the Leased Premises immediately, and that the office equipment, furniture, and other personal property of Paschen's could not be removed from the Leased Premises even though Paschen owed nothing under the Lease. On December 7, 2020, Baker changed the locks to the Leased Premises. On December 8, 2020, Paschen notified Lafayette Rentals by letter sent via overnight carrier and USPS Certified Mail that it would be removing its personal property from the Leased Premises on December 9, 2020. On December 9, 2020, Paschen, its movers, and its attorney arrived at Baker & Associates P.C., spoke with Baker, and requested access to the Leased Premises to remove the property. Baker refused to grant access to the Leased Premises to Paschen and refused to allow Paschen to remove its property. Paschen incurred $680.25 in expenses to the movers for December 9, 2020.

[5] On December 9, 2020, Paschen, through its counsel, contacted Baker by email and requested a date and time when Paschen could remove its property from the Leased Premises and gave Baker a deadline of 1:00 p.m. on December 10, 2020, to respond. At 12:47 p.m. on December 10, 2020, Baker emailed Paschen's counsel stating he would not have a response by the 1:00 p.m. deadline but would try to have a response by the next morning.

[6] At 9:25 a.m. on December 11, 2020, Baker emailed Paschen's counsel demanding: (i) an acknowledgment that Paschen breached the Lease; (ii) payment of one month's rent for such alleged breach; (iii) payment of $300 for

Baker's personal time; (iv) payment of attorney fees in an unspecified amount; and (v) removal of paint cans and cigarette butts outside the Leased Premises. *Id*. at 34. At 3:38 p.m. that day, Paschen's counsel emailed Baker, advising that one month's rent had been paid and demanding access to the Leased Premises to remove its personal property on either December 17 or 18. *Id*. at 35. At 4:41 p.m., Baker emailed Paschen's counsel, advising that he would be removing the property from the Leased Premises and putting it in storage. *Id*.

[7] At that time, Paschen was not in default under the terms of the Lease and had no amount of money due pursuant to the Lease. Despite Paschen's repeated demands, Defendants refused to grant Paschen access to retrieve its personal property.

[8] On December 18, 2020, Paschen filed a complaint against Defendants, alleging Count I, breach of contract; Count II, theft; Count III, conversion; and Count IV, injunctive relief. *Id*. at 2–22. Defendants did not file an answer. Appellants' App. Vol. II at 4. On January 6, 2021, Paschen filed a Praecipe for Hearing on its request for preliminary injunction, and a hearing was set for January 13, 2021, at 11:00 a.m. On January 13, 2021, Defendants failed to appear for the hearing on Paschen's request for preliminary injunction, which was conducted without Defendants, and the trial court granted the preliminary injunction.

[9] On January 19, 2021, Paschen filed a motion for default judgment, and the trial court set a hearing for March 1, 2021. After the hearing, at which Defendants

did not appear, the trial court granted Paschen's motion for default judgment. After a status conference, at which Defendants appeared, the trial court issued an order regarding scheduling the retrieval of Paschen's personal property.

[10] On May 24, 2021, Paschen filed a Supplemental Petition for Attorney Fees. On June 18, 2021, Baker filed an objection to Paschen's Supplemental Petition for Attorney Fees and a Motion to Set Aside Default Judgment. On August 16, 2021, the trial court held a hearing on Baker's Motion to Set Aside Default Judgment at which time Baker acknowledged that the reason he failed to attend the hearing on Paschen's verified Motion for Default Judgment was because:

> I am a CPA, I'm working well over a [sic] 110 hours per week during this period of time I didn't want to come down for COVID and such. I admit the first hearing that I missed was because I thought he was filing an agreed—we had come up with an agreed order so that they could get their belongings. Turns out that he didn't file that. It also turns out that I think my staff sent it to his phone number instead of his fax number when the day that they were trying to get that to him which was a morning that I think that the hearing was for. I was under the impression that would put off a default judgment and then he put the default judgment in.

Tr. Vol. 2 at 5–6. On August 16, 2021, the trial court entered an order denying Defendants' Motion to Set Aside Default Judgment and granting Paschen's Supplemental Petition for Attorney fees. Defendants now appeal.

Discussion and Decision

[11] The decision whether to set aside a default judgment is given substantial deference on appeal, and on appeal, we review the trial court's decision for an abuse of discretion. *Huntington Nat. Bank v. Car-X Assoc. Corp.*, 39 N.E.3d 652, 655 (Ind. 2015). 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.* 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, when we review 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*.

[12] Defendants first argue that they were entitled to relief from default judgment under Indiana Trial Rule 60(B)(1) for excusable neglect. Under Trial Rule 60(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. "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) (citation omitted), *trans. denied*. 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.*

[13] In denying Defendants' motion to set aside the default judgment, the trial court found that:

> Defendant was aware of the hearing on March 1, 2021[,] and chose not to appear for various reasons, including COVID-19 concerns and he was too busy because it was tax season. The defendant had means to retain counsel and time to file a motion to continue. Instead, he ignored the matter . . . .

Appellee's App. Vol. II at 86. We note that, in both the trial court proceedings and here on appeal, Defendants are pro se. However, "pro se litigants are held to the same standards as a trained attorney and are afforded no leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). In the Motion to Set Aside Default Judgment, Defendants argued that "[t]he Defendant is not an attorney at law and was not aware that a legal answer needed to be filed . . . ." Appellee's App. Vol. II at 76. But simply not knowing the rules is insufficient to establish excusable neglect under Trial Rule 60(B).

[14] In the Motion to Set Aside Default Judgment, Baker admitted that he was aware of Paschen's complaint, Paschen's motion for default judgment, and the hearing scheduled on March 1, 2021, for the motion for default judgment. *Id.*

at 75–76. Despite this, Defendants did not file an answer to the complaint, did not attend any hearings, or otherwise attempt to defend the lawsuit until after default judgment was granted. At the hearing on the Motion to Set Aside Default Judgment, Baker testified that the reason he did not appear at the default judgment hearing was because he is a CPA and was working over 100 hours per week during that period of time, and "I didn't want to come down for COVID and such." Tr. Vol. II at 5–6. Baker also testified that he did not appear at a previous hearing on the preliminary injunction because he believed that the parties had an agreed order that would be filed with the trial court, although he acknowledged that he had sent his signed copy of the agreed order to the wrong number, which meant that Paschen did not receive it. *Id*. at 6. Because Baker admitted that he was aware of the motion for default judgment filed by Paschen and of the hearing set on the motion and that the reason for the failure to attend the hearing was that Baker was a busy CPA and "for COVID and such," he has not shown evidence of excusable neglect. *See Coslett v. Weddle Bros. Constr. Co*, 798 N.E.2d 859, 862 (Ind. 2003) (holding that in ruling on motions to set aside default judgments, the controlling question is whether there is even slight evidence of excusable neglect).

[15] Defendants next argue they are entitled to relief from default judgment under Indiana Trial Rule 60(B)(3) for fraud, misrepresentation, or other misconduct of an adverse party. "A party making a claim under Trial Rule 60(B)(3) and alleging fraud or misrepresentation must demonstrate that: (1) 'the opposing party knew or should have known from the available information that the

representation made was false,' and (2) 'the misrepresentation was made with respect to a material fact which would change the trial court's judgment.'" *Seleme v. JP Morgan Chase Bank*, 982 N.E.2d 299, 310–11 (Ind. Ct. App. 2012) (quoting *Zwiebel v. Zwiebel,* 689 N.E.2d 746, 748 (Ind. Ct. App. 1997), *trans. denied*), *trans. denied*.

[16] In their argument, Defendants assert that Paschen made false statements in the complaint and essentially challenge the allegations in the complaint. But the allegations in the complaint had no bearing on the trial court granting Paschen's motion for default judgment. In its order granting default judgment, the trial court found that Paschen had served its complaint on Defendants and that they had not filed an answer, appeared in the matter, or otherwise attempted to defend the complaint. Appellants' App. Vol. 2 at 17. Therefore, the alleged misrepresentations that Defendants reference were not made with respect to a material fact which would change the trial court's judgment because the judgment was based on the fact that Defendants failed to answer the complaint or attempt to defend the complaint in any manner.

[17] Defendants next argue that they were entitled to relief from default judgment under Indiana Trial Rule 60(B)(8), which allows the trial court to set aside a default judgment for "any reason justifying relief from the operation of the judgment, other than those reasons set forth in" (B)(1)–(B)(4). But Defendants did not raise this issue to the trial court in the Motion to Set Aside Default Judgment. Appellee's App. Vol. II at 74–76. It is the general rule that an argument or issue raised for the first time on appeal is waived for appellate

review. *First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020). Defendants have therefore waived this issue on appeal.[1]

[18] Lastly, Defendants contend that the trial court erred in awarding attorney fees to Paschen because the case was not decided on the merits. In making this argument, Defendants cite to our Supreme Court's decision in *Reuille v. E.E. Brandenberger Construction, Inc.*, 888 N.E.2d 770 (Ind. 2008), and assert that in Indiana, when a contract states that the prevailing party shall be entitled to attorney fees in an action and the term prevailing party is not defined, the term will be interpreted to require the favorable entry of judgment on the merits. Appellant's Br. at 13–14 (citing *Reuille*, 888 N.E.2d at 771). However, the term prevailing party does not appear in the lease between Lafayette Rentals and Paschen. As to attorney fees, the lease stated, "Each party shall pay the other party's reasonable legal costs and attorney's fees incurred in successfully enforcing, against the other party any covenant, term or condition of the Lease." Appellant's App. Vol. 2 at 40. And *Reuille* dealt with the question of whether a party who settled a claim by mediation was a prevailing party entitled to attorney fees under the contract. 888 N.E.2d at 771–72. *Reuille* is not applicable here. First, the Lease did not contain the phrase "prevailing

[1] Defendants also allege that they were entitled to relief from default judgment because they alleged a meritorious defense. Under Trial Rule 60(B), "[a] movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense." However, because Defendants have not established any grounds for relief under Trial Rule 60(B), we need not consider whether they have a meritorious defense.

party." Appellant's App. Vol. 2 at 40. Second, this case did not involve a situation where the parties entered into a mediated settlement; instead, judgment was entered in favor of Paschen through default judgment. By obtaining a default judgment in its favor, Paschen successfully enforced a term of the Lease against Defendants, specifically Sections IV and XII, which were alleged to have been breached in Paschen's complaint.

[19] The trial court did not abuse its discretion in denying Defendants' Motion to Set Aside Default Judgment because Defendants did not demonstrate they were entitled to relief from judgment under Trial Rule 60(B). Nor did the trial court err in awarding attorney fees to Paschen because the Lease provided for such an award.

[20] Affirmed.

Mathias, J., and Brown, J., concur.