

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph Jarboe, Smoke 'M Jarbs,
LLC,

Appellants-Defendants,

and

JM Newburgh, LLC, Greg Moore,
Sandra Shackelford Moore, Spring
Creek Subdivision, LLC

Defendants,

v.

Thompson Homes, Inc.,
Appellee-Plaintiff.

September 20, 2021

Court of Appeals Case No.
21A-CC-468

Appeal from the Warrick Superior
Court

The Honorable J. Zach Winsett,
Judge

Trial Court Cause No.
87D01-1703-CC-458

Najam, Judge.

Statement of the Case

- [1] Thompson Homes, Inc. (“Thompson”) filed an amended complaint against Joseph Jarboe and Smoke ‘M Jarbs, LLC (collectively, “the Jarboe parties”).¹ After the Jarboe parties failed to timely respond to the amended complaint, Thompson filed a motion for default judgment, which motion the trial court granted. The Jarboe parties then filed a motion to set aside the default judgment, which motion the trial court denied.
- [2] The Jarboe parties now appeal the trial court’s denial of their motion to set aside the default judgment. The Jarboe parties raise two issues for our review, which we revise and restate as follows:
1. Whether the trial court abused its discretion when it denied the Jarboe parties’ motion to set aside.
 2. Whether the trial court erred when it failed to set a hearing on the question of damages.

- [3] We affirm.

Facts and Procedural History

- [4] On March 8, 2016, Thompson entered into a “Lot Purchase and Take Down Agreement” with JM Newburgh, LLC (“Newburgh”). Appellants’ App. Vol. 2 at 19. Pursuant to that contract, Thompson paid Newburgh \$8,000 in exchange

¹ JM Newburgh, LLC; Greg Moore; Sandra Shackelford Moore; and Spring Creek Subdivision, LLC, named defendants below, do not participate in this appeal.

for the “exclusive option to purchase and build upon several designated lots” within a new development. *Id.* at 13.

[5] On March 16, 2017, Thompson filed a complaint against Newburgh and its members Jarboe and Greg Moore. In that complaint, Thompson asserted that the defendants had breached the contract by failing to transfer the property to Thompson, committed fraud by failing to have ownership over the subject real estate, and committed civil conversion by failing to return Thompson’s funds. In addition, Thompson sought to pierce Newburgh’s corporate veil. On August 4, Jarboe filed his answer and affirmative defenses, as well as a cross claim against Moore.

[6] Following discovery, which included the deposition of Jarboe, Thompson filed a motion for leave to file an amended complaint. In that motion, Thompson sought to amend the complaint in order “to join additional parties needed for just adjudication.” *Id.* at 34. Specifically, Thompson asserted that the addition of other parties was “necessary to fully develop” the claims pending before the court. *Id.* The trial court granted Thompson’s motion, and, on January 10, 2020, Thompson filed its amended complaint. In that complaint, Thompson named as an additional defendant, among others, Smoke ‘M Jarbs, LLC. In addition, Thompson also raised additional claims, including a request to certify the matter as a class action and a claim under the Civil Racketeering Influenced and Corrupt Organization (“RICO”) Act. *See id.* at 74-75. The Jarboe parties were each served with a copy of the amended complaint on January 23. *See id.* at 90-91.

- [7] Thereafter, on March 24, Thompson filed a motion for default judgment. Thompson alleged that more than sixty days had passed since the Jarboe parties had been served with the amended complaint but that “no answer or responsive pleading has been received or filed[.]” *Id.* at 93. The trial court scheduled a hearing on Thompson’s motion for September 23.
- [8] On the morning of the scheduled hearing, the Jarboe parties filed their answers to the amended complaint, which again included a cross claim against Moore. At the hearing, the parties presented oral argument. Thompson maintained that a default judgment was proper because the Jarboe parties had failed to timely respond to the amended complaint. Thompson also asserted that the Jarboe parties had failed to demonstrate excusable neglect in its answer and that they had failed to outline a meritorious defense.
- [9] In response, the attorney for the Jarboe parties acknowledged that he “didn’t get [the answer] done in time.” *Tr.* at 11. However, the attorney alleged that the “only real amendment” to the complaint was the addition of “some factual allegations and two additional counts that were already answered[.]” *Id.* And the attorney asserted that its cross claim against Moore constituted a meritorious defense. Following the hearing, the court granted Thompson’s motion for default judgment and awarded Thompson \$8,000 in actual damages, plus an additional \$8,000 and court costs.
- [10] Thereafter, on November 13, the Jarboe parties filed a motion to set aside the default judgment. The Jarboe parties acknowledged that they had received a

copy of the amended complaint but that they did not respond because their attorney had “mistakenly believed” that the complaint merely added additional defendants instead of additional counts. Appellants’ App. Vol. 2 at 208. They further again asserted that their cross claim against Moore constituted a meritorious defense to Thompson’s claim. The trial court denied the Jarboe parties’ motion to set aside the default judgment on February 18, 2021, without a hearing. This appeal ensued.

Discussion and Decision

Timeliness of Appeal

[11] Before we reach the merits of the Jarboe parties’ appeal, we first address Thompson’s claim that the Jarboe parties’ appeal is untimely and must be dismissed.² Specifically, Thompson asserts that the Jarboe parties’ motion to set aside the default judgment was “deemed denied” on December 28, 2020, pursuant to Indiana Trial Rule 53.3 and that the Jarboe parties failed to file their notice of appeal with thirty days of that date. Appellee’s Br. at 19. However, we agree with the Jarboe parties that Thompson’s reliance on the “deemed denied” language of Trial Rule 53.3. is “misplaced.” Reply Br. at 7.

[12] Trial Rule 53.3 provides that, if a trial court fails to rule on a motion to correct error within forty-five days after it was filed, the pending motion “shall be

² Thompson separately filed a motion to dismiss this appeal, which our motions panel denied. Even though our motions panel previously considered and ruled on this issue, Thompson is not precluded from again presenting its argument. *See D.C., Jr. v. C.A.*, 5 N.E.3d 473, 475 (Ind. Ct. App. 2014).

deemed denied.” Ind. Trial Rule 53.3. But the Jarboe parties did not file a motion to correct error. Rather the Jarboe parties asserted that they had failed to timely answer the amended complaint based on a mistake by their attorney and that they had asserted a meritorious defense, both of which are elements of a motion for relief from judgment under Trial Rule 60(B). Further, Indiana Trial Rule 55 provides that a default judgment may be set aside “in accordance with the provisions of Rule 60(B).” T.R. 55(A). As such, it is clear that the Jarboe parties’ motion to set aside default judgment was a motion for relief from judgment pursuant to Trial Rule 60 and not a motion to correct error.

[13] “Indiana Trial Rule 53.3 does not include any deemed denied provisions for a Trial Rule 60 motion for relief from judgment[.]” *Cnty. Materials Corp. v. Indiana Precast, Inc.*, ___N.E.3d___, No. 20A-PL-1683, 2021 WL 3730492 at *6 (Ind. Ct. App. Aug. 24, 2021), *not yet certified*. Thus, contrary to Thompson’s contention on appeal, the Jarboe parties’ motion to set aside the default judgment was not deemed denied on December 28, 2020, but was denied when the trial court ruled on that motion on February 18, 2021. And because the Jarboe parties filed their notice of appeal twenty-nine days later on March 19, their notice of appeal was timely. We therefore turn to the merits of the Jarboe parties’ contentions on appeal.

Issue One: Denial of Motion to Set Aside Default Judgment

[14] The Jarboe parties first allege that the trial court abused its discretion when it denied their motion to set aside the default judgment.³ As this Court has previously stated:

The decision whether to set aside a default judgment is given substantial deference on appeal. Our standard of review is limited to determining whether the trial court abused its discretion. 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.

Kmart Corp. v. Englebright, 719 N.E.2d 1249, 1253 (Ind. 1999) (internal citations omitted). When 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.*

[15] Indiana Trial Rule 60(B)(1) provides that a “judgment by default,” may be set aside based on a party’s “mistake, surprise, or excusable neglect” if the motion is filed within one year of the judgment⁴ and the moving party “allege[s] a

³ Thompson asserts that the Jarboe parties’ brief should be stricken as they “attempt to argue the merits of the Amended Complaint and the action of [Thompson’s] attorney[.]” Appellee’s Br. at 20. However, it is clear that the Jarboe parties’ argument on this issue is limited to whether the court abused its discretion when it denied their motion to set aside the default judgment, which is an issue properly before us on appeal.

⁴ There is no dispute that the Jarboe parties filed their Rule 60(B) motion within one year.

meritorious claim or defense.” On appeal, the Jarboe parties contend that the trial court abused its discretion when it denied their motion for relief from judgment because: 1) they established mistake or excusable neglect, 2) Jarboe had actively defended the case since its inception, 3) Thompson was not prejudiced by the Jarboe parties’ failure to timely answer the amended complaint, and 4) Thompson did not notify the Jarboe parties’ attorney that an answer was required.⁵ We address each argument in turn.

Mistake or Excusable Neglect

[16] On this issue, the Jarboe parties first allege that their attorney did not file an answer to the amended complaint based on an assumption that the amended complaint “only added new parties and not new causes of action.” Appellants’ Br. at 12. And they contend that the attorneys’ assumption “was justified as that was the reason given by [Thompson] in requesting leave to file an Amended Complaint.” *Id.* In other words, the Jarboe parties assert that their attorney’s assumption constituted a mistake or excusable neglect that entitle them to relief from the default judgment.

[17] There is no dispute that the Jarboe parties’ attorney received a copy of the amended complaint. And there is no dispute that the attorney simply relied on the statements contained within Thompson’s motion for leave to file an

⁵ We note that the trial court entered default judgment against both Jarboe and Smoke ‘M Jarbs on all claims. On appeal, the Jarboe parties do not suggest that the court should have partitioned the default judgment in any way.

amended complaint when he made the assumption about the amended complaint and decided not to file an answer. We acknowledge that it was the attorney's actions—or lack thereof—that resulted in the default judgment. However, “the negligence of an attorney is attributable to the client for Trial Rule 60(B) purposes, and attorney negligence will not support a finding of excusable neglect.” *Thompson v. Thompson*, 811 N.E.2d 888, 903-04 (Ind. Ct. App. 2004). Indeed, an attorney “can bind a client to a default judgment entered due to an attorney’s neglect.” *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1302 n.2 (Ind. 1998). A client “is bound by the action of the attorney, even though the attorney is guilty of gross negligence.” *Id.*

[18] Here, despite having received a copy of the amended complaint, the Jarboe parties’ attorney made an assumption and decided not to file a response, which resulted in Thompson filing a motion for default judgment. And even after having received the motion for default judgment, the Jarboe parties’ attorney still did not file an answer for several months. Thus, while it was a lack of response on the part of the attorney that resulted in the default judgment, the attorney’s inaction, even if negligent, is attributable to the Jarboe parties and will not support a finding of excusable neglect.⁶ *See Thompson*, 811 N.E.3d at 903-04. And the Jarboe parties have not directed us to any authority to demonstrate that an attorney’s inaction can support a finding of mistake. Under the facts of this case, we cannot say that the trial court abused its

⁶ We express no opinion as to whether the attorney’s conduct amounted to negligence.

discretion when it declined to find that the Jarboe parties had demonstrated a mistake or excusable neglect under Trial Rule 60(B).⁷

Jarboe's Defense of Case

- [19] Still, the Jarboe parties contend that the court abused its discretion when it denied their motion to set aside the default judgment because Jarboe had actively defended the case since its inception. To support their assertion, the Jarboe parties rely on this Court's opinion in *Snyder v. Tell City Clinic*, 391 N.E.2d 623 (Ind. Ct. App. 1979). In that case, this Court affirmed the trial court's denial of a plaintiff's motion for default judgment because "there were motions from both parties before the court, and discovery was occurring during the period of defendants' inaction on plaintiffs amended complaint." *Id.* at 627.
- [20] However, the Jarboe parties' reliance on *Snyder* is misplaced. While Jarboe answered the original complaint and participated in discovery at the inception of the case, unlike in *Snyder*, the Jarboe parties did not answer the amended complaint or otherwise participate in discovery during the relevant period of the Jarboe parties' inaction. Instead, after Thompson filed its amended complaint, the Jarboe parties did not take any action until they ultimately answered the amended complaint several months after Thompson had filed its motion for default judgment. We cannot say that the trial court abused its discretion when

⁷ Because the Jarboe parties did not demonstrate mistake or excusable neglect, we need not address their claim that they had a meritorious defense to Thompson's claims. See *Sanders Kennels, Inc. v. Lane*, 153 N.E.3d 262, 268 (Ind. Ct. App. 2020).

it denied the Jarboe parties' motion to set aside the default judgment despite Jarboe's initial participation in the case.

Lack of Prejudice

[21] The Jarboe parties next contend that the trial court abused its discretion when it denied their motion to set aside the default judgment because Thompson was not prejudiced by their failure to answer the amended complaint. Specifically, the Jarboe parties assert that it "is hard to imagine what additional information might have been forthcoming in [their] Answer to the new counts[.]" Appellants' Br. at 14. But the Jarboe parties do not cite any authority to support their assertion that a lack of prejudice is a ground to set aside a default judgment. As such, we conclude that they have not met their burden on appeal as to this question. *See* Ind. Appellate Rule 46(A)(8)(a).

Lack of Notice

[22] Finally, on this issue, the Jarboe parties assert that the court's denial of its motion to set aside the default judgment was improper because Thompson "did not give a heads-up" to the Jarboe parties' attorney that he needed to file an answer before filing its motion for default judgment. Appellants' Br. at 15. The Jarboe parties maintain that a "phone call or text to counsel notifying him that an appearance and answer was due would have been the courteous and civil course to take." *Id.*

[23] To support their assertion that Thompson was required to contact the Jarboe parties' attorney, the Jarboe parties rely on our Supreme Court's opinion in

Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999). In that case, the plaintiff served a copy of his complaint on the defendants at their place of business but did not provide a copy to the defendants' attorney. *Id.* at 1261. Six weeks later, the plaintiff filed for default judgment, which the trial court granted. Thereafter, the defendants' attorney filed an appearance and a motion for relief from judgment arguing, among other things, that his clients were entitled to relief from judgment because the actions of the plaintiff's attorney amounted to misconduct under Trial rule 60(B)(3). *Id.* The trial court disagreed and denied defendant's motion. *Id.*

[24] On appeal, the Supreme Court held that, while the Trial Rules only required the plaintiff's attorney to serve the party, the Rules of Professional Conduct gives rise to a duty to provide notice to the attorney, if known, before seeking any relief from the court. *Id.* at 1263. And because the plaintiff's attorney knew that the defendants had representation, the plaintiff's attorney's failure to contact the defendants' attorneys was "unacceptable." *Id.* The Court, therefore, held that the defendants were entitled to relief.

[25] However, the facts of *Smith* are readily distinguishable from the present case. Unlike in *Smith*, where the defendants' attorney did not receive notice of the pending lawsuit or the motion for default judgment, there is no dispute here that the Jarboe parties' attorney received a copy of both. Indeed, the Jarboe parties' attorney acknowledged that he had received a copy of the amended complaint but simply made an assumption about its contents and decided not to respond. Because the Jarboe parties' attorney had actual notice of the amended

complaint, we decline to impose on Thompson's attorney a duty to contact opposing counsel prior to filing a motion for default judgment. Because there is no dispute that the Jarboe parties' attorney received a copy of the amended complaint, we cannot say that the trial court abused its discretion when it denied the Jarboe parties' motion for default judgment even though Thompson did not alert the Jarboe parties' attorney that he was required to file an answer.

[26] In sum, the Jarboe parties have not demonstrated that an attorney's failure to read and respond to an amended complaint amounts to a mistake or excusable neglect under Trial Rule 60(B)(1). In addition, even though Jarboe participated in the lawsuit at its inception, neither of the Jarboe parties took any action to participate in the lawsuit after Thompson filed its amended complaint. Further, the Jarboe parties have not met their burden on appeal to demonstrate that any lack of prejudice to Thompson is a basis for a relief from judgment. Finally, because there is no dispute that the Jarboe parties' attorney received the amended complaint, Thompson's attorney was not required to notify the Jarboe parties' attorney that he was required to file an answer before it filed its motion for default judgment. Accordingly, we cannot say that the trial court abused its discretion when it denied the Jarboe parties' motion to set aside the default judgment.

Issue Two: Failure to Set a Hearing on Damages

[27] The Jarboe parties also assert that, even the if the court properly denied the motion to set aside the default judgment, the court still erred when it failed to set a hearing on the question of damages. Indiana Trial Rule 55(B) provides:

“If, in order to be enable the court to enter judgment or carry it into effect, it is necessary to take an account or to determine the amount of damages . . . the court may conduct such hearing” as it deems necessary. However, a trial court “is not required to hold a hearing if a hearing is not necessary to determine the amount of damages.” *Fitzpatrick v. Kenneth J. Allen and Assoc., P.C.*, 913 N.E.2d 255, 269 (Ind. Ct. App. 2009) (quotation marks omitted).

[28] The Jarboe parties maintain that, “[e]ven accepting the allegations in the Amended Complaint as true, [Thompson] is not entitled to treble damages[.]” Appellants’ Br. at 20. Specifically, the Jarboe parties assert that “a serious question exists whether the allegations contained in the Amended Complaint, even if true, permit the award of treble (or double) damages[.]”⁸ *Id.* at 21-22.

[29] However, the Jarboe parties did not raise the issue of damages during the hearing on Thompson’s motion for default judgment or in its motion to set aside the default judgment. Rather, the Jarboe parties raise this issue for the first time on appeal. The Jarboe parties’ failure to raise this issue to the trial court constitutes waiver of the issue on appeal. *See Allstate Inc. Co. v. Love*, 944 N.E.2d 47, 52 (Ind. Ct. App. 2011) (finding waiver of issue on appeal where the

⁸ In its amended complaint, Thompson sought \$8,000 in actual damages plus damages under Indiana’s civil conversion statute and the federal RICO Act. *See* Appellant’s App. Vol. 2 at 76. Following the default judgment, the trial court awarded Thompson its actual damages plus an additional \$8,000 in “treble” damages. *Id.* at 198. The court did not identify under which statute it awarded those additional damages. Nor did it explain why the so-called “treble” damages were in an amount equal to the actual damages plus an additional \$8,000 instead of three times the actual damages.

appellant failed to raise the question of damages to the trial court until after this Court had accepted jurisdiction).

Conclusion

[30] The trial court did not abuse its discretion when it denied the Jarboe parties' motion to set aside the default judgment. And the Jarboe parties have waived its argument that the trial court was required to hold a hearing on the question of damages. Accordingly, we affirm the trial court.

[31] Affirmed.

Riley, J., and Brown, J., concur.