MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Help At Home, LLC,
Appellant-Defendant,

v.

John Doe I, John Doe II, and Jane Doe
Appellee-Plaintiffs.

September 6, 2022

Court of Appeals Case No. 22A-CT-784

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No. 48C06-2110-CT-143

Mathias, Judge.

[1] Help At Home, LLC ("HAH") appeals the Madison Circuit Court's denial of its motion to set aside the default judgment entered against it on a complaint for damages filed by John Doe I, John Doe II, and Jane Doe. HAH raises a single

issue for our review, namely, whether the trial court erred when it denied its motion to set aside the default judgment. We affirm.

Facts and Procedural History

[2] HAH owns and operates a company in Madison County that serves, among others, people with developmental disabilities. In January 2020, Scott Delaney was charged with Level 4 child molesting in Grant County. While that charge was pending, HAH hired Delaney as a caregiver.

[3] John Doe II ("Son") is an adult living with Down Syndrome, and his parents are John Doe I ("Father") and Jane Doe ("Mother") (collectively, "Parents"). Parents had hired HAH to provide care to Son. From April to August of 2020, HAH assigned Delaney to be Son's caregiver. And from August 13 through August 20, Delaney sexually assaulted Son.

[4] On October 29, 2021, Parents and Son (collectively, "Appellees") filed a complaint against HAH. The complaint alleged claims for respondeat superior; negligent hiring, supervision, and retention of Delaney; and negligent infliction of emotional distress. HAH was served by certified mail on November 4. HAH did not file an answer, and on December 2, Appellees filed a motion for default judgment against HAH. The trial court granted that motion the same day.

[5] On January 21, 2022, HAH filed a motion to set aside the default judgment under Trial Rule 60(B)(1) and (8). Attached to its accompanying memorandum, HAH included an affidavit executed by Michelle Wersching, the director of risk management for HAH. In her affidavit, Wersching stated that, on November 7,

2021, the registered agent for HAH sent her the instant complaint. Wersching knew of an "open file in regard to the accusations against" Delaney, and she "thus thought [HAH's] counsel was aware of the lawsuit." Appellant's App. Vol. 2, p. 43. Accordingly, Wersching "did not contact counsel or forward the Complaint to their attention." *Id.* Wersching then stated that counsel for HAH contacted her on January 14, 2022, to see whether HAH had been served with the complaint.

[6] On February 4, Appellees filed a status report with the trial court and requested that the court hold HAH's motion in abeyance pending their deposition of Wersching. The court granted that request. And after taking Wersching's deposition, on March 7, Appellees filed their memorandum in opposition to HAH's motion to set aside the default judgment. Appellees argued that Wersching's deposition testimony showed that HAH was not entitled to have the default judgment set aside. In particular, Appellees pointed out that Ginger Levin, an in-house lawyer employed by HAH, knew about the instant complaint and had told Wersching in an email to send it to their defense attorneys, but Wersching "accidentally deleted" that email before she read it. *Id.* at 79. Appellees argued that Wershing's "inadvertence" did not warrant relief from the judgment. *Id.* at 53. Appellees also argued that HAH had not adequately alleged a meritorious defense to their claims.

[7] On March 9, the trial court denied HAH's motion to set aside the default judgment. On April 8, HAH filed a motion to reconsider the trial court's denial of its motion to set aside default judgment. HAH filed a notice of appeal the

same day. The trial court denied HAH's motion to reconsider, and this appeal ensued.

Discussion and Decision

[8] HAH contends that the trial court erred when it denied its motion to set aside the default judgment. In particular, HAH asserts that the court erred in denying the motion to set aside without permitting HAH to file a reply brief and without holding a hearing on HAH's motion. And HAH maintains that the evidence supports its motion to set aside the default judgment under both Trial Rule 60(B)(1) and (8). We cannot agree.

[9] Indiana Trial Rule 60(B) states in relevant part:

> 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;[and] . . .
>
> (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).

[10] We typically review a trial court's denial of a motion to set aside default judgment for an abuse of discretion, but here, where "the trial court ruled on a paper record without conducting an evidentiary hearing, we are 'in as good a position as a trial court to determine the force and effect of evidence.'" *Williams v. Tharp*, 934 N.E.2d 1203, 1215 (Ind. Ct. App. 2010) (quoting *Farmers Ins.*

Exch. v. Smith, 757 N.E.2d 145, 148 (Ind. Ct. App. 2001)). Thus, our review is de novo.

Trial Rule 60(D)

[11] First, HAH argues that the trial court "abused its discretion by ruling without a hearing, or allowing a reply brief, to consider evidence in support of HAH's Motion to Set Aside." Appellant's Br. at 21. In support, HAH points out that "'Trial Rule 60(D) generally requires trial courts to hold a hearing on any pertinent evidence before granting relief.'" *Id.* (quoting *Integrated Home Techs. v. Draper*, 724 N.E.2d 641, 643 (Ind. App. Ct. 2000)). But HAH ignores case law where this Court has held that the trial court did not err when it did not hold a hearing on a Trial Rule 60(B) motion. For instance, in *Williams*, we noted that "[a]ll parties [had] submitted evidentiary exhibits for the trial court's consideration, and Appellants have failed to direct us to any pertinent evidence that was not before the trial court when it ruled on their motion." 934 N.E.2d at 1214-15. And we reiterated that, "'[w]hen there is no pertinent evidence to be heard, a hearing is unnecessary.'" *Id.* at 1215 (quoting *Thompson v. Thompson*, 811 N.E.2d 888, 904 (Ind. Ct. App. 2004), *trans. denied*). Thus, we held that the trial court did not err when it did not hold a hearing.

[12] Likewise, here, the parties submitted evidence to the trial court with their memoranda. HAH did not request a hearing. On appeal, HAH does not direct us to any pertinent evidence that was not before the trial court when it ruled on its motion. Thus, we cannot say that the trial court erred when it denied HAH's motion without a hearing. *See id.* Further, HAH does not make cogent

argument or cite relevant authority to show that the trial court erred when it ruled before HAH had time to respond to Appellees' memorandum in opposition to HAH's motion.

Trial Rule 60(B)(1)

[13] Next, HAH contends that its failure to timely respond to the complaint was the result of excusable neglect, mistake, or surprise. As this Court has explained, "a Trial Rule 60(B)(1) motion is addressed to the trial court's equitable discretion, with the burden on the movant to affirmatively demonstrate that relief is necessary and just." *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1254 (Ind. Ct. App. 1999). "There is no general rule as to what constitutes excusable neglect under Trial Rule 60(B)(1)[,]" and "[e]ach case must be determined on its particular facts." *Id.* (citing *Boles v. Weidner*, 449 N.E.2d 288, 290 (Ind. 1983)).

[14] Examples of facts that have been held to constitute excusable neglect, mistake, or surprise include:

> "(a) [the] absence of a party's attorney through no fault of [the] party; (b) an agreement made with [the] opposite party, or his attorney; (c) conduct of other persons causing [a] party to be misled or deceived; (d) unavoidable delay in traveling; (e) faulty process, whereby [a] party fails to receive actual notice; (f) fraud, whereby [a] party is prevented from appearing and making a defense; (g) ignorance of the defendant; (h) insanity or infancy; (i) married [persons] deceived or misled by [the] conduct of [their spouses]; (j) sickness of a party, or illness of [a] member of a family."

Id. (quoting *Continental Assurance Co. v. Sickels*, 145 Ind. App. 671, 675, 252 N.E.2d 439, 441 (1969)).

[15] Here, HAH argues that Wersching's "mistake of fact" in believing that defense counsel and the insurance company already knew about the instant complaint was "compounded by a breakdown in communication with HAH's associate general counsel, Ginger Leaven[.]" Appellant's Br. at 22. And HAH analogizes the facts here with those in *Whittaker v. Dail*, 584 N.E.2d 1084 (Ind. 1992). In *Whittaker*, the plaintiff's negligence action was pending for three years before trial. The defendant's counsel withdrew shortly before trial, but the defendant was led to believe that his insurance company would represent him at trial. When neither defendant nor counsel for the defendant appeared at trial, the trial court granted plaintiff's motion for default judgment. The trial court then denied the defendant's motion to set aside the default judgment under Trial Rule 60(B)(1).

[16] On appeal, our Supreme Court described the defendant's evidence in support of his Trial Rule 60(B) motion as "clear and unequivocal." *Id.* at 1087. And the Court held 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." *Id.* However, the Court acknowledged that not "every breakdown in communication requires that a judgment be set aside." *Id.* (emphasis omitted).

[17] We decline HAH's invitation to follow *Whittaker* here. The evidence shows that Wersching was confused about whether the instant complaint was a new matter or one already being handled by HAH's defense counsel. However, Leaven unequivocally instructed Wersching to forward the complaint to defense counsel. Wersching did not follow that instruction. We hold that HAH's failure to timely respond to the complaint was not the result of excusable neglect, mistake, or surprise. *See, e.g.*, *Menard Inc. v. Lane*, 68 N.E.3d 1106, 1114 (Ind. Ct. App. 2017) (affirming trial court's denial of Trial Rule 60(B)(1) motion to set aside because store employee's failure to act on receipt of complaint or to pass on to appropriate person constituted neglect but not excusable neglect), *trans. denied*. The trial court did not err when it denied HAH's motion to set aside the default judgment under Trial Rule 60(B)(1).

Trial Rule 60(B)(8)

[18] Finally, HAH contends that we should grant its motion to set aside the default judgment under Trial Rule 60(B)(8) because "equitable considerations warrant[] relief from judgment[.]" Appellant's Br. at 27. As this Court has explained,

> "T.R. 60(B)(8) is an omnibus provision which gives broad equitable power to the trial court in the exercise of its discretion and imposes a time limit based only on reasonableness. Nevertheless, under T.R. 60(B)(8), the party seeking relief from the judgment must show that its failure to act was not merely due to an omission involving the mistake, surprise or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively. This circumstance must be other than those circumstances enumerated in the preceding subsections of T.R. 60(B)."

Indiana Ins. Co. v. Ins. Co. of N. Am., 734 N.E.2d 276, 279–80 (Ind. Ct. App. 2000) (quoting *Blichert v. Brososky*, 436 N.E.2d 1165, 1167 (Ind. Ct. App. 1982)), *trans. denied*. In sum, "'[t]hese residual powers under subsection (8) may only be invoked upon a showing of *exceptional circumstances justifying extraordinary relief*[.]'" *Id.* at 279 (quoting *Graham v. Schreifer*, 467 N.E.2d 800, 803 (Ind. Ct. App. 1984)) (emphasis original).

[19] HAH argues that "equitable considerations warranted relief from judgment [under Rule 60(B)(8)] because 'during the ongoing investigation [of allegations against Scott Delaney], [HAH] communicated with Plaintiffs directly [regarding] the allegations. Plaintiffs never notified [HAH] that they were planning to, or did indeed, file a lawsuit.'" Appellant's Br. at 27. And HAH asserts, for the first time on appeal, that relief is warranted because Appellees caused confusion by using pseudonyms rather than identifying themselves in the complaint.

[20] However, as the Appellees point out, *only one day* after Father had informed HAH about Delaney's sexual assault of Son, HAH told Father that "an internal investigation had been completed and was closed because the abuse was not substantiated." Appellant's App. Vol. 2, p. 71. Thereafter, the only communication from HAH to the Appellees was a single voicemail in September 2020, only a few weeks after the assaults. Thus, the evidence shows that HAH did not make any meaningful attempt to engage with the Appellees to resolve their claims prior to the initiation of the litigation. HAH has not

shown "exceptional circumstances justifying extraordinary relief" under Trial Rule 60(B)(8). *See Indiana Ins. Co.*, 734 N.E.2d at 279.

Conclusion

[21] HAH has not shown that the trial court erred when it ruled on its motion to set aside default judgment without a hearing. Neither has HAH shown that its failure to timely respond to Appellees' complaint was due to mistake, surprise, excusable neglect, or any reason justifying relief from the default judgment.[1] The trial court did not err when it denied HAH's motion to set aside the default judgment.

[22] Affirmed.

Bradford, C.J., and Brown, J., concur.

[1] Accordingly, we need not address the issue of whether HAH alleged meritorious defenses against Appellees' claims.