MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

City of Hobart,

Appellant-Defendant / Counterclaimant,

v.

Teddian Jackson, Individually, Montego Bay Restaurant Group, LLC and Hobart Holdings, LLC,

Appellees-Plaintiffs / Counterclaim-Defendants.

December 12, 2023

Court of Appeals Case No. 23A-PL-1241

Appeal from the Lake Superior Court

The Honorable Stephen E. Scheele, Judge

Trial Court Cause No. 45D05-2110-PL-700

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] The City of Hobart ("the City") appeals the Lake Superior Court's order setting aside the dismissal of a complaint for declaratory judgment filed by Teddian Jackson, individually; Montego Bay Restaurant Group, LLC; and Hobart Holdings, LLC (collectively, "Jackson"). The City presents one issue for our review, namely, whether the trial court abused its discretion when it granted Jackson's Trial Rule 60(B) motion to set aside the dismissal of his complaint.

[2] We affirm.

Facts and Procedural History

[3] In 2017, Jackson applied for a permit to "renovate and operate a restaurant" in Hobart. Appellant's App. Vol. 2, p. 19. As part of the permitting process, and pursuant to an ordinance,[1] the City's Sanitary District ("the District") charged Jackson $4,536 for a "Change of Use Tap on Fee" ("connection fee") related to sewer services. *Id.* Jackson executed a promissory note ("the Note") whereby he agreed to pay the District twelve monthly installments of $408.24. The District agreed to "set up a separate bill" for those payments "until [the] sewer/water connection [was] complete." *Id.* at 27. Jackson made the first installment payment. But the District did not thereafter bill Jackson for the additional

[1] Hobart Ordinance No. 2015-05 provides in relevant part that the City's Sanitary District "shall charge a Connection Fee for all new structures connecting to the District's collection system." Appellant's App. Vol. 2, p. 20. The parties dispute whether Jackson's renovation of an existing structure constituted a "new structure" under the ordinance.

payments or otherwise seek payment, and Jackson did not make any additional payments under the Note.

[4] In May 2021, Jackson applied for a permit for an "expansion project" unrelated to the 2017 renovation. Appellant's Br. at 23 n.6. The City "refused" to grant that permit application unless Jackson paid the balance owing on the Note. Appellant's App. Vol. 2, p. 20. Accordingly, in October 2021, Jackson filed a complaint seeking a declaratory judgment and injunctive relief. In particular, Jackson alleged that the City misinterpreted the ordinance in assessing the connection fee and that the Note was void. The City filed an answer and counterclaim seeking damages under the Note. Jackson did not respond to the counterclaim. However, in early 2022, Jackson's attorney and the City's attorney engaged in preliminary settlement negotiations. And Jackson and Hobart's Mayor also discussed a possible settlement. But those negotiations did not come to fruition. Nonetheless, the City ultimately granted Jackson the new permit.

[5] In January 2023, the trial court issued a rule to show cause order stating in relevant part that

> there has been a failure to comply with the Indiana Rules of Procedure in that no action has been taken in this case for a period of sixty (60) days or more and pursuant to T.R. 41(E), the Court now orders a hearing held on February 24, 2023[,] at 10:00 AM for the purpose of dismissing this case.

Id. at 46. At 5:36 p.m. on February 23, Jackson filed with the trial court his "Consent to the Entry of Dismissal Pursuant to Trial Rule 41(E)" requesting that the court dismiss his complaint "without prejudice[.]" *Id.* at 47.

[6] Neither Jackson nor his counsel attended the hearing on February 24. The City, by counsel, attended the hearing, at the conclusion of which the court dismissed Jackson's complaint *with* prejudice. The trial court noted that the City's counterclaim was not dismissed. On February 25, Jackson moved to dismiss the City's counterclaim for failure to prosecute under Trial Rule 41(E). And on March 3, the City filed a motion for default judgment on its counterclaim.

[7] On March 4, Jackson filed a motion for a change of judge, which the trial court granted. After the case was transferred to the new judge, Jackson filed a motion to set aside the dismissal of his complaint pursuant to Trial Rule 60(B)(1) (mistake, surprise, or excusable neglect) and (3) (fraud, misrepresentation, or misconduct). Jackson argued that: he had a meritorious claim because the ordinance did not authorize a fee for a structure he was remodeling; his failure to attend the Trial Rule 41(E) hearing was due to excusable neglect; and dismissal without prejudice was appropriate because he believed he and the Mayor had settled the dispute. In support of his motion, Jackson submitted an affidavit he prepared, as well as an affidavit by his attorney. The City moved to strike certain paragraphs of Jackson's affidavit and the entirety of his attorney's affidavit.

[8] Following a hearing on all pending motions, the trial court granted the City's motion to strike; denied the City's motion for default judgment on its counterclaim; denied Jackson's motion to dismiss the City's counterclaim; and granted Jackson's motion to set aside the dismissal of his complaint. This appeal ensued.

Discussion and Decision

[9] The City contends that the trial court abused its discretion when it reinstated Jackson's complaint under Trial Rule 60(B).[2] Our standard of review is well settled:

> A grant of equitable relief under Ind. Trial Rule 60 is within the discretion of the trial court. An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. When reviewing the trial court's determination, we will not reweigh the evidence.
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> *KWD Industrias* [*SA DE CV v. IPM LLC*], 129 N.E.3d [276,] 280 [(Ind. Ct. App. 2019)] (internal citations omitted). "An abuse of discretion will not have occurred so long as there exists even slight evidence of mistake, surprise, or excusable neglect." *Destination Yachts, Inc. v. Pierce*, 113 N.E.3d 645, 655 (Ind. Ct. App. 2018) (citing *Stemm v. Estate of Dunlap*, 717 N.E.2d 971, 974

[2] To the extent the City argues that the trial court properly dismissed Jackson's complaint under Trial Rule 41(E), that issue is subsumed by the Trial Rule 60(B) motion to set aside the dismissal. In other words, there is no apparent dispute that the trial court had acted within its discretion when it dismissed the complaint under Trial Rule 41(E). Rather, the issue on appeal is whether the court abused its discretion when it reinstated the complaint under Trial Rule 60(B). *See* T.R. 41(F) ("A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)").

(Ind. Ct. App. 1999)). "The burden is on the movant to establish grounds for Trial Rule 60(B) relief." *Id.*

Logansport/Cass Cnty. Airport Auth. v. Kochenower, 169 N.E.3d 1143, 1149 (Ind. Ct. App. 2021).

[10] Trial Rule 60(B) provides in relevant part that a trial court may set aside a judgment for: (1) mistake, surprise, or excusable neglect; or (3) fraud, misrepresentation, or other misconduct of an adverse party. In his motion to set aside the dismissal, Jackson argued that both subsection (1) and (3) warranted reinstatement of his complaint. In its order granting that motion, the trial court did not specify whether it was granting Jackson's motion under subsection (1) or (3) or both.

[11] As Appellant, it is the City's burden to demonstrate that the trial court erred. *See Vanderkooi v. Echelbarger*, 250 Ind. 175, 235 N.E.2d 165, 167-68 (1968). In its brief on appeal, the City does not make any specific argument under either subsection (1) or (3). Rather, the City cites only "Trial Rule 60(B)" in support of its argument. And, while the City argues that Jackson "has failed to show anything beyond Inexcusable Neglect," which appears to address Trial Rule 60(B)(1), the City makes no argument addressing Jackson's alternative allegations of fraud and misrepresentation under Trial Rule 60(B)(3). Appellant's Br. at 38. The City addresses those issues for the first time in its Reply Brief, but the law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived. *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d

968, 977 (Ind. 2005). Accordingly, the City has waived this issue for our review. *See id.*; *see also* Ind. Appellate Rule 46(A)(8).

[12] Waiver notwithstanding, we briefly address the merits of the City's contentions on appeal. The City asserts that Jackson "has failed to show anything beyond Inexcusable Neglect." Appellant's Br. at 38. In particular, the City argues that Jackson is not entitled to reinstate his complaint because he: did not prosecute his complaint; did not respond to the City's counterclaim; and did not appear at the hearing on the motion to dismiss. And the City rejects Jackson's argument that he agreed to dismiss his complaint because he believed that the parties had settled.

[13] As this Court has stated,

> 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.*

Biodynamic Extraction, LLC v. Kickapoo Creek Botanicals, LLC, 187 N.E.3d 295, 299 (Ind. Ct. App. 2022).

[14] Here, the trial court did not make findings in support of its order reinstating the complaint. But Jackson argued that he did not appear for the Trial Rule 41(E) hearing because he believed that the parties had settled their claims ("mistake" or "excusable neglect"). And Jackson argued that the City was not authorized to assess the connection fee under the ordinance ("fraud" or "misrepresentation").

[15] The City maintains that

> Jackson is charged with the knowledge that: a) he was in default as to City of Hobart's Counterclaim; b) he and his attorney had not concluded a written, executed settlement release document with City of Hobart, least of all on the terms set forth by City of Hobart; c) he had not entered a stipulation to dismiss his action with prejudice based upon any such alleged settlement, and City of Hobart's Counterclaim was still pending; and d) the Court had required that he appear and show cause why his action should not be dismissed with prejudice.

Appellant's Br. at 41. And the City asserts that Jackson has not shown that he has a meritorious claim. But the City's argument amounts to a request that we reweigh the evidence, which we cannot do on appeal. *Kochenower*, 169 N.E.3d at 1149.

[16] First, while Jackson did not file a timely response to the City's counterclaim, default is discretionary but not mandatory. *See Avery v. Avery*, 953 N.E.2d 470, 472 (Ind. 2011) (stating that a party "*may* be defaulted" for failure to file a responsive pleading) (citing T.R. 55(A)). Second, Jackson's alleged confusion

regarding settlement negotiations is not necessarily undermined, as a matter of law, by the lack of an executed settlement release document.

[17] For all these reasons, we cannot say that the trial court abused its discretion when it granted Jackson's motion to set aside the dismissal of his complaint.[3] While we may not have granted the motion if we were sitting as the trial court, we cannot say that the court's decision is clearly against the logic and effect of the facts and inferences supporting the judgment for relief.

[18] Affirmed.

Riley, J., and Crone, J., concur.

[3] To the extent the City purports to appeal the trial court's denial of its motion for default judgment on its counterclaim, the City does not present any discrete, cogent argument in support thereof. The City's statement of the issues lists this purported second issue, but there is no corresponding analysis in the argument section of the brief. Thus, we do not address that issue.