MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Michael W. Phelps
Stewart Phelps Wood
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Bette J. Peterson
Cynthia A. Muse
State Farm Litigation Counsel
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

James Neil,

Appellant,

v.

Joe Byers and Debra Byers,

Appellees.

August 31, 2021

Court of Appeals Case No. 21A-CT-431

Appeal from the Marion Superior Court

The Honorable James A. Joven, Judge

Trial Court Cause No. 49D13-1909-CT-39600

Brown, Judge.

[1] James Neil appeals the denial of his Motion to Vacate Order Granting Motion for Summary Judgment. We affirm.

Facts and Procedural History

[2] On September 23, 2019, Neil filed a Complaint for Damages.[1] Also on that date, Dean J. Arnold ("Attorney Arnold") filed an appearance on behalf of Neil. On September 26, 2019, Michael W. Phelps ("Attorney Phelps") filed an appearance on behalf of Neil. On October 11, 2019, Bette J. Peterson ("Attorney Peterson") filed an appearance on behalf of Joe and Debra Byers. On October 28, 2019, Attorney Phelps filed an updated appearance indicating a change of his contact information. On September 11, 2020, the parties filed an Agreed Notice for Dispositive Motions which stated: due to Covid-19, the deposition of Neil had been postponed until September 2, 2020; the deposition had not yet been transcribed; once transcribed, Neil had thirty days to review it; the Byerses anticipated that a dispositive motion would be filed based upon the deposition testimony; and Attorney Arnold, counsel for Neil, had agreed to an extension of the deadline for filing dispositive motions until November 13, 2020. On November 4, 2020, the Byerses filed a motion for summary judgment, a designation of evidence, and a memorandum in support of the

[1] The appellant's appendix does not include a copy of the complaint. In the complaint available through Indiana's Odyssey Case Management System, Neil alleged that, on or about December 22, 2018, he was assisting his neighbor with removing a washer and dryer from the basement of her rental property owned by Joe and Debra Byers, he slipped and fell down the steps, the Byerses negligently failed to maintain a safe stairwell, and it was their duty to use ordinary care and diligence to maintain the premises in a condition reasonably safe for its intended uses.

motion.[2] On December 11, 2020, the trial court issued an order granting the Byerses' motion for summary judgment.

[3] On December 12, 2020, Neil filed a "Plaintiff's Motion to Vacate Order Granting Motion for Summary Judgment and Motion for Extension of Time to File a Response," stating that Attorney Phelps did not receive service of the Byerses' November 4, 2020 summary judgment motion and supporting documentation "via IEFS or by any other manner."[3] Appellant's Appendix Volume II at 25. On December 14, 2020, the Byerses filed an objection which stated that Neil, by and through his counsel Attorney Arnold, was served the motion for summary judgment and referred to an attached exhibit. The exhibit, titled "Odyssey File & Serve – Envelope Receipt," indicates that Attorney Peterson, on behalf of the Byerses, filed documents on November 4, 2020, that the descriptions of the filings stated "Motion for Summary Judgment," "Memorandum of Law in Support of Defendant's [sic] Motion for Summary Judgment," and "Designation of Evidence in Support of Defendant's [sic] Motion for Summary Judgment," and that the names of the filed documents were "Neil – Motion for Summary Judgment.pdf," "(Neil) MSJ MEMO.pdf," and "Neil designation of Evidence.pdf." *Id*. at 33-35. Under "eService

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[2] The Certificate of Service attached to the motion and memorandum indicates that Attorney Peterson certified the documents were served upon Attorney Phelps and Attorney Arnold via the Indiana E-Filing System.

[3] Ind. Trial Rule 86(A)(7) provides: "*Indiana E-Filing System ('IEFS').* Indiana E-Filing System is the system of networked hardware, software, and service providers approved by the Supreme Court for the filing and service of documents via the Internet, into the Case Management System(s) used by Indiana courts."

Details," the Envelope Receipt, with respect to each of the documents, states "Sent" under the heading "Status," includes Attorney Arnold's name under the heading "Name," states "Yes" under the heading "Served," and states "11/5/2020" under the heading "Date Opened." *Id.* The Envelope Receipt does not list Attorney Phelps's name. On December 17, 2020, Neil filed a reply which cited Ind. Trial Rule 5(B)[4] and argued the rule "requires service on all counsel of record." *Id.* at 38. On December 22, 2020, the Byerses filed a response arguing that Neil "failed to show that he was not aware of the Motion for Summary Judgment as one of his counsels was properly served." *Id.* at 45.

[4] On January 27, 2021, the court held a hearing. Attorney Phelps stated that he was acting as lead counsel for Neil and was not served with the summary judgment motion and designation of evidence.[5] The court asked "what about co-counsel? Did he receive anything," and Attorney Arnold responded:

> Your Honor, and that's – that's me. The answer is yes, we did, there's – there's no doubt we received it. Uhm, we uh – Mike's [Attorney Phelps] been lead counsel dealing – dealing with Bette [Attorney Peterson] since the beginning and uh we assumed that it was also that he received a copy of it as well and we didn't double check, and so there's nothing else I can say other than we did get it, yes, but we had assumed since Mike and Bette had been dealing with each other as

[4] Ind. Trial Rule 5(B) provides in part: "Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party is ordered by the court."

[5] As the Byerses note in their brief, the appearance forms filed by Attorney Phelps and Attorney Arnold do not indicate a designation of "lead" counsel.

> lead counsel and we were simply uhm-uh sitting second chair that it had been served on Mike.

Transcript Volume II at 5-6. The court noted that it had previously issued a case management order which included a deadline for dispositive motions, that the parties at some point agreed that deadline would be shifted, and that a notice was filed on September 11, 2020, stating the deadline was November 13, 2020. The court asked "Mr. Phelps, did you participate in that conversation where you agreed on behalf of [Neil] to extend the dispositive motion deadline until November 13th," and Attorney Phelps replied "Yes, your Honor, I did." *Id*. at 6. When asked "[a]nd when November 13 rolled around and you didn't see [a] dispositive motion from the [Byerses], what'd you do," he stated "assumed, none had been filed because I had not been served with one." *Id*. The court stated "you're aware, of course, of the obligation for counsel representing parties . . . need to remain abreast of what's happening in the case and they do so by reviewing the chronological case summary that is now in fact online and available, not only through Odyssey, but though MyCase," and Attorney Phelps replied "I do, and – and I do, I just did not during just that time frame. I do check them, your Honor." *Id*. Attorney Peterson indicated that she had sent an email to Attorney Phelps on September 29, 2020, stating that she would be filing a motion for summary judgment.[6] On February 10,

[6] At the court's request, Attorney Peterson filed a supplemental exhibit after the hearing which contained a copy of the email.

2021, the trial court entered an order denying Neil's motion to vacate the entry of summary judgment.

Discussion

[5] Neil asserts the trial court erred in denying his motion to vacate summary judgment. He contends that his motion "was, in substance, a Trial Rule 60(B) motion for relief from judgment" and asserts that "the doctrine of excusable neglect should relieve [him] from a harsh result such as dismissal pursuant to T.R. 56." Appellant's Brief at 8, 11. He also argues that Trial Rule 5(B) "is explicit that each attorney who represents a party shall be served." Appellant's Brief at 10. The Byerses argue in part that Neil has failed to make a prima facie showing of a meritorious defense and that counsel of record has a duty to keep abreast of case events.

[6] Ind. Trial Rule 60(B) provides, "[o]n 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 . . . [or] (8) any reason justifying relief from the operation of the judgment . . . ." Rule 60(B) further provides that "[a] movant filing a motion for reasons (1) . . . and (8) must allege a meritorious claim or defense."

[7] Even assuming any neglect by Neil's counsel was excusable, Neil has not demonstrated that he is entitled to relief under Trial Rule 60(B) as Rule 60(B) requires a movant to allege a meritorious claim or defense. The Indiana Supreme Court has held "Rule 60(B)'s requirement of a meritorious defense . . .

merely requires a prima facie showing of a meritorious defense, that is, a showing that will prevail until contradicted and overcome by other evidence" and the movant "need only present evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the judgment to stand." *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73-74 (Ind. 2006) (citation and quotation marks omitted). This Court has held that, to successfully allege a meritorious claim or defense pursuant to Rule 60(B), a party "must state a factual basis for his purported meritorious claim or defense." *Logansport/Cass Cty. Airport Auth. v. Kochenower*, 169 N.E.3d 1143, 1149 (Ind. Ct. App. 2021). We noted that "mere conclusory statements will not suffice under the Rule" and that "such allegations may be satisfied when the moving party 'state[s] enough facts to give a court an opportunity to measure whether the claim or defense has any potential.'" *Id*. at 1148-1149 (citing 12 MOORE'S FEDERAL PRACTICE, § 60.24[2] (3d ed. 1997)). It is for the trial court to determine whether the moving party has made such a prima facie showing. *Id*. at 1149. Neil's motion to vacate the entry of summary judgment did not allege a meritorious claim or defense. He did not allege any evidence that, if credited, would demonstrate that a different ruling on summary judgment would be reached or allege any "facts to give a court an opportunity to measure whether the claim or defense has any potential." *See id*. at 1148-1149 (citing 12 MOORE'S FEDERAL PRACTICE, *supra*, at § 60.24[2]). We cannot conclude that the court erred in denying Neil's motion to vacate the entry of summary judgment.

[8] For the foregoing reasons, we affirm the trial court.

[9] Affirmed.

Najam, J., and Riley, J., concur.