MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE
COURT OF APPEALS OF INDIANA

David Kelly,
Appellant-Plaintiff,

v.

Paul Goldberg and The Crown Hill Cemetery d/b/a Crown Hill Cemetery,[1]
Appellees-Defendants.

March 7, 2023

Court of Appeals Case No. 22A-CT-2266

Appeal from the Marion Superior Court

The Honorable Kurt Eisgruber, Judge

Trial Court Case No. 49D06-2105-CT-17166

[1] Neither Paul Goldberg nor The Crown Hill Cemetery d/b/a Crown Hill Cemetery have filed briefs in this appeal. However, "[a] party of record in the trial court . . . shall be a party on appeal." Ind. Appellate Rule 17(A).

Memorandum Decision by Senior Judge Shepard
Judges May and Pyle concur.

Shepard, Senior Judge.

[1] David Kelly appeals from the trial court's order granting Paul Goldberg's Verified Motion to Set Aside Default Judgment, contending the court abused its discretion and erred as a matter of law. We agree, and therefore reverse and remand with instructions.

Facts and Procedural History

[2] The facts, as taken from Kelly's complaint, reflect that on August 10, 2019, Kelly was riding his bicycle on roadways within Crown Hill Cemetery when an unleashed dog owned by Goldberg ran into the roadway and struck Kelly's bicycle, knocking him to the ground and causing serious injuries. Crown Hill Cemetery, which was open to the public, "had in place published visitor rules prohibiting the presence of unleashed dogs." Appellant's App. Vol. II, p. 12. And Revised Code of the Consolidated City of Indianapolis and Marion County Section 531-102(c)(2) (2009) provides a penalty for animals at large "approach[ing] a person in . . . an apparent attitude of attack . . . result[ing] in serious injury to any person . . . ."

[3] On May 21, 2021, Kelly filed his civil suit against Goldberg and Crown Hill seeking money damages for his injuries. The Marion County Sheriff served the complaint and summons on Goldberg at 3247 Boulevard Place, Indianapolis, Indiana, and Goldberg was also served by mail at that address. On July 14th,

Kelly moved for a default judgment against Goldberg, but the motion was denied for "Insufficient documentation. No affidavit of debt or military service." Appellant's App. Vol. II, p. 19. Kelly then filed a "Renewed Motion for Default Judgment as to Defendant Paul Goldberg Only" with supporting affidavits on December 14th. The court issued its order entering default judgment and awarding damages against Goldberg on January 24, 2022. *Id.* at 34.

[4] Next, on February 8, 2022, Kelly filed a Motion for Additur to Judgment as to Defendant Paul Goldberg Only, which the trial court set for hearing on April 4, 2022. Kelly's motion and the trial court's order were served on Goldberg by United States mail, postage prepaid. At the hearing, Kelly appeared and testified to his damages and overall condition. On June 30, 2022, the court issued an order awarding Kelly damages totaling $335,560. Kelly filed a lis pendens notice seeking to "foreclose on a judgment lien on the subject real estate that arises from the Judgment [Kelly] obtained against [Goldberg]." *Id.* at 43.

[5] On August 23, 2022, Goldberg filed a Verified Motion to Set Aside Default Judgment, listing his address as 3247 Boulevard Place, Indianapolis. Goldberg provided his reasons for setting aside the default judgment, stating, "I did not understand court proceedings, [and] cannot afford a lawyer. I respectfully ask the court for the [opportunity] to put the truth on the record." *Id.* at 47. He further affirmed under the penalties of perjury that he had a valid legal defense to Kelly's claim, stating, "The plaintiff has knowingly and intentionally made

false statements in the affidavit committing perjury and fraud." *Id.* Seven days later, without holding a hearing, the court granted Goldberg's motion, advising that "Mr. Goldberg should contact Legal Aid or the Indianapolis Bar Association for referrals for counsel." *Id.* at 10. This appeal ensued.

Discussion and Decision

[6] Here, where an appellee has not submitted a brief, "we do not undertake the burden of developing arguments for the appellee." *Damon Corp. v. Estes*, 750 N.E.2d 891, 892-93 (Ind. Ct. App. 2001). We may reverse the trial court if the appellant can establish prima facie error, which, in this context, means "'at first sight, on first appearance, or on the face of it.'" *Id.* (quoting *Johnson Cnty. Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind. Ct. App. 1985). If the appellant cannot meet that burden, we must affirm. *Id.*

[7] On appeal, Kelly argues the trial court "erred as a matter of law, in that it abused its discretion by granting Goldberg's motion summarily, without receiving from Goldberg any affidavit, testimony or other evidence" to establish that his failure to respond was the result of mistake, surprise, or excusable neglect. Appellant's Br. p. 6. Kelly further argues the court abused its discretion and erred as a matter of law by granting Goldberg's request when his motion "did not present sufficient averment, which, if credited, demonstrated that a different result would be reached if the case were retried on the merits." *Id.*

[8] In his motion, Goldberg did not indicate the exact subsection of Indiana Trial Rule 60(B) that would entitle him to relief from judgment. *See* Appellant's App. Vol. II, p. 47. However, a "litigant's failure to specify the exact paragraph under which he seeks relief will not defeat his request for relief from judgment or dismissal *if he can make an adequate showing that there are sufficient grounds to support his motion*." *Greengard v. Indiana Lawrence Bank*, 556 N.E.2d 1373, 1375 (Ind. Ct. App. 1990) (emphasis added). Goldberg has not made such a showing.

[9] Indiana Trial Rule 60(B)(1) provides "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 judgment and the moving party "allege[s] a meritorious claim or defense." "A motion under Rule 60(B)(1) 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." *KWD Industrias SA DE CV v. IPM LLC*, 129 N.E.3d 276, 281 (Ind. Ct. App. 2019) (citing *Kmart v. Englebright*, 719 N.E.2d 1249, 1254 (Ind. Ct. App. 1999), *trans. denied*).

[10] Further, our Supreme Court has stated a default judgment,

> is not generally favored, and any doubt of its propriety must be resolved in favor of the defaulted party. It is an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants.

Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001) (internal quotation marks and citations omitted).

[11] "Trial Rule 60(D) generally requires trial courts to hold a hearing on any pertinent evidence before granting relief." *Integrated Home Tech., Inc. v. Draper*, 724 N.E.2d 641, 643 (Ind. Ct. App. 2000). "Where there is no 'pertinent evidence,' however, a hearing is unnecessary." *Id.* (quoting *Public Serv. Comm'n v. Schaller*, 157 Ind. App. 125, 133-34, 299 N.E.2d 625, 630 (1973)). In the present case, the court's order granting relief was entered a week after Goldberg's request was filed without a response from Kelly or a hearing. For reasons apparent from Kelly's argument on appeal, a hearing would not have been futile because pertinent evidence exists.

[12] First, Kelly contends the court erred by summarily granting Goldberg's one-page request because he appears to claim "excusable neglect from ignorance" by stating that "I did not understand court proceedings . . . ." Appellant's Br. p. 7. Contrary to that statement, there is evidence that after an ordinance violation was filed against Goldberg in Marion County, he entered into an agreed judgment and order with the City of Indianapolis in Cause Number 49D04-2010-OV-36334. Goldberg admitted that he was in violation of Revised Code section 531-102(c)(1) ("Animals at large prohibited; penalties") as alleged and agreed to pay a civil penalty of $500 plus court costs. *See City of Indianapolis, Ind. v. Paul Goldberg*, Cause Number 49D04-2010-OV-36334 (Agreed Judgment and Order filed on December 28, 2020).

[13] Thus, Goldberg entered into an agreed judgment and order in his ordinance violation proceedings for a different subsection of the same ordinance alleged in Kelly's complaint. Had the court held a hearing in this matter, it could have considered "the unique factual background" of this case and could have discovered, contrary to Goldberg's assertion, his prior experience with court proceedings.[2] *See Coslett v. Weddle Bros. Const. Co., Inc.*, 798 N.E.2d 859, 861 (Ind. 2003) (quoting *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332, 340 (Ind. 1983)).

[14] Additionally, Goldberg's lack of understanding of court proceedings does not entitle him to relief under Trial Rule 60(B). *See Baker v. Paschen*, 188 N.E.3d 486, 491 (Ind. Ct. App. 2022) ("simply not knowing the rules is insufficient to establish excusable neglect under Trial Rule 60(B)."), *trans. denied*. And Goldberg's bald assertion that he "cannot afford an attorney[]" is not supported by any evidence. Appellant's App. Vol. II, p. 47. As Goldberg did not meet his burden to show sufficient grounds for relief under Rule 60(B) in this regard, the court abused its discretion in setting aside the default judgment on these procedural grounds. *See Baker,* 188 N.E.3d at 491. ("burden is on the movant to show sufficient grounds for relief under Indiana Trial Rule 60(B).").

[15] Next, we turn to Kelly's argument that Goldberg did not present a "sufficient averment, which, if credited, demonstrated that a different result would be

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[2] Kelly directs us to a case filed in the United States District Court for the Southern District of Indiana in which Goldberg was the plaintiff. Appellant's Br. pp. 7-8.

reached if the case were retried on the merits." Appellant's Br. p. 6. Goldberg stated that his "valid legal defense to [Kelly's] claim" was that Kelly "has knowingly and intentionally made false statements in the affidavit committing perjury and fraud." Appellant's App. Vol. II, p. 47.

[16] We have set forth the rule used for assessing the sufficiency of the allegation of a meritorious claim or defense as follows:

> Trial Rule 60(B) provides that a movant "must allege a meritorious claim or defense" when he seeks relief under Rule 60(B)(1); while mere conclusory statements will not suffice under the Rule, neither must the movant prove an asserted meritorious claim or defense. Rather, as stated in Moore's Federal Practice, 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." [12] Moore's Federal Practice, supra, at § 60.24[2][(3d ed 1997)].

Logansport/Cass Cnty Airport Auth. v. Kochenower, 169 N.E.3d 1143, 1148-49 (Ind. Ct. App. 2021). The widespread use of this rule is evident from its inclusion in Moore's Federal Practice.

[17] Here, Goldberg's allegation does not state "enough facts to give a court an opportunity to measure whether the claim or defense has any potential." *Id.* Indeed, Goldberg's request is devoid of facts, consisting only of assertions. And this lack of facts deprived the court of an opportunity to measure whether the claim or defense has any potential. Consequently, the court abused its discretion in granting Goldberg relief under Trial Rule 60(B).

Conclusion

[18] In light of the foregoing, we reverse the trial court's order granting Goldberg's motion to set aside default judgment, and direct the court to reinstate its default judgment in favor of Kelly.

[19] Reversed and remanded with instructions.

May, J., and Pyle, J., concur.