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IN THE

COURT OF APPEALS OF INDIANA

Legacy Builders Indiana, Inc. and as amended Legacy Builders Indiana, LLC, et al,

Appellants-Defendants,

v.

Christopher Crocker and Beth Anne Robards-Crocker,

Appellees-Plaintiffs.

April 29, 2022

Court of Appeals Case No. 21A-CT-2255

Appeal from the Clay Circuit Court

The Honorable Joseph D. Trout, Judge

Trial Court Cause No. 11C01-2008-CT-469

Tavitas, Judge.

Case Summary

[1] Legacy Builders Indiana, Inc. ("Legacy Builders"), and Jonathon D. Douglas ("Douglas"), individually and d/b/a Legacy Builders Indiana, Inc.,

(collectively, "Defendants") appeal the trial court's denial of their motion to set aside a default judgment in favor of Christopher Crocker and Beth Anne Robards-Crocker (the "Crockers"). The trial court held a hearing on Defendants' motion to set aside the default judgment on the day after the motion was filed without notice to the Defendants and denied the motion to set aside. We conclude that: (1) the trial court abused its discretion by holding a hearing without notice to the Defendants; and (2) the trial court erred by denying the motion to set aside the default judgment where the trial court lacked personal jurisdiction. Accordingly, we reverse and remand.

Issues

[2] Defendants raise two issues, which we restate as:

> I. Whether the trial court erred by conducting a hearing on the motion to set aside the default judgment without notice to the Defendants.
>
> II. Whether the trial court erred by denying the motion to set aside the default judgment because the trial court lacked personal jurisdiction due to the Crockers' failure to serve a summons with the complaint.

Facts

[3] On August 5, 2020, the Crockers filed a complaint against Defendants regarding Legacy Builders' remodeling project at the Crockers' residence in Poland, Indiana. On August 25, 2020, the Sheriff's Department filed a return, which provided that the complaint was served by "D/M Copy" at an address in

Franklin, Indiana. Appellants' App. Vol. II p. 8. The record does not indicate that a summons was filed or served.

[4] On October 23, 2020, the Crockers filed a motion for default judgment "without notice" against Defendants. *Id.* at 10. On October 26, 2020, the trial court found that "[s]ervice was perfected on the Defendant's [sic] by Sheriff, delivery on August 25, 2020;" granted default judgment against Legacy Builders; and set the matter "for hearing on whether or not to enter judgement [sic] individually against Defendant, Jonathon D. Douglas." *Id.* at 12. The trial court also set the matter for a hearing on damages.

[5] On February 19, 2021, the trial court held the damages hearing, at which Defendants did not appear. The trial court issued its order on the damages hearing on May 13, 2021, and entered judgment against Defendants "jointly and severally" in the amount of $22,969.65. Appellees' App. Vol. II p. 16. The Crockers filed a motion for proceedings supplemental, and the trial court set the matter for hearing on September 1, 2021. On August 31, 2021, Defendants filed a motion to continue the September 1, 2021 hearing, which the trial court granted and rescheduled for September 16, 2021.

[6] On September 15, 2021, Defendants filed a motion to set aside the default judgment. Defendants alleged that: (1) the Crockers did not file or serve a summons with the complaint; (2) Defendants did not receive a copy of the motion for default judgment; and (3) the motion for default judgment does not contain a certificate of service. On the same day, Defendants also filed a

motion to continue the proceedings supplemental hearing, which was scheduled for the next day. The chronological case summary does not reflect that the trial court granted or denied the motion to continue.

[7] Defendants did not appear for the scheduled proceedings supplemental hearing. Although the trial court did not give Defendants notice, it conducted a hearing on the motion to set aside the default judgment, instead of on the proceedings supplemental. The trial court denied Defendants' motion to set aside the default judgment but reset the hearing on the proceedings supplemental for October 4, 2021, and issued the following written order:

> Matter comes before the Court for two reasons; the first issue before the Court [is] the Defendant(s) motion to set aside default judgement. Defendant(s), nor counsel appear. Plaintiff, Beth Crocker appears by B. Lee Reberger. Argument heard. Hearing called and conducted. The Court being duly advised in the premises now DENIES the Defendant(s) request to set aside the default judgement. The second issue before the Court is proceedings supplemental to execution. The Court does note that as of yesterday 09/15/2021 the Defendant(s), Legacy Builders Indiana, Inc., and Jonathon D. Douglas moved to continue the hearing on proceedings supplemental to execution however, that motion was not granted. The Court can assume that the Defendant(s) counsel assumed that it would be granted and therefore simply resets this matter for hearing on October 4, 2021 at 3:00 p.m.

Appellants' App. Vol. II p. 26.

[8] Defendants filed a motion to reconsider and alleged:

> 6. That Defendants' counsel communicated with Plaintiffs' counsel, and both had agreed that the procedural supplement matter should be continued until a decision was rendered on the Motion to Set Aside the Default Judgment.
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> 7. That Plaintiffs' counsel informed Defendants' counsel that he needed time to prepare for such hearing and that one day was not adequate time.
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> 8. That the Court set the hearing on the Motion to Set Aside the Default Judgment on September l6, 2021, at 3:00 P.M.
>
> 9. That Counsel or Defendants were not given notice of such hearing and that based on communication with Plaintiffs' counsel, Plaintiffs' counsel was given notice via a telephonic call from the court that such hearing would happen on September 16, 2021, at 3:00 PM.
>
> 11. [sic] That for those reason [sic] mentioned Defendants and Defendants' counsel were not present at such hearing and were not given an opportunity to present their arguments with regards to the Motion to Set Aside Default Judgment.

Id. at 28. The trial court denied Defendants' motion to reconsider. Defendants now appeal.

Analysis

[9] Defendants challenge the trial court's denial of their motion to set aside a default judgment. We review a trial court's denial of a motion for relief from judgment pursuant to Trial Rule 60(B) under an abuse of discretion standard. *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021). Further, a "decision whether to

set aside a default judgment is entitled to deference and is reviewed for abuse of discretion." *Fields v. Safway Grp. Holdings, LLC*, 118 N.E.3d 804, 809 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs where the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court errs on a matter of law. *Berg*, 170 N.E.3d at 227. "Any doubt about the propriety of a default judgment should be resolved in favor of the defaulted party." *Fields*, 118 N.E.3d at 809. "Indiana law strongly prefers disposition of cases on their merits." *Id.*

I. Notice of Hearing

[10] Defendants argue that the trial court erred by conducting a hearing on Defendants' motion to set aside the default judgment without providing notice to Defendants. The provision of a hearing regarding a motion to set aside is governed by Indiana Trial Rule 60(D), which provides: "In passing upon a motion allowed by subdivision (B) of this rule the court *shall hear any pertinent evidence*, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule." (emphasis added). Thus, "Indiana Trial Rule 60(D) generally requires trial courts to hold a hearing on any pertinent evidence before granting Trial Rule 60(B) relief." *Thompson v. Thompson*, 811 N.E.2d 888, 904 (Ind. Ct. App. 2004), *trans. denied*. When there is no pertinent evidence to be heard, however, a hearing is unnecessary. *Id.*

[11] Here, Defendants alleged that the trial court lacked personal jurisdiction to grant the motion for default judgment due to lack of proper service. Although

the trial court held a hearing on the motion to set aside the default judgment, the hearing was held the day after Defendants filed their motion. Defendants were aware that a hearing was scheduled, but the scheduled hearing was for the purpose of addressing the proceedings supplemental, not the motion to set aside. The record contains no indication that Defendants were provided with any notice that the trial court would be hearing their motion to set aside at the same time.

[12] "It is generally acknowledged that procedural due process includes notice and an opportunity to be heard." *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940, 948 (Ind. Ct. App. 2006) (citing *Harper v. Boyce*, 809 N.E.2d 344, 350 (Ind. Ct. App. 2004)). "[A] party is entitled to be informed of certain subsequent proceedings in order to give it an opportunity to be heard or to defend before the matter is finally concluded." *Abrahamson Chrysler Plymouth, Inc. v. Ins. Co. of North America*, 453 N.E.2d 317, 321 (Ind. Ct. App. 1983). Here, Defendants were not provided with notice of the hearing on the motion to set aside and were not given an opportunity to be heard. Accordingly, the trial court abused its discretion by conducting a hearing on Defendants' motion to set aside the default judgment without notice to Defendants.

II. Personal Jurisdiction

[13] Defendants also argue that the trial court abused its discretion by denying their motion to set aside the default judgment because the trial court lacked personal jurisdiction of Defendants. "Personal jurisdiction is a question of law." *LinkAmerica Corp. v. Cox*, 857 N.E.2d 961, 965 (Ind. 2006). "As with other

questions of law, a determination of the existence of personal jurisdiction is entitled to de novo review by appellate courts." *Id.* "We do not defer to the trial court's legal conclusion as to whether personal jurisdiction exists." *Id.*

[14] Indiana Trial Rule 60(B) provides: "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: . . . (6) the judgment is void." Our Supreme Court has held that "a judgment entered where there has been no service of process is void for want of personal jurisdiction." *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 759 (Ind. 2014). Although such a motion filed pursuant to Rule 60(B)(6) must be "filed within a reasonable time," our Supreme Court has held that "'a judgment that is void for lack of personal jurisdiction may be collaterally attacked at any time and . . . the 'reasonable time' limitation under Rule 60(B)(6) means no time limit.'" *Hair v. Deutsche Bank Nat. Tr. Co.*, 18 N.E.3d 1019, 1022 (Ind. Ct. App. 2014) (quoting *Stidham v. Whelchel*, 698 N.E.2d 1152, 1156 (Ind. 1998)).

[15] Here, the record indicates that the Crockers served Defendants with a complaint but failed to file or serve a summons.[1] Indiana Trial Rule 4(A) provides that the trial court "acquires jurisdiction over a party or person who

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[1] The Crockers seem to argue that their failure to file or serve a summons was excused by the Covid-19 pandemic and a series of emergency orders issued by our Supreme Court related to the Covid-19 pandemic. The Crockers, however, cite no authority for the proposition that the service of a summons with a complaint was excused by these emergency orders. The argument is, therefore, waived. *See* Ind. Appellate Rule 46(B) (requiring an appellee's brief to conform with Indiana Appellate Rule 46(A), which requires that arguments be supported by cogent reasoning).

under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law." Trial Rule 4(B) provides: "Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary." "The summons and complaint shall be served together unless otherwise ordered by the court." T.R. 4(E). Our Supreme Court has held that "actual knowledge of the suit does not satisfy due process or give the court in personam jurisdiction." *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 817 (Ind. 2012) (quoting *Overhauser v. Fowler*, 549 N.E.2d 71, 73 (Ind. Ct. App. 1990)).

[16] We note that, under some circumstances, defects in service or a summons may be excused under Trial Rule 4.15(F), which provides: "No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and *the time within which he is required to respond*." (emphasis added). Because Defendants did not receive a summons, they were not informed of the time within which they were required to respond. Accordingly, the defective service is not excused by Rule 4.15(F).

[17] In *Overhauser*, this court held that the service of a summons, not accompanied by the complaint, was insufficient to confer personal jurisdiction. 549 N.E.2d at 73. Likewise, here, the service of a complaint, not accompanied by a summons, was insufficient to confer personal jurisdiction. Under these circumstances, the trial court should have granted Defendants' motion to set

aside the default judgment. *See, e.g., Hair*, 18 N.E.3d at 1025 (holding that the trial court erred by denying a motion to set aside a judgment due to lack of personal jurisdiction).

Conclusion

[18] The trial court abused its discretion by conducting a hearing on Defendants' motion to set aside without notice to Defendants. Moreover, because the Crockers failed to file a summons with their complaint, the trial court did not acquire personal jurisdiction of the Defendants. The trial court, thus, erred by denying Defendants' motion to set aside the default judgment. Accordingly, we reverse and remand for proceedings consistent with this opinion.

[19] Reversed and remanded.

Bradford, C.J., and Crone, J., concur.