MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Paul Oliver,

Appellant-Plaintiff,

v.

FLH Mill, LLC; Jeremy Ferree; and Crystal Ferree,

Appellee-Defendant.

March 30, 2021

Court of Appeals Case No. 20A-CT-1798

Appeal from the Greene Superior Court

The Honorable Dena A. Martin, Judge

Trial Court Cause No. 28D01-1908-CT-8

Weissmann, Judge.

[1] Paul Oliver cut a deal with Jeremy Ferree (Jeremy) and FLH Mill, LLC (FLH) to build a log home for Oliver. That deal rotted when Jeremy and FLH failed to complete the home. After filing a complaint for breach of contract and conversion against FLH, Jeremy, and Jeremy's wife, Crystal Ferree (Crystal), Oliver obtained default judgments against all three, but those judgments were subsequently set aside. In this appeal, Oliver asks us to reinstate all three of his default judgments. We find the trial court properly overturned the default judgment against Crystal but abused its discretion in doing the same for Jeremy and FLH.

Facts

[2] Oliver entered into a contract with Jeremy to build a log home in Linton for $323,900. The contract lists the "Builder" as "Jeremy Ferree (FLH Mill LLC)." Oliver and Jeremy signed the contract, which reflects the word "Builder" next to Jeremy's signature but contains no explicit reference to FLH in the signature section. Crystal's name does not appear on the contract and the record contains no indication that she was involved in FLH's operations.

[3] Oliver eventually filed suit against Jeremy, FLH, and Crystal, alleging breach of contract and home improvement fraud. The complaint asserted Oliver had paid $313,681 of the $323,000 contract price to the defendants, who allegedly used the funds for other purposes and did not complete his log home. Oliver served the company and summons on Jeremy as agent for FLH by leaving the documents with another person at the business's address. Oliver served Crystal

and Jeremy individually by leaving copies of the complaint and summons for each with the owner of a campground in Linton at which the Ferrees purportedly were staying.

[4] Jeremy, *pro se* on his own behalf and also on behalf of FLH, timely answered the complaint and denied Oliver's claims.[1] Crystal failed to answer the complaint, prompting Oliver to move for default judgment against her. The trial court granted Oliver's motion and entered default judgment against Crystal on the day the motion was filed. *Id.* at 46-48.

[5] Two months later, Oliver moved to set aside the default judgment against Crystal only as to the count of home improvement fraud. Id. at 51-52. In the same motion, Oliver sought permission to amend the complaint to allege conversion, instead of home improvement fraud, as to Jeremy and FLH. *Id.* at 51-52. The trial court granted that motion, dismissing the default judgment against Chrystal only as to the home improvement count and otherwise reaffirming that default judgment. The trial court also authorized Oliver's proposed amendment of the complaint as to Jeremy and FLH. Oliver filed his amended complaint November 14, 2019. *Id.* at 56, 58. Jeremy and FLH failed to answer the amended complaint, prompting Oliver to seek default judgment against them. Jeremy and FLH failed to appear at the hearing on that motion.

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[1] Oliver served Jeremy individually at 10923 W. 185 N. in Linton and as an agent for FLH at 1797 N. 1100 W in Linton.

The trial court entered default judgment against Jeremy and FLH for $414,120.80.

[6] Two months later Jeremy, FLH, and Crystal filed a combined motion to set aside all of the default judgments under Ind. Trial Rule 60(B) based on excusable neglect. *Id.* at 82. At the hearing on their motion, the three defendants alleged Crystal had not been served with the complaint and that Jeremy and FLH did not understand they needed to file an answer to the amended complaint. The trial court granted the Trial Rule 60(B) motion as to all three defendants without specifying its reasons. *Id.* at 16.

Discussion and Decision

[7] Oliver contends the trial court abused its discretion in granting the motion to set aside the default judgments. We determine he is correct as to the judgments against Jeremy and FLH but wrong as to the judgment against Crystal.

I. Standard of Review

[8] Decisions to set aside default judgments are entitled to deference because Indiana law strongly favors disposition on the merits. *Fields v. Safway Grp. Holdings, LLC*, 118 N.E.3d 804, 809 (Ind. Ct. App. 2019). We review the trial court's judgment only for an abuse of discretion, resolving in favor of the defaulted party any doubt about the propriety of the default judgment. *Id.* An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.*

[9] None of the defendants filed an appellee's brief. Under such circumstances, we apply a less stringent standard of review and do not assume their burden of presenting arguments against reversal. *Rickman v. Rickman*, 993 N.E.2d 1166, 1167 (Ind. Ct. App. 2013). Oliver need only establish prima facie error to obtain reversal. *Jacob v. Vigh*, 147 N.E.3d 358, 360 (Ind. Ct. App. 2020). Yet even under this prima facie standard, we remain obligated to apply the law correctly to the facts in the record to determine whether reversal is warranted. *Tisdale v. Bolick*, 978 N.E.2d 30, 34 (Ind. Ct. App. 2012).

II. Abuse of Discretion

[10] Oliver contends the trial court misapplied Indiana Trial Rule 60(B) when it set aside the three default judgments. That rule provides in relevant part:

> **(B) Mistake--Excusable Neglect--Newly Discovered Evidence--Fraud, etc.** 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 . . .
>
> (6) the judgment is void . . .
>
> (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) . . .
>
> A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense . . . .

The three defendants sought to set aside the judgments under subsections (1) (excusable neglect) and (8) (the catchall provision). App. Vol. II, p. 83.

[11] Oliver contends the defendants failed to meet their burden under Trial Rule 60(B) relief because they did not offer any evidence to support their claims of excusable neglect. He asserts they also failed to establish a meritorious defense, as required by Trial Rule 60(B). The Trial Rule 60(B) motion is unverified and without accompanying affidavits. At the hearing on the motion, the defendants offered only arguments by counsel and submitted no evidence.

[12] As the issues differ, we split Oliver's claims into two parts: 1) the default judgment against Crystal; and 2) the default judgments against Jeremy and FLH.

A. Crystal

[13] Crystal alleged in the Trial Rule 60(B) motion that she had never been served with either the complaint or the amended complaint. App. Vol. II, pp. 82-83. The return of service filed with the trial court shows service was accomplished by certified or registered mail. Exhibits, p. 9. However, contrary to Indiana Trial Rule 4.11, Oliver did not provide a return receipt showing Crystal received that mailing. Instead, the sheriff's return indicates only that the sheriff left a copy of the summons and complaint at 10923 W. 185 N. in Linton—a location that the sheriff described as Crystal's "home or abode." Exhibits, p. 9. The return has a handwritten note indicating that Crystal "live[s] at the Eagles

Nest Campground and has no address." Exhibits, p. 8. The sheriff left the summons and complaint with the campground owner. Tr. Vol. II, pp. 13, 28.

[14] Crystal conceded the Ferrees temporarily lived at the campground after suffering a fire at their Linton home. App. Vol. II, p. 82. However, Crystal asserted they never changed their mailing address to that location and, instead, maintained a mailing address at a different location in Linton. App. Vol. II, p. 82. As a result, Crystal did not receive notice and failed to appear to defend herself until after default judgment was entered against her.[2]

[15] "If service of process is inadequate, the trial court does not acquire personal jurisdiction over a party, and any default judgment rendered without personal jurisdiction is void." *King v. United Leasing, Inc.*, 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). A judgment that is void for lack of personal jurisdiction may be collaterally attacked at any time, without the need to establish a meritorious defense under Trial Rule 60(B). *Stidham v. Whelchel*, 698 N.E.2d 1152, 1156 (Ind. Ct. App. 1998); *Moore v. Terre Haute First Nat. Bank*, 582 N.E.2d 474, 476-477 (Ind. Ct. App. 1991), *reh. denied*. A party's failure to appear due to faulty process and lack of notice is "excusable neglect" within the meaning of Trial Rule 60(B)(1). *Moore*, 582 N.E.2d at 479.

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[2] The trial court CCS reflects that on September 20, 2019, Crystal was served at "1797 N 1100 W"—FLH's business address at the start of the litigation—with the default judgment entered against her three days earlier. Crystal either received that notice or learned of the judgment through other means because she appeared at a subsequent hearing concerning this judgment.

[16] The question, then, is whether Oliver's service of the summons and complaint on Crystal was defective and excused Crystal's failure to appear prior to the default judgment. Service upon an individual is governed by Indiana Trial Rule 4.1, which provides in relevant part:

> **(A) In General.** Service may be made . . . by:
>
> > (1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or
> >
> > (2) delivering a copy of the summons and complaint to him personally; or
> >
> > (3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode; or
> >
> > (4) serving his agent as provided by rule, statute or valid agreement.
>
> **(B) Copy Service to Be Followed With Mail.** Whenever service is made under Clause (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons and the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

[17] Oliver did not comply with Trial Rule 4.1(A)(1) because he has not produced any return showing Crystal's receipt of any registered or certified mailing of the

summons and complaint. He also failed to comply with Trial Rule 4.1(A)(3) because the campground was neither Crystal's "dwelling house" or "usual place of abode." Instead, the campground was only a temporary place where she stayed after a house fire, as evidenced by Oliver's successful service of the default judgment on Crystal at a different address one month later.

[18] Compliance with Trial Rule 4.1(B) is "a jurisdictional prerequisite to obtaining personal jurisdiction." *Barrow v. Pennington*, 700 N.E.2d 477, 479 (Ind. Ct. App. 1998); *accord Swiggett Lumber Constr. Co. v. Quandt*, 806 N.E.2d 334,338-39 (Ind. Ct. App. 2004). Trial Rule 4.15(F), which prohibits setting aside service where "reasonably calculated to inform the person to be served that an action has been instituted against him," does not excuse such noncompliance. *Barrow*, 700 N.E.2d at 479; *Swiggett*, 806 N.E.2d at 338.

[19] Due to Oliver's defective service on Crystal, which is evident from the record, the trial court never acquired jurisdiction over Crystal prior to entering default judgment. The trial court therefore properly set aside that judgment.[3]

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[3] We note that Jeremy was served at the same campground and received notice of the lawsuit. However, Jeremy also was served with the complaint at FLH's business address. The record does not reveal how Jeremy became aware of the lawsuit—that is, whether it was through service at the campground or at FLH's business address or by some other means. More importantly, however, the record contains no evidence indicating Crystal had actual knowledge of the lawsuit prior to entry of the default judgment against her. Although an agency relationship between married individuals may exist to allow one spouse to accept service on behalf of the other spouse, evidence of marriage alone is not sufficient to establish that service on one spouse is service on the other. *Nwannunu v. Weichmann & Associates, P.C.*, 770 N.E.2d 871, 878 (Ind. Ct. App. 2002), *reh. denied* (noting one spouse may have concealed the litigation from the other spouse.)

B. Jeremy and FLH

[20] Oliver next contends the trial court abused its discretion in setting aside the default judgment against Jeremy and FLH. Oliver argues Jeremy and FLH did not present any evidence in support of their unverified motion, either through attachments to the motion or at the related hearing. They merely relied on their counsel's arguments which is not enough.

[21] We agree with Oliver. Trial Rule 60(B) movants cannot meet their burden by relying solely on counsels' arguments. *Denny v. Vanoy*, 148 N.E.3d 1144 (Ind. Ct. App. 2020). Instead, evidence, such as affidavits or witness testimony, is required. *Id.* at 1146.

[22] Counsel for Jeremy and FLH alleged in the 60(B) motion and at the related hearing that the two parties did not understand the need to file an answer to the amended complaint. According to counsel, Jeremy and FLH believed their answer to the original complaint would suffice. App. Vol. II, pp. 82-83; Tr. Vol. II, pp. 7-8. But neither Jeremy nor FLH backed up these claims with affidavits or witness testimony. That left the trial court with no admissible evidence excusing the failure of Jeremy and FLH to answer the amended complaint.

[23] In addition, neither Jeremy nor FLH presented evidence of any meritorious defense, as is required for Trial Rule 60(B) relief under these circumstances. *See Moore*, 582 N.E.2d at 479. Jeremy's counsel merely asserted, without any supporting evidence, that FLH was the contracting party, and Jeremy was not

personally liable for FLH's misconduct or obligations. Tr. Vol. II, p. 9. Neither party presented a viable defense against Oliver's accusation of conversion. Tr. Vol. II, p. 8.

[24] Finally, Jeremy and FLH never explained, either in their Trial Rule 60(B) motion or at the hearing, why they failed to appear at the hearing on Oliver's motion for default judgment. They never alleged a lack of service. If they had appeared at that hearing, they might have avoided default judgment, eliminating the need for their Trial Rule 60(B) motion. Although judgment on the merits is preferred, a default judgment plays an important role in the maintenance of an orderly, efficient judicial system. *Bunch v. Himm*, 879 N.E.2d 632, 635 (Ind. Ct. App. 2008). A default judgment, both generally and as used here, is a weapon for enforcing compliance with the rules of procedure and for facilitating speedy determinations of disputes. *See id.*

[25] We conclude that Oliver has made a prima facie showing that the trial court abused its discretion in setting aside the default judgments against Jeremy and FLH. Accordingly, we reverse the trial court's judgment in part and order the trial court to reinstate the default judgments against Jeremy and FLH. We affirm the trial court's judgment setting aside the default judgment against Crystal.

Mathias, J., and Altice, J., concur.