

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

W. Keith Asbury,
Appellant-Defendant,

v.

Mark Duncan,
Appellee-Plaintiff.

May 4, 2022

Court of Appeals Case No.
21A-MI-2128

Appeal from the Fountain Circuit
Court

The Honorable Samuel A. Swaim,
Special Judge

Trial Court Cause No.
23C01-1908-MI-303

Najam, Judge.

Statement of the Case

- [1] W. Keith Asbury appeals the trial court's order denying his motion to set aside the default judgment against him on Mark Duncan's complaint for damages

and the court's award of compensatory damages and attorney's fees to Duncan.

Asbury presents three issues for our review:

1. Whether the trial court erred when it denied his motion to set aside the default judgment.
2. Whether the trial court erred when it calculated the compensatory damages award.
3. Whether the trial court abused its discretion when it awarded attorney's fees to Duncan.

[2] We affirm.

Facts and Procedural History

[3] For several years, Asbury and Duncan were friends and partners in a house renovation business, Blood Brothers Properties, LLC. Following various disputes regarding the business, on August 7, 2019, Duncan filed a complaint against Asbury¹ alleging breach of fiduciary duty, unjust enrichment, conversion, fraud, and constructive fraud. Duncan also sought damages and attorney's fees under Indiana Code Section 34-24-3-1, the Crime Victim Relief Act. Asbury did not file an answer, and on October 4, Duncan moved for default judgment, which the trial court granted on October 14.

¹ Duncan also named Asbury's wife, Melanie Asbury, as a defendant, but she was subsequently dismissed from the suit.

- [4] On November 27, Asbury filed a motion to set aside the default judgment “pursuant to Indiana Trial Rule 60(B)” and alleged that, while he had received a copy of the complaint on September 11, he did not receive “a Summons to inform him that he needed to respond within twenty (20) days to avoid a default judgment being entered against him.” Appellant’s App. Vol. 2 at 16. Asbury alleged that he “was prepared to defend himself in this matter and was mistakenly waiting for a hearing to be set.” *Id.* at 17. Asbury did not specify which subsection of Trial Rule 60(B) applied to his motion. Following a hearing, the trial court denied the motion.
- [5] The following year, on August 7, 2020, Asbury filed a second motion to set aside the default judgment “pursuant to Indiana Trial Rule 60(B).” *Id.* at 22. Again, Asbury did not specify which subsection of Trial Rule 60(B) applied to his motion. Asbury alleged that the parties’ operating agreement included an arbitration clause and that, therefore, “[t]he parties should be ordered to proceed to arbitration” pursuant to Indiana statute. *Id.* at 24. But Asbury did not explain why he had not previously raised this issue to the trial court. The trial court denied the motion without a hearing.
- [6] Following a damages hearing held over two days in April and July 2021, the trial court made findings and conclusions and awarded Duncan compensatory damages in the amount of \$15,398.39 and attorney’s fees in the amount of \$18,246.74, for a total damages award of \$33,645.13. This appeal ensued.

Discussion and Decision

Issue One: Trial Rule 60(B) Motion to Set Aside Default Judgment

[7] Asbury first contends that the trial court erred when it denied his motion to set aside the default judgment. Generally, a grant or denial of equitable relief under Indiana Trial Rule 60 is within the discretion of the trial court and is reviewed for an abuse of that discretion. *Baker v. Baker*, 50 N.E.3d 401, 403 (Ind. Ct. App. 2016). “However, if a trial court’s ruling is strictly based upon a paper record, we will review the ruling de novo because we are in as good a position as the trial court to determine the force and effect of the evidence.” *Jahangirizadeh v. Pazouki*, 27 N.E.3d 1178, 1181 (Ind. Ct. App. 2015) (citing *In re Adoption of C.B.M.*, 992 N.E.2d 687, 691 (Ind. 2013)). The trial court here ruled solely upon a paper record, and so our review is de novo.

[8] “‘Upon a motion for relief from a default judgment, the burden is on the movant to show sufficient grounds for relief under Indiana Trial Rule 60(B).’” *Huntington Nat. Bank v. Car-X Assoc. Corp.*, 39 N.E.3d 652, 655 (Ind. 2015) (quoting *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1253 (Ind. App. 1999) (internal citations omitted)). Here, Asbury does not identify which subsection of Trial Rule 60(B) applies to his motion to set aside the default judgment against him. Rather, Asbury merely alleges that, because the parties’ operating agreement includes an arbitration clause, the trial court was required to order

the parties to arbitration under Indiana Code Section 34-57-2-3(a).² We cannot agree.

- [9] Nothing about Asbury's claim on appeal suggests that any of the subsections of Trial Rule 60(B) apply here. Asbury's motion does not refer to any Trial Rule 60(B) subsection, and no hearing was held on the motion. To the extent that his claim *might* fall under Trial Rule 60(B)(8), which provides for relief from judgment for "any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4)," Asbury has not met his burden to show that that subsection applies. "In order to prevail under Rule 60(B)(8), the movant must 1) allege sufficient grounds showing exceptional circumstances justify relief from the operation of the judgment other than those set forth in Rule 60(B)(1)-(4), 2) allege a meritorious defense, and 3) file the motion within a reasonable time." *Dalton Corp. v. Myers*, 65 N.E.3d 1142, 1145 (Ind. Ct. App. 2016), *trans. denied*. While Asbury has alleged a meritorious defense, he has neither shown exceptional circumstances to justify relief from the judgment nor has he shown that he filed his motion within a reasonable time. Indeed, Asbury does not explain why he raised the issue of the arbitration clause for the first time in his second motion to set aside

² Indiana Code Section 34-57-2-3(a) provides that, on application of a party showing an agreement that includes an arbitration provision, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration.

the default judgment, which was filed eight months after his first motion to set aside the default judgment was filed.

[10] Further, “[e]ven where a written agreement to submit a dispute to arbitration is valid and enforceable, ‘the right to require such arbitration may be waived by the parties.’” *JK Harris & Co., LLC v. Sandlin*, 942 N.E.2d 875, 884 (Ind. Ct. App. 2011) (quoting *Tamko Roofing Products, Inc. v. Dilloway*, 865 N.E.2d 1074, 1078 (Ind. Ct. App. 2007)). In *JK Harris & Co.*, we held that, where the trial court had entered default judgment against the defendant, the defendant had waived its right to compel arbitration. *Id.* at 885. We agree with Duncan that Asbury has likewise waived his right to compel arbitration. And we affirm the trial court’s order denying Asbury’s Trial Rule 60(B) motion to set aside the default judgment.

Issue Two: Compensatory Damages

[11] Asbury next contends that the trial court erred when it calculated the compensatory damages award to Duncan. As this Court has stated:

Where, as here, issues are tried upon the facts by the trial court without a jury, and the trial court enters specific findings sua sponte, we apply a two-tiered standard and determine whether the evidence supports the findings, and then whether the findings support the judgment. Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences to support them. A judgment is clearly erroneous when our review of the record leaves us with a firm conviction that a mistake has been made.

VanHawk v. Town of Culver, 137 N.E.3d 258, 265 (Ind. Ct. App. 2019) (internal citations omitted).

[12] Asbury contends that the trial court erred when it did not “offset” the damages award in amounts reflecting expenditures that benefited both him and Duncan. Appellant’s Br. at 13-14. However, Asbury does not support his contentions with citations to relevant authority or relevant portions of the appendix or transcript.³ See Ind. Appellate Rule 46(A)(8)(a). Given the lack of cogent argument, we hold that Asbury has waived this issue for our review. Waiver notwithstanding, Asbury’s contentions on this issue amount to a request that we reweigh the evidence, which we cannot do. The trial court did not err when it calculated the compensatory damages award to Duncan.

Issue Three: Attorney’s Fees

[13] Finally, Asbury contends that the trial court abused its discretion when it awarded attorney’s fees to Duncan. In particular, he asserts that, because the parties’ operating agreement did not include a provision for attorney’s fees, and because there was no evidence to support the award of attorney’s fees under Indiana Code Section 34-52-1-1, the American Rule applies here. We review a trial court’s award of attorney’s fees for an abuse of discretion. *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020). An abuse of

³ Asbury cites to a few pages of the transcript in this part of his brief, but the cited evidence does not support his claims that he is entitled to offsets.

discretion occurs when the court's decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law. *Id.*

[14] In his complaint, Duncan alleged in relevant part that Asbury had committed conversion, and Duncan sought attorney's fees under the Crime Victim Relief Act ("the Act"). The Act provides in relevant part that a person who suffers a pecuniary loss as a result of a violation of the criminal conversion statute may bring a civil action against the person who caused the loss for treble damages and reasonable attorney's fees. I.C. § 34-24-3-1. Here, when the trial court entered default judgment against Asbury, that included judgment in favor of Duncan and against Asbury on Duncan's conversion claim. Accordingly, Duncan was entitled to attorney's fees under the Act, and Asbury has not shown that the trial court abused its discretion when it awarded attorney's fees.⁴ *See, e.g., Palmer Dodge, Inc. v. Long*, 791 N.E.2d 788, 792 (Ind. Ct. App. 2003) (affirming attorney's fees award where complaint sounded in criminal conversion and the evidence supported a finding of criminal conversion).

[15] Affirmed.

Bradford, C.J., and Bailey, J, concur.

⁴ To the extent Asbury contends that the trial court abused its discretion when it awarded an excessive amount in attorney's fees, he does not support that contention with cogent argument, and the issue is waived.