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IN THE
COURT OF APPEALS OF INDIANA

Expert Pool Builders, LLC,
Appellant-Defendant,

v.

Paul Vangundy,
Appellee-Plaintiff.

January 18, 2023

Court of Appeals Case No. 22A-PL-1499

Appeal from the St. Joseph Superior Court

The Honorable Jamie C. Woods, Judge

Trial Court Cause No. 71D06-2110-PL-366

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Expert Pool Builders, LLC (EPB), appeals the trial court's denial of EPB's motion to correct error following the trial court's entry of a default judgment in favor of Appellee-Plaintiff, Paul Vangundy (Vangundy).

[2] We dismiss.

ISSUE

[3] EPB presents this court with three issues on appeal, while Vangundy presents one issue on cross-appeal. We find only one issue dispositive, which we restate as: Whether EPB waived his appeal by failing to file a motion to set aside default judgment pursuant to Indiana Trial Rule 60(B).

FACTS AND PROCEDURAL HISTORY

[4] On October 27, 2021, Vangundy filed a Complaint against Giuseppi Borracci, IPOOLS Unlimited, and EPB, alleging breach of contract in the construction of a private pool, unjust enrichment, violations of the home improvement statute, violations of the Indiana deceptive consumer sales act, fraud, negligence, and liability through agency. On November 30, 2021, Vangundy filed a motion for

default judgment against all parties after they failed to file responsive pleadings. The trial court granted Vangundy's motion on December 1, 2021.[1]

[5] On December 23, 2021, EPB filed a motion to set aside the default judgment because service for EPB had allegedly been mistakenly made on a neighboring business. On December 28, 2021, Vangundy indicated that he was agreeable to setting aside the default judgment. On January 6, 2022, the trial court granted EPB's motion, set aside the default judgment, and gave EPB thirty days to file a responsive pleading to Vangundy's Complaint, with the due date set on or before February 7, 2022.

[6] On February 9, 2022, without having received a responsive pleading from EPB, Vangundy filed a second motion for default judgment. The following day, EPB filed a response to the motion for default judgment and a motion to dismiss the Complaint followed on February 11, 2021. In his response to Vangundy's motion for default judgment, EPB's counsel, without any supporting evidence, stated that, prior to Vangundy filing his second motion for default judgment, he had made numerous phone calls to Vangundy's counsel, which, he claimed had resulted, on January 10, 2022, in

> an agreement [] for EPB not to file any responsive pleadings following the [c]ourt issuing its January 6, 2022 Order until counsel for Plaintiff had another opportunity to confer with her client about dismissal of EPB and avoiding the time and expense

[1] Borracci and IPOOLS Unlimited have not contested the entry of the default judgment against them and are not part of this appeal.

> of filing a Motion to Dismiss and future hearing on the same. During this same call, counsel for EPB advised that due to the potential of EPB being dismissed voluntarily, EPB would not be appearing at the January 19, 2022 default hearing against the remaining defendants.

(Appellant's App. Vol. II, p. 45).

[7] On February 17, 2022, Vangundy, by counsel, filed a response, denying that any such conversation had taken place or that an agreement regarding the filing of a responsive pleading by EPB to his Complaint had been reached. In support, Vangundy's counsel submitted the call records for counsel's law firm for the entire month of January, the cell phone records for Vangundy's counsel, and an affidavit by Vangundy's counsel affirmatively denying EPB's unsupported allegations. Vangundy's counsel also submitted a transcript of the voicemail left by EPB's counsel on her office phone on January 24, 2022, to negate the allegation that an agreement had been reached previously on January 10, 2022:

> [G]ood morning, uh [EPB] Attorney [] calling this on the Vangundy uh vs. uh Joe Borracci, IPOOLS Unlimited, Expert Pool Builders. Uhm, I know you and I talked, and I saw that you did uh get the default against uh Mr. Borracci last week in his uh IPOOLS Unlimited. I did wanna touch base with you as to where your client stands it – as to my – as to my folks uh, involvement at least as it pertains to the defendant in the case, uh so that I can advise and give clear direction as to what our next steps are going to be in responding to the complaint. So, not a long conversation, but just wanted to touch base with you since we did discuss uh the possibility of maybe dismissing them entirely uhm, I think earlier this month. Uh, give me a call back

> on my cell phone, I'm working from home today cause of the storm.

(Appellee's App. Vol. II, p. 91).

[8] On March 24, 2022, the trial court conducted a hearing on Vangundy's motion for default judgment and EPB's motion to dismiss. During the hearing, the trial court heard argument on the communications between counsel regarding an alleged deadline extension for EPB to file a responsive pleading to Vangundy's Complaint and received evidence regarding EPB's motion to dismiss Vangundy's Complaint. On April 1, 2022, the trial court entered a default judgment against EPB, concluding, in pertinent part, that

> EPB's [sic] asserts that on January 10, 2022, an agreement was reached for EPB not to file any responsive pleadings following the [c]ourt issuing its January 6, 2022 Order until counsel for Plaintiff had another opportunity to confer with her client about dismissal of EPB and avoiding the time and expense of filing a Motion to Dismiss and future hearing on the same. Despite asserting that EPB received this open-ended extension of time, EPB has not provided any email or written communication that was sent to Plaintiffs' counsel confirming this extension. ln response, Plaintiff has provided an affidavit from his counsel stating that no conversation took place on January 10, 2022, because counsel was not in the office. As well, Plaintiff has provided the call logs from his counsel's law firm and cell phone records from his attorney that demonstrate counsel for EPB did not contact Plaintiff's attorney on January 10. The [c]ourt finds the fully developed testimony and documentation provided by Plaintiff to confirm that there was no agreement as set forth by EPB. Instead, EPB made decision not to respond to the

> Plaintiff's Complaint in timely fashion without any agreed extension.
>
> * * * *
>
> Considering all the foregoing, even with Indiana's disfavor of default judgments, the Plaintiff's Motion for Default in this matter is Granted. In the case at hand, EPB has been represented by counsel. Counsel had notice of the Complaint and was aware of the January 6, 2022 Order setting forth the timeframe for EPB to respond. As well, counsel for EPB failed to return the last telephone communication from counsel for Plaintiff. After considering the filings of the parties, the [c]ourt finds that it is clear that no agreement was reached between the parties for EPB to have any extension of the time to respond to Plaintiff's Complaint. Balancing the interests as set forth under Indiana law, Default Judgment is appropriate in this cause. For all these reasons, Plaintiff's Motion for Default Judgment is Granted.

(Appellant's App. Vol. II, pp. 14, 15) (references to the record omitted). In addition, the trial court did not rule on EPB's motion to dismiss Vangundy's Complaint "due to the entry of [j]udgment in favor of [Vangundy]" and entered judgment in the amount of $123,500 in favor of Vangundy and against EPB. (Appellant's App. Vol. II, p. 16).

[9] On May 2, 2022, EPB filed a motion to correct error pursuant to Indiana Trial Rule 59, which was denied by the trial court on May 26, 2022 following a hearing on the motion. EPB did not file a motion for relief from judgment pursuant to Indiana Trial Rule 60(B).

[10] EPB now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[11] We review a trial court's denial of a motion to correct error for an abuse of discretion. *Principal Life Ins. Co. v. Needler*, 816 N.E.2d 499, 502 (Ind. Ct. App. 2004). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court, or reasonable inferences therefrom. *Id*. We also consider the standard of review for the underlying ruling, which in this case was the trial court's entry of a default judgment in favor of Vangundy. The decision whether to set aside a default judgment is given substantial deference on appeal. *Anderson v. State Auto Ins. Co.*, 851 N.E.2d 368, 370 (Ind. Ct. App. 2006). The trial court's discretion is broad in these cases because each case has a unique factual background. *Id*. This court will not reweigh the evidence or substitute our judgment for the judgment of the trial court. *Id*. Generally, default judgments are not favored in Indiana, for it has long been the preferred policy of this state that courts decide a controversy on its merits. *Walker v. Kelley*, 819 N.E.2d 832, 837 (Ind. Ct. App. 2004). Any doubt of the propriety of a default judgment should be resolved in favor of the defaulted party. *Coslett v. Weddle Bros. Const. Co., Inc.*, 798 N.E.2d 859, 861 (Ind. 2003).

II. *Preservation of Issue for Appellate Review*

[12] EPB's appeal is entirely premised on arguments steeped in Indiana Trial Rule 60(B)(1) and (8), arguing that the trial court erroneously entered a default

judgment against it and now requesting this court to set aside the default judgment based on EPB's "reasonable understanding that it was waiting on an answer as to whether it would be dismissed by Vangundy." (Appellant's Br. p. 20).

[13] In *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332 (Ind. 1983), our supreme court clarified the procedure to be followed by a party in order to preserve the issues in a default judgment for appellate review. Due to an apparent confusion about whether a motion to correct error or a motion to set aside a judgment should be used to contest a default judgment, the court concluded that motions to correct error applied to judgments on the merits, while motions to set aside judgment applied to default judgments. *Id*. at 337.

> We hold the proper procedure in the Indiana Rules of Trial Procedure for setting aside an entry of default or grant of default judgment thereon is to first file a Rule 60(B) motion to have the default or default judgment set aside. Upon ruling on that motion by the trial court the aggrieved party may then file a Rule 59 [m]otion to [c]orrect [e]rror alleging error in the trial court's ruling on the previously filed Rule 60(B) motion. Appeal may then be taken from the court's ruling on the [m]otion to [c]orrect [e]rror.
>
> We point out the holding we reach today does nothing to modify the rule that a Rule 60(B) motion may not be used as a substitute for a direct appeal based upon a timely Rule 59 [m]otion to [c]orrect [e]rror. That rule still applies to judgments after a trial on the merits. But where a judgment has been granted after an entry of default, Rule 55(C) and 60(B), when read together, clearly allow a Rule 60(B) motion to be filed to begin the attempt to set aside the default judgment at any time within one year after

> that judgment has been granted, including during the first sixty [60] days thereafter.

Id. (internal quotation omitted). In reaching this conclusion, our supreme court explicitly overruled previous precedent indicating that a motion brought under T.R. 60(B) to set aside a default judgment would be regarded as a T.R. Rule 59 motion to correct error, as well as precedent that previously established that an appeal could be taken directly from the trial court's ruling on a T.R. 60(B) motion. *Id*.

[14] The *Siebert* holding was reiterated four years later by this court in *Lee v. Hawthorne*, 516 N.E.2d 1088, 1089 (Ind. Ct. App. 1987), where we stated

> In *Siebert Oxidermo, Inc. v. Shields* [446 N.E.2d 332 (Ind. 1983)], the Indiana Supreme Court cleared up years of confusion and conflict among the districts of the [c]ourt of [a]ppeals regarding the correct procedure for appealing from an adverse ruling on a T.R. 60(B) motion. The [s]upreme [c]ourt in *Siebert Oxidermo* held that, in order to preserve the issue for appellate review, the aggrieved party must file a Trial Rule 59 motion to correct errors after the trial court has ruled on the T.R. 60(B) motion. [] A default judgment may only be attacked by a T.R. 60(B) motion and thus cannot be attacked by a T.R. 59 motion to correct error[].

See also Sekerez v. Jasper Co. Farm Bureau Coop. Ass'n, Inc., 458 N.E.2d 286 (Ind. Ct. App. 1984) (dismissing appellant's appeal from the trial court's entry of a default judgment because the appellant's "motion to correct error[] was prematurely filed and [was] without effect. Without a ruling on the 60(B)

motion, he [was] unable to perfect an appeal, since no error [was] thereby preserved").

[15] Here, after the entry of the default judgment against it, EPB, instead of filing a motion to set aside default judgment pursuant to T.R. 60(B), filed a motion to correct error pursuant to T.R. 59. EPB then filed its notice of appeal following the denial of his motion to correct error, again without filing a motion to set aside default judgment.

[16] In an effort to preserve the issue on appeal, EPB now contends in his reply brief that his response to Vangundy's motion for default judgment was treated as a T.R. 60(B) motion at the March 24, 2022 hearing, as his response raised various factual issues related to excusable neglect and its meritorious defense. Therefore, requiring EPB to still file a separate motion to set aside the default judgment would amount to judicial inefficiency and redundancy. Disregarding the prematurity of filing a motion to set aside default judgment before the entry of the default judgment, our review of EPB's response to Vangundy's motion for default judgment reveals the complete absence of any references or argument with respect to the grounds for a motion to set aside default judgment, as enumerated in T.R. 60(B)(1)-(8). Likewise, during the hearing, the trial court did not receive any evidence or argument with respect to the possible grounds to set aside the default judgment, besides a brief reference to the trial rule by Vangundy's counsel.

[17] Accordingly, as EPB failed to follow the proper procedure to contest the trial court's entry of default judgment, as clearly announced in *Siebert*, EPB failed to preserve the issue and we dismiss his appeal.

CONCLUSION

[18] Based on the foregoing, we conclude that EPB did not properly preserve the issue on appeal by failing to file a T.R. 60(B) motion to set aside the default judgment.

[19] Dismissed.

[20] Bailey, J. concurs

[21] Vaidik, J. dissents with separate opinion

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Court of Appeals Case No.
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Vaidik, J., dissenting.

[22] I respectfully dissent. In dismissing the appeal, the majority holds that EPB didn't "preserve" its objection to default judgment because it didn't file a 60(B) motion in the trial court before appealing. I disagree. As detailed in the majority opinion, EPB opposed Vangundy's motion for default judgment and was able to present all of its evidence and arguments against default judgment. This opposition preserved EPB's objection to default judgment, so a 60(B) motion was not required and would have been a redundant waste of time and resources.

[23] In concluding otherwise, the majority relies on *Siebert Oxidermo*, where our Supreme Court explained that the proper procedure for "setting aside" a default

judgment is to file a 60(B) motion. But this is not a case where, as in *Siebert Oxidermo*, the defendant was seeking to have a default judgment "set aside" after failing to appear and later learning that the judgment was entered. As just noted, this case involves a defendant who had appeared before default judgment was entered and fully presented its position as to why it should not be entered. This distinction is critical. In the former situation, requiring a 60(B) motion makes perfect sense because the trial court has never had the opportunity to consider the defaulted defendant's arguments against default judgment. In the latter situation, a 60(B) motion is unnecessary and would be futile because the trial court has already heard and rejected the defaulted defendant's position. *Siebert Oxidermo* didn't address the latter situation, and its discussion of the proper procedure for "setting aside" a default judgment is inapplicable.

[24] It is helpful to contrast this case from *Greer v. Discover Bank*, 49 N.E.3d 1110 (Ind. Ct. App. 2016), *reh'g denied*, *trans. denied*. There, Greer failed to appear or otherwise answer the complaint, and the trial court entered default judgment. After learning of the default judgment, Greer appealed directly to this Court. Citing *Siebert Oxidermo*, we dismissed because Greer had not first filed a 60(B) motion in the trial court. We went on to explain that

> Greer's appeal demonstrates the wisdom of the *Siebert Oxidermo* holding. In her attempt to prove her argument on appeal, Greer repeatedly asserts that Discover gave the trial court "false information" regarding service of process; that she had not been "notified in any way that there had been an action" against her in the trial court; that "[t]here has been nothing received at [her]

> address"; that her father lives with her and would have "be[en] there if anyone had attempted to deliver a summons." These assertions are factual allegations that this court is in no position to assess on appeal. It is for the trial court to consider, in its discretion, the merits of Greer's allegations[.]

Id. at 1111-12. We ended by noting that Greer could go back to the trial court and seek relief via Rule 60(B).

[25] Here, unlike in *Greer*, EPB has already presented the trial court with its factual allegations in opposition to default judgment, and the court considered and rejected them. There is simply no need for further litigation in the trial court. EPB's appeal is properly before us, and we should address it on the merits.