

## 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

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Deutsche Bank National Trust  
Company, as Trustee for  
GSAMP Trust 2006-FM2,  
Mortgage Pass-Through  
Certificates, Series 2006-FM2,  
*Appellant-Plaintiff,*

v.

Velvika James, Brian Onofrio,  
Advanced Physical Therapy  
Plus, First Financial Investment  
Fund II, LLC, State of Indiana,  
*Appellees-Defendants.*

April 21, 2022

Court of Appeals Case No.  
21A-MF-1910

Appeal from the Lake Superior  
Court

The Honorable Calvin D.  
Hawkins, Judge

Trial Court Cause No.  
45D02-1709-MF-149

**Weissmann, Judge.**

[1] More than two years after foreclosing on Velvika James' home, Deutsche Bank National Trust Company (Bank) tried to remove her from the property. Without challenging service of the foreclosure complaint as deficient, James claimed she was unaware she no longer owned the home. James requested a hearing, during which she persuaded the trial court to vacate the foreclosure and set aside a sheriff's sale. Bank appeals, and James has failed to file an appellee's brief. Because Bank has shown prima facie error, we reverse and remand.

## Facts

[2] James bought her Hammond, Indiana home (Property) in 2006 with a mortgage from Bank. Ten years later, she fell behind on mortgage payments. Bank filed a complaint to foreclose in September 2017. James never responded to the complaint, but she did call her loan servicer (Servicer) to work out a mortgage assistance plan.

[3] In February 2018, Bank filed a motion for default judgment and decree of foreclosure against James. Bank then moved to stay proceedings as its negotiations with James continued. But after two months without an agreement, Bank moved to reinstate the case. On May 9, 2018, the trial court reinstated the case, granted default judgment against James, and foreclosed upon Property. App. Vol. II, pp. 72, 75. James claims that she was unaware of the foreclosure, but she never claimed that notice of the foreclosure was legally deficient. *Id.* at 121-22.

- [4] Still, conversations between James and Servicer about a mortgage assistance plan continued. James claims that Servicer’s communications were conflicting and confusing and that she was never informed that the foreclosure occurred. Tr. Vol. I, pp. 15-16; App. Vol. II, pp. 121-23. The confusion was heightened when Servicer merged with another company, and James began dealing with a new loan servicer (also Servicer). Tr. Vol. I, p. 13. James failed to make any payments on her mortgage after April 2019. Tr. Vol. II, pp. 23, 26.
- [5] Eventually, Bank purchased Property in a sheriff’s sale to hold in trust. App. Vol. II, p. 104. Several months later, Bank filed for a writ of assistance to remove James from Property. James later testified that she received notice from Bank that she interpreted to mean she still owned Property, even after the sheriff’s sale. Tr. Vol. I, p. 15. Even so, the trial court granted Bank’s writ of assistance to remove James from Property. James quickly requested a hearing to contest the foreclosure and sale. In the meantime, Bank sold Property to Eagle Pro Realty, which also began proceedings against James. *Id.* at 115. The two matters were consolidated.
- [6] In January 2021, almost three years after the court issued its foreclosure order, James moved for relief from judgment under Indiana Trial Rule 60(B)(8). She claimed Bank and Servicer misled her during the foreclosure proceedings and that the trial court violated her due process rights by reinstating the foreclosure proceeding and entering default judgment against her on the same day. James argued that she believed Bank and Servicer were working with her to “save her home” up until she received the order on Bank’s writ of assistance. App. Vol.

II, p. 123. She also claimed that Servicer lost some of her payments and repeatedly misdirected her inquiries. She asked that the foreclosure be set aside, her property be restored, and the writ of assistance be recalled.

[7] The trial court found in James' favor and granted the motion for relief. The order stated:

[D]ue to error on the part of the Court in entering the Decree of Foreclosure on the same day as lifting the prior stay in this matter, Defendant's Motion for Relief from Judgment should be and is GRANTED and the Decree of Foreclosure entered on May 9, 2018 is VACATED and the subsequent Sheriff's Sale is set aside.

App. Vol. II, p. 213.

[8] Bank now appeals.

## Discussion and Decision

[9] Bank makes three arguments on appeal: (1) James' 60(B)(8) motion was untimely; (2) James failed to carry her burden to show she was entitled to relief; and (3) the balance of equities weigh in Bank's favor. James did not file an appellee's brief, and we will not make her arguments for her. *See Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008). Instead, we may reverse if Bank has shown prima facie error, meaning error at first sight, on first appearance, or on the face of it. *Id.* Finding that Bank established such error, we reverse and remand.

[10] Trial Rule 60(B) motions are left to the equitable discretion of the trial court, which is limited to eight categories listed by the rule. *Ind. Ins. Co. v. Ins. Co. of N. Am.*, 734 N.E.2d 276, 278 (Ind. Ct. App. 2000). Relief is permitted under sub-paragraph (8) for “any reason justifying relief from the operation of the judgment” except mistake, fraud, any ground for a motion to correct error, and default judgment against a defendant served by publication who did not have actual notice of the suit. T.R. 60(B). As the movant, James bore the burden of showing: “1) [she] brought [her] claim within a reasonable time in light of the circumstances of the case; 2) extraordinary or exceptional circumstances justify that relief; and 3) [she] has alleged a meritorious claim or defense.” *State v. Collier*, 61 N.E.3d 265, 269 (Ind. 2016) (emphasis added). All of these elements are required for James to prevail under sub-paragraph (8). We reverse only when the trial court has abused its discretion, meaning its action is against the logic and effect of the facts before it and the inferences which may be drawn from those facts. *Ind. Ins. Co.*, 734 N.E.2d at 278-279.

[11] Bank has established prima facie error because James failed to allege a meritorious defense. James’s testimony reveals she was confused by Servicer's communications during and after the foreclosure, but she does not claim—nor does the record reveal—that notice was legally deficient. Nor does James dispute she had not made a mortgage payment in almost two years by the time she moved for relief from judgment. James nods toward potential defenses in her motion, suggesting Bank lacked standing and promising that “defendant has learned of potential procedural irregularities in the Sheriff’s sale of the subject

property which . . . should negate that sale.” App. Vol. II, p. 124. But James presented no evidence to support any defense which would justify overturning the foreclosure order. Mere suggestion, without more, cannot show that “vacating the judgment will not be an empty exercise.” *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006). Movants need only show some factual basis for their claim, and James’ allegations do not meet even this low threshold. See *Logansport/Cass Cnty Airport Auth. v. Kochenower*, 169 N.E.3d 1143, 1149 (Ind. Ct. App. 2021).

[12] Because we find this issue dispositive, we need not address Bank’s other arguments. Bank has made a prima facie showing that the trial court erred in granting James’ 60(B)(8) motion. Accordingly, we reverse the trial court’s order granting relief from judgment.

Najam, J., and Vaidik, J., concur.