

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin R. Newby,
Appellant-Defendant,

v.

Richard E. Newby, et al.,
Appellees-Plaintiffs.

March 14, 2022

Court of Appeals Case No.
21A-MF-1051

Appeal from the Hamilton
Superior Court

The Honorable David K. Najjar,
Judge

Trial Court Cause No.
29D05-1810-MF-9496

Altice, Judge.

Case Summary

[1] Richard and Edna Newby (the Newbys) entered into a conditional land sale contract (the Contract) with their son, Kevin Newby (Kevin), and his wife, Gail Wiles-Newby (Gail) (collectively, the Buyers), whereby the Newbys agreed to sell a residence and surrounding real estate in Hamilton County to the Buyers in accordance with specified terms. Alleging that the Buyers defaulted on the Contract, the Newbys and their daughter, Ann Burkett,¹ (collectively, the Plaintiffs), filed a complaint seeking to foreclose on the Contract. The Plaintiffs filed a motion for summary judgment, which the trial court granted except as to Gail as she had filed for bankruptcy. On appeal, Kevin presents several issues, which we consolidate and restate as:

1. Did the trial court violate Kevin’s right to due process when it denied his request for an extension of time to respond to the Plaintiffs’ summary judgment motion?
2. Did the trial court erroneously grant summary judgment against Kevin in light of Gail’s filing for Chapter 7 bankruptcy?
3. Did the trial court properly enter summary judgment in favor of the Plaintiffs?

[2] We affirm and remand.

¹ Burkett identified herself as “acting as next friend for her elderly father, Richard E. Newby.” *Appellant’s Appendix Vol. 2* at 29.

Facts & Procedural History

[3] The Newbys are the owners of a single-family residence that sits on an eighteen-acre parcel of real estate located in Hamilton County. On July 16, 2013, the Newbys and the Buyers executed the Contract for the sale/purchase of the house on the Newbys' property along with three or four acres surrounding the residence. The Contract identified the real estate by its commonly known address and specified that "the legal address will be provided at time of title transfer and/or when the contract matures or is paid in full."² *Appellant's Appendix Vol. 2* at 35. As set out in the Contract, the purchase price was \$179,250, with the manner of payment being \$10,000 upon execution and delivery of the Contract, followed by 5 monthly payments of \$1650, then 11 monthly payments of \$1000, and finally a balloon payment of \$150,000 due on December 15, 2014. The Buyers agreed to assume and pay taxes and any assessments on the real estate, procure necessary insurance coverage, and use the property in accordance with local zoning guidelines. The Contract also included a provision for default and acceleration.

[4] On October 5, 2018, the Plaintiffs filed their complaint for foreclosure, alleging that the Buyers had failed to pay taxes, assessments, insurance, and payments

² In the Affidavit of Indebtedness designated in support of the Plaintiffs' motion for summary judgment, the Plaintiffs state that Kevin and Gail had offered to purchase the whole of the real estate owned by the Newbys for \$500,000, but the Newbys declined the offer. The Newbys and the Buyers eventually reached an agreement for the sale/purchase of the house and some surrounding land, which agreement is memorialized in the Contract. As stated in the affidavit, "[u]pon [the Buyers'] payment of the Purchase Price, the Real Estate was to be split into two parcels," with the Newbys to retain title to a fifteen-acre parcel and the Buyers to receive title to "the house and a 3-acre tract surrounding the house." *Id.* at 119.

according to the terms of the Contract and that they failed to use the real estate in accordance with Westfield zoning ordinances. On October 26, 2018, Gail filed a Voluntary Petition for Relief under Chapter 13 of the Bankruptcy Code. Upon receiving notice of Gail's bankruptcy filing, the trial court stayed the underlying action as to Gail only.

[5] On February 13, 2019, the Plaintiffs moved for default as to Kevin because he had not yet filed a response to their complaint. Two days later, the trial court entered default judgment against Kevin. The Plaintiffs then pursued a Sheriff's Sale as to Kevin's interest in the real estate. Before the Sheriff's Sale could take place, the Plaintiffs filed a notice with the trial court requesting that the Sheriff's Sale be stayed and the default judgment set aside because pursuant to 11 U.S.C. § 1301 Gail's bankruptcy filing "should have stayed the proceedings and enforcement of judgment against . . . Kevin" because the underlying matter was a consumer transaction and Kevin was a codebtor with Gail.³ On March 26, 2019, after Kevin submitted evidence confirming that the subject of the current action was a consumer transaction, the trial court vacated the default judgment entered against him and stayed the underlying action.

[6] On November 15, 2019, Gail filed another Notice of Bankruptcy, informing the trial court that she had filed a second Voluntary Petition for Relief under

³ After an order for relief under Chapter 13, "a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor." 11 U.S.C. § 1301(a).

Chapter 13 of the Bankruptcy Code on November 14, 2019.⁴ She asserted that such operated to continue the stay of the underlying proceedings as to herself and Kevin.

[7] On February 11, 2021, the Plaintiffs filed a Notice of Dismissal of Bankruptcy in which they informed the trial court that Gail's November 14, 2019 bankruptcy petition was dismissed on July 14, 2020, and requested that the trial court lift the stay on their foreclosure action. That same day, the Plaintiffs filed a Motion for Summary Judgment, along with a supporting memorandum and designated evidence. The Plaintiffs asserted that the Buyers failed to make payments pursuant to the terms of the Contract, and as a result, the Plaintiffs were opting to accelerate the indebtedness pursuant to the terms of the Contract. Specifically, the Plaintiffs requested the trial court to declare all sums due and payable under the Contract and to foreclose any equitable interest Kevin and Gail may have obtained in the real estate. The Plaintiffs claimed that, as of August 27, 2020, the Buyers' total amount of indebtedness was \$68,336.29⁵ plus attorney's fees to collect such balance. A Judge's Entry of February 12, 2021, noted the Plaintiffs' summary judgment filing, advised "any opposing party" to file a response or request for enlargement of time within thirty days, and warned that the court could not consider any filings in response

⁴ It is unclear when Gail's first bankruptcy petition was dismissed.

⁵ This amount includes \$58,650 in principal, \$1700 in late charges, \$3317.92 in property taxes, and \$4668.37 in previous attorney's fees.

to summary judgment if made after the thirty-day deadline had passed.

Appellant's Appendix Vol. 2 at 156.

- [8] On March 10, 2021, the attorney representing the Buyers filed a motion to withdraw his appearance. Attached to the motion was a letter to Kevin dated February 11, 2021, that stated:

This letter will confirm my conversation today with Kevin. As I indicated, the plaintiffs in the foreclosure action have today filed a Motion for Summary Judgment. I have enclosed copies of the filing with this letter. As I indicated, a response is due thirty (30) days from today. If no response is filed, the court may take action including entering judgment against you.

This letter will also confirm that you have agreed that I will withdraw my appearance on behalf of both Kevin and Gail ten (10) days after the date of this letter without filing a response on behalf of either of you.

If this is not your understanding, or if you have any questions, please contact me immediately.

Id. at 160.

- [9] On March 12, 2021, Gail filed a Notice of Bankruptcy with the trial court, informing the court that she filed a Voluntary Petition for Relief under Chapter 7 of the Bankruptcy Code on March 11, 2021. The same day, Kevin filed a

motion for extension of time⁶ to respond to Plaintiffs' summary judgment motion, noting that his response was due on or before March 15, 2021, and that his attorney had requested to withdraw his appearance on his behalf. The Plaintiffs objected to an extension of time asserting that "Defendants have taken nearly every action possible to needlessly delay this foreclosure action." *Id.* at 168. The trial court denied Kevin's motion for extension of time to respond to Plaintiffs' motion for summary judgment.⁷

[10] Kevin retained new counsel and on March 18, 2021, filed a motion asking the court to reconsider its denial of his request for an extension of time. Simultaneously therewith, Kevin filed his response to the summary judgment motion. Kevin claimed genuine issues of material fact existed because the Contract did not precisely specify the land to be purchased and thus, insurance, taxes, and assessment values could not be computed. On March 25, 2021, the Plaintiffs objected to Kevin's motion to reconsider⁸ and moved to strike his response to their summary judgment motion as untimely.⁹ They also requested that the trial court rule on their summary judgment motion without a hearing.

⁶ The motion was filed by the attorney who two days prior filed a request to withdraw his appearance. The court had not yet ruled on counsel's request.

⁷ The court's order was signed on Friday, March 12, but not entered in the record until Monday, March 15.

⁸ The Plaintiffs point out that Kevin's new counsel in this matter is his retained counsel in an action Kevin and Gail initiated in Hamilton Superior Court 4 with the filing of a complaint against the Newbys on April 20, 2020. According to the Plaintiffs, the action in Hamilton Superior Court 4 concerns the same land and the same contract at issue herein.

⁹ The trial court did not rule on the motion to strike. In any event, it is well-established that courts have no discretion to alter the time limits of T.R. 56, and courts cannot consider summary judgment filings made after

[11] On March 26, 2021, the trial court granted Plaintiffs’ motion for summary judgment except as to Gail.¹⁰ The court awarded Plaintiffs¹¹ a personal money judgment against Kevin in the amount of \$68,336.29 plus interest as well as attorney’s fees and out-of-pocket expenses totaling \$10,100. Kevin now appeals. Additional information will be provided below as necessary.

Discussion & Decision

[12] Before reaching the merits of the appeal, we address a matter presented by Global Signal Acquisitions II LLC (GSA), a company that has no ties to the instant action but was erroneously identified as a defendant. GSA filed a Brief of Appellee requesting that this court “order correction of a judgment or order, under Appellate Rule 66(C)(7)” such that any reference to GSA be stricken from the trial court’s order on summary judgment. *GSA Brief of Appellee* at 1. GSA explains that it was not named as a defendant in the complaint and that the trial court mistakenly listed GSA as a defendant in the action based on an incorrect case caption on the Plaintiffs’ counsel’s notice of appearance. After GSA learned that it had been erroneously identified as a defendant, it notified the trial court of the error and requested that it be dismissed. However, the trial

the expiration of the time limitations set forth therein. *See, e.g., Borsuk v. Town of St. John*, 820 N.E.2d 118, 123 n. 5 (Ind. 2005) (citing *Desai v. Croy*, 805 N.E.2d 844, 848-49 (Ind. Ct. App. 2004)). As Kevin’s response to the summary judgment motion was filed beyond the deadline, the trial court could not consider it.

¹⁰ Plaintiffs did not seek a ruling as to Gail in light of the automatic stay resulting from her most-recent filing for Chapter 7 bankruptcy.

¹¹ Richard passed away on June 10, 2021. Edna passed away on June 17, 2021. On August 3, 2021, an estate was opened for Edna in Hamilton County, Indiana.

court had already granted summary judgment, identifying GSA as a defaulting defendant, and this appeal had been initiated before any correction could be made. The Plaintiffs have filed a Notice of Statement of No Opposition to GSA's Brief of Appellee. Therefore, pursuant to App. R. 66(C)(7), we remand and order the trial court to correct its summary judgment order to omit any reference to GSA as a defendant in this action.

1. Due Process

[13] Kevin argues that he was denied due process when the trial court denied his motion for extension of time to respond to the Plaintiffs' motion for summary judgment. In support of his argument, Kevin cites two cases, neither of which support his position that he was denied due process.¹²

[14] Ind. Trial Rule 56(C) provides that a party has thirty days to respond to an opposing party's summary judgment motion. T.R. 56(I) provides, "[f]or cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit." We review a trial court's action in altering the time limits on summary judgment for an abuse of discretion.

¹² Kevin cites *Hess v. Hess*, 679 N.E.2d 153 (Ind. Ct. App. 1997), in which this court did not address due process but rather reviewed the trial court's decision to deny a motion for continuance using the abuse of discretion standard. Kevin also cites *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), wherein the U.S. Supreme Court stated that a "matter of continuance is traditionally within the discretion of the trial judge" but noted that "a denial of a continuance [can be] so arbitrary as to violate due process." In the latter instance, the Court stated that courts should look to "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied" in deciding whether there was a denial of due process. *Id.* Kevin has not shown that under the circumstances, the court's denial was "so arbitrary as to violate due process." *Id.*

McGuire v. Century Surety Co., 861 N.E.2d 357, 360 (Ind. Ct. App. 2007). An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before it. *Id.*

[15] The primary basis for Kevin’s request for an extension of time was that his attorney withdrew from the case, leaving him with “effectively eleven days to retain counsel and file a response” to the summary judgment motion.

Appellant’s Brief at 16. Kevin asserts that the trial court’s denial of his extension request left him “without the benefit of counsel at what was potentially the ultimate state of the proceedings against him,” which amounted to a violation of his due process rights. *Id.*

[16] First, we note that “withdrawal of legal counsel does not entitle a party to an automatic continuance[.]” *Riggin v. Rea Riggin & Sons, Inc.*, 738 N.E.2d 292, 311 (Ind. Ct. App. 2000). In considering denials of motions to continue due to withdrawal of legal counsel, Indiana courts have analyzed: whether the withdrawal occurred at a crucial stage in the proceedings; whether the movant had engaged in dilatory tactics; whether the non-movant would have been prejudiced by a delay; whether new counsel would have had adequate time to respond taking into account the complexity of the case; whether the attorney’s withdrawal was expected or foreseeable; whether the movant was at fault; and what efforts the movant took to secure new counsel. *See Hess*, 679 N.E.2d at 154; *Homehealth, Inc. v. Heritage Mut. Ins. Co.*, 662 N.E.2d 195, 198 (Ind. Ct. App. 1996), *trans. denied*.

[17] In the two and a half years since the Plaintiffs filed their complaint, Gail has filed for bankruptcy three times. Gail's first bankruptcy was filed twenty-one days after the complaint was filed and mere days before the Buyers' answer was due. This stayed these proceedings as to both Kevin and Gail. After Gail's first bankruptcy was dismissed, she filed a second bankruptcy petition. This second bankruptcy was dismissed approximately nine months later due to Gail's failure to comply with the bankruptcy court's directive and such dismissal operated to lift the stay of the underlying proceedings.

[18] Six months after dismissal of Gail's second bankruptcy, the Plaintiffs informed the court thereof and immediately filed their motion for summary judgment. That same day, Kevin's attorney confirmed by letter to Kevin their conversation about the filing of the summary judgment motion, the deadline for a response, and the possible ramifications of failing to respond. Counsel also confirmed that he had told Kevin he would not be filing a response on Kevin's behalf and that he would be withdrawing his representation in ten days. The trial court also issued a notice to all parties regarding the deadline to respond to the motion for summary judgment or request for a continuance and warned that it could not consider responses filed after the thirty days.

[19] Contrary to Kevin's assertion that he had only eleven days to retain counsel and file a response to summary judgment, the record demonstrates that Kevin knew of the motion for summary judgment the day it was filed. As of that same day, he also knew that his attorney was withdrawing from the case. Thus, Kevin had thirty days to retain counsel and file a response. Yet, Kevin waited until

the Friday before the Monday that his summary judgment response was due to request an extension. Kevin did not detail any failed efforts to secure new counsel or demonstrate any other cause for an extension in his request.

Further, we note that three days after the court denied his extension, Kevin retained new counsel who immediately filed a motion to reconsider as well as a response to the summary judgment motion. And, as noted in footnote 9, *supra*, Kevin's new counsel already represented him in a separate matter involving the same real estate and contract at issue here. Kevin has offered no reason why he could not have secured counsel and timely responded. Rather, his actions, or lack thereof, highly suggest that he was seeking to further delay this action.

[20] The trial court was clearly swayed by the Plaintiffs' assertion that the "Defendants have taken nearly every action possible to needlessly delay this foreclosure action." *Appellant's Appendix Vol. 2* at 168. As outlined above, the record supports such a finding. Kevin's attempt to blame the trial court for his failure to timely respond to the summary judgment motion is another attempt to further delay the underlying action. That he was "without the benefit of counsel at what was potentially the ultimate state of the proceedings against him" was due largely to his own inaction. *Appellant's Brief* at 16. Under the circumstances, we conclude that the trial court did not abuse its discretion, let alone violate Kevin's due process rights when it denied his request for an extension of time to respond to the motion for summary judgment.

2. *Bankruptcy*

[21] Kevin argues that the trial court was precluded from entering summary judgment against him in light of the pending bankruptcy filed by Gail. Automatic stays under the Bankruptcy Code are governed by 11 U.S.C. § 362(a), which states:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim *against the debtor* that arose before the commencement of the case under this title;

(2) the enforcement, *against the debtor* or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a

claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(Emphases supplied). Bankruptcy petitions therefore serve as automatic stays of proceedings, recovery of claims, or enforcement of judgments against the debtor.

[22] 11 U.S.C. § 1301, titled “Stay of action against codebtor,” works in conjunction with Section 362 of the Bankruptcy Code by extending the protections provided by Section 362 to co-debtors if the debtor filed for bankruptcy under Chapter 13. Specifically, Section 1301(a) states that “after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor *from any individual that is liable on such debt with the debtor.*” (Emphasis supplied).

[23] There is no dispute that Kevin is a codebtor with Gail under the Contract. Thus, Gail's two Chapter 13 bankruptcy filings stayed the proceedings against both Gail and Kevin. Gail's third bankruptcy filing, however, was under Chapter 7 of the Bankruptcy Code. Chapter 7 bankruptcy filings act to stay proceedings only against debtor(s). There is no provision under Chapter 7 that extends the protections of Section 362 to co-debtors. Thus, to the extent Kevin argues that the trial court was precluded from entering summary judgment against him given Gail's Chapter 7 bankruptcy filing, he is mistaken.

3. *Summary Judgment*

[24] It is well settled that we review a trial court's summary judgment order de novo. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). On summary judgment, the moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Chenoweth v. Estate of Wilson*, 827 N.E.2d 44, 47 (Ind. Ct. App. 2005). If this requirement is met, the burden shifts to the nonmovant to establish genuine issues of material fact for trial. *Id.* Considering the designated facts and drawing all reasonable inferences in favor of the nonmovant, we will affirm a grant of summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing T.R. 56(C)).

[25] Here, the Plaintiffs filed a motion for summary judgment and designated as evidence their complaint, an Affidavit of Indebtedness, and the Contract.

Kevin never filed an answer to the complaint, nor did he file a timely response to the motion for summary judgment.

[26] The Plaintiffs established that the terms of the Contract required the Buyers to pay taxes, assessments, insurance, and payments on the property. They also established that the Contract contains a default provision allowing the Newbys to accelerate the indebtedness and declare all sums under the Contract due and payable and to foreclose any equitable interest the Buyers may have obtained. In the Affidavit of Indebtedness, Burkett affirmed that the Buyers are in default “for, among other things, their failure to make payments when due” under the terms of the Contract. *Appellant’s Appendix Vol. 2* at 120. Plaintiffs have made a prima facie showing that there is a contract and that Kevin defaulted on the Contract by failing to make payments in accordance therewith. The trial court did not err in granting summary judgment in favor of Plaintiffs.¹³

[27] Judgment affirmed and remanded.

Bailey, J. and Mathias, J., concur.

¹³ Because the Plaintiffs made a prima facie showing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law and Kevin did not file a timely responsive pleading to their summary judgment motion, we need not address his appellate arguments challenging the validity of the Affidavit of Indebtedness or the Contract.