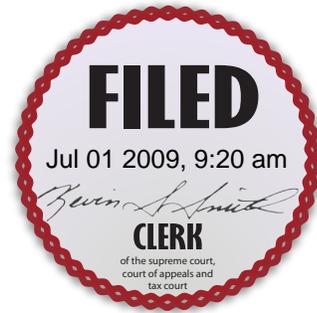


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CAPITAL ONE BANK, )  
 )  
Appellant, )  
 )  
vs. ) No. 34A02-0902-CV-121  
 )  
DENTON MANERS and CAROLYN MANERS )  
 )  
Appellees. )

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APPEAL FROM THE HOWARD SUPERIOR COURT  
The Honorable George A. Hopkins, Judge  
Cause No. 34D04-0704-CC-429

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**July 1, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Capital One Bank appeals the dismissal of its civil collection action against Denton and Carolyn Maners. The following issue is dispositive of the appeal: Did the trial court abuse its discretion in denying Capital One's motion for relief under Ind. Trial Rule 60(B)?

We affirm.

The facts favorable to the ruling are that on April 23, 2007, Capital One filed a complaint for a civil collection action against the Manerses for an unpaid credit card balance. The Manerses timely filed their appearance by counsel along with a Motion to Attach a Written Instrument. That motion was promptly denied. Lacking sufficient information to answer the complaint, the Manerses submitted discovery requests to Capital One, including a set of interrogatories and a request for production of documents. When Capital One did not respond to the discovery requests, on July 2, 2007, the Manerses filed a motion to compel discovery. The court set the matter for hearing on July 30, 2007. On the day before the scheduled hearing, Capital One sought a continuance, to which the Manerses did not object. The Manerses agreed to Capital One's request for an additional thirty days to comply with the Manerses' discovery requests. Thereafter, Capital One partially complied with the request for production but did not respond to the interrogatories.

The hearing on the Manerses' motion to compel was held on September 5, 2007. The Manerses appeared at the hearing but Capital One did not. The trial court granted the motion to compel and ordered Capital One to comply with the outstanding discovery requests within fourteen days. When Capital One failed to comply with the motion to compel, on October 2, 2007, the Manerses filed a Motion For Sanctions For Failure to Comply With Discovery,

seeking dismissal of Capital One's complaint under Indiana Trial Rule 37. The trial court granted the motion and dismissed Capital One's action on October 2, 2007. Almost one year later, on October 1, 2008, Capital One filed a Motion To Set Aside Dismissal Pursuant To TR 60. In it, counsel stated that Capital One's law firm's failure to attend the October 2, 2007 hearing was attributable to a breakdown in its calendaring system. The trial court denied the motion and Capital One appeals.

We review the grant or denial of a T.R. 60(B) motion for relief from judgment for an abuse of discretion. *WW Extended Care, Inc. v. Aetna Life Ins. Co.*, 755 N.E.2d 712 (Ind. Ct. App. 2001). An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* In conducting this review, we accord the trial court's ruling substantial deference on appeal. *Swiggett Lumber Const. Co., Inc. v. Quandt*, 806 N.E.2d 334 (Ind. Ct. App. 2004). We may not reweigh the evidence or substitute our judgment for that of the trial court. We note also that the movant bears the burden to show sufficient grounds for relief under T.R. 60(B). *Id.* On the facts of this case, the dismissal of Capital One's complaint was the functional equivalent of a default judgment. Although "the decision to set aside a default judgment is largely the province of the trial court, Indiana disfavors default judgments and prefers resolution of a cause on its merits." *Id.* at 336. We are constrained to resolve any doubt as to the propriety of a dismissal such as this in favor of the defaulted party. *Swiggett Lumber Const. Co., Inc. v. Quandt*, 806 N.E.2d 334.

Capital One does not explicitly identify the particular subsection of T.R. 60(B) under

which it seeks relief. It is clear from its argument, however, that it advances this motion under subsection (1), which includes “mistake, surprise, or excusable neglect[.]” In its petition to the trial court and its arguments upon appeal, Capital One focuses primarily upon two points: (1) the fact that the Manerses have not yet filed an answer and (2) the claim that dismissal under T.R. 37 is a disproportionate sanction on the facts of this case. Those matters become relevant only if Capital One makes the threshold showing under T.R. 60(B)(1) that the actions that prompted the trial court to dismiss its lawsuit were the product of mistake, surprise, or excusable neglect within the meaning of T.R. 60(B)(1).

To meet this threshold, Capital One set forth the following explanation in its motion to set aside:

7. [The law firm representing Capital One] uses a central calendaring system for the coverage of hearings. When notice of hearings are received the date and location of the hearing is to be transmitted to and placed on the central calendar for coverage.

8. The September 5, 2007, continued hearing on defendant’s motion to compel through a breakdown of communication was not placed on the central calendar for coverage. But for the breakdown in communication counsel for the plaintiff would have appeared at the September 5, 2007 hearing.

*Appellant’s Appendix* at 57. Thus, it appears that the basis of Capital One’s claim for relief is that it simply missed the September 5 hearing because of a failure in its calendaring system. If the failure to attend the hearing were the only consideration for the trial court’s ruling, we might be inclined to view Capital One’s claim more sympathetically. It is apparent, however, that the dismissal was premised upon other conduct as well, i.e., the persistent failure to comply with discovery requests. A review of the record before us reveals that Capital One

still had not complied with the request at the time the trial court denied its motion to set aside. In fact, the court indicated at the hearing that the dismissal was premised upon a pattern of conduct and not a single incident:

To be quite honest with you, here's what's bothering me. July 2<sup>nd</sup> of '07 a hearing was set for July 30<sup>th</sup>. Counsel for the plaintiff on the 30<sup>th</sup> advised the court they'd be faxing a motion for continuance. [Defense counsel] did not object. On the 31<sup>st</sup>, based upon a telephone conversation with plaintiff's counsel, and on today's date, which means the 31<sup>st</sup>, we got the fax'd [sic] motion to extend the time. We granted that motion that the Plaintiff shall have 30 days from today's date, meaning 31<sup>st</sup> of July, to respond. Same day we set, we reset the hearing for September 5, 2007. September 5, plaintiff fails to appear. We granted the Motion to Compel, requested the documents be produced within 14 days and that was never done. I just have a problem with the idea that these files are setting [sic] on somebody's desk (inaudible) responding in a prompt, as prompt a manner as possible could. This is not a situation where it took 10, 15, 20 days to respond to anything.

*Transcript on Appeal* at 11. Clearly, the court was disturbed by Capital One's persistent failure to comply with the Manerses' discovery requests.

As we have indicated, an order dismissing an action or granting a default judgment is an extreme sanction, and one that is not looked upon favorably. Nonetheless, it sometimes is warranted, especially where a party has demonstrated disregard for the trial court's orders, as well as where the conduct of that party has or threatens to delay or obstruct the rights of the opposing party. *See Prime Mortgage. USA, Inc. v. Nichols*, 885 N.E.2d 628 (Ind. Ct. App. 2008). In this case, Capital One does not dispute that it was properly notified of every request made of it and of the September 5 hearing. Nevertheless, it did not attend the hearing and, both before and after, persistently failed to comply with the court's discovery orders over a period of months, thereby obstructing the Manerses' access to the materials. Under

these circumstances, we cannot say the trial court abused its discretion in denying Capital One's T.R. 60(B) motion to set aside the order dismissing Capital One's case.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.