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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable Margot F. Reagan, Judge  
Cause No. 71D04-0706-MF-546

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**February 3, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellants/Defendants/Supplemental Plaintiffs Michael Linner and Penelope Linner (collectively the “Liners”) challenge the trial court’s order denying their motion to correct error following the trial court’s entry of summary judgment against them in subsequent proceedings relating to a foreclosure action brought by Appellee/Plaintiff/Supplemental Defendant Wells Fargo Bank, N.A. (“Wells Fargo”). We affirm.

**FACTS AND PROCEDURAL HISTORY**

On April 12, 2002, the Liners, for value received, executed and delivered a mortgage note (“note”) by which they promised to pay Wells Fargo the sum of \$92,176 in monthly installment payments of principal plus interest in the sum of \$644.51 per month at an annual rate of 7.5 percent. At the same time, the Liners executed a mortgage on certain real estate owned by the Liners, and any improvements located thereon in order to secure the payment of the note. The Liners have failed to make the scheduled monthly payments on the note and are in default.

On June 13, 2007, Wells Fargo initiated foreclosure proceedings. Wells Fargo completed service on the Liners on June 19, 2007. On June 30, 2007, Wells Fargo filed a

motion seeking a default judgment entry and decree of foreclosure after the Linners failed to appear or defend the matter. On that same day, the trial court granted Wells Fargo's motion and entered a judgment and decree of foreclosure (the "foreclosure decree"). The Linners did not appeal the foreclosure decree.

On December 12, 2007, the Linners notified Wells Fargo that they had retained counsel. In this notification, the Linners also threatened to move to set aside the foreclosure decree. The Linners, however, did not move to set aside the foreclosure decree at that time.

On December 2, 2008, the Linners filed a complaint in the United States District Court for the Northern District of Indiana (the "federal action"), essentially seeking that the foreclosure decree be set aside. Wells Fargo moved to dismiss the federal action on February 2, 2009. In its motion to dismiss, Wells Fargo stated that it would continue with the sale of the property in question because the Linners had not sought a stay of execution of the judgment of foreclosure in state court. The federal action was ultimately dismissed on August 20, 2009.

The Linners' property was sold to Wells Fargo at a Sheriff's Sale on June 25, 2009. Nearly a month later, on July 20, 2009, the Linners filed a motion and a complaint under the same cause number assigned to the original foreclosure proceedings seeking equitable relief and to set aside the foreclosure decree pursuant to Indiana Trial Rule 60(B)(8). The Linners' complaint named both Wells Fargo and the St. Joseph County Sheriff, Frank Canarecci, as defendants. In support, the Linners attached a supplemental complaint and second amended

complaint which they sought permission to file in the federal action.<sup>1</sup> The trial court conducted a status conference on October 21, 2009, at which it was confirmed that the essence of the Linners' pleading was an attempt to vacate the foreclosure decree pursuant to Indiana Trial Rule 60(B)(8).

On November 30, 2009, Sheriff Canarecci filed a motion seeking summary judgment asserting that all claims raised against him by the Linners were barred by the doctrine of quasi-judicial and statutory immunity, that the Linners had failed to state a cause of action under both the federal and state RICO statutes, and that any state law claims for damages were barred by the Linners' failure to file a timely Notice of Tort Claims. Likewise, on December 2, 2009, Wells Fargo filed a motion for summary judgment asserting that the Linners' request was neither filed within a reasonable time, nor did it demonstrate extraordinary circumstances justifying relief. The trial court conducted a hearing on Sheriff Canarecci's and Wells Fargo's motions on January 29, 2010. On February 11, 2010, the trial court denied the Linners' request to set aside the foreclosure decree and granted summary judgment in favor of Sheriff Canarecci and Wells Fargo.

On March 12, 2010, the Linners filed a motion to correct error. The Linners' motion to correct error only challenged the trial court's denial of their request to set aside the foreclosure decree pursuant to Indiana Trial Rule 60(B)(8), and did not challenge any claims raised against Sheriff Canarecci. The trial court set the matter for a hearing, and on April 27, 2010, denied the Linners' motion to correct error. This appeal follows.

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<sup>1</sup> The federal court denied the Linners' request to file the supplemental complaint and second amended complaint. Accordingly, the supplemental complaint was never filed in the federal action.

## DISCUSSION AND DECISION

### I. Claims Relating to Sheriff Canarecci

Initially, we note that the Linners' appellate brief does not contain any cogent argument regarding any claims relating to Sheriff Canarecci. "It is well settled that this court will not consider an appellant's assertion on appeal when he or she has failed to present a cogent argument supported by authority and references to the record as is required by the [appellate] rules." *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). Therefore, to the extent that the Linners' appeal includes any claim relating to Sheriff Canarecci, such claim is waived. *See id.* (providing that we will deem alleged errors waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate consideration of the errors).

### II. Claims Relating to Wells Fargo

The Linners contend that the trial court erred in denying their motion to correct error because their challenge to the foreclosure decree pursuant to Indiana Trial Rule 60(B)(8) was timely and raised a meritorious claim.

Our scope of review for the granting or denying of a T.R. 60(B) motion is limited to whether the trial court abused its discretion. *Blichert v. Brososky*, 436 N.E.2d 1165, 1167 (Ind. Ct. App. 1982). 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.* Further, a trial court must balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation. *Id.*

*Chelovich v. Ruff & Silvian Agency*, 551 N.E.2d 890, 892 (Ind. Ct. App. 1990).

Trial Rule 60(B) provides, in relevant part, as follows:

**(B) Mistake–Excusable neglect–Newly discovered evidence–Fraud, etc.**  
On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:

\* \* \* \*

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Thus, in order to obtain relief, the Linnens must prove that they filed their challenge to the foreclosure decree within a reasonable time *and* make a prima facie showing of a meritorious claim or defense. *See Baker & Daniels, LLP v. Coachmen Indus.*, 924 N.E.2d 130, 141 (Ind. Ct. App. 2010); *Smith v. Johnson*, 711 N.E.2d 1259, 1265 (Ind. 1999); *Chelovich*, 551 N.E.2d at 892.

A meritorious defense is one showing if the case was retried on the merits a different result would be reached. *Vanjani v. Federal Land Bank of Louisville*, 451 N.E.2d 667, 672 (Ind. Ct. App. 1983). Indiana requires a party seeking to set aside a judgment to make a prima facie showing of a good and meritorious defense. *Id.* at 671. The catalyst needed to obtain the proper relief is some admissible evidence which may be in the form of an affidavit, testimony of witnesses, or other evidence obtained through discovery. *Bross v. Mobile Home Estates, Inc.*, 466 N.E.2d 467, 469 (Ind. Ct. App. 1984). Some admissible evidence must be presented to the trial court which would indicate the judgment would not remain unchanged and an injustice would be foisted upon the defaulted party if the judgment is allowed to stand. *Id.* A mere allegation except for the excusable neglect the action would have been

defended is insufficient to set aside a judgment. *Id.*

*Chelovich*, 551 N.E.2d at 892.

Here, the Linners effectively concede that they were in default of the note which was held by Wells Fargo. They do not present any argument or evidence suggesting that they were not in default, but rather focus their argument on the nationwide foreclosure crisis. The Linners, however, fail to provide any cogent argument showing how the nationwide foreclosure crisis affects the specific facts and circumstances relating to their particular situation. Furthermore, the Linners fail to present any argument or evidence suggesting that the foreclosure proceedings were deficient in any way. The Linners, therefore, have failed to provide a prima facie showing of a meritorious claim or defense as required by Indiana Trial Rule 60(B). Having concluded that the Linners have failed to provide a prima facie showing of a meritorious defense, we need not consider the timeliness of their challenge to the foreclosure decree. *See Coachmen*, 924 N.E.2d at 141 (providing that a challenge pursuant to Indiana Trial Rule 60(B) must be timely *and* make a prima facie showing of a meritorious claim or defense).

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.