

Case Summary

A buyer filed a complaint against the seller of real estate and its general partner for breach of contract and other claims. When service to the seller and general partner was returned as “unclaimed,” the buyer issued summons by publication. The seller and general partner failed to file a responsive pleading. The trial court subsequently granted the buyer’s motions for default judgment and proceedings supplemental. Upon receiving service regarding the proceedings supplemental, the seller and general partner filed an Indiana Trial Rule 60(B) motion to set aside the default judgment, in which they averred that they had no actual knowledge of the lawsuit and had a meritorious defense. The seller and general partner now appeal the trial court’s denial of that motion. Because the seller and general partner were served only by publication, filed the motion to set aside less than one month after the default judgment, and in that motion averred that they had no actual knowledge of the action and judgment and had a meritorious claim or defense, we conclude that the trial court abused its discretion by denying the motion to set aside the default judgment. We therefore reverse and remand.

Facts and Procedural History

Dennis Fahlsing is the general partner of Stroh Landmark, LP. Willis Hecht was interested in purchasing real estate owned by Stroh Landmark in Auburn, Indiana. On November 12, 2008, Hecht entered into a written agreement to purchase the real estate from Stroh Landmark, which provided, “This Agreement represents the entire understanding and agreement between the parties with respect to the subject matter hereof[], supersedes all prior agreements and or negotiations between such parties, and

may be amended, supplemented or changed only by an agreement in writing which makes specific references hereto and which is signed by the party against whom enforcement of any such amendment supplement or modification is sought.” Appellant’s App. p. 13, 16, 32. The agreement also provided that Hecht and Stroh Landmark would split closing costs equally. Hecht and Fahlsing both signed the agreement.

Closing occurred on January 20, 2009. The settlement statement lists \$84,000 as the purchase price, but because of settlement and other charges totaling \$8,163.76, Stroh Landmark received only \$75,836.24. The settlement statement reflects that closing costs were not split equally between the parties. *Id.* at 21. The deed was transferred to Hecht.

The terms of the agreement and what occurred at closing are disputed. Hecht alleges that the written agreement originally provided that he would purchase the real estate for \$70,000. He claims that the parties subsequently agreed to substitute the page of the agreement stating a purchase price of \$70,000 with a different page stating a purchase price of \$84,000. According to Hecht, Stroh Landmark and Fahlsing agreed to give him the additional \$14,000 at closing, and the price was increased “for the purpose of allowing [Hecht] to obtain additional funds to be used in covering closing costs and remodeling work on the real estate.” *Id.* at 9. Hecht alleges that at closing, however, Fahlsing told Hecht for the first time that because there were back taxes owed and an existing mortgage on the real estate, Stroh Landmark would not give him the additional \$14,000. Instead, Hecht continues, Fahlsing told him that he would personally provide the money to him. Hecht claims that Stroh Landmark and Fahlsing have refused to pay Hecht the additional money despite repeated requests.

On the other hand, Stroh Landmark and Fahlsing allege that the written agreement provided that Hecht would purchase the real estate for \$84,000, the agreement by its terms could only be amended or changed by signed written agreement, and the parties did not enter into a subsequent written agreement regarding the \$14,000. Stroh Landmark and Fahlsing further claim that Stroh Landmark deeded the real estate to Hecht, but because Hecht's mortgage lender paid Stroh Landmark only \$75,836.24, Hecht still owes Stroh Landmark \$8,163.76.

In October 2009, Hecht filed a complaint against Stroh Landmark and Fahlsing alleging breach of contract, theft/conversion, and misrepresentation. Three versions of the written agreement were attached to his complaint: (1) an agreement with the first page stating a purchase price of \$70,000 and the second page signed by the parties and dated November 12, 2008, (2) a partial agreement consisting of only the first page stating a purchase price of \$84,000, and (3) an agreement apparently sent via email from Linda Fahlsing on January 2, 2009, with the first page stating a purchase price of \$70,000 and the second page signed by the parties and dated November 12, 2008. The warranty deed and settlement statement, both dated January 20, 2009, were also attached to Hecht's complaint.

Hecht attempted to serve Stroh Landmark and Fahlsing through the county clerk by certified mail at Fahlsing's address as listed on the written agreement, 530 South 1100 East, Avilla, Indiana. Apparently, this is also the address on file with the Indiana Secretary of State. Both mailings were returned as "unclaimed" in November 2009. *Id.* at 2, 22, 23. In December 2009, Hecht issued summons by publication. On May 27,

2010, Hecht filed a motion for default judgment, which the trial court granted the same day. The default judgment against Stroh Landmark and Fahlsing was “in the amount of \$10,041.62, plus \$146.00 court costs plus \$1,000.00 attorney fees plus \$116.50 publication fees, plus interest of 10% per annum from this date.” *Id.* at 25.

On June 14, 2010, Hecht filed a motion for proceedings supplemental, which the trial court granted the same day. The chronological case summary entry for the order granting this motion states, “Order to be served by private process server.” *Id.* at 2.

One week later on June 21, 2010, Stroh Landmark and Fahlsing filed a motion to set aside the default judgment. Attached to the motion was an affidavit by Fahlsing in which he stated that he did not reside at the Avilla address in October 2009 or thereafter, he was not served with a summons or complaint, and the judgment was a “complete surprise” to him and Stroh Landmark. *Id.* at 29. Fahlsing further stated that the written agreement provided that Hecht would purchase the real estate for \$84,000, the agreement by its terms could only be amended or changed by signed written agreement, and the parties did not enter into a subsequent written agreement. Fahlsing alleged that Stroh Landmark deeded the real estate to Hecht, but because Hecht’s mortgage lender paid Stroh Landmark only \$75,836.24, Hecht still owes Stroh Landmark \$8,163.76. Fahlsing’s affidavit included as an exhibit the written agreement providing for a purchase price of \$84,000, signed by the parties and dated November 12, 2008.

After a hearing, the trial court denied the motion to set aside the default judgment based on the following facts:

1. That on October 20, 2009, Plaintiff filed his Complaint against the Defendants.

2. That the Defendant, Dennis Fahlsing is a General Partner of Stroh Landmark, LP.

3. That the information on file with the Indiana Secretary of State's Office (Petitioner's Exhibit 1) reflects that the Defendant, Dennis Fahlsing is a General Partner of Stroh Landmark, LP and that his address is 530 S. 1100 E., Avilla, Indiana 46710.

4. That at the time of the filing of the Complaint Plaintiff served both Defendants by certified mail at the address maintained by the Indiana Secretary of State, which address was 530 S. 1100 E., Avilla, Indiana 46710.

5. That the certified mail to both Defendants was returned "unclaimed" after leaving notice of the certified mail on three (3) consecutive weeks, October 22, 2009, October 29, 2009, and November 6, 2009.

6. That Plaintiff thereafter obtained service on the Defendants by publication.

Id. at 5-6.

Stroh Landmark and Fahlsing now appeal.

Discussion and Decision

Stroh Landmark and Fahlsing contend that the trial court abused its discretion by denying their Indiana Trial Rule 60(B) motion to set aside the default judgment.

We initially note that Hecht did not file an appellee's brief. When an appellee fails to submit a brief, we need not undertake the burden of developing arguments for him, and we apply a less stringent standard of review with respect to showings of reversible error. *Ferguson v. Stevens*, 851 N.E.2d 1028, 1031 (Ind. Ct. App. 2006). That is, we may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

Upon appellate review of a refusal to set aside a default judgment, the trial court's ruling is entitled deference and will be reviewed for an abuse of discretion. *Allstate Ins. Co. v. Watson*, 747 N.E.2d 545, 547 (Ind. 2001). The trial court's discretion should be

exercised in light of the disfavor in which default judgments are generally held. *Id.*; see also *Coslett v. Weddle Bros. Constr. Co.*, 798 N.E.2d 859, 861 (Ind. 2003) (“Indiana law strongly prefers disposition of cases on their merits.”), *reh’g denied*. Any doubt as to the propriety of a default judgment must be resolved in favor of the defaulted party. *Watson*, 747 N.E.2d at 547. A default judgment is an extreme remedy and is available only where a party fails to defend or prosecute a suit. *Id.* It is not a trap to be set by counsel to catch unsuspecting litigants. *Id.*

Indiana Trial Rule 60(B) provides in relevant part:

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:

* * * * *

(4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings

A Trial Rule 60(B)(4) motion must be filed “not more than one year after the judgment, order or proceeding was entered or taken” and “allege a meritorious claim or defense.” Ind. Trial Rule 60(B). Thus, to obtain relief under Trial Rule 60(B)(4), a party must show that: (1) default was entered against him, (2) he was served only by publication, (3) he was without actual knowledge of the action and judgment, order, or proceedings, (4) he filed a Trial Rule 60(B)(4) motion not more than one year after the judgment, order, or proceeding was entered or taken, and (5) he has alleged a meritorious claim or defense. See T.R. 60(B); *Ferguson*, 851 N.E.2d at 1031.

The evidence is clear that default was entered against Stroh Landmark and Fahlsing.

Further, although the trial court found it significant that the unclaimed service was sent to the address on file with the Indiana Secretary of State, the relevant inquiry is whether Stroh Landmark and Fahlsing were served only by publication. Hecht attempted service to both Stroh Landmark and Fahlsing by certified mail to the Avilla address, but both mailings were returned as “unclaimed.” Unclaimed service is insufficient to establish a reasonable probability that a party received adequate notice and to confer personal jurisdiction. *Munster v. Groce*, 829 N.E.2d 52, 59 (Ind. Ct. App. 2005) (citing *King v. United Leasing, Inc.*, 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002)). Hecht’s attempted service by certified mail did not result in actual service to either Stroh Landmark or Fahlsing. Moreover, the record does not reveal what other steps Hecht took, if any, to give actual service to Stroh Landmark and Fahlsing before serving them by publication. We conclude that Stroh Landmark and Fahlsing were served only by publication.

The trial court did not make any findings as to whether Stroh Landmark and Fahlsing had actual knowledge of the lawsuit. In the record before us, the only evidence on this matter is Fahlsing’s affidavit, in which he states that the default judgment was a “complete surprise” to him and Stroh Landmark. The record is uncontroverted that Stroh Landmark and Fahlsing had no actual knowledge of the action and judgment.

Regarding whether Stroh Landmark and Fahlsing timely filed their Trial Rule 60(B) motion, the evidence shows that the trial court entered default judgment on May 27, 2010. Stroh Landmark and Fahlsing filed their Trial Rule 60(B) motion less than one

month later on June 21, 2010. This is well within the one-year limitation imposed by Trial Rule 60(B).

Finally, we must determine whether Stroh Landmark and Fahlsing alleged a meritorious claim or defense in their Trial Rule 60(B) motion. Fahlsing's affidavit states that the written agreement provided for a purchase price of \$84,000. The written agreement is attached as an exhibit to Fahlsing's affidavit, which shows a purchase price of \$84,000 and was signed by Hecht and Fahlsing on November 12, 2008. It also includes the provision, "This Agreement represents the entire understanding and agreement between the parties with respect to the subject matter hereof[], supersedes all prior agreements and or negotiations between such parties, and may be amended, supplemented or changed only by an agreement in writing which makes specific references hereto and which is signed by the party against whom enforcement of any such amendment supplement or modification is sought." Fahlsing states in his affidavit that the parties did not enter into any subsequent written agreement. He also states that because Hecht's mortgage lender paid Stroh Landmark only \$75,836.24, Hecht still owes Stroh Landmark \$8,163.76. We conclude that Stroh Landmark and Fahlsing alleged a meritorious claim or defense in their Trial Rule 60(B) motion.

Here, Stroh Landmark and Fahlsing have shown that default was entered against them, they were served only by publication, they were without actual knowledge of the action and judgment, they timely filed their Trial Rule 60(B) motion, and they alleged a meritorious claim or defense in that motion. Stroh Landmark and Fahlsing have established prima facie error. We conclude that the trial court abused its discretion by

denying the motion to set aside the default judgment and therefore reverse the judgment of the trial court and remand for further proceedings.

Reversed and remanded.

BAKER, J., and BARNES, J., concur.