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APPELLANT PRO SE:

JEFF CANEN
Plainfield Re-Entry Educational Facility
Plainfield, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JEFF CANEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A04-0903-CV-138
	)	
FISHER VOORHIS DRAPER CHAPEL,	)	
	)	
Appellee-Plaintiff.	)	
	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0705-CC-97

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jeff Canen, *pro se*, contends that the trial court abused its discretion in denying his Trial Rule 41(E) motion to dismiss the cause due to Fisher Voorhis Draper Chapel's ("Fisher Voorhis") failure to prosecute the case for well over a year. Because the trial court made clear it was not going to grant a Trial Rule 41(E) motion to dismiss by granting Fisher Voorhis' motion for default judgment, and once default judgment is entered against a party, the only means of challenging that judgment is by a motion to set aside the default judgment in accordance with the provisions of Trial Rule 60(B), Canen should be challenging the trial court's denial of his Trial Rule 60(B) motion on appeal, which he is not doing. We therefore affirm the trial court.

Facts and Procedural History

On May 25, 2007, Fisher Voorhis filed a Complaint for Damages against Canen in White Superior Court for unpaid funeral expenses plus interest to that date in the amount of $11,643.16 plus additional interest and attorney fees. An alias summons and complaint were filed on October 12, 2007, and Canen was eventually served on October 16, 2007. On November 21, 2008, the trial court *sua sponte* issued a Show Cause Order for Dismissal Pursuant to Trial Rule 41(E). Pursuant to this order:

> The Court, on its own motion, after reviewing the record of proceedings herein, finds that this case is subject to a Show Cause Order for Dismissal pursuant to Trial Rule 41(E) for the reason that there has been no activity in this case for over sixty (60) days.
>
> IT IS THEREFORE ORDERED that this case is set for hearing on January 21, 2009 at 2:00 p.m., at which time the parties are directed to appear and demonstrate that there exists good cause why this matter should not be dismissed, pursuant to Trial Rule 41(E).

Appellant's App. p. 9.

On December 2, 2008, Fisher Voorhis filed a Motion for Default Judgment. In its motion, Fisher Voorhis alleged that Canen was served with process on or about October 16, 2007, and that he had failed to appear or answer the complaint despite the expiration of the time limit for him to do so. As such, Fisher Voorhis asked the court to enter default judgment in the amount of $11,643.16 plus interest, attorney fees, and costs. The trial court entered default judgment that same day. *Id.* at 12. As a consequence, the Trial Rule 41(E) show cause hearing was vacated.

On December 10, 2008, Canen filed a *pro se* Motion for Dismissal pursuant to Trial Rule 41(E), which the trial court denied because "Default Judgment was entered December 2 2008." *Id.* at 2 (CCS entry); *see also id.* at 17 ("Since a final judgment has been entered in this cause, [Canen's] Motion for Dismissal is untimely and the same is now denied.").

On December 31, 2008, Canen filed a *pro se* motion to reconsider the trial court's December 10, 2008, order. Specifically, Canen alleged:

> 1. That on the 2nd day of December, 2008 [Fisher Voorhis] filed a Trial Rule 56[1] [sic] Motion for Default Judgment.
> 2. That on or about the 5th day of December, 2008 Canen was served [Fisher Voorhis'] Trial Rule 56 [sic] pleading.
> 3. That on the 2nd day of December, 2008, the same day [Fisher Voorhis] filed [its] pleading, the Court granted Summary[2] [sic] Judgment against Canen.
> 4. That Trial Rule 56(C) is specific, in that an adverse party shall be provided thirty (30) days, after service of the motion, to file a Response and Opposing Affidavit(s).
> 5. That the Court's ORDER of December 10, 2008 is in error, due to the Court failing to afford Canen the prerequisite thirty (30) days to prepare,

[1] Default judgments are governed by Trial Rule 55, not Trial Rule 56.

[2] The trial court entered default judgment against Canen.

> and file, a proper Trial Rule 56(C) Responsive Pleading and Opposing Affidavit(s).

Id. at 18.

Contrary to the content of Canen's motion, Fisher Voorhis had not filed a motion for summary judgment; rather, it filed a motion for default judgment, which is governed by Trial Rule 55. Trial Rule 55(B) provides that "[i]f the party against whom judgment by default is sought has appeared in the action he . . . shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application." Pursuant to Trial Rule 55, the trial court is not required to allow an adverse party thirty days to file a response and opposing affidavits. Because Canen had not appeared in this action, he was not entitled to three days notice of the application for default judgment. In any event, the trial court entered the following order on January 5, 2009:

> On December 31, 2008, the defendant, Jeff Canen, pro se, filed a Motion to Reconsider.
>
> And the Court being advised, now grants [Canen] to and including February 6, 2009 to file a pleading requesting relief from the judgment herein pursuant to Indiana Trial Rule 60.

Id. at 21. In essence, the trial court treated Canen's motion to reconsider as a motion to set aside the default judgment.

On February 2, 2009, Canen filed a *pro se* Motion for Relief from Judgment Order pursuant to "Trial Rule 60(6)"[3] which alleges, in pertinent part:

> 4. That [Fisher Voorhis], almost thirty-two months after filing their original complaint on May 25, 2007, and only after an Order from the

[3] Trial Rule 60(B)(6) provides that the court may relieve a party from a judgment, including a judgment by default, for the reason that "the judgment is void."

> Court had been issued, filed their Motion for Summary [sic] Judgment on December 2, 2008.
> 5. That Canen filed a scantily constructed *"Motion for Dismissal"* with the Court on December 10, 2008; however, the basis for a lack of due diligence claim had been asserted therein.
> 6. That while Canen's Motion to Dismiss was in the mail and in the process of being filed with the Court, this Court Granted Summary [sic] Judgment in favor of [Fisher Voorhis], the very same day Summary [sic] Judgment had been sought on December 2, 2008.
> 7. That [Fisher Voorhis] failed to pursue [its] claim with due diligence, and as such, the claim should have been summarily dismissed in accord with Trial Rule 41(E) when no action had been taken in this civil case for a period of sixty (60) days.
> 8. That Canen is contemporaneously filing a Motion to Dismiss Cause of Action for Lack of Prosecution. With the Court.

Id. at 22-23 (citation omitted). Canen also filed a *pro se* Motion to Dismiss Cause of Action for Lack of Prosecution on February 2, 2009. Specifically, he alleged that Fisher Voorhis failed to pursue its claim with due diligence and, as such, this cause should be summarily dismissed in accordance with Trial Rule 41(E).

On February 19, 2009, the trial court entered the following order:

> On December 31, 2008, the defendant, Jeff Canen, filed a Motion to Reconsider pertaining to the Court's entry of summary[4] [sic] judgment in favor of [Fisher Voorhis] in this cause.
>
> On January 5, 2009, the Court granted [Canen] to and including February 6, 2009 to file a pleading requesting relief from the judgment herein pursuant to Indiana Trial Rule 60.
>
> On February 2, 2009, [Canen] filed a Motion for Relief from Judgment Order and a Motion to Dismiss Cause of Action for Lack of Prosecution.
>
> The Court, having reviewed [Canen's] motions, having considered Indiana Trial Rule 60, and having considered the record in this cause, now orders that [Canen's] Motion for Relief from Judgment and [Canen's] Motion to Dismiss Cause of Action for Lack of Prosecution be and the same are denied.

Id. at 27. Canen, *pro se*, now appeals.

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[4] Again, we note that the trial court entered *default* judgment against Canen.

Discussion and Decision

Canen, *pro se*, raises one issue on appeal.[5] He contends that the trial court abused its discretion when it denied his Trial Rule 41(E) motion to dismiss the cause due to Fisher Voorhis' failure to prosecute the case for well over a year. However, this issue is not available to him on appeal. This is because the trial court made clear that it was not going to grant a Trial Rule 41(E) motion to dismiss by entering default judgment against Canen. Once default judgment is entered against a party, the only means of challenging that judgment is by a motion to set aside the default judgment in accordance with the provisions of Trial Rule 60(B). *Heartland Res., Inc. v. Bedel*, 903 N.E.2d 1004, 1006 (Ind. Ct. App. 2009). Therefore, Canen should be challenging the trial court's denial of his Trial Rule 60(B) motion on appeal.[6] We affirm the trial court.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

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[5] We observe that Fisher Voorhis has failed to file an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish *prima facie* error. *State Farm Ins. v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). *Prima facie* is defined in this context as "at first sight, on first appearance, or on the face of it." *Id.* The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this Court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *Id.* Where an appellant is unable to establish *prima facie* error, we will affirm. *Id.*

[6] We note, however, that the Trial Rule 60(B)(6) motion Canen filed in the trial court did not set forth *any* reason why Canen did not appear or respond to Fisher Voorhis' complaint. Rather, Canen rehashed his argument that Fisher Voorhis did not pursue its claim with due diligence, which was the basis for his Trial Rule 41(E) motion to dismiss. *See* Appellant's App. p. 22-23. We fail to see how this meets the test for determining whether a judgment is void. *See* Ind. Trial Rule 60(B)(6).