



## STATEMENT OF THE CASE

Appellant-Defendant, Nynthia Richardson (Richardson), appeals the trial court's denial of her motion to set aside a default judgment entered in favor of Appellee-Plaintiff, BAC Home Loans Servicing L.P. f/k/a Countrywide Home Loans Servicing, L.P. (BAC Home Loans).

We affirm.

## ISSUE

Richardson raises four issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court abused its discretion by denying her motion to set aside a default judgment following a complaint filed by BAC Home Loans to foreclose on a mortgage.

## FACTS AND PROCEDURAL HISTORY

On January 24, 2005, Cleo Richardson (Cleo), Richardson's husband, executed and delivered a note to America's Wholesale Lender in the amount of \$79,800.00 at a fixed interest rate of 6.750%. As security for payment, Cleo executed a mortgage. This mortgage was also signed by Richardson. The note and mortgage were subsequently assigned to BAC Home Loans. Cleo died on May 2, 2008. On August 11, 2009, BAC Home Loans filed its complaint to foreclose on the mortgage. On July 30, 2010, BAC Home Loans filed its motion for default judgment, which was issued by the trial court on the same day.

Four months prior to the entry of the default judgment, on March 29, 2010, Richardson's attorney notified BAC Home Loans that he was assisting Richardson with the

administration of her husband's estate and requested a copy of all documents relating to the note and mortgage. The following day, March 30, 2010, Richardson sent a letter to BAC Home Loans demanding that it institute an action against Cleo. On April 16, 2010, Richardson's counsel was notified by BAC Home Loans that its "system has been documented to allow our Customer Service representatives to discuss your loan with [Richardson's counsel] at any time[.]" (Appellant's App. p. 38). On May 19, 2010, Richardson's counsel reiterated his request with BAC Home Loans in writing.

On September 3, 2010, Richardson filed her motion to set aside the default judgment. On October 5, 2010, the trial court conducted a hearing on Richardson's motion. Three days later, on October 8, 2010, the trial court denied the motion to set aside the default judgment.

Richardson now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

Richardson argues that the trial court abused its discretion in refusing to set aside the default judgment entered against her. Our standard of review of the denial of a motion to set aside a default judgment pursuant to T.R. 60(B) is limited to determining whether the trial court abused its discretion. *Allstate Ins. Co. v. Love*, 944 N.E.2d 47, 50 (Ind. Ct. App. 2011). An abuse of discretion occurs where the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* The trial court's decision on a motion to set aside a default judgment is given substantial deference on appeal. *Id.* Therefore, absent an unequivocal abuse of discretion, the trial court's judgment will not be lightly disturbed. *Id.*

Pursuant to Indiana Trial Rule 60(B),

[o]n 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:

(1) mistake, surprise, or excusable neglect;

\* \* \*

(6) the judgment is void;

\* \* \*

(8) any reason justifying relief from the operation of the judgment, [].

The motion shall be filed within a reasonable time for reasons [], (6),[] and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), []. A movant filing a motion for reasons (1), [], and (8) must allege a meritorious claim or defense.

When deciding whether or not a default judgment may be set aside because of excusable neglect, the trial court must consider the unique factual background of each case because no fixed rules or standards have been established as the circumstances of no two cases are alike. *Coslett v. Weddle Bros. Const. Co., Inc.*, 798 N.E.2d 859, 860-61 (Ind. 2003).

Richardson initially claims that she is entitled to relief because she has no memory of ever being served with a copy of the summons. She states that she suffered a stroke in April of 2009 that left her disabled and significantly impaired her memory and cognitive abilities. The first memory she has of the foreclosure action was the receipt of the default judgment issued on July 30, 2010. In addition, she contends that BAC Home Loans induced the default

because BAC Home Loans never informed her of the foreclosure action despite Richardson's counsel's correspondence with BAC Home Loans.

On the other hand, while BAC Home Loans concedes that Richardson's health issues might be an appropriate ground for relief pursuant Ind. T.R. 60(B)(1), it asserts that in the instant case no such basis for relief exists as Richardson failed to submit admissible evidence documenting her allegations.

Indiana Trial Rule 60(D) provides that "[i]n passing upon a motion allowed by subdivision (B) of this rule, the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule." To that end, we have held that:

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. Trial Rules 60, 59, and 52 provide for relief from a judgment based upon the showing of needed relief by presenting admissible evidence to the trial court. There need not be a showing of absolute entitlement to the relief sought in the instances of a defense or necessary party, for example, but enough evidence must be presented to reasonably satisfy the trial court that there is sufficient merit in the motion for relief to justify altering or setting the judgment aside upon hearing additional evidence.

*Bross v. Mobile Home Estates, Inc.*, 466 N.E.2d 467, 469 (Ind. Ct. App. 1984).

Richardson did not present us with any evidence supporting her contentions. At the hearing on Richardson's motion to set aside the default judgment, no affidavits documenting her stroke and disability were submitted, no witnesses were interrogated, nor was any other evidence admitted. Despite Richardson's counsel's allegations that he frequently corresponded with BAC Home Loans, the only evidence submitted together with the motion

to set aside default judgment are his letters dated March 29, 2010, March 30, 2010, and May 19, 2010 requesting information from BAC Home Loans and BAC Home Loans' response dated April 16, 2010, inviting Richardson's counsel to contact them by phone. Therefore, based on the record before us, we cannot say that the trial court abused its discretion by denying Richardson's motion to set aside the default judgment.<sup>1</sup>

Nevertheless, in her reply brief, Richardson suggests that if "it is absolutely necessary for the trial court to receive evidence before ruling on a motion to set aside a default judgment . . . , the [c]ourt should vacate the judgment of the trial court and remand the case with instructions to hold an evidentiary hearing." (Appellant's Reply Br. pp. 4-5). However, the trial court already conducted a hearing on Richardson's motion on October 5, 2010. Therefore, remanding to the trial court with instructions to schedule an evidentiary hearing would give Richardson the proverbial second bite at the apple. This we cannot do.

As a second main argument to set aside the default judgment, Richardson asserts that the default judgment is void because BAC Home Loans did not provide pre-suit notice to Cleo in accordance with I.C. § 32-30-10.5-8. Indiana Code section 32-30-10.5-8 requires that the creditor sends the debtor pre-suit notice of the foreclosure action at the address of the mortgaged property or at the last known mailing address of the debtor. The statute defines "debtor" as "the maker of the note secured by the mortgage." I.C. § 32-30-10.5-3. Here, BAC Home Loans was aware that Cleo was deceased at the time of filing the foreclosure

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<sup>1</sup> Because we conclude that Richardson did not establish excusable neglect or any other reason justifying relief pursuant to T.R. 60(B), we do not need to analyze whether Richardson presented a meritorious claim or defense.

action and the statute is silent as to whether a pre-suit notice should be sent to the estate of a deceased debtor. However, BAC Home Loans mailed the pre-suit notice to Richardson, who had co-signed the mortgage and was living in the mortgaged property, to inform her of the imminent foreclosure action. Even if the argument is made that a pre-suit notice should have been sent to Cleo's estate, the notice would still be mailed to Richardson at the mortgaged property as the very limited evidence indicates that Richardson was the administrator of Cleo's estate. As such, we conclude that BAC Home Loans satisfied the requirements of the statute and the default judgment is not void.

#### CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by refusing to set aside the default judgment entered in favor of BAC Home Loans.

Affirmed.

DARDEN, J., and BARNES, J., concur.