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.

FILED
Jul 14 2009, 8:55 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

DOCK MCDOWELL
McDowell Law Firm
Merrillville, Indiana

ATTORNEY FOR APPELLEE:

DOUGLAS M. GRIMES
Gary, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CALUMET TOWNSHIP TRUSTEE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 45A04-0808-CV-449
	)	
CALUMET TOWNSHIP ADVISORY BOARD,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Elizabeth F. Tavitas, Presiding Judge
Cause No. 45D03-9905-CP-1810

July 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The Calumet Township Trustee appeals the denial of its 2008 motion for relief from a 1999 judgment. We affirm.[1]

FACTS AND PROCEDURAL HISTORY

In 1991 the Calumet Township Board wanted to hire its own attorney, and the Township Trustee asked the Attorney General for an opinion whether the Board could. The Attorney General opined the Board did not have that authority. In 1997 a statute governing service contracts for local government units was repealed, and the Trustee decided it could hire counsel pursuant to the Home Rule Act.[2] In 1998 the Board adopted a "Resolution on Contracts for Professional Services," (App. at 783), that would permit it to enter into contracts for such services up to amounts that did not require competitive bidding. In 1999 the Board sought a declaratory judgment asking the court to interpret

---

[1] Because we find the Trustee did not bring its motion for relief from judgment within a reasonable time, we need not address its arguments the Board's attorney had a conflict of interest or the trial judge should have recused herself. Nor do we find the Trustee entitled to relief on the ground proper notice prior to a hearing on the application for default judgment was not provided as required by Ind. Trial Rule 55(B). Such failure renders a default judgment voidable. *Evansville Garage Builders v. Shrode*, 720 N.E.2d 1273, 1277 (Ind. Ct. App. 1999). *trans. denied* 735 N.E.2d 232 (Ind. 2000). Such a judgment qualifies for relief under T.R. 60(B)(8), *id*., and is sufficient grounds for reversal when the voidable judgment brought to the court's attention *within a reasonable time*. *Id*. at 1277-78.

Finally, the Trustee argues the trial court, in its order denying its motion for relief from the 1999 judgment, "impermissibly modified" the 1999 judgment, (Amended Br. of Appellant at 36), apparently by finding "the Board is entitled to an award of attorney's fees . . . ." (*Id*. at 37.) Nothing in the record to which the Trustee directs us indicates the trial court made any such award. We are therefore unable to address that allegation of error.

[2] The Home Rule Act, Ind. Code chapter 36-1-3, provides in part that a local unit of government has all powers granted to it by statute and all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute. Ind. Code § 36-1-3-4(b). A township is a "unit." Ind. Code § 36-1-2-23. The Act further provides "Any doubt as to the existence of a power of a unit shall be resolved in favor of its existence." Ind. Code § 36-1-3-3(b). These broad grants of power to local governments were intended to further the state's policy to "grant units all the powers that they need for the effective operation of government as to local affairs." Ind. Code § 36-1-3-2. But a governmental unit may not exercise any power that is expressly denied by statute or expressly granted to another entity. Ind. Code § 36-1-3-5.

the Home Rule Act to determine whether the Board could employ its own legal advisor. The Trustee did not answer. In August of 1999, the court decided the Board had that authority. The Trustee did not bring a motion to correct error, nor did it[3] appeal. The Board has since hired attorneys.

In October of 2006 the Trustee filed a motion for relief from the 1999 declaratory judgment, and it filed an amended motion in March of 2008. The trial court denied the motion in June of 2008.

DISCUSSION AND DECISION

A decision whether to set aside a default judgment is entitled to deference and is reviewed for abuse of discretion. *Coslett v. Weddle Bros. Const. Co., Inc.*, 798 N.E.2d 859, 861 (Ind. 2003), *reh'g denied*. Any doubt of the propriety of a default judgment should be resolved in favor of the defaulted party. *Id*. Indiana law strongly prefers disposition of cases on their merits. *Id*.

1. Subject Matter Jurisdiction

The Trustee first argues the trial court had no subject matter jurisdiction to hear "the class of cases to which this one belonged because state law required, as a prerequisite to invoking the Home Rule Act, that the board adopt a resolution in compliance with **I.C. § 36-1-3-6(b)**." (Amended Br. of Appellant at 20) (bold type in original). The Trustee characterizes this, without explanation, as an "administrative" remedy the Board was obliged to "exhaust." (*Id*.)

[3] During the time span in which this litigation was conducted, Calumet Township had both male and female trustees. We will therefore refer to the office of the trustee as "it."

Under the Home Rule Act, if there is no constitutional or statutory provision requiring a specific manner for exercising a power, a township wanting to exercise the power must either adopt a resolution prescribing a specific manner for exercising the power or comply with a statutory provision permitting a specific manner for exercising the power. Ind. Code § 36-1-3-6(b). Such a resolution must be adopted by the township legislative body, Ind. Code § 36-1-3-6(d), which is the township board. Ind. Code § 36-6-6-2(c).

The record reflects the Board did pass such a resolution on June 25, 1998. Resolution 98-13a explicitly addressed the Township's ability to contract for professional services. The Trustee argues "the Board was required to *present proof of compliance*" with Ind. Code § 36-1-3-6(b) "before or in conjunction with" its request for entry of judgment. (Amended Br. of Appellant at 22) (emphasis supplied). It was not. Under the statute, the Board was required to "adopt a resolution," and it did. We decline the Trustee's invitation to insert into the statute an additional provision that a trial court lacks jurisdiction to hear a case of this kind just because a litigant that has in fact complied with a statutory prerequisite might not have "presented proof" of its compliance to a court deciding whether to issue a declaratory judgment. The trial court had jurisdiction over the request for declaratory judgment.

2. Trial Rule 60(B)(8)

The Trustee did not bring its motion for relief from judgment within a reasonable time after the entry of the default judgment, so the denial of the motion was not error. Ind. Trial Rule 60(B), relief from judgment or order, provides in pertinent part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> * * * *
>
> (8) any reason justifying relief from the operation of the judgment, other than [certain reasons enumerated in other sections of the rule].

A Rule 60(B)(8) motion must be filed "within a reasonable time." *Id*. What is a reasonable time varies with the circumstances of each case. *G.B. v. State*, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999). Relevant to the question of timeliness is prejudice to the party opposing the motion and the basis for the moving party's delay. *Id*.

The trustee did not bring its motion in a reasonable time.[4] It appears from the record that the present Trustee took office in January 2003 and became aware of the judgment at about that time.[5] It did not file its initial motion for relief from the judgment

---

[4] Because we so hold, we do not address whether the trustee has demonstrated the result of the 1999 declaratory judgment would be different were the case retried on its merits. A motion for relief from judgment under Rule 60(B)(8) must allege a meritorious claim or defense. *Parham v. Parham*, 855 N.E.2d 722, 729 (Ind. Ct. App. 2006), *trans. denied* 869 N.E.2d 449 (Ind. 2007). A meritorious defense is one showing that if the case were retried on the merits, a different result would be reached. *Id.*

[5] The trial court noted the Trustee's argument it could not file its motion "until 2006 because she did not become the elected Trustee until January 1, 2003," (App. at 33), but found that argument failed because the previous trustee could have filed a Rule 60(B) motion between August of 1999 and January 2003, but did not. The Trustee does not offer cogent argument in response to that ground for the trial court's denial of its motion. Instead, it states only "that in and of itself should not be counted against [the current Trustee]. A mere lunar calculation misses the point . . . ." (Amended Br. of Appellant at 35.)

until October 2006. It asserts it obtained a copy of the order in early 2004, and between February 2004 and October 2006 "sought advice and counsel regarding the 19 August 1999 order." (Reply Br. of Appellant at 8.)[6]

While the Trustee offers this timeline, it does not offer argument why the delay of about a year between the time it became aware of the judgment and the time it obtained a copy of it, and the delay of some two and one-half years while it sought "advice and counsel" was reasonable. We therefore cannot find the delay reasonable. See *Young v. Butts*, 685 N.E.2d 147, 150 (Ind. Ct. App. 1997) (We are unable to consider allegations on appeal that are not presented in the form of "cogent argument supported by legal authority and references to the record as our rules require.").

While we cannot find "reasonable" the delay in bringing the motion for relief from judgment, the Trustee argues the trial court improperly excluded evidence it offered to explain the reasons for the delay. It did not.

The Trustee asserts it "attempted to present evidence regarding [its] reasons for waiting from January, 2003 to October, 2006 to file the motion," (Amended Br. of

[6] The Trustee directs us to "(Tr. 352-53)" in support of that statement. There is no testimony by the Trustee on those pages of the transcript, nor does the testimony that does appear there support that assertion. *See* Ind. Appellate Rule 22(E) ("Tr." is abbreviation for "transcript"). We remind the Trustee's counsel that on review, "we will not search the record to find a basis for a party's argument." *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997). We acknowledge such testimony can be found on pages 120 and 121 of the transcript, which counsel includes in his "Appendix of Appellant" at pages 352 and 353.

Appellant at 34),[7] but the Board objected, the court sustained the objection, and the Trustee made an offer of proof.

We cannot find error in the exclusion of the evidence the trustee offered. Its entire argument on this point appears to be the following statement: "the trial court **excluded** [the Trustee's] proffered evidence on this point and then **used** the absence of such evidence as a basis for denying the Motion. **(Tr. 32-35)**[.][8] In this regard, the trial court's judgment denying the Motion is clearly erroneous." (Amended Br. of Appellant at 34) (bold type in original) (footnote supplied).

By failing to present cogent argument supported by legal authority, the Trustee has waived its allegation it was error to exclude the evidence. As support for its statement that it is error for a trial court to exclude evidence, then base its decision on the absence of evidence, it cites *Capehart v. Capehart*, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999) *trans. denied* 726 N.E.2d 302 (Ind. 1999). That decision addresses when findings or the judgment thereon are "clearly erroneous," but nothing in that decision supports the Trustee's apparent premise that when ruling on a motion, a trial court is obliged to take into account evidence it has excluded. We decline the trustee's invitation to so hold.

---

[7] To support this assertion, the trustee's counsel directs us to "(Tr. 310-374)." There is no testimony or other presentation of evidence by the Trustee to be found on those pages.

[8] Nothing in those pages of the transcript supports this statement.

We cannot say the trial court abused its discretion in denying the Trustee's motion for relief from judgment. We accordingly affirm.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.