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IN THE
COURT OF APPEALS OF INDIANA

AARON ISBY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1009-CT-660
	)	
DAVID GILSTRAP, EDWIN BUSS, KEVIN EWERS, JAMES BASINGER, ROGER RANDALL and DAVID SLOAN,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE MARION CIRCUIT COURT
The Honorable Louis F. Rosenberg, Judge
The Honorable Mark A. Jones, Master Commissioner
Cause No. 49C01-1007-CT-029313

July 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

In exchange for releasing the Indiana Department of Correction and its employees from any liability for damage to his television, Aaron Isby agreed to receive a "used," "AS IS" television. Isby, however, became upset when that television was not "in workable mint condition" and alleged fraud on the part of DOC employees. Isby, pro se, filed a declaratory judgment action, and the employees responded with an Indiana Trial Rule 12(B)(6) motion to dismiss, which the trial court granted. Because the plain language of the written agreement between the parties refutes Isby's claim that he was defrauded by the employees who failed to provide him with a television in workable mint condition, we affirm the trial court's dismissal of Isby's declaratory judgment action for failure to state a claim. We also affirm the trial court's denial of Isby's Trial Rule 60(B)(3) motion for relief from judgment based on fraud.

Facts and Procedural History

Isby is an inmate at Wabash Valley Correctional Facility. On January 25, 2010, Isby and an employee of Wabash Valley Correctional Facility entered into the following Settlement and Release Agreement ("Agreement"):

> The undersigned hereby promises that in exchange for a *used* television set to be provided to him by the Wabash Valley Correctional Facility (WVCF), he agrees to dismiss any claims pending or contemplated, with regard to any lost/damaged television set up to and including the date of the execution of this Agreement. In executing this Agreement, the undersigned releases the State of Indiana and the Indiana Department of Correction and it's [sic] agents and employees from any liability for any lost/damaged television set for which the undersigned would otherwise be entitled to seek reimbursement.

> The undersigned acknowledges receipt of a used television set *AS IS* from the Wabash Valley Correctional Facility by the execution of this Agreement.

Appellant's App. p. 42 (emphases added). The Agreement was signed by Isby and "D. Gilstrap." *Id.* Isby also signed a Receipt and Release in which he acknowledged receipt of a RCA Clearview television "AS IS" with serial number G191736. *Id.* at 43.

Two days later, Isby complained in writing to staff that the television was a "lemon" and was not "in mint condition" because it worked in spurts of only forty minutes to two hours. *Id.* at 44. He asked the staff to provide him "with a clear[1] replacement t.v. that is in mint and workable condition a.s.a.p." so that he could watch the Super Bowl. *Id.*

On July 1, 2010, Isby filed an "Action for Declaratory Judgment" in Marion Superior Court against DOC employees David Gilstrap, Edwin Buss, Kevin Ewers, James Basinger, Roger Randall, and David Sloan (collectively, "Defendants"). *Id.* at 36. Isby attached a copy of the Agreement to the declaratory judgment action. Specifically, Isby alleged that Defendants entered into the Agreement with the "intent to defraud" him because they never intended to give him a replacement television in workable mint condition but rather only a broken and damaged television. *Id.* at 37. Accordingly, Isby asserted that "an actual controversy has arisen and now exists . . . regarding their respective rights and duties under the [A]greement," and he therefore "desire[d] a judicial determination of Defendants' rights and duties and a declaration as to the enforceability of the [A]greement entered by the Defendants." *Id.*

[1] Apparently, there is a DOC requirement that television casings must be clear, not black.

The State responded on August 4, 2010, with a motion to dismiss for failure to state a claim pursuant to Indiana Trial Rule 12(B)(6) as well as a motion for Isby to incur a strike under Indiana's three-strikes law. On August 13, Isby filed an amended declaratory judgment action. However, on August 16, Isby moved to withdraw the amended declaratory judgment action and moved for leave to file a second amended declaratory judgment action.[2] Defendants then filed a reply in support of their motion to dismiss. On September 7, the trial court entered the following order:

> Having received and reviewed various motions filed by [Isby], *pro se*, and Defendants' Motion To Dismiss And For Plaintiff To Incur A Strike Under Indiana's Civil Action 3-Strikes Law and their Reply in Support thereof, filed by counsel, the Court now finds and orders as follows:
>
> * * * * *
>
> 2. [Isby's] Motion to Strike or Withdraw Amended Action for Declaratory Judgment Filed August 6,[3] 2010, is GRANTED.
>
> 3. [Isby's] originally filed Action for Declaratory Judgment fails to state a claim upon which relief can be granted and is frivolous within the meaning of I.C. 34-58-1-1 *et seq*.
>
> 4. There are no . . . remaining claims that may proceed, and Defendants' Motion To Dismiss is well-founded.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Isby's] Action For Declaratory Relief is dismissed with prejudice. This is a final judgment and there is no reason for delay.

Appellant's Br. p. 25.[4]

Isby filed a notice of appeal on September 20, 2010. Appellant's App. p. 9. However, on October 4, Isby filed a Motion for Relief of Final Order and Supplement

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[2] Although the trial court ruled on Isby's motion to withdraw the amended petition, it appears that the court never ruled on Isby's motion for leave to file the second amended declaratory judgment action.

[3] The file-stamp on this motion is August 16, 2010.

[4] This order is contained at the end of Isby's brief but is not numbered. We provide an extrapolated page number for ease of reference.

Motion for Relief from Final Order pursuant to Trial Rules 59 and 60(B) based on fraud. Isby also filed a motion to consolidate these motions. The trial court granted the motion to consolidate but denied the motions. *See id.* at 6 (CCS). Isby now appeals.

Discussion and Decision

Isby raises various issues on appeal, but we address the following three.[5] First, Isby contends that the trial court erred in dismissing his declaratory judgment action pursuant to Trial Rule 12(B)(6). Second, he contends that the trial court erred by not allowing him to amend his complaint as a matter of right within ten days of the dismissal pursuant to Trial Rule 12(B). Finally, Isby contends that the trial court erred in denying his Trial Rule 60(B) motion.

I. Trial Rule 12(B)(6) Dismissal

Isby first contends that the trial court erred in dismissing his declaratory judgment action pursuant to Trial Rule 12(B)(6). A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Droscha v. Shepherd*, 931 N.E.2d 882, 887 (Ind. Ct. App. 2010). Thus, our review of a trial court's grant or denial of a Trial Rule 12(B)(6) motion is de novo. *Id.* When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. *Id.* A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint that the complaining party is not entitled to relief. *Id.* All

[5] Isby also alleges that a valid contract was not formed, was not signed by a proper DOC employee, and is unconscionable because of the presence of the "AS IS" clause. However, these issues were not raised in his declaratory judgment action. Furthermore, as discussed later, Isby did not timely amend his declaratory judgment action after the trial court dismissed it to include any of these issues. We therefore do not address them on appeal.

allegations must be accepted as true, and it is the appellate court's duty to determine whether the underlying complaint states any set of allegations upon which the court below could have granted relief. *Id.* Dismissal of a complaint under Trial Rule 12(B)(6) is disfavored generally because such motions undermine the policy of deciding causes of action on their merits. *Id.*

Isby highlights that his original declaratory judgment action alleged that the Agreement "provided for the recovery of a replacement television in *workable mint condition*." Appellant's Br. p. 11 (citing Action for Declaratory Judgment) (emphasis added).[6] Isby alleges that Defendants "entered into the [A]greement with intent to defraud [him], instead of the Defendants affording [him] a replacement television in workable mint condition to remedy the damage they cause[d] [him], the Defendants defrauded [him] by giving [him] a broken/damaged replacement television as payment for their violation." *Id.* at 11-12. Accordingly, "[a]n actual controversy has arisen and now exists between [him] and [D]efendants regarding their respective rights and duties under the [A]greement." *Id.* at 11.

However, the Agreement which Isby attached to his declaratory judgment action does not refer to a television in "workable mint condition." Instead, it refers to a "used" television in an "AS IS" condition. There is no allegation that Isby was forced to sign this Agreement.

When reviewing a motion to dismiss for failure to state a claim, a court need not accept as true allegations that are contradicted by other allegations or exhibits attached to

[6] Notably, Isby does not allege in his declaratory judgment action that there were promises made concerning the condition of the television separate from the Agreement itself.

or incorporated in the pleading. *Irish v. Woods*, 864 N.E.2d 1117, 1120 (Ind. Ct. App. 2007). Further, "[i]t is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *Id.* (quotation omitted). Indeed, "a plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment." *Id.* The plain language of the Agreement refutes Isby's claim that he was defrauded by Defendants who failed to provide him with a television in workable mint condition. Although Isby states that he "thought the replacement television was in mint workable condition," Appellant's Br. p. 14, his impression could not have been based upon the Agreement. The trial court did not err by dismissing Isby's declaratory judgment action for failure to state a claim.

II. Amendment as a Matter of Right

Isby next contends that the trial court erred by not allowing him to amend his declaratory judgment action as a matter of right within ten days of the dismissal pursuant to Trial Rule 12(B). Trial Rule 12(B) provides:

> When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule.

Isby claims he sought leave to amend, but the record shows that he sought leave to amend on August 16, which is *before* the trial court even dismissed the declaratory judgment action on September 7. Isby did file motions on October 4, which was nearly thirty days after the dismissal, but they were motions for relief from a final order. Moreover, Isby

does not set forth how he would have amended his complaint *after* the trial court's dismissal. There is no error on this issue.

III. Trial Rule 60(B) Motion

Finally, Isby contends that the trial court erred in denying his Trial Rule 60(B)(3) motion. In this motion, he alleged that Defendants' trial counsel committed fraud on the court because counsel (1) argued to the trial court that the "AS IS" clause was effective although he knew all along that such clauses do not apply to personal transactions, (2) knew that Gilstrap was not a proper signatory to the Agreement, and (3) knew that the Agreement was unconscionable.

The decision whether to grant or deny a Trial Rule 60(B) motion for relief from judgment is within the sound, equitable discretion of the trial court. *Stonger v. Sorrell*, 776 N.E.2d 353, 358 (Ind. 2002). We will not reverse a denial of a motion for relief from judgment in the absence of an abuse of discretion. *Id.* Trial Rule 60(B)(3) enables a court to grant relief from an otherwise final judgment for "fraud, misrepresentation, or misconduct" of an adverse party. *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind. 2006). When applying the "fraud" provision of 60(B)(3), the movant must show that the fraud prevented him "from fully and fairly presenting [his] case." *Id.* at 73. This is because "subsection (b)(3) creates a limited exception to the general rule of finality of judgments. If a party cannot show that fraud . . . *substantially prejudiced* the party's presentation of the party's case, a court should not set aside an otherwise final judgment." *Id.* (emphasis added).

Here, Isby makes no allegation that the alleged fraud substantially prejudiced the presentation of his case. We therefore affirm the trial court's denial of Isby's Trial Rule 60(B)(3) motion.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.