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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. STEPHENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A03-0811-CV-571
	)	
GILKEY WHOLESALE GREENHOUSES, INC.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITLEY SUPERIOR COURT
The Honorable Michael D. Rush, Judge
Cause No. 92D01-0507-CC-176

October 2, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Michael A. Stephens ("Stephens") is appealing from the Whitley Superior Court denial of his motion to set aside default judgment. Stephens argues that the trial court abused its discretion when it denied his motion to set aside default judgment.

Affirmed.

Facts and Procedural History

Gilkey Wholesale Greenhouses, Inc. ("Gilkey") sells plants and flowers on a wholesale basis. Stephens is the principal of two corporations, Heaven Scent, Inc. and Stephens Holdings, Inc. which operated a retail floral business known as Carriage House Flowers and Gifts ("Carriage House"). Carriage House purchased plants and flowers from Gilkey for resale.

Carriage House became delinquent in its payments on account to Gilkey. Carriage House delivered checks signed by Stephens to Gilkey that were not honored. Despite this state of affairs, Gilkey continued to provide flowers and plants to Carriage House. Carriage House did attempt to reduce the balance of their account with Gilkey.

During 2004, Gilkey decided to turn over the matter of the dishonored checks to the Whitley County Prosecutor ("Prosecutor"). The Prosecutor filed criminal charges against Stephens and concluded that the amount owing for bad checks was $3,881.55. Appellant's App. pp. 68-69. On July 13, 2005, Gilkey filed suit against Stephens, Heaven Scent, Inc., and Stephens Holdings, Inc. for amounts owed on the checks and the unpaid account.

In August 2005, Stephens met with Doug Fahl ("Fahl"), a friend and attorney, regarding this matter and other collection matters pending at the time. Fahl made

telephone contact and payment arrangement with other creditors but not Gilkey. Fahl never filed an appearance or answer in this case. During this time, Fahl began working full-time as a prosecutor in Kosciusko County. In December of 2005, Fahl told Stephens that he needed to get an attorney to take Fahl's place in dealing with the collection matters because Fahl did not feel like he could give Stephens's matters sufficient attention along with his duties as prosecutor. Tr. p. 23.

On March 8, 2006, Gilkey filed a motion for default judgment. The motion was granted the same day. The judgment against Stephens consisted of $10,593.75 for treble damages for dishonored checks, $22,937.66 for balance owed for product and merchandise, and $6,324.00 for attorney fees for a total of $39,855.41.

On March 27, 2006, Stephens filed a motion to set aside default judgment and to file answer and counter-claims. An evidentiary hearing was heard on the motion on June 13, 2006. On August 21, 2006, the corporate defendants filed a notice to stay proceedings due to their Chapter 11 bankruptcy filing which was granted. On May 18, 2008, Gilkey filed a motion for relief of stay of proceedings and denial of motion to set aside default judgment alleging that the bankruptcy stay only applied to the corporate defendants, not to Stephens. On July 3, 2008, the trial court ordered that the stay be lifted as to Stephens and denied Stephens's motion to set aside default judgment.

Stephens filed a motion to correct errors. After a hearing on October 24, 2008, the motion was denied. Stephens appeals.

Discussion and Decision

Stephens argues that the trial court abused its discretion when it denied his motion to set aside default judgment. Ind. Trial Rule 55(A) authorizes the entry of default judgment for failure to file a pleading. However, Ind. Trial Rule 55(C) allows the judgment to be set aside if grounds under Ind. Trial Rule 60(B) exist. T.R. 60(B) provides that a judgment may be set aside for "mistake, surprise, or excusable neglect." There are no fixed standards "to determine the bounds of 'mistake, surprise or excusable neglect.'" Indiana Dept. of Natural Resources v. Van Keppel, 583 N.E.2d 161, 162, (Ind. Ct. App. 1991), trans. denied. Courts must balance the need for efficient administration of justice with the preference for deciding cases on their merits and giving a party its day in court. Id. The decision to grant or deny a motion to set aside default judgment is within the equitable discretion of the trial court, and we will only reverse a trial court's ruling upon review for an abuse of discretion. Whelchel v. Community Hospitals of Indiana, Inc., 629 N.E.2d 900, 902 (Ind. Ct. App. 1994), trans. denied.

Stephens argues that miscommunication between himself and his friend and attorney Doug Fahl, caused the failure to file an answer. Stephens testified that he believed that Fahl had been addressing the various collection matters pending at the time, including the Gilkey matter. Based on this belief, Stephens did not file an answer and this failure culminated in the default judgment.

On June 13, 2006, the trial court held a hearing at which Fahl testified. Fahl stated that in December of 2005 he notified Stephens that Stephens should retain other counsel because Fahl did not have enough time to devote to Stephens's collection matters. Tr. p.

23. The trial court determined that Fahl had told Stephens to retain other counsel and that Stephens had not done so. Appellant's App. p. 86.

This is neglect, but not excusable neglect under Trial Rule 60(B)(1). Stephens knew that Fahl did not have time to work on Stephens's collection matters. He also knew that Fahl had told him to retain other counsel. Regardless, Stephens did not retain other counsel to deal with the Gilkey matter. We do not agree that Stephens's failure to retain other counsel amounts to a breakdown in communication sufficient to qualify as excusable neglect under Trial Rule 60(B)(1).

Stephens's case is distinguishable from our previous decisions finding that a breakdown in attorney-client communications was excusable neglect. In those cases the defendants did all that they were required to do but subsequent misunderstandings as to the assignments given to agents of the defendants resulted in the failure to appear. In Flying J, Inc. v. Jeter, 720 N.E.2d 1247 (Ind. Ct. App. 1999), Flying J, Inc. had instructed its insurance adjuster to retain a specific law firm but the adjuster had not done so. Flying J, Inc. had thought that the adjuster would immediately retain the firm whereas the adjuster believed that Flying J, Inc. would inform him when they were served with the summons and complaint then the adjuster would retain the law firm. We determined that Flying J, Inc. reasonably believed that it had retained counsel. Id. at 1249.

Under the facts and circumstances of this case, Stephens's default judgment did not arise from a breakdown in communication with his attorney or from any other "mistake, surprise, or excusable neglect." Rather the default judgment resulted because Stephens failed to act for a substantial period of time after being advised by Fahl that

Stephens should retain alternative counsel in the Gilkey matter. After being so advised, Stephens could not reasonably believe that Fahl continued to deal with the Gilkey matter.

After Fahl had notified Stephens of his inability to continue as counsel, Stephens had at least two months to make alternative arrangements before Gilkey filed its motion for default judgment. Stephens knew that he needed to retain another attorney. Stephens cannot now argue that his neglect of this matter is excusable under Trial Rule 60 (B) (1).[1]

The trial court did not abuse its discretion when it denied Stephens's motion to set aside default judgment.

Affirmed.

DARDEN, J., and ROBB, J., concur.

[1] Because we cannot say that the trial court abused its discretion by concluding that Stephens failed to show mistake, surprise, or excusable neglect, we need not determine whether Stephens has made a showing of a meritorious defense to the judgment. See T.R. 60(B).