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IN THE
COURT OF APPEALS OF INDIANA

W. KENNETH BALDWIN, CHARLES W. ELLISON, and C.W. ELLISON BUILDERS, INC.,	)	
Appellants-Defendants.	)	
vs.	)	No. 79A02-0903-CV-266
KIMBERLY A. GILBERT, TRUSTEE, TERRY AND JANINE LATHROP, ROBERT AND DORIS LATHROP,	)	
Appellees-Plaintiffs,	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0607-CC-00405

NOVEMBER 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Charles W. Ellison, and C.W. Ellison Builders, Inc., appeal the trial court's denial of their motion to set aside a default judgment entered against them in favor of Robert and Doris Lathrop as well as the trial court's grant of summary judgment in favor of Kimberly Gilbert, Trustee for Terry and Janine Lathrop.

We affirm in part and reverse in part the trial court's denial of Ellison and Ellison Builder's motion to set aside the default judgment and affirm the trial court's grant of summary judgment in favor of Gilbert.

Appellants raise the following two issues for our review:

1. Whether the trial court erred in denying Ellison and Ellison Builder's motion to set aside the default judgment; and

2. Whether the trial court erred in granting summary judgment in favor of Gilbert.

In 1989, Ellison was the president of C.W. Ellison Builders, Inc. Ellison Builders held title to a real estate parcel located in Lafayette, Indiana. In April 1989, Ellison Builders entered into a land sales contract to sell the property to Robert and Doris and Terry and Janine. The purchase price was $170,000, and the Lathrops made substantial payments pursuant to the terms of the contract. The land sales contract was never recorded. The Lathrops operated their business from the real estate from 1989 until 2004, when Ellison Builders sold a portion of the real estate parcel to W. Kenneth Baldwin without notice to the Lathrops. Thereafter, the City of Lafayette, by eminent domain, obtained a judgment against Ellison Builders for $51,800 for the rest of the real estate

parcel the Lathrops had purchased. The Lathrops were subsequently excluded from the real estate and their business failed. Terry and Janine filed for relief under Chapter 7 of the United States Bankruptcy Code, and Kimberly Gilbert was appointed to be the trustee over their bankruptcy estate.

In July 2006, Gilbert and the Lathrops filed a complaint against Baldwin, Ellison, and Ellison Builders. The complaint alleged that Ellison and Ellison Builders had actual knowledge that the Lathrops owned the real estate but nonetheless sold it to Baldwin and received a condemnation award from the City of Lafayette. The complaint further alleged that Ellison and Ellison Builders committed larceny and theft by failing to disclose the Lathrops' interest in the real estate and receiving money for the real estate in total disregard of their contract with the Lathrops.

In August 2006, Ellison and Ellison Builders appeared by counsel, Stan Miller. Miller filed an answer and motion to dismiss on behalf of Ellison, and an answer and counterclaim on behalf of Ellison Builders. In December 2006, Miller filed a motion to withdraw his appearance, which the trial court granted. In May 2007, Robert and Doris filed an amended complaint. The following month, Ellison filed a pro se motion for extension of time to respond to the amended complaint. Ellison Builders did not respond to the amended complaint. In August 2007, the trial court entered a default judgment in favor of Robert and Doris on the amended complaint and ordered Ellison and Ellison Builders to pay Robert and Doris the $960,000.00 that they requested in their amended complaint. In September 2007, Ellison filed a pro se motion asking the court to set aside

the default judgment. The trial court denied the motion in an order that provides in relevant part as follows:

> The Court has discretion to set aside default judgments. But where as herein no attorney is of record and the Answer has not been filed and no showing exists as to mistake or excusable neglect or improper service, a default should be entered. Defendant[]s Ellison discharged their attorney Stan Miller and appeared without counsel. They cannot claim any mistake or excusable neglect and a meritorious defense does not matter. . . . The Court finds that the default judgment entered against Debtors CW Ellison Builders, Inc. and Charles W. Ellison is not set aside.

Appellant's App. at 16.

Also in August 2007, Gilbert filed a summary judgment motion against Ellison and Ellison Builders. While being questioned by the trial court at a hearing, Ellison admitted the existence of the land sales contract with the Lathrops as well as his sale of the property to Baldwin. Ellison also admitted that he owed the Lathrops the money they sought in their complaint. Following the hearing, the trial court issued an order that provides in relevant part as follows:

> As to the Trustee's Motion for Summary Judgment the Court finds that based on the testimony and evidence entered at the hearing on Summary Judgment held 12/5/07 that an unrecorded contract to purchase real estate was entered between Plaintiffs and Defendants for the purchase of the property on Farabee Drive and SR 26, Lafayette Indiana and Plaintiffs possessed such real estate for over 15 years and made payments thereon. A contract for real estate must be foreclosed which Defendants failed to do but sold the real estate with knowledge of Plaintiff's ownership. Contracts such as that attached to Plaintiff's complaint are best determined at a hearing on summary judgment. . . .

Appellant's App. at 16-17.

Ellison and Ellison Builders appeal the trial court's denial of their motion to set aside the default judgment as well as the trial court's grant of summary judgment in favor of Gilbert. They first argue that the trial court erred in denying their motion to set aside the default judgment. Specifically, Ellison and Ellison Builders' sole contention is that the default judgment should be set aside because Indiana Trial Rule 55(B) requires parties who have appeared in an action to be served with notice of an application of default, and the Lathrops failed to serve them.

A default judgment plays an important role in the maintenance of an orderly, efficient judicial system as a weapon for enforcing compliance with the rules of procedure and for facilitating the speedy determination of litigation. *Standard Lumber Company of South Bend, Inc. v. Josevski*, 706 N.E.2d 1092, 1095 (Ind. Ct. App. 1999). The decision whether to set one aside is given substantial deference on appeal. *Id.* The trial court has abused its discretion where the judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.*

Once a party is entitled to judgment by default, the party must apply to the court for such a judgment and a hearing will be held. *Evansville Garage Builders v. Shrode*, 720 N.E.2d 1273, 1276 (Ind. Ct. App. 1999), *trans. denied*. Indiana 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." The language of T.R. 55(B) is not superfluous and strict adherence to the notice provision is required. *Id.* An

appearance may be effected by any act by which a person recognizes the case as being in court, such as by filing a motion. *King v. King*, 610 N.E.2d 259, 262 (Ind. Ct. App. 1993), *trans. denied*.

Here, neither Ellison nor Ellison builders was served with written notice of the application for judgment. As to Ellison, our review of the evidence reveals that after the Lathrops filed their amended complaint, Ellison filed a pro se motion for extension of time to respond to the amended complaint. The filing of this motion constituted an appearance, *see King*, 610 N.E.2d at 262, and Ellison should have been served with written notice of the Lathrops' application for default judgment. The trial court therefore erred in failing to set aside the default judgment against Ellison.

We reach a different result regarding Ellison Builders. A corporation must appear by an attorney in all cases. Ind. Code § 34-9-1-1. Here, no attorney appeared in the case on behalf of Ellison Builders. Because no attorney appeared in the case, Ellison Builders was not entitled to written notice of the application for default judgment. The trial court therefore did not err in failing to set aside the default judgment in favor of Ellison Builders.

Ellison and Ellison Builders also argue that the trial court erred in granting summary judgment in favor of Gilbert. When reviewing the trial court's grant of summary judgment, this court views the same matters and issues that were before the trial court and follows the same process. *Nationwide Insurance Company v. Heck*, 873 N.E.2d 190, 196 (Ind. Ct. App. 2007). We construe all facts and reasonable inferences to

be drawn from those facts in favor of the non-moving party. *Id.* Summary judgment is appropriate when the designated evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *Id.* Here, Gilbert alleged that Ellison and Ellison Builders committed larceny and theft by failing to disclose the Lathrops' interest in the real estate and by receiving money for the real estate in total disregard of their contract with the Lathrops. While being questioned by the trial court during a hearing, Ellison admitted the existence of the land sales contract with the Lathrops as well as his sale of the property to Baldwin. Ellison also admitted that he owed the Lathrops the damages that they sought in their complaint. Ellison's admissions conclusively established facts that entitled Gilbert to judgment as a matter of law. *See Walker v. Employers Insurance of Wausau*, 846 N.E.2d 1098, 1102 (Ind. Ct. App. 2006) (stating that an admission conclusively establishes a fact). The trial court did not err in granting summary judgment in favor of Gilbert.[1]

Affirmed in part and reversed in part.

BARNES, J., and VAIDIK, J., concur.

[1] Because of Ellison's admissions, we need not address Ellison and Ellison Builders' additional arguments regarding the propriety of the trial court's grant of summary judgment.