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IN THE
COURT OF APPEALS OF INDIANA

JAMAAL TINSLEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A05-1104-CT-162
	)	
NANCY PARRISH,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0902-CT-5039

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jamaal Tinsley appeals the trial court's denial of his motion to set aside default judgment. Tinsley raises one issue, which we revise and restate as whether the court abused its discretion in denying his motion. We reverse and remand.

The relevant facts follow. On February 2, 2009, Nancy Parrish filed a complaint against MBR, LLC d/b/a 8 Seconds ("8 Seconds"), Tinsley, Marquis Daniels, and Keith McLeod alleging that on or about February 5, 2007, she was checking coats for 8 Seconds, that Tinsley, Daniels, and McLeod were patrons of 8 Seconds at the time, and that she "was injured as a result of an altercation that occurred near the coat check area between one or more of the patrons of the 8 Seconds when such altercation breached the coat check area and [Parrish] was knocked to the floor and landed on a floor 'buffer' type apparatus being stored in the coat check area." Appellant's Appendix at 8. Parrish alleged that Tinsley, Daniels, and McLeod "were willfully and wantonly involved in an altercation near the coat check area in which during such altercation the entry to the coat check area was breached by one or more of said defendants" and that "[a]s a direct and proximate result of [] Tinsley, Daniels, & McLeod's conduct [Parrish] was injured when she was knocked over and onto a floor buffer machine causing injuries to but not limited to [her] lower back and lower extremities." Id. at 9-10.

The Sheriff delivered a summons and complaint for Tinsley to the office of the Indiana Pacers on February 4, 2009, and the Indiana Pacers refused to accept service for Tinsley.[1] Parrish also prepared an alias summons which was mailed by the clerk of the

[1] The summons indicates that the Sheriff left a copy of the summons and complaint at Tinsley's place of employment. In her appellee's brief, Parrish states that "[t]he Indiana Pacers refused to accept service for Tinsley . . . ." Appellee's Brief at 15.

Marion County court by certified mail return receipt requested to Tinsley at "c/o Memphis Grizzlies" in Memphis, Tennessee, and return receipts show that the alias summons was received twice by the Memphis Grizzlies in December 2009.[2] Id. at 92. Notice of the lawsuit was published in the Indianapolis Star on October 22, October 29, and November 5, 2009.

On January 20, 2010, Parrish filed an Application for Default Judgment as to Liability alleging that Tinsley "was served with Summons and Complaint via certified mail to his employer on December 21, 2009" and requested the court "for default judgment as to liability only against [] Tinsley and to set this matter for a hearing on damages . . . ." Id. at 29.

On February 11, 2010, the court entered an Order on Application for Default Judgment as to Liability, in which the court found that Tinsley "was served via his employer by certified mail December 21, 2009 and has failed to otherwise plead or defend in this action" and that Parrish was entitled to a default judgment as to liability. Id. at 31.

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[2] The record includes receipts which appear to indicate that the court clerk sent a copy of the alias summons on December 7, 2009, and that it was received by the Memphis Grizzlies on December 9, 2009. The record also includes receipts which appear to indicate that a copy of the alias summons was sent by the court clerk on December 15, 2009. The return receipt for delivery shows that the delivery was received by the Memphis Grizzlies but did not include a date of delivery; the court clerk certified on December 24, 2009, that it had received the return receipt. The trial court's February 11, 2010 order on application for default judgment as to liability states that "Tinsley was served via his employer by certified mail December 21, 2009," Appellant's Appendix at 31, and the court's March 21, 2011 order on Tinsley's motion to set aside default judgment and its September 12, 2011 certification of statement of evidence both state that Tinsley was served by certified mail at the office of his employer, the Memphis Grizzlies, on December 9, 2009, and December 15, 2009.

On October 4, 2010, following a hearing at which Parrish testified and presented evidence regarding the extent of her injuries, the court issued a judgment entry in favor of Parrish and against Tinsley in the amount of $225,000. Parrish instituted garnishment proceedings, and on January 6, 2011, the court entered a Final Order in Wage Garnishment in which it ordered the Clerk of Marion County to levy an amount on Tinsley's income from the Indiana Pacers to be applied to the unpaid balance of the October 4, 2010 judgment.

On January 21, 2011, Tinsley filed a Motion to Set Aside Default Judgment and Request for Stay of Garnishment Proceedings requesting that the trial court set aside the default judgment pursuant to Ind. Trial Rule 60(B). Tinsley's counsel filed an appearance on January 24, 2011. Parrish filed an objection to Tinsley's motion in which she argued that "Tinsley was properly served with summons and complaint on numerous occasions but failed to appear, plead or otherwise defend." Id. at 70. In support of her argument, Parrish attached as exhibits to her objection an article showing that Tinsley was employed by the Indiana Pacers at the time of the complaint, the summons delivered to the Indiana Pacers, copies of the alias summons delivered to the Memphis Grizzlies and associated return receipts, an article showing Tinsley was an employee of Memphis Grizzlies at the times of service of the alias summons, a publisher's affidavit related to service by publication, and the Indiana Pacers' answers to interrogatories, among other documents.

On March 2, 2011, the court held a hearing on Tinsley's motion, at which the court heard arguments by the parties, granted Tinsley's counsel two weeks to submit any affidavits and a response, and took the matter under advisement.[3]

On March 16, 2011, Tinsley filed a reply to Parrish's objection, which attached the affidavits of Tinsley and Tinsley's personal assistant, and argued that his motion should be granted under Trial Rule 60(B)(8), that Parrish demanded a significant amount of money for the alleged harm caused by Tinsley, that Tinsley's "failure to respond resulted not only from surprise, but exceptional circumstances existed that were not within the control of Tinsley," that he "was in the middle of changing employers and had moved out of the State of Indiana when this case was first filed," and that "[s]ervice by publication was ineffective because at the time of publication, [he] resided in Georgia." Id. at 110. Tinsley also argued that he "has several meritorious defenses which he is prepared to present at trial, including but not limited to, self defense and that he was not the proximate cause of any injury to [Parrish]." Id. at 111.

In his affidavit attached to the reply, Tinsley stated that he "was never made aware of a summons purportedly delivered to the Indiana Pacers" and "nor was [he] playing basketball for the Indiana Pacers at that time," that he "was never made aware of service of a summons purportedly made to the Memphis Grizzlies Basketball team," that in April of 2009 he retained counsel in an unrelated civil action, that he "learned that [Parrish] attempted to deliver a summons and complaint after April 2009," that "[i]f [he] had

[3] The court noted that it did not make a record of the hearing because the recording equipment was not working and that counsel was advised of that fact.

known that a summons and complaint existed for the present case, [he] would have requested [his counsel] to respond to any pleading filed against [him] as they had already been retained in another matter," and that he "first learned of the lawsuit . . . upon notification from [his] banker in December 2010 that a garnishment order had issued against [his] contractual payments from the Indiana Pacers," that "[a]t all times relevant" he "resided in the state of Georgia," and that "[a]t the time of the publication of a summons in the Indianapolis Star for the present case [he] was not in the State of Indiana." Id. at 113. In her affidavit, Tinsley's personal assistant stated that she "was and still [is] responsible for receiving and handling [] Tinsley's mail and other personal matters," that she "never received nor was [she] aware of a summons and complaint," that she was "never made aware of service of a summons made to the Memphis Grizzlies," and that she first learned of the lawsuit in December 2010 upon notification from Tinsley's banking institution that a garnishment order had been issued. Id. at 115.

On March 21, 2011, the court denied Tinsley's motion and found that Parrish "tried many ways to serve [] Tinsley with a summons and complaint," that Tinsley "was employed as a professional basketball player by the Memphis Grizzlies at the time service of the summons and complaint was made on his employer, the Memphis Grizzlies, by certified mail December 9, 2009 and December 15, 2009," that Tinsley "failed to appear or otherwise defend and judgment by default was properly entered," and that Tinsley "has not met his burden of proof on the issues in setting aside the default judgment." Id. at 117-118.

Tinsley filed a motion for certification of statement of evidence in August 2011 which stated that the March 2, 2011 proceedings were not recorded for transcription and attached an affidavit of Tinsley's counsel regarding the arguments at the hearing. Parrish filed a response in September 2011 which stated that "[t]here was no evidence taken at the hearing March 2, 2011" and that she "believes the Motion by [] Tinsley is incomplete and inaccurate in part as to the proceedings" and attached affidavits of her counsel. Id. at 128.

On September 12, 2011, the court entered a certification of statement of evidence providing that the court did not make a record of the March 2, 2011 hearing because the recording equipment was unavailable and that the court "reviewed its file and a discussion was had between the attorneys of record regarding the Motion to Set Aside Default Judgment." Id. at 133. In its certification, the court further stated that "[t]he file showed that Tinsley was served certified mail at the office of his employer, the Memphis Grizzlies, two times: December 9, 2009 and December 15, 2009," that "[c]ounsel for Tinsley stated that Tinsley was a member of the Memphis Grizzlies basketball team at the time the Memphis Grizzlies were served with [Parrish's] Summons and Complaint," that "[c]ounsel for Tinsley told the Court that had Tinsley known about the suit he would have contacted [his] attorney['s] office because they were presently handling another lawsuit for Tinsley," and that counsel for Tinsley "stated he had talked to Renee Sparks of the Memphis Grizzlies who signed the certified mail receipt" and that Sparks "stated she did not remember this specific incident but that it was her practice and procedure that when she received legal papers and other mail for players on the team, she would put it in

an envelope with the player's name on it, and send it to the locker room and that is what she would have done." Id. at 133-134. The court also certified that it had stated at the hearing that Parrish "had complied with the trial rules and properly served Tinsley" and that "even if what Tinsley's attorney alleged was accurate Parrish was still entitled to the original judgment under the law." Id. at 134. The certification further provided that counsel for Tinsley had requested two weeks to file and affidavit and brief.

The issue is whether the court abused its discretion in denying Tinsley's motion to set aside default judgment. Upon appellate review of a refusal to set aside a default judgment, the trial court's ruling is entitled to deference and will be reviewed for an abuse of discretion. Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001). The trial court's discretion should be exercised in light of the disfavor in which default judgments are generally held. Id.; see also Coslett v. Weddle Bros. Constr. Co., 798 N.E.2d 859, 861 (Ind. 2003) ("Indiana law strongly prefers disposition of cases on their merits."), reh'g denied.

Tinsley maintains that the court abused its discretion in denying his motion to set aside default judgment. Tinsley cites to Ind. Trial Rule 60(B)(1) and argues that he "established excusable neglect that warranted setting aside the default judgment" and that he and his personal assistant "had no actual knowledge of this lawsuit until after the default had been entered and Tinsley's wages had been garnished." Appellant's Brief at 6. Tinsley argues that he established that "had he known about this lawsuit he would have taken the relatively easy action of having his counsel from [another civil lawsuit] appear and defend this one," that "considerable injustice would result from leaving [the]

default intact due to the size of the judgment: $225,000," and finally that "he had meritorious defenses to the lawsuit: self-defense and that he did not proximately cause Parrish's injuries." Id. at 6-7. Tinsley further contends that the court "ignored the standards and presumptions that apply to setting aside default judgments," that default judgments are disfavored and any doubt of the propriety of a default judgment must be resolved in favor of the defaulted party, that default judgments "are especially disfavored in cases involving material issues of fact and substantial amounts of money," that other factors must be considered including the "possible prejudice to the moving party and the length of delay," and that the court "fail[ed] to acknowledge its obligation to weigh these factors . . . ." Id. at 7-8. Tinsley asserts that he moved to set aside the default judgment 18 days after the trial court entered the final wage garnishment, and that "[b]y contrast, the record demonstrates that Parrish totally failed to show the trial court how she was prejudiced by the length of the delay." Id. at 9.

Parrish maintains that the trial court should be affirmed because Tinsley "failed to offer any evidence of a meritorious defense." Appellee's Brief at 7. Parrish further argues that Tinsley "failed to meet his burden of proof on mistake, surprise or excusable neglect," that there "was no absence by Tinsley's attorney through no fault of his own, no agreement made with opposing party or her attorneys, no conduct by Parrish causing him to be misled or deceived, no unavoidable delay in traveling, no faulty process, no fraud, insanity, no infancy, no sickness or illness." Id. at 12-13. Parrish asserts that Tinsley's neglect is supported by the facts that he failed to respond to service on the Indiana Pacers, failed to respond to service on the Memphis Grizzlies, failed to show up at the

proceedings supplemental hearing "even while admitting to have prior knowledge,"[4] failed to show up at the hearing on his motion to set aside the default judgment, or "make any explanations to the court surrounding his residence, his arrangement for his mail, his employment with the Memphis Grizzlies, or why he did not show up for his hearings." Id. at 14. Parrish argues that the court could consider Tinsley's "carelessness regarding hearings and court proceedings when deciding Tinsley's credibility as to whether or not he really knew about the lawsuit much sooner than he claims." Id. at 17.

In his reply brief, Tinsley argues that he sufficiently alleged a meritorious defense, that the current version of Trial Rule 60(B) "requires only an allegation of meritorious defenses in support of a motion to set aside a judgment," and that admissible evidence from the damages hearing shows prima facie evidence of his meritorious defenses. Appellant's Reply Brief at 2. Tinsley also argues that he established excusable neglect that warranted setting aside the default judgment.

Default judgments are not favored in Indiana. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). Any doubt as to the propriety of a default

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[4] In a footnote in her brief, Parrish asserts:

> On the morning of January 3, 2011, counsel for [Parrish] received a phone call from Tinsley's lawyer advising that he represented Tinsley on another matter and had been contacted by Tinsley because the Indiana Pacers told Tinsley's bank that his automatic deposit into his bank account would be "light" because of [the garnishment proceedings]. Counsel for [Parrish] advised [Tinsley's attorney] there was a hearing on January 4, 2011 for a Final Order in Garnishment and that [Parrish] would be proceeding with the hearing to get a Final Order in Garnishment. Tinsley's counsel advised that he would not be attending the hearing but that Tinsley would be filing a Motion to Set Aside Default Judgment.

Appellee's Brief at 5 n.1 (citing Appellant's Appendix at 6 (the CCS), 72 (showing page 5 of Parrish's opposition to Tinsley's motion to set aside default judgment wherein Parrish asserts facts consistent with the above)).

judgment must be resolved in favor of the defaulted party. Watson, 747 N.E.2d at 547. "Moreover, no fixed rules or standards have been established because the circumstances of no two cases are alike." Kmart v. Englebright, 719 N.E.2d 1249, 1253 (Ind. Ct. App. 1999) (citing Siebert Oxidermo, Inc. v. Shields, 446 N.E.2d 332, 340 (Ind. 1983)), trans. denied. "A cautious approach to the grant of motions for default judgment is warranted in 'cases involving material issues of fact, substantial amounts of money, or weighty policy determinations.'" Id. (citing Green v. Karol, 168 Ind. App. 467, 473-474, 344 N.E.2d 106, 110-111 (1976)). In addition, the trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. Id.

The entry of a default judgment is authorized by Ind. Trial Rule 55(A), and pursuant to Trial Rule 55(C) a judgment by default which has been entered may be set aside by the court for the grounds and in accordance with the provisions of Trial Rule 60(B). In his appellate briefs, Tinsley cites to Ind. Trial Rule 60(B)(1). Ind. Trial Rule 60(B) provides in part that "[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; . . . ." Ind. Trial Rule 60(B)(1). A motion shall be filed not more than one year after the judgment was entered for purposes of Trial Rule 60(B)(1), and a movant filing a motion for reasons under Trial Rule 60(B)(1) must allege a meritorious claim or defense. "A Trial Rule 60(B)(1) motion does not attack the substantive, legal merits of a judgment, but rather addresses the procedural, equitable grounds justifying the relief from the finality of a

judgment." Kmart, 719 N.E.2d at 1254 (citing Blichert v. Brososky, 436 N.E.2d 1165, 1167 (Ind. Ct. App. 1982)). Moreover, a Trial Rule 60(B)(1) motion is addressed to the trial court's equitable discretion, with the burden on the movant to affirmatively demonstrate that relief is necessary and just. Id.

We have held that "relief from judgment is essentially equitable in nature and, thus, a trial court must balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in finality of litigation." Id. at 1257 (citing King v. King, 610 N.E.2d 259, 262 (Ind. Ct. App. 1993), reh'g denied, trans. denied).

There is no general rule as to what constitutes excusable neglect under Trial Rule 60(B)(1). Id. at 1254 (citing In re Marriage of Ransom, 531 N.E.2d 1171, 1172 (Ind. 1988)). Each case must be determined on its particular facts. Id. (citing Boles v. Weidner, 449 N.E.2d 288, 290 (Ind. 1983)). The following facts have been held to constitute excusable neglect, mistake, or surprise:

> (a) absence of a party's attorney through no fault of party; (b) an agreement made with opposite party, or his attorney; (c) conduct of other persons causing party to be misled or deceived; (d) unavoidable delay in traveling; (e) faulty process, whereby party fails to receive actual notice; (f) fraud, whereby party is prevented from appearing and making a defense; (g) ignorance of the defendant; (h) insanity or infancy; (i) married women deceived or misled by conduct of husbands; (j) sickness of a party, or illness of member of a family.

Id. (citing Continental Assurance Co. v. Sickels, 145 Ind. App. 671, 675, 252 N.E.2d 439, 441 (1969)). "Although 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, in Indiana there is a marked judicial deference for deciding disputes on their merits and for giving parties their day in court, especially in cases involving material issues of fact, substantial amounts of money, or weighty policy determinations." Charnas v. Estate of Loizos, 822 N.E.2d 181, 184-185 (Ind. Ct. App. 2005). Even though there is a technical default, the non-defaulting party is not entitled to a judgment by default as a matter of right. Green, 168 Ind. App. at 473, 344 N.E.2d at 110. This court has considered the amount of money involved, the material issues of fact accompanying the allegations, the short length of the delay, and lack of prejudice to the non-movant by the delay in concluding that a trial court did not abuse its discretion in allowing a case to be heard on the merits. See id. at 475, 344 N.E.2d at 111.

Based upon the record, and in light of the issues of fact accompanying the allegations, the length of the delay, the amount of money at issue, and the absence of evidence of prejudice to Parrish by the delay,[5] we conclude that Tinsley's failure to respond to Parrish's complaint constituted excusable neglect under Trial Rule 60(B)(1). See Kmart, 719 N.E.2d at 1257-1258 (holding that Kmart's failure to respond to Englebright's complaint constituted excusable neglect under Trial Rule 60(B)(1) and reversing the court's denial of Kmart's motion to set aside default judgment).

However, in order to obtain relief under Trial Rule 60(B)(1), Tinsley must also show that he alleged a meritorious defense. The rule by its terms requires only an

[5] Parrish does not argue or point to evidence that her claim is prejudiced by the delay.

allegation of a meritorious defense.[6] A meritorious defense is one showing that, if the case was retried on the merits, a different result would probably be reached. Baxter v. State, 734 N.E.2d 642, 646 (Ind. Ct. App. 2000). To establish a meritorious defense, a party need not prove the absolute existence of an undeniable defense. Bunch v. Himm, 879 N.E.2d 632, 637 (Ind. Ct. App. 2008). Rather, a defendant need only make a *prima facie* showing of a meritorious defense. Id. While Trial Rule 60(B) states that a party must "allege" a meritorious defense it "provides no further guidance as to what constitutes a proper allegation under the rule." Shane, 869 N.E.2d at 1238.

Here, Parrish's February 2, 2009 complaint alleged that Tinsley, Daniels, and McLeod were willfully and wantonly involved in an altercation near the coat check area during which "the entry to the coat check area was breached by one or more of said defendants" and that "[a]s a direct and proximate result of [] Tinsley, Daniels, & McLeod's conduct [Parrish] was injured when she was knocked over and onto a floor buffer machine causing injuries to but not limited to [her] lower back and lower extremities." Appellant's Appendix at 9-10. In paragraph 16 of his March 16, 2011 reply to Parrish's objection to his motion to set aside, Tinsley alleged that he "has several meritorious defenses which he is prepared to present at trial, including but not limited to, self defense and that he was not the proximate cause of any injury to [Parrish]." Id. at 111.

[6] Trial Rule 60(B) provides that "[a] movant filing a motion for reasons (1), (2), (3), (4), and (8) must *allege* a meritorious claim or defense." (Emphasis added).

Tinsley was required only to allege a meritorious defense and was not required to present admissible evidence to satisfy the requirement. See Goodson v. Carlson, 888 N.E.2d 217, 222 n.9 (Ind. Ct. App. 2008) (holding that "[c]ontrary to the Carlsons' argument, Goodson was not required to present *admissible* evidence to satisfy the meritorious defense requirement") (citing Shane, 869 N.E.2d at 1238); see also Baker & Daniels, LLP v. Coachmen Industries, Inc., 924 N.E.2d 130, 141-142 (Ind. Ct. App. 2010) (noting Baker & Daniels' argument that Coachmen failed to allege a meritorious claim, and finding that while Coachmen could have presented more evidence to demonstrate the merits of its claim this court was satisfied that it met the minimum standard to satisfy the meritorious claim requirement), trans. denied.

Further, we note that although Tinsley did not explicitly incorporate the "meritorious claim or defense" language of Trial Rule 60(B) into his Motion to Set Aside Default Judgment, we are satisfied that the motion read in conjunction with paragraph 16 of his reply to Parrish's objection to the motion adequately advised the trial court that Tinsley had a meritorious defense. See State Farm Mut. Auto. Ins. Co. v. Hughes, 808 N.E.2d 112, 118 (Ind. Ct. App. 2004) (holding that "[a]lthough State Farm's motion did not explicitly incorporate the 'meritorious claim or defense' language of T.R. 60(B), we are satisfied that paragraph 6 of the motion to set aside the default judgment read in conjunction with paragraphs 6 and 7 of the motion to intervene adequately advised the trial court, which had previously reviewed the pleadings, that State Farm had a meritorious defense"); Hoosier Health Sys. v. St. Francis Hosp. & Health Centers, 796 N.E.2d 383, 387 (Ind. Ct. App. 2003) (holding that "[a]lthough St. Francis did not

explicitly incorporate in its motion the 'meritorious claim' language of T.R. 60(B), we are satisfied that the language of Paragraph 5 adequately advised the trial court, which had previously reviewed the pleadings and summary judgment materials, that St. Francis alleged it has a meritorious claim for payment").

Based upon the record, we find that Tinsley alleged a meritorious defense to Parrish's claim which would specifically negate an element of her claim against him. See Kmart, 719 N.E.2d at 1259 (holding that Kmart presented "a meritorious defense to Englebright's [negligence] claim, specifically negating the causation element").

Finding that Tinsley has established that he was entitled to relief from the default judgment by demonstrating excusable neglect and a meritorious defense, we conclude that the trial court abused its discretion in denying Tinsley's Trial Rule 60(B)(1) motion to set aside the default judgment. Accordingly, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MAY, J., and CRONE, J., concur.