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IN THE COURT OF APPEALS OF INDIANA

GREGORY L. BROWN, Appellant-Petitioner, vs. MEDICAL LICENSING BOARD OF INDIANA, Appellee-Respondent.	)))))))))	No. 49A02-0612-CV-01109

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth Johnson, Judge
Cause No. 49D02-0608-PL-34229

June 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Gregory L. Brown appeals from the trial court's dismissal of his petition for judicial review of appellee-respondent Medical Licensing Board of Indiana's (Board) request for relief from a default order terminating his license to practice medicine in Indiana. Brown argues, among other things, that the trial court erroneously ruled on the Board's motion to dismiss before his time to respond thereto had passed and that he should have been entitled to seek relief analogous to that provided by Indiana Trial Rule 60(B) even though he was litigating in an administrative setting. Finding that even if the trial court ruled on the motion precipitously such error was harmless, and finding that even if Brown was entitled to seek something akin to Rule 60(B) relief he has failed to establish that such relief was warranted, we affirm the judgment of the trial court.

FACTS

Brown was licensed to practice medicine in Indiana and Kentucky until he surrendered his Kentucky license on November 10, 2004. Prior to that time, he had become addicted to pain medications and had been obtaining the medications outside of the proper channels—e.g., by writing prescriptions for his parents, his partner, and friends and filling the prescriptions for his own use.

The State of Indiana learned of the suspension of Brown's Kentucky medical license and, on February 21, 2005, the State filed a petition for summary suspension of his Indiana medical license with the Board. The petition requested a ninety-day suspension. On the day the petition was filed, the Board issued a notice of a hearing on the petition and set the hearing for February 24, 2005. Brown did not appear at the hearing but notified the State

that he would not appear and that he did not object to a ninety-day suspension of his license. Thus, on April 5, 2005, the Board issued a non-final summary suspension order.

On April 12, 2005, the State filed a complaint against Brown before the Board, based on the same issues underlying the ninety-day suspension, namely, Brown's narcotics abuse, his failure to complete rehabilitation programs, and the surrender of his Kentucky medical license. On April 14, 2005, the Board issued a hearing notice and set the matter for hearing on April 28, 2005. The hearing notice indicated that the purposes of the hearing were to determine whether the ninety-day suspension should be renewed and whether a "disciplinary sanction" should be imposed on Brown's medical license. Appellee's App. p. 17. Brown did not appear at the April 28, 2005, hearing but indicated to the State that he would not appear and requested another ninety-day suspension of his license and continuance of the final hearing. The Board agreed to an additional ninety-day suspension and set a hearing for June 23, 2005, which the Board emphasized was a "final hearing . . . ." Id. at 28 (emphasis in original).

Even though Brown received notice of the June 23, 2005, hearing, he did not appear. Therefore, on July 11, 2005, the Board issued a notice of proposed default, ordering as follows:

> In accordance with Indiana Code § 4-21.5-3-24, [Brown] must file a written motion within seven (7) days of service of this Order requesting that the Board not enter a default order in this case and stating the reasons relied upon for his request. Failure of the Respondent to file such a written motion within seven (7) days shall result in the issuance of a default order. If the Respondent timely files a motion, the Board shall consider said motion along with any other relevant facts in determining whether a default order should be entered.

Id. at 31. The Board also extended the suspension of Brown's Indiana medical license for another ninety days.

Although Brown received this notice, he did not file a motion opposing a default order within seven days. Consequently, on September 9, 2005, the Board found Brown in default and concluded, among other things, that

> [Brown's] conduct constitutes a violation of Indiana Code § 25-1-9-4(a)(7), in that, [Brown's] license to practice has been disciplined in another jurisdiction on grounds similar to Indiana Code § 25-1-9-4(a)(4)(D), in that, [Brown] continued to practice although unfit to practice due to addition to, abuse of, or severe dependency upon alcohol or other drugs that endangered the public by impairing [Brown's] ability to practice safely.

Appellant's App. p. 14. The Board then revoked Brown's license to practice medicine in Indiana.

Over seven months later, on April 20, 2006, Brown filed a motion for rehearing with the Board. Among other things, the motion stated that Brown failed to appear at the June 23, 2005, final hearing because Brown, his attorney, and his personal assistant "mistakenly believed that the ninety day emergency suspension order was the only matter pending and failed to make arrangements for [Brown] to appear at the June 23, 2005 final hearing before this Board." Id. at 3. The motion also stated that Brown and his attorney "believed an agreement existed with the Assistant Attorney General that a suspension would be entered for an additional ninety days. A careful review of the documents would have cured this mistake, but for inexplicable reasons, this did not occur." Id. Attached to the motion was an October

28, 2005, letter to Brown from his attorney at the time,[1] who admitted that he had not carefully reviewed the documents:

> On July 11, 2005, the [Board] filed an order which granted the Extended Summary Suspension of 90 days but also contained provisions that there needed to be a motion filed within seven days of the service of that order concerning the reason relied upon for the request for the Extended Summary Suspension. On July 25, 2005, [Brown's assistant] faxed me a copy of that July 11, 2005, order. At that time, I had a conversation with [the assistant] and advised her that the order did, in fact, give you a temporary suspension for another 90 days from the date of the order. Even though the time for filing the required motion had expired prior to the July 11, 2005, order being forwarded to me, I should have noticed the requirement to file the motion and called it to your attention.
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> Dr. Brown, even though the period for filing the required motion was passed when I received the July 11 order, I certainly apologize for my failure to examine it closely enough to advise you earlier that you were in default.

Id. at 21-22. On July 10, 2006, the Board entered an order denying Brown's motion for rehearing as untimely, inasmuch as more than thirty days had passed since the entry of the September 9, 2005, order.

On August 9, 2006, Brown filed a petition for judicial review. On September 25, 2006, the Board filed a motion to dismiss based on Indiana Trial Rules 12(B)(1) and 12(B)(6). Essentially, the Board argued that the trial court did not have jurisdiction over the petition because Brown had failed to file a timely agency record and because Brown's

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[1] Brown's attorney at that time was licensed to practice law in Kentucky but not in Indiana and was careful to advise his client that he had never spoken with the Board on Brown's behalf and that he is "not licensed in Indiana and could not represent you there." Appellant's App. p. 21. The record does not reveal whether Brown was represented by an Indiana attorney during the relevant period of time.

motion for rehearing with the Board was untimely; hence, the petition failed to state a claim upon which relief can be granted. On October 3, 2006, before Brown had an opportunity to respond to the Board's motion, the trial court dismissed Brown's petition with prejudice. Brown now appeals.

DISCUSSION AND DECISION

I. Standard of Review

In considering a trial court's dismissal of a complaint pursuant to Trial Rule 12(B)(6), we apply a de novo standard of review. A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. Therefore, we review the complaint in a light most favorable to the non-movant, drawing every reasonable inference in favor of that party. The trial court's grant of a motion to dismiss is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. In determining whether any facts will support the claim, we look only to the complaint and not to any other evidence in the record. Harmony Health Plan of Ind., Inc. v. Ind. Dep't of Admin., 864 N.E.2d 1083, 1089 (Ind. Ct. App. 2007).

II. Brown's Claims

Brown first argues that the trial court erroneously dismissed his complaint before his allotted time to respond to the Board's motion to dismiss had passed. He acknowledges that our Supreme Court has held that, under the Indiana Trial Rules, a trial court need not provide a party the opportunity to respond before ruling on a 12(B)(6) motion to dismiss. Cobb v.

Owens, 492 N.E.2d 19, 20 (Ind. 1986). Brown notes, however, that in this case, unlike in Cobb, there is a local rule—Marion County Local Rule 5.1—which provides that an objecting party shall have fifteen days to file a response to any motion. Consequently, Brown argues that Cobb is inapposite, inasmuch as he was entitled to fifteen days to respond to the Board's motion pursuant to the local rules.

Even if we assume for argument's sake that the trial court erroneously ruled on the motion to dismiss before fifteen days had passed, we find herein that Brown's complaint does not, in fact, state a claim upon which relief may be granted. We have taken his defense into account in arriving at that conclusion. Consequently, even if the trial court erred in ruling precipitously on the Board's motion, it was a harmless error.

Brown raises a number of other arguments. Solely for argument's sake, we will assume that Brown's petition for judicial review was timely filed and the trial court had subject matter jurisdiction. We will even assume, solely for argument's sake, that Brown was entitled to attempt to set aside the Board's default order pursuant to something akin to Trial Rules 55 and 60—a proposition that is dubious, at best, inasmuch as Brown was litigating in an administrative setting in which the trial rules do not apply and the Board is divested of jurisdiction if a party does not seek rehearing within thirty days of the Board's final order. Ind. Code § 4-21.5-3-31.

Brown argues that he has established that his untimely request for rehearing on, or to set aside, the Board's order finding him in default and revoking his license was the result of excusable neglect. See Ind. Trial Rule 60(B) (providing that a party may be entitled to have a

default judgment set aside because of, among other things, his "excusable neglect"). Thus, he insists that the Board erroneously denied his untimely motion for rehearing. We find this claim to be paltry, at best. Brown's petition for judicial review and the attachments thereto merely explain that Brown, his assistant, and his attorney mistakenly believed that an agreement was in place to extend the suspension of his license for another ninety days. He concedes, however, that "[a] careful review of the documents would have cured this mistake, but for inexplicable reasons, this did not occur." Appellant's App. p. 3.

Indeed, our review of the documents leads to an inexorable conclusion that the import of the documents could not have been clearer. The June 23, 2005, hearing was explicitly a "final hearing . . . ." Appellee's App. p. 28 (emphasis in original). The July 11, 2005, notice of proposed default gave Brown seven days to request that no default be entered and state the basis of that request. He did not do so. The September 9, 2005, default order revoked Brown's license. He had thirty days to request that the order be set aside; he did not do so within that timeframe. Brown was given every opportunity to appear at the hearings, request that no default order be entered, and dispute the default order within thirty days of its entry. His only explanation for his failure to do so is that, for "inexplicable reasons," neither he nor his attorney carefully reviewed the documents. Appellant's App. p. 3. We cannot conclude that these circumstances constitute excusable neglect pursuant to Trial Rule 60(B).

Moreover, even if Brown was entitled to seek relief pursuant or analogous to Rule 60(B)—a claim that, again, we accept solely for argument's sake—he was still required to do so in a timely fashion. Relief sought pursuant to Trial Rule 60(B)(1) must be filed within one

year of the entry of the disputed judgment and also within a reasonable time. Whitt v. Farmer's Mut. Relief Ass'n, 815 N.E.2d 537, 540-41 (Ind. Ct. App. 2004). The determination of what constitutes a reasonable time is factually sensitive such that "'[t]here may be cases where a two week delay was unreasonable, and others where an eleven month delay was reasonable.'" Id. at 540 (quoting Henderson v. Am. Optical Co., 418 N.E.2d 549, 553-54 (Ind. Ct. App. 1981)).

Here, giving Brown the benefit of the broadest possible doubt, we will assume that he did not know of the default order and revocation of his license until his attorney sent him a letter on October 28, 2005, explaining the circumstances. Brown waited for six more months to file his request for a rehearing with the Board on April 20, 2006. This six-month delay is unexplained and unreasonable. Consequently, even if Brown had been entitled to seek administrative relief analogous to Trial Rule 60(B), he has failed to establish that his delay was reasonable or caused by excusable neglect. Therefore, on the face of the petition for judicial review and attachments thereto, Brown has failed to state a claim upon which relief may be granted under any circumstances.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.