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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD PERRY,

)

Appellant-Intervenor,

)

vs.

)

No. 23A04-0703-CV-156

)

HOPE RILEY,

)

Appellee-Plaintiff.

)

)

)

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Robert M. Hall, Senior Judge
Cause No. 23C01-0412-MF-505

September 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-intervenor Richard Perry appeals the trial court's order denying him relief from judgment that it previously entered in a foreclosure action to which Richard was not a party. Specifically, Richard argues that the trial court erred because he had an interest in the property at issue and was entitled to the requested relief. Concluding that Perry's motion was untimely, we affirm the judgment of the trial court.

FACTS

Gerald and Mildred Perry were married and owned real estate in Fountain County (the property). In 1985, the Perrys executed and recorded a mortgage on the property in favor of their daughter, Hope Riley, and her husband, Lee Riley. The mortgage was to secure a \$10,000 demand note to reflect a loan that the Rileys had made to the Perrys so that the Perrys could hire a lawyer on behalf of their son—Hope's brother—Terry Perry, who had been convicted of numerous drug offenses and sentenced to an aggregate term of fifty years imprisonment. No payments were ever made on the demand note.

Gerald died in 1993 and Mildred became the sole owner of the property. On May 23, 1994, Mildred executed a quitclaim deed in favor of herself, Terry, and Hope as joint tenants with the right of survivorship. Mildred died in 2001.

Hope filed a foreclosure action against Terry on December 16, 2004. Terry was incarcerated throughout the foreclosure proceedings. On April 15, 2005, the trial court ruled in favor of Hope, awarding her \$10,000 and ordering that Terry's interest in the property be sold at a sheriff's sale to foreclose the mortgage. Hope purchased Terry's interest at the foreclosure sale.

Richard is Hope's nephew, who had been living on the property for an unspecified amount of time. After the property foreclosure, Hope transferred a portion of the property to her daughter, who filed an ejectment action against Richard in November 2006. On December 27, 2006, Richard filed a motion for relief from judgment and to intervene as a party defendant in the foreclosure action. Richard requested that the trial court set aside the underlying judgment, alleging that Hope had been appointed Terry's power of attorney in October 2000 to deed a portion of the property to Richard, which she never did. Richard also alleged that Terry had sold him his interest in the property in September 2004—before Hope filed the foreclosure action—and that Hope was aware of this transaction but did not honor it.¹ Richard contended that he was unaware of the foreclosure action until spring 2006 and, consequently, requested that the trial court vacate the foreclosure deed on the property.

Hope filed a motion to strike Richard's pleading on January 4, 2007, arguing that his request was untimely. The trial court held a hearing and ultimately ruled in favor of Hope on February 22, 2007. Appellant's App. p. 10. Richard now appeals.

DISCUSSION AND DECISION

A motion to intervene is typically filed pursuant to Indiana Trial Rule 24. However, an intervenor "takes the case as he finds it" and is not permitted to litigate matters already determined in the case. State Farm Mut. Auto. Ins. Co. v. Hughes, 808 N.E.2d 112, 116 (Ind. Ct. App. 2004). Therefore, a party seeking to intervene after judgment has already been

¹ As evidence of this transaction, Richard submitted a handwritten letter purportedly signed by Terry that "sell[s] to Richard Perry my interest in the [property] for the sum of one dollar." Appellant's App. p. 36.

issued seeks relief pursuant to Trial Rule 60. Id. (noting that Rule 24(C) “expressly recognizes the right of a party to intervene after judgment for the purposes of presenting a motion under Trial Rule 60”).

Trial Rule 60(B) provides, in relevant part, that

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

(Emphasis added). We review the grant or denial of a Trial Rule 60(B) motion under an abuse of discretion standard. Wheatcraft v. Wheatcraft, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005). On appeal, we will not find an abuse of discretion unless the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Id.

In his motion, Richard argued that Hope had been “appointed Terry Perry’s power of attorney to deed a part of the [property] to [Richard,]” that Terry had “sold [Richard] his half of the [property,]” and that “Hope Riley was aware of this transaction before she filed the

Complaint in this [foreclosure] action.” Appellant’s App. p. 30. Richard contended that the foreclosure suit was “done without my knowledge and consent” and that Hope “never told me she was trying to sell the land out from under me through the foreclosure suit.” Id.

While Richard argues that his motion was premised on the catch-all provision of Rule 60(B)(8), id. at 32; appellant’s reply br. p. 4-6, his motion clearly sounded in fraud. Although Richard disagrees, the gravamen of his argument is that Hope perpetuated a fraud against him by not honoring the interest he allegedly held in the property or including him as a party in the foreclosure action. Rule 60(B)(3) applies when a party seeks relief from a final judgment based on “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” Because Richard’s arguments are premised on Hope’s alleged deception, misconduct, and fraud, Richard’s motion sought relief from the trial court’s judgment pursuant to Rule 60(B)(3).

The last paragraph of Trial Rule 60(B) provides that the motion “shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4).” (Emphasis added). The trial court’s final judgment in the foreclosure action was entered on April 15, 2005. Richard filed his Rule 60(B)(3) motion on December 27, 2006—more than eighteen months after the trial court’s judgment. Therefore, pursuant to the plain language of Trial Rule 60(B), Richard’s motion was untimely, and the trial court did not abuse its discretion by denying him relief.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.