ATTORNEY FOR APPELLANTS:

DANA CHILDRESS-JONES
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

JAMES E. CARLBERG
BRYAN H. BABB
CARINA M. de la TORRE
Bose McKinney & Evans
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NORTH SIDE SERVICE CENTER, INC., and HENRY DUNCAN,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A02-0609-CV-792
HERBERT KULWIN and SHIRLEY KULWIN,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE MARION CIRCUIT COURT
The Honorable Theodore Sosin, Judge
Cause No. 49C01-9312-CP-4074

September 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

North Side Service Center, Inc., and Henry Duncan (collectively, "North Side") appeal the trial court's denial of their motion for relief from judgment filed in the action brought against them by Shirley Kulwin and the Estate of Herbert Kulwin (collectively, "the Kulwins"), predecessors-in-interest to SMK Ventures, Inc. ("SMK"). North Side raises one issue, which we restate as whether the trial court abused its discretion by denying their motion for relief from judgment under Ind. Trial Rule 60(B)(7). We affirm.

The relevant facts follow. In March 1991, Duncan entered into a purchase agreement with the Kulwins regarding property located on Dr. Martin Luther King Street in Indianapolis. North Side executed and Duncan guaranteed a promissory note in favor of the Kulwins in the amount of $135,000, and the note was secured by a mortgage on the property.[1] The mortgage provided:

> The Mortgagor shall procure and maintain in effect at all times in insurance companies acceptable to the Mortgagee adequate insurance against loss, damage to, or destruction of the Mortgaged Premises because of fire, windstorm or other such hazards in such amounts as the Mortgagee may reasonably require from time to time. All such insurance policies shall contain proper clauses making all proceeds of such policies payable to the Mortgagee and the Mortgagor as their respective interests may appear.
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> * * * * *
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> The Mortgagee may, at his option, advance and pay all sums necessary to protect and preserve the security intended to be given by this mortgage. All sums so advanced and paid by the Mortgagee shall become a part of the indebtedness secured hereby and shall bear interest from the date or dates of payment at the rate of fifteen percent (15%) per annum. Such sums may include, but are not limited to, insurance premiums . . . .

[1] The note and mortgage were originally executed in favor of Herbert Kulwin only, but Herbert later assigned a one-half interest in the note and mortgage to Shirley Kulwin.

Appellees' Appendix at 9-10.

North Side defaulted on its payments and failed to maintain insurance on the property, and the Kulwins obtained insurance on the property. In December 1993, the Kulwins filed a complaint to foreclose the mortgage, and the trial court entered a decree of foreclosure in December 1995. The trial court found that North Side owed $127,492.73 plus $6,100 in attorney fees and interest to the Kulwins. The parties agreed to cancel the sheriff's sale of the property if North Side made payments toward the judgment. North Side subsequently made payments of $108,000.

In the fall of 1999, the building on the property was partially destroyed by fire, and the Kulwins' insurance claim was denied because the insurance company claimed that Shirley Kulwin had improperly represented herself to be the owner of the property during the application process.

In 2005, Shirley Kulwin, on behalf of herself and as heir to the Estate of Herbert Kulwin, assigned her interest in the decree of foreclosure to SMK. **(Appellees' Appendix at 123)** SMK then sought to enforce the decree of foreclosure by sheriff's sale and requested additional attorney fees. North Side filed a petition to stay the sheriff's sale, and after a hearing, the parties agreed to remove the property from the sheriff's sale list and discuss the balance due on the judgment. On April 5, 2006, North Side filed a motion to vacate the judgment and decree of foreclosure. North Side alleged that "but for Kulwin's alleged material misrepresentation to the insurance company, the $150,000.00 insurance proceeds would have satisfied the remaining balance due and owing on the

judgment." Appellants' Appendix at 26. After a hearing, the trial court denied the motion to vacate, determined that $94,193.87 was due on the judgment, and awarded additional attorney fees of $8,253.57. Specifically, the trial court found that "the mortgage documents signed by [the Kulwins] and [North Side] place the obligation to maintain insurance on [North Side]." Id. at 39.

On April 17, 2006, North Side filed a motion for relief from judgment pursuant to Ind. Trial Rule 60(B)(7) and 60(B)(8). North Side alleged that Duncan thought that the Kulwins had insurance on the property, that Duncan repeatedly requested information on the insurance proceeds after the fire, that because the Kulwins failed to provide the requested information to Duncan, the unpaid judgment has increased significantly, and that "it is no longer equitable that the judgment entered on December 14, 1995 have prospective application." Id. at 42. On June 13, 2006, North Side filed a renewed motion for relief from judgment. After a hearing, the trial court denied North Side's motions.

The issue is whether the trial court abused its discretion by denying North Side's motion for relief from judgment under Ind. Trial Rule 60(B)(7).[2] A grant of equitable relief under Ind. Trial Rule 60 is within the discretion of the trial court. Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 72 (Ind. 2006). Accordingly, we review a trial court's ruling on Rule 60 motions for abuse of discretion. Id. "An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of

[2] Although North Side's motion for relief from judgment also requested relief pursuant to Ind. Trial Rule 60(B)(8), North Side makes no argument concerning Ind. Trial Rule 60(B)(8) on appeal.

the facts and inferences supporting the judgment for relief." Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 558 (Ind. Ct. App. 1999), reh'g denied, trans. denied, cert. denied, 529 U.S. 1021, 120 S. Ct. 1424 (2000).

On appeal, North Side argues that the trial court abused its discretion by denying its motion for relief from judgment under Ind. Trial Rule 60(B)(7). Ind. Trial Rule 60(B)(7) allows a trial court to relieve a party from an entry of final judgment if "it is no longer equitable that the judgment should have prospective application." "To establish that it is no longer equitable for a final judgment to have prospective application the movant must show that there has been a change of circumstances since the entry of the original judgment and that the change of circumstances was not reasonably foreseeable at the time of entry of the original judgment." McIntyre v. Baker, 703 N.E.2d 172, 174-175 (Ind. Ct. App. 1998). See also Crafton v. Gibson, 752 N.E.2d 78, 82 (Ind. Ct. App. 2001) ("T.R. 60(B)(7) is an appropriate procedural mechanism for seeking relief from judgments of prospective application when the law has subsequently changed.").

According to North Side, it is no longer equitable that the decree of foreclosure have prospective application because: (1) North Side made payments of $108,000 toward the judgment; (2) North Side expected the Kulwins to maintain insurance on the property; and (3) but for Shirley Kulwin's alleged material misrepresentation to the insurance company, the insurance coverage of $150,000 would have satisfied the outstanding judgment balance.

The Kulwins argue that they did not assume any legal obligation to insure the property that would support a reduction in North Side's judgment balance. In support of their argument, the Kulwins rely upon Tincher v. Greencastle Fed. Savs. Bank, 580 N.E.2d 268 (Ind. Ct. App. 1991). In Tincher, the mortgagor agreed to insure the property, but the insurance premiums were paid by the bank through an escrow account. 580 N.E.2d at 269. In 1986, the insurance company cancelled the mortgagor's policy and refunded the premium to the bank, but neither the insurance company nor the bank notified the mortgagor. Id. at 270. The house was later destroyed by fire. Id. The mortgagor filed a complaint against the bank, but the trial court granted summary judgment to the bank. Id. at 269.

On appeal, the mortgagor argued in part that the bank had a contractual duty to provide insurance on the property. Id. at 270. We noted that the mortgage provided:

> The Mortgagor will insure and keep insured all improvements now on said real estate or which may hereafter be placed thereon, in such amounts and against such hazards and in such companies as shall be satisfactory to the Mortgagee, said policy to be endorsed for the benefit of the Mortgagee as its interest may-appear.
>
> If the Mortgagor shall fail to pay taxes, liens or assessments when due, or to purchase and deliver insurance, to keep the property in good repair or to perform any covenants herein, the Mortgagee, at its election may pay such taxes, liens, assessments, purchase such insurance . . . and perform such covenants. All sums of money so advanced by the Mortgagee, together with interest at the rate of 8% per annum from date, shall be and hereby are made a part of the mortgage debt hereby secured . . . .

Id. We determined that this "provision simply allows [the bank,] if it chooses to do so, to protect its security interest in the event of [the mortgagor's] breach, and to be reimbursed

for its expenditures." Id. at 270-271. We declined to "hold that a mortgagee assumes the duty to insure or maintain insurance when it acts pursuant to similar clauses [or] that failure to do so may render mortgagee liable for breach of contract." Id. at 271. Consequently, the bank had no contractual obligation to provide insurance on the property.

Likewise, here, the Kulwins had no contractual obligation to provide insurance for North Side. North Side has failed to show a change of circumstances that would make prospective application of the decree of foreclosure no longer equitable. We conclude that the trial court did not abuse its discretion by denying North Side's motion for relief from judgment. See, e.g., McIntyre, 703 N.E.2d at 175 (affirming the trial court's denial of McIntyre's motion for relief from judgment under Ind. Trial Rule 60(B)(7)).

For the foregoing reasons, we affirm the trial court's denial of North Side's motion for relief from judgment.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur