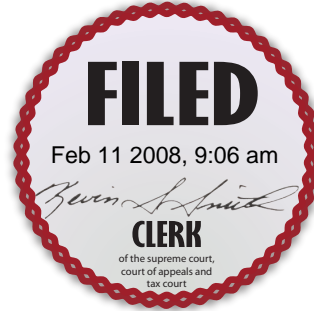


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOYCE STARKES NEELY,)

Appellant-Plaintiff,)

vs.)

No. 45A05-0708-CV-476

DAVISTER TIBERON CORP.)
d/b/a TIBERON TRAILS APARTMENTS,)

Appellee-Defendant.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable E. Duane Daugherty, Judge Pro Tempore
Cause No. 45D05-0604-CT-64

February 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Joyce Starkes Neely (“Neely”) appeals the Lake Superior Court’s decision to grant Davister Tiberon’s (“Davister”) motion to dismiss for failure to state a claim upon which relief can be granted. Neely appeals and argues that the trial court erred when it dismissed her complaint.

We affirm.

Facts and Procedural History

On May 24, 2002, Neely allegedly slipped and fell on the property of Tiberon Trails Apartments (“Tiberon”). Apparently, Davister notified AIG Claims Services, Inc. (“AIG”) of the accident as required by their insurance carrier. On June 17, 2002, Neely’s attorney notified Tiberon that he had been retained by Neely with regard to the May 24, 2002 accident. On June 18, 2002, AIG sent a letter to Neely and refused to compensate her for the accident.

Nearly two years later on May 20, 2004, Neely filed a complaint naming Basic Capital Management (“BCM”) as defendant property owner (“BCM Complaint”).¹ After filing suit, Neely and AIG attempted to resolve the claim without defense counsel and without litigation. On May 12, 2005, Attorney Calvert Miller (“Miller”) notified Neely that he had been retained to represent BCM. That day, BCM filed its Answer to Neely’s Complaint.

Between May 2005 and August 2005, the parties corresponded and conducted discovery with BCM. On August 22, 2005, during Neely’s deposition, Miller notified Neely that BCM might not be the correct defendant. Also, Neely determined that her injury occurred on May 24, 2002 rather than May 23, 2002 as originally pleaded. Neely

¹ Lake Superior Court Cause No. 45D05-0405-CT-128

sought to amend her Complaint on October 4, 2005. Without objection, the complaint was amended to show the correct date. However, Neely did not seek to amend the complaint as to the defendant. In BCM's Answer to Neely's Amended Complaint dated November 30, 2005, BCM denied that it was the owner of Tiberon.

On December 16, 2005, BCM, in its Answer to Neely's Supplemental Interrogatories, named the owner of Tiberon as Davister Tiberon Corporation. Neely sought to substitute parties but BCM declined to stipulate to the substitution. On March 3, 2006, Neely filed her motion to amend the complaint to add Davister as the proper defendant. BCM also filed a Motion for Summary Judgment.

Additionally, nearly four years after the accident, Neely filed another complaint ("Davister Complaint")² naming Davister as defendant on April 3, 2006 and alleged the following:

1. On or about May 24, 2002, and at all times relevant herein, the Plaintiff, Joyce Starkes Neely, was a resident of Lake County, State of Indiana.
2. On or about May 24, 2002, and at all times relevant herein, Defendant, Davister Tiberon Corporation, was an entity doing business in the State of Indiana.
3. On or about May 24, 2002, and at all times relevant herein, plaintiff Joyce Starkes Neely was an invitee on the premises of the Davister Tiberon Corporation located in Lake County, Indiana.
4. The defendant owed plaintiff, Joyce Starkes Neely, a duty to maintain the premises in a non-negligent manner.
5. The defendants[] owed a duty of care to plaintiff to take appropriate steps to remove any and all hazardous/defective conditions of which it had or should have had knowledge of from its premises.
6. The defendants[] further had a duty to warn plaintiff of any and all hazardous/defective conditions of which it had or should have had knowledge existed on its premises.
7. That the defendant[] breached these duties by allowing a hazardous/defective condition to exist. Defendant further breached its

² Lake Superior Court Cause No. 45D05-0604-CT-64

- duty to plaintiff by failing to remove defects and failing to warn plaintiff of these defects.
8. As a direct and proximate result of the negligent acts of the Defendant, the Plaintiff, Joyce Starkes Neely, sustained personal injuries.
 9. As a direct and proximate result of the negligent acts of the Defendant, the Plaintiff, Joyce Starkes Neely, sustained pain and suffering and emotional trauma.
 10. As a direct and proximate result of the negligent acts of the defendant, and plaintiff's injuries, the Plaintiff, Joyce Starkes Neely, has incurred medical expenses, past, present and future.
 11. As a direct and proximate result of the negligent acts of the defendant, and plaintiff's injuries, the Plaintiff incurred lost wages and loss of life's enjoyments.

Appellants App. pp. 56-57.

Davister filed its Answer to the complaint and its motion to dismiss for failure to state a claim on April 25, 2006. The parties agreed to consolidate hearings on both causes but did not consolidate the causes. Neely responded to the motion to dismiss on March 6, 2007, alleging estoppel. The trial court denied Neely's motion to amend the BCM complaint and granted BCM's motion for summary judgment on June 29, 2007. On July 3, 2007, the trial court granted Davister's motion to dismiss. Importantly, Neely appeals from the trial court decision related to the dismissal of the Davister complaint and did not appeal the trial court's order denying Neely's motion to amend the BCM complaint and granting BCM's motion for summary judgment.

Standard of Review

Trial Rule 12(B)(6) provides a civil action may be dismissed for "failure to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of a claim, not the facts supporting it. Under T.R. 12(B)(6), a trial court's grant of a motion to dismiss is proper if the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. In making this determination, the court must look only to the complaint and may not resort to any other evidence in the record. The court considers the allegations in the complaint to be true. Such a motion

should be viewed in the light most favorable to the non-moving party and all inferences should be resolved in the non-moving party's favor.

We review de novo the trial court's dismissal pursuant to T.R. 12(B)(6). Viewing the complaint in the light most favorable to the non-moving party, we must determine whether the complaint states any facts on which the trial court could have granted relief. If a complaint states a set of facts that, even if true, would not support the relief requested therein, we will affirm the dismissal. We may affirm the grant of a motion to dismiss if it is sustainable on any theory.

Dawson v. Newman, 845 N.E.2d 1076, 1080 (Ind. Ct. App. 2006), trans. denied.

Discussion and Decision

As noted above, this appeal is based solely on trial court's dismissal of the Davister complaint. Neely does not appeal the June 29, 2007 order relating to the BCM complaint. Therefore we must review the appeal using the standard appropriate for a motion to dismiss for failure to state a claim.

Under the standard of review for a motion to dismiss for failure to state a claim, we review the dismissal de novo and must look at the complaint and only the complaint. Dawson, 845 N.E.2d at 1080. Neely is seeking to recover under a negligence cause of action. Appellant's App. p. 56. Under Indiana Code section 34-11-2-4 (1999), an action for injury to person or character must be commenced within two years after the cause of action accrues. Neely filed the Davister complaint on April 3, 2006. The alleged injury occurred on or about May 24, 2002. Obviously, the Davister complaint was filed outside of the statute of limitations as set forth in Indiana Code section 34-11-2-4.

Based on the face of the complaint, Neely has failed to state a claim upon which relief can be granted. Neely alleged negligence yet even if we assume that all of the facts alleged in the Davister complaint are correct, Neely still failed to include any facts in the

complaint that would toll the statute of limitations or otherwise circumvent the requirement that an action for an injury to person be commenced within two years after the action accrues. We therefore conclude that the trial court properly dismissed Neely's Davister complaint.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.