MEMORANDUM DECISION

APPELLANT PRO SE

Thomas DeCola
North Judson, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thomas DeCola,
Appellant-Defendant,

v.

Jeffrey Baker Shane, *et al.*,
Appellees-Plaintiffs.

February 21, 2023

Court of Appeals Case No. 22A-PL-2442

Appeal from the Starke Circuit Court

The Honorable Kim Hall, Judge

The Honorable Micah P. Cox, Magistrate

Trial Court Cause No. 75C01-2201-PL-5

Memorandum Decision by Judge Riley
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Thomas DeCola (DeCola), appeals the trial court's dismissal of his Amended Complaint against Appellees-Defendants, Jeffrey Baker Shane (Baker Shane), Krzysztof Wasowicz (Wasowicz), and Waclaw Ustupski (Ustupski) (collectively, Defendants), for failure to state a claim upon which relief could be granted.

[2] We affirm.

ISSUE

[3] DeCola presents this court with one issue, which we restate as: Whether the trial court erred when it dismissed his Amended Complaint for failure to state a claim.

FACTS AND PROCEDURAL HISTORY

[4] Pursuant to our standard of review, we take the following facts as set forth in the Amended Complaint as true. DeCola and Defendants are the owners of adjoining parcels of real estate in North Judson, Indiana, that are bordered on one side by a regulated open drain (Origer Ditch). The closest public highway to the parcel owned by DeCola (DeCola Parcel) is County Road 250 South. The DeCola Parcel does not have access to County Road 250 South or to any other public highway.

[5] On January 31, 2022, DeCola[1] filed a Complaint, apparently seeking an easement from the DeCola Parcel through Defendants' parcels along the Origer Ditch to County Road 250 South. On February 9, 2022, Shane Baker filed his answer, and on March 7, 2022, Wasowicz and Ustupski filed their joint answer, affirmative defenses, counterclaims, and motion to dismiss for failure to state a claim. On March 28, 2022, DeCola filed his response to the joint motion to dismiss. On June 1, 2022, the trial court held a hearing on the joint motion to dismiss. On July 18, 2022, and July 28, 2022, the parties filed their post-hearing memoranda in support of their positions.

[6] On August 17, 2022, the trial court entered an order dismissing the Complaint for failure to state a claim. The trial court found that DeCola had failed to allege facts in support of an easement by grant, an implied easement, or an easement by prescription. The dismissal order also provided as follows:

> 7. Plaintiff also seeks relief under Indiana Code [section] 32-23-3-1 which clearly states that "the landowner of the affected land shall be granted the right of easement established as a way of necessity as provided under [I.C. §] 32-24-1." Indiana Code [section] 32-24-1 deals with eminent domain and the Plaintiff has made no showing in his complaint that he is entitled to avail himself to those laws or even complied with that law's requirements in the least.

[1] The January 31, 2022, Complaint was originally filed by Argento, LLC. On March 14, 2022, the trial court granted DeCola's motion to be substituted as plaintiff.

(Appellant's App. Vol. II, p. 11). The trial court dismissed DeCola's Complaint and noted that DeCola had a ten-day window to amend his Complaint.

[7] On August 24, 2022, DeCola filed his Amended Complaint containing the factual allegations set forth above. In his Amended Complaint, DeCola sought a declaratory judgment determining the scope of his right to an easement of necessity to establish a means of ingress and egress from the DeCola Parcel, along the Origer Ditch, and through Defendants' parcels to County Road 250 South. The Amended Complaint contained the following relevant allegations:

> 5. DeCola asserts that he has the right to an easement of necessity as provided by Ind. Code § 32-23-3-1, from County Road 250 South then along a proposed reasonably wide easement of necessity to allow vehicle ingress and egress to be measured from the top bank of the Origer Ditch through the Defendants' respective parcels . . . to access his approximately 3 acres on the north side of the Origer Ditch.
>
> 6. DeCola asserts that the above stated proposed route is the most practical and statutorily right approach to access his landlocked real estate.
>
> 7. DeCola asserts that he is not taking portions of the Defendants' parcels but placing a statutory easement of necessity servitude upon them which is classified as an encumbrance and not a fee simple taking.
>
> NOTICING PROCEDURE UNDER IND. CODE § 32-24-1
>
> 8. DeCola affirms that he did not follow the technical guidelines under I.C. § 32-24-1 to notice the Defendants of his asserted and

> proposed statutory right to an easement of necessity; albeit notice was fundamentally provided and the technical guidelines for seeking a right-of-way under I.C. § 32-24-1 were followed by DeCola in this action.
>
> 9. In short, DeCola sued the Defendants without providing an out of court notice upon his demand.

(Appellant's App. Vol. II, pp. 13-14) (internal footnotes omitted).

[8] On September 12, 2022, Wasowicz and Ustupski filed their joint answer and motion to dismiss the Amended Complaint. On September 13, 2022, Shane Baker filed his answer. On September 16, 2022, the trial court entered its Order, dismissing DeCola's Amended Complaint with prejudice for failure to state a claim upon which relief could be granted without entering additional findings of fact or conclusions of law thereon.

[9] DeCola now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *State of the Record*

[10] Before proceeding to the merits of DeCola's arguments, we pause to address the state of the record before us. The purpose of an Appendix is to provide this court with copies of the portions of the Record on Appeal that are necessary to decide the issues presented. App. R. 50(A)(1). Contrary to Indiana Appellate Rule 50(A)(2)(f), DeCola has not included copies of Defendants' September 12 and September 13, 2022, responsive pleadings to the Amended Complaint,

including Wasowicz's and Ustupski's motion to dismiss the Amended Complaint. DeCola also failed to include in his Appendix copies of his original Complaint, Defendants' responsive pleadings to the Complaint, including their motions to dismiss, or the briefing filed after the June 1, 2022, motion to dismiss hearing. DeCola did not request that the June 1, 2022, hearing on Defendants' motions to dismiss be transcribed for purposes of this appeal.

[11] These omissions hindered our review. DeCola has not requested that we take judicial notice of any records in the lower court cause, and we decline to do so sua sponte. Rather, we will address DeCola's arguments based upon the limited record before us.

II. *Standard of Review*

[12] DeCola appeals following the trial court's grant of Defendants' Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. A motion under Rule 12(B)(6) merely tests the sufficiency of the plaintiff's claim and not the facts supporting the claim. *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). We conduct our review of such matters de novo. *Residences at Ivy Quad Unit Owners Ass'n v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022). As part of our de novo review, we take the facts alleged in the complaint as true, consider all the allegations of the complaint in the light most favorable to the non-moving party, and draw every reasonable inference in the non-moving party's favor. *Id*. Ultimately, our task to is to determine whether the non-movant has alleged some factual scenario in which a legally actionable injury has occurred. *Id*. We may affirm a trial

court's Rule 12(B)(6) dismissal of a complaint "if it is sustainable on any basis in the record." *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015).

[13] We observe that Defendants have not filed an appellees brief. In such a circumstance, we do not undertake the burden of developing arguments for the appellees, and we will apply a less stringent standard of review. *U.S. Bank Trust Nat'l Assn. v. Dugger*, 193 N.E.3d 1015, 1018 (Ind. Ct. App. 2022). "[W]e may reverse if the appellant establishes prima facie error, which is error at first sight, on first appearance, or on the face of it." *Id*. However, "we remain obligated to correctly apply the law to the facts in order to determine whether reversal is required." *Id*.

III. *Failure to State a Claim*

[14] In his Amended Complaint, DeCola sought relief pursuant to Indiana Code section 32-23-3-1, which provides as follows:

> If:
>
> (1) land that belongs to a landowner in Indiana is shut off from a public highway because of the:
>
> (A) straightening of a stream under Indiana law;
>
> (B) construction of a ditch under Indiana law; or
>
> (C) erection of a dam that is constructed by the state or by the United States or an agency or a political subdivision of the state or of the United States under Indiana law; and
>
> (2) the owner of the lands described in subdivision (1) is unable to secure an easement or right-of-way on and over the land that is adjacent to the affected land, and intervening between the land

> and the public highways that are most convenient to the land because:
>
> > (A) an adjacent and intervening landowner refuses to grant an easement; or
> > (B) the interested parties cannot agree upon the consideration to be paid by the landowner that is deprived of access to the highway;
>
> the landowner of the affected land shall be granted the right of easement established as a way of necessity as provided under IC 32-24-1.

Therefore, a complainant seeking relief under the statute must show that he is unable to secure an easement because either (A) an adjacent and intervening landowner refuses to grant the easement, or (B) the parties cannot agree on the consideration to be paid by the landowner seeking the easement. In addition, the statute provides that "the landowner of the affected land shall be granted the right of easement established as a way of necessity as provided under [I.C. §] 32-24-1[,]" which is Indiana's eminent domain statute. I.C. § 32-23-3-1. Indiana Code section 32-24-1-5(a) generally requires as a condition precedent to filing a complaint in condemnation that the landowner seeking to acquire the property extend an offer to purchase to the owner of the property sought to be acquired. Indiana Code section 32-24-1-4(a) provides that "if the person seeking to acquire the property does not agree with the owner of an interest in the property or with the guardian of an owner concerning the damages sustained by the owner, the person seeking to acquire the property may file a complaint for that purpose[.]" Subsection (b) of 32-24-1-4 provides that a

complaint under subsection (a) "must state the following" and lists several facts that must be alleged, including

> [t]hat the plaintiff has been unable to agree for the purchase of the property with the owner, owners, or guardians, as the case may be, or that the owner is mentally incompetent or less than eighteen (18) years of age and has no legally appointed guardian, or is a nonresident of Indiana.

I.C. § 32-24-1-4(b)(6).

[15] Here, in the Amended Complaint, DeCola did not allege that he was qualified under section 32-23-3-1(2) due to Defendants' refusal to grant him an easement or an inability to agree on a purchase price with Defendants, nor did he plead the allegation required by I.C. § 32-24-1-4(b)(6). Rather, DeCola alleged the contrary by affirming that "he did not follow the technical guidelines under I.C. § 32-24-1 to notice the Defendants of his asserted and proposed statutory right to an easement of necessity" and that he "sued the Defendants without providing an out of court notice upon his demand." (Appellant's App. Vol. II, p. 14). Whether the statutory requirements are necessary elements of a claim or provide the basis for a meritorious defense, the result is the same, as "a plaintiff may plead itself out of court if its complaint alleges, and thus admits, the essential elements of a defense." *Bellwether Props.*, 87 N.E.3d at 466. DeCola provides us with no authority indicating that his allegation that "notice was fundamentally provided and the technical guidelines for seeking a right-of-way under I.C. § 32-24-1 were followed by him" was sufficiently pleaded to

withstand Defendants' dismissal motions, especially in light of his other cited allegations. (Appellant's App. Vol. II, p. 14).

[16] DeCola's arguments on appeal and cited authority attempt to persuade us that the easement he seeks is not a taking. DeCola does not discernably address the deficiencies in his Amended Complaint. On appeal, we do not undertake to develop arguments for the parties. *Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 364 (Ind. Ct. App. 2021). Therefore, even under our less stringent standard of review due to Defendants' failure to file an appellees brief, we find no error and do not disturb the trial court's dismissal of the Amended Complaint with prejudice.

CONCLUSION

[17] Based on the foregoing, we conclude that the trial court properly dismissed the Amended Complaint for failure to state a claim.

[18] Affirmed.

[19] Altice, C. J. and Pyle, J. concur