

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Smelko,
Appellant-Plaintiff,

v.

Olivia Ortega, Stephanie Perez,
and Alberto Ortega,
Appellees-Defendants

September 19, 2022

Court of Appeals Case No.
22A-CT-515

Appeal from the Lake Superior
Court

The Honorable Bruce D. Parent,
Judge

Trial Court Cause No.
45D11-2104-CT-391

Crone, Judge.

Case Summary

- [1] Robert Smelko, pro se, appeals the trial court's order granting summary judgment for Olivia Ortega (Ortega), Stephanie Perez, and Alberto Ortega. We reverse and remand.

Facts and Procedural History

- [2] Smelko and Ortega are next-door neighbors in Hammond. In April 2021, Smelko filed a pro se complaint against Ortega and the other appellees alleging that water runoff from Ortega's downspouts and gutters was damaging his garage. Ortega, by counsel, filed an answer to Smelko's complaint in which she either denied or was unable to admit or deny all of Smelko's substantive allegations. Ortega also stated that Alberto Ortega was deceased and that she had no knowledge of Perez. Appellee's App. Vol. 2 at 17.¹
- [3] On December 15, 2021, Ortega filed a motion for summary judgment asserting that Smelko's claim was barred by the common enemy doctrine. In support of her motion, Ortega designated only Smelko's complaint. Smelko did not file a response to Ortega's motion until February 3, 2022. Neither party requested a hearing on the motion. On February 17, 2022, the trial court issued an order stating that it could not consider Smelko's response because it was untimely. *See Borsuk v. Town of St. John*, 820 N.E.2d 118, 123 n.5 (Ind. 2005) ("When a nonmoving party fails to respond to a motion for summary judgment within 30

¹ Ortega is the only defendant for whom an appearance has been entered in this action.

days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period.”). The order further states that Ortega carried her burden to establish that the defendants were entitled to summary judgment. Smelko now appeals.

Discussion and Decision

[4] “The purpose of summary judgment is to terminate litigation if there are no genuine, material factual disputes and the issue can be determined as a matter of law.” *Buckingham Mgmt. LLC v. Tri-Esco, Inc.*, 137 N.E.3d 285, 289 (Ind. Ct. App. 2019). We review the trial court’s ruling “de novo, and we take ‘care to ensure that no party is denied his day in court.’” *Zartman v. Zartman*, 168 N.E.3d 770, 778 (Ind. Ct. App. 2021) (quoting *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013)), *trans. denied*. “Summary judgment in Indiana is an intentionally ‘high bar’ that ‘consciously errs on the side of letting marginal cases proceed to trial on the merits[] rather than risk short-circuiting meritorious claims.’” *Pack v. Truth Pub. Co.*, 122 N.E.3d 958, 965 (Ind. Ct. App. 2019) (quoting *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014)). “Relying on specifically designated evidence, the moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.” *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 873 N.E.2d 105, 109-10 (Ind. Ct. App. 2007) (citing Ind. Trial Rule 56(C)), *trans. denied* (2008). Only after the moving party has met this burden “does the burden then shift to the non-moving party to establish that a genuine

issue of material fact does in fact exist.” *Webb v. City of Carmel*, 101 N.E.3d 850, 864 (Ind. Ct. App. 2018).

[5] “A fact is ‘material’ if its resolution would affect the outcome of the case, and an issue is ‘genuine’ if a trier of fact is required to resolve the parties’ differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.” *Whitt v. Town of New Carlisle*, 171 N.E.3d 1025, 1028 (Ind. Ct. App. 2021) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)), *trans. denied*. “Mere suppositions, such as unsupported statements in pleadings, cannot support summary judgment, but a scintilla of evidence, such as a self-serving affidavit, is enough.” *Id.* at 1028-29 (quoting *Cox v. Mayerstein-Burnell Co.*, 19 N.E.3d 799, 804 (Ind. Ct. App. 2014)).

[6] As mentioned above, Ortega argued in her summary judgment motion that Smelko’s claim was barred by the common enemy doctrine. Briefly stated, the common enemy doctrine holds that

surface water [i.e., rainwater that is diffused over the surface of the ground or that temporarily flows upon or over the surface] which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in, and diverting or accelerating its flow by any means whatever.

Bulldog Battery Corp. v. Pica Invs., Inc., 736 N.E.2d 333, 339 (Ind. Ct. App. 2000) (quoting *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982)). “The common enemy doctrine applies regardless of the form of action brought by the plaintiff,

that is, regardless of whether the plaintiff asserts his claims as an action for negligence, trespass, or nuisance.” *Id.* “The only limitation on the common enemy doctrine that has thus far been recognized is that ‘one may not collect or concentrate surface water and cast it, in a body, upon his neighbor.’” *Id.* (quoting *Argyelan*, 435 N.E.2d at 976). “Whether surface water is collected and cast upon neighboring land as a body or collected but diffused before entering neighboring property will be largely a question of fact.” *Id.* at 340.

[7] Ortega asserted that the rainwater that flows from her downspouts and gutters is “diffused to a general flow once it enters [Smelko’s] property[,]” Appellant’s App. Vol. 2 at 28, but she designated no evidence (such as an affidavit or photographs or videos) to substantiate this assertion. Thus, Ortega failed to make a *prima facie* showing that no genuine issue of material fact exists regarding the applicability of the common enemy doctrine. Accordingly, the burden never shifted to Smelko to establish that a genuine issue of material fact does in fact exist. The trial court erred in granting Ortega’s summary judgment motion, and therefore we reverse and remand for further proceedings, in which the status of the additional defendants should be resolved.

[8] Reversed and remanded.

May, J., and Weissmann, J., concur.