MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Thaddeus F. Radziwiecki,
Appellant-Plaintiff,

v.

Larson-Danielson Construction,
Appellee-Defendant.

November 29, 2023

Court of Appeals Case No. 23A-SC-576

Appeal from the Lake Superior Court

The Honorable Robert Jeffrey Boling, Magistrate

Trial Court Cause No. 45D09-2205-SC-2566

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] Thaddeus Radziwiecki appeals, raising a single issue for our review: Is his claim barred by the applicable statute of limitation because he discovered or should have discovered his house was damaged by Larson-Danielson Construction more than six years before he brought his action? Because a genuine issue of material fact exists regarding when Radziwiecki discovered or should have discovered the damage, granting Larson-Danielson summary judgment was improper. Accordingly, we reverse and remand.

Facts and Procedural History

[2] Construction of a new Highland Police Station began in September 2014. Larson-Danielson was one of several construction companies hired for the project. During construction, Radziwiecki lived in "close proximity" to the work site. *Tr. Vol. 1* at 7. Because of the heavy machinery and equipment used to construct the new police building, at various times, Radziwiecki's "whole house was shaking" and the "surrounding ground experienced ground vibrations and tremors." *Id.* at 7–8, 24. The construction project was "substantially completed" by November 13, 2015. *Id.* at 5.

[3] Around June 15, 2016, Radziwiecki discovered damage to his house, including cracks in his ceilings, walls, and windows; sloping of his concrete sidewalk and stairs; and shifts in soil which caused his light pole, fence, and mailbox to "lean significantly." *Id.* at 8. Two days later, Radziwiecki obtained a quote regarding the cost of fixing the damage to his house.

[4] On May 31, 2022, Radziwiecki filed a Notice of Claim seeking to recover $10,000 from Larson-Danielson for "Real Property Damages caused from Heavy Equipment and Activities while in the construction of the Highland Police Station." *Appellant's App. Vol. 2* at 7. Larson-Danielson moved for summary judgment and argued Radziwiecki discovered or should have discovered any damage attributable to Larson-Danielson by the time construction was substantially completed—November 2015. Therefore, Larson-Danielson contended Radziwiecki's claim was barred by an applicable six-year statute of limitation.

[5] In response, Radziwiecki argued the statute of limitation began to run when he discovered the damage in June 2016, not when Larson-Danielson substantially completed the construction. Thus, in Radziwiecki's view, he filed his Notice of Claim within the six-year statute of limitation. The trial court disagreed with Radziwiecki and granted Larson-Danielson summary judgment "[d]ue to statute of limitations." *Id.* at 126. Radziwiecki filed a motion to correct error, which the trial court denied. Radziwiecki now appeals the trial court's grant of summary judgment in favor of Larson-Danielson.

Summary Judgment Standard of Review

[6] We review a trial court's summary judgment decision de novo, applying the same standard as the trial court. *U.S. Automatic Sprinkler Corp. v. Erie Ins. Exch.*, 204 N.E.3d 215, 220 (Ind. 2023). When reviewing a summary-judgment motion, we consider only the evidence designated to the trial court and draw all

reasonable inferences in the non-movant's favor. *Ebert v. Ill. Cas. Co.*, 188 N.E.3d 858, 863 (Ind. 2022). A party seeking summary judgment must establish that "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). "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." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)).

[7] Statute of limitation defenses are "particularly appropriate for summary judgment determination." *City of Marion v. London Witte Grp., LLC*, 169 N.E.3d 382, 390 (Ind. 2021) (quotation omitted). The party moving for summary judgment "must make a prima facie showing that the action was commenced outside the statutory period by identifying '(1) the nature of the plaintiff's action, so that the relevant statute of limitations period may be identified; (2) the date the plaintiff's cause of action accrued; and (3) the date the cause of action was brought, being beyond the relevant statutory period.'" *Id.* (quoting *McMahan v. Snap On Tool Corp.*, 478 N.E.2d 116, 120 (Ind. Ct. App. 1985)).

[8] "If the moving party demonstrates these matters properly, the burden shifts to the opponent 'to establish facts in avoidance of the statute of limitations defense.'" *Id.* (quoting *Snap On Tool Corp.*, 478 N.E.2d at 120). The non-moving party, however, cannot "rest upon the mere allegations or denials of his

pleading." T.R. 56(E). Instead, the party opposing summary judgment must, by affidavit or other evidence, "set forth specific facts showing that there is a genuine issue for trial." *Id.* "And '[a]lthough the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court.'" *Hughley*, 15 N.E.3d at 1003 (quoting *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909–10 (Ind. 2009)).

Genuine Issue of Material Fact Precludes Summary Judgment

[9] Radziwiecki claims the trial court erred by concluding his action was barred by the applicable statute of limitation. "Statutes of limitation seek to provide security against stale claims, which in turn promotes judicial efficiency and advances the peace and welfare of society." *Cooper Indus., LLC v. City of S. Bend*, 899 N.E.2d 1274, 1279 (Ind. 2009). Relevant here, actions for injuries to real property "must be commenced within six (6) years after the cause of action accrues[.]" Ind. Code § 34-11-2-7. Under Indiana's discovery rule, a cause of action accrues and the limitation period begins to run "when a claimant knows or in the exercise of ordinary diligence should have known of the injury." *Cooper Indus.*, 899 N.E.2d at 1280. "For an action to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred." *Id.* To exercise ordinary diligence, the injured party "must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and

experience on notice that some right of his has been invaded or that some claim against another party might exist." *Bambi's Roofing, Inc. v. Moriarty*, 859 N.E.2d 347, 356 (Ind. Ct. App. 2006).

A. Larson-Danielson Met Its Prima Facie Burden of Showing Radziwiecki's Claim was Untimely

[10] To meet its prima facie burden for its statute of limitations defense, Larson-Danielson had to identify the relevant statute of limitation, the date Radziwiecki's cause of action accrued, and the date the suit was brought. *See London Witte Grp.*, 169 N.E.3d at 393. Through designated evidence, Larson-Danielson argued—and Radziwiecki does not dispute—Indiana Code Section 34-11-2-7 applies to Radziwiecki's claim. Larson-Danielson further established construction of the Highland Police Department occurred between September 2014 and November 2015; thus, arguing Radziwiecki's claim accrued no later than November 2015. And lastly, Larson-Danielson showed Radziwiecki filed his claim on May 31, 2022—more than six years after it alleged Radziwiecki's claim accrued. Therefore, Larson-Danielson met its prima facie burden for asserting a statute of limitations defense on summary judgment, which shifted the burden to Radziwiecki.

B. Radziwiecki Met His Burden by Raising a Genuine Issue of Material Fact

[11] Once Larson-Danielson shifted the burden to Radziwiecki, he needed to raise a "genuine issue of material fact" to avoid summary judgment. *See Hughley*, 15 N.E.3d at 1004. To do so, Radziwiecki designated an affidavit that specifically controverted Larson-Danielson's prima facie case, arguing under oath that his

claim did not accrue until June 15, 2016, when he "discovered significant damage to [his] [p]roperty." *Appellant's App. Vol. 2* at 120. That evidence—even if rather thin and self-serving—is sufficient to raise a factual issue to be resolved at trial, and thus to defeat Larson-Danielson's summary-judgment motion. *See Hughley*, 15 N.E.3d at 1005 (expressing summary judgment "is not appropriate merely because the non-movant appears unlikely to prevail at trial") (quotation omitted).

Conclusion

[12] Because a genuine issue of material fact exists, granting Larson-Danielson summary judgment was improper. We reverse and remand with instructions to deny Larson-Danielson's motion for summary judgment.

[13] Reversed and remanded.

Bailey, J., and Tavitas, J., concur.