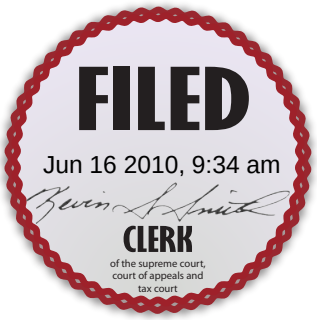

APPELLANT PRO-SE:

LORENZO BORDERS
Michigan City, Indiana

ATTORNEYS FOR APPELLEES:

Attorneys for City of Elkhart:

THOMAS A. CARTON
TIMOTHY A. ALSPACH
Bullaro & Carton
Highland, Indiana

Attorneys for Stephen R. Bowers:

DAVID C. JENSEN
NICHOLAS G. BRUNETTE
Eichhorn & Eichhorn
Hammond, Indiana

Attorneys for Elkhart County Sheriff, Elkhart County Sheriff's Department, Elkhart County Public Defenders, and the City of Goshen:

MICHAEL F. DeBONI
NATHANIEL M. JORDAN
Yoder, Ainlay, Ulmer & Buckingham
Goshen, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LORENZO BORDERS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 20A03-0907-CV-346
	)	

CITY OF ELKHART, INDIANA, et al.,)
)
Appellees-Defendants.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan Roberts, Judge
Cause No. 20D01-0807-PL-27

June 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Lorenzo Borders appeals the trial court's grant of summary judgment and motions to dismiss his complaint for false arrest and false imprisonment in favor of appellees-defendants City of Elkhart, et al. (collectively, Elkhart).[1] Borders claims, among other things, that his actions against Elkhart were not subject to summary judgment and/or dismissal under Trial Rule 12(B)(6) because he properly submitted a Notice of Tort Claim in a timely fashion and that the trial court erred in determining that his actions were barred by the statute of limitations. Concluding that the trial court properly dismissed Borders's complaint and did not err in granting summary judgment in Elkhart's favor because the two-year statute of limitations had long expired, we affirm.

FACTS

[1] The appellees include the City of Elkhart, Elkhart City Police Officers, the Elkhart County Sheriff, the Elkhart County Sheriff's Department, and several Elkhart Public Defenders who were counsel of record in Borders's criminal case. Attorney Stephen Bowers has filed a separate appellee's brief in this case.

On February 2, 1994, Borders was charged with one count of murder and an initial hearing was conducted that same day. Borders was convicted of that charge on November 3, 1994, and subsequently sentenced to sixty years of incarceration. Borders appealed, and our Supreme Court affirmed the conviction in November 1997.[2]

On July 29, 2008, Borders filed a civil action against Elkhart for "violations of state common law for [false] arrest and [false] imprisonment." Appellant's App. p. 36. Borders claimed that he was unlawfully incarcerated in the Elkhart County Jail because he was arrested on January 26, 1994, and subsequently transported to the jail without probable cause or a warrant. Borders also alleged in the complaint that he was held in the jail for two days without communication with his attorney or family, and that his attorneys failed to conduct an adequate investigation of his case. Borders did not advance any specific claims against Goshen or Elkhart County.

On September 22, 2008, Bowers, who was one of Borders's attorneys of record in the murder case, filed a motion to dismiss the action against him under Indiana Trial Rule 12(B)(6), alleging that Borders's action was time-barred under the two-year statute of limitations set forth in Indiana code section 34-11-2-4. Bowers also claimed that Borders was necessarily precluded from seeking an award of damages for false imprisonment and false arrest because his murder conviction had not been overturned.

On September 29, 2008, Goshen and the Elkhart County defendants moved to dismiss Borders's action, claiming that the factual allegations of Borders's complaint

[2] Borders v. State, 688 N.E.2d 874 (Ind. 1997).

were insufficient to provide notice of any claim against them "upon which relief may be granted." Appellees' App. p. 46. In the alternative, their motion alleged that Borders's action was barred by the two-year statute of limitations.

Similarly, on December 15, 2008, Elkhart and "all other employees of the City and Police Department of Elkhart" filed a motion for summary judgment, claiming that it was entitled to judgment as a matter of law because Borders

> never served any of the movants with a Tort Claims Notice as is required under Indiana law and his complaint is therefore time-barred. Moreover, the Plaintiff has filed this action over twelve . . . years beyond the two-year statute of limitations governing his complaint allegations and his complaint is therefore time-barred.

Appellees App. p. 69-70.

Following a hearing on June 11, 2009, on all pending motions, the trial court granted Elkhart's motion for summary judgment and the remaining defendants' motions to dismiss. In relevant part, the trial court's order provided that

> The alleged actions that give rise to Borders' Complaint happened in 1994. The statute of limitation in this case against all of the Defendants is two years. I.C. §34-11-2-4. While this two years may be tolled, Border[s] has presented no cogent argument for tolling the statute of limitations arguably past November of 1997, way outside the two-year period.

Appellees' App. p. 31. Borders now appeals.[3]

DISCUSSION AND DECISION

[3] Elkhart had also filed a motion to strike Borders's designated evidence that he submitted in response to the motion for summary judgment. The trial court granted Elkhart's motion to strike because the materials that Borders submitted wholly failed to satisfy the designated evidence requirements of Indiana Trial Rule 56. See Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004) (holding that pro se litigants without legal training are held to the same standard as trained counsel). Borders does not appeal the trial court's ruling on the motion to strike.

I. Standard of Review

As noted above, Borders is appealing both the grant of summary judgment and the motions to dismiss with regard to the various appellees. A Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. K.M.K. v. A.K., 908 N.E.2d 658, 662 (Ind. Ct. App. 2009), trans. denied. Therefore, we view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in favor of this party. Id. In reviewing a ruling on a motion to dismiss, we stand in the shoes of the trial court and must determine if the trial court erred in its application of the law. The trial court's grant of the motion to dismiss is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. Id. Furthermore, in determining whether any facts will support the claim, we look only to the complaint and may not resort to any other evidence in the record. Id.

On the other hand, Trial Rule 12(B) also provides that a motion to dismiss for failure to state a claim upon which relief can be granted "shall be treated as one for summary judgment" if matters outside the pleading are presented and not excluded. See Ace Foster Care & Pediatric Home Nursing Agency Corp. v. Ind. Family & Soc. Servs. Admin., 865 N.E.2d 677, 681-82 (Ind. Ct. App. 2007) (observing that when the parties were provided a reasonable opportunity to present external material and to respond to the arguments made, the trial court's order is reviewed as one granting summary judgment).

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C), In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. Hendricks County Bd. of Comm'rs v. Rieth-Riley Constr. Co., Inc., 868 N.E.2d 844, 848-49 (Ind. Ct. App. 2007). Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. Id. at 849. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. Id. Finally, we note that if the trial court's grant of summary judgment can be sustained on any theory or basis in the record, we will affirm. Beck v. City of Evansville, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006).

II. Borders's Contentions

In addressing Borders's contentions that the trial court erred in granting Elkhart's motions to dismiss and motion for summary judgment, we note that Indiana Code section 34-11-2-4 provides that an action for injury to a person must be commenced within two years after the cause of action accrues. A tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered, that an injury had been sustained as a result of the tortious act of another. Johnson v. Blackwell, 885 N.E.2d 25, 30 (Ind. Ct. App. 2008). Claims of false arrest,

false imprisonment, and actions for attorney malpractice are governed by the two-year statute of limitations set forth in Indiana Code section 34-11-2-4. Id.

In this case, Borders acknowledged in his complaint that he was "informed" of the murder charge against him at the initial hearing that was conducted on February 2, 1994. Appellees' App. p. 49. Similarly, the alleged failure of Borders's defense attorneys—including Bowers—to investigate the matter would have taken place in 1994 or shortly thereafter. That said, although Borders concedes that his claims are subject to the two-year statute of limitations set forth in Indiana Code section 34-11-2-4 and would ordinarily bar his action in this circumstance, he argues that the statute was tolled under the doctrine of fraudulent concealment. Borders asserts that the statute was necessarily tolled because the Elkhart County clerk denied him access to his court file and he would have learned that no probable cause affidavit had been filed in his criminal case. Appellant's Br. Argument III.[4]

The doctrine of fraudulent concealment operates as an equitable device to estop a defendant from asserting a statute of limitations when he has, either by deception or by violation of duty, concealed from the plaintiff material facts preventing the plaintiff from pursuing a potential cause of action. Ayers v. State Farm Mut. Auto. Ins. Co., 558 N.E.2d 831, 833 (Ind. Ct. App. 1990). The critical event necessary to apply the doctrine of fraudulent concealment is the defendant's concealment, by deception or violation of a duty, of facts from the plaintiff that would have alerted the plaintiff to a cause of actions.

[4] Contrary to the requirements of Indiana Rule of Appellate Procedure 43(F), Borders did not number the pages of his appellate brief.

City of East Chicago v. East Chicago Second Century, Inc., 908 N.E.2d 611, 621 (Ind. 2009).

In this case, Borders acknowledges that it was not until January 23, 2008, that he "requested pro se Elkhart County clerk for a true certified copy of the probable cause affidavit and probable cause affidavit in support of warrant alleged to be filed in [the murder case]." Appellant's App. p. 38. Borders has filed a separate cause of action against the court clerk, and even more compelling, he does not contend that any of the Elkhart defendants participated in the clerk's alleged fraudulent conduct or that they prevented him from discovering his purported cause of action. In other words, there is no designated evidence explaining how any of the defendants in this case engaged in any affirmative acts of concealment that were "calculated to mislead and hinder him from obtaining information by the use of ordinary diligence or to prevent inquiry or elude investigation." Olcott Intern. & Co., Inc., v. Micro Data Base Sys., Inc., 793 N.E.2d 1063, 1072 (Ind. Ct. App. 2003). Thus, Borders does not prevail on his claim that the two-year statute of limitations was tolled. And, under these circumstances, it is apparent that the statute of limitations commenced to run more than sixteen years ago. As a result, the trial court properly granted Elkhart's motions to dismiss and the motion for summary judgment.

The judgment of the trial court is affirmed.[5]

DARDEN, J., and CRONE, J., concur.

[5] As an aside, we note that even assuming for the sake of argument that a probable cause affidavit had not been filed in support of Border's murder charge, a conviction is deemed to retroactively establish probable cause and bars recovery in an action for false arrest or false imprisonment. Drake v. Lawrence, 524 N.E.2d 337, 340 n.3 (Ind. Ct. App. 1988). As noted above, Borders was convicted of murder in November 1994, and our Supreme Court affirmed the conviction on November 18, 1997. Thus, at the very latest, probable cause was determined at that point, which was eleven years before Borders filed his complaint against the defendants.