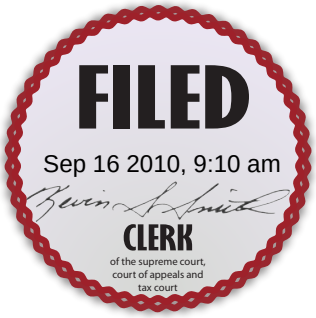

ATTORNEY FOR APPELLANT:

ERIC E. SNOUFFER
Snouffer & Snouffer
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

MATTHEW J. MIZE
Law Offices of Matthew J. Mize, LLC
North Manchester, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RICHARD WION d/b/a LOTHLORIEN FARMS,	)	
Appellant-Defendant,	)	
vs.	)	No. 85A05-1004-PL-307
TOWN OF NORTH MANCHESTER,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0912-PL-739

September 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

A town sued a building owner to enforce an order for the owner to vacate and demolish the building, which was deemed unsafe. The building owner did not respond to the town's complaint to enforce the order. The town moved for summary judgment. Both parties appeared at a hearing on the motion for summary judgment, after which the trial court granted the town's motion. The building owner now appeals, questioning the sufficiency of the evidence to support summary judgment. Finding the evidence sufficient and that no genuine issue material fact remains, we affirm.

Facts and Procedural History

Beginning in 2002, the Town of North Manchester ("the Town"), through its building commissioner Bernie Ferringer, began to inquire about the safety of a structure owned by Richard Wion d/b/a Lothlorien Farms ("Wion"). Wion indicated that he would repair the structure but failed to do so. In 2006, building inspectors determined that repair of the structure was no longer feasible. Thereafter, the Town's Board of Public Works and Safety Board voted that the property be demolished. On July 10, 2009, the Town's Enforcement Authority issued an order for Wion to vacate and demolish the structure. The Town also sent Wion notice of the hearing on the order and notice of his right to appeal the order. Wion was present at the hearing held on September 2, 2009, following which the Enforcement Authority made findings of fact and conclusions of law and issued a modified order. The modified order gave Wion another opportunity to repair or demolish the structure. The modified order advised Wion that if he failed to make the necessary repairs or demolish the

structure, the structure would be demolished by the Town with the costs associated with the demolition assessed to Wion. Again, Wion was informed of his right to appeal the modified order. Wion did not appeal the modified order, and the structure was neither repaired by Wion nor demolished.

On December 2, 2009, the Town filed a complaint against Wion to enforce its modified order to vacate and demolish. Wion did not file an appearance or proper response to the Town's complaint.[1] Thereafter, on January 15, 2010, the Town filed a motion for summary judgment and its designation of evidence. Wion did not respond to the motion for summary judgment. A hearing was held on February 19, 2010, with both parties in attendance. Wion appeared pro se. That same day, the trial court granted the Town's motion and entered summary judgment in favor of the Town. This appeal ensued.

Discussion and Decision

Our standard of review for summary judgment is well settled. Indiana Trial Rule 56(C) provides that summary judgment is appropriate when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party moving for summary judgment bears the initial burden of demonstrating no genuine issue of material fact and the appropriateness of

[1] It appears from the record that Wion sent an "unsigned response" along with photographs to the trial court on December 31, 2009. Appellant's App. at 2.

judgment as a matter of law. *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 975 (Ind. 2005). If the moving party fails to make this prima facie showing, then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in response to the motion for summary judgment. *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203-04 (Ind. 2003). Review of a summary judgment motion is limited to those materials designated to the trial court, and all facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). We must carefully review a decision on summary judgment to ensure that a party was not improperly denied his day in court. *Id*.

In support of its motion for summary judgment, the Town designated the complaint to enforce, photographs of Wion's structure, a title search, and the affidavit of Bernie Ferringer, the Town's building commissioner. Wion concedes that he failed to file a response or designation of evidence in opposition to the Town's motion for summary judgment. Still, he maintains that the Town failed to meet its burden to establish that it was entitled to judgment as a matter of law.

First, Wion challenges the admissibility of most of the Town's designated evidence. However, Wion appeared at the summary judgment hearing and made no motion to strike or other objection to any of the designated evidence.[2] Therefore, Wion has waived any error in

[2] While we recognize that Wion was a pro se litigant, pro se litigants "are held to the same standard as trained counsel and are required to follow procedural rules." *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*.

the trial court's reliance on that evidence. *See Hay v. Hay*, 885 N.E.2d 21, 23 n.1 (Ind. Ct. App. 2008) (failure to make timely objection or to file timely motion to strike results in waiver of the right to have evidence excluded at trial and the right on appeal to assert the admission of evidence as erroneous).

Wion maintains that "[t]he only admissible evidence submitted in support of the Town's motion for summary judgment was the affidavit of Bernie Ferringer." Appellant's Br. at 4. Even if we were to assume that Ferringer's affidavit is the only admissible designated evidence, the affidavit is sufficient by itself to demonstrate that the Town is entitled to judgment as a matter of law. Ferringer's affidavit provided that he, as the Town's building commissioner, had been in personal contact with Wion and interested in the safety of Wion's structure since 2002. Ferringer stated that Wion indicated that he would repair the structure but failed to do so. Ferringer stated that, in 2006, inspectors determined that repair of the structure was no longer feasible, causing the Town's Board of Public Works and Safety Board to vote that the property be demolished. Ferringer averred that he personally sent Wion an order to vacate and demolish, notice of a hearing on that order, and notice of his right to appeal the order. Ferringer stated that Wion neither contested the order to demolish nor appealed the order and that the unsafe structure remains on the property. These designated facts are sufficient for the Town to meet its burden to demonstrate that it is entitled to judgment as a matter of law.

Although he concedes that the affidavit itself is admissible, Wion asserts that Ferringer's affidavit includes statements based upon inadmissible evidence. Indiana Trial

Rule 56(E) provides in relevant part that affidavits submitted in support of or in opposition to a summary judgment motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." To the extent that Wion contends that Ferringer's affidavit sets forth inadmissible facts, by failing to object at the hearing before the trial court, Wion has again waived our review of any error. *See Bankmark of Florida, Inc. v. Star Fin. Card Serv., Inc.*, 679 N.E.2d 973, 980 (Ind. Ct. App. 1997) (party complaining that an affidavit is defective has duty to direct complaint to trial court, and failure to do so results in waiver).[3]

Wion next questions the timing of the hearing on the motion for summary judgment. The summary judgment hearing was held on February 19, 2010, a date which Wion contends was eight days "too early." Appellant's Br. at 5. He directs us to Indiana Trial Rule 56(C), which provides that the trial court is to conduct a hearing on a motion for summary judgment "not less than ten (10) days after the time for filing the response." Because Wion's response to summary judgment was due on or before February 17, 2010, he argues that the summary judgment hearing should not have been held until February 27, 2010. Wion appeared at the summary judgment hearing, but failed to raise any objection to the trial court regarding the

[3] It appears that Wion is most disgruntled by the entry of summary judgment because he wants a de novo review of the Enforcement Authority's order to vacate and demolish his building. However, he has missed his opportunity to obtain such review. Indiana Code Section 36-7-9-8 provides the means for obtaining judicial review of an administrative action such as the one at issue. That section requires that a complaint for review be filed within ten days after the date when the administrative order or action was taken. *See* Ind. Code § 36-7-9-8(b). Wion failed to file a complaint for judicial review of the Enforcement Authority's order within the requisite ten-day period. Accordingly, Wion waived his ability to challenge the Enforcement Authority's

timing of the hearing. Thus, Wion has waived any defect in the timing of the hearing and cannot now raise the issue for the first time on appeal. *See Ahnert v. Adams*, 176 Ind. App. 630, 376 N.E.2d 1182, 1187 (1978) (failure to object to defect in timing of summary judgment hearing pursuant to Trial Rule 56(C) results in waiver on appeal); *see also Poulard v. Lauth*, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003) (an issue not raised before the trial court on a summary judgment motion cannot be argued for the first time on appeal and is waived). We affirm the trial court's entry of summary judgment in favor of the Town.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

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findings and to have a trial court conduct a de novo review of the evidence. *See Quaker Properties, Inc. v. Dep't of Unsafe Bldgs. of City of Greendale, Ind.*, 842 N.E.2d 865, 868 (Ind. Ct. App. 2006), *trans. denied*.