MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Alan Gull,

Appellant-Petitioner

v.

Ann Marie Estrada,

Appellee-Respondent

April 30, 2024

Court of Appeals Case No.
23A-MI-573

Appeal from the Lake Superior Court

The Honorable Calvin D. Hawkins, Judge

Trial Court Cause No.
45D02-2209-MI-603

Memorandum Decision by Judge Kenworthy
Chief Judge Altice and Judge Weissmann concur.

Kenworthy, Judge.

Case Summary

[1] Alan Gull appeals the trial court's dismissal of his complaint for replevin against Ann Marie Estrada. Gull presents one issue for our review, which we restate as: did the trial court err when it dismissed his complaint for failure to state a claim on which relief can be granted? We reverse and remand.

Facts and Procedural History

[2] After several years of marriage, Gull and Estrada divorced in 2008. They did not, however, go their separate ways. The former spouses continued to reside together in their Michigan home for another four years. In 2012, they moved to a new home in Munster, Indiana. Although Gull and Estrada continued to live together, Estrada was the sole record owner of the Munster home, and Gull had no legal interest in the home except as a tenant.

[3] When Gull and Estrada moved to Munster, they each brought personal property over which they maintained separate ownership, control, and possession. Gull's personal property included items of sentimental value, resale value, or both. The sentimental category includes family heirlooms, Gull's birth certificate, and photos of Gull shaking hands with Pope Benedict XVI and President Bill Clinton, to name a few examples. Baseball memorabilia, wines, and vintage license plates are among the items Gull claims have resale value.

[4] Eventually, Gull and Estrada's relationship soured. On May 19, 2015, Estrada sought and received an *ex parte* protective order against Gull. The trial court dismissed the protective order on June 24. Gull then tried to arrange with Estrada a time to retrieve his personal property from the home, but Estrada "refused to agree on plans" or "cancelled agreed upon plans," and Gull was never able to reclaim his personal property. *Appellant's App. Vol. 2* at 9.

[5] On June 2, 2021, Gull filed a complaint in the United States District Court for the Northern District of Indiana (the "federal case") for replevin, demanding Estrada return his property. The district court dismissed the complaint for lack of subject matter jurisdiction on August 22, 2022. Within a month of dismissal, Gull filed a complaint in Lake Superior Court (the "state case") again asserting replevin. In this complaint, Gull alleges Estrada "ultimately[] barred" him from the Munster home following dismissal of the protective order on June 24, 2015, "wrongfully and unlawfully exerting control" over his property. *Id.* at 9–10. Gull attached to his complaint an affidavit with additional factual assertions, including that "[a]s of June 2015," he and Estrada "lived together and shared" the Munster home. *Id.* at 12.

[6] Estrada moved to dismiss the complaint. She alleges Gull's claim is barred by the statute of limitations and fails to state a claim on which relief could be granted. Estrada attached Gull's complaint and affidavit from the federal case as exhibits to her motion to dismiss. She also filed a memorandum of law supporting her motion that relied on those documents and asserted "*based upon Gull's own admissions in his [federal case affidavit]*, he knew or should have known

that when he was allegedly barred from the Munster Home on May 19, 2015, Estrada was allegedly attempting to exert unauthorized control over his personal property." *Id.* at 25–26 (emphasis added). Gull responded, arguing his complaint shows he first knew Estrada was unlawfully detaining his personal property when she denied him access to it after the protective order was dismissed in June. At a hearing, Estrada's counsel argued Gull's complaint and affidavit in the state case conflicted with his complaint and affidavit in the federal case about when he knew or should have known Estrada was unlawfully detaining his property. Estrada's counsel urged the court to compare Gull's "testimony" from the federal and state affidavits and determine "which of these two items is true." *Tr. Vol. 1* at 7–8. The trial court, without elaboration, granted Estrada's motion and dismissed Gull's complaint.

Standard of Review

[7] A motion to dismiss for failure to state a claim on which relief may be granted is an appropriate means of raising the statute of limitations. *See* Ind. Trial Rule 12(B)(6); *William F. Braun Milk Hauling, Inc. v. Malanoski*, 192 N.E.3d 213, 217 (Ind. Ct. App. 2022). A Rule 12(B)(6) motion tests the legal sufficiency of a claim, not the facts supporting it. *Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 193 N.E.3d 1009, 1013 (Ind. 2022); *see also Arflack v. Town of Chandler*, 27 N.E.3d 297, 302 (Ind. Ct. App. 2015) ("The grant or denial of a motion to dismiss . . . does not require determinations of fact."). A court considering a Rule 12(B)(6) motion to dismiss looks only to the complaint and no other evidence in the record, accepts the alleged facts as true, and construes

the allegations and reasonable inferences in the light most favorable to the nonmoving party. *See Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). Dismissals under Rule 12(B)(6) are improper unless it is clear on the face of the complaint the plaintiff is entitled to no relief. *Id.* We review a Rule 12(B)(6) dismissal *de novo*. *Id.*

Estrada's motion to dismiss was converted to a motion for summary judgment by operation of law.

[8] To recover in an action for replevin, the plaintiff must prove he has title or right to possession of personal property and the property was "wrongfully taken or unlawfully detained[.]" I.C. § 32-35-2-1 (2002); *see Sperro LLC v. Ford Motor Credit Co. LLC*, 64 N.E.3d 235, 244 (Ind. Ct. App. 2016). A replevin action must be brought no later than six years after the cause of action accrues. I.C. § 34-11-2-7(3). But a cause of action does not accrue—and the statute does not begin to run—until "the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as the result of the tortious act of another." *Est. of Verdak v. Butler Univ.*, 856 N.E.2d 126, 133 (Ind. Ct. App. 2006) (quoting *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992)).

[9] Estrada's motion to dismiss alleges Gull's complaint was filed after the statute of limitations expired.[1] Although not raised by the parties, we first address whether we are reviewing a decision on a motion to dismiss or one granting summary judgment. *See Hipps v. Biglari Holdings, Inc.*, 136 N.E.3d 629, 636 (Ind. Ct. App. 2019) (addressing this issue *sua sponte*), *trans. denied*. Our standard for reviewing a decision on these two motions is the same—that is, *de novo*. *Doe v. Adams*, 53 N.E.3d 483, 492 (Ind. Ct. App. 2016), *trans. denied*. But correctly identifying the motion is an important threshold question because the legal standard to succeed on each is different. *Id.*

[10] If a Rule 12(B)(6) motion to dismiss presents "matters outside the pleading" and those matters are not excluded by the trial court, "the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56." T.R. 12(B) (emphasis added). A trial court converts a Rule 12 motion to a motion for summary judgment "by its consideration of extraneous matters" regardless of whether the court expressly states it is doing so. *Davidson v. State*, 211 N.E.3d 914, 925 (Ind. 2023) (quoting *Milestone Contractors, L.P. v. Ind. Bell*

[1] Gull filed the state case on September 16, 2022—more than seven years after the cause of action accrued regardless of who is correct about the discovery date. But he initially filed his replevin claim on June 2, 2021, in the Northern District of Indiana. *See Gull v. Estrada*, No. 2:21-CV-184-JEM, 2022 WL 255523 (N.D. Ind. Jan. 27, 2022). Because the federal case was dismissed for jurisdictional reasons and not Gull's negligence in prosecuting the action, the Journey's Account Statute allowed Gull to initiate a new action within three years assuming the federal case was timely filed. *See* I.C. § 34-11-8-1(a)(1), (b)(1); *see also Blackman v. Gholson*, 46 N.E.3d 975, 980–81 (Ind. Ct. App. 2015) ("The purpose of the [Journey's Account Statute] is to provide for continuation of a cause of action when a plaintiff fails to obtain a decision on the merits for some reason other than his or her own neglect and the statute of limitations period expires while the suit is pending.").

Tel. Co., 739 N.E.2d 174, 176 (Ind. Ct. App. 2000)); *Dixon v. Siwy*, 661 N.E.2d 600, 604 n.5 (Ind. Ct. App. 1996) (explaining the "conversion process is one which takes place by operation of law in light of the trial court's action in considering material extraneous to the complaint").

[11] Here, Estrada attached to her motion to dismiss matters outside the complaint—Gull's federal complaint and affidavit—and the trial court did not exclude them.[2] Estrada relied on these documents to support her motion to dismiss, and she repeatedly referred to the two affidavits as Gull's "testimony" at the hearing. *See, e.g.*, *Tr. Vol. 1* at 5, 7, 8. Indeed, Estrada argued at the hearing: "Gull has given sworn testimony related to the actions that led to the basis for his replevin claim. Those sworn statements are what the Court should look at and needs to evaluate in order to determine whether or not these claims are timely on their face." *Id.* at 7. In other words, Estrada invited the trial

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[2] Estrada asserted in her motion to dismiss that the inclusion of pleadings from the federal case "does not act to convert this motion to dismiss into a motion for summary judgment" because matters of which a trial court may take judicial notice are not considered "matters outside the pleading" for purposes of Trial Rule 12(B)(6). *Appellant's App. Vol. 2* at 22 n.1 (citing *Moss v. Horizon Bank, N.A.*, 120 N.E.3d 560, 563 (Ind. Ct. App. 2019)). But Estrada does not identify a basis for taking judicial notice of these records, either in the trial court or on appeal. The most likely basis is Indiana Evidence Rule 201(b)(5), which provides a court may judicially notice "records of a court of this state." But to the extent Estrada relies on this provision, she cites no authority for the proposition that it allows Indiana state courts to take judicial notice of federal cases, and our research has uncovered none. *See Turkette v. State*, 151 N.E.3d 782, 785 n.2 (Ind. Ct. App. 2020) (denying a request to take judicial notice of the defendant's federal case for lack of citation to authority to do so), *trans. denied*. As Estrada's assertion is unsupported, we consider the content of the exhibits attached to her motion to dismiss to be matters outside the pleading.

However, even if we accept Estrada's assertion and review this under the Rule 12(B)(6) standard, the face of Gull's complaint is sufficient to withstand a Rule 12(B)(6) motion, *see infra* ¶ 12, and our result would be the same. Estrada's materials do not *negate* the allegations but merely challenge their veracity.

court to consider the extraneous documents, weigh the evidence, and make a factual determination.

[12] The trial court stated it was granting the motion to dismiss, but it is apparent the court considered the federal case documents in reaching its decision. Gull's complaint alleges he had personal property in the Munster home. Estrada obtained a protective order against him on May 19, 2015, precluding him from contacting her or entering the home. His personal property remained in the home. After the protective order was dismissed on June 24, 2015, Gull attempted to reclaim his property, but Estrada did not cooperate. Estrada still has possession of the property despite Gull's demand for its return. Taking those facts as true and construing them in Gull's favor, Gull may have known on May 19 he was precluded by the protective order from retrieving his property at that time, but he only knew or should have known on or after June 24 that Estrada intended to retain possession of it. It is not clear from the face of the complaint that Gull has no right to relief, and therefore, the trial court must have considered the federal case documents in granting Estrada's motion to dismiss. In so doing, the trial court "placed the case in a summary judgment posture." *Dixon*, 661 N.E.2d at 603.

[13] Whether a trial court commits reversible error by failing to expressly convert a motion to dismiss to a motion for summary judgment and proceed accordingly turns on whether the court gave the parties "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." T.R. 12(B); *see also Dixon*, 661 N.E.2d at 603. If the court provided the parties with a reasonable

opportunity to present Rule 56 materials, the error is harmless. *Dixon*, 661 N.E.2d at 604.[3]

[14] We consider three factors in determining whether the parties were given a reasonable opportunity to present Rule 56 materials. One, was the movant's reliance on evidence outside the pleadings so readily apparent "there is no question that the conversion is mandated by T.R. 12(B)"? *Azhar v. Town of Fishers*, 744 N.E.2d 947, 950–51 (Ind. Ct. App. 2001). Here, Estrada's reliance on the federal case documents was obvious—the arguments in her memorandum of law referenced them repeatedly.

[15] Two, was there ample time after the filing of the motion for the nonmovant to seek to exclude the evidence relied on by the movant or submit its own materials in response? *Id.* at 951. Estrada filed her motion on December 2, 2022. The trial court held a hearing on the motion on February 17, 2023. Gull had over sixty days to act on Estrada's motion. In that time, he did not seek to exclude the materials or submit additional evidence of his own. But he did file a response to the motion on January 13 and therefore, had ample time to act. *See id.* (determining three months was ample time for the nonmovant to move to exclude the evidence, seek more time to conduct discovery, and/or submit her own materials).

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[3] In light of the unique procedural posture of a motion to dismiss converted to a motion for summary judgment by operation of Trial Rule 12(B), *Dixon* held the designation of evidence requirements of Trial Rule 56 do not have to be strictly applied. 661 N.E.2d at 604 n.5.

[16] And three, did the nonmovant present a "substantiated argument setting forth how she would have submitted specific controverted material factual issues to the court if [she] had been given the opportunity"? *Id.* (internal quotation marks omitted). We have raised this issue, not Gull. Therefore, Gull has not made such an argument. But he attached to his complaint an affidavit that can be considered in determining whether there are material issues of fact precluding summary judgment. He also responded to Estrada's motion and had a chance to argue his position at a hearing. It is unclear what—if any—other materials Gull could have submitted. But as discussed below, Gull's complaint and affidavit in the state case are enough to create a factual dispute notwithstanding other materials Gull would have provided.

[17] In sum, the trial court treated Estrada's motion as one for summary judgment when it considered the extra materials attached to the motion. But the parties had a reasonable opportunity to present Rule 56 materials and any error in the trial court's procedure was harmless. *See Dixon*, 661 N.E.2d at 604–05 (treating as harmless court's failure to expressly convert a 12(B)(6) motion into one for summary judgment where appellant had "ample opportunity to present material external to the pleadings in opposition" to the Rule 12(B)(6) motion but did not try to do so). Accordingly, we treat this appeal as if it comes from a grant of summary judgment. *See id.* at 604.

Genuine issues of material fact preclude summary judgment in Estrada's favor.

[18] We review summary judgment *de novo*, applying the same standard as the trial court: summary judgment is appropriate "if 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." T.R. 56(C); *Young v. Hood's Gardens, Inc.*, 24 N.E.3d 421, 423–24 (Ind. 2015). We "assess the trial court's decision to ensure that the parties were not improperly denied their day in court [but] analyze the issues . . . in the same way as a trial court would." *Shambaugh & Son, Inc. v. Carlisle*, 763 N.E.2d 459, 460–61 (Ind. 2002) (citations omitted). That is, we "accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the non-movant, and resolve all doubts against the moving party." *Id.* at 461. "We must reverse the grant of a summary judgment motion if the record discloses an unresolved issue of material fact." *Ayres v. Indian Heights Volunteer Fire Dep't, Inc.*, 493 N.E.2d 1229, 1234 (Ind. 1986).

[19] Here, we conclude summary judgment was improper because when Gull discovered or should have discovered he had a claim for replevin is a genuine issue of material fact. "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[.]" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)). Estrada's argument to the trial court essentially conceded there was an issue of fact, because she asked the trial court to determine which of the

two affidavits was "true." *Tr. Vol. 1* at 8. Specifically, Estrada contends the federal complaint and affidavit show Gull knew or should have known on May 19, 2015, she was allegedly attempting to unlawfully detain his property. She bases this contention primarily on Gull's statement in his federal complaint that "[o]n or about May 19, 2015, [Estrada] barred [Gull] from entering the Munster Home[.]" *Appellant's App. Vol. 2* at 29. Gull's complaint and affidavit in the state case, on the other hand, allege "[a]s of June 2015," he and Estrada "lived together and shared" the Munster home and he was barred from the home sometime following the dismissal of the protective order on June 24. *Id.* at 9, 12. Because the original complaint was filed on June 2, the accrual date is a material fact, and that fact is in dispute. Summary judgment is inappropriate under these circumstances.

Conclusion

[20] Estrada's motion to dismiss was converted to a motion for summary judgment when the trial court considered materials outside the pleading. The evidence shows a genuine issue of material fact as to when Gull's cause of action accrued. Accordingly, we reverse the trial court's judgment for Estrada and remand for further proceedings.

[21] Reversed and remanded.

Altice, C.J., and Weissmann, J., concur.

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