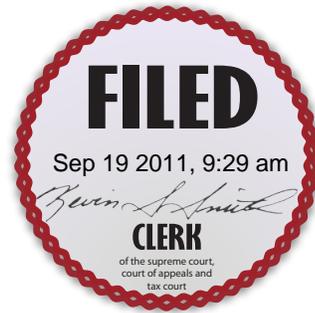


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DWAYNE E. GRAY,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 49A02-1102-PL-185
)	
SAFEGUARD REAL ESTATE PROPERTIES)	
d/b/a SAFEGUARD PROPERTIES, LLC,)	
)	
Appellee-Defendant.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-1004-PL-17176

September 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Dwayne E. Gray, pro se,¹ appeals the trial court's entry of summary judgment for Safeguard Real Estate Properties, d/b/a Safeguard Properties, LLC ("Safeguard").² Gray raises five issues for our review, which we consolidate and restate as the following two issues:

1. Whether the trial court abused its discretion when it denied Gray's motion to amend the pleadings.
2. Whether a genuine issue of material fact precluded the entry of summary judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 24, 2002, Gray executed a promissory note with Chase Manhattan Mortgage Corporation ("Chase") for the purchase of real property in Marion County. On August 2, 2005, Citibank, N.A. ("Citibank"), as Chase's successor, filed a motion to foreclose on that property due to Gray's failure to pay Citibank in accordance with the terms of the promissory note. On July 30, 2008, Chase³ submitted a work order to Safeguard to conduct monthly visual inspections of the property. Safeguard, in turn, hired JT Property Services, Inc. ("JT Property") as an independent contractor to perform the work.

¹ A litigant who proceeds pro se is held to the same standards that trained counsel is expected to follow. See Smith v. Donahue, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), trans. denied.

² We note that Gray's briefs name JT Property Services as a party to this appeal. As discussed below, JT Property Services has never been a named party to Gray's claims, and it is not a party to this appeal.

³ It is not clear why Chase rather than Citibank made this request. The answer to that question, however, is immaterial to this appeal.

Between August and November, JT Property conducted three visual inspections of the property. For each inspection, the residence at the property was vacant and the grass was in need of being cut. Following the November inspection, JT Property recommended that the locks to the residence be changed, the property be winterized, and debris be removed. Safeguard forwarded JT Property's recommendation to Chase, and Chase agreed. Safeguard then hired JT Property to perform the recommended services. In early December, JT Property performed the services and sent its invoice to Safeguard.

On December 11, 2008, Gray filed a notice of claim in the Marion Small Claims Court against Safeguard. Gray alleged \$4,995 in damages due to Safeguard's "[i]llegal entry and property damage." Appellee's App. at 51. Gray did not name JT Properties as a defendant.

On March 12, 2010,⁴ the small claims court granted judgment to Safeguard, and Gray appealed that judgment to the Marion Superior Court. In the superior court, Gray again named only Safeguard as the defendant. On June 17, Safeguard filed its answer. Safeguard stated that JT Property acted as an independent contractor for the allegedly damaging services and that Safeguard had no liability in the matter. Safeguard also asserted as an affirmative defense that Gray's complaint should be dismissed "for failure to join . . . J.T. Property Services pursuant to Trial Rules 12(B)(7) and 19." *Id.* at 45. The trial court did not rule on Safeguard's request for dismissal.

⁴ We note that this order is not contained in the Appellant's Appendix.

On September 23, 2010, Safeguard filed its motion for summary judgment. Five days later, on September 28, Gray filed a motion to add JT Property as a party. The trial court denied Gray's motion on October 7.

The trial court held a hearing on Safeguard's motion for summary judgment on November 18. Gray did not appear. On November 24, the court granted Safeguard's motion for summary judgment.

On November 30, Gray filed a motion to set aside the judgment. On February 8, 2011, the court denied Gray's motion. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Motion to Add Necessary Party

We first consider Gray's allegation that the trial court erred when it denied his September 28, 2010, motion to add JT Properties as a party to his complaint.⁵ Although not clearly argued by Gray, he appears to contend that JT Properties was a necessary party to his claim. According to Indiana Rule of Trial Procedure 19(A):

A person who is subject to service of process shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties

If he has not been so joined, the court shall order that he be made a party.

We review the trial court's judgment on a Rule 19 motion for an abuse of discretion. See Rollins Burdick Hunter of Utah, Inc. v. Bd. of Trustees of Ball State

⁵ In his motion, Gray simply asked the court to "add proper parties." Appellee's App. at 26. The caption to his motion, however, named JT Properties and Chase as new parties along with Safeguard. Gray also filed other motions to amend his complaint, but those motions are not included in the record on appeal. As such, we cannot and do not consider them or the grounds they may have been based on.

Univ., 665 N.E.2d 914, 920 (Ind. Ct. App. 1996). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). The rule governing joinder of parties does not set forth a rigid or mechanical formula for making the determination, but, rather, it is designed to encourage courts to apprise themselves of the practical considerations of each individual case in view of the policies underlying the rule. Rollins Burdick Hunter, 665 N.E.2d at 920. Therefore, we employ a fact-sensitive, flexible analysis. Id. The burden of proving that joinder is necessary rests with the party asserting it. Id.

The trial court did not abuse its discretion. Gray was aware of JT Property's relationship with Safeguard since at least June of 2010, when Safeguard identified JT Property as an independent contractor and alleged that JT Property was a necessary party under Trial Rule 19. Nevertheless, Gray did not request the court's permission to add JT Property as a party. Several months later, in September of 2010, Safeguard moved for summary judgment. Five days after that, Gray moved to add JT Property as a party. Granting Gray's motion so late in the proceedings would have unfairly prejudiced Safeguard and caused undue delay in determining Safeguard's liability to Gray.⁶ As such, we hold that the trial court did not abuse its discretion in denying Gray's motion.

⁶ We also note that, sometime after the trial court denied Gray's motion to add JT Property as a party, JT Property filed for bankruptcy relief pursuant to Title 11 of the United States Code. See Appellee's App. at 352. Thus, any claim that Gray may have asserted against JT Property would have been subject to an automatic stay. However, that information was not before the trial court when it denied Gray's motion, and, therefore, we do not consider it on appeal.

Issue Two: Summary Judgment

Gray also challenges the court's entry of summary judgment for Safeguard. Our standard of review for summary judgment is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Tom-Wat, Inc. v. Fink, 741 N.E.2d 343, 346 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. Tom-Wat, Inc., 741 N.E.2d at 346. Also, review of a summary judgment motion is limited to those materials designated to the trial court. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001).

Gray has alleged that Safeguard caused damage to his property in connection with JT Property's activity in early December 2008. Again, the undisputed facts show that JT Property was the party responsible for the alleged damages and that JT Property was an independent contractor of Safeguard. Presumably, then, Gray has sued Safeguard on a theory of vicarious liability, that is, the liability of a supervisory party for the conduct of a subordinate. See Black's Law Dictionary 927 (7th ed. 1999).

Gray's theory of liability is not supported by Indiana law. As our supreme court has recognized:

In Indiana, the long-standing general rule has been that a principal is not liable for the negligence of an independent contractor. Prest-O-Lite Co. v. Skeel (1914), 182 Ind. 593, 597, 106 N.E. 365, 367; City of Logansport v. Dick (1880), 70 Ind. 65, 78. However, five exceptions have been recognized for more than half a century. See, e.g., Bogard v. Mac's Restaurant (1988), Ind. App., 530 N.E.2d 776; Denneau v. Indiana & Michigan Elec. Co. (1971), 150 Ind. App. 615, 277 N.E.2d 8; Scott Constr. Co. v. Cobb (1928), 86 Ind. App. 699, 703, 159 N.E. 763. The exceptions

are: (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal. Perry v. Northern Ind. Pub. Serv. Co. (1982), Ind. App., 433 N.E.2d 44, 47.

Bagley v. Insight Commc'ns Co., 658 N.E.2d 584, 586 (Ind. 1995).

Thus, Safeguard cannot be held liable for the acts of JT Property unless one of the five exceptions applies. Gray's only argument that one of those five exceptions applies is his assertion that JT Property acted illegally in entering his residence. But Gray himself acknowledges that "Chase . . . did have an interest in Mr. Gray's property." Appellant's Br. at 4. And there is no dispute that JT Property, through Chase and Safeguard, was authorized to preserve Chase's interest in the property. Accordingly, there is no genuine issue of material fact regarding Safeguard's liability, and Safeguard is entitled to judgment as a matter of law.⁷

Affirmed.

RILEY, J., and BARNES, J., concur.

⁷ Any other arguments purportedly raised by Gray in this appeal are not supported by cogent reasoning and are waived. Ind. Appellate Rule 46(A)(8)(a).