

STATE OF MICHIGAN
COURT OF APPEALS

BERNARD E. ELY,

Plaintiff-Appellant,

v

CITY OF CHARLEVOIX,

Defendant-Appellee.

UNPUBLISHED

March 27, 1998

No. 199090

Charlevoix Circuit Court

LC No. 96-041718 NZ

Before: Michael J. Kelly, P.J., and Cavanagh and N. J. Lambros*, JJ.

PER CURIAM.

Plaintiff alleged that the electrical system of his boat and various appliances were damaged when he connected his boat's electrical system to an improperly wired electrical outlet at a docking space owned and operated by the city of Charlevoix. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) asserting that plaintiff's claim was barred by governmental immunity. The trial court agreed and granted the motion. Plaintiff appeals as of right, and we affirm.

Plaintiff first contends that his claim falls within the public building exception to governmental immunity. MCL 691.1406; MSA 3.996(106). We disagree. The scope of this exception is narrowly drawn. *Eberhard v St. Johns Public Schools*, 189 Mich App 466, 467; 473 NW2d 745 (1991). We are not persuaded that the definition of "public building" is expansive enough to include a marina. Accordingly, the trial court properly determined that defendant's marina did not come within the purview of the public buildings exception.

Plaintiff also argues that defendant's operation of the marina was a proprietary function not protected by governmental immunity. MCL 691.1413; MSA 3.996(113) provides in relevant part:

The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the

* Circuit judge, sitting on the Court of Appeals by assignment.

governmental agency, excluding, however, any activity normally supported by taxes or fees.

Plaintiff acknowledges that he submitted no evidence to support the applicability of this exception. On the other hand, defendant submitted an affidavit of the city treasurer stating that the marina is “not operated primarily for the purpose of producing a pecuniary profit” for the city, but is “operated as a service for the benefit of the general public.”. The treasurer’s affidavit also states that the marina is supported by fees and also taxes from the general fund “to the extent necessary for repairs and other non-routine expenses.”

Plaintiff suggests that had he been given an opportunity to respond to defendant’s evidence, he could have established that the operation of the marina was a proprietary function. However, plaintiff failed to gather evidence to support an exception to governmental immunity before filing the complaint or during the six months between the filing of the complaint and the entry of the order granting defendant’s motion, despite the fact that governmental immunity was pleaded as an affirmative defense. Summary disposition was granted one day before the discovery deadline. In light of plaintiff’s failure to gather evidence for months preceding the court’s granting of defendant’s motion, we conclude that one additional day of discovery did not stand a fair chance of uncovering factual support for plaintiff’s position. *Bayn v Dep’t of Natural Resources*, 202 Mich App 66, 70; 507 NW2d 746 (1993). Because the undisputed evidence submitted by defendant indicated that the proprietary exception to governmental immunity did not apply, the trial court properly granted defendant’s motion for summary disposition.

Plaintiff’s final issue on appeal is that the trial court erred by refusing to allow plaintiff to amend his pleadings to cure any deficiency. We disagree. Had plaintiff produced evidence to support the asserted exceptions to governmental immunity, an amendment to allow plaintiff to plead facts in avoidance of immunity may have been the appropriate course. Here, however, plaintiff failed to come forward with evidence. Under the circumstances, an amendment of the complaint would have been futile. Therefore, the trial court did not abuse its discretion. *Ben P. Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973).

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros