

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA BOLDEN and J.W.B.G. ENT.,

Plaintiffs-Appellees,

v

CITY OF DETROIT, DETROIT POLICE
DEPARTMENT and CITY OF DETROIT
PLANNING AND DEVELOPMENT
DEPARTMENT,

Defendants-Appellants.

UNPUBLISHED

February 19, 1999

No. 202900

Wayne Circuit Court

LC No. 96-640815 AZ

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendants, City of Detroit (City), City of Detroit Planning and Development Department (Department) and Detroit Police Department, appeal by leave granted from an order denying their motion for summary disposition brought pursuant to MCR 2.116(C)(7). We reverse and remand for entry of summary disposition in favor of defendants.

This case arises from plaintiffs' purported purchase of residential property in the City from Charles Coleman, Benito Hassan, and Dent Development. Plaintiff Bolden alleges she gave Coleman in excess of \$31,000 toward the purchase of these properties, and that the City has refused to honor the purchase agreements. The City avers that it never entered into any purchase agreements with plaintiffs and that any sale by Coleman, a former Department employee, to Bolden was done without authority or authorization from the City. The City further avers that it had no relationship whatsoever with Hassan or Dent Development.

I

We review a trial court's grant or denial of a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). Defendants' motion in the present case was brought pursuant to MCR 2.116(C)(7), which provides that summary disposition is proper when a claim is

barred because of immunity granted by law. In deciding a motion for summary disposition based on governmental immunity, the court must consider all documentary evidence submitted by the parties, and accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor. *Citizens Ins Co, v Osmose Wood Preserving Inc*, 231 Mich App 40, 43; 585 NW2d 314 (1998).

II

Although plaintiffs' complaint does not expressly state so, it appears that plaintiffs seek to hold the City both directly and vicariously liable for the fraud allegedly perpetrated on them. See generally *Ross, supra* at 621. For purposes of this appeal only, we assume, without deciding, that the sale of real property by the City constitutes a proprietary, governmental function so that the City would not normally be immune from tort claims arising from such an activity.¹ MCL 691.1407; MSA 3.996(107); *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998), citing *Ross v Consumers Power Co (On Reh)*, 420 Mich 567, 620; 363 NW2d 641 (1984).

A

In support of their motion for summary disposition, defendants submitted an affidavit from George Biram, Executive Director of the Department, who asserted that he had personal knowledge of the facts set forth in the affidavit. Biram asserted that the City owned six of the seven parcels of the subject property, never entered into purchase agreements with Bolden for the property, never received any money from her for the purchase of the property, never granted Coleman the authority to sell the property on the City's behalf, and never entered into any contract, or had any relationship, with Hassan or Dent Development. Plaintiffs submitted no evidence, by affidavit or otherwise, to counter this assertion of facts.

Accordingly, plaintiffs failed to establish that the City was at all involved in, or knowledgeable about, Coleman's actions. Aside from plaintiffs' allegations, there is no indication that the City engaged in *any* real estate transactions with Bolden, much less fraudulent transactions. Consequently, plaintiffs failed to meet their burden in opposing defendants' motion for summary disposition, and the trial court erred in denying defendants' motion for summary disposition as to plaintiffs' direct claim against the City.

B

Plaintiffs also seek to hold the City vicariously liable for the actions of Coleman, its former employee. "[A] governmental agency can be held vicariously liable only when its officer, employee, or agent, *acting during the course of employment and within the scope of authority*, commits a tort while engaged in an activity that is nongovernmental or proprietary or that falls within a statutory exception." *Gracey v Wayne County Clerk*, 213 Mich App 412, 421; 540 NW2d 710 (1995), overruled on other grounds sub nom *American Transmissions, Inc v Attorney General*, 454 Mich 135, 142; 560 NW2d 50 (1997) (emphasis added). Assuming, *arguendo*, that Coleman was engaged in a proprietary activity when he purported to sell surplus city property to plaintiffs, he was nonetheless not acting within the course of his employment or scope of his authority, as demonstrated by Biram's

affidavit, to which plaintiffs failed to respond. Consequently, the City cannot be held vicariously liable to plaintiffs for Coleman's allegedly fraudulent activities.

Moreover, it is almost axiomatic that the City cannot be held liable to plaintiffs for the allegedly fraudulent activities of Hassan. The City asserted that it had no relationship whatsoever with Hassan. Plaintiffs failed to present any evidence to suggest the existence of any relationship, beyond asserting that further discovery may uncover one. Such speculation or supposition about the existence of evidence is insufficient to defeat a motion for summary disposition. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

III

In their brief on appeal, the City also argues that plaintiffs failed to establish the existence of a contract between it and Hassan, Dent Development, or Coleman, and that a breach of contract claim is an improper method by which to seek to hold a government defendant liable in tort.² This issue was not presented to the trial court in defendant's motion for summary disposition. However, we hold that it would be futile to remand this matter for further proceedings. Plaintiff's failure to respond to Biram's affidavit, which affirmatively denies the existence of any such contracts, is fatal to her claim. Defendant is entitled to summary disposition.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ Although plaintiffs' complaint also named the Department and the Police Department as defendants, these are not separate legal entities against which a tort action can be directed. *McPherson v Fitzpatrick*, 63 Mich App 461, 463-464; 234 NW2d 566 (1975).

² We note that governmental immunity is not a bar to claims sounding in contract. *Lawrence v Ingham County Health Dep't*, 160 Mich App 420, 425; 408 NW2d 461 (1987).