STATE OF MICHIGAN

COURT OF APPEALS

DAWN WENDELKEN,

Plaintiff-Appellant,

v

CITY OF LIVONIA and JAMES INGLIS,

Defendants-Appellees.

UNPUBLISHED
June 6, 2000

No. 208073
Wayne Circuit Court
LC No. 97-704669-NO

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) (governmental immunity) on her claims for negligence, gross negligence, premises liability, and nuisance. We affirm.

Plaintiff's complaint alleged that she was injured on residential property owned by the City of Livonia and leased to low-income residents. Plaintiff was visiting the tenant and fell as she exited through a side door, allegedly because of a defective condition of the steps, screen door, and doorway jamb. Plaintiff alleged claims of negligence, premises liability, and nuisance against the city. She subsequently amended her complaint to add as a defendant James Inglis, the Executive Director of the Livonia Housing Commission, and to add a claim for gross negligence.

Defendants moved for summary disposition on the basis of governmental immunity. In response, plaintiff argued that the city was not involved in a "governmental function" as a landlord for the house in question and, therefore, did not enjoy immunity from tort liability under MCL 691.1407; MSA 3.996(107). Alternatively, plaintiff contended that governmental immunity did not apply because the city's activity in renting the premises was a proprietary function under MCL 691.1413; MSA 3.996(113). As a second alternative, plaintiff argued that defendant was not immune from tort liability under the common-law trespass-nuisance exception to governmental immunity. The trial court granted summary disposition to defendants, but did not indicate its rationale for doing so.

This Court reviews de novo an order granting summary disposition. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). When reviewing a grant of summary

disposition on the ground that the claim is barred by governmental immunity, this Court considers all documentary evidence submitted by the parties. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). All well-pleaded allegations are construed in favor of the nonmoving party. *Id.* To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Plaintiff first argues that she presented evidence that would allow a reasonable jury to conclude that defendant James Inglis' conduct amounted to gross negligence and, therefore, he was not entitled to the protection of governmental immunity. We disagree. MCL 691.1407(2); MSA 3.996(107)(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Under this statute, Inglis, as an employee or officer of the Livonia Housing Commission, was immune from tort liability as long as he was acting or reasonably believed that he was acting within the scope of his authority, was engaged in the exercise or discharge of a governmental function, and his conduct did not amount to gross negligence that was the proximate cause of plaintiff's injuries.

The only statutory element that is at issue here is whether Inglis' conduct amounted to gross negligence. Plaintiff contends that summary disposition was improper because she undisputedly pleaded allegations of gross negligence in her amended complaint and the trial court was bound to accept these allegations as true. We disagree. First, the trial court was bound to accept these allegations as true only if they were not contradicted by documentation submitted by defendant. *Maiden*, *supra* at 119. Second, even if the trial court *did* accept these allegations as true, they did not amount to allegations of

gross negligence. Indeed, the allegations referred to an alleged failure to exercise reasonable care in the design, maintenance, inspection, and repair of the steps, door, and doorway jamb of the house in question, as well as the failure to warn of the allegedly hazardous conditions. These allegations sounded only in ordinary negligence.

Similarly, the documentary evidence submitted by the parties raised an issue of only ordinary – and not gross – negligence. The evidence, viewed in the light most favorable to plaintiff, established that (1) the door in question did not open properly, (2) the metal stripping on the door jamb was slippery, (3) the rise of the first step was too high, (4) the top of the threshold of the door was an inch and a half above the inside landing, (5) the defective conditions had lasted for two years before the accident, (6) defendants inspected the premises only sporadically, (7) plaintiff informed Inglis about the defects "months" before the accident, and (8) Inglis did nothing to remedy the problem after being alerted to it. This evidence simply did not raise a question of fact regarding whether Inglis acted "'so reckless[ly] as to demonstrate a substantial lack of concern for whether an injury results.'" See *Stanton v Battle Creek*, 237 Mich App 366, 374-375; 603 NW2d 285 (1999), quoting MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). While the evidence may have raised a question of fact regarding Inglis' ordinary negligence, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden, supra* at 122.

Plaintiff notes that in *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989), this Court acknowledged that a failure to act on the part of a defendant can amount to gross negligence. However, *Tallman* is factually distinguishable in that the plaintiff in that case was a minor under the defendant teacher's supervision, and the injury was allegedly caused by an inadequately-shielded power saw, an inherently dangerous tool if used or equipped improperly. *Id*. at 142, 144. In the present case, defendant's failure to fix the problems associated with the steps and the door after the tenant's complaint did not amount to the reckless disregard for harm apparent in *Tallman*. Because plaintiff failed to allege facts in her complaint or come forward with evidence in opposition to defendant's motion for summary disposition that would allow a reasonable jury to conclude that defendant Inglis' conduct amounted to gross negligence, the trial court properly granted summary disposition to defendant Inglis under MCL 691.1407(2); MSA 3.996(107)(2).[1] See *Stanton, supra* at 375.

Next, plaintiff argues that the City of Livonia was not entitled to governmental immunity because of the common-law trespass-nuisance exception to governmental immunity. Under MCL 691.1407(1); MSA 3.996(107)(1), "governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function." However, our Supreme Court has recognized a limited common-law trespass-nuisance exception to the doctrine of governmental immunity. *Continental Paper & Supply Co, Inc v City of Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996). Trespass-nuisance involves an interference with the use of land caused by a physical intrusion set in motion by the government and resulting in personal or property damage. *Peterman v DNR*, 446 Mich 177, 205; 521 NW2d 499 (1994). See also *Kent Co Aeronautics Bd v State Police*, 239 Mich App 563, 586-587 n 6; ___ NW2d ___ (2000).

Plaintiff has not established that the trespass-nuisance exception applies to her claims because she has not shown that her injuries were caused by a physical intrusion onto private property by defendants. *Id.*; *Peterman, supra* at 205, 207. Plaintiff's reliance on *Munson v County of Menominee*, 371 Mich 504; 124 NW2d 246 (1963), is misplaced. In *Munson*, the Supreme Court determined that the defendant was not engaged in a governmental function when the plaintiff was injured in offices owned by the defendant but leased by the plaintiff's employer, the state department of social welfare. *Id*. at 514-515. Because the defendant was engaged in a proprietary function in leasing the property, the Court found that the plaintiff's nuisance claim could go to the jury. *Id*. In the present case, as discussed *infra*, the City of Livonia was indeed engaged in a governmental function and was not engaged in a proprietary activity while renting the subject property to low-income residents. Therefore, *Munson* does not contain the "identical issues" as the present case, as plaintiff claims in her appellate brief, and does not establish that plaintiff is entitled to the application of the trespass-nuisance exception. Moreover, to the extent that *Munson* might imply that a trespass-nuisance exception could be found in the absence of a physical intrusion onto the property, it has been effectively overruled by the Supreme Court's ruling in *Peterman, supra* at 205, 207.

Plaintiff also alleges that defendant failed in its duty to maintain a safe premises in violation of MCL 125.536; MSA 5.2891(16), which provides in pertinent part:

> (1) When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling . . . any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition.

However, this statute provides a cause of action to "any occupant," and plaintiff was not an occupant of the premises in question. Therefore, the statute was inapplicable to plaintiff's claims.

Next, plaintiff contends that the City of Livonia was not involved in a governmental function while owning and leasing the subject property to low-income residents and, therefore, was not entitled to governmental immunity. A governmental function is defined as an activity "expressly or impliedly mandated or authorized by the constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(f). The operation of low income housing by municipal housing commissions is expressly authorized by MCL 125.651 *et seq.*; MSA 5.3011 *et seq*. Among the powers specifically conferred upon such commissions is the power "to lease and/or operate any housing project or projects." MCL 125.657(b); MSA 5.3017(b). A "housing project" is defined as "any work or undertaking of a city or incorporated village or housing commission pursuant to Act No. 18 of the Public Acts of the extra session of 1933, as amended, or any similar work or undertaking of a housing authority or of the federal government." MCL 125.603(c); MSA 5.3057(3). The house where plaintiff was injured was owned by the Livonia Housing Commission and leased by the Commission to low-income residents. Accordingly, the property was a "housing project," which the housing commission of defendant City of Livonia was statutorily authorized to operate. Because the city was engaged in a statutorily-authorized activity in owning and leasing the house to low-income residents, the

city was engaged in a governmental function within the meaning of MCL 691.1407(1); MSA 3.996(107)(1) and was entitled to governmental immunity from plaintiff's claims.

Alternatively, plaintiff argues that defendant's activity falls into the proprietary function exception to immunity. In order for an activity to be deemed a proprietary function, it must: (1) be conducted primarily for the purpose of producing a pecuniary profit; and (2) not normally be supported by taxes or fees. Whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to a determination of the governmental agency's intent. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97-98; 494 NW2d 791 (1992).

Pursuant to MCL 125.677; MSA 5.3037, municipal housing commissions are precluded from operating public housing projects for a profit. Moreover, the collection of rents does not turn this activity into a proprietary function, because an agency may conduct an activity on a self-sustaining basis without subjecting itself to the proprietary function exception. *Sylvan Glen*, *supra* at 98. Thus, plaintiff has not established that defendant's activities fell within the proprietary function exception to governmental immunity.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] Because we find that plaintiff did not establish a question of fact regarding whether Inglis acted in a grossly negligent manner, we need not address defendants' argument that Inglis was entitled to absolute immunity under MCL 691.1407(5); MSA 3.996(107)(5) as the highest appointed executive official of a level of government.