STATE OF MICHIGAN

COURT OF APPEALS

SAFA JUNDY and FADWA JUNDY, Plaintiffs-Counterdefendants-Appellees,	UNPUBLISHED July 27, 2004
v	No. 248389 Wayne Circuit Court
CITY OF DETROIT, Defendant-Counterplaintiff-Appellant.	LC No. 02-207409-CZ

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Plaintiffs filed a three-count complaint, alleging causes of action for gross negligence, trespass, and trespass-nuisance with respect to defendant city's actions in razing and demolishing plaintiffs' party store that had previously been damaged in a fire. Defendant city filed a counterclaim, seeking the costs of demolition. Defendant appeals as of right an order denying its motion for summary disposition, with regard to plaintiffs' complaint and its counterclaim, and granting summary disposition in favor of plaintiffs on their complaint and defendant's counterclaim.[1] We conclude that governmental immunity did not bar plaintiffs' trespass/trespass-nuisance claims pursuant to *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), and that the trial court properly entered judgment in favor of plaintiffs on the complaint and counterclaim because no genuine issues of material fact existed and plaintiffs were entitled to judgment as a matter of law, MCR 2.116(C)(10). Accordingly, we affirm.

I. Complaint and Counterclaim

Plaintiffs' complaint was filed on March 5, 2002, a date which has a significant impact on the governmental immunity analysis as discussed infra. Plaintiffs alleged that they owned a structure located at 6800 Kercheval in the city of Detroit that was known as the Concord Market,

[1] The trial court did summarily dismiss plaintiffs' gross negligence claim after plaintiffs conceded that such an action could not be maintained against the city, as opposed to city employees, under MCL 691.1407.

and which was demolished by defendant in November 2000. The market suffered substantial fire damage on September 11, 1998, and plaintiffs were forced to close the facility until it could be repaired. Plaintiffs alleged that during the time period of September 11, 1998, to the demolition in November 2000, they were engaged in negotiations with their insurance company regarding the damaged property and taking bids to perform the necessary repairs.

Plaintiffs claimed that defendant, without authority, notice, or permission, entered the premises of the Concord Market and demolished the structure, and in the process, defendant also destroyed numerous items of personal property located in the market. As noted above, plaintiffs alleged causes of action for gross negligence, trespass, and trespass-nuisance.

Defendant responded in its answer and affirmative defenses that it was lawfully on the premises and that it lawfully demolished the building pursuant to the Dangerous Building Ordinance 290-H, 1984 Detroit City Code, § 12-11-28.0 *et seq.* Defendant city also filed a counterclaim, alleging that on July 28, 2000, the city inspected the subject property and determined that the market constituted a dangerous building under § 12-11-28.0 *et seq.* Subsequently, defendant served a notice of hearing regarding the dangerous building determination on the "owner of record." Later, a hearing was conducted, and the hearing officer recommended that remedial action be undertaken. Defendant then issued an order that the dangerous building be demolished. Defendant further alleged that a demolition permit was procured on October 30, 2000, and that, following additional inspections confirming the dangerous nature of the market and having received no response by the record owner, the building was destroyed in mid-November 2000. The demolition cost to the city was $12,146, and defendant sought compensation for the cost from plaintiffs pursuant to city ordinance.

II. Summary Disposition, Documentary Evidence, and the Trial Court's Ruling

Defendant filed a motion for summary disposition, arguing that the city was immune from liability, that the city could not be guilty of trespass because it was authorized to enter and demolish plaintiffs' property, and that the city was entitled, as a matter of law, to recover the cost of the demolition. Defendant contended that the notice of demolition was sent to the address shown on the tract index on record with the Wayne County Register of Deeds, which was "the same address used for the taxpayer of record," and that it complied with the notice provision of § 12-11-28.4. Defendant also argued that "[e]ven though plaintiff[s] had adopted a new address for subsequent tax years, the address of record at the time of the order to demolish was used by the city." The motion contained claims that the market was first inspected on August 21, 1999, on the basis of a complaint by a neighborhood resident, and that the market was found barricaded. The July 28, 2000, inspection found that one of the brick walls of the building had been stripped and that the building was a structural hazard and should be demolished on an emergency basis as permitted by § 12-11-29.1. Defendant maintained that it was demolished on an emergency basis.

In response, plaintiffs argued that, prior to the demolition and during the notice period, they had paid the property taxes on the market property and they had engaged in active, ongoing discussions and communications with the city on the purchase of three adjoining lots and the expansion of the market, which communications included the city corresponding with plaintiffs on several occasions by sending mail to a correct Warren, Michigan address. Further, plaintiffs had never seen any notice posted on the market, they sent the city notice of their Warren address

for purposes of tax bill and assessment mailings relative to the subject property, and the tax rolls on the property reflected the Warren address. According to plaintiffs, despite the city's knowledge of plaintiffs' correct address, the city sent notices regarding demolition by certified mail on August 22, 2000, to the address of the fire-damaged property, where no one was residing, and to a ten-year-old prior address of plaintiffs, and these notices were returned as undeliverable. Plaintiffs requested that the trial court grant summary disposition in their favor on the trespass/trespass-nuisance claims and on defendant's counterclaim for demolition costs.

In a reply brief, defendant contended that it pursued demolition of the market property on an emergency basis under § 12-11-29.0 *et seq.* of the city code and was thus not under any obligation to provide notice. It was argued, therefore, that assuming without conceding that the notice was deficient, defendant acted properly and its actions did not constitute trespass/trespass-nuisance.

Our review of the documentary evidence submitted by the parties reveals a March 2, 1999, letter from the Detroit Planning & Development Department (hereinafter "planning department") that was addressed to plaintiffs at the Warren address and regarded the potential purchase of lots surrounding the parcel on which the market was located. In fact, the market address at 6800 Kercheval is crossed out in the letter with the Warren address written in. The record also contains a June 2000 interoffice memorandum of the planning department reflecting a $730 good-faith deposit on the surrounding lots paid by plaintiffs. Further, there is a September 20, 2000, letter from the planning department mailed to plaintiffs at their Warren address, which states, in part:

> On July 25, 2000, the City Planning & Development Department conducted a site visit of the properties you requested to purchase at 1820 Concord. The Concord Market has been destroyed by fire damage. What is your planned use of the properties?

The record also contains letters dated September 27 and October 3, 2000, sent by the planning department to plaintiffs at the Warren address regarding property purchases. There are several letters from plaintiffs to the planning department containing plaintiffs' Warren address. Plaintiffs additionally submitted a handwritten letter sent by plaintiffs to the city, stamp-dated August 12, 1999, which indicated their ownership of the market and informed the city to "change the mailing address for all tax bills and statements to" the Warren address. The trial court further received the following documents: an undated 2000 tax assessment notice or statement concerning the taxes on the market property covering December 1, 2000, to November 30, 2001, mailed by the city to the Warren address; 1997-1999 city income tax documents for plaintiffs mailed to the Warren address; an undated emergency demolition request from the Detroit Buildings and Safety Engineering Department (hereinafter "buildings department") to the Detroit Department of Public Works regarding the market property; an August 18, 2000, emergency demolition request from the buildings department to the city council,[2] and copies of certified

[2] This request provides in relevant part:

(continued…)

mail receipts showing attempted and failed delivery of notices to plaintiffs at an old address and at the market address. The notices were mailed out on August 22, 2000.

Plaintiffs also submitted an affidavit of a former employee of the market who lived in the neighborhood where the market was located. The affiant stated that plaintiffs continued to employ him after the fire by having him keep an eye on the fire-damaged market. The affiant asserted that he walked by and examined the building on a daily basis and never observed any type of notice on the structure. Finally, plaintiffs submitted a portion of a deposition transcript relative to the deposition of Abdul-Musawwair Aquil, an assistant chief in the buildings department, who testified with regard to the notice procedure utilized by the city prior to demolition.

> *Q.* Would they use the Wayne County information as to who has paid the taxes and what address they have for that person to send notices to, if you know?
>
> *A.* No.
>
> *Q.* If it's the owner of the building they wouldn't?
>
> *A.* Well, it's just not checked.
>
> *Q.* What do you mean it's not checked?
>
> *A.* Well, we're only – our processes only require us to check the addresses at the Wayne County Register of Deeds and send notification to the holders of the warranty deed or those who have – may have the lien or such interest in the property.
>
> *Q.* All right. So you may use an address on a warranty deed that's 30 years old?
>
> *A.* Yes.
>
> *Q.* And you don't check the tax rolls to make sure that that person hasn't moved?
>
> *A.* It hasn't been part of our procedures.

Defendant city presented the affidavit of a finance department employee who averred that the 1999 and 2000 county tax rolls reflected that the address for the taxpayer of record regarding the market property was the same address as the market. The employee further averred that to change the tax assessment records regarding the address of the taxpayer of record, it was

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(…continued)

> It is our opinion that there is an actual and immediate danger affecting the health, safety and welfare of the public. Therefore, under the authority of Ordinance 290-H, we request that the Department of Public Works immediately take emergency measures to have this building or portions thereof removed with the cost assessed against the property.

necessary to use a preprinted governmental form. Finally, the finance department employee asserted that the taxpayer of record for the market property in August 2000 had the same address as the market property; the notices of demolition were sent out in August 2000. Supporting documentation was attached to the affidavit which was submitted as part of defendant's reply brief.

The relevant provisions of the Dangerous Building Ordinance 290-H, 1984 Detroit City Code, read as follows:

Section 12-11-28.4(a).

> Notwithstanding any other provisions of this ordinance, when the whole or any part of any building or structure is found to be a dangerous building, the Building Official shall issue a notice to the owner or owners of record that the building or structure is a dangerous building and to appear before a hearing officer, who shall be appointed by the Building Official, to show cause at the hearing why the building or structure should not be demolished, repaired, or otherwise made safe. All notices shall be in writing and shall be delivered by an agent of the department, or shall be sent by registered or certified mail, return receipt requested, to the last known address of such owner or owners. In determining the last known address of the owner(s), the department shall examine the records of the last City of Detroit and County of Wayne tax assessment, and the records of the County of Wayne Registrar of Deeds. If an owner cannot be located after a diligent search, the notice shall be posted upon a conspicuous part of the building or structure.

Section 12-11-29.2.

> When in the opinion of the building official, there is actual or immediate danger of collapse or failure of a building or structure or any part thereof or where such other conditions exist which would endanger life, or constitute a hazard to the general public, he shall cause the necessary work to be done to abate the dangerous condition, whether or not the legal procedure herein described has been instituted.

The parties presented oral argument, and the trial court, clearly exasperated by the city's failure to provide notice to the Warren address and its reliance on sending the notice to the burned-out market where no one residing, ruled in plaintiffs' favor in cursory fashion, adopting plaintiffs' position on the matters presented. Judgment was entered in favor of plaintiffs on the trespass/trespass-nuisance claims, the gross negligence claim was dismissed, and defendant's claim for recovery of demolition costs was summarily dismissed.

Defendant appeals as of right, arguing that plaintiffs' trespass/trespass-nuisance claims are barred by governmental immunity, that the city cannot be held liable for trespass/trespass-nuisance because the demolition was authorized by law, and that the city is entitled to recover the costs of demolition as a matter of law.

III. Analysis

A. *Standards of Review and Summary Disposition Tests*

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven,* 460 Mich 667, 674; 597 NW2d 99 (1999). Issues of law are also reviewed de novo. *Mahaffey v Attorney General,* 222 Mich App 325, 334; 564 NW2d 104 (1997).

MCR 2.116(C)(7) tests, in part, whether claims are barred due to immunity granted by law. *Glancy v City of Roseville,* 457 Mich 580, 583; 577 NW2d 897 (1998). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Pusakulich v City of Ironwood,* 247 Mich App 80, 82; 635 NW2d 323 (2001). In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the trial court must consider all affidavits, depositions, admissions, or other documentary evidence if submitted or filed by the parties. *Id.* When facts material to the immunity claim are not disputed, the issue becomes whether the defendant is entitled to immunity as a matter of law. *Gilliam v Hi-Temp Products, Inc,* 260 Mich App 98, 108-109; 677 NW2d 856 (2003).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has held that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in regard to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* The burden then shifts to the party opposing the motion to establish that a genuine issue of disputed fact exists. *Id.* All affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion for summary disposition is properly granted. *Id.* at 363.

B. *Governmental Immunity*

Defendant argues that plaintiffs' trespass/trespass-nuisance claims are barred by governmental immunity. It is unnecessary for us to explore in detail defendant's argument because our Supreme Court's ruling in *Pohutski, supra,* a case not addressed or acknowledged by defendant, clearly dictates our course. The Michigan Supreme Court, overruling *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988), and its progeny, held:

> [T]he plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. Trespass-nuisance simply is not one of the five exceptions to immunity set forth in the governmental tort liability act. As stated above, we are bound by the clear and unambiguous

> statutory text; we lack constitutional authority to impose on the people of this state our individual policy preferences regarding the availability of lawsuits arising from the operation of a sewage system. We must "seek to faithfully construe and apply those stated public policy choices made by the Legislature" in drafting the governmental tort liability act. We are mindful that, because immunity necessarily implies that a "wrong" has occurred, some harm caused by a governmental agency may lack a remedy. Although governmental agencies have many duties regarding the services they provide to the public, a breach of those duties is compensable under the statute only if it falls within one of the statutorily created exceptions. [*Pohutski, supra* at 689-690 (citations omitted).]

The Supreme Court, however, held that its ruling was prospective and "will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply." *Id.* at 699. Here, plaintiffs' complaint was filed on March 5, 2002. Accordingly, *Hadfield* applies, and, as stated by the *Pohutski* Court, *Hadfield* concluded that recognition of the historic trespass-nuisance exception to governmental immunity was required by the language of MCL 691.1407. *Pohutski, supra* at 685. The *Hadfield* Court held that, "[b]ecause the concepts of trespass and 'classic' nuisance are so close, we include both trespass and trespassory nuisance within the exception adopted today." *Hadfield, supra* at 151. Plaintiffs' trespass/trespass-nuisance claims, therefore, are not barred under principles of governmental immunity.

C. *Trespass/Trespass-Nuisance*

Defendant argues that it cannot be held liable for trespass/trespass-nuisance because the demolition was authorized by law and it complied with the demolition procedures set forth in the ordinance.

Trespass arises where there is an invasion or intrusion of a landowner's interest in the exclusive possession of his land. *Hadfield, supra* at 151. Nuisance arises, in general, where there is an interference with a property owner's use and enjoyment of his property. *Id.* "Trespass-nuisance shall be defined as trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage." *Id.* at 169. The elements of a trespass-nuisance cause of action are: "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Id.*

Trespass is an unauthorized intrusion or invasion, *Douglas v Bergland*, 216 Mich 380, 384; 185 NW 819 (1921), and "[n]ormally, a public officer who is on the premises of another pursuant to legal authorization is not liable for trespass[,]" *Antkiewicz v Motorists Mut Ins Co*, 91 Mich App 389, 396; 283 NW2d 749 (1979), vacated in part on other grounds 407 Mich 936; 285 NW2d 659 (1979). See also *Antonian v City of Dearborn Heights*, 224 F Supp 2d 1129, 1143-1144 (ED Mich, 2002); *Fruman v Detroit*, 1 F Supp 2d 665, 675 (ED Mich, 1998). There is liability, however, when the public officer acts in excess of his authority, such as where he does not comply with city code or an ordinance. *Antkiewicz, supra* at 396; *Antonian, supra* at 1144; *Fruman, supra* at 675. We recognize that simply because an ordinance or code authorizes a particular action, it does not necessarily make the action lawful, even where there is full compliance with the ordinance or code, where the provision is enacted in excess or in violation

of statutory or constitutional authority. But no such claims are made here, and our focus is on whether defendant complied with the ordinance, and more particularly whether defendant complied with the applicable notice provisions. Of course, our analysis is also made within the framework of a (C)(10) motion.

Section 12-11-28.4(a) touches on delivery of notice to the "last known address," examination of tax assessment and register of deeds records, and the exercise of a diligent search. It appears that the notices, sent in August 2000, were mailed to addresses predicated on deed records that matched, at the time, tax roll addresses. On the other hand, it is arguable that the "city" was aware of a proper "last known address," which deviated from the tax and deed records, where for two plus years the planning department mailed correspondence to the Warren address, and where plaintiffs, in August 1999, mailed a change of address request to the city for tax purposes relative to the market property. Despite the fact that the change of address was not made pursuant to proper procedure through the use of governmental forms, there is no indication that the city did not receive the handwritten paperwork. Apparently, one arm of the city, the buildings department, was not aware of well-known information held by another arm, the planning department, with respect to plaintiffs' Warren address. We note our full appreciation of the complexity of city government in high-density population centers such as Detroit and the overwhelming job involved in monitoring dilapidated and dangerous buildings located throughout the large city.

We find it unnecessary to determine whether defendant exercised diligence in ascertaining an address, whether the buildings department, and hence the city, should be held knowledgeable of address information known to the city's planning department, whether all that was necessary was use of deed and tax records, or whether genuine issues of material fact exist on these matters. It is unnecessary because of the last sentence in § 12-11-28.4(a), which provides that "[i]f an owner cannot be located after a diligent search, the notice *shall* be posted upon a conspicuous part of the building or structure." (Emphasis added.) The owners could not be located as reflected in the certified mailings that came back undeliverable, and, assuming a diligent search, it was incumbent on defendant to post the notice on the building. Defendant, however, submitted no evidence that any notice was placed or posted on the market. At oral argument below, this point was essentially conceded by defense counsel as indicated on questioning by the trial court.

> *Q.* Well, where did you attach the notice?
>
> *A.* That I do not know. I don't know if there was notice attached quite frankly, Your Honor.

Moreover, plaintiffs employed an individual to keep an eye on the building during the intervening two years between the fire and demolition, and this individual submitted an affidavit, averring, in relevant part:

> 4. [I] had occasion to walk by and examine the building on a daily basis.
>
> 5. That at no time prior to the demolition of the Concord Market on November 15, 2000, was any type of notice ever posted on the Concord Market.

In light of the evidence presented at summary disposition, there is no genuine issue of fact that defendant failed to post a notice on the market as required by the ordinance; therefore, it lacked legal authority, under § 12-11-28.4(a), to intrude on the property owned by plaintiffs and demolish the building. Accordingly, the city's actions constituted trespass/trespass-nuisance.[3] Had defendant posted the required notice, it most likely would have been observed by plaintiffs' employee, and the whole incident could have been avoided.

Defendant argues that it was not proceeding under § 12-11-28.4(a) but rather § 12-11-29.0 *et seq.*, which governs emergency demolitions. Section 12-11-29.2 does authorize the city to abate a dangerous condition that needs urgent attention in order to avoid a danger to the public, "whether or not the legal procedure herein described has been instituted." Defendant submitted two documents indicating a *request* for emergency demolition made to the city council and the public works department. One of the requests is undated and the other is dated August 18, 2000, which is approximately an entire month after the July 2000 inspection that ultimately lead to the alleged emergency demolition. Regardless, the record indicates that irrespective of a request for emergency demolition, the procedure that was actually implemented was consistent with § 12-11-28.0 *et seq.* As reflected in defendant's counterclaim[4], this included the mailing of notices, the holding of a show cause hearing, the entering of a decision and recommendation by the hearing officer following hearing, and the issuance of a demolition order by the city council. See § 12-11-28.4. The actual demolition occurred nearly four months after the July 2000 inspection. The city did not pursue this matter as an emergency demolition under § 12-11-29.0 *et seq.*, and it cannot now claim that it did so in order to avoid the failure of proper notice. We also note that defendant's answer and affirmative defenses reference and place reliance solely on § 12-11-28.0 *et seq.*, calling into question defendant's claim that § 12-11-29.0 *et seq.* controlled and suggesting a waiver of any defense premised on legal authorization without necessity to provide notice. MCR 2.111(F)(3)(b)&(c). The trial court did not commit error. In light of our

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[3] In *Fruman*, the city of Detroit incorrectly sent out eight notices of hearings and/or demolition to the address of the property to be demolished, while being aware of the plaintiff's correct Dearborn address based on the plaintiff changing his address on the city tax rolls and tax notices being sent to the Dearborn address. The federal district court found the city liable for trespass in demolishing the property, where the city failed to mail the notices to the last known address, failed to perform a diligent search to ascertain the plaintiff's whereabouts, and failed to post any notices. *Fruman, supra* at 675. In the context of its discussion regarding a procedural due process violation, the court stated that "to the extent that the City contends that its demolition of Plaintiff's building was lawful under the Ordinance because Plaintiff could not be located, there is no evidence that the City 'conspicuously posted' any of the notices on the Gratiot building as provided in the Ordinance." *Id.* at 672.

[4] Defendant's counterclaim provided in part:

> 7. On or after that date, Counter-Plaintiff City of Detroit served a notice of hearing regarding these findings on the owner of record.
>
> 8. On or after that date, a hearing was held on the finding of a dangerous building, and the hearing officer recommended that remedial action be taken.

conclusion that defendant lacked proper lawful authority to demolish plaintiffs' market, there is no basis for defendant to recover its demolition costs as requested in the counterclaim, and that claim was properly dismissed.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White