

STATE OF MICHIGAN
COURT OF APPEALS

AMANDA BROOKS, Individually and as Next
Friend of DEVONTE BROOKS, a Minor,
FREDDERICK MORROW, a Minor, and
CHAKYRA MORROW, a Minor,

Plaintiff-Appellee,

v

CITY OF DETROIT and DETROIT HOUSING
COMMISSION,

Defendants-Appellants.

UNPUBLISHED
January 29, 2009

No. 282413
Wayne Circuit Court
LC No. 07-705107-NI

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right the order of the trial court denying their motion for summary disposition predicated on governmental immunity. We reverse and remand this case to the trial court with instructions to grant the motion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

According to plaintiff, she and her three minor children lived in public housing in Detroit pursuant to a lease between plaintiff and the Housing Commission. The lease obligated the Housing Commission to inspect the premises and to maintain them in good repair, in compliance with all applicable building codes and regulations. Plaintiff asserted that failures to fulfill those duties resulted in a water leak that caused mold to develop. Plaintiff complained that her requests for repairs or alternate housing went unanswered, causing her family to endure “pain, suffering, humiliation, embarrassment, diminution of earning capacity, and mental and emotional anguish and anxiety as well as a deprivation of the normal enjoyments of life.”

The complaint alleged both breach of contract and gross negligence. Plaintiff originally included the United States Department of Housing and Urban Development among the defendants. The federal agency removed the case to federal district court, upon which plaintiff stipulated to dismissal of the agency from the case, thus leaving no basis for federal jurisdiction. The case returned to Wayne Circuit Court.

Defendants moved for summary disposition in accordance with MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(8) (failure to state a claim). The trial court granted the motion with respect to the gross negligence claim, but denied it with respect to the contract claim. Plaintiff expressed interest in amending her complaint to allege a claim under 42 USC 1983, but the trial court rebuffed the request on the ground that the stipulation given in federal court, which stated that there were no federal issues, precluded such amendment.

In refusing to dismiss the contract claim, the trial court initially stated that it should not go forward, correctly stating, “the law is that you can’t claim a personal injury based on a contract.” But the trial court then went on to express sympathy for plaintiff and personal disagreement with how governmental immunity operates, and it declined to dismiss the contract claim while advising plaintiff that this Court would likely reverse.

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). “[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed.” *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphases in the original). Accordingly, governmental and private tortfeasors are to be treated differently, with the result that “some tort claims, against a governmental agency, will inevitably go unremedied.” *Id.* at 156-157. No exception to governmental immunity covers negligent failure to maintain public housing in good repair.

MCR 2.116(C)(7) authorizes motions for summary disposition premised upon “immunity granted by law” A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting as true all well-pleaded allegations and construing them in the light most favorable to the nonmoving party. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 583; 640 NW2d 321 (2001). Review is de novo. *Id.* at 582.

Plaintiff has pleaded a personal injury action for damages in negligence, not an action for contract damages. See *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995) (“[T]he court may look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted.”) She complains of health problems, embarrassment, diminished earnings, and emotional anguish, and seeks damages to redress those personal injuries. However, where negligent breach of contractual duties results in personal injuries, those personal injuries are compensable in tort, not contract. See *Mobil Oil Corp v Thorn*, 401 Mich 306, 310-313; 258 NW2d 30 (1977). Plaintiff has thus failed to plead in avoidance of governmental immunity. See *Jones v Williams*, 172 Mich App 167, 171; 431 NW2d 419 (1988).

Because plaintiff’s contract claim is really a tort claim in disguise, concerning an area where no exception to governmental tort immunity applies, the trial court erred in denying defendants’ motion for summary disposition of it.

Further, “[u]nder the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise.” *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000). Not at issue in this case is that the alleged failures to inspect and repair were in violation of applicable city ordinances and federal regulations. Accordingly, contract

damages in connection with those violations would not be available to plaintiff even if she had otherwise pleaded a valid contract claim.

Plaintiff urges this Court, in the event that we conclude that the contract claim may not go forward, to allow her to amend her complaint to set forth a claim under 42 USC 1983. However, plaintiff's attorney provided a case summary to the federal district court while this case was pending there, asserting that "there are no longer any federal issues to be decided by the court, nor are there any other bases for federal jurisdiction in the matter." This stipulation resulted in the remand of this case to Wayne Circuit Court. That no federal issues remain is thus the law of the case. Further, because this alternative argument calls for a change in the outcome below, plaintiff was obliged to cross appeal to raise it, but did not do so. See *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). For these reasons, plaintiff's alternative prayer for relief is unavailing.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra