STATE OF MICHIGAN

COURT OF APPEALS

LEE M. KHAN, a/k/a LEE M. KAHAN,[1]

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
December 7, 2010

No. 293991
Genesee Circuit Court
LC No. 08-089357-CZ

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Plaintiff owned a one-unit house that was damaged by fire. Plaintiff reached an agreement with the property's insurer about compensation but, before construction started, defendant demolished the property. Plaintiff's subsequent claim to the property's insurer was denied because the damage to the property was the result of a demolition and this type of damage was not covered under the policy. Plaintiff brought suit against defendant, claiming a violation of his constitutional rights to due notice under the state and federal constitutions and tortious interference with a contractual relationship.

After filing an answer to plaintiff's complaint and its affirmative defenses, defendant sent plaintiff a set of interrogatories, requests for admissions, and requests for production. When plaintiff failed to respond to the requests for admissions, defendant first sent a reminder letter and then filed a motion asking the court to deem as admitted the matters of those requests.[2] The trial court granted this motion and found, among other things, that "[p]laintiff was aware that

[1] Plaintiff's last name is spelled variously throughout the lower court record as Khan and Kahan.

[2] Under MCR 2.312(B)(1), each matter as to which a request for admissions is made is deemed admitted unless the party to whom the request is directed files an answer or objection within 28 days.

[the property] was set for demolition before the demolition took place." The court later granted summary disposition in favor of defendant.

II. STANDARD OF REVIEW

We review de novo both a trial court's ruling on a motion for summary disposition, *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007), as well as issues of constitutional law. *In re Carey*, 241 Mich App 222, 226; 615 NW2d 742 (2000). We view all the pleadings and the evidence in a light most favorable to the nonmoving party when considering a motion for summary disposition brought under MCR 2.116(C)(10). *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

III. CONSTITUTIONAL CLAIMS[3]

We must first decide whether the defendant's employee's failures to properly read the registry and request a title search violated plaintiff's due process rights under the state and federal constitutions. "The federal and Michigan constitutions guarantee that persons may not be deprived of life, liberty, or property without due process of law." *Hanlon v Civil Service Comm*, 253 Mich App 710, 722; 660 NW2d 74 (2002), citing US Const, Am V; Const 1963, art 1, § 17. The Michigan constitution provides no greater due process protection than the federal due process guarantee. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). When evaluating a due process claim, courts are to first determine "'[w]hether any procedural protections are due' and then decide[] 'what process is due.'" *Dow v State of Michigan*, 396 Mich 192, 203; 240 NW2d 450 (1976), quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

The US Supreme Court has determined that the phrase "due process of law" entitles individuals whose property interests are at stake to "notice and an opportunity to be heard." *Dusenbery v United States*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002), quoting *United States v James Daniel Good Real Property*, 510 US 43, 48; 114 S Ct 492; 126 L Ed 2d 490 (1993). When determining whether the notice given is sufficient for due process purposes, courts are to determine whether the notice was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 168, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314, 319; 70 S Ct 652; 94 L Ed 865 (1950). Due process does not require actual notice to an interested party, only that the effort in giving notice be reasonably calculated to apprise interested parties of the action. *Dusenbery*, 534 US at 170-171. Lastly, the fundamental requirements of due process are satisfied if a party received actual notice. See *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich App 502, 506; 448 NW2d 43 (1989); see also *Reenders v Parker*, 217 Mich App 373, 376; 551 NW2d 474 (1996).

[3] Although poorly drafted, plaintiff's petition essentially alleges three claims: a 42 USC 1983 civil rights claim, a due process violation under the Fourteenth Amendment, and a taking claim under the Fifth Amendment. On remand, the plaintiff shall be permitted to amend his pleading to more specifically argue these claims and how the facts meet the elements of each claim, without prejudice to defendant's right to bring motions for summary disposition should discovery not provide support for plaintiff's claims.

In this case, plaintiff failed to timely respond to defendant's requests for admissions and the court deemed admitted that "[p]laintiff was aware that [the property] was set for demolition before the demolition took place." We agree with the trial court that the admission establishes that plaintiff had actual notice of a planned demolition. However, nothing in the record indicates that plaintiff had notice of his right to a hearing, let alone when, where, or how to request such a hearing.

> As due process has been interpreted to require both "notice" and "hearing," the absence of either will result in a denial of due process, hence, an unlawful taking. It is important to recognize that for notice to be effective, it is necessary that the notice be given not only as to what is to be (or has been) decided (*i.e.*, the determination of plaintiff's house to be a nuisance and the decision to demolish it) but also notice as to when and where the hearing is going to take place regarding said issues, including what, if anything, must be done to demand such a hearing. To omit the latter would certainly destroy the whole purpose of a hearing—providing one with an opportunity before the taking of his property to defend, protect and enforce his rights. [*Geftos v Lincoln Park*, 39 Mich App 644, 651-652; 198 NW2d 169 (1972).]

Because plaintiff's actual notice of the demolition was not sufficient to constitute the notice required for due process, the trial court erred in granting summary disposition of plaintiff's claims to defendant under MCR 2.116(C)(8) on that ground.

Furthermore, in *Sidun v Wayne Co Treasurer*, 481 Mich 503, 514-515; 751 NW2d 453 (2008), our Supreme Court held:

> If the government provides notice by mail, due process requires it to be mailed to an "address reasonably calculated to reach the person entitled to notice." *Dow* [*v Michigan*, 396 Mich 192,] 211[; 240 NW2d 450 (1976)]. The address "reasonably calculated to reach [plaintiff]," a person who was entitled to notice, was her home address that was listed on the recorded deed in defendant's possession. Because defendant had plaintiff's address at hand, but failed to mail notice to her at that address, defendant failed to accord plaintiff minimal due process.

Here, the record indicates that defendant had plaintiff's address but failed to mail him notice, which under *Sidun* is a violation of due process. Accordingly, we conclude that plaintiff's due process claims survived summary disposition.

Nevertheless, we conclude that summary disposition as to plaintiff's claim under the Michigan Constitution was appropriate because defendant, as a municipality, cannot be sued for violations of the state constitution, since a plaintiff may pursue other remedies against a municipality. *Jones v Powell*, 462 Mich 329, 333, 337; 612 NW2d 423 (2000). Thus, because the trial court reached the right result, albeit for the wrong reason, we affirm the dismissal of plaintiff's claim under the Michigan Constitution. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

As for plaintiff's 42 USC 1983 claim against defendant City, we agree with defendant that this claim may not be based simply upon the fact that the clerk who sent the notice to the wrong location was an employee of the City. "[A] municipality cannot be held liable *solely* because it employs a tortfeasor . . . a municipality may not be held liable under § 1983 on a *respondeat superior* theory." *Monell v Department of Social Services*, 436 US 658, 691; 98 S Ct 2018, 2036; 56 L Ed 2d 611 (1978) (emphasis in original). Rather, to establish municipal liability, the plaintiff must establish that the actions of the employee giving rise to the constitutional violation were taken in conformity with or in furtherance of an "unconstitutional municipal policy which policy can be attributed to a municipal policymaker." *Oklahoma City v Tuttle*, 471 US 808, 823-824; 105 S Ct 2427, 2436; 85 L Ed 2d 791 (1985). Indeed, where the employee is adhering to an official policy, even a single instance of unconstitutional activity may be sufficient to impose municipal liability. *Id*.; *Pembrauer v City of Cincinnati*, 475 US 469, 478-480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). "But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 US at 824 (footnote omitted).

In its response to the summary disposition motion, plaintiff submitted an affidavit from a member of the City Council indicating that although the city had had a procedure in place to assure that proper notice was provided before any demolitions occurred, the mayor at the time of the instant events had adopted a policy that that procedure was no longer to be followed. The mayor is an ultimate decisionmaker whose policies can be attributed to the city. See *Board of County Commissioners of Bryan County v Brown*, 520 US 397, 405; 117 S Ct 1382; 137 L Ed 2d 626 (1997). If the mayor's alleged action is shown to be the cause of the City employee's failure to provide proper notice, then municipal liability may be properly found.

Defendant asserts that a single constitutional violation can never be the basis for a § 1983 claim against a municipality. We disagree. In, *Brown* the Court held that the issue is not how often the constitutional deprivations occur, but whether there is a "direct causal link between the municipal action and the deprivation." *Brown*, 520 US at 404. Thus, if the policy purportedly created by the mayor was the cause of the employee's actions in failing to provide notice, then municipal liability arises. If the plaintiff fails, however, to demonstrate that the mayor had adopted such a policy and that the employee's actions followed from that policy, then no municipal liability arises.[4] Defendant cites federal cases where several discrete incidents of constitutional violations have been held not to amount to a custom or policy. However, in those cases, the only evidence of the custom was the existence of these discrete incidents. In the instant case, there is an affidavit from a council person attesting to a decision by the mayor to adopt such a policy.

Accordingly, there was a question of fact whether the failure to provide notice to the plaintiff was the result of an unconstitutional municipal policy, precluding summary disposition of plaintiff's § 1983 claim.

[4] Defendant has suggested that in such a situation, plaintiff would not be deprived of a remedy as he could still bring claims against the employee herself.

IV. TORTIOUS INTERFERENCE

Plaintiff next argues that defendant's actions constituted tortious interference with a contract[5] and contends that he set forth the requisite pleadings and evidence concerning this claim when he provided proof that his second claim to the property's insurer was denied and alleged that defendant acted with bad faith when it deprived him of notice of the demolition.[6] However, plaintiff did not overcome defendant's affirmative defense of governmental immunity. Although plaintiff correctly argues that the doctrine of governmental immunity does not protect a defendant while engaging in proprietary functions, there was no evidence that showed defendant pursued demolition activities for the primary purpose of producing a pecuniary profit. See *Herman v City of Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004). Therefore, the trial court properly granted summary disposition of this claim under MCR 2.116(C)(7) on the ground of governmental immunity.

V. REMAINING CLAIMS

Finally, plaintiff's arguments concerning the claims of trespass-nuisance and uncompensated taking were not alleged in his complaint nor adjudicated at the trial level. Therefore, they were not preserved for appellate review, and we decline to address them for the first time on appeal. See *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 569-570; 766 NW2d 896 (2009). However, nothing in this opinion shall preclude plaintiff from filing a motion to amend to include these claims on remand.

VI. CONCLUSION

We affirm the trial court's grant of summary disposition as to plaintiff's claim under the Michigan Constitution as well as his tortious interference claim, but reverse the trial court's grant of summary disposition as to plaintiff's claims under the US Constitution, and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full. MCR 7.219.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

[5] The elements of tortious interference with a contract are: (1) the existence of a contract; (2) a breach of the contract; and (3) an unjustified instigation of the breach by the defendant. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005).

[6] See *CMI Intern, Inc v Intermet Intern Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002) (one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice).