STATE OF MICHIGAN

COURT OF APPEALS

FRANK NALI,

Plaintiff-Appellant,

v

CITY OF GROSSE POINTE WOODS, ANTHONY CHALUT and JAMES LAFER,

Defendants-Appellees.

UNPUBLISHED
May 17, 2012

No. 304019
Wayne Circuit Court
LC No. 10-007655-CZ

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. Because plaintiff's claim is barred by governmental immunity, we affirm.

City of Grosse Pointe Woods police officers, including the two named defendants, executed a search warrant at plaintiff's home in 2002 as part of an investigation. Certain items of plaintiff's personal property were seized and plaintiff was ultimately convicted of extortion. His conviction was eventually overturned and plaintiff thereafter sought to have his personal items returned to him. According to plaintiff, some of the seized items were damaged due to two separate floods that occurred within the property room of the police department and at least two items were not returned to him. Plaintiff thus initiated the instant action alleging negligence on the part of defendants. At the close of discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), which the trial court granted in their favor.

This Court reviews a trial court's grant of summary disposition de novo. *Blue Harvest, Inc v DOT*, 288 Mich App 267, 271; 792 NW2d 798 (2010). Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred by governmental immunity. *Id*. The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence," provided that the evidence would be admissible at trial. *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999)). This Court accepts the contents of the complaint as true unless contradicted by the evidence provided. *Id*.

This Court also reviews issues of statutory interpretation de novo. *Chandler v County of Muskegon*, 467 Mich 315, 319; 652 NW2d 224 (2002). "When interpreting statutory language,

[this Court's] obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Id*.

Plaintiff first argues that defendants had a duty to protect plaintiff's property because they seized plaintiff's property for an investigation, that a bailment arose under the circumstances, and that governmental immunity does not apply to bailments. We agree that defendants had a duty to maintain plaintiff's property, but hold that governmental immunity applies to this claim.

Plaintiff essentially argues that government immunity does not apply to his claim because he alleged the breach of a bailment contract, rather than a tort. We would not dispute that in general, the police have a duty to maintain property seized during an investigation. However, even if plaintiff were able to show a bailment this Court does not look to the label chosen by plaintiff to determine the substance of the complaint and, in turn, whether governmental immunity applies. See, *Spruytte v Department of Corrections*, 82 Mich App 145, 147; 266 NW2d 482 (1978). Because "significant public policy considerations are involved, the [c]ourt is not controlled by the labels chosen by the plaintiff." *Id*. The gist of plaintiff's complaint, no matter how labeled, is that defendants negligently handled his personal items and/or negligently maintained their premises such that his items stored at the police station were damaged. His action thus sounds in tort.

MCL 691.1407(1) provides, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." This Court's determination of whether governmental immunity applies only depends, then, on whether the governmental agency was engaged in a "governmental function." *Russell v Department of Corrections*, 234 Mich App 135, 137; 592 NW2d 125 (1999); *Spruytte*, 82 Mich App at 147; MCL 691.1407(1). The parties do not dispute that the police department is a governmental agency, that a police investigation constitutes carrying out a governmental function, or that defendants seized plaintiff's property under these conditions. Governmental immunity, therefore, applies to plaintiff's claim.

Plaintiff next argues that he has presented a question of fact regarding whether Officer Chalut's and Lafer's actions amounted to gross negligence that was the proximate cause of his property damage, such that they were not entitled to governmental immunity. We disagree.

We first note that plaintiff failed to plead facts in his complaint showing that governmental immunity does not apply, which is fatal to his claims against the defendant governmental entity, City of Grosse Pointe Woods. *Odom*, 482 Mich at 478-479 ("A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity. Placing this burden on the plaintiff relieves the government of the expense of discovery and trial in many cases."). "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack v City of Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Because plaintiff did neither, all of his claims against the City necessarily fail.

With respect to Officers Chalut and Lafer, they are employees of governmental agencies and are entitled to immunity from tort liability for injury to a person or damage to property, so long as: (1) the employee reasonably believed he or she was acting within the scope of his or her authority, (2) the governmental agency is engaged in a governmental function, and (3) the employee's conduct did not amount to gross negligence that is the proximate cause of the injury or damage. *Stanton v City of Battle Creek*, 466 Mich 611, 619-620; 647 NW2d 508 (2002); MCL 691.1407(2). "Gross negligence" means "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). "The" proximate cause of an injury for purposes of MCL 691.1407(2) is the "one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'" *Robinson v City of Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000). "Evidence of ordinary negligence does not create a material question of fact concerning the gross negligence necessary to overcome a defense of governmental immunity." *Maiden*, 461 Mich at 122-123.

Plaintiff only disputes the third element applicable to immunity, claiming that the officers' conduct amounted to gross negligence. Plaintiff's claim fails on several grounds. First, plaintiff only plead ordinary negligence. Additionally, as defendants note, plaintiff did not allege in his complaint that any exception to governmental immunity applies with respect to the governmental agency, *or* its employees. Second, plaintiff has failed to show which flood caused the damage. According to defendants, the first flood was caused by an outdoor storm sewer drain back-up, presumably outside defendants' control, which allowed water to enter their building. The second flood was caused by a burst water pipe inside the building. Plaintiff may not rely on speculation regarding what caused his alleged damages. Third, plaintiff alleges that certain items of his property were missing, such as the hard drive from the computer that was returned to him. However, defendants presented the inventory log showing that all the property was returned, and plaintiff has not presented evidence to refute this point. Plaintiff admitted at his deposition that he simply threw the computer away and did not provide defendants or anyone else the opportunity to inspect the computer to determine if the hard drive was, in fact, missing. Because plaintiff may not rely on mere allegations if disputed by record evidence, he has failed to show that the computer was returned without the hard drive.

Finally, plaintiff has failed to show that Officer Chalut's and Lafer's actions were "the" proximate cause of his damages, i.e., the most efficient, direct cause of plaintiff's damages. Defendants have admitted that two floods occurred in the police property room, but have also provided testimony that the floods were caused by ordinary problems associated with older buildings. No reasonable trier of fact could find that defendants were the proximate cause of the first flood, which was caused by the overflow of a storm drain, located outside of the building. Likewise, whether the second flood was caused by the bursting of a water pipe or a steam release valve, Officers Chalut and Lafer cannot be said to have been the proximate cause of this event. Plaintiff has not provided any evidence whatsoever that the officers' ordinary, let alone gross negligence caused or allowed a storm sewer located outside the building to back up or a pipe inside the building to burst. Plaintiff failed to establish that either of these occurrences happened before, or that defendants knew or had reason to know that the pipe would cause a flood. This claim, therefore, fails.

Plaintiff next argues that the trial court erred in finding that the public building exception to governmental immunity does not apply to the facts of this case. We disagree.

"The public building exception applies to public buildings open for use by members of the public and makes governmental agencies liable for injuries sustained for defects or dangerous conditions of a building if an agency failed to remedy such a condition or take action necessary to protect the public against it." *Kerbersky v Northern Mich Univ*, 458 Mich 525, 533; 582 NW2d 828 (1998) (citing MCL 691.1406) "[F]or a plaintiff to avoid governmental immunity under the public building exception, the plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time." *Renny v Dept of Trans*, 478 Mich 490, 495-496; 734 NW2d 518 (2007).

Defendants concede that a government agency is involved in this case. However, plaintiff has failed to show that the building in question should be considered open to use by members of the public at the time of the damage to his property. "Because the statutory language limits the exception to periods when the building is open for use by members of the public, accidents that occur when the building is closed to the public do not fall within the confines of the exception, and the government is entitled to immunity." *Maskery v Bd of Regents*, 468 Mich 609, 619-620; 664 NW2d 165 (2003). Plaintiff failed to depose any witnesses or present any other evidence regarding when the damage to his property occurred. Plaintiff, therefore, failed to meet his burden to produce evidence sufficient to find that this exception applies.

Plaintiff also failed to show that the floods occurred as a result of a dangerous or defective condition in the building. Again, the first flood occurred as a result of a storm drain overflow that occurred outside of the building, but caused water to flow into the building. This flood, therefore, occurred as a result of a condition outside the building. The second flood occurred as a result of a burst water pipe. Although the water pipe burst, plaintiff has failed to show that the burst occurred because of a dangerous condition, and the mere fact that damage occurred is insufficient to establish this fact. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) (". . . the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation . . . ."). Additionally, to the extent that plaintiff's argument may be construed as stating that a design defect caused the damage, it fails because "[MCL 691.1406] clearly does not support a design defect claim." *Renny*, 478 Mich at 500. Plaintiff has thus failed to establish that the cause of his injury was a dangerous condition in the building. Lastly, plaintiff failed to show that the governmental agency had actual or constructive knowledge of the alleged defect or that it failed to correct the defect in a reasonable time. Again, plaintiff simply failed to depose any witnesses or present any other record evidence supporting this element. Plaintiff's claim, therefore, must fail.

Plaintiff next argues that defendants waived their right to assert governmental immunity by purchasing indemnity insurance. We disagree.

MCL 691.1409 states:

> (2) The existence of an insurance policy indemnifying a governmental agency against liability for damages is not a waiver of a defense otherwise available to the governmental agency in the defense of the claim.

This statute explicitly and unambiguously allows a governmental agency to purchase indemnity insurance without waiving its right to assert defenses. As this Court stated in previously rejecting this argument, " . . . defendant did not waive any immunity by the purchase of liability insurance because the statute says so in language so clear and unequivocal that discussion is not warranted." *Pichette v Manistique Public Schools*, 50 Mich App 770, 775; 213 NW2d 784 (1973), rev'd on other grounds 403 Mich 268 (1978). We therefore reject this argument.

Plaintiff finally argues that, although not part of the statute, this Court should recognize an exception to governmental immunity based on public policy. We find no merit to his argument. There are six statutory exceptions to governmental immunity, and public policy is not included among them. Further, exceptions to governmental immunity are narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich at 614. To accept a nonstatutory exception would amount to a judicial expansion of the exceptions, creating such a cause of action would contravene the govermental tort liability act. We therefore refuse plaintiff's invitation to create a judicial exception to governmental immunity.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen Fort Hood