STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BUCK,

Plaintiff-Appellant,

v

CENTURY FARMS HOMEOWNERS' ASSOCIATION,

Defendant-Appellee,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

UNPUBLISHED
December 13, 2012

No. 306304
Wayne Circuit Court
LC No. 10-002411-CZ

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant Century Farms Homeowners' Association (CFHA) in this negligence action. We affirm.

I. BASIC FACTS

Plaintiff owns the home located at 1301 Heritage Drive in Canton, Michigan. This home is located in the Century Farms subdivision, making plaintiff a member of the CFHA. Part of CFHA's responsibilities included maintaining the common areas in the subdivision. One of these common areas ("the park") abuts plaintiff's back yard, with plaintiff's property sloping down to the park.

The area of the park near plaintiff's property line would regularly collect standing water after it rained. Historically, this water accumulation was contained to the park and did not go onto plaintiff's property. The CFHA Board of Directors was aware of this water accumulation for many years, and although it contemplated adding additional drainage to the area, it ultimately never made any alterations or improvements to the park area. The President of the Association, Robert Whiteaker, stated in an affidavit that he was informed by a Canton Township official that,

regardless of the presence of standing water, the drainage in the park was adequate. Further, Gregory Pyle, the environmental services supervisor for Canton Township, testified that there were no evident structural defects or blockages in the storm drainage system in the park area.

In 1996, plaintiff had a fiberglass in-ground pool installed in his backyard. Every winter a contractor would come to the house to winterize the pool and close it for the season. Shortly after removing the cover for the pool in May 2009, plaintiff noticed over the course of a few days that the pool itself "started raising out of the ground" and progressively got "worse and worse." The movement caused cracks and twists in the top half of the pool and the surrounding concrete. Because of the cracks at the top of the pool, the pool could only hold about half its capacity of water.

Plaintiff contacted defendant State Farm, his homeowner insurance carrier, about the damage. State Farm then sent Bud G. Schoch III, a licensed professional engineer from Paragon Forensic, to investigate the damage. Schoch issued a report to State Farm, where he concluded the following:

> The fiberglass pool floated up out of the ground because of an elevated ground water table. Willow Run Airport, located about 8 miles southwest of the loss location, recorded 1.87 inches of rain between May 13 and May 16. Because of the elevated groundwater table, the rigid pool acted like a boat and floated up out of the ground, lifting the edge of the surrounding concrete apron that was tied to the perimeter of the pool.

After receiving Schoch's report, State Farm denied coverage to plaintiff because the homeowner's policy specifically excluded damage as a result of "water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure."

On February 25, 2010, plaintiff filed a complaint alleging negligence against CFHA and two of its officers. On November 4, 2010, the parties stipulated to dismissing the two officers as parties. Then on December, 28, 2010, plaintiff filed an amended complaint against CFHA.[1] The amended complaint again alleged negligence and, with regard to causation, alleged the following:

> 19. As a proximate result of the CFHA's negligence and carelessness, the rainwater was permitted to continue to accumulate in the common park area.
>
> 20. [Plaintiff's] property was damaged as a proximate result of either the water being allowed to accumulate in the common park area due to improper drainage and flooding into [plaintiff's] backyard thereby lifting the pool or by that

[1] The amended complaint also named State Farm as a defendant, but plaintiff later voluntarily dismissed its claims against State Farm.

standing water being allowed to significantly raise the ground water table, thereby lifting the pool from its concrete apron.

After discovery had closed, CFHA moved for summary disposition under MCR 2.116(C)(10). CFHA first argued that it owed to no duty to plaintiff, and in support of its argument, CFHA relied on case law that addressed how, in general, parties are not responsible for the flow of surface water onto adjacent properties. Alternatively, CFHA argued that it was entitled to summary disposition because "plaintiff cannot show a genuine issue of factual causation, let alone legal or proximate causation. Plaintiff's case against defendant rests solely on speculation and conjecture because plaintiff cannot adequately establish[] what caused the alleged damage to his property."

Plaintiff opposed the motion and argued that there were issues of material fact remaining and that CFHA's reliance on any case law dealing with surface water was inapplicable since the damage was caused by ground water. CFHA filed a reply brief on July 26, 2011.[2]

At the motion hearing, plaintiff argued that CFHA's argument related to causation was not properly before the court because the issue was first raised in CFHA's reply brief. CFHA disagreed and noted that its motion for summary disposition included a discussion related to how plaintiff's claims of causation were based on "speculation and conjecture." After hearing oral arguments, the trial court granted CFHA's motion, stating that "there is nothing before the court to substantiate the claim [of causation] but speculation. . . . The report of Dr. Shock [sic] doesn't shed any light on the source of the groundwater."

Plaintiff filed a motion for reconsideration, which the trial court denied. Plaintiff's appeal ensued.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition in favor of CFHA. We disagree.

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim, *Dalley v Dykema Gossett*, 287 Mich App 296, 304 n 3; 788 NW2d 679 (2010), and we review a trial court's decision on such a motion novo, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

[2] Although this brief is missing from the lower court record, the absence of this brief has no bearing on our disposition of this case.

In order to establish a claim of negligence, a plaintiff must prove all of the following elements: "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; ___ NW2d ___ (2012) (quotations omitted). Therefore, to avoid summary disposition, plaintiff was required to make a prima facie showing of each of these elements. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

The trial court correctly found that plaintiff failed to produce any evidence on the element of causation. First, contrary to plaintiff's argument at the trial court and here on appeal, CFHA's initial motion for summary disposition in fact did assert that plaintiff's theory of causation was based on speculation and conjecture.[3] Second, plaintiff presented evidence, Schoch's report, merely establishing that *elevated ground water* caused the damage to the swimming pool. However, evidence that elevated ground water caused damage to plaintiff's swimming pool is not itself evidence that any alleged *CFHA breach of duty* caused the damage. Schoch's report made no statement or opinion regarding whether, or how, CFHA (or the standing water in the park) caused the ground water table to become elevated. As the trial court aptly noted, Schoch's report "doesn't shed any light on the source of the groundwater." Thus, plaintiff failed to produce evidence of the necessary element of causation, and the trial court did not err in granting summary disposition in favor of CFHA. The time to produce evidence is at the time of the motion for summary disposition – a plaintiff's promise to offer factual support at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992).[4]

Because we find that plaintiff did not produce evidence to establish the element of causation, we offer no opinion on whether plaintiff's evidence was sufficient to establish the other remaining elements.

We further note that plaintiff's attempt to show that there were genuine material issues of fact by finding inconsistencies in the submitted evidence misses the mark. None of the inconsistencies has any bearing on whether plaintiff successfully established a prima facie case of negligence against CFHA, which necessarily included evidence that CFHA's actions or inactions caused the ground water to become elevated such that it damaged plaintiff's pool.

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[3] As such, we offer no opinion on whether a defendant, on summary disposition, can raise for the first time in a reply brief the issue of a plaintiff's failure to establish a necessary element. We also feel compelled to note that plaintiff seeks support for his argument in MCR 7.212(G), the court rule regarding appellate briefs in this Court, but does not argue the application of court rules that govern procedure at the trial court.

[4] We also note that there was no evidence to support plaintiff's alternate theory in his complaint that standing/surface water "flood[ed]" onto his property and caused the damage. As discussed, the only submitted evidence related to causation unequivocally states that ground water, not surface water, caused the damage.

Affirmed. CFHA, the prevailing party may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher