STATE OF MICHIGAN

COURT OF APPEALS

JOHN CARLO, INC.,

Plaintiff-Appellant,

v

CITY OF AUBURN HILLS, OAKLAND COUNTY, and ORCHARD, HILTZ & McCLIMENT, INC.,

Defendants-Appellees.

UNPUBLISHED
March 19, 1999

No. 208521
Oakland Circuit Court
LC No. 97-543938 CZ

Before: Sawyer, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

This lawsuit arises out of the reconstruction and widening of a portion of University Drive that runs through the City of Auburn Hills in Oakland County. Defendant City of Auburn Hills contracted with defendant Orchard, Hiltz & McCliment, Inc. (OHM) to provide preliminary engineering services and plans and specifications for the project. The plans and specifications were incorporated into the bidding documents for the project. Plaintiff John Carlo, Inc. was the low bidder on the project and was awarded the contract.

During construction, plaintiff removed a quantity of peat from the construction site that it sold to a local landowner ("Haddix") who spread it on his land. The peat was apparently contaminated with "foundry clinkers," a manufacturing by-product. In a separate lawsuit, the landowner sued plaintiff to compel it to remove the contaminated material and to remediate the land. Plaintiff subsequently brought the present suit, alleging breach of contract, fraud and misrepresentation, innocent misrepresentation, negligence, and quantum meruit, in an effort to recoup the costs incurred in remediating the Haddix property. Plaintiff's suit was based on its assertion that the documents contained in the bid package supplied by the City did not indicate the presence of contaminated soil. The trial court granted summary disposition of all counts in favor of defendants, finding that under the terms of the contract, plaintiff was

required to test any materials removed from the construction site before disposing of the materials and that the costs incurred in remediating the Haddix property resulted from plaintiff's breach of contract.

Plaintiff first contends that, because the plans and specifications contained in the bid package for the project did not indicate the presence of contaminated materials, it was not contractually required to perform laboratory testing of soil removed from the construction site before disposing of it pursuant to the contract's "Special Provision for Non-hazardous Contaminated Material Handling and Disposal." This provision provided in relevant part that:

> The contractor shall be responsible for all sampling and analysis required for disposal of non-hazardous contaminated material.

We need not determine whether this provision requires a contractor to test *all* excavated materials in the absence of any indication in the plans and specifications for the project regarding the presence of contaminated materials. Here, the bid package provided to plaintiff included analyses of soil borings taken from the construction site.[1] Soil boring 10 indicated the presence of "slag, [2]" or foundry clinkers, thus alerting the contractor to the possibility of the existence of contaminated soil. Hence, under the express terms of the contract, plaintiff was responsible for the sampling and analysis required to dispose of any contaminated material. Plaintiff breached the express terms of the contract by failing to test the excavated soil before disposal. Hence, the trial court properly granted summary disposition of plaintiff's breach of contract claim against the City.

Plaintiff next contends that the trial court improperly determined that, as a matter of law, defendants are not liable to plaintiff for contribution under the Natural Resources Environmental Protection Act (NREPA), MCL 324.101 *et seq.;* MSA 13A.101 *et seq.*, as a result of the release of contaminated material from the project site. We disagree. The City and County are specifically excepted from liability under these facts pursuant to MCL 324.20126(3)(b); MSA 13A.20126(3)(b), which provides that:

> (3) Notwithstanding subsection (1), the following persons are not liable under this part unless the person is responsible for an activity causing a release at the facility:
>
> (b) A state or local unit of government that holds or acquires an easement interest in a facility, holds or acquires an interest in a facility by dedication in a plat, or by dedications pursuant to Act. No. 283 of the Public Acts of 1909, being sections 220.1 to 239.6 of the Michigan Compiled Laws, *or otherwise holds or acquires an interest in a facility for a transportation or utility corridor or public right of way.*

Plaintiff contends nonetheless that the City and County are responsible for the activity causing the release of contaminated material from the project site. However, it is undisputed that the City contracted with plaintiff to test and dispose of any contaminated materials at an approved "Type II" disposal facility. Instead, plaintiff failed to test the soil and contracted in its own capacity to sell the peat to a landowner. The "release" occurred when plaintiff improperly disposed of contaminated soil in violation of its contract with the City. Hence, it was plaintiff that was responsible for the activity causing

the release. Further, because OHM neither owned nor operated a facility, nor arranged for disposal or transportation of contaminated materials, the trial court properly dismissed the claim against OHM under the NREPA.

Plaintiff also contends that the trial court erred by concluding, as a matter of law, that governmental immunity barred plaintiff's tort actions against the City. We disagree. Highway design, construction, and maintenance clearly constitute governmental functions for which the City is immune from tort liability. MCL 691.1407(1); MSA 3.996(107)(1); *Potes v Dep't of State Highways*, 128 Mich App 765, 768; 341 NW2d 210 (1983). Plaintiff failed to allege facts that establish a recognized exception to the immunity afforded by § 1407. Further, plaintiff's vicarious liability claim against the City for the alleged negligence of OHM is similarly barred by governmental immunity. *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995).

Plaintiff next contends that the trial court erred in holding that, as a matter of law, OHM did not have a duty to test the soil for contamination. We disagree. The evidence presented revealed that OHM contracted with the City to prepare an environmental assessment to "evaluate project impacts to the environment," and to conduct "soil borings and related geotechnical investigations and recommendations for road work, culvert modifications, and wetland mitigation." Evidence was presented that OHM's duty was to determine whether the land was suitable for the project. No evidence was presented that OHM had a contractual duty to assess whether any contamination existed at the project site. In the absence of a genuine issue of material fact, the trial court properly granted summary disposition of plaintiff's claims against OHM for negligence and fraudulent misrepresentation.

Last, plaintiff argues that the trial court erred by summarily dismissing its quantum meruit claim against the County because the County was unjustly enriched by the removal of contaminated soil from the project site. We disagree. The County has only a transportation easement over the construction site and, therefore, has no liability for response activity costs at the site. MCL 324.20126(3)(b); MSA 13A.20126(3)(b). Hence, plaintiff's removal of the contaminated peat bestowed no benefit upon the County.[3]

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[1] Although the soil borings were performed to determine the appropriateness of the site for the proposed construction, see *infra*, the borings identified the presence of slag, a possible contaminant.

[2] Slag is defined as "the more or less completely fused and vitrified matter separated during the reduction of a metal from its ore." See Random House Webster's College Dictionary, 1992, p 1257.

[3] Further, the contract between the City and plaintiff specifically provided that plaintiff would be compensated for the removal, testing, and disposal of contaminated material. Any additional expense

incurred by plaintiff as a result of the removal of the contaminated material from the Haddix property was incurred solely as a result of plaintiff's breach of contract to test and properly dispose of excavated material.