STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. BICKLER and MARCIE BICKLER,

Plaintiffs-Appellees,

v

CITY OF TRAVERSE CITY,

Defendant-Appellant.

UNPUBLISHED
June 29, 2004

No. 248318
Grand Traverse Circuit Court
LC No. 02-022158-NZ

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial of its motion for partial summary disposition pursuant to MCR 7.202(7)(a)(v) and MCR 7.203(A)(1). We agree with defendant's argument that the trial court erred when it denied defendant's motion for summary disposition of plaintiffs' common law trespass-nuisance action because it is barred by the operation of MCL 691.1407. Reversed in part and remanded.

On December 30, 2001 water and sewage entered plaintiff's basement when a sewer main owned an operated by defendant became plugged. Plaintiffs filed a complaint on May 10, 2002 raising the following claims entitled: Count I Trespass-nuisance, Count II Taking-Michigan Constitution, Count III Taking – Federal Constitution, and Count IV Environmental Protection Act. Plaintiffs filed their first amended complaint on September 18, 2002 adding Count V Sewage Disposal System Event. On November 22, 2002, plaintiffs filed their second amended complaint adding a sixth claim, Count VI Promissory Estoppel.

Defendant brought a motion for partial summary disposition pursuant to MCR 2.116 (C)(7) and (8) and MCR 2.116(I)(2). Defendant argued that plaintiffs' common law trespass nuisance claim should be dismissed due to the holding of *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) eliminating common law trespass nuisance claims. Defendant argued plaintiffs' second claim, a taking under the Michigan Constitution should be dismissed because defendant's conduct did not constitute a taking under state law. Defendant asserted that plaintiffs' third claim, a federal takings claim, should be dismissed because it is not ripe for adjudication and that the alleged intrusion upon plaintiffs' property does not constitute a taking under the United States Constitution. Defendant charged that because plaintiff's did not properly state a claim under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101, *et seq*., plaintiff's fourth claim must be dismissed. Defendant next averred that it was entitled to partial summary disposition of plaintiff's fifth count for a sewage disposal event

pursuant to the sewage disposal act, MCL 691.1416 *et seq*. because plaintiffs did not allege the proofs necessary to recover non-economic damages. Finally, defendant claimed it was entitled to summary disposition on plaintiffs' last count, promissory estoppel because plaintiffs' sole remedy for relief is the sewage disposal act, and additionally, plaintiffs have failed to satisfy the elements of promissory estoppel.

In response, plaintiffs countered that defendant's motion should be denied and that the court should grant summary disposition in favor of plaintiffs. Plaintiffs argued that the sewage disposal act did not abrogate its constitutional claims because the state cannot statutorily abrogate constitutional claims. Further, that the sewage disposal act, by its own terms, abrogated only claims under the common law and therefore does not act as a bar to plaintiffs' statutory claim brought under NREPA. Plaintiffs' also claimed that they were entitled to summary disposition pursuant to MCR 2.116(C)(10) on their claims because there are no disputes regarding any material facts in the case other than damages.

During oral arguments on the cross-motions for summary disposition, plaintiffs' voluntarily dismissed count IV of their complaint under the NREPA. At the conclusion of the parties' arguments, the trial court issued an order concerning both motions. Regarding plaintiffs' Count I for common law trespass-nuisance, the trial court denied defendant's motion for summary disposition, and neither granted nor denied plaintiffs' motion for summary disposition "pending further briefing of the issue by the parties as to whether a material factual issue exists." The trial court denied both plaintiffs' and defendant's motions for summary disposition on plaintiffs' Count II, a takings claim under the Michigan Constitution. The trial court dismissed plaintiff's fourth count under the NREPA without prejudice. Finally, the trial court declined considering defendant's request for summary disposition on the remaining three counts, Count III Taking – Federal Constitution, Count V Sewage Disposal System Event, and Count VI Promissory Estoppel stating that if defendant wanted the requests heard, to re-notice the matter. It is from this order that defendant appealed to this Court.

On appeal, defendant raises only one issue. Defendant argues that the trial court erred when it failed to grant summary disposition pursuant to MCR 2.116(C)(8) in favor of defendant with respect to plaintiffs' common law trespass-nuisance claim because it is barred by MCL 691.1407. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The trial court did not indicate under what court rule it decided defendant's motion. However, because MCR 2.116(C)(7) specifically applies to motions brought on the basis of immunity, we will review defendant's motion under that subrule. A motion for summary disposition brought pursuant to "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

Until January 2, 2002, there were five statutory exceptions to governmental immunity, at which time 2001 PA 222[1] took effect. *Pohutski, supra*, at 689, 697-699. MCL 691.1417(2) provides, in pertinent part:

> Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

"2001 PA 222 amends the governmental tort liability act to provide a remedy for damages or physical injuries caused by a sewage disposal system event." *Pohutski, supra,* at 697. The *Pohutski* Court specifically held that MCL 691.1416 *et seq*. is not to be given retroactive application:

> 2001 PA 222 does not contain any language indicating it is meant to apply retroactively, but provides only that it is to take immediate effect. Section 19(1) provides that a claimant is not entitled to compensation under the statute unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within forty-five days after the date the damage or physical injury was or should have been discovered. Only two exceptions to the forty-five-day limit are available: if the claimant notified the contacting agency during the forty-five-day period or if the failure to comply resulted from the contacting agency's failure to comply with notice requirements. Given the absence of any language indicating retroactive effect, the forty-five day notice limit, and the presumption that statutes operate prospectively, we conclude that 2001 PA 222 does not apply retroactively. [*Pohutski, supra* at 698 (emphasis added).]

The *Pohutski* Court explicitly determined that MCL 691.1416 *et seq*. is prospective, and therefore the application of the statutory scheme applies to all claims filed after the effective date of the statute. Specifically, the Court stated:

> [T]his decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield*[2] will apply. [*Id*.]

Because plaintiffs' case was not brought until May 10, 2002, the *Pohutski* decision clearly applies. *Pohutski, supra* at 698-699. Accordingly, we find that the trial court erred when it denied defendant's motion for summary disposition of plaintiffs' first count for common law trespass nuisance because it is barred because of the elimination of the trespass nuisance theory by *Pohutski*.[3]

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[1] 2001 PA 222 has been codified as MCL 691.1416 *et seq*.

[2] *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988).

[3] We are mindful of the express purpose enunciated by the Supreme Court in giving *Pohutski* (continued…)

As an alternate basis for their proposition that summary disposition on the common law trespass nuisance claim should survive, plaintiffs argue that it is a constitutionally based exception to governmental immunity. Therefore, the legislature is not empowered to abrogate it statutorily. Like the situation in *Pohutski*, the trial court here has not yet addressed both of plaintiff's takings claims brought under both the Michigan and federal constitutions. For that reason, we decline to reach those claims. *Pohutski*, *supra*, 465 Mich 699.

We reverse the trial court's denial of summary disposition of defendant's motion regarding plaintiffs' first count of trespass-nuisance in their complaint. We remand the cause for further action consistent with this opinion and resolution of the remaining counts contained in plaintiffs' complaint.

Reversed in part and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

(…continued)

prospective application only. The Court stated, "[t]hus, if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* or 2001 PA 222. Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Pohutski*, *supra*, 465 Mich 698-699. Like those unfortunate plaintiffs, these plaintiffs are likewise victims of timing. Here, plaintiffs' cause of action accrued before January 2, 2002, the effective date of 2001 PA 222, but was filed after April 2, 2002. Therefore, plaintiffs fall within a gap created by application of the law and are victims without a remedy as they cannot seek redress under either a trespass nuisance theory or the statutory scheme. Notwithstanding *Pohutski's* desire to afford victims a remedy, we cannot read a date of accrual into *Pohutski* in light of the Court's statement, "[t]his decision will be applied only to cases brought on or after April 2, 2002." *Id*.