STATE OF MICHIGAN

COURT OF APPEALS

C.K. CORPORATION,

Plaintiff-Appellant,

V

CITY OF CENTER LINE,

Defendant-Appellee,

and

MACOMB COUNTY HEALTH DEPARTMENT,[1]

Defendant.

UNPUBLISHED
October 19, 2010

No. 292336
Macomb Circuit Court
LC No. 2008-000714-CE

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. This case arises out of the misconnection of plaintiff's wastewater into defendant's storm water system. On appeal, plaintiff argues that the trial court erred when it concluded that plaintiff's claims were barred by governmental immunity. Because plaintiff has not alleged facts giving rise to an exception to governmental immunity, we affirm.

Plaintiff first argues that governmental immunity was not applicable in this case because MCL 691.1417(2) provides an exception for injury flowing from a "sewage disposal system event." We decline to review this issue because plaintiff failed to raise it before the trial court. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007); *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Nevertheless, were we to review this issue, we would conclude that MCL 691.1417(2) is not applicable to this case. MCL 691.1417(2) provides:

[1] Defendant, Macomb County Health Department was dismissed from this case by an order granting summary disposition in its favor. It has no part in this appeal.

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system *unless the overflow or backup is a sewage disposal system event* and the governmental agency is an appropriate governmental agency. 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. [MCL 691.1417(2) (emphasis added).]

"'Sewage disposal system event' or 'event' means the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k).

In this case, plaintiff's sewage output was connected into the public wastewater system instead of the sewage system. There has been no evidence presented that the sewage disposal system ever overflowed or backed up onto any property. The sewage was simply directed into the wrong system for almost 30 years. Plaintiff has not demonstrated, or argued, that there was an overflow or backup of sewage in this case. The exception of MCL 691.1417(2) is not applicable to this case.

Plaintiff next argues that immunity is not applicable because defendant committed gross negligence. On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties. *Regan v Washtenaw Rd Comm'rs*, 249 Mich App 153, 157; 641 NW2d 285 (2002). The motion tests whether plaintiff has alleged facts giving rise to an exception to governmental immunity. *Id*. Issues of law are reviewed de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008).

MCL 691.1407(2) limits immunity in instances where a government employee commits "gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c); *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006). "Gross negligence is 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Id*., quoting MCL 691.1407(7)(a).

In this case, the only "claim" of gross negligence presented by plaintiff is the statement in its response to defendant's motion for summary disposition, repeated in plaintiff's brief on appeal, that defendant "has arguably acted with negligence or gross negligence in causing the wrongful connection and in later approving it." Plaintiff's complaint only states that the hook-up was "overseen and in accordance with the directions" of defendant's employees. Plaintiff never alleges reckless conduct or gross negligence. Plaintiff's principal testified that plaintiff hired the plumbing contractor but that the city employee made the connection. He later acknowledged that he did not see the city employee make the connection because he was inside the building. He also acknowledged that he did not know which workers were city employees and which were employed by the plumbing contractor. Plaintiff's entire argument is that defendant "arguably" acted with gross negligence, but plaintiff never alleged any reckless conduct by any specific government employee. This argument is unavailing.

Plaintiff next argues that governmental immunity has no applicability to a breach of contract claim. As plaintiff notes, MCL 691.1407 provides immunity from tort liability, not from liability for a breach of contract: "Except as otherwise provided in this act, a governmental agency is immune from tort liability . . . ." MCL 691.1407(1). Plaintiff has not identified any actual contractual relationship with defendant, however. Plaintiff's complaint contains no reference to any contract. There is no indication in the sparse factual record of any contractual relationship between the parties.

Plaintiff argues that summary disposition under MCR 2.116(C)(10) was improper because there remain genuine issues of material fact. However, the trial court did not grant summary disposition on the basis of MCR 2.116(C)(10). Rather, the court granted summary disposition under MCR 2.116(C)(7), on the ground that defendant was entitled to governmental immunity. Further, we are unable to identify any genuine issues of material fact on the record, primarily because there has been very little factual development.

Finally, plaintiff argues that defendant is not entitled to judgment as a matter of law. To the extent that we can discern a cognizable argument on this issue, it is merely repetitious of the previous argument regarding MCR 2.116(C)(10). This argument is meritless.

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

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio