STATE OF MICHIGAN

COURT OF APPEALS

KEVIN SORRELL,

Plaintiff-Appellee,

v

WAYNE COUNTY TREASURER, ALEX FERENCZ, JOHN FERENCZ, DOWNRIVER AUTO STORAGE,

Defendants,

and

CITY OF ECORSE,

Defendant-Appellant.

UNPUBLISHED
August 21, 2014

No. 315850
Wayne Circuit Court
LC No. 12-004423-CZ

Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

Defendant City of Ecorse[1] appeals as of right an order denying its motion for summary disposition. Because defendant was entitled to governmental immunity for all of plaintiff's non-constitutional claims and because there was no question of fact that plaintiff ever was denied due process, we reverse and remand for entry of summary disposition in favor of defendant.

I. BASIC FACTS

This case arises from a tax foreclosure and ultimate sale of plaintiff's real property, located at 595 and 599 Visger, in the City of Ecorse. In October 2007, a fraudulent quit claim deed was drafted, which purported to convey the property from plaintiff to Sylvester Craft. Later that same day, another quit claim deed was executed that transferred Craft's interest in the property to Michael Prather, who was a former tenant of the property. Theresa Capra, a City of

[1] The other defendants are not involved in the issue on appeal, and our use of the term "defendant" in this opinion will refer only to the City of Ecorse.

Ecorse employee and notary public, notarized the signatures on the deeds, including plaintiff's, even though plaintiff was not present at the time. Both deeds were recorded in February 2008 with the Wayne County Register of Deeds.

As a result of the purported property transfers, defendant "uncapped" the property for the purposes of assessing the property taxes, which resulted in an increase in property taxes on the property.[2]

In a separate action, an arbitrator awarded plaintiff money for conversion and trespass against Prather. The arbitrator further opined that because there was no valid transfer to begin with, the property taxes should not have become "uncapped."

According to plaintiff, he notified defendant of the arbitration ruling and requested that the taxes be rolled back to the earlier "capped" value. However, defendant never did modify the assessment.

After the property taxes went unpaid, the Wayne County Treasurer filed a petition for foreclosure of the property. Plaintiff filed an objection to the foreclosure in March 2008. But the circuit court later entered a judgment of foreclosure, which vested title to the property in the Wayne County Treasurer, and the Wayne County Treasurer ultimately sold the property on November 18, 2011, at a foreclosure auction to Alex Ferencz.

On March 30, 2012, plaintiff filed the instant action. Plaintiff alleged six counts in his complaint: negligence, statutory conversion, violation of due process, fraudulent conveyance, trespass, and quiet title/set aside tax sale.[3]

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), on September 28, 2012, arguing, in part, that it was entitled to governmental immunity and that plaintiff's claim, that he was denied due process, already was rejected by the trial court. The trial

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[2] In 1994, the voters passed Proposal A, which "limited the amount that a property's taxable value could increase each year, even if the property's true cash value rose at a greater rate." *Kane v Williamstown Twp*, 301 Mich App 582, 589; 836 NW2d 868 (2013). However, upon a property transfer, that limit or "cap" does not apply, and the property "shall be assessed at the applicable proportion of current true cash value." Const 1963, art 9, § 3.

[3] The complaint is imprecisely crafted since it uses the generic, plural term "defendants" in all of its six counts, when it is clear that not every defendant is involved with each count. For instance, when plaintiff claims that he was deprived of due process as a result of "Defendants fail[ing] to notify him of the pending tax sales and by failing to correct the previously fraudulent transfers after be[ing] put on notice," it is clear from context that he is not referring to any private individual, like defendants Alex Ferencz, John Ferencz, and Downriver Auto Storage. See also *Christensen v Mich State Youth Soccer Ass'n*, 218 Mich App 37, 41-42; 553 NW2d 638 (1996) (emphasizing that due process protections apply to actions taken by governmental actors and public entities).

court denied the motion, reasoning that the fact that defendant was aware of the arbitrator's award, which determined that the conveyances were fraudulent, and still did not rescind the "uncapped" assessment, created "a question of fact whether or not there's gross negligence on the part of the City."

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Whether governmental immunity bars a claim is decided under MCR 2.116(C)(7). *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 382; 838 NW2d 720 (2013). A motion for summary disposition under this subrule is properly granted when the undisputed facts establish that the moving party is entitled to immunity as a matter of law. *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). The motion may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Moraccini*, 296 Mich App at 391.

Defendant also moved for summary disposition under MCR 2.116(C)(10),[4] which tests the factual sufficiency of a complaint. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). When deciding a motion for summary disposition under this subrule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm'n*, 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).

III. ANALYSIS

In order to evaluate whether summary disposition is appropriate, we first will need to identify the particular claims that plaintiff raises in his complaint against defendant. As noted previously, plaintiff was imprecise by pleading that generic "defendants" were responsible for all six of his alleged counts. "It is well established that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

After reviewing the complaint, it is clear that the only two counts that actually relate to defendant are the negligence count and, arguably, the due-process count. For the negligence

[4] Because the parties relied on materials outside the pleadings, it is inappropriate to evaluate under MCR 2.116(C)(8), even though that was one of the rules defendant cited in its motion. See *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

count, plaintiff alleges that defendant negligently failed to revert the assessment back to its "capped" value. And the due-process count is based on plaintiff's allegation that defendant failed to provide notice to plaintiff of the pending tax sale.

A. NEGLIGENCE COUNT

"Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, broadly shields and grants to governmental agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function." *Id.*, citing MCL 691.1407(1). It is undisputed that defendant, being a city, is a "governmental agency" under the GTLA. MCL 691.1401(a), (d), and (e).

> A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions. An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity. [*Moraccini*, 296 Mich App at 392 (citations and quotation marks omitted).]

The statutory exceptions to governmental immunity include the following: "the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Wesche v Mecosta Co Rd Comm'n*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008). But none of these exceptions applies, and plaintiff does not suggest that any does.[5] Thus, because plaintiff's negligence count is based on defendant's alleged failure to properly assess the property and because the assessing of properties is a "governmental function" that is authorized by statute, see MCL 211.27a; MCL 211.24c, defendant is immune from tort liability for this aspect of plaintiff's claims, MCL 691.1407(1). Consequently, the trial court erred in failing to grant defendant's motion for summary disposition with respect to the negligence count.

We also note that the trial court's reliance on defendant potentially acting grossly negligent is misplaced because whether defendant acted grossly negligent is not relevant. The

[5] Plaintiff argues on appeal that defendant's alleged negligence in failing "to correct the previously fraudulent transfers after being put on notice" constituted a deprivation of due process, which, being a constitutional claim, would fall outside the purview of governmental tort immunity. See *Jones v Powell*, 227 Mich App 662, 673; 577 NW2d 130 (1998), aff'd 462 Mich 329 (2000). But procedural due process only requires notice, an opportunity to be heard, and an impartial decision-maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Thus, it is clear that defendant failing to rescind or modify the uncapped assessments does not implicate due process and does not circumvent the GTLA.

trial court apparently conflated the statutory exceptions to governmental immunity *for governmental agencies* with the exceptions applicable *to employees/officers* of a governmental agency. "MCL 691.1407(2)(c) generally provides that a governmental agency's *employee* is immune from tort liability for an injury caused by the employee while in the course of employment if (a) the employee was acting within the scope of his or her authority, (b) the governmental agency was engaged in the exercise of a governmental function, and (c) the employee's conduct did not amount to gross negligence that was the proximate cause of the injury." *Radu*, 302 Mich App at 382 (emphasis added). Thus, because defendant is a governmental agency, and not a governmental employee, the gross negligence exception is not applicable.

B. DUE-PROCESS COUNT

With respect to plaintiff's position that his claim of a due-process violation should survive defendant's motion for summary disposition based on a purported lack of notice, we disagree.

There are several reasons why plaintiff's position is untenable. First, defendant was not the foreclosing entity—instead, it was established that the foreclosing authority was the Wayne County Treasurer. Thus, the duty to provide notice of the foreclosure fell to that party, not defendant. See MCL 211.78k(5)(f). Accordingly, defendant was not involved with the foreclosure and had no duty to provide notice of another government entity's proceedings.[6]

Second, to the extent that plaintiff alleges in his complaint that he lacked notice of the April 2011 foreclosure, it is conclusively refuted. Plaintiff admitted to the trial court that, in March 2008, he filed an objection to the proposed foreclosure. Obviously, since he filed an objection to the tax foreclosure, he necessarily was aware of it. See also MCL 211.78k(5)(f)(*iii*) (providing that a person who has actual notice of the hearing is deemed to have received notice). Accordingly, plaintiff's allegation in his complaint that he lacked notice of the pending foreclosure is wholly disproven and of no import. See *Dextrom*, 287 Mich App at 428.

Third, accepting as true plaintiff's assertion that he lacked notice of the August 2011 sale, and not the April 2011 foreclosure that vested title with the Wayne County Treasurer, this fact does not implicate due process. Due process is only required when the government is affecting a person's "life, liberty, or property." US Const, Am XIV; Const 1963, art 1, § 17; see also *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012) ("Whether the due process guarantee is applicable depends initially on the presence of a protected 'property' or 'liberty' interest."). At the time of the August sale, plaintiff did not have an interest in the property because any property interest he had was extinguished after the judgment of foreclosure was

[6] We also note that plaintiff attempted to claim a lack of due process against Wayne County Treasurer, but the trial court previously granted summary disposition in favor of Wayne County Treasurer on this issue.

entered in April.[7] Thus, due process did not require plaintiff to be provided any notice of the August sale since plaintiff possessed no property interest at the time. Instead, that sale merely transferred *the Wayne County Treasurer's interest in the property*.

Therefore, after reviewing the record, there is no question of fact that plaintiff was not denied due process, and accordingly, defendant is entitled to summary disposition on plaintiff's due-process claim. We are aware that discovery had not concluded yet, but in light of the undeniable facts, any further discovery would be futile. See *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 329-330; 539 NW2d 774 (1995) (stating that summary disposition is appropriate before end of discovery "if no fair chance exists that further discovery will result in factual support for the nonmoving party").

IV. CONCLUSION

We therefore conclude that defendant was entitled to summary disposition on all of the counts that applied to it for the reasons stated in this opinion. We reverse and remand for entry of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

[7] The judgment provided that "[f]ee simple title to each parcel foreclosed upon . . . will vest absolutely in the [Wayne County Treasurer], without any further rights of redemption, if all the forfeited delinquent taxes, interest, penalties and fees foreclosed against the parcel are not paid to the County Treasure within 21 days of the entry of his judgment." It is not disputed that no one paid the delinquency off before the expiration of the 21-day period. This judgment was never vacated or set aside.