STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL W. MITCHELL,

Plaintiff-Appellant,

v

IRON COUNTY TREASURER,

Defendant-Appellee.

UNPUBLISHED
December 22, 2020

No. 350182
Iron Circuit Court
LC No. 18-005707-CH

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

In this foreclosure action involving delinquent property taxes, plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We affirm.

I. BACKGROUND

This case involves application of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., and whether plaintiff was afforded proper notice to satisfy due process. The issues on appeal relate solely to whether plaintiff was provided adequate notice of delinquency proceedings and whether his statutory conversion claim for the disposal of his personal property was barred by governmental immunity.

Plaintiff and his then-wife purchased the subject property in 1998 via warranty deed. In 2005, his wife quitclaimed her interest to him as part of divorce proceedings. Both deeds listed plaintiff's address as a post office box in Schofield, Wisconsin ("the P.O. box address"); plaintiff's actual home address in Schofield was not listed on either of the deeds. The property fell into delinquency for unpaid taxes in 2015. On March 1, 2017, a certificate of forfeiture was entered against the property. The certificate provided that the property could be redeemed until March 31, 2018, at which point title would pass to defendant.

During the forfeiture proceedings, numerous notices were mailed to the P.O. box address both by defendant and an entity that defendant contracted with, Title Check, LLC. However, in December 2017, the notices mailed during that time were returned as "Not Deliverable as Addressed" and "Box Closed, No Order." At this point, defendant took additional steps to find an

address at which plaintiff could be provided notice of the forthcoming proceedings. One of the central issues on appeal is whether these additional steps were adequate. On February 9, 2018, judgment of foreclosure was entered against the property, and title was passed to defendant. Subsequently, some of plaintiff's personal property was disposed of from the property. In February 2018, the judgment of foreclosure, as well as instructions for redeeming the property, were mailed to plaintiff's home address. Plaintiff failed to redeem the property at any point throughout this period.

Plaintiff filed this action in July 2018 and alleged that defendant failed to provide adequate notice of the delinquency and foreclosure proceedings and, accordingly, violated his due-process rights. Additionally, plaintiff contended that, by disposing of his personal property, defendant was liable for statutory conversion. Defendant filed its motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that there was no genuine issue of material fact with respect to its assertions that it mailed numerous notices to plaintiff's P.O. box address, which was listed on the deeds, and that, after notice to this address became inadequate in December 2017, it took reasonable additional steps to notify plaintiff. Regarding plaintiff's statutory conversion claim, defendant argued that it was barred by governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The trial court agreed with defendant and granted summary disposition in its favor.

II. ANALYSIS

A. DUE PROCESS

Plaintiff first argues that his due-process rights were violated because defendant failed to take adequate additional steps after it determined that the P.O. box address was no longer valid. We disagree.

This Court reviews de novo both a trial court's decision on a motion for summary disposition and questions involving constitutional issues. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). Although the trial court did not explicitly state the subsection of MCR 2.116(C) on which it granted defendant's motion, it is abundantly clear that, regarding plaintiff's due-process claim, the court considered documentary evidence outside the pleadings. Therefore, this Court will "treat the motion as having been brought and decided under MCR 2.116(C)(10) . . . ." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 207; 920 NW2d 148 (2018). A motion is properly granted pursuant to MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id*. at 415-416.

The GPTA provides "[t]hat all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." MCL 211.1. The GPTA was intended by the Legislature to "satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States" but not to "create new rights

beyond those required under the state constitution of 1963 or the constitution of the United States." MCL 211.78(2). The GPTA requires the treasurer, or an entity that the treasurer has contracted with, to "initiate a search of records" to identify the owner of forfeited property. MCL 211.78i(1). This search of records is explicitly defined in subsection (6) to mean the search of:

> (a) Land title records in the office of the county register of deeds.
>
> (b) Tax records in the office of the county treasurer.
>
> (c) Tax records in the office of the local assessor.
>
> (d) Tax records in the office of the local treasurer. [MCL 211.78i(6).]

After this search, the treasurer or contracted entity "shall determine the address reasonably calculated to apprise those owners of a property interest of the show cause hearing . . . and shall send notice of the show cause hearing . . . and the foreclosure hearing . . . by certified mail, return receipt requested, not less than 30 days before the show cause hearing." MCL 211.78i(2). If the treasurer or contracted entity "discovers any deficiency in the provision of notice, the foreclosing governmental unit shall take reasonable steps in good faith to correct that deficiency not later than 30 days before the show cause hearing . . . if possible." MCL 211.78i(4).

Both the Michigan and United States Constitutions protect individuals from the deprivation of property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *Sidun*, 481 Mich at 508-509. "A fundamental requirement of due process in such proceedings is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Sidun*, 481 Mich at 509 (citation omitted). "[T]he means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice." *Id*. Actual notice, however, is not required. *Id*. See also *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 415 (2006). When a property owner does not receive actual notice, the question becomes "whether the methods employed by the county treasurer were sufficient to satisfy due-process requirements." *Sidun*, 481 Mich at 509-510. "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Jones*, 547 US at 226 (citation omitted). What constitutes adequate notice will vary depending on the "circumstances and conditions." *Id*. at 227 (quotation marks and citation omitted).

In the present case, the evidence overwhelmingly supported defendant's position that plaintiff was provided adequate notice both before and after notice was returned as undeliverable. Both deeds listed plaintiff's address as being the P.O. box address. A tax summary for 2017 lists plaintiff's address for the property as being the P.O. box address, and prior tax records listed the same; the home address, in contrast, is not listed. Accordingly, a simple search of these records would demonstrate to defendant and Title Check that the P.O. box address was the address most "reasonably calculated, under all the circumstances, to apprise" plaintiff of the forfeiture and foreclosure. *Jones*, 547 US at 226 (quotation marks and citation omitted). Defendant acknowledges that, in December 2017, notices sent to the P.O. box address began to be returned.

However, unlike in *Jones*—which plaintiff cites extensively in his brief on appeal—defendant took additional steps when it learned of this. Title Check, which was contracted to provide notice, performed a nationwide search through Accurint, a widely used commercial database, and determined that the most probable current address for plaintiff was the property address. Notices were subsequently sent to this address, some by first-class mail, but they were returned because of the lack of a mailbox. Additionally, notice by publication occurred between December 2017 and February 2018 as yet another attempt to provide plaintiff with notice. Finally, notice was sent to plaintiff's home address, which appears to have been discovered sometime in February 2018. Title Check's general counsel submitted an affidavit in which he affirmed that Title Check searched the records listed in MCL 211.78i(6). Plaintiff provided no evidence to the contrary. We are, accordingly, convinced that defendant took reasonable additional steps to find another address at which to provide plaintiff notice once it was determined the P.O. box address was no longer valid.

Plaintiff appears to contend that defendant and Title Check knew of his home address throughout the proceedings but failed to mail notice to it. Plaintiff provides no evidence to support this assertion. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). Furthermore, the record provides no support for plaintiff's position. The evidence suggests that the earliest that defendant knew about plaintiff's home address was in February 2018. Our review of the record gives no indication or suggestion that plaintiff's home address was listed in defendant's records or that defendant or Title Check knew of this address prior to this date.

Once the moving party meets its burden to provide documentary evidence to support its MCR 2.116(C)(10) motion for summary disposition, the burden then shifts to the nonmoving party to provide its own documentary evidence to show a genuine issue of material fact. *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994). "The nonmovant may not rest upon mere allegations or denials in the pleadings, but must by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Id*. Defendant met its initial burden of providing documentary evidence, and plaintiff failed to produce evidence showing a genuine issue of fact. Although plaintiff submitted an affidavit stating that he did not receive notice of the proceedings until July 2018, this failed to create a genuine issue of material fact because *actual* notice was not required. When a property owner does not receive actual notice, the question becomes "whether the *methods employed* by the county treasurer were *sufficient* to satisfy due-process requirements." *Sidun*, 481 Mich at 509-510 (emphasis added).

B. STATUTORY CONVERSION

Plaintiff next contends that governmental immunity was not applicable to his statutory conversion claim because his claim was outside the scope of the GTLA. We disagree.

"The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). This Court also reviews de novo both a trial court's decision on a motion for summary disposition and the interpretation and application of a statute. *Dextrom*, 287 Mich App at 416. A motion is properly granted pursuant to MCR 2.116(C)(8) when the opposing party fails to state a claim upon which relief can be granted. Such a motion "tests the legal sufficiency of the claim on the basis of the

pleadings alone . . . ." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When reviewing the motion, the trial "court must accept as true all factual allegations contained in the complaint." *Id*. The trial court must grant the motion "if no factual development could justify the plaintiff's claim for relief." *Id*. (quotation marks and citation omitted).

The GTLA grants to government agencies and entities general immunity from tort liability if engaged in a governmental function (absent specific, enumerated exceptions). MCL 691.1407(1). MCL 691.1401 defines governmental function to be "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). "[T]his definition is to be broadly applied and requires only that there be some constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged." *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 327; 869 NW2d 635 (2015) (quotation marks and citation omitted; alteration in original). Governmental immunity is not an affirmative defense; it is a characteristic of government. *Mack v Detroit*, 467 Mich 186, 199-200; 649 NW2d 47 (2002). A plaintiff must plead in avoidance of governmental immunity. *Id*. at 199. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id*. at 204. There appears to be no dispute that defendant, as county treasurer, was engaged in the performance of a governmental function. Additionally, plaintiff does not argue that an exception applied. Rather, plaintiff contends that his claim was outside the GTLA's scope.

Our Supreme Court, interpreting the GTLA, stated that "at least two categories of claims are not barred by the GTLA: those seeking compensatory damages for breach of contract and claims seeking a remedy other than compensatory damages." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). Plaintiff alleged statutory conversion, which is governed by MCL 600.2919a and provides in relevant part:

> (1) A person damaged as a result of either or both of the following *may recover 3 times the amount of actual damages sustained*, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [Emphasis added.]

Plaintiff claimed that defendant had wrongfully converted plaintiff's personal property that was located on the real property being foreclosed upon, and plaintiff sought treble damages on that basis. There was no contractual claim, and nothing in section 2919a suggests that it sounds in contract. Moreover, because plaintiff sought treble damages, this was not a case in which plaintiff sought "a remedy other than compensatory damages." *Wright*, 504 Mich at 417. Therefore,

plaintiff's statutory conversion claim failed to fall into any of the types of claims espoused in *Wright*. The GTLA applied, and it barred plaintiff's claim.

C. SURPLUS PROCEEDS

Finally, we address plaintiff's contentions that he was entitled to the surplus proceeds from the sale of the property. At the time that plaintiff submitted this action and his appellate brief, this issue had not yet been addressed and was pending before our Supreme Court in *Rafaeli, LLC v Oakland Co*, ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 156849). The issue before the Court was whether "retaining the surplus proceeds from the tax-foreclosure sale of" the plaintiffs' "properties that exceed the amount plaintiffs owed in unpaid delinquent taxes, interest, penalties, and fees under the" GPTA amounted to an unconstitutional taking. *Id*. at ___; slip op at 2. The Court held that it did amount to such a taking, that the plaintiffs held a vested property right in the proceeds even after the properties' title passed to the defendant, and that the plaintiffs were entitled to just compensation. *Id*. at ___; slip op at 2, 49. This just compensation amounted to the surplus proceeds "in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." *Id*. at ___; slip op at 46-48.

Accordingly, we agree with plaintiff that, if there were surplus proceeds, he would be entitled to these. Nevertheless, plaintiff has provided no evidence of such a sale or of the existence of such proceeds, and our review of the record reveals no evidence of a sale or of surplus proceeds. This implicates the doctrine of ripeness, which "is closely related to the standing doctrine in that it 'focuses on the timing of the action.' " *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017) (citations omitted). Ripeness "requires that a party has sustained an actual injury to bring a claim" and "not premise an action on a hypothetical controversy." *Id*. at 554. Given that plaintiff has failed to demonstrate an actual injury, i.e., a foreclosure with a surplus of proceeds, this issue is not ripe for review.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Deborah A. Servitto