STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY PARKER and EBONI PARKER,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant,

and

DETROIT LAND BANK AUTHORITY,

Defendant-Appellant.

UNPUBLISHED
December 22, 2020

No. 351045
Wayne Circuit Court
LC No. 19-006708-CZ

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

Defendant, the Detroit Land Bank Authority (the DLBA), appeals as of right the order denying its motion for summary disposition, brought pursuant to MCR 2.116(C)(7) (claim barred by governmental immunity) and (8) (failure to state a claim) in this negligence and breach of contract action. We reverse.

I. FACTS & PROCEDURAL HISTORY

This case arises from a September 2016 incident in which a tree on property owned by the DLBA fell on plaintiffs' home. Plaintiffs filed suit and allege that the DLBA was negligent and that the "proprietary function" exception to the DLBA's governmental immunity applies in this case because the DLBA eventually sold the property for a profit. Plaintiffs further allege that the deed in which the Wayne County Treasurer granted the subject property to the DLBA created a

contractual duty to "maintain and secure" the property for the benefit of neighboring homeowners, which was breached.[1]

The DLBA moved for summary disposition. Plaintiffs argued, but did not plead, a claim that individual employees of the DLBA may have been grossly negligent in failing to inspect the property. The trial court denied the DLBA's motion for summary disposition, reasoning that the case should proceed to discovery because plaintiffs had "properly pled in avoidance of governmental immunity . . . ." The DLBA now appeals.

II. ANALYSIS

The DLBA argues that the trial court erred in denying its motion for summary disposition because 1) plaintiffs cannot establish that the propriety function exception to governmental immunity applies in this case, 2) the language of the deed does not specify any class of third-party beneficiaries, and 3) discovery regarding a gross negligence claim that plaintiffs raised in a brief and at oral argument, but never pleaded, is unwarranted. We agree with the DLBA on all three arguments.

We review de novo issues regarding the interpretation of statutes and contracts, including deeds, *In re Rudell Estate*, 286 Mich App 391, 403; 780 NW2d 884 (2009), and a grant or denial of summary disposition de novo, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity." *Id*. at 119. "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. The substance or content of the supporting proofs must be admissible in evidence. *Id.* The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id.* If, after examining the pleadings and any documentary evidence, "no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). If there is a genuine factual dispute regarding the issue of immunity, the trial court may hold an evidentiary hearing before resolving the issue as a matter of law, but it may not submit the issue to the fact-finder as a question of fact. *Id*. at 431-432.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden*, 461 Mich at 119-120. When deciding a motion brought under this section, we consider only the pleadings and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* Documents attached to the pleadings are considered a part of the pleadings for purposes of deciding a motion under MCR 2.116(C)(8). *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 162; 934 NW2d 665 (2019), citing MCR 2.113(C). However, a court may not, under MCR 2.116(C)(8),

[1] Plaintiffs also alleged gross negligence by the city of Detroit (the city). The city was dismissed from the suit and is not a party to this appeal.

construe attachments to the pleadings as substantive evidence that defeats a factual allegation of the nonmoving party. *Id*. at 163.

Under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., government agencies are immune from tort claims when "engaged in the exercise or discharge of a government function." There are six statutory exceptions to governmental immunity,[2] only one of which plaintiffs have alleged in this case. MCL 691.1413 provides a "proprietary function" exception to governmental immunity:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. . . .

For the proprietary function exception to apply, the governmental activity at issue "(1) must be conducted primarily for the purpose of producing a pecuniary profit; and (2) it cannot be normally supported by taxes and fees." *Goodhue v Dept of Transp*, 319 Mich App 526, 532; 904 NW2d 203 (2017) (quotation marks and citations omitted). The existence of profit is not dispositive because an "agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exception." *Id*. (quotation marks and citation omitted). "If profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose." *Id*.

In this case, plaintiffs alleged that the proprietary function exception applies because the DLBA's transactions, including its 2018 sale of the property from which the tree fell, "routinely" produce a profit. In response, the DLBA submitted a copy of the intergovernmental agreement between the city of Detroit and the Michigan Fast Track Land Bank Authority that established the DLBA. Section 3.05 of that agreement provides, in relevant part:

> The [DLBA] shall not be operated for profit. No earnings of the [DLBA] shall inure to the benefit of a Person other than the [DLBA] or the Parties. . . . The Parties also intend the activities of the [DLBA] to be governmental functions carried out by an instrumentality or political subdivision of government . . . .

Neither plaintiffs' documentary evidence attached to the complaint—a deed showing the DLBA sold the subject property for $1,500—nor plaintiffs' allegation that the DLBA's transactions "routinely" produce a profit, satisfy the first prong of the proprietary function exception test. Nor does plaintiffs' evidence contradict the documentation submitted by the DLBA

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[2] "The six statutory exceptions are: 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)." *Goodhue v Dep't of Transp*, 319 Mich App 526, 531 n 1; 904 NW2d 203 (2017) (quotation marks and citation omitted).

showing that it is a nonprofit governmental agency. In a nutshell, plaintiffs' evidence that the DLBA made a profit in a single transaction does not create a genuine dispute as to whether the DLBA conducts its activities "primarily for the purpose of producing a pecuniary profit." *Goodhue*, 319 Mich App at 532. Therefore, the trial court improperly denied summary disposition under MCR 2.116(C)(7).

Plaintiffs also allege that the DLBA assumed a contractual duty to plaintiffs by accepting a deed for the property in which the Wayne County Treasurer transferred the property in fee simple subject to the condition subsequent that the DLBA or its assignee "maintain and secure" the property. MCL 600.1405 provides, in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

"[A] third-party beneficiary may be a member of a class, but the class must be sufficiently described. . . ." *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002) (quotation marks and citation omitted). "[C]ontractual language referring to the city repairing improvements 'as may be necessary for the public safety' " is insufficient to establish any discernable class of intended third-party beneficiaries. *Id*.

Here, plaintiffs claim that neighboring homeowners were made third-party beneficiaries to the deed because of the following language:

> B. That Grantee or subsequent Purchaser/Assignee shall either demolish the property within six months following the date of the deed or maintain and secure the Property for two years following the date of the deed from Grantor/Treasurer in accordance with local building, health and public safety ordinances.

The standard for determining whether a person is a third-party beneficiary is an objective standard and must be determined from the language of the contract only. *Shay v Aldrich*, 487 Mich 648, 664; 790 NW2d 629 (2010). Like the language at issue in *Brunsell*, the "maintain and secure" condition subsequent that plaintiffs rely upon does not create any discernable third-party beneficiary. The deed also contained the following language:

> C. That failure of the Grantee or subsequent Purchaser/Assignee to comply with above clauses A and/or B or to cure the default within 30 days of written notice may result in a reversion of the title of the Property to the Grantor/Treasurer or assigned to the State of Michigan, County of Wayne, City, or Township where the property is located, at the discretion of the Grantor Treasurer. . . . VIOLATORS SHALL BE PERSONALLY LIABLE TO PURCHASER AND/OR GRANTOR/TREASURER FOR DAMAGES AND AGREE TO SUBMIT TO THE JURISDICTION OF THE COURTS IN THE STATE OF MICHIGAN.

Plaintiffs contend that the language regarding submission to the jurisdiction of Michigan courts is ambiguous and that plaintiffs should be allowed to discover parole evidence of the grantor's intent. However, the jurisdictional language does not create a class of third-party beneficiaries because it expressly applies to "violators" liable to the purchaser or grantor, not "beneficiaries" to whom the purchaser or grantor are liable. In addition, the language is not ambiguous: the DLBA or its successor in interest agreed to submit to Michigan courts any future dispute between them arising from the deed. There is no textual support to conclude that the deed conferred rights or obligations on any party but those expressly mentioned. Plaintiffs' claim also fails to the extent that it relies on the theory that the DLBA voluntarily waived its governmental tort liability by accepting the deed because no such "voluntary waiver" exception exists under the GTLA. See *Goodhue*, 319 Mich App at 531 n 1 (listing the six exceptions to governmental immunity permitted by the GTLA). Therefore, summary disposition of the breach of contract claim was appropriate under MCR 2.116(C)(8).

At the hearing on the DLBA's motion for summary disposition, plaintiffs argued that discovery is necessary to reveal the identities of the DLBA employees responsible for inspecting the property, because those individuals may have been grossly negligent. Plaintiffs failed to plead a claim of gross negligence against individual DLBA employees and did not move to amend the complaint. Plaintiffs do not allege any facts that, if true, would establish an identifiable employee's gross negligence or that such gross negligence was "the one most immediate, efficient, and direct cause of the injury." *Ray v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017) (quotation marks and citation omitted). Therefore, the trial court erred when it determined that a hypothetical gross negligence claim against an individual DLBA employee warranted discovery.

III. CONCLUSION

The trial court improperly denied the DLBA's motion for summary disposition. Accordingly, we reverse the trial court's order and remand this case for the trial court to enter an order granting summary disposition in favor of the DLBA. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron