STATE OF MICHIGAN

COURT OF APPEALS

CITY OF PORT HURON,

Plaintiff-Appellee,

v

HARSHAD C. MEHTA and SHILPA H. MEHTA,

Defendants-Appellants.

UNPUBLISHED
June 24, 2021

No. 353332
St. Clair Circuit Court
LC No. 18-002598-CZ

Before: MURRAY, C.J., and FORT HOOD and RICK, JJ.

PER CURIAM.

Defendants, Harshad C. Mehta and Shilpa H. Mehta, appeal as of right an order of judgment entered in favor of plaintiff, the city of Port Huron. On appeal, defendants challenge the trial court's earlier orders denying their motion to amend their pleadings, striking defendants' expert witnesses, and granting plaintiff's motion for summary disposition under MCR 2.116(C)(10). Finding no errors warranting relief, we affirm.

In 2018, plaintiff brought this action to recover the cost of abating allegedly dangerous conditions created after a massive fire on commercial property owned and operated by defendants. Defendants consistently asserted below, and now on appeal, that the improper manner in which plaintiff fought the fire contributed to much of the dangerous condition of the property. Accordingly, defendants assert that they should not be held liable for the vast majority of the costs associated with the cleanup.

I. GENERAL FACTUAL BACKGROUND

In 2014, defendant Shilpa H. Mehta purchased a large area of commercial property located in Port Huron, Michigan. Several buildings were located on the property. The largest building is referred to as the Chicory building because of its history as a chicory roasting factory. However, the Chicory building is actually comprised of several conjoined "buildings" of various sizes. The buildings share walls, but have separate roofing structures. Four of the "buildings," identified as the Raw Stock building, the Finished Stock building, the Cereal building, and the Carmel building, are the most relevant to this appeal. The Finished Stock building, which is sometimes referred to as the "main building," appears from photographs to be the largest building. Defendant Harshad

Mehta, who is Shilpa's husband, was responsible for the day-to-day operation and control of the property. Over the years, the buildings were used for various purposes, including as a haunted house, a paintball playground, and a storage warehouse.

Between January 2016 and October 2017, the Port Huron Police Department responded to nine reports of vandalism at the property. On May 1, 2018, a group of juveniles entered the property. While playing on the top floor of the Chicory building, an 11-year-old boy fell through several floors and sustained severe injuries when he landed on a pile rocks on the bottom floor. After this event, the Port Huron fire inspector and several other city employees inspected the building and noted multiple building code violations, including faulty electrical wiring. On May 17, 2018, the fire marshal issued a violation letter to defendants. Defendants were provided 30 days to correct multiple hazards, including electrical issues, a collapsed roof, and rotting floors. On May 31, 2018, the city inspector sent a similar letter identifying numerous violations of the Michigan Building Code. Defendants allegedly failed to correct the violations by the imposed deadline.

On the evening of June 22, 2018, a fire broke out in the Finished Stock building of the Chicory campus. The Port Huron Fire Department responded to the scene, but fire departments from surrounding communities also aided in the efforts to put out the fire.

Plaintiff contends that Battalion Chief Jeffrey Tucker, after investigating the perimeter, determined that the firefighting would be a defensive operation because no one was in the building and there were known preexisting safety concerns about the structural integrity of the buildings. As a consequence, fire department command officials decided to employ fire suppression efforts as a defensive operation. This required that firefighters remain on the exterior of the building. Apparently, despite these efforts, additional collapse occurred within the buildings. Defendants contend that plaintiff intended the approach to be one of a defensive operation before even arriving at the location.

Several hours into the firefighting efforts, fire command determined that it would be necessary to breach the walls of the main building with heavy construction equipment to access the interior and extinguish the blaze. Defendants apparently owned heavy equipment capable of breaching the wall, but because defendants allegedly were unwilling to provide the services within the necessary time frame, a construction and demolition company, S.A. Torello, was contacted for this purpose. Defendants deny that they were unwilling to provide construction/demolition services.

Initially, the demolition efforts were directed at the west walls of the main building. However, it was determined that this could not be completed safely. Consequently, fire command determined that it would be necessary to go through the Carmel building, which was not on fire, and also the Cereal building to reach the interior of the main building where the fire was primarily burning.

At 6:30 a.m. on June 23, 2018, S.A. Torello began razing parts of the Cereal and Carmel buildings with heavy construction equipment, allegedly so that unreachable sections of the fire in the Finished Stock building could be accessed and extinguished. After most of the fire was extinguished, there allegedly remained numerous unsupported interior and exterior walls of the

buildings that were deemed to be in danger of collapse. In an effort to complete the extinguishment of the fires and remove perceived safety hazards, the Port Huron fire chief and the city manager ordered demolition of the Cereal and Carmel buildings. Plaintiff alleged that large amounts of asbestos material in the buildings became intermingled with the debris, which required the demolition contractor to treat all of the building material as asbestos and take immediate action to abate the hazards of airborne asbestos material.

In contrast to the actions taken by plaintiff's fire command, defendants contend that the firefighters could have safely attacked the fire through the Raw Stock building, i.e., a building in the northwest corner of the Chicory building. Defendants assert that aerial photographs taken during the fire indicate that there was no threat to safety by entering this area because the photographs show that the fire in the Raw Stock building had already dissipated to the point of smoldering hot spots. Essentially, defendants contend that it was unnecessary for the firefighters to attack the fire by breaching the Cereal or Carmel buildings.

On July 29, 2018, firefighting personnel were informed that there was an oil sheen in the nearby Black River. According to plaintiff, defendants' agent had previously informed the fire department that fuel tanks located in the basement of the structure were empty. This, apparently, was incorrect. Upon investigation, firefighting personnel discovered that the fuel leak was attributable to a broken fitting in the fuel tanks. After the fuel leak was discovered, plaintiff pursued efforts to contain the fuel leak. Shortly thereafter, defendants assumed responsibility for abating the fuel leak into the river.

In October 2018, plaintiff filed a complaint alleging that defendants, as owners and operators of the property upon which the Chicory buildings were located, were responsible for the cleanup costs associated with the fire. Plaintiff alleged that after the fire, defendants failed to take immediate remedial measures and, as a consequence, plaintiff was forced to abate the dangerous condition on the property. Plaintiff allegedly incurred expenses totaling $472,295. In Count I of its complaint, plaintiff alleged that it was entitled to recover from defendants the costs associated with the cleanup pursuant to Port Huron Ordinance §§ 10-211, 24-41, and 24-42. In Count II, plaintiff alleged, alternatively, that because defendants benefited from plaintiff's efforts, plaintiff was entitled to reimbursement under the equitable theory of unjust enrichment.

In their answer to the complaint, defendants generally denied that plaintiff was entitled to recover all of the costs associated with the cleanup of the property. In their affirmative defenses, defendants alleged, among other things but most pertinent to this appeal, that plaintiff's acts constituted an "unlawful taking" of Shilpa Mehta's property. They further alleged inverse condemnation as an affirmative defense because "plaintiff has taken Defendant Shilpa H. Mehta's property rights without the payment of just compensation and without instituting appropriate condemnation proceedings." In addition, defendants alleged that plaintiff's claims were barred by the ordinary or gross negligence of its agents and representatives.

II. ANALYSIS

A. MOTION TO AMEND

Defendants first argue that the trial court erred when it denied their motion for leave to amend their pleadings to assert a claim of gross negligence against individual city of Port Huron employees. This Court generally reviews a trial court's decision on a motion to amend pleadings for an abuse of discretion. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 207-208; 920 NW2d 148 (2018). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* at 208 (quotation omitted). We conclude that the trial court did not abuse its discretion.

On July 3, 2019, approximately five weeks before the scheduled trial date, defendants filed a motion to amend their pleadings. Defendants sought to "modify" their affirmative defenses and to assert a counterclaim against plaintiff. Defendants alleged that plaintiff, both before and during the fire, committed acts of negligence that contributed to the loss of the buildings on the property. Specifically, defendants alleged that plaintiff was negligent in failing to properly supervise and control the demolition process, failing to properly investigate the property while in its control, failing to investigate a suspicious fire and preserve evidence, and failing to investigate the status of the fuel storage tanks. Regarding actions before the fire, defendants alleged that plaintiff was negligent by failing to conduct timely and sufficient building inspections to identify building violations and hazardous materials.

At the motion hearing, the trial court properly denied defendants' proposed amendments. As the court correctly found, and defendants eventually conceded, claims of this nature against plaintiff would be barred by governmental immunity and, therefore, were futile.[1] Defendants then switched tactics and asserted that they wished to amend their pleading to assert a claim against plaintiff's fire chief. Again, the court denied leave to amend, and defendants eventually conceded that negligence claims against the fire chief would similarly be barred by governmental immunity.[2]

Thereafter, defendants filed a motion for reconsideration in which they argued that the trial court should grant them leave to amend their pleadings to include a "counter-complaint against the

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[1] The Governmental Tort Liability Act grants governmental agencies immunity from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). It was never disputed that plaintiff's firefighting efforts constituted the exercise and discharge of a governmental function.

[2] MCL 691.1407(5) grants absolute immunity to "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government" if he or she is "acting within the scope of his or her judicial, legislative, or executive authority." In concluding that plaintiff's fire chief would be entitled to immunity, the trial court relied on this Court's opinion in *Davis v Detroit*, 269 Mich App 376; 711 NW2d 462 (2005). In *Davis*, this Court concluded that Detroit's fire department and water and sewage department were "levels of government" and that the highest appointed officials of those departments were entitled to absolute immunity under MCL 691.1407(5). *Id.* at 381.

appropriate City employee(s)." Defendants asserted that part of the damage to the Chicory buildings was not caused by the fire, but instead, by the gross negligence of plaintiff's employees or agents. Defendants further explained that the part of the Chicory building with brown roofs, i.e., the Cereal and Carmel buildings, sustained "insignificant fire damage before the Port Huron Fire Department ('PHFD') allowed S.A. Torello, Inc. ('Torello') to demolish the brown roofed structure." Defendants asserted that plaintiff's position that the brown-roofed structure was demolished because of instability caused by the fire was untrue. Notably, defendants did not include a proposed complaint against an appropriate city employee along with their motion for reconsideration.

By their motion for reconsideration, defendants presumably believed that certain employees of the city would not be immune from tort liability. Under certain circumstances, a lower-level government employee may be held liable for his or her gross negligence. An employee of a governmental agency is entitled to immunity only if (1) the employee reasonably believed he or she was acting within the scope of his or her authority, (2) the employee was engaged in the exercise or discharge of a governmental function, and (3) the employee's conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(a) to (c).

In its order denying defendants' motion for reconsideration, the trial court revisited and reaffirmed its prior rulings that any counterclaim against plaintiff or the fire chief would be barred by governmental immunity. The court then denied defendants' alternative request that they be granted leave to file a counterclaim against some other city employee because defendants had not provided the court with a proposed complaint, they had not identified a specific employee of the city, and they had not stated with particularity the facts supporting an allegation that some unnamed individual committed acts amounting to gross negligence.[3] Notwithstanding this ruling, the trial court indicated that its denial of leave to amend as to a lower-level city employees was without prejudice. Indeed, the court encouraged defendants to refile an appropriate motion after correcting the specified deficiencies. Despite this encouragement, defendants never renewed their motion.

Defendants have failed to establish that they are entitled to relief because the record confirms that the trial court correctly denied defendants' motion to amend. "Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Id.* Because the proposed amendment, as described in defendants' motion for reconsideration, did not set out allegations adequate to state a claim for gross negligence committed by an identified lower-level employee of the city, the trial court correctly determined that the proposed amended pleading was futile. The trial court stated on the record its

[3] The court also found, for the same reason, that defendants' request to amend their affirmative defenses must also fail.

particularized reason for denying defendants' motion and the court's denial of the motion was based on the legal insufficiency of the proposed claim on its face. As such, the court's decision does not fall outside the range of reasonable and principled outcomes, and accordingly, was not an abuse of discretion.

B. MOTION IN LIMINE

Defendants next argue that the trial court erred by granting plaintiff's motion in limine and thereby striking defendants' proposed expert witnesses. We disagree. We review a trial court's decision whether to grant or deny a motion in limine for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005).

Defendants identified two experts they intended to call at the time of trial. Loton Eastman, an architect and engineer, was prepared to opine that the cost of rebuilding the Cereal and Carmel buildings would be $928,150. It was anticipated that John Agosti, a retired fire chief, would give testimony criticizing, among other things, the training of plaintiff's firefighters, the insufficiency of the public water supply system for firefighting purposes, and the way in which the fire personnel fought the fire. In particular, Agosti opined that it was unnecessary for the firefighters to breach the Cereal building, which allegedly was nonfire damaged, to attack the fire in the Finished Stock building. In its motion in limine, plaintiff requested that the court strike defendants' proposed experts because the anticipated testimony was not relevant to any of the issues in the case. Plaintiff asserted that there was no claim for negligence or gross negligence against it and defendants were not permitted to second guess or challenge the executive decisions made by fire personnel. Plaintiff reasoned that under MCL 29.7a, the Legislature delegated to the city's fire chief or his or her designates the sole decision-making authority when responding to a public emergency. Plaintiff also noted that this lawsuit was solely to recover costs for the demolition and cleanup of the fire-damaged building. Plaintiff argued that because the only issue for trial was whether the costs for which plaintiff sought recovery were incurred in carrying out the order of the fire chief, the opinions of Eastman and Agosti were not relevant and would be unfairly prejudicial. Therefore, their testimony should be excluded under MRE 402 and 403.

When granting plaintiff's motion to strike the expert witnesses, the trial court essentially adopted plaintiff's reasoning. The court concluded that because the manner in which plaintiff's fire department decided to combat the fire was not subject to challenge or review, expert testimony criticizing the decisions made by the fire department in an emergency situation was not relevant. Accordingly, the court granted plaintiff's request to strike the witnesses. On appeal, defendants assert that the trial court erred when it concluded that the proposed expert testimony was irrelevant. We disagree.

Defendants rely on MCL 29.7a to support their position that they could challenge the decision of plaintiff's fire chief to demolish the Cereal and Carmel buildings to reach the interior of the main building where the fire was primarily burning because those actions were unnecessary. Defendants' reliance on MCL 29.7a is misplaced.

MCL 29.7a, which is part of Michigan's Fire Prevention Code, MCL 29.1 *et seq.*, provides:

> (1) Subject to section 7d, if the state fire marshal or the commanding officer of the fire department of a city, village, township, or county, or a fire fighter in uniform acting under the orders and directions of the commanding officer determines a dangerous condition exists, the state fire marshal, the commanding officer of the fire department of a city, village, township, or county, or the fire fighter in uniform acting under the orders and direction of the commanding officer upon finding an emergency condition dangerous to persons or property, *may take all necessary steps and prescribe all necessary restrictions and requirements to protect persons and property until the dangerous condition is abated.*
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> (2) Subject to section 7d, the state fire marshal, the commanding officer of the fire department of a city, village, township, or county, or a fire fighter in uniform acting under the orders and directions of the commanding officer, responding to a fire or emergency call, who, upon arriving at the scene of a fire or emergency, finds a condition dangerous to persons or property, *may take all necessary steps and requirements to protect persons and property until the dangerous condition is abated.*
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> (3) The state fire marshal or the commanding officer of the fire department of a city, village, township, or county, or a fire fighter in uniform acting under the orders and direction of the commanding officer may investigate causes and effects related to dangerous conditions. [Emphasis added.]

Defendants interpret this statute as a limit on a fire chief's discretion when confronted with an emergency situation. They reason that because a fire chief is only authorized to take "necessary" steps to protect persons and property, the fire chief's decision in this case that it was necessary to breach the Cereal and Carmel buildings is subject to scrutiny and, therefore, a viable defense to this litigation. Defendants then conclude that the testimony of their expert witnesses was critical to their defense. However, defendants have misread the statute and have not considered the language in its entirety.

The rules of statutory construction have been clearly explained by both this Court and the Michigan Supreme Court:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009) (cleaned up).]

"A provision of a statute is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning." *In re AGD*, 327 Mich App 332, 343; 933 NW2d 751 (2019). "Unless defined in the statute, every word or phrase of a statute should be

accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002).

Applying these principles, it is clear that the city fire chief has the sole discretion to determine if a dangerous condition exists. The statute begins with the phrase, "if the . . . commanding officer of the fire department of a city . . . determines a dangerous condition exists . . . ." MCL 29.7a(1). It would therefore logically follow that if this discretion lies with the fire chief to determine if a dangerous condition exists, it is also within this commanding officer's discretion to determine what steps are "necessary" to protect persons and property. Defendants' interpretation to the contrary defies the principles of statutory construction.

Defendants' interpretation of MCL 29.7a also runs afoul of the Governmental Tort Liability Act, MCL 691.1401 *et seq.* MCL 691.1407(1) provides, in pertinent part, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(5) provides, "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." Considering that in some respects the statues share overlapping purposes, the two statutes should be read together:

> Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control. [*In re AGD*, 327 Mich App at 344 (cleaned up).]

Applying defendants' interpretation of MCL 29.7a, an injured party could file a claim of negligence against a municipality and its fire chief to recover damages associated with the fire chief's discretionary response to an emergency situation. Taking defendants rationale to its logical extreme, this theoretical plaintiff could presumably challenge a fire commander's determination that certain actions were "necessary." However, MCL 691.1407(1) and (5) would clearly preclude such an action. Indeed, in reaching such a conclusion, MCL 29.7a would be implicated because this statute vests a fire chief with the authority to take measures to protect persons and property.

Defendants argue that MCL 29.7a permits them to raise as a defense that the actions of plaintiff's fire chief were unnecessary. However, no reasonable interpretation of the statute would yield such a result. Indeed, the statute on which defendants rely actually supports the opposite conclusion, namely, that decisions made by a city's fire chief in response to a dangerous condition and designed to protect persons and property are not subject to challenge. We find no compelling reason to conclude to the contrary simply because the circumstances in this case involve the defendant attempting to use this in a defense. Because the reasonableness of plaintiff's actions are not relevant to the issues in this case, the trial court did not err when it granted plaintiff's motion to strike defendants' expert witnesses.

As an alternative basis for reversal, defendants argue that the testimony of their experts was relevant to their affirmative defenses of an unlawful taking and inverse condemnation. We find no merit to this alternative argument. Initially, we question the viability of inverse condemnation as an affirmative defense as opposed to a counterclaim. A counterclaim is a cause of action that exists in favor of a defendant against the plaintiff and on which the defendant might have brought a separate action and recovered judgment. See 20 Am Jur 2d, Counterclaim, § 1, p 260-261. "A counterclaim does not seek to defeat the plaintiff's claim as a cause of action; rather it is an independent, affirmative claim for relief." See 20 Am Jur 2d, Counterclaim, § 1, p 261. In this case, defendants' allegation of an unlawful taking does not make out a defense to their obligation to pay for the cleanup costs associated with the fire on their property. It sounds more in the nature of an independent cause of action. As raised within the circumstances present in this case, inverse condemnation would be the proper subject of a counterclaim, rather than an affirmative defense. See, e.g., *Pacific Coast Capital Corp v Research to Reality, Inc,* 57 Mich App 75, 77-78; 225 NW2d 177 (1974) (holding that "plaintiff's liability was the proper subject of a counterclaim, but not of an affirmative defense.").[4] Defendants have not stated a viable affirmative defense, and they never pursued a counterclaim of this nature. Accordingly, defendants' claim that the testimony of their experts was relevant to establish their affirmative defense of inverse condemnation lacks the necessary factual predicate.

In any event, whether raised as an affirmative defense or a counterclaim, defendants cannot establish that plaintiff's actions in fighting the fire on defendants' property amounted to an unlawful taking without just compensation.

The Michigan Constitution contemplates that the government may exercise the power of eminent domain to acquire private property for public use. Const 1963, art 10, § 2. In addition, Michigan recognizes a cause of action for inverse condemnation, which is a taking of private property for public use without commencement of condemnation proceedings. *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982). Under the Michigan Constitution, Const 1963, art 10, § 2, and the United States Constitution, Am V, a victim of such a de facto taking is entitled to just compensation for the value of the property. *Id.* "A taking may occur without absolute conversion of the property and may occur when serious injury is inflicted to the property itself." *Attorney General v Ankersen*, 148 Mich App 525, 561; 385 NW2d 658 (1986) (cleaned up). However, "not every diminution in property values remotely associated with governmental actions will amount to a 'taking.' " *Id.* A plaintiff must establish (1) that the government actions were a substantial cause of the decline of property values, and (2) that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. *Id.*

Defendants' proposed claim of inverse condemnation must fail as a matter of law. A city's action in entering onto private property to extinguish a massive fire that the property owner lacks the resources and experience to combat themselves cannot be regarded as a taking of private

[4] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

property by the government for public use. Further, in light of the provisions of MCL 29.7a, which grants a commanding officer of a city's fire department authority to determine that a dangerous condition exists and then exercise the discretion to take actions necessary to protect persons and property until the dangerous condition is abated, it cannot be shown that plaintiff abused its legitimate powers. Whether couched as an affirmative defense or a counterclaim, defendants cannot establish an unlawful taking or inverse condemnation.

Defendants argue that the proposed testimony of their expert witness was relevant to establish their affirmative defenses. MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides that evidence which is not relevant is not admissible. Without a viable claim for an unlawful taking, defendants cannot establish that the proposed testimony of their expert witnesses was relevant to any issue of consequence. Accordingly, the trial court did not abuse its discretion when it granted plaintiff's motion to strike the witnesses.

C. MOTION FOR SUMMARY DISPOSITION

Lastly, defendants argue that the trial court erred when it granted plaintiff's motion for summary disposition. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's complaint. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under MCR 2.116(C)(10), this Court must consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Plaintiff's complaint sought recovery for the costs incurred to complete the demolition of a fire-damaged building and cleanup of the resulting debris on the property owned or operated by defendants. Plaintiff alleged that after the fire, defendants failed to take prompt remedial measures and, as a consequence, plaintiff was forced to abate the dangerous condition of the property. In Count I of its complaint, plaintiff alleged that it was entitled to recover from defendants the costs associated with the cleanup pursuant to Port Huron Ordinance § 10-211, which provides, in pertinent part:

> (d) The City Manager may abate any public nuisance defined in this section, if the public safety requires immediate action, without preliminary order of the City Council. Thereafter, the cost of abating such nuisance shall be charged against the premises and the owner thereof.
>
> (e) In addition, the City may commence legal action against the owner of the premises for recovery of the full cost of abatement, including, but not limited to, demolition, making the premises safe, or maintaining the exterior of the structure

> or grounds adjoining the structure. A judgment in an action brought pursuant to this section may be enforced against assets of the owner other than the building or structure.

In Count II of the complaint, plaintiff sought reimbursement under the theory of unjust enrichment. To prevail on a claim of unjust enrichment, a plaintiff must prove that the defendant received a benefit from the plaintiff and that the retention of that benefit by the defendant is unjust. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22-23; 831 NW2d 897 (2012). If both elements are satisfied, the law will "imply a contract in order to prevent unjust enrichment." *Id*. at 23.

Defendants argue, as they did in the trial court, that questions of fact exist regarding whether plaintiff's actions were necessary and, furthermore, whether certain buildings constituted a dangerous condition. However, as already discussed, MCL 29.7a leaves the determination of whether a dangerous condition exists and what actions are necessary to protect persons and property to the discretion of, among others, the commanding officer of the fire department of a city. Thus, no question of material fact existed in this regard. Further, defendants did not challenge plaintiff's entitlement to relief on any other grounds. Indeed, defendants essentially conceded that, in general, they would be responsible for expenses incurred by plaintiff for cleaning up the debris on their property. We note that in response to plaintiff's motion for summary disposition, defendants asserted that because demolition of the Cereal and Carmel building was, in their estimation, unnecessary, they were not liable for the costs associated with the cleanup in that area. However, defendants agreed they were responsible for the costs associated with the cleanup of the "warehouse portion of the Chicory building where the fires started and burned." Defendant also acknowledged that plaintiff provided documentary evidence supporting their claim for damages totaling $472,495. Accordingly, the trial court did not err when it concluded that no genuine issues of material fact existed and summary disposition was, therefore, appropriate under MCR 2.116(C)(10).

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Michelle M. Rick