STATE OF MICHIGAN

COURT OF APPEALS

GEORGE H. PATTON,

Plaintiff-Appellant,

v

VILLAGE OF CASSOPOLIS, and KEVIN GILLETTE,

Defendants-Appellees.

UNPUBLISHED
January 24, 2012

No. 301754
Cass Circuit Court
LC No. 10-000891-CZ

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants' motion for summary disposition in this action arising from the condemnation and demolition of plaintiff's commercial building, located at 200-202 East State Street in Cassopolis (the property). For the reasons set forth in this opinion, we affirm.

Defendant Village of Cassopolis (the Village) served plaintiff with a condemnation notice on March 26, 2009, describing the structure on the property as "in a significantly deteriorated state of repair," setting forth a myriad of structural deficiencies and violations of the International Property Maintenance Code (IPMC), and advising plaintiff that the structure met the criteria for demolition set forth in the IPMC. The notice, signed by the Village Manager, Kevin Gillette, directed plaintiff to take immediate action to secure the structure and to obtain demolition permits and hire a licensed demolition contractor; it instructed plaintiff that if he failed to take this action, the Village would secure the building at plaintiff's expense and would solicit bids and hire a contractor to perform the demolition. Plaintiff was advised by the notice that he had 20 days to appeal the condemnation in writing, and that the Village "fully intends to have this structure removed in the very immediate future."

Plaintiff appealed the condemnation notice by letter dated April 6, 2009. At the Village Council meeting on April 13, 2009, plaintiff read a statement setting forth his position as to the condition of the property. At that same meeting, the council voted to authorize the solicitation of bids for the demolition of the property. On April 16, 2009, the Village denied plaintiff's appeal by written letter, on the basis that plaintiff failed to demonstrate any factual inaccuracy in the description of the condition of the building or its visible defects, as set forth in the condemnation notice. At the May 11, 2009, Village council meeting, plaintiff was again permitted to state his

position as to the condition of his property. Thereafter, the Council voted to accept a demolition bid for the property. By letter dated the next day, the Village notified plaintiff that the council had authorized the demolition of the structure on the property and advised him to remove any personal items in or on the structure immediately. The record indicates that the building was demolished on or about May 20, 2009.

Plaintiff filed the instant complaint, asserting claims titled "gross negligence," "simulating legal process," "ethnic intimidation," "conversion," "severe physical and emotional distress," and "Violation of Michigan Laws." Plaintiff alleged that defendants acted improperly and violated his rights by failing to afford him due process, by arbitrarily denying him a hearing before an impartial board in response to his letter of appeal, by seizing his property without a court order, and by ordering his seized real estate "summarily demolished," maliciously destroying that property, in violation of the laws of this Sate. Plaintiff further asserted that defendant Gillette acted outside the scope of his employment in issuing the condemnation notice and the correspondence sent to plaintiff on behalf of the Village.

Defendants moved for summary disposition of the complaint under MCR 2.108(C)(1), and MCR 2.116(C)(4), (7) and (8), asserting that the circuit court lacked subject matter jurisdiction over plaintiff's complaint, that the penal code sections cited in plaintiff's complaint did not afford plaintiff with a private cause of action in a civil lawsuit, and that the decision to condemn plaintiff's building was a governmental function for which defendants are immune from liability. The trial court agreed, concluding that it lacked subject matter jurisdiction because plaintiff failed to seek a writ of superintending control to prevent the demolition of his building pursuant to MCL 125.542 within the time frame afforded him by that statute. The trial court concluded further that the penal statutes cited by plaintiff did not provide him with a private cause of action and that defendants were entitled to immunity from liability. Accordingly, the trial court granted defendants' motion, and dismissed plaintiff's complaint, pursuant to MCR 2.116(C)(8).

Plaintiff first argues that the trial court erred by concluding that it lacked subject matter jurisdiction over the instant complaint. The question whether subject matter jurisdiction exists is a question of law that this Court reviews de novo. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007).

We find the trial court's conclusion that it lacked subject matter jurisdiction over plaintiff's complaint to be in error. Defendants did not condemn and demolish plaintiff's structure in accordance with the procedures specified by MCL 125.138 *et seq.* Therefore, MCL 125.542 was never implicated by defendants' actions.

MCL 125.538 *et seq.* sets forth the procedure a municipality is to follow when it seeks to demolish a dangerous building, as that term is defined in MCL 125.139. MCL 125.540 specifies the manner in which the owner of the building is to be notified. It provides further that

> (3) The notice shall specify the time and place of a hearing on whether the building or structure is a dangerous building. The person to whom the notice is directed shall have the opportunity to show cause at the hearing why the hearing

officer should not order the building or structure to be demolished, otherwise made safe, or properly maintained.

(4) The hearing officer shall be appointed by the mayor, village president, or township supervisor to serve at his or her pleasure. The hearing officer shall be a person who has expertise in housing matters including, but not limited to, an engineer, architect, building contractor, building inspector, or member of a community housing organization. An employee of the enforcing agency shall not be appointed as hearing officer. The enforcing agency shall file a copy of the notice that the building or structure is a dangerous building with the hearing officer.

(5) The notice shall be in writing and shall be served upon the person to whom the notice is directed either personally or by certified mail, return receipt requested, addressed to the owner or party in interest at the address shown on the tax records. If a notice is served on a person by certified mail, a copy of the notice shall also be posted upon a conspicuous part of the building or structure. The notice shall be served upon the owner or party in interest at least 10 days before the date of the hearing included in the notice. [MCL 125.540.]

MCL 125.541 sets forth the manner in which the hearing prescribed by MCL 125.540 is to be conducted by the hearing officer, as well as the manner in which the decision regarding the disposition of the building is to be issued. Finally, MCL 125.142 provides that "[a]n owner aggrieved by a final decision or order of the legislative body or the board of appeals under [MCL 125.541] may appeal the decision or order to the circuit court by filing a petition for an order of superintending control within 20 days from the date of the decision."

Defendants argued below, and the trial court ruled, that plaintiff's failure to seek superintending control under MCL 125.542 deprived the circuit court of subject matter jurisdiction over the instant action. However, the record plainly establishes that defendants did not declare plaintiff's building to be a "dangerous building," under MCL 125.139, and they did not adhere to the process set forth in MCL 125.540 and MCL 125.541 before demolishing plaintiff's building. At no time was plaintiff provided with a notice of hearing to determine whether his building or structure was a dangerous building, at which he would have the opportunity to show cause why the hearing officer should not order the building or structure to be demolished, otherwise made safe, or properly maintained as required by MCL 125.540. And, no hearing was held where a hearing officer took testimony of the Village, plaintiff, or any interested party, no decision as to whether the building should be demolished was rendered by any hearing officer, and no subsequent hearing was held to consider any such decision, as required by MCL 125.541. Defendants' assertion that plaintiff's presence at the May 11, 2009 council meeting satisfied the requirement that he be afforded a hearing under MCL 125.540 and 125.541 is without merit. Even if plaintiff's presence, and his opportunity to speak, at that meeting could be construed as affording him an opportunity to offer testimony as to why his building should not be demolished, that testimony was not taken by, and no subsequent decision was issued by, a hearing officer meeting the requirements of MCL 125.540 and 125.541. Simply stated, at no time was any "final decision or order . . . under MCL 125.541" issued for the demolition of plaintiff's building, from which plaintiff could have sought to appeal under MCL

125.542. Consequently, plaintiff's failure to appeal the council's resolution to undertake that demolition pursuant to MCL 125.542 cannot be said to have deprived the circuit court of jurisdiction over the instant action.

Still, this Court will affirm the circuit court where it reached the correct result, even if it did so for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Despite finding that it lacked subject matter jurisdiction over the complaint, the trial court proceeded to conclude, correctly, that plaintiff failed to state a claim against defendants upon which relief can be granted. Therefore, dismissal of plaintiff's complaint under MCR 2.116(C)(8) was appropriate.

First, the trial court correctly concluded that defendants are entitled to absolute immunity from tort liability arising from the decision to demolish plaintiff's building. MCL 691.1407 provides in relevant part:

> (1) 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. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
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> (5) 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.

There is no question that the Village is a governmental agency within the meaning of MCL 691.1407(1), see *Jackson County Drain Commissioner v Village of Stockbridge*, 270 Mich App 273, 284–285; 717 NW2d 391 (2006), or that it is a level of government of which Gillette is its highest appointive executive official within the meaning of MCL 691.1407(5), see, e.g., *Davis v Detroit*, 269 Mich App 376, 379-381; 711 NW2d 462 (2006); *Grahovac v Munising Twp*, 263 Mich App 589, 594; 689 NW2d 498 (2004); *Nalepa v Plymouth-Canton Comm Sch Dist*, 207 Mich App 580, 587; 525 NW2d 897 (1994), aff'd 450 Mich 934 (1995). Thus, defendants are entitled to absolute immunity for actions taken while engaged in a governmental function. MCL 691.1407(1), (5). A governmental function is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local ordinance, or other law." MCL 691.1401(1)(f). State law provides local units of government the enabling authority to administer and enforce recognized model building codes within their political boundaries. MCL 125.1507 *et seq.* Therefore, because the enforcement of the IPMC was authorized by statute, defendants were engaged in the exercise or discharge of a governmental function when condemning and demolishing plaintiff's building pursuant to the requirements and provisions of that code. Plaintiff has not alleged that any statutory exception applies in this case. Therefore, defendants are immune from tort liability.

Moreover, the gravamen of plaintiff's complaint is that he was denied due process by defendants' failure to afford him with a hearing before an impartial hearing officer before demolishing his building. To the extent that this constitutes a constitutional claim, plaintiff is precluded from seeking a damages remedy against defendants for such a claim in state court. While a damages remedy for violation of the Michigan Constitution may be inferred against the State, or State officials sued in their official capacity, *see Smith v Dep't of Public Health*, 428 Mich 540, 410 NW2d 749 (1987), *aff'd sub nom Will v Dep't of State Police*, 491 US 58; 109 SCt 2304; 105 L Ed 2d 45 (1989), no such remedy exists for violation of the Michigan Constitution in an action against a municipality or a government employee sued in his individual capacity. *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). Therefore, while plaintiff may seek money damages by way of a claim against defendants under 42 USC § 1983, he cannot state a valid state law cause of action arising there from. Consequently, the trial court correctly determined that plaintiff failed to state a claim upon which relief may be granted so as to warrant summary disposition under MCR 2.116(C)(8).

Finally, plaintiff alleges that defendants violated a number of penal statutes by way of their conduct in demolishing his building, to wit: MCL 750.478 (wilfull neglect of duty by a public officer); MCL 750.368(2) (preparation, issuance, service of unauthorized process); MCL 750.370 (falsely and maliciously accusing another of a crime); MCL 750.147 (denial of equal public accommodation); MCL 750.380(1) (malicious destruction of a house, barn or building of another); and MCL 750.147b (ethnic intimidation). However, generally, where a statute contains criminal penalties for violations of its provisions, this Court has held that no private cause of action based on alleged violations of the statute will lie. *Lane v KinderCare Learning Ctrs Inc*, 231 Mich App 689, 699; 588 NW2d 715 (1998); see also *Lowell R Fisher v WA Foote Memorial Hosp*, 261 Mich App 727, 730; 683 NW2d 248 (2005). Thus, with the exception of a claim for ethnic intimidation, for which a civil remedy is statutorily provided, there is no basis for plaintiff's assertion of a cause of action arising from the alleged violations of the cited statutes.

Even were plaintiff permitted to seek enforcement of the penal statutes cited, a review of the record presented quickly establishes that plaintiff's allegations that defendants violated those statutes are without any basis in fact. And, as to plaintiff's claim of ethnic intimidation, this Court has explained that to establish a claim for ethnic intimidation, there must be "evidence of an underlying predicate criminal act committed because of racial animosity." *People v Schutter*, 265 Mich App 423, 427; 695 NW2d 360 (2005). There is no evidence in the record, nor any inference arising from any record evidence, that any actions taken by defendants, even presuming the commission of a criminal act, were committed because of racial animosity toward plaintiff.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello