# STATE OF MICHIGAN

# COURT OF APPEALS

KIEK INVESTMENTS, LLC,

Plaintiff-Appellee,

v

CHARTER TOWNSHIP OF FRUITPORT,

Defendant/Third-Party Plaintiff-Appellant,

v

MOORE & BRUGGINK, INCORPORATED, JACKSON-MERKEY CONTRACTORS, INC., and THE OHIO CASUALTY INSURANCE CO.,

Third-Party Defendants.

UNPUBLISHED
March 29, 2012

No. 302491
Muskegon Circuit Court
LC No. 10-047208-CK

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from an order of the circuit court denying its motion for summary disposition brought pursuant to MCR 2.116(C)(7) (governmental immunity). We affirm.

This case involves a utility line easement granted to defendant by plaintiff. The purpose of the easement was to construct and maintain "utility lines, including sewer line or lines, water line or lines, storm sewer lines, drains and drain tiles, and their appurtenant valves, hydrants and accessories." Plaintiff alleged that defendant breached the terms of the easement by failing to properly restore the property after finishing construction of its utility lines. Specifically, plaintiff alleged that defendant failed to compact the soil as it was being backfilled, and that approximately 1,860 yards of fill sand was inappropriately taken from the site to an adjacent property. The easement stated:

> As a consideration for the Township to have the right to construct and install said Utility Lines, Township shall be obligated, at its sole expense (i) to fill and grade to ground level the trench or ditch occupied by said Utility Lines and (ii) to restore the drives, parking areas, shrubs or grass to their former condition, insofar

> as is reasonably possible. Township does further covenant and agree that in the event it shall become necessary, at any time, to enter upon the above-described Easement Description for the purpose of maintenance, repair, replacement, construction or reinstallation of said Utility Lines, Township shall, at its sole expense, return said piece or parcel of land to a similar condition as before such maintenance or repair upon the completion of the same, insofar as is reasonably possible.

Defendant sought summary disposition under MCR 2.116(C)(7). The trial court denied the motion, concluding that plaintiff's claim was properly characterized as a claim for breach of contract.

The denial of a motion for summary disposition is a question of law to be reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In making its determinations, the appellate court reviews the entire record to determine if the moving party was entitled to summary disposition. *Id*. A moving party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. *Id*. at 119. The contents of the complaint are accepted as true unless specifically contradicted by suitable documents. *Id*. Additionally, an exhibit attached to a pleading (here the easement at issue) is considered to be part of that pleading for all purposes. MCR 2.113(F)(2).

MCL 691.1407(1) provides as follows:

> 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.

Governmental immunity does not extend immunity to breach of contract claims, "even when the contract action arises out of the same facts that would support a tort action." *Koenig v City of South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999). Defendant correctly points out that plaintiff's characterization of its claim as a breach of contract action is not dispositive, and that it is well established that "the court may look behind the technical label that a plaintiff attaches to a cause of action to the substance of the claim asserted." *Local 1064, RWDSU AFL-C10 v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995). For the sake of argument, defendant asserts that if it did fail to properly compact the soil in the utility line trench, or if inappropriate removal of excess fill sand did occur, then it is alleged to have exceeded the scope of the easement and misused its rights under the granted easement. Accordingly, defendant contends that any injury resulting from such alleged misuse is properly characterized as an unauthorized invasion of or interference with plaintiff's property and a trespass or trespass-nuisance. See *Embrey v Weissman*, 74 Mich App 138, 142-143; 253 NW2d 687 (1977).

We agree with the circuit court that the complaint does not sound in tort, but instead is a claim for breach of contract. The easement falls within the definition of a "deed poll" as being a written instrument that conveys some interest in property "executed by grantor only" as opposed

to an indenture signed by both grantor and grantee. See 23 Am Jur 2d, Deeds, § 3, p 77. Further, "according to the great weight of authority, the acceptance by the grantee of a deed poll signed and sealed by the grantor containing covenants to be performed by the grantee binds the latter to the performance of these covenants as effectually as if he had executed the instrument." *Johnston v Mich Consol Gas Co*, 337 Mich 572, 579-80; 60 NW2d 464 (1953); see also *AG v Mich Central R Co*, 145 Mich 140, 147; 108 NW 772 (1906). Accordingly, the law views the performance of such duty by the grantee as having been expressly assented to, failure of which will result in an action for breach of contract. See *Mich Central R Co*, 145 Mich at 147.[1] In other words, a deed poll is a contract in which one party provides a property interest in exchange for the fulfillment of certain conditions by the second party.

In this case, utilities were constructed and placed underground by defendant pursuant to the granted easement. Plaintiff asserted that defendant failed to comply with the restoration requirements of the easement. Plaintiff has successfully pleaded a claim for breach of contract. "If a plaintiff successfully pleads and establishes a non-tort cause of action, [MCL 691.1407] will not bar recovery simply because the underlying facts could have also established a tort cause of action." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984). Accordingly, defendant's motion for summary disposition was properly denied.

Affirmed. Plaintiff is entitled to costs under MCR 7.219.

/s/ Michael J. Kelly
/s/ Kurt T. Wilder
/s/ Douglas B. Shapiro

[1] Plaintiff points out that the courts have also implied the existence of a contract to prevent the unjust enrichment of one of the parties. However, such a contract can only be implied where no express contract covering the same subject matter already exists, as is the case here. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006).