

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Columbia Gas of Ohio, Inc.

Court of Appeals No. L-14-1058

Appellee

Trial Court No. CVE 13-01348

v.

Lucas County Sanitary Engineers

DECISION AND JUDGMENT

Appellant

Decided: February 27, 2015

* * * * *

Amanda Rasbach Yurechko, for appellee.

Julia R. Bates, Lucas County Prosecuting Attorney, John A. Borell
and Karlene D. Henderson, Assistant Prosecuting Attorneys, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Lucas County Sanitary Engineers, appeals the judgment of the Sylvania Municipal Court denying appellant's motion for judgment on the pleadings. For the reasons that follow, we affirm.

{¶ 2} Appellant does not set forth any assignments of error. However, appellant offers the following arguments:

I. The complaint fails to allege an exception to the general rule of political subdivision immunity[.]

II. Assertions of excavations relating to a county water system fail to allege an exception to the general rule of political subdivision immunity, since this is not a proprietary function[.]

III. Assertions of excavations relating to a county sewer system fail to allege an exception to the general rule of political subdivision immunity, since this is not a proprietary function[.]

IV. Even if the complaint alleges facts that, if true, constitute an exception to the general rule of immunity, immunity is restored by R.C. 2744.03[.]

{¶ 3} On October 21, 2013, appellee, Columbia Gas of Ohio, Inc., filed a complaint against appellant in Sylvania Municipal Court to recover \$1,120.40 in damages appellee alleged it sustained to its underground lines as a result of appellant's negligent excavation. In its complaint, appellee alleged appellant, through its representative, operated equipment "to perform excavation without informing itself of the location" of appellee's underground lines, or negligently excavated despite notice of appellee's lines.

{¶ 4} Appellant answered the complaint then filed a motion for judgment on the pleadings asserting it was immune from liability, pursuant to R.C. 2744.02, based on the

allegations in appellee's complaint. The trial court denied appellant's motion finding appellee had sufficiently alleged that appellant was engaged in a proprietary function, excavating, which was performed negligently thereby causing damages. Appellant timely appealed.

{¶ 5} In construing a complaint upon a motion for judgment on the pleadings, the trial court must presume the truth of all factual allegations of the complaint and make all reasonable inferences in favor of the nonmovant. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165, 297 N.E.2d 113 (1973). A motion for judgment on the pleadings tests the allegations of the complaint and presents only questions of law. *Id.* at 166. Appellate review of a judgment granting or denying a motion for judgment on the pleadings is *de novo*. *See Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 20.

{¶ 6} Civ.R. 8(A) states “[a] pleading that sets forth a claim for relief * * * shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled.” Civ.R. 8(C) provides “[i]n pleading to a preceding pleading, a party shall set forth affirmatively * * * any other matter constituting an avoidance or affirmative defense.” Statutory immunity is an affirmative defense which must be timely raised. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 97, 706 N.E.2d 1261 (1999).

{¶ 7} A three-step analysis is used to determine whether a governmental entity is entitled to immunity from tort liability. *Elston v. Howland Local Schools*, 113 Ohio St.3d

314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10. First, R.C. 2744.02(A)(1) sets forth the general blanket immunity applicable to political subdivisions which provides a political subdivision is generally not liable in a civil action for injury, death, or loss to person or property incurred while performing governmental or proprietary functions. To overcome this statutory immunity, a plaintiff must show that one of the five exceptions contained in R.C. 2744.02(B) applies. These exceptions include: negligent operation of a motor vehicle, negligent conduct of employees while carrying out a proprietary function, a municipality's failure to keep roads and sidewalks free from a nuisance, injury or loss which occurs on or within buildings, due to physical defects, used for governmental functions and is caused by the negligence of the municipality's employees, and any other situation in which liability is imposed by the Revised Code. If a plaintiff establishes one of the five enumerated exceptions to governmental immunity applies, a political subdivision may then assert one of the defenses set forth in R.C. 2744.03(A) to revive its immunity.

{¶ 8} Here, there is no dispute that appellant, as a political subdivision, is entitled to the general grant of immunity under R.C. 2744.02(A)(1). However, there is a dispute as to whether, under the second prong of the analysis, an exception to immunity applies; specifically R.C. 2744.02(B)(2), which subjects a political subdivision to liability for “the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.” Appellee contends an exception to immunity could exist, under R.C. 2744.01(G)(2)(d), if it is proven at trial that the excavation was performed in

the “maintenance, destruction, operation, and upkeep of a sewer system.” Appellee observes since there is no evidence before the court as to what appellant was doing when it was excavating, this exception cannot be excluded. Appellant argues exceptions to immunity must be strictly construed and there is no exception for “excavation activities.” In addition, appellant asserts R.C. 2744.01(G)(2)(c) defines a proprietary function as “[t]he establishment, maintenance, and operation of a utility, including municipal corporation water supply system,” and not a *county* water supply system. If an exception to immunity does apply, appellant contends its immunity is restored pursuant to R.C. 2744.03(A)(5) “if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources * * *.”

{¶ 9} Arguments similar to those raised by appellant were rejected in *Rosenbrook v. Lucas Cty. Bd. of Commrs.*, 6th Dist. Lucas No. L-11-1272, 2012-Ohio-6247. In that case, the appellant assigned as error the trial court’s failure to grant its motion for judgment on the pleadings because the complaint failed to allege an applicable exception to immunity. *Id.* at ¶ 5-7. The appellant argued the complaint failed to allege the specific statutory language found in the exception. *Id.* at ¶ 15. In affirming the judgment of the trial court, we observed the appellee used a satisfactory substitute for the statutory language, and held “[w]hile we recognize that Rosenbrook could have been more precise in her choice of words, we conclude that the language in Rosenbrook’s complaint is sufficient to survive a motion for judgment on the pleadings.” *Id.* at ¶ 16. Moreover, we

found “[a]fter reviewing the complaint in its entirety and construing it liberally to serve the substantial merits of the action, we cannot say the trial court erred by denying appellant’s motion for judgment on the pleadings.” *Id.* at ¶ 19.

{¶ 10} Here, appellee’s complaint, much like the complaint in *Rosenbrook*, “could have been more precise in [its] choice of words.” Nevertheless, accepting as true the allegations in the complaint and making all reasonable inferences in appellee’s favor, the complaint sufficiently alleges an exception to immunity. Appellee has alleged facts which, if proven, demonstrate that appellant could be liable if the excavation was negligently performed by appellant or its representative while in “[t]he maintenance, destruction, operation, and upkeep of a sewer system.” Moreover, there are no allegations in the pleadings which can be construed as restoring immunity to appellant. Thus, appellee’s complaint states a cause of action sufficient to survive the motion for judgment on the pleadings. For the foregoing reasons, appellant’s arguments are not well-taken.

{¶ 11} On consideration whereof, the judgment of the Sylvania Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.