

STATE OF MICHIGAN
COURT OF APPEALS

MONTE CARLO CONSTRUCTION, INC.
and ANTONIO EANGELISTA, INC.,

UNPUBLISHED

Plaintiff-Counterdefendants,
Appellants, Cross Appellees,

v

No. 172298
Wayne Circuit Court
LC No. 92220247 CK

CITY OF LINCOLN PARK,
L.N. HAYDEN, INC, a Michigan
corporation, and AL BENKER, jointly
and severally,

Defendant, Counterplaintiffs,
Appellees, Cross Appellants.

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

WHITE, J. (concurring).

I conclude that in the context of this case, the release and declaration provisions relied on by defendants are ambiguous as to scope.

As to the governmental immunity issue, while the cases relied on by plaintiffs do, indeed, allow for misrepresentation and fraud claims in circumstances similar to those alleged to be present here, the cases do not address the governmental immunity issue. As plaintiffs observe, to the extent tort claims were maintained in those cases, the claims arose out of the contractual relationship. In the instant case, in addition to their tort claims for gross negligence, fraud and negligent misrepresentation, plaintiffs' complaint alleges separate counts of estoppel, breach of contract, breach of express warranty, breach of implied warranty, and quantum meruit. These claims overlap the tort claims and are not barred by governmental immunity. The question is not whether governmental immunity insulates the governmental defendant from any liability arising from the transaction at issue, but whether plaintiffs' tort claims, as pleaded separate and apart from their contract-based claims, are barred. I agree that the circuit court properly dismissed the tort claims against Lincoln Park on the basis of governmental immunity.

As to the interest issue, I conclude that Lincoln Park waived any right to submit the matter to the decision of an agent under MCL 125.1564(1); MSA 5.2949(104)(1) by failing to designate an agent on a timely basis. MCL 125.1564(2); MSA 5.2949(104)(2). Further, while Lincoln Park seems to assert that the statute's dispute resolution procedures apply because the controversy falls within the provisions of MCL 125.1563(4); MSA 5.2949(103)(4), the relevant provision is MCL 125.1564(3); MSA 5.2949(104)(3), and Lincoln Park has not established that provision's applicability.

As to the claims against L. N. Hayden, Inc. and Benker, I agree that genuine issues remained as to their status as governmental employees. Further, their entitlement to immunity under the provisions of MCL 691.1407(2); MSA 3.996(107)(2), if applicable, has not been established.

In all other respects I join in the per curium opinion.

/s/ Helene N. White