

STATE OF MICHIGAN
COURT OF APPEALS

JACK LARSEN and DEBORAH LARSEN,

Plaintiffs-Appellees,

v

INGHAM COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 245717
Ingham Circuit Court
LC No. 02-000858-CC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant, Ingham County Road Commission, appeals the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7). We reverse and remand for further proceedings.

I. Facts and Procedural History

Defendant owns a parcel of land that is adjacent to a parcel owned by plaintiffs, Jack and Deborah Larsen. In their June 5, 2002 complaint, plaintiffs alleged that defendant entered their land and removed or destroyed trees, soil, and vegetation in order to build a ramp and road to defendant's property. Plaintiffs asserted claims of trespass, conversion, nuisance, and inverse condemnation.

On October 17, 2002, defendant filed a motion for summary disposition under MCR 2.116(C)(7). Defendant maintained that, when it entered plaintiffs' land, it was operating a gravel pit on its own property for the purpose of repairing and maintaining public roads. Therefore, defendant argued, it is immune from tort liability because it was engaged in the discharge of a governmental function. According to defendant, because plaintiffs failed to "plead in avoidance of governmental immunity," their tort claims of trespass, conversion and nuisance are barred and must be dismissed.¹ Defendant further argued that, though plaintiffs asserted a claim of inverse condemnation, it was actually a trespass-nuisance claim that is invalid under *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

¹ See *Mack v City of Detroit*, 467 Mich 186, 198-199; 649 NW2d 47 (2002).

In response, plaintiffs argued that defendant's motion was premature because discovery was not complete. Plaintiffs also said that the immunity statute does not apply because defendant failed to show that it was engaged in a governmental function. According to plaintiffs, while defendant is obligated to repair and maintain county roads, the operation of a gravel pit is not part of that governmental function. Plaintiffs further asserted that, if the operation of a gravel pit is a governmental function, it does not require defendant to trespass on plaintiffs' property and, therefore, defendant's actions are not protected by governmental immunity. Plaintiffs did not address defendant's argument that plaintiffs failed to plead in avoidance of governmental immunity.

The trial court denied defendant's motion for summary disposition in an order entered on December 10, 2002. At the motion hearing, the trial court judge explained that "there are factual disputes here which need to be developed to determine whether governmental immunity kicks in or not."

II. Analysis

A. Standard of Review and Applicable Law

As our Supreme Court explained in *Brown v Genesee County Bd of Com'rs*, 464 Mich 430, 433; 628 NW2d 471 (2001):

We review the grant or denial of a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). MCR 2.116(C)(7) permits summary disposition where immunity granted by law bars a claim. Courts must consider documentary evidence submitted by the parties.

Under the government tort liability 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(1).]

To maintain an action against a government agency, a plaintiff must plead in avoidance of immunity. *Mack v City of Detroit*, 467 Mich 186, 198-199; 649 NW2d 47 (2002). "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id.* at 204. A "governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." *Id.*, quoting MCL 691.1401(f). "To determine whether a governmental agency is engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995).

B. Application

Here, though defendant raises several arguments regarding the trial court's ruling, we find that one argument is dispositive: Plaintiffs failed to plead in avoidance of governmental

immunity. Plaintiffs' complaint describes defendant's alleged conduct of trespassing and removing earth and trees from plaintiffs' property, but plaintiffs clearly failed to either plead a claim that fits within a statutory exception to governmental immunity or facts that show that the alleged torts occurred during defendant's discharge of a nongovernmental or proprietary activity. Indeed, plaintiffs raised their unsupported argument that defendant was engaged in a "nongovernmental function" for the first time in response to defendant's motion for summary disposition. Again, however, no facts in the complaint allege, let alone "demonstrate," that defendant was engaged in a nongovernmental or *ultra vires* activity.

It appears from the record that plaintiffs misapprehended their burden before the trial court. Plaintiffs erroneously argued below that they established an issue of fact because *defendant* failed to show that the operation of a gravel pit is a governmental function. Again, and contrary to this assertion, for a motion under MCR 2.116(C)(7), the court "must review the complaint to determine whether the plaintiff has pleaded facts justifying application of an exception to governmental immunity." *Johnson v City of Detroit*, 457 Mich 695, 700-701; 579 NW2d 895 (1998). Accepting the contents of the complaint as true, plaintiffs failed to do so.

Because the trial court erroneously ruled that plaintiffs established an issue of fact regarding whether governmental immunity applies, we reverse the trial court's denial of summary disposition on plaintiffs' tort claims. Plaintiff failed to plead facts that demonstrate that defendant was engaged in a nongovernmental function. Because of this failure and the failure to plead a statutory exception to governmental immunity, the trial court should have dismissed plaintiffs' tort claims of trespass, conversion and nuisance as a matter of law.² None of these claims fall under one of the five statutory exceptions to governmental immunity,³ and the claims should have been dismissed.

Because the trial court did not address plaintiffs' allegations of inverse condemnation or violation of the Uniform Condemnation Procedures Act, MCL 213.51 *et seq.*, we decline to address those claims at this time.

² The trial court ruled only that a factual dispute exists regarding whether governmental immunity applies to defendant's conduct. The court failed to rule on defendant's argument that plaintiffs alleged only tort claims and failed to plead one of the five statutory exceptions to governmental immunity. However, because our review is *de novo*, and because plaintiffs clearly asserted tort claims and did not allege one of the statutory exceptions, we conclude that those claims should have been summarily dismissed.

³ The exceptions five statutory exceptions include the highway exception, MCL 691.1402, the motor vehicle exception, MCL 691.1405, the public building exception, MCL 691.1406, the proprietary function exception, MCL 691.1413, or the governmental hospital exception, MCL 691.1407(4).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra