

STATE OF MICHIGAN
COURT OF APPEALS

FARMERS INSURANCE GROUP,
Plaintiff-Appellant,

UNPUBLISHED
May 17, 2005

v

DEPARTMENT OF NATURAL RESOURCES,
Defendant-Appellee.

No. 252488
Ingham Circuit Court
LC No. 02-000229-MM

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff Farmers Insurance Group appeals as of right from the trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arose when an abandoned building in Detroit, which had reverted to the state because of delinquent taxes, caught fire and spread to an adjacent property. Plaintiff filed suit seeking to recoup funds it paid to its insured, the owner of the adjacent building, as a result of the fire. The complaint alleged that defendant is liable to plaintiff based on a trespass-nuisance theory and because defendant's failure to abate the fire hazard existing in its building amounted to an unconstitutional taking or inverse condemnation of the neighboring property.¹

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because the Takings Clause² of the Michigan Constitution was triggered

¹ The trial court granted summary disposition of plaintiff's trespass-nuisance claim based on MCR 2.116(C)(7). It correctly noted that, pursuant to our Supreme Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675, 689-690; 641 NW2d 219 (2002), such claims against government agencies are barred by governmental immunity under MCL 691.1407(1). Plaintiff does not challenge this ruling on appeal.

² The Takings Clause, Const 1963, art 10, § 2, provides, "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

when defendant caused damage to the adjacent property. Plaintiff asserts that a governmental entity has a constitutional duty to prevent or abate a nuisance condition on property that it owns or controls before it results in damage to private property. And plaintiff contends that the trial court erred in finding that an unconstitutional taking resulting from a nuisance requires an affirmative action on the part of the governmental entity.

The decision to grant or deny a motion for summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Under MCR 2.116(C)(8), a trial court properly grants a motion for summary disposition where the opposing party has failed to state a claim on which relief can be granted. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). Such motions test the legal sufficiency of a claim based solely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). When considering motions brought under MCR 2.116(C)(8), courts must accept all well-pleaded factual allegations as true and construe them in a light most favorable to the non-moving parties. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

This Court's recent decision in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004), resolves the issue presented in the instant case. *Hinojosa* similarly dealt with a fire that started in an abandoned building owned by the state before spreading to adjacent properties. *Id.* at 538-539. The owners of the surrounding buildings filed suit alleging an unconstitutional taking or inverse condemnation. *Id.* at 540. The trial court granted summary disposition on the ground that the plaintiffs' complaint failed to allege an overt activity on the part of the defendant that interfered with the plaintiffs' enjoyment of their property. *Id.* On appeal, this Court noted that, to establish a de facto taking or inverse condemnation, a plaintiff must prove that (1) "the government's actions were a substantial cause of the decline of its property" and (2) that "the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.* at 549, quoting *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004). It then held that because the complaint failed to allege any "affirmative action by the state directed at plaintiffs' properties," the trial court properly granted the defendant's motion for summary disposition under MCR 2.116(C)(8). *Hinojosa, supra* at 548, 550.

As in *Hinojosa*, the complaint in the instant case does not allege that defendant took any affirmative action directed at the property owned by plaintiff's subrogor. Rather, plaintiff alleges that the property in question suffered damage due to defendant's failure to act and abate the dangerous conditions present on its property. Such a claim amounts to no more than "alleged negligent failure to abate a nuisance" and is therefore barred by governmental immunity. *Hinojosa, supra* at 548. Consequently, plaintiff has failed to state a claim upon which relief may be granted.³

³ With respect to plaintiff's statutory argument, we first note that the alleged statutory violations were not contained in plaintiff's complaint. Moreover, the statutes cited on appeal do not
(continued...)

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski

(...continued)

suggest that the government is subject to civil tort liability. For instance, plaintiff references the Fire Prevention Code, MCL 29.1 *et seq.*, which indeed provides that government owned buildings that constitute a fire hazard “shall be subject in all cases to the provisions of this act.” MCL 29.17. The Fire Prevention Code further provides for criminal penalties, civil fines, and for the abatement of a fire hazard. MCL 29.22 and MCL 29.23. There is no language indicating that the government is subject to civil tort liability contrary to governmental immunity principles. Rather, the statutory scheme stands only for the unremarkable proposition that government buildings must be maintained consistent with the Fire Prevention Code or else fines, criminal penalties, and injunctive action may arise.