STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. FALK,

Plaintiff-Appellant,

v

DEPARTMENT OF NATURAL RESOURCES and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants-Appellees.

UNPUBLISHED
November 20, 2012

No. 307212
Court of Claims
LC No. 11-000043-MZ

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition. We affirm.

Defendants manage and control a pond known as Peterson Pond, which is located approximately two miles north of plaintiff's pond. At some point, defendants constructed a dam in the Peterson pond. Plaintiff alleged that defendants were negligent in the construction and maintenance of that dam and, in April of 2008, the dam failed causing plaintiff's downstream pond to be damaged. Plaintiff did not notice the damage until several months later and, in August of 2009, he notified defendants. After an investigation, in June of 2010 defendants denied responsibility for the damage. Plaintiff filed this action in April of 2011.

Defendants responded to plaintiff's complaint with a motion for summary disposition. Defendants argued that dismissal was proper under MCR 2.116(C)(7) and (C)(8) because defendants are generally immune from tort liability, MCL 691.1407, and plaintiff did not state a claim in avoidance of that immunity. Further, defendants argued, dismissal was proper under MCL 2.116(C)(4) because plaintiff failed to comply with the statutory notice requirement set forth in MCL 600.6431(3). In actions for property damage, the claimant must "file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). Here, defendants argued, plaintiff did not file the claim until 36 months after the event giving rise to the claim; thus, plaintiff failed to provide the proper notice and, consistent with the holding of *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), dismissal of the complaint was mandatory.

Plaintiff responded to defendants' motion arguing, in pertinent part, that defendants had actual notice of plaintiff's claim, acknowledged the claim, investigated the claim, and stated an intention to resolve the claim. Therefore, plaintiff argued, the substance of the statutory notice requirement was met. Plaintiff also moved to file an amended complaint. In his amended complaint, plaintiff alleged an unconstitutional taking arising from defendants' negligent construction and maintenance of the dam in the Peterson Pond. The court allowed plaintiff's amended complaint.

Subsequently, the Court of Claims granted defendants' motion for summary disposition. First, the court held that plaintiff's unconstitutional taking claim was barred by governmental immunity because plaintiff "failed to allege any affirmative action by Defendants directed toward Falk Pond," as set forth in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 550; 688 NW2d 550 (2004). Therefore, defendants were entitled to summary disposition under MCR 2.116(C)(7) and (C)(8). Second, the court held that plaintiff was required, under MCL 600.6431(3), to file his claim within six months of his pond allegedly sustaining damage but he filed this case 36 months later; thus, as set forth in *Rowland*, 477 Mich at 219, the court lacked subject matter jurisdiction. Therefore, defendants were also entitled to summary disposition under MCR 2.116(C)(4). Accordingly, this case was dismissed in its entirety. This appeal followed.

Plaintiff argues that noncompliance with the statutory notice provision, MCL 600.6431(3), does not require dismissal of this case because defendants had actual notice of his claim and they acknowledged, investigated, and attempted to resolve his claim. We disagree.

The lower court's decision to grant defendants' motion for summary disposition is reviewed de novo, as are issues of statutory interpretation. See *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

This case is governed by *McCahan v Brennan*, 492 Mich 730; ___ NW2d ___ (2012), which specifically involved the notice provision of the Court of Claims Act, MCL 600.6431(3). The relevant issue in that case was: "what effect must be given to a failure to file either a claim or notice of intent to file a claim pursuant to subsection (3), particularly when a state entity otherwise received actual notice of plaintiff's injury?" *Id*., slip op at 4. Our Supreme Court answered that "the failure to file a compliant claim or notice of intent to file a claim against the state within the relevant time periods designated in either subsection (1) or (3) will trigger the statute's prohibition that '[n]o claim may be maintained against the state . . . .'" *Id*., slip op at 6. Further, the Court held that, although the plaintiff had provided the defendant with "notice of the accident, information sufficient to investigate the accident, and notice of her intent to bring suit if necessary to resolve her claim," the plaintiff's claim was barred because "no saving construction—such as requiring a defendant to prove actual prejudice—is allowed." *Id*., slip op at 6, 8.

In this case, pursuant to MCL 600.6431(3), plaintiff was required to file his property damage claim or a notice of intent to file such claim "with the clerk of the court of claims" within six months "following the happening of the event giving rise to the cause of action." Because plaintiff did not comply with the plain language of the notice provision, his action is

barred. Accordingly, defendants' motion for summary disposition premised on this argument was properly granted. In light of our resolution of this issue, we need not consider plaintiff's other argument on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro