

Court of Appeals, State of Michigan

ORDER

Leon V. Bonner v James Rowell

Docket No. 303814

LC No. 11-025737-CZ

Jane E. Markey
Presiding Judge

Christopher M. Murray

Douglas B. Shapiro
Judges

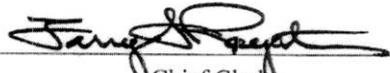
The Court orders that the unpublished majority opinion and the partial concurrence/dissent in this case, which were issued on November 29, 2012, are VACATED. New majority and partially concurring/dissenting opinions will be issued on a future date.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

NOV 30 2012

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

LEON V. BONNER and MARILYN E. BONNER,

Plaintiffs-Appellants,

UNPUBLISHED
November 29, 2012

v

JAMES ROWELL, DANA FOSTER,
KATHLEEN LAWRENCE, CHAD COOPER,
JAMES MUZZIN, SHAWN PIPOLY, CLAUDIA
ROBLEE, MAYOR RICCI BANDKAU,

No. 303814
Livingston Circuit Court
LC No. 11-025737-CZ

Defendants-Appellees.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court’s order granting summary disposition in favor of defendants. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case stems from an ongoing dispute between plaintiffs and the city of Brighton regarding the city’s efforts to demolish certain structures plaintiffs owned that defendant James Rowell, the city’s building and code enforcement official, found to be “unsafe” under the Brighton Code of Ordinances (BCO).¹ A detailed recitation of the factual and procedural history of the dispute can be found in *Bonner v City of Brighton*, __ Mich App __; __ NW2d __, issued June __, 2012 (Docket No. 302677). That appeal concerned consolidated trial court actions in which plaintiffs sued the city under numerous legal theories, and the city sued plaintiffs in an attempt to procure a demolition order relative to the unsafe structures.

¹ To a lesser extent, this case also involved allegations by plaintiffs that they were improperly billed for water and sewer services and unlawfully threatened with foreclosure for nonpayment of those services, where the water supply to the properties subject to potential demolition, along with other properties owned by plaintiffs, had been shutoff many years ago. Plaintiffs also complained about failures to turn the water back on relative to those properties.

The current appeal pertains to a subsequent and separate action plaintiffs filed against various individuals, which included Rowell, the city manager, city council members, and the city's mayor, who is also a member of the council. Plaintiffs went beyond the earlier suits that involved only themselves and the city, initiating this litigation directly against city personnel who actually engaged in the conduct and decision-making that plaintiffs deemed unlawful. Plaintiffs alleged various state and federal constitutional violations in their complaint, along with additional state law claims. On defendants' motion for summary disposition, the trial court ruled that defendants were protected by governmental immunity under MCL 691.1407(5) with respect to all of plaintiffs' state law claims and that the federal law claims were barred by the doctrine of res judicata arising out of a judgment in the earlier litigation that was predicated on acceptance of case evaluation.

II. ANALYSIS

A. STANDARD OF REVIEW AND MCR 2.116(C)(7)

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011); *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008). Further, the determination regarding the applicability of governmental immunity and an exception to governmental immunity is a question of law that is also subject to de novo review. *Co Rd Ass'n of Michigan v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010); *Robinson v Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009), rev'd on other grounds 486 Mich 1 (2010). We review de novo questions of law in general, including matters concerning statutory construction and the applicability of the doctrine of res judicata. *Loweke*, 489 Mich at 62; *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002); *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008).

Under MCR 2.116(C)(7), an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law" or "barred because of . . . prior judgment." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008);² *RDM Holdings*, 281 Mich App at 687. The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom*, 482 Mich at 466. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377;

² The burden of proof with respect to governmental immunity for an individual falls on the "governmental employee to raise and prove his entitlement to immunity as an affirmative defense." *Odom*, 482 Mich at 479.

532 NW2d 541 (1995). If, however, a pertinent factual dispute exists, summary disposition is not appropriate. *Id.*

B. RES JUDICATA AND THE FEDERAL LAW CLAIMS

Plaintiffs first argue that the trial court erred in summarily dismissing their federal law claims on the basis of res judicata. Plaintiffs maintain that the court, when it invoked the doctrine of res judicata, relied on a judgment that was entered after the parties accepted case evaluation in the earlier-filed litigation; however, the court subsequently vacated that judgment and thus the doctrine is inapplicable. We note that plaintiffs filed a motion to set aside the summary disposition order after the appeal was filed in light of the events that transpired, but the trial court declined to entertain the motion on jurisdictional grounds given that the case was pending in this Court.

In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), our Supreme Court, discussing the doctrine of res judicata, stated:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [Citations omitted.]

We vacate the trial court's order granting summary disposition based on res judicata in regard to the federal law claims, including the conspiracy count in the complaint as it relates to the allegations that defendants conspired to commit inverse condemnation or a regulatory taking in violation of US Const, Am V. There is no dispute that, because of extensive confusion, misunderstandings, mistakes, and legal errors relative to the case evaluation and the award, the court later vacated the case evaluation proceedings and award in the consolidated actions, along with the judgment that was based on acceptance of case evaluation. Accordingly, there was ultimately no decision on the merits and the prior judgment can no longer support the application of res judicata principles.

As an alternative basis to affirm the trial court's ruling, defendants argue that they are immune from liability with respect to the federal law claims brought under 42 USC 1983. Defendants contend that absolute immunity exists in regard to the exercise of legislative discretion by local legislators or officials and that qualified immunity exists relative to conduct characterized as or reflecting mistaken judgments. Defendants assert that the actions plaintiffs complained of fall within the principles of absolute and qualified immunity. Plaintiffs, in cursory fashion, maintain that 42 USC 1983 and preemption principles preclude granting immunity protection to defendants. The trial court declined to address the issue because of its res judicata ruling on the federal law claims, which made it unnecessary to reach immunity matters on those claims. We remand to the trial court for consideration of the immunity argument posed by defendants in relationship to the federal law claims. This will give the parties

an opportunity to more thoroughly develop their respective positions. We do note that federal causes of action filed in state court require examination of “federal case law on the issue of governmental immunity.” *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 594; 640 NW2d 321 (2001).

C. GOVERNMENTAL IMMUNITY AND THE STATE LAW CLAIMS

Plaintiffs set forth a variety of arguments challenging the trial court’s ruling that defendants were shielded from liability by governmental immunity as to the state law claims, which arguments we shall address after reciting the governing principles. In *Odom*, 482 Mich at 479-480, our Supreme Court enunciated the test for analyzing cases concerning governmental immunity in relationship to claims against individual governmental agents, employees, and officers:

To summarize and simplify the application of our decision, we provide these steps to follow when a defendant raises the affirmative defense of individual governmental immunity. The court must do the following:

(1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity . . . by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

With respect to immunity for certain governmental officials under MCL 691.1407(5), which the trial court relied upon in granting summary disposition on the state law claims, the statute provides as follows:

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

Plaintiffs present a prefatory argument that defendants Rowell and Foster (the city manager) were not entitled to immunity under MCL 691.1407(5) because they were employees hired or appointed under contracts with the city and not *elected* officials as mistakenly found by the trial court. We first note that the trial court did not find that Rowell and Foster were elected officials, but instead ruled that they were “the highest appointed officials in their respective roles.” Furthermore, as clearly stated in MCL 691.1407(5), the immunity extends to the “elective *or* highest appointive executive official” (Emphasis added.) It is not necessary to be an elected governmental official under the plain and unambiguous language of the statute. Accordingly, we reject plaintiffs’ arguments.

Plaintiffs next argue that defendants are not judges or the highest appointed executive officials for purposes of MCL 691.1407(5). Plaintiffs further argue that, assuming the applicability of MCL 691.1407(5) as to defendants’ governmental positions, defendants were nevertheless not entitled to immunity under the statute because they were acting outside the scope of their authority. They acted outside the scope of their authority, according to plaintiffs, when defendants participated in the decision to order the demolition of plaintiffs’ structures without providing them an opportunity to repair the structures, which option is alleged to be mandated by the city’s charter. Plaintiffs contend that defendants were also acting outside the scope of their authority when they authorized the initiation of demolition litigation by the city against plaintiffs in one of the consolidated actions absent an opportunity to repair. Plaintiffs further claim that defendant city council members were not acting in a legislative capacity or within their legislative authority relative to the challenged conduct; therefore, they lacked absolute immunity. Finally, plaintiffs argue that defendants were not entitled to governmental immunity because they committed intentional torts and engaged in conduct that was grossly negligent and reflected malice and bad faith.

To properly analyze the issues presented, we must first reflect on the nature of the state law claims plaintiffs raise and the type of relief sought. These claims included allegations of various procedural and substantive due process violations under Const 1963, art 1, § 17 (money damages and equitable relief); conspiracy to commit an unlawful regulatory taking or inverse condemnation under Const 1963, art 10, § 2 (money damages – just compensation); gross negligence, as reflected in various acts and omissions (money damages); willful misapplication of state law through the enforcement of an unconstitutional ordinance, BCO, § 18-59, and the

failure to enforce BCO, § 18-60 and § 18-77 (§ 110.1 of adopted International Property Maintenance Code) (money damages); mandamus and superintending control (equitable relief); intentional infliction of emotional distress (money damages), and tortious interference with a business expectancy (money damages). As indicated in the prayers for relief relative to each of the claims, plaintiffs sought money damages and/or equitable relief.

Initially, although not addressed by the trial court or the parties, plaintiffs' claims for money damages arising out of alleged violations of procedural and substantive due process rights under the Michigan Constitution fail as a matter of law. *Jones v Powell*, 462 Mich 329, 335-337; 612 NW2d 423 (2000) (there is no money damage remedy for violation of the Michigan Constitution in suit against individual governmental employees); *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001) ("no inferred damages remedy for a violation of a state constitutional right exists against individual government employees"). Accordingly, the trial court, albeit for different reasons, properly dismissed the Michigan constitutional claims relative to due process to the extent that money damages were sought. This includes plaintiffs' claim seeking money damages for willful misapplication of state law, which is premised on violations of the Michigan Constitution.

With respect to equitable relief and plaintiffs' Michigan constitutional due process claims, we note that the immunity protection afforded under MCL 691.1407(5) is immunity from "tort liability." The immunity does not extend to alleged constitutional violations for which a party seeks equitable relief. *Duncan v Michigan*, 284 Mich App 246, 271-272; 774 NW2d 89 (2009), aff'd on other grounds 486 Mich 906 (2010) (governor not shielded by immunity under MCL 691.1407[5] on various claims, including alleged violation of due process under Const 1963, art 1, § 17, whereon declaratory and injunctive relief was sought); see also *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007) (noting that injunctive or declaratory relief was still available to the defendant even though governmental immunity did not allow for cause of action for money damages based on violation of statute that itself failed to provide for a cause of action). Accordingly, the trial court erred in summarily dismissing the procedural and substantive due process claims brought under the Michigan Constitution to the extent that equitable relief was sought on those claims. With respect to the count of conspiracy to commit an unlawful regulatory taking or inverse condemnation under Const 1963, art 10, § 2, governmental immunity does not protect against a takings claim. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 90-91 n 38; 445 NW2d 61 (1989) ("Since the obligation to pay just compensation arises under the constitution and not in tort, the immunity doctrine does not insulate the government from liability").³ Effectively, none of plaintiffs' claims under the Michigan Constitution required contemplation of whether the individual defendants were covered by MCL 691.1407(5).

³ We are not voicing an opinion regarding the legal validity or soundness of a conspiracy-takings cause of action brought against individuals; we are simply indicating that governmental immunity does not bar the claim, assuming it to be a recognizable cause of action.

In regard to the state mandamus count in plaintiffs' complaint, this Court in *Mercer v Lansing*, 274 Mich App 329, 332; 733 NW2d 89 (2007), stated that "a mandamus action is not subject to the governmental tort liability act (GTLA)," MCL 691.1401 *et seq.* Accordingly, defendants are not shielded by immunity under MCL 691.1407(5) with respect to the mandamus count, even assuming the applicability of MCL 691.1407(5).

This leaves, for purposes of analyzing the applicability of MCL 691.1407(5), the state law claims of gross negligence, intentional infliction of emotional distress, and tortious interference with a business expectancy, which all concern tort liability and money damages. Plaintiffs argue that defendants are not judges or the highest appointed executive officials for purposes of MCL 691.1407(5), which requires a party to be a "judge, a legislator, [or] the elective or highest appointive executive official of all levels of government." Although it is a bit difficult to decipher plaintiffs' brief, they do not appear to directly argue that defendant city council members are not "legislator[s]."⁴ Rather, plaintiffs maintain that the city council members were not acting within their legislative authority relative to the challenged conduct, but were instead acting jointly as a board of appeals. We shall address that argument below, focusing now on plaintiffs' argument that Rowell, as the city's building official, and Foster, as the city manager, were mere employees and did not qualify as the highest appointive executive officials in or of a level of government. Unfortunately, this is essentially the full extent of plaintiffs' argument. They fail to develop the argument, fail to cite any legal authorities in support of their position, and wholly fail to engage in any kind of legal analysis pertaining to the applicable principles necessary to answer the question. See *Grahovac v Munising Twp*, 263 Mich App 589, 593-594; 689 NW2d 498 (2004) (reciting cases and principles in determining whether a fire chief was the highest appointed executive official of a level of government). Accordingly, the issue has been waived for purposes of appellate review. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).⁵ Thus, given plaintiffs' inadequate briefing on the subject, we decline to disturb the trial court's ruling.

⁴ To the extent that plaintiffs are making such an argument, we reject it. Defendant city council's members, which include the mayor, hold elective legislative positions as part of the city's governing body; consequently, they have the authority to pass and enforce city laws and ordinances. Brighton Charter, §§ 2.2, 3.5, and 4.1. They qualify as legislators. See *Gora v City of Ferndale*, 456 Mich 704, 720; 576 NW2d 141 (1998) (observing that city council members hold legislative office).

⁵ The Court in *Mudge*, 458 Mich at 105, stated:

"It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

With respect to plaintiffs' argument that defendants were not acting within the scope of their authority in calling for demolition absent an option to repair and in authorizing the commencement of a lawsuit against plaintiffs, we disagree. Under the Brighton Charter, § 2.3(t), the city is given the power to provide for "requiring . . . an owner of real property within the city to abate public hazards and nuisances which are dangerous to the health or safety of inhabitants of the city *within a reasonable time* after the Council notifies him that such hazard or nuisance exists[.]" (Emphasis added.) Plaintiffs rely on the emphasized language for the proposition that the city must provide for a reasonable period of time in which an owner can make repairs and that, in failing to so provide here, defendants were acting outside the scope of their authority. Still, the charter provision speaks of a "reasonable time" to abate the nuisance, not to repair the structure, and abatement can take the form of demolition. Accordingly, the city charter implicitly authorized the city to provide for the demolition of property within a reasonable time frame without an option to repair. The city so provided in BCO, § 18-59, which is the provision that this panel found to be unconstitutional in *Bonner*, __ Mich App __ (Docket No. 302677), and which provision the city enacted under its authority to pass ordinances, Brighton Charter, § 2.2. Regardless of our ruling in the published opinion, BCO, § 18-59, was an ordinance in effect at the time of the alleged misconduct; therefore, defendants were acting within the scope of their authority when they enforced the ordinance. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633 n 41; 363 NW2d 641 (1984) (requirement that an individual act within the scope of his authority protects against an individual being "held liable merely because it is later determined that he acted under an unconstitutional statute").⁶

Finally, we address plaintiffs' argument that the city council members were not acting within their legislative authority relative to the challenged conduct but were instead acting jointly as a board of appeals. Under BCO, § 18-61, city council members, as a legislative body governing city affairs, had the authority to hear appeals regarding unsafe structures; therefore, plaintiffs' argument fails. Plaintiffs seem to suggest that defendant council members needed to be engaged in legislative-type activities, e.g., passing resolutions or enacting ordinances, in order to be covered by MCL 691.1407(5), but such a position finds no support in the plain language of MCL 691.1407(5). The council members were legislators "acting within the scope of [their] . . . legislative . . . authority." MCL 691.1407(5). Making decisions as an appellate board on building matters is exactly, in our view, the kind of activity that the Legislature was attempting to protect from tort liability under MCL 691.1407(5); it is akin to a judicial function.

The trial court did not err in summarily dismissing under MCL 691.1407(5) the state law claims of gross negligence, intentional infliction of emotional distress, and tortious interference with a business expectancy. Accordingly, it is unnecessary to address plaintiffs' arguments

⁶ Plaintiffs' argument that defendants were acting outside the scope of their authority when they authorized the initiation of demolition litigation absent a repair option is predicated on the same charter provision. Accordingly, we similarly reject the argument. There is no indication that defendants lacked the authority to authorize the commencement of litigation. Whether the authority was properly exercised is a different question altogether and irrelevant to our analysis.

concerning gross negligence, malice, and bad faith, which only come into play with regard to governmental employees or officials not protected under MCL 691.1407(5). *Odom*, 482 Mich at 479-480.

III. CONCLUSION

We vacate the trial court's order granting summary disposition to defendants with respect to plaintiffs' federal law claims, including the conspiracy count as it relates to inverse condemnation or a taking under US Const, Am V. Further, we affirm the trial court's order granting summary disposition in favor of defendants in regard to plaintiffs' claims of gross negligence, intentional infliction of emotional distress, tortious interference with a business expectancy, and the procedural and substantive due process claims under the Michigan Constitution to the extent that money damages were requested and which also encompasses the misapplication-of-state-law claim. Finally, we vacate the trial court's order granting summary disposition to defendants with respect to plaintiffs' mandamus count, plaintiffs' procedural and substantive due process claims under the Michigan Constitution to the extent that equitable relief was requested, and plaintiffs' conspiracy count as it relates to inverse condemnation or a taking under Const 1963, art 10, § 2.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, we do not award costs. MCR 7.219.

/s/ Jane E. Markey

/s/ Douglas B. Shapiro