

STATE OF MICHIGAN
COURT OF APPEALS

SAFECO PROPERTY & CASUALTY
INSURANCE COMPANY,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 16, 2006

No. 258977
Wayne Circuit Court
LC No. 04-412389-CH

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

PER CURIAM.

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

This case involves vacant property in Detroit located at 7742 Senator and owned by defendant. On October 1, 2002, a fire allegedly began on this property and spread to the neighboring property at 7748 Senator. The owner of 7748 Senator was insured by plaintiff and incurred damages to her property as a result of the fire. Plaintiff paid its insured \$82,381.66 on this fire-related claim.

Plaintiff, as subrogee to its insured, brought this suit seeking damages on claims of trespass-nuisance and inverse condemnation. Plaintiff alleged that defendant's failure to abate the fire hazard nuisance that existed at 7742 Senator, which caught fire and spread to 7748 Senator, amounted to an inverse condemnation of 7748 Senator under the Takings Clause of the Michigan Constitution.¹ The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(7) and (C)(8).

¹ The Takings Clause, Const 1963, art 10, § 2, provides: "Private property shall not be taken for public use without just compensation thereof being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 540-541; 688 NW2d 550 (2004). In this case, the motion for summary disposition under MCR 2.116(C)(7) tested whether the claim of trespass-nuisance was barred because of immunity granted by law. Under such a motion the court must consider all documentary evidence in a light most favorable to the nonmoving party. *Hinojosa, supra* at 541. The court must accept the complaint as true unless specifically contradicted by submitted documentary evidence. *Id.*

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone to determine whether plaintiff has stated a claim on which relief may be granted. *Id.* All well-pleaded allegations are to be accepted as true when construed in the light most favorable to the nonmoving party. *Id.* "The motion may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (internal citations omitted).

The tort of trespass-nuisance is a distinct action from that of a constitutional taking. *Id.* at 546. Even though some "judicial decisions have closely associated trespass-nuisance with the Taking Clause, it remains a tort." *Id.* The governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. *Id.* at 547.

In light of the holding in *Hinojosa*, plaintiff's claim of trespass-nuisance against defendant is barred on the basis of governmental immunity. Summary disposition based on MCR 2.116(C)(7) was therefore appropriate. Plaintiff's reliance on *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970), was misplaced because *Buckeye* was decided based on common-law sovereign immunity. *Hinojosa, supra* at 543. "[N]either statutory immunity, MCL 691.1407, nor Const 1963, art 10, § 2, were at issue in *Buckeye*." *Id.*

Inverse condemnation requires a showing of two necessary elements. *Hinojosa, supra* at 549. The plaintiff must first prove "that the government's actions were a substantial cause of the decline of its property." *Id.* Second, the plaintiff must "establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.* Merely alleging a negligent failure to abate a nuisance does not establish an affirmative governmental action directed at the plaintiff's property. *Id.* at 548.

Plaintiff did not allege any affirmative action directed at the property of its insured. Rather, plaintiff asserts that the insured's property suffered damage because of defendant's failure to act and abate the dangerous conditions at 7742 Senator. Such an allegation does not set forth the elements required to state a claim of inverse condemnation.

Affirmed.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra