STATE OF MICHIGAN

COURT OF APPEALS

JODI ALLEN,

Plaintiff/Counter Defendant-Appellee,

v

CITY OF LAINGSBURG,

Defendant/Counter Plaintiff/Third Party Plaintiff-Appellant,

and

SHIAWASSEE COUNTY DRAIN COMMISSIONER,

Defendant,

and

CARRIE ALLEN, LARRY EAKIN, BRIDGET EAKIN, ROBERT HURST, and JAYNE HURST,

Third Party Defendants.

UNPUBLISHED
February 16, 2010

No. 286031
Shiawassee Circuit Court
LC No. 07-005653-CH

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant City of Laingsburg (defendant) appeals as of right from the trial court's order denying in part its motion for summary disposition with respect to plaintiff's inverse condemnation claim. We affirm.

On June 4, 2007, plaintiff filed his complaint alleging, in relevant part, that defendant modified the elevations of its land near plaintiff's property which directly impacted the flow of storm water run-off—purportedly because the area's storm management system became overburdened—and caused permanent flooding conditions on plaintiff's property. Because a portion of his property is submerged by storm water run-off, plaintiff asserted that defendant's actions amounted to a taking of his property.

On December 4, 2007, defendant moved for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8) with regard to the inverse condemnation claim. First, defendant argued that it was entitled to immunity under MCL 691.1417 because plaintiff failed to establish that the "sewage system disposal event" exception, MCL 691.1417(2), applies in this case. See *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006). Second, defendant argued that plaintiff's complaint failed to state a claim upon which relief could be granted because (1) plaintiff failed to provide pre-filing notice required by MCL 691.1419(1), and (2) plaintiff failed to allege the necessary elements required by MCL 691.1417(3), i.e., he failed to plead facts in avoidance of governmental immunity. See *Willett*, *supra* at 49-50.

In response to defendant's motion, plaintiff first argued that governmental immunity is not a defense to his claim. He pleaded a constitutional takings claim—inverse condemnation, not a tort claim. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994). His inverse condemnation claim was based on a physical intrusion and permanent deprivation of the use of his land caused by defendant's actions. Second, defendant's argument for dismissal under MCR 2.116(C)(8) was without merit because plaintiff did not allege a claim for damages under a tort theory, i.e., this was not a claim for damages due to flooding, it was a takings claim. And, plaintiff argued, if he did desire to seek damages due to flooding, to the extent his complaint failed to properly set forth his claim, he should be permitted to amend his complaint to comply with MCL 691.1417.

On February 29, 2008, the trial court heard oral argument on defendant's motion and took the matter under advisement. On May 28, 2008, the court issued its opinion denying defendant's motion with respect to plaintiff's inverse condemnation claim. The court recognized that a governmental agency is generally "immune from a suit based on flooding," unless the plaintiff can establish that the flooding is a result of a "sewage disposal system event" as defined by MCL 691.1416(k). See MCL 691.1417(2). However, the court noted that plaintiff's complaint was not alleging a tort, but rather the creation of a permanent condition that constituted an unconstitutional taking of his property without compensation. The trial court concluded that governmental immunity cannot bar a claim based on an unconstitutional taking; thus, defendant's argument was without merit. This appeal followed.

Defendant argues that the trial court erroneously denied its motion for summary disposition because the procedural requirements set forth in MCL 691.1416 through MCL 691.1419 apply to plaintiff's claim. After de novo review of the trial court's decision on defendant's motion for summary disposition, we disagree. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiff pleaded a claim for inverse condemnation. A claim for inverse condemnation is based on a violation of the constitutional provision prohibiting the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982); *Kethman v Oceola Twp*, 88 Mich App 94, 105; 276 NW2d 529 (1979). An inverse condemnation action may be instituted by an owner whose property, while not formally taken for public use, has been damaged by a public improvement undertaking or other public activity. *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004), quoting *In re Acquisition of Virginia Park*, 121 Mich App 153, 158; 328 NW2d 602 (1982).

In this case, defendant claims that the procedural requirements set forth under the Governmental *Tort* Liability Act (GTLA), MCL 691.1401 *et seq*., apply. The GTLA provides that, in general, governmental agencies engaged in governmental functions are immune from tort liability. MCL 691.1407(1). Plaintiff has not brought a tort claim against defendant. An inverse condemnation action is not a tort action. Plaintiff claims that his property has been damaged by a public improvement; particularly, a modification of the land elevations which significantly and negatively impacted the flow of storm water run-off. Whether defendant was negligent with regard to the public improvement is not at issue. The issue is whether defendant's actions constituted a taking in violation of US Const, Am V; Const 1963, art 10, § 2. It is well settled that a claim against a governmental agency based on constitutional rights is not subject to governmental immunity. See *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989); *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546-547; 688 NW2d 550 (2004). Thus, the procedural requirements set forth in the GTLA are not applicable to plaintiff's inverse condemnation claim and defendant's motion for summary disposition premised on this argument was properly denied by the trial court.

Defendant alternatively argues that it is entitled to summary disposition because plaintiff's complaint fails to sufficiently state a claim for inverse condemnation. This issue was not raised or addressed in the trial court; thus, it is not preserved for appellate review. See MCR 7.203(A)(1); *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). However, because the issue involves a question of law and the facts necessary for its resolution have been presented, we will address this issue in the interest of judicial economy as on leave granted. See *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008); *Pierce v Lansing*, 265 Mich App 174, 182-183; 694 NW2d 65 (2005).

A governmental action that has permanently deprived the property owner of any possession or use of the property is a taking for purposes of inverse condemnation. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 294; 769 NW2d 234 (2009). Here, considering plaintiff's complaint as a whole, plaintiff alleges that defendant has permanently deprived him of a portion of his property—the portion that is permanently submerged in water. See *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006).

"In determining whether a taking occurred, the form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined." *Marilyn Froling Revocable Living Trust*, *supra* at 295, citing *Heinrich v Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979). However, not every injury to property remotely associated with governmental actions will amount to a taking. *Attorney General v Ankersen*, 148 Mich App 524, 561; 385 NW2d 658 (1986), quoting *Heinrich*, *supra*. Rather, a plaintiff must establish a causal connection between the government's action and the plaintiff's loss. *Id*.; see, also, *Marilyn Froling Revocable Living Trust*, *supra*. A plaintiff's burden with regard to causation was set forth in *Heinrich*, *supra*, and includes proving that (1) "the government's actions were a Substantial cause of the decline of his property's value," and (2) "the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id*. at 700, citing *Holloway Citizens Committee of Lapeer & Genesee Cos, Inc v Genesee Co*, 38 Mich App 317, 320; 196 NW2d 484 (1972).

In this case, plaintiff alleged in his complaint that defendant's actions with regard to modifying the elevations of its land were not only a "substantial cause," but the only cause of the damage to his property which resulted in a decline of his property's value. Plaintiff also alleged that defendant's affirmative actions in modifying the elevations of its nearby land, which directly and negatively impacted the flow of storm water run-off, caused a portion of his property to be permanently submerged in water. In *Holloway Citizens Committee of Lapeer & Genesee Cos, Inc*, *supra*, a case relied on by *Heinrich* in formulating this second causation requirement, the Court held that "[t]o warrant a recovery[,] the damage must be different in kind from that sustained by the people of the whole neighborhood." *Holloway Citizens Committee of Lapeer & Genesee Cos, Inc*, *supra* at 320. Plaintiff's factual allegations, accepted as true, and reasonable inferences and conclusions that can be drawn from them, construed in the light most favorable to plaintiff, lead us to conclude that further factual development could possibly justify recovery. See MCR 2.116(C)(8); *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

Defendant relies on *Hinojosa*, *supra*, in support of its argument that plaintiff failed to state a claim upon which relief could be granted, but that case is factually distinguishable. In *Hinojosa*, the plaintiffs' homes were damaged by a fire that spread from an abandoned house that was owned by the state. *Id*. at 539. Plaintiffs sued the state alleging an unconstitutional taking or inverse condemnation and the trial court summarily dismissed the claim on the ground that plaintiffs failed to allege "any overt activity which interfered with the Plaintiffs[']s enjoyment of their property." *Id*. at 540. This Court affirmed the dismissal, holding that "plaintiffs did not allege any overt action by the state directed at plaintiffs' properties," and, at most, the state failed to abate a fire hazard nuisance. *Id*. at 538, 550.

The allegations in this action are also unlike the allegations set forth in *Ankersen*, *supra* at 561-562, an opinion the *Hinojosa* Court found particularly instructive with regard to the analysis of an inverse condemnation claim. In *Ankersen*, a case involving the improper storage of hazardous waste which created a fire hazard, the plaintiffs, who lived near the operation, alleged that "the granting of licenses and subsequent failures to supervise and regulate the disposal operations . . . proximately caused a loss of use and value in the property and constituted a 'taking.'" *Id*. at 560-561. This Court held that the granting of licenses to a private person or corporation allowing the operation of a private business cannot be regarded as a taking of private property by the government for public use. *Id*. at 561. And, with regard to the state's alleged misfeasance in licensing and supervising the operation, the *Ankersen* Court held that such "inaction and omissions by the state cannot be found to constitute a 'taking.'" *Id*. at 562.

And the facts of this case are distinguishable from the facts set forth in *Marilyn Froling Revocable Living Trust*, *supra* at 267-273. In that case, the plaintiff's claim for inverse condemnation arose from the city's refusal to construct a drainage system to cure the flooding of their private property which was allegedly created by their neighbor's new construction of a house that was built with the city's approval. *Id*. at 267-268. The trial court dismissed the claim on the ground that plaintiff failed to allege any affirmative action by the city directed at plaintiff's property. *Id*. at 294. This Court affirmed the dismissal for the same reason. *Id*. at 296.

In this case, unlike the plaintiffs in *Hinojosa*, *Ankersen*, and *Marilyn Froling Revocable Living Trust*, plaintiff has alleged that defendant took deliberate and affirmative actions in modifying the elevations of its nearby land which directly impacted the flow of storm water run-

off so as to cause a portion of plaintiff's property to be permanently submerged in water and rendered useless to him. Plaintiff is not merely alleging that defendant failed to abate, respond to, or remedy a condition that was created by one other than defendant. It is not a claim of inaction or omissions by defendant. Plaintiff has alleged that defendant abused its legitimate powers in affirmative actions directly aimed at his property and that such actions were a substantial cause of the decline of his property's value. See *Heinrich*, *supra* at 700. Thus, plaintiff's complaint states a legally sufficient inverse condemnation claim. See MCR 2.116(C)(8).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

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SHAPIRO, J. (*concurring*).

I concur with the majority's conclusion that tort immunity does not shield a governmental entity from a claim of inverse condemnation. Such a claim requires an allegation, and ultimately proof, that defendant took affirmative actions directly aimed at the plaintiff's property. After reviewing the complaint, I do not believe plaintiff has alleged actions *directly aimed* at plaintiff's property. However, I would affirm the denial of summary disposition and remand to allow plaintiff to amend his complaint in order to properly plead such an action.

/s/ Douglas B. Shapiro