STATE OF MICHIGAN

COURT OF APPEALS

SANDRA CHURCH, Plaintiff-Appellee,	UNPUBLISHED December 12, 2017
v	No. 335413 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 15-016873-NO

Before: JANSEN, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right a trial court order denying its motion for summary disposition under MCR 2.116(C)(7) of negligence claims brought by plaintiff, after she allegedly injured herself on an exposed edge of sidewalk within the city. The trial court entered the order after deciding that plaintiff had met the requirements to bring suit under an exception to governmental immunity for sidewalk defects under MCL 691.1402a. We reverse.

Plaintiff claims that on July 7, 2015, while walking southbound on Virgil Street, she "walked up over the curb and over the berm, and as she reached the sidewalk, she tripped and fell as a result of a raised/unleveled portion of the sidewalk, whose vertical discontinuity was caused by a tree owned by the City of Detroit." On August 24, 2015, plaintiff's attorney sent by certified mail a notice of intent to file a negligence claim to the "City of Detroit Law Department," specifically identifying the location of the defect and describing the nature of plaintiff's injury. Thereafter, after receiving a letter acknowledging receipt of her notice of claim, plaintiff brought a negligence action against defendant in the circuit court, alleging failure to maintain the sidewalk and remove any dangerous conditions. Defendant answered the complaint within 30 days, and discovery ensued.

Almost nine months later, defendant moved for summary disposition under MCR 2.116(C)(7) for governmental immunity, arguing that plaintiff's claim was barred under the highway defect exception to governmental immunity because (1) plaintiff's statutory notice did not comply with MCL 691.1404, and (2) the alleged "defect" was not on the sidewalk, but on the strip of grass between the road and the sidewalk. The trial court denied defendant's motion for summary disposition after concluding that plaintiff had alleged a proper defect in the sidewalk and that plaintiff's statutory notice was sufficient because it was filed pursuant to defendant's own procedures for processing informal claims.

On appeal, defendant first argues that the trial court erred by denying its motion for summary disposition because plaintiff failed to meet the requirements for statutory notice under MCL 691.1404. We agree.

"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). "Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred because of immunity granted by law." *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quotation marks and citation omitted). "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial." *Id.* (quotation marks and citation omitted). To survive a (C)(7) motion based on governmental immunity, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

"The governmental tort liability act, MCL 691.1401 *et seq*., provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents or employees." *McLean v Dearborn*, 302 Mich App 68, 73; 836 NW2d 916 (2013). There are several specific exceptions to the Legislature's general grant of governmental immunity. *Lash v Traverse City*, 479 Mich 180, 195; 735 NW2d 628 (2007). One such exception is outlined in MCL 691.1402a, which provides that a municipal corporation may be liable for failing to maintain in reasonable repair "a sidewalk adjacent to a municipal, county, or state highway." See *Robinson v Lansing*, 486 Mich 1, 20-21; 782 NW2d 171 (2010). However, before an injured party may sue the municipal corporation for failure to properly maintain a sidewalk, he or she must first provide notice to the governmental agency of the injury and defect under MCL 691.1404. *Milot v Dep't of Transp*, 318 Mich App 272, 277; 897 NW2d 248 (2016).

Defendant first challenges the sufficiency of plaintiff's service of notice on defendant's Law Department. In pertinent part, MCL 691.1404 provides:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
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> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Defendant here is the City of Detroit. The requirements for lawful service on "a public, municipal, quasi-municipal, or governmental corporation," are set forth in MCR 2.105(G), which provides that service of process on one of the listed governmental agencies may be made upon "the mayor, the city clerk, or the city attorney of a city[.]" MCR 2.105(G)(2). In *McLean*, 302

Mich App at 78-79, this Court considered the relationship between MCL 691.1404(2) and MCR 2.105(G) and held that service of statutory notice on a city must be made by serving one of the three individuals specifically described in the court rule. The *McLean* Court explicitly stated that any apparent authority of a recipient other than the three listed individuals to accept service on the city's behalf is insufficient under MCL 691.1404(2) unless the recipient is "authorized by *written appointment or law* to accept service on behalf of defendant." *McLean*, 302 Mich App at 80, citing MCR 2.105(H).

In this case, plaintiff, through her attorney, sent a notice of injury and defect by certified mail to the "The City of Detroit c/o The City of Detroit Law Department." The return receipt indicates that the notice was received by a Tom McCutchin—an individual that neither party argues is the mayor, city clerk, or city attorney. Plaintiff has offered no discussion of McCutchin's authority, and has not even attempted to argue that he is authorized by either appointment or law to accept service on behalf of defendant. Plaintiff's notice of claim clearly failed to meet the requirement that it be served on an individual who may "lawfully be served with civil process directed against" the City of Detroit. MCL 691.1404(2). It was therefore insufficient as a matter of law. *McLean*, 302 Mich App at 80.

Plaintiff concedes that her notice of claim was not served on the mayor, city clerk, or city attorney, but attempts to argue the sufficiency of her statutory notice and preserve her personal injury claim with a variety of meritless positions. We address each argument in turn.

First, plaintiff suggests that because MCL 691.1404(1) only requires notice on the governmental agency, the Legislature's use of the permissive "*may* be served" in MCL 691.1404(2) indicates only that service on a governmental agency might be accomplished by various means, *including* service on one of the specific individuals authorized to accept service under MCR 2.105(G). Plaintiff's suggestion is directly contradicted by this Court's holding in *McLean*, 302 Mich App at 78-79, wherein we considered the application of MCL 691.1404 and concluded that the plain language of the statute, with reference to the court rule, indicates that service is insufficient unless made upon "the mayor, city clerk, or the city attorney of a city." The *McLean* opinion also clearly forecloses plaintiff's attempt to argue that Tyrone Butler, the city's claims adjuster to whom plaintiff's notice was directed, was a proper recipient of notice because he would ultimately handle any claim served on the City of Detroit's mayor, city clerk, or city attorney. Evidence that Butler or anyone else at the Law Department received plaintiff's claim is not proof that the mayor, city clerk, or city attorney received the notice as required by the strict reading of MCL 691.1404(2) and MCR 2.105(G)(2) adopted in *McLean*. And although MCR 2.105(H) permits service of process on a defendant "by serving . . . an agent authorized by written appointment or by law to receive service of process," there is no evidence that Butler possessed the actual or apparent authority to accept service on behalf of defendant or its mayor, city clerk, or city attorney.

Next, plaintiff argues that the Law Department itself is a proper recipient of statutory notice as an authorized agent under MCR 2.105(H) because, according to plaintiff, defendant's Code of Ordinances provides the Law Department with written authorization to accept service of process on behalf of defendant. Specifically, plaintiff relies on § 2-4-18 of the Code, which provides:

> All claims of whatever kind against the city, excluding claims by city employees arising out of the employment relationship, claims against the department of water and sewerage and undisputed claims for services, labor and materials furnished to city departments shall be first submitted to and reviewed by the law department. [Detroit Ordinances, § 2-4-18.]

This section nowhere authorizes the Law Department to accept *service of process* on behalf of defendant or any of the individuals listed in MCL 2.105(G)(2). To the contrary, the provision simply directs that any claims received by the city are first forwarded to its legal department. Regardless, the plain language of MCL 691.1404(2) specifically restricts the authority of a municipal corporation to alter the statute's service requirements, stating that "notice may be served upon any individual . . . who may lawfully be served with civil process directed against the governmental agency, *anything to the contrary in the charter of any municipal corporation notwithstanding*." (Emphasis added). The Code does nothing to relieve potential plaintiffs of their obligation to read and comply with the statutory notice requirements. Indeed, an annotation to this particular section reminds potential plaintiffs of their obligation to follow state law, providing that "[d]elineation of procedure for claims against [the] city could not properly be interpreted as requiring resort to and compliance with it by a claimant as a condition precedent to bringing suit in the circuit court; *nor could this be interpreted as freeing a claimant of his statutory duty to give verified notice to the governmental agency of the occurrence of the injury and the defect*[.]" (Detroit Ordinances, § 2-4-18, emphasis added.)

Next, because plaintiff's notice substantially complied with the statutory requirements, and defendant ultimately received notice of the pending claim, plaintiff argues that her suit should not be dismissed on the "mere technicality" of service on an improper party. Relying on this Court's opinion in *Plunkett v Dep't of Trans*, 286 Mich App 168; 779 NW2d 263 (2009), plaintiff asserts that the statutory notice requirements of MCL 691.1404 should be "liberally construed." In *Plunkett*, 286 Mich App at 176-177, we explained:

> The Michigan Supreme Court has established that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect" and "must be enforced as written." However, when notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect. The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.
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> " ' "[T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice. . . ." ' " "[A] notice should not be held ineffective when in 'substantial compliance with the law. . . .' " A plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when "[c]oupled with the specific description of the location, time and nature of injuries. . . ." " 'Some degree of

> ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.' " [Citations omitted.]

Plaintiff misinterprets this passage, which clearly expresses the Court's intent to permit a liberal construction only to the requirements for the *form* of the notice. It is the "description and nature of the defect" which "may be deemed to substantially comply." *Id*. Nothing in this Court's reasoning suggests that service on an improper recipient can be deemed substantially compliant. In *McLean*, 302 Mich App at 74, a case decided after *Plunkett*, we reaffirmed that although "notice need not be provided in any particular form," a plaintiff's "[f]ailure to *provide* adequate notice under [MCL 691.1404] is fatal to a plaintiff's claim against a governmental agency." (Emphasis added.) The *McLean* Court explained:

> We see no great injustice in requiring plaintiffs seeking to provide notice to defendants under the statute to serve their notices on the correct parties. Although plaintiff asserts that there "should be no requirement that the supplemental notice be served upon the same cast of persons as identified in MCR 2.105(G)," we are not in a position to re-write the statute or the court rule. We reiterate that our Supreme Court has found this notice provision to be both constitutional and unambiguous. [*Id*. at 81, citing *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 219; 731 NW2d 41 (2007).]

Next, plaintiff argues that because defendant's website and claim form direct injured parties to submit notice of claims to the Law Department, and because Butler, an employee of the Law Department, mailed plaintiff written acknowledgment of her claim, defendant should be estopped from raising the defense of improper statutory notice. Equitable estoppel is a legal doctrine, and its application presents a question of law. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001). "Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existences of the facts." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006) (quotation marks and citation omitted).

The doctrine of equitable estoppel requires reasonable or justifiable reliance. *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998). It seems that plaintiff submitted her notice of claim to the Law Department in reliance on defendant's process for filing informal claims against defendant. Even if defendant's website and claim form directed plaintiff to file a *statutory* notice of claim with its Law Department, plaintiff was not entitled to rely on defendant's interpretation of the statutory requirements of MCL 691.1404 as a justification for her failure to act in conformance with those requirements. It is a general rule of equity that "where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." *Rix v O'Neil*, 366 Mich 35, 42; 113 NW2d 884 (1962) (quotation marks and citation omitted). Plaintiff, who was acting through her attorney, was not unsophisticated or lacking in resources. MCL 691.1404 clearly requires that notice be served upon "the mayor, the city clerk, or the city attorney." MCL 691.1404(2); MCR 2.105(G)(2). It was unreasonable for plaintiff to rely on defendant's informal claims materials despite her ability to inform herself of the statutory notice requirement. Her estoppel argument therefore fails.

Finally, plaintiff argues that defendant should not be permitted to argue insufficient statutory notice as grounds for summary disposition because defendant did not raise insufficient notice as an affirmative defense in its answer to plaintiff's complaint. We have explicitly held that a municipal corporation need not plead defective notice as an affirmative defense because municipalities are presumed to have immunity; rather, "the burden is on [the] plaintiff to prove that one of the exceptions to governmental immunity is applicable." *Fairley v Dep't of Corrections*, 497 Mich 290, 299-300; 871 NW2d 129 (2015).

Because plaintiff failed to comply with the statutory notice requirements of MCL 691.1404, her claim is barred as a matter of law. *McLean*, 302 Mich App at 80. Plaintiff did not satisfy the requirements for bringing suit under the highway defect exception to governmental immunity, and defendant is therefore entitled to summary disposition under MCR 2.116(C)(7).

Defendant also argues that plaintiff's claim is barred because she failed to identify all available witnesses and failed to allege a proper defect in the sidewalk. Because we find summary disposition appropriate in light of plaintiff's failure to properly serve defendant with statutory notice, we need not address the merits of defendant's remaining claims.

Reversed. We remand to the trial court with instructions to grant summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron