STATE OF MICHIGAN

COURT OF APPEALS

KELLY KELLEY, SHAWN KELLEY, MANISTEE BUSINESS, INC., STEVEN COTE, KAREN COTE, JOYCE BRENNER, AND ROBERT BRENNER,

Plaintiffs-Appellees,

and

BOATHOUSE GRILL, INC.,

Plaintiff,

v

CITY OF MANISTEE,

Defendant-Appellant.

UNPUBLISHED
May 27, 2014

No. 314994
Manistee Circuit Court
LC No. 11-014394-NZ

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs brought this class action suit against the City of Manistee (City) pursuant to MCL 691.1416 *et seq.*, seeking compensation for property damage that occurred when their homes and businesses were flooded with raw sewage as a result of a backup and overflow of the City's sewer system. The City moved for summary disposition pursuant to MCR 2.116(C)(7). The trial court denied the City's motion, concluding that material facts were in dispute. The City now appeals as of right. We affirm, but remand for an evidentiary hearing.

On May 11, 2011, the City of Manistee experienced torrential rainfall. At that time, the City's sewer system was undergoing construction involving the creation of separate sewer systems: one for collecting and conveying storm water, and another for transporting sanitary sewer water to the City's wastewater treatment plant. The City contracted with an engineering firm, Abonmarche, to perform the design work and oversee the separation project. Jeffrey Mikula, Vice President of Abonmarche, served as the primary contact for the project. Prior to the separation project, the City's sewer operated on a "combined system," which collects and transports storm water and sanitary sewer water in the same pipe. Thus, during periods of heavy

rain, the combined sewer system could become overburdened, causing excess water to discharge into the Manistee Lake or Manistee River.

On May 11, 2011, the separation project was 75 percent complete; the remaining portion of the combined system was located near the intersection of Cedar and Second Street, which was under construction. As a part of the construction, a brick manhole "tube" located on Second Street was completely exposed by a surrounding trench. Because that portion of the City was still operating on a combined sewer system, the amount of rain entering the system created significant hydraulic pressure which caused the side of the exposed manhole to burst, allowing diluted sewer water to shoot into the trench. In response to a flood report involving the manhole rupture, Mikula directed a construction team to relieve the sewer's hydraulic pressure by creating a larger hole in the side of the exposed manhole. Bypass pumps were also set up to divert the sewer water away from the Cedar and Second Street intersection. By late evening on May 11, 2011, the water intrusion into plaintiffs' homes and businesses subsided but residual sewer debris remained.

Thereafter, plaintiffs filed a class action complaint against the City seeking damages. Subsequently, the City moved for summary disposition under MCR 2.116(C)(7), arguing that it was entitled to immunity with regard to the discharge. Following a hearing, the trial court concluded that issues of material fact precluded summary disposition.

On appeal, the City argues that its motion for summary disposition should have been granted because plaintiffs cannot establish the necessary elements set forth at MCL 691.1417(3) to avoid immunity. We disagree.

This Court reviews rulings on summary disposition motions de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In deciding a motion for summary disposition under MCR 2.116(C)(7), "all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005). The court must determine, after giving proper deference to a plaintiff's allegations, whether any question of material fact exists. *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010).

Governmental liability with respect to sewage disposal system events is governed by MCL 691.1416–691.1419. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 113; 729 NW2d 883 (2006). "A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." MCL 691.1417(2). A "sewage disposal system event" is defined in pertinent part as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). Pursuant to MCL 691.1417(3), a claimant must also show that: (1) the governmental agency was an appropriate agency as defined in MCL 691.1416(b), (2) the sewage disposal system had a defect as defined in MCL 691.1416(e), (3) the governmental agency knew or should have known about the defect, (4) the governmental agency "failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect," and (5) "[t]he defect was a substantial proximate cause of the event and the property damage" as set forth in MCL 691.1416(*l*). Pursuant to MCL 691.1417(4),

a claimant must further show reasonable proof of ownership and the value of the damaged personal property, as well as compliance with MCL 691.1419, which is the notice provision. See *Willett v Waterford Charter Twp*, 271 Mich App 38, 50; 718 NW2d 386 (2006).

In this case, the City does not dispute that it is the appropriate governmental agency, that plaintiffs have shown proof of ownership and the value of damaged property, and that plaintiffs provided timely notice. However, the City argues that plaintiffs cannot show that the system had a construction, design, maintenance, operation, or repair defect at the time of the sewage disposal system event. See MCL 691.1417(3)(b); *Willett*, 271 Mich App at 49.

To the contrary, plaintiffs argue that the City's sewer system was "riddled with defects that prevented it from functioning on May 11, during the rain event." Specifically, plaintiffs assert that the system had several maintenance defects, including with regard to inflow and infiltration, which inundated the combined sewer system through "collapsed pipes, holes, cracks, and offset joints," and ultimately caused the sewage to back up into plaintiffs' properties. Plaintiffs also assert that the City's failure to employ bypass pumping at the Cedar and Second Street intersection, where the separation project was primarily concentrated at the time of the rain event, constituted an operation defect. According to plaintiffs, "the sewer system was literally ripped apart and it never occurred to anyone in charge to monitor that situation during the rain event or employ bypass pumping to help alleviate the flow of water." In support of plaintiffs' allegations, they presented the affidavit of Rick Arbour and supporting documentation.

In response, the City asserts that plaintiffs' argument is based on evidence that was gleaned from an outdated study conducted in 1997 and that an up-to-date study from 2009 shows that any system defects noted in the 1997 study were not in the location of the sewer that serviced plaintiffs' properties. The City further claims that an infiltration/inflow analysis conducted as part of the 1997 study revealed no significant infiltration into the sewer system. Thus, the City contends that plaintiffs' evidence fails to show that the sewage disposal system had a defect, and therefore, plaintiffs cannot meet all of the elements to defeat governmental immunity.

We agree with the trial court that the facts regarding whether a defect existed in the City's sewage disposal system on May 11, 2011, are clearly in dispute. In *Willett*, this Court held that the plain language of MCL 691.1417(3)(b) requires only that a plaintiff "*allege* the mere existence of a 'defect' in the sewage disposal system," but need not show fault in this step of the analysis. *Willett*, 271 Mich App at 52 (emphasis added). At minimum, when plaintiffs' proofs are given proper deference, they allege a defect in the City's sewer disposal system and create a material question of fact that should be resolved by the trial court.

The City also claims that plaintiffs have not provided sufficient evidence to create a question of fact as to whether the City knew, or in the exercise of reasonable diligence should have known, about the alleged defect. See MCL 691.1417(3)(c); *Willett*, 271 Mich App at 52. To the contrary, plaintiffs contend that the City was aware of the sewage disposal system defects at the time of, and leading up to, the rain event on May 11, 2011. Plaintiffs rely on Arbour's affidavit which concludes that the City "failed to meet the industry standard of care and adequately maintain its sewer system." In his affidavit, Arbour also noted system-wide defects in the City's sewer system as evidenced by a 2010 video inspection that was conducted by

Abonmarche, the engineering firm hired by the City to oversee the separation project. The inspection included the sewer system that services plaintiffs' homes and businesses and revealed "defects, including but not limited to, sags, severe build-up of debris, holes, and collapsed pipes."

In support of Arbour's findings, plaintiffs also identify several sewer-backup investigations that were documented by the City in response to homeowner complaints of sewer backups before and after the rain event on May 11, 2011. Plaintiffs further rely on several news articles published between 2002 and 2012 to indicate that the City had been on notice for several years regarding the sewage disposal system defects. In an article dated May 13, 2011, only two days after the rain event, the Manistee City Manager was quoted as saying: "Under normal or dry conditions, no problem, the piping infrastructure is large enough to accommodate minimum storm water and sewage. It's during heavy storm events when they aren't large enough to handle flows." Another article, dated December 7, 2012, quoted Jeffrey Mikula, Vice President of Abonmarche, as saying: "There's still storm water that's getting into the sanitary system, and we're trying to figure out where that's coming from." Plaintiffs assert that these statements support their argument that flood problems because of excessive inflow and infiltration into the sewer system were widely known by city officials. Moreover, plaintiffs argue, on the day of the rain event, the City's wastewater treatment plant began documenting high flows as early as 10:00 a.m. Therefore, plaintiffs assert, the City clearly knew about the sewage disposal system defects or, at minimum, in the exercise of reasonable diligence, should have known about the defects.

In light of the evidence, we conclude that the trial court properly held that summary disposition was inappropriate; whether this condition was met should also be decided as a matter of fact by the trial court.

The City next argues that plaintiffs have failed to create a question of fact concerning the reasonableness of the remedial measures taken by the City after it received knowledge of the alleged defect. However, plaintiffs argue that the City has known for years about the defects in the sewage disposal system, and failed to correct them. According to plaintiffs and their expert, the study conducted in 1997 documents several defects in the City's sewer system including "inflow and infiltration, non-uniform pipe settling, blockages due to tree root growth and cracked and broken pipes." Plaintiffs assert that the 1997 study, in combination with the various sewer-backup investigations documented between 2005 and 2012, confirms that the City failed to take reasonable steps to correct the defects within a reasonable amount of time. Plaintiffs also contend that, despite having early warning that the sewer system was reaching capacity due to rainfall, the City failed to implement bypass pumping near the construction site at the intersection of Cedar and Second Street until *after* flooding began. Plaintiffs further argue that the City exacerbated the problem by closing one of the sewer gates to the wastewater treatment plant, which consequently restricted the amount of flow going through the treatment plant so that it started backing up down the line. Plaintiffs assert that the treatment plant employees neither communicated these actions to the Department of Public Works, nor to anyone on the engineering or construction teams, and that this action constituted both a failure to properly operate the system and a failure to remedy the problems caused by the system defects.

The City relies on *Willett* to support the argument that it acted reasonably when responding to plaintiffs' flood reports within five hours. However, the City mischaracterizes the

facts of *Willett*. The Court in *Willett* concluded that "reasonable minds could not differ that 2½ hours to locate and resolve a sewer back up of unknown cause or origin is a reasonable amount of time." *Willett*, 271 Mich App at 53. However, this argument ignores plaintiffs' claims that the City did not reasonably act and, in fact, may have at least partly exacerbated the pre-existing problems inherent in the system during the storm. It is not only the actions of Mikula at the manhole site that are at issue here.

In light of the evidence, we agree with the trial court's conclusion that questions of material fact exist as to whether the City took reasonable steps to repair, correct, or remedy the defect, and if so, whether those steps were taken in a reasonable amount of time. See MCL 691.1417(d).

Finally, the City argues that plaintiffs cannot show that any alleged defect was a substantial proximate cause of the sewage disposal system event and the property damage. To the contrary, plaintiffs argue that the maintenance and operation defects discussed above caused plaintiffs' properties to flood. Plaintiffs provided evidence that the City removed the outfalls near the intersection of Cedar and Second Street. Outfalls allow any overflow in the system to be discharged into a river or lake. Because the outfalls were removed, and because the defects outlined in the 1997 study were never corrected, the water entering the combined system had nowhere else to go but into the basements and lower levels of homes and businesses. The City responds that the substantial proximate cause of plaintiffs' damages was the rain event on May 11, 2011. Moreover, the City argues, the rain event was a "100-year" storm and therefore constitutes an "act of God," which is an affirmative defense that absolves any liability on the City's part.

A "100-year" storm or flood is a technical term that is generally used to describe "a flood which has a 1% chance of occurring any given year." *Henry v Dow Chemical Co*, 484 Mich 483, 491 n 7; 772 NW2d 301 (2009). In this case, plaintiffs retained forensic meteorologist Bryan Rappolt to provide "an evaluation and estimation of rainfall depth, duration, and determination of the recurrence interval of the rainfall across a portion of Manistee, Michigan on May 11 and May 12, 2011." In Rappolt's accompanying report, he explained that the rain event that occurred on May 11 was not a 100-year storm; rather, it was approximately a twenty-five to fifty-year storm. While the City attempts to discredit Rappolt's findings, where an issue of material fact exists, the issue of causation is for the factfinder. *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998). Based on the evidence presented, the trial court properly found that an act of God defense may not be decided as a matter of law, and did not err in finding that disputed facts existed which precluded summary disposition in favor of the City.

However, as this Court held in *Dextrom*, 287 Mich App at 430:

> [T]o the extent that the trial court envisioned that such further inquiry and clarification would be arrived at during a *trial*, with either the court sitting as a finder of fact or a jury serving the same function, we disagree. A *trial* is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity. [Emphasis in original.]

Rather, because there are questions of fact that must be decided to resolve the ultimate issue whether governmental immunity applies—which is a question of law for the court—we remand this matter for an evidentiary hearing to determine whether the City is entitled to summary disposition on the ground of governmental immunity. See *id*. at 432-433.

Affirmed, but remanded for an evidentiary hearing and further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly