STATE OF MICHIGAN

COURT OF APPEALS

SOUTHFIELD HOCKEY CLUB, INC., Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 259893 Oakland Circuit Court
CITY OF HAZEL PARK, Defendant-Appellant.	LC No. 03-051848

Before: Donofrio, P.J., and O'Connell and Servitto, JJ

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition. Because plaintiff failed to plead in avoidance of governmental immunity and has not alleged facts or offered evidence to justify application of an exception to government immunity to its claim of tortious interference, we reverse.

Plaintiff and defendant contracted for plaintiff's rental of ice time at an arena owned by defendant. Plaintiff filed a two-count complaint against defendant contending that defendant breached the parties' contract by charging more for the ice time than was contemplated by the contract. Plaintiff also claimed defendant tortiously interfered with its contract/advantageous business relationship with the amateur hockey population located in its area. Defendant moved for summary disposition on both counts, relying upon MCR 2.116(C)(7), (8), and (10), and the trial court denied defendant's motion in its entirety. Defendant's sole issue on appeal is whether the trial court erred in denying defendant's motion for summary disposition on plaintiff's tortious interference claim.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). MCR 2.116(C)(7) permits summary disposition where the claim is barred because of any one of several occurrences, including immunity granted by law. In reviewing a motion under MCR 2.116(C)(7), the Court accepts the plaintiff's well-pleaded allegations as true, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where no material facts are in dispute, whether the claim is statutorily barred is a question of law. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000).

A movant is entitled to summary disposition under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). A motion for summary disposition based on failure to state a claim tests the legal sufficiency of the claim based on the pleadings alone. *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 368-369; 711 NW2d 391 (2006). When reviewing a motion under MCR 2.116(C)(8), we accept all well-pleaded allegations, as well as any reasonable inferences that can be drawn from the allegations, as true. *Jenks v Brown*, 219 Mich App 415, 417; 557 NW2d 114 (1996). A motion brought under this subrule should be granted only when the claim is clearly so unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

Tort immunity is broadly granted to governmental agencies. Governmental agencies generally include the state, political subdivisions and municipal corporations, and combinations of them acting jointly. MCL 691.1401(a), (b) and (d); *Warda v Flushing City Council*, 472 Mich 326, 331-332; 696 NW2d 671 (2005). Except as otherwise provided by law, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1).

Governmental immunity is a characteristic of government and, as such, a party must plead in avoidance of immunity to maintain an action against a government agency. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack, supra* at 204. Summary disposition is proper if the plaintiff fails to plead in avoidance of governmental immunity. *Mack, supra.*

In this case, plaintiff's complaint makes no mention of governmental immunity with respect to its tortious interference claim. In Count I of the complaint, plaintiff alleged that defendant had breached the contract to provide ice rental for a two-year period for an annual amount of $200 per hour of ice rental by unlawfully demanding that plaintiff pay $250 per hour. In Count II, plaintiff asserted that defendant had committed a tort by interfering with plaintiff's contract or advantageous business relationship with a significant portion of the amateur hockey population located in its area. While plaintiff did allege that defendant was involved in a contract for ice rental, pleading that fact by itself does not demonstrate that the alleged tortious interference occurred during the exercise of a nongovernmental function, or that a statutory exception to immunity applies. In fact, plaintiff never discussed whether maintaining the ice arena is a governmental function or whether defendant operated the arena for the purpose of producing a profit until defendant moved for summary disposition. Because plaintiff failed to state a claim that fits within a statutory exception or plead facts that demonstrate that the alleged tort occurred during the exercise of a nongovernmental or proprietary function, we conclude that plaintiff did not plead in avoidance of governmental immunity and its tortious interference claim should have be dismissed pursuant to MCR 2.116(C)(8).

Even if plaintiff adequately pled in avoidance of governmental immunity, summary disposition would still be proper pursuant to MCR 2.116(C)(7). To survive a motion for summary disposition on the basis of governmental immunity, the plaintiff must allege facts showing that governmental immunity does not apply or warranting the application of an exception. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004); *Summers v City of Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994).

Here, plaintiff claims that the operation of the ice arena is not a governmental function. A "governmental function" is an activity "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). The definition of governmental function is to be broadly applied. *Maskery, supra* at 614. Moreover, the determination of whether an activity was a governmental function must focus on the general activity and not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

In this case, operating the ice arena was a governmental function because there was some legal basis for it. MCL 123.51 provides that "[a]ny city, village, county or township may operate a system of public recreation and playgrounds; acquire, equip and maintain land, buildings or recreational facilities; employ a superintendent of recreation and assistants; vote and expend funds for the operation of such system." While the trial court apparently accepted plaintiff's claim that a recreational activity must be tied to an educational institution in order to be a governmental function, that claim has no support in Michigan case law. See, e.g., *Morrison v City of East Lansing*, 255 Mich App 505, 516-517; 660 NW2d 395 (2003)(holding that a community center developed and provided by the city for the locality is a governmental function).

Plaintiff also claims that if operation of the ice arena is a governmental function, the proprietary function exception to governmental immunity is applicable. Plaintiff has not, however, alleged facts that justify the application of the propriety function exception to governmental immunity. The proprietary function exception to governmental immunity is set forth in MCL 691.1413 and provides, in part, that governmental immunity "shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section." To be a proprietary function, an activity must: (1) be conducted primarily for the purpose of producing a pecuniary profit; and (2) not normally be supported by taxes and fees. *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004).

Plaintiff offered no evidence suggesting that defendant primarily operates the ice arena for profit. Even assuming arguendo that a question of fact existed concerning whether defendant's operation of the ice arena is primarily for profit, summary disposition would be proper because plaintiff did not allege facts sufficient to satisfy the second prong of the test, namely, that defendant's operation of the ice arena was not supported by taxes and fees. While plaintiff claims on appeal that the ice arena was a "vast and lucrative" enterprise that is surely beyond the support of taxes and fees alone, it offers no evidence to support its claims.

Reversed as to plaintiff's tortious interference claim and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto