STATE OF MICHIGAN

COURT OF APPEALS

FRANKLIN WHITE,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
December 17, 2009

No. 286572
Wayne Circuit Court
LC No. 06-622558-NO

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.117(C)(7) (governmental immunity). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in April 2005 when a ceiling tile or vent cover fell on his head at Cobo Hall. Plaintiff and a coworker, Reginald Robinson, had been delivering newspapers there when, without warning, the tile fell and hit the back of plaintiff's head. Security guards present at the time completed an incident report. Robinson took plaintiff to his work clinic, where he was examined, sent to Henry Ford Hospital, fitted into a cervical collar, and then released. Plaintiff testified that he went back to Cobo Hall two days later to see if he could learn anything in person because no information would be released over the telephone. He spoke to two employees there, one male and one female. According to plaintiff's testimony, the female employee said "they were doing some – cleaning the air vents for ventilation, because they were having an event there, and that they had a situation before, one fell out – one of the vents fell out of the ceiling." She did not specify when, and she did not say if it was the same tile. The male employee "stated they should have been fixed – fixed, the ceiling tiles." Plaintiff stated that he knew they were employees at Cobo "[b]ecause they were both maintenance workers, and we both, we just indulged in conversation, because really, they had heard about me, so when [sic] I came back up and I was asking around." He said they had a cart and a broom but he was not sure if they wore uniforms or name tags. He had no idea what their names were.

Plaintiff was off work a couple of weeks. In early August, he experienced severe pain in his neck and underwent surgery. He testified that he did not injure his neck in any way between April and August. He sued, asserting that defendant was liable under the public building exception to governmental immunity, MCL 691.1406, and alleging that defendant "knew or

should have known in the exercise of reasonable care and diligence that the above specified defect was a hazardous condition for the public." He did not allege any facts showing defendant knew or should have known of the condition.

Defendant moved for summary disposition, arguing that plaintiff was unable to show that it had notice of the condition and had reasonable time to repair it. Defendant attached plaintiff's own deposition, pointing out that there was no evidence of when the condition occurred, other than seconds before the tile fell, so plaintiff had not shown defendant failed to remedy the condition. In his response, plaintiff included the affidavit of coworker Robinson, who stated that "immediately after Mr. White was struck with the ceiling panel at Cobo Hall, I reported the incident to a male employee who identified himself as an employee of Cobo Hall." Robinson also averred that after he reported the incident, the employee stated, "Oh, man, we have known there was a problem with that panel falling before about 3 weeks ago, I thought they fixed it." Defendant's reply argued that the statement referenced by Robinson was not admissible as a party admission under MRE 801(d)(2)(D). Plaintiff provided no evidence regarding the scope of agency concerning the unidentified employees and their employers. Defendant pointed out that there are many people who work in Cobo Hall who are not defendant's employees.

The trial court agreed with defendant, indicating that plaintiff's testimony about the two employees he spoke with did not establish any timeframe. At most, it demonstrated that a vent cover had fallen on an earlier date. As for Robinson's affidavit, the court said that, even assuming that the person referenced therein was a Cobo employee, plaintiff failed to establish that the statement was within the scope of his employment. Thus, it was not admissible under MRE 801(d)(2)(D).

Plaintiff moved for reconsideration, asking for oral argument and requesting permission to submit a supplemental affidavit by Robinson. In its opinion denying plaintiff's motion, the trial court reiterated its finding that plaintiff failed to provide admissible evidence sufficient to avoid governmental immunity by showing defendant had notice of the condition. The court denied plaintiff's request to file a supplemental affidavit because plaintiff identified no court rule or law that permitted him to "rely upon a 'supplemental affidavit' to defeat summary disposition *after* summary disposition has already been granted in favor of the opposing party" (emphasis in original). Finally, the court stated that dispensing with oral argument was within its discretion under MCR 2.119(E)(3).

The trial court granted defendant's motion under both MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact). "The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties. MCR 2.116(G)(5); *Green v Berrien General Hosp Auxiliary, Inc*, 437 Mich 1, 4 n 4; 464 NW2d 703 (1990). All well-pleaded allegations are accepted as true, unless specifically contradicted by documentary evidence, and construed most favorably to the non-moving party. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992), mod by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Patterson*, *supra* at 434 n 6. In order to survive a motion for summary disposition, the plaintiff must allege facts justifying application of an exception to governmental immunity. *Wade*, *supra* at 163. The party

challenging a motion brought under MCR 2.116(C)(10) must come forward with at least some evidentiary proof upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Tort immunity is granted to governmental agencies in MCL 691.1407(1), which provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The governmental immunity act sets forth six exceptions to immunity. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). Under one of these exceptions, a governmental agency can be liable for damages caused by a dangerous or defective public building. MCL 691.1406. The public building exception provides, in relevant part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. [*Id*.]

The exception is to be narrowly construed. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A plaintiff asserting the building exception to immunity must show a defect, actual or constructive knowledge of the defect, and a failure to act on the part of the responsible agency within a reasonable time. *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998). Constructive knowledge of a defect may be established by showing that the agency should have discovered the defect in the exercise of reasonable diligence and through the length of time the defect existed. *Ali v Detroit*, 218 Mich App 581, 586-587; 554 NW2d 384 (1996); *Singerman v Municipal Serv Bureau, Inc*, 211 Mich App 678, 686; 536 NW2d 547 (1995), aff'd 455 Mich 135; 565 NW2d 383 (1997).

The only substantive issue before the court at this point is whether the alleged statements of the unidentified "Cobo employees" constitute admissible evidence sufficient to show that defendant had or should have had sufficient notice of the condition. A statement is only admissible as a party admission under MRE 801(d)(2)(D) if it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship." "It is well established that the apparent authority for which the

principal . . . may be liable must be traceable to it and cannot be established by the acts and conduct of the agent." *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 271; 288 NW2d 613 (1979).

The statement of the female employee, referenced by plaintiff in his deposition, was that "they were doing some – cleaning the air vents for ventilation, because they were having an event there, and that they had a situation before, one fell out – one of the vents fell out of the ceiling." The employee evidently did not say who "they" are, where the vent fell, or when. If it was not the same vent that hit plaintiff, in order to overcome summary disposition, this statement would have to lead to the conclusion that the fact that one other vent fell somewhere in Cobo Hall at some time was sufficient to give defendant notice of a more widespread problem *and* that defendant would have had notice within a reasonable time to make repairs. We cannot accept this proposition. Neither of the employees' statements referred to in plaintiff's deposition have any reference to time and they are insufficient to overcome summary disposition. The statement averred to by Robinson, while much more specific, fails for the reasons stated by the trial court. Robinson averred that the employee "identified himself as an employee of Cobo Hall." This is not enough to establish that the man was, indeed, defendant's employee and that the statement was made during his employment with defendant. See *id*.[1] Moreover, plaintiff cannot show that the statement was within the man's scope of employment. Even accepting the argument that it is every employee's duty to notice and report unsafe conditions in their work areas, there is no indication that this unidentified person worked in that location, as opposed to another work station.

Finally, the procedural issue regarding plaintiff's request to file a supplemental affidavit by Robinson was decided correctly by the court. Plaintiff utterly failed to meet the requirements set forth in MCR 2.116(H). His argument that he did not know he needed to aver certain elements until after the trial court's opinion was issued does not prove that he was unable to obtain the affidavit in time; it only shows that he was ignorant of the proofs he was required to establish. Moreover, his argument that the pertinent issue surrounding Robinson's affidavit was not raised earlier ignores the fact that the affidavit did not exist at the time defendant's motion brief was filed, nor does it accurately represent the fact that defendant thoroughly addressed the issue in its reply brief.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[1] Moreover, there is always the possibility that this somewhat ambiguous statement meant that the person worked *at* Cobo Hall and not necessarily that he was employed by defendant.