

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE No.: 12-CP-10-6922

Tipperary Sales d/b/a La-Z-Boy)
Furniture Gallery,)

Plaintiff,)

vs.)

South Carolina Department of)
Transportation; South Carolina)
Department of Health and)
Environmental Control; City of)
North Charleston; Charleston Water)
System; Associated Developers, Inc.,)
Parkhill, LLC,)

Defendants.)

**ORDER GRANTING DHEC'S
MOTION FOR SUMMARY JUDGMENT**

FILED
2014 FEB 18 PM 2:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

THIS MATTER came before me for a hearing on January 7, 2014 on Defendant South Carolina Health and Environmental Control's (DHEC) Motion for Summary Judgment. Present in the courtroom were the Plaintiff's counsel: Yancey A. McLeod, III, Esquire; Defendant Charleston Water System's counsel, G. Wade Cooper, Esquire, and Leslie S. Riley, Esquire; Defendant City of North Charleston's counsel Phillip S. Ferderigos, Esquire; Andrew S. Halio, Esquire, counsel for DHEC; and Jason A. Daigle, Esquire, counsel for South Carolina Department of Transportation.

As to DHEC, Plaintiff alleges two causes of action: negligence/gross negligence and inverse condemnation. These causes of action arise out of DHEC's issuance of various land disturbance permits, which are alleged to have resulted in the flooding of the Plaintiff's property. After reviewing the pleadings, the motion, and the Plaintiff's opposing memorandum, and considering the arguments of counsel, the Court hereby grants DHEC's Motion for Summary Judgment for the reasons set forth below.¹

1. SOUTH CAROLINA TORT CLAIMS ACT

Under South Carolina law, any tort action against a governmental entity is governed by the South Carolina Tort Claims Act, which is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Among other portions, the Tort Claims Act sets forth:

¹ The various governmental entity Defendants filed separate motions on similar grounds; however, as the factual allegations against each Defendant governmental entity are somewhat distinct, the Court has adopted separate Orders for each Defendant. In support of its motion for summary judgment, DHEC relies on all of the materials generated in the case, including the materials generated in discovery. The Court also notes that DHEC did not move on the basis of the statute of limitations, but had it done so, the result would have been the same as the Court's ruling with respect to the other governmental entities on that issue.

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S.C. Code Ann. § 15-78-60. Exceptions to waiver of immunity.

The governmental entity is not liable for a loss resulting from:

- (1) legislative, judicial, or quasi-judicial action or inaction;
- (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
- ...
- (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
- (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
- ...
- (7) a nuisance;
- ...
- (12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner;
- (13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

When a governmental entity owes a duty of care to plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in the Tort Claims Act which are asserted by the governmental entity. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit the liability of the State. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999). However, the burden of establishing a limitation upon liability or an exception to the state's waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense. *Id.*

The application of the Tort Claims Act to allegations arising out of design and/or maintenance of a governmental entity's drainage system has been addressed before by South Carolina courts. In Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), the Court of Appeals held that the Tort Claims Act immunity provisions bar such claims.²

² More specifically, in Hawkins, a business owner brought an action against the City alleging that the City's improper and negligent design and maintenance of its drainage system caused his business to flood. The Court of Appeals held that (1) the city's design and maintenance of the drainage system did not constitute inverse

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In Hawkins, Louie Hawkins sued the city of Greenville for improper and negligent design and maintenance of its municipal drainage system. Hawkins alleged the City's malfeasance caused his property to flood. The Court affirmed the trial court's grant of summary judgment in favor of the City by noting that, among other applicable exceptions to the waiver of immunity, "the City [wa]s not liable for loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (4) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (5) "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee"; or (13) "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13) (Supp.2003); Id. at 293, 594 S.E.2d 564.

The Court of Appeals stated that, although South Carolina courts had previously not applied the Tort Claims Act to facts similar to those of the Hawkins case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered to be inherently quasi-judicial, discretionary functions for which a governmental entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The Texas court in City of Tyler opined:

The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

The South Carolina appellate court held that it found that a comparable degree of discretion was granted to the City in the Hawkins case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the Court found that the City was immune from liability for negligence claims arising out of the design and maintenance of the drainage system at issue in that case. Hawkins 358 S.C. at 293-94, 594 S.E.2d at 564. The Hawkins decision's broad language

condemnation; (2) city was not liable under Tort Claims Act; (3) city was not liable for trespass; and (4) city was not liable for conversion. Similar to the allegations in the La-Z-Boy Complaint, Hawkins' property was also located in a low-lying area and had been heavily developed with retail businesses and other large commercial developments. In his lawsuit, Hawkins brought his action against the city, alleging causes of action for (1) inverse condemnation, (2) negligence in the city's design and maintenance of its storm water drainage system, (3) violation of S.C. Code § 5-31-450, (4) trespass, (5) conversion, and (6) nuisance. As a whole, Hawkins stands for the proposition that a governmental entity will not be held liable for damages allegedly resulting from the overall design, construction, or maintenance of its systems for handling surface water absent an "affirmative, positive, aggressive act" by the governmental entity and which proximately causes damages to a person's property. The Hawkins decision controls in this case.

affords a governmental entity absolute immunity for design, construction, and maintenance decisions. The rationale of Hawkins is also applicable to DHEC, which is alleged to have negligently reviewed, inspected and approved erroneous drainage plans, failed to mitigate flooding problems, and failed to supervise surface water drainage near the Plaintiff's property, all of which is precluded by the exceptions to waiver of immunity provisions in the Tort Claims Act cited above and by Hawkins. Additionally, S.C. Code § 15-78-60 (12) provides immunity to DHEC for the issuance of the permits, and Plaintiff was unable to provide any evidence that the permits at issue were issued in a grossly negligent manner. For these reasons, Plaintiff's negligence/gross negligence claims against DHEC fail as a matter of law.

2. INVERSE CONDEMNATION

Plaintiff's inverse condemnation claim against DHEC also fails under Hawkins. Hawkins argued that the City was liable for his inverse condemnation claim, contending he was deprived of his full rights to his property without just compensation as a result of the City's design and maintenance of the drainage system. The court summarily rejected Hawkins' claim.

In affirming the dismissal of Hawkins' inverse condemnation claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

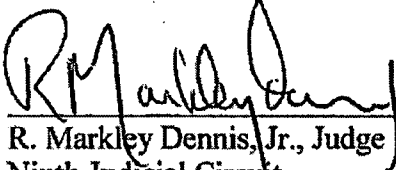
In the present case, Hawkins has failed to allege any affirmative acts by the City which damaged the ServiceMaster property or otherwise diminished his rights in the property. Most of the City's "acts" he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by "affirmative, positive, aggressive" acts by the governmental agency. Allegations of mere failure to act are insufficient. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). Id. at 562 (Emphasis added).

Similarly, Plaintiff has failed to allege or show any "affirmative, positive, aggressive act" on the part of DHEC in this case. The allegations setting forth the basis for the inverse condemnation claim against DHEC are found in Paragraphs 65 - 70 of the Amended Complaint. The mere allegation that DHEC issued permits without accounting for potential downstream flooding is insufficient to support a claim for inverse condemnation. No proof of an "affirmative, positive, aggressive act" on the part of DHEC has been presented to the Court. As such, Plaintiff's inverse condemnation claim against DHEC fails as a matter of law.

CONCLUSION

For the reasons stated herein, this Court hereby grants DHEC'S Motion for Summary Judgment.

IT IS SO ORDERED!


R. Markley Dennis, Jr., Judge
Ninth Judicial Circuit

Dated: February 7, 2014
Charleston, South Carolina

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