STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Tipperary Sales d/b/a La-Z-Boy Furniture Gallery,	)	C/A No. 12-CP-10-06922
	)	
Plaintiff,	)	
	)	
Versus	)	ORDER GRANTING CHARLESTON WATER SYSTEM'S MOTION TO DISMISS
	)	
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.	)	

THIS MATTER came before me for a hearing January 7, 2014 on Defendant Charleston Water System's (CWS)[1] Motion to Dismiss Pursuant to SCRCP Rule 12(c), or, in the alternative, Motion for Summary Judgment. Present in the court 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 South Carolina Department of Health and Environmental Control; and Jason A. Daigle, Esquire, counsel for South Carolina Department of Transportation.

As to the CWS, Plaintiff alleges four causes of action:

(1) Inverse Condemnation;
(2) Negligent and grossly negligent design, construction, and maintenance;
(3) Negligent and grossly negligent failure to manage storm water runoff; and,
(4) Trespass.

After reviewing the pleadings, the Motions to Dismiss, the Memoranda in support of the Motions and opposing the Motions, reviewing the pleadings, and considering the arguments of counsel, the Court hereby grants Defendant Charleston Water System's Motion to Dismiss based on the pleadings.[2]

[1] The legal name for CWS is the Commissioners of Public Works of the City of Charleston, which does business as CWS.

[2] The various governmental entity Defendants filed Motions for Dismissal Pursuant to SCRCP Rule 12(c) on similar grounds; however, as the factual allegations against each Defendant governmental entity are somewhat distinct, the Court has adopted separate Orders of Dismissal for each separate Defendant.

pmp 1

I. THE PLAINTIFF'S CLAIMS FOR DAMAGES ARISING OUT OF ANY FLOODING EVENT PRIOR TO APRIL 8, 2008 ARE DISMISSED PURSUANT TO THE STATUTE OF LIMITATIONS.

Initially, based upon the pleadings, the Plaintiff's allegations asserting claims against Defendant Charleston Water System for the March 20, 2003, June 16, 2004 and July 22, 2005 flood events are time-barred pursuant to the statute of limitations. For claims filed under the Tort Claims Act, the statute of limitations is two years after the loss was or should have been discovered. See S.C. Code Ann. § 15-78-110 (2005). Plaintiff's Sixth, Seventh, and Eighth causes of action (negligence and trespass) are governed by the South Carolina Tort Claims Act's two-year statute of limitations period for tort claims brought against a governmental entity.[3] For the Plaintiff's remaining claim for inverse condemnation (Fourth cause of action), a three year statute of limitations applies.

Additionally, under South Carolina law, the discovery rule applies to this action.[4] According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999).[5] Under § 15-3-530 and the South Carolina common law, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of diligently acquired facts sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333

---

[3] The South Carolina Tort Claims Act further provides the limitations period is extended an additional year, for a total of three years, when the claimant files a verified claim within one year of the loss or injury. S.C. Code Ann. §§ 15-78-80, -100(a) (2005). Plaintiff did not allege that it filed a verified claim; therefore, the applicable statute of limitations is two years.

[4] See S.C. Code Ann. § 15-3-530 (2005) (applying the discovery rule to causes of action arising under § 15-3-530); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under § 15-3-530, we apply the 'discovery rule'").

[5] Under South Carolina law, "'[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.' Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941) modified Santee Portland Cement v. Daniel Internat'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston v. Sims, supra"; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3 of 7 (S.C. 1997). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

Rump 2

S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

Furthermore, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).[6]

Here, pursuant to S.C. Code Ann. § 15-78-110 for claims arising under the Tort Claims Act, Plaintiff was required to commence its action against CWS within two years after Plaintiff knew or should have known it had a claim. Further, for all non-tort claims, a three year statute of limitations applies pursuant to S.C. Code Ann. §15-3-530. It is self evident that the operative date Plaintiff had notice and knew or should have known a cause of action may exist against this Defendant was, at the latest, when each flood occurred in 2003, 2004, 2005, 2008 and 2009. As such, for both the Tort Claims Act and non-Tort Claims Act claims, Plaintiff was required to at least file its Summons and Complaint within three years after each flood event to comply with the statute of limitations. Plaintiff failed to do so, and Plaintiff missed the statute of limitations for the alleged flood events in 2003, 2004 and 2005 by filing his Summons and Complaint on April 8, 2010.

As such, Plaintiff's Summons and Complaint in this action were not filed prior to the three year expiration of the statute of limitations, which, at the latest, expired for the alleged 2003, 2004 and 2005 flood events. As the Plaintiff failed to file its Summons and Complaint until April 8, 2010, well after the statute of limitations had been expired for the 2003, 2004, and 2005 flood events, Plaintiff failed to commence its action within the mandatory time period for the statute of limitations and the statute of limitations bars Plaintiff's claims for such events.

II. THE PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF FOR ITS (1) TORT CLAIM NEGLIGENCE/GROSS NEGLIGENCE, (2) INVERSE CONDEMNATION, AND (3) TRESPASS CAUSES OF ACTION AGAINST CHARLESTON WATER SYSTEM PURSUANT TO THE HAWKINS DECISION AND THE SOUTH CAROLINA TORT CLAIMS ACT.

---

[6] The courts of South Carolina apply the "discovery rule" to determine when a cause of action accrues under the Tort Claims Act. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). According to the discovery rule, the statute of limitations begins to run from the date the injury resulting from the wrongful conduct date either is discovered or may have been discovered by the exercise of reasonable diligence. Id. "The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question." Id. "One purpose of a statute of limitations is to 'relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting McKinney v CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." Moates, 322 S.C. at 176, 470 S.E.2d at 404.

page 3

1. NEGLIGENCE/GROSS NEGLIGENCE & 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:

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;
...
(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;

Code 1976 § 15-78-60.

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.

MMP 4

2004), the Court of Appeals held that the Tort Claims Act immunity provisions bar such claims.[7] 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 a comparable degree of discretion was granted to the City in the Hawkins case to exercise the measured policy judgments required

---

[7] 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 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.

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 the case. Hawkins, 358 S.C. at 293-94, 594 S.E.2d at 564. The Hawkins decision's broad language affords a governmental entity absolute immunity for design, construction, and maintenance decisions, and the Tort Claims Act immunity provisions (1), (2), (4), (5), (7), and (13) bar Plaintiff's present tort claims against Charleston Water System.

With regard to CWS, there is an additional statutory basis for dismissal on this basis. CWS is a statutorily-created Commissioners of Public Works pursuant to S.C. Code Ann. §5-31-210 *et seq*. Section 5-31-250 sets forth specific powers of any commissioners of public works as follows:

> The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

Given that CWS has only the powers invested in it by the Legislature as set forth above, CWS does not and cannot have control of any design, construction or maintenance of any drainage system, much less a drainage system located outside of the corporate limits of the City of Charleston.

Here, Plaintiff's Amended Complaint Paragraphs 5 - 52 and Fourth, Sixth, Seventh, and Eighth causes of action do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. Specifically, Plaintiff alleges liability due to CWS' "incorrect design, construction, and maintenance" of its drainage system (Am. Comp. ¶ 20); its refusal "to lower the water level of the Goose Creek Reservoir to prevent upstream flooding" (Am. Comp. ¶ 85); its failure "to design, maintain, and operate the drainage system under its control to prevent or mitigate flooding resulting from even moderate rainfall" (Am. Comp. ¶ 98 (a)); its failure "to institute protocols and procedures by which the level of the Goose Creek Reservoir would be lowered in the event of significant rainfall resulting in potential for flooding" (Am. Comp. ¶98 (b)); and CWS' "failure or refusal to take appropriate steps to manage storm water runoff through its drainage basin terminating at the Goose Creek Reservoir" (Am. Comp. ¶ 105). As for the allegations regarding "the drainage system under [CWS'] control," it is clear from §5-31-250 that CWS does not have any control over storm water or drainage systems and therefore cannot fail to maintain such. With regard to the remaining allegations, they, at most, are mere "failures to act" which do not constitute "an affirmative, positive, aggressive act" on the part of this Defendant pursuant to the Hawkins decision. As such, Plaintiff's negligence/gross negligence tort claims against Charleston Water System fail as a matter of law.

2. INVERSE CONDEMNATION

Plaintiff's inverse condemnation claim against CWS also fails pursuant to the Hawkins decision. 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, here, Plaintiff fails to allege any "affirmative, positive, aggressive act" on the part of the Charleston Water System. Complaint Paragraphs 5 - 52, and 7-88 do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. The allegations of the CWS' mere failure to act are insufficient as a matter of law. Here, the alleged conduct by the CWS giving rise to Plaintiff's inverse condemnation claim is practically the same as the City of Greenville's conduct (or lack thereof) absolved by the court in Hawkins. La-Z-Boy repeatedly alleges in its Complaint that the CWS' failure to mitigate upstream flooding by lowering the level of the downstream Goose Creek Reservoir proximately caused flooding on its premises. (Am. Comp. ¶¶ 85, 97, 98, 99, 101, 103, 105). However, pursuant to the Hawkins' court's ruling, the failure to act or to remedy the drainage defects, do not constitute the type of "'affirmative, positive, aggressive' acts by [a] governmental agency" to render it liable for inverse condemnation. At most, the CWS' actions amount to a "mere failure to act," which Hawkins holds is an insufficient basis to render a municipality liable for inverse condemnation. *Id.; see also*, Kiriakides v. School District of Greenville County, 675 S.E.2d 439, 443 (S.C. 2009) ("regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land.") (affirming Master-in-Equity's dismissal of inverse condemnation claim).

PMD 7

3. TRESPASS

As addressed in Hawkins, the essential elements of a trespass cause of action are that (1) "the act must be affirmative, (2) the invasion of the land must be intentional, and (3) the harm caused by the invasion of the land must be the direct result of that invasion." Trespass does not lie for nonfeasance or failure to perform a duty. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. In South Carolina, to maintain a trespass action, an action in trespass will lie if the defendant intentionally entered the property. The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means of entry, or the extent of damage. The entry itself is the wrong. See Anderson S.C. Requests to Charge – Civil § 31-13; 4-41; Cedar Cove Homeowners Association, Inc. vs. DiPietro, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2007).

Here, for the same reasons outlined in the Hawkins decision and pursuant to the Tort Claims Act, the trespass claim allegations (¶¶ 108-111) in this case fail to set forth sufficient facts to constitute a claim for relief against this Defendant.

CONCLUSION

For the reasons stated herein, this Court hereby grants Defendant Charleston Water System's Motion to Dismiss Pursuant to SCRCP Rule 12(c) based on the South Carolina Tort Claims Act and the Hawkins decision.

IT IS SO ORDERED!

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

Dated: February 7, 2014
Charleston, South Carolina

PMD 8