STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

W.G. ENTERPRISES, INC., a Michigan corporation,

Plaintiff,

vs

File No. 93-11292-CK
HON. PHILIP E. RODGERS, JR.

LIGHT & POWER DEPARTMENT OF THE CITY OF TRAVERSE CITY, and THE CITY OF TRAVERSE CITY, jointly and severally,

Defendants.
_____/

Patrick E. Heintz (P31443)
Attorney for Plaintiff

James J. Murray (P40413)
Attorney for Defendants

DECISION AND ORDER

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Subsequently, Plaintiff filed a motion for leave to amend complaint and a motion to strike, in that order. This Court has issued Pre-Hearing Orders in response to the pending motions. Plaintiff's responses were untimely. Defendants' responses to Plaintiff's motions were timely.

Defendants contend that this litigation should be dismissed because it is barred by governmental immunity. This Court agrees. In its consideration of the motion for summary disposition, this Court reviewed the briefs and affidavits, and the court file.

Plaintiff operates a restaurant known as "LaSenorita of Traverse City." Plaintiff alleges that it contacted agents of the city-operated utility to inquire whether Plaintiff would pay less for its energy usage by combining its six separate electrical meters into a single meter. Plaintiff further alleges, in paragraph 6 of the Complaint, that Defendant Light and Power

Department's ("TCL&P") agents determined, after an investigation, that "combining meters would not result in a significant savings of the cost of the electricity, and would not warrant the initial expense of combining said meters."

Plaintiff contends that the agents' statements were false misrepresentations, knowingly or recklessly made and that Plaintiff relied on those statements to its detriment. Plaintiff contends that, at a later time, it sought an energy audit from a private firm. The meter conversion was made after the audit, and Plaintiff experienced a savings on its energy bill.

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

> In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987).

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

In Plaintiff's response brief, particular facts regarding the conversion and resultant cost savings are described. The facts are not supported by an affidavit or reference to the documentary record. Plaintiff seeks "damages equal to the difference between the costs of what electricity would have been by purchasing electricity through one meter versus the cost under six meters." Defendants argue that the operation of TCL&P is a governmental function and Plaintiff's claims are barred by the doctrine of governmental immunity.

Defendants cite MCL 691.1407(1) et seq; MSA 3.996(107)(1) et seq. MCL 691.1407(1) reads, as follows:

> Except as otherwise provided in this Act, all governmental agencies shall be immune from tort liability

> in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this Act, this Act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965 which immunity is affirmed.
>
> MCL 691.1407(1); MSA 3.996(107)(1) reads, as follows:
>
> Except as otherwise provided in this Act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this Act, this Act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965 which immunity is affirmed.

Further, Defendants rely on the Supreme Court's rulings in Ross v Consumers Power Co (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984), Smith v Dep't of Public Health, 428 Mich 540; 410 NW2d 749 (1987) and related cases to support their assertion that governmental immunity bars Plaintiff's claims.

The following discussion found in Defendants' brief concisely delineates the applicable statutes and case law and applies them to the allegations in Plaintiff's complaint:

> The Supreme Court in Ross v Consumers Power Co (On Rehearing), 420 Mich 567 (1984) continued and furthered Michigan's commitment to the doctrine of governmental immunity by articulating a definition of "governmental function" which provided that:
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> > [A] governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute of [sic] other law. When a governmental agency engages in mandated or authorized activities, it is immune from tort liability unless the activity is proprietary in nature...or falls within one of the other statutory exceptions to governmental immunity...420 Mich 567, 620[.]
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> With the passage of MCLA 691.1401(f); MSA 3.996(101)(f), the Michigan Legislature adopted the Ross Court's "governmental function" definition with slight modification:
>
> > (f) "Governmental Function" is any activity which is expressly or impliedly mandated or

> authorized by constitution, statute, local charter or ordinance or other law.
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> Thus, if the acts of which the instant Plaintiff complains occurred while the City of Traverse City was engaged in the exercise or discharge of a governmental function, Plaintiff cannot proceed on its tort claims, be those for negligence or for the City's alleged commission of an intentional tort.

In the Complaint, Plaintiff describes charter and statutory provisions for Defendant entities, as follows:

> 2. That Defendant Light & Power Department of the City of Traverse City, hereinafter referred to as "Light & Power", is a department of the City of Traverse City created and existing by virtue of Chapter 17 of the Charter of the City of Traverse City.
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> 3. That Defendant City of Traverse City, hereinafter referred to as "City", is a municipal corporation and body politic duly created by charter and statute in such case made.

In their answer to the Complaint, Defendants admit these allegations with the notation that the TCL&P "operates under Chapter 18 of the Charter."

Defendants support the argument that TCL&P's operation is a non-proprietary function. With the affidavit of Charles Fricke, Executive Director of the Light and Power, Affiant Fricke states, inter alia, as follows:

> 4. The operation of the City of Traverse City Light & Power is a governmental function of the City of Traverse City.
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> 5. The primary purpose of the Traverse City Light & Power is to provide electricity to the residents and businesses of Traverse City. The City charges for the use of its electricity by the residence, but reimbursement for the cost of the electricity is provided in the nature of cost defrayment, not profit-making. Traverse City Light & Power is not involved in a commercial business servicing the general population and is not engaged in a pecuniary activity.

Defendants' assertion that the utility is a non-proprietary, governmental function is uncontroverted. Plaintiff argues that discovery is necessary to determine whether TCL&P is a proprietary

function but offers no insight into the nature of such discovery or why it has not yet been accomplished.

In Hyde v Univ of Michigan Regents, 426 Mich 223, 230; 393 NW2d 847 (1986), the Supreme Court refined the definition of "governmental function." In Hyde, the Supreme Court considered three cases in which plaintiffs alleged tortious violations against hospitals. The Hyde Court made a consolidated ruling which addressed the issue of "whether, and under what circumstances, the operation of a public general hospital or medical facility constitutes a proprietary function, which is not entitled to immunity from tort liability." Justice Cavanagh, writing for the Hyde Court, opined, as follows:

> Plaintiffs bear the burden of pleading facts in their complaint which would justify a finding that recovery in their tort cause of action is not barred by the governmental immunity act. Ross, p 621, n 34; Galli v Kirkeby, 398 Mich 527, 532, 540-541; 248 NW2d 149 (1976). Paragraph 5 of the plaintiffs' amended complaint merely alleges that plaintiffs paid the University Hospital for medical services which are routinely provided by private medical facilities. Plaintiffs did not allege that the diagnosis, treatment, and care of patients at the hospital was primarily intended to produce a pecuniary profit for the state, and that this activity was not normally supported by taxes or fees. Plaintiffs' amended complaint failed, as a matter of law, to state a tort cause of action which falls within Section 13's "proprietary function" exception.

Hyde, supra at p 261.

On p 5 of their response brief, Plaintiff mistakenly stated that, "[i]n the present case, it is plead in the complaint that it is believed TCL&P is not a governmental function, but rather a proprietary function." As stated above, in its review of a (C)(7) motion, this Court must consider the pleadings. Well-pled factual allegations are to be accepted as true and construed most favorable to the complainant. Wakefield, supra. The Court does not find any reference to "governmental function" or "proprietary function" in the complaint.

As noted above, after Defendants filed the instant motion, Plaintiff filed a motion for leave to amend the complaint and

submitted a proposed First Amended Complaint. In its review of the proposed amended complaint, this Court finds no reference to "governmental function" or "proprietary function." In light of the Hyde opinion, Plaintiff's Complaint does not meet the requirement that the complainant must allege facts in avoidance of governmental immunity. Hyde, supra at p 261.

It is the opinion of this Court that the allegations in the Complaint do not evidence an attempt to plead facts in avoidance of governmental immunity. Yet, Michigan appellate precedent has consistently required that such facts be pled in the Complaint. Hyde, supra, Smith, supra and Pawlak v Redox Corp, 182 Mich App 758. In Pawlak, the Court of Appeals reviewed the trial court's decision to grant the City of Detroit, one of several defendants in the action, summary disposition pursuant to MCR 2.116(C)(7) and (8). The per curiam Pawlak opinion provides the following comprehensive review of immunity motions brought in accordance with these rules:

> MCR 2.116(C)(7) provides for summary disposition when suit is barred by immunity granted by law. When a governmental agency moves for summary disposition under this court rule, the plaintiff's complaint must be reviewed to see whether facts have been pled justifying a finding that recovery in a tort cause of action is not barred by governmental immunity. Dettloff v Royal Oak, 178 Mich App 319, 321; 443 NW2d 410 (1989).
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> Summary disposition under MCR 2.116(C)(8) is available when the plaintiff has failed to state a claim upon which relief can be granted. A motion in accordance with this rule tests the legal sufficiency of the claim by the pleadings alone. Formall, Inc v Community National Bank of Pontiac, 166 Mich App 772, 777; 421 NW2d 289 (1988). All factual allegations in support of a claim are accepted as true, as well as all inferences which can fairly be drawn from the facts. Mills v White Castle System, Inc, 167 Mich App 202, 205; 421 NW2d 631 (1988), lv den 431 Mich 880 (1988). The motion should only be granted when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. Scamehorn v Bucks, 167 Mich App 302, 306; 421 NW2d 918 (1988), lv den 430 Mich 886 (1988).

> Our Supreme Court has held, in a memorandum opinion, that there is no intentional tort exception to governmental immunity. Smith v Dep't of Public Health, 428 Mich 540, 544; 410 NW2d 749 (1987), reh den 420 Mich 1207 91987), aff'd sub nom Will v Michigan Dep't of State Police, 491 US __; 109 S ct 2304; 105 L Ed 2d 45 (1989). As stated by Justice BRICKLEY in his separate opinion in Smith, "intentional torts are immune if committed within the scope of a governmental function." Id., p 611. A governmental function was defined by the Supreme Court in Ross v Consumers Power Co (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984), reh den 421 Mich 1202 (1985), an activity which is expressly or impliedly mandated or authorized by constitution, statute or other law. Id., pp 618, 620. The Ross definition is to be broadly applied and only requires that there be some constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged. Hyde v University of Michigan Bd of Regents, 426 Mich 223, 253; 393 NW2d 847 (1986).

Pawlak, supra at pp 763-764.

Defendants also rely upon an unpublished federal case, Hanna v City of Traverse City, consolidated case numbers G84-177 CA7/G84-178 CA7, to support their contention that operation of TCL&P's electrical facility is not a proprietary function.

This Court recognizes that Hanna does not have precedential value. However, while the Hanna opinion is unpublished, Chief Judge Douglas W. Hillman's analysis of the relevant law is worthy of repetition and consideration.

> The Government Tort Liability Act, MCL 691.1401 et seq., as interpreted by Ross v Consumer Power Co., 420 Mich. 567, 363 N.W.2d 641 (1984), is the controlling law on governmental immunity in Michigan. Under Ross, nonsovereign governmental units and agencies are immune from tort liability whenever they are engaged in a governmental function. Id. at 605. A governmental function is an activity that is expressly or impliedly mandated or authorized by the people through their constitution, statutes, or other laws. Id. at 620. According to the Michigan Supreme Court, the enactors of the Government Tort Liability Act intended a "broad" grant of immunity encompassing "most of the activities undertaken by governmental agencies." Id. at 621. The law provides only four "narrowly drawn exceptions" to this immunity. Id. at 618. Those exceptions apply to the undertaking of activities that are primarily for proprietary purposes (MCL Section 691.1413), the failure

to maintain highways in reasonable repair (MCL Section 1402), the negligent operation of a government owned motor vehicle by an officer, agent, or employee of the government (MCL Section 691.1405), and the failure to correct dangerous or defective conditions in public buildings under a government agency's control (MCL Section 691.1406).

It is uncontroverted that Traverse City is a nonsovereign governmental unit and that TCL&P and its governing board are nonsovereign governmental agencies. Furthermore, plaintiffs admit that the operation of TCL&P is an activity explicitly authorized by the Michigan Constitution (Article VII, Sections 24, 34, and 22), Michigan statutory provisions (MCL 117.1 et seq.) and Traverse City's charter (Chapter XVIII). However, in their brief in opposition to defendant's motion for summary judgment, plaintiffs argue that, as a matter of law, the operation of the plant must be characterized as a proprietary function. During the hearing on this motion, defendants argued that the proprietary nature of the plant involved a question of "motive' dependent on facts which are in issue.

Looking to the language of the statute, the Ross opinion, and the facts established by the affidavits, depositions and exhibits, I must disagree. In section 31 of the Government Tort Liability Act, the Michigan Legislature defined a proprietary function as an activity "which is conducted primarily for the purpose of producing a pecuniary profit ..." (emphasis added). Although neither Ross nor other Michigan cases specifically address the meaning of "primarily," the plain language could make the legislature's intent no less clear. To fall within the exception, the principal, preeminent, or fundamental intent of the undertaking must be the generation of a profit. See e.g., Major Realty Corp. & Subsidiaries v. Commissioner, 749 F.2d 1483, 1487-88 (11th Cir. 1985)(interpreting "primarily" when used in the tax code); Marshall v. Sunshine Leisure, Inc., 496 F. Supp. 354, 358 (C.D. Fla. 1980) (defining "Primarily" as used in the Fair Labor Standards Act); People ex rel. Hartigan v. Dynasty System Corp., 28 Ill. App. 3d 874, 471 N.E.2d 236, 241 (1984) (defining "primarily" as used in a statute defining prohibited sales schemes). The fact that a fee is charged those who enjoy the benefit of a governmental function or that an incidental profit may be derived from such fees does not transform a governmental function, an activity that the people expressly or implicitly authorize the government to undertake, into a proprietary one. Ross, supra at 612; See also, Faigenbaum v. Oakland Medical Center, 143

Mich. App. 303, 373 N.W.2d 161, 165-66 (1985).

In deposition the Executive Director of TCL&P, Thomas Richards, testified that the primary purpose of the Department was to "benefit ... the citizens of the City of Traverse City, by rendering a municipal service that they feel is superior to that which could be rendered by a private enterprise." (Richards' deposition p.26). Plaintiffs, attempting to refute this statement of purpose, argue that the primary intent to operate TCL&P for pecuniary gain can be inferred from the annual fee that TCL&P pays to the city (five percent of the money collected through the fee charged electrical power users) and the amount of money that TCL&P budgets for capital improvements together with the incidental amount that TCP&L has recognized over and above its budget during the past several years. All of these sums are profit according to the plaintiffs.

The court is not convinced by this argument. In the light of other facts established by Mr. Richards' deposition and affidavit, the court is satisfied that the five percent fee paid to the city is a capital payment on TCP&L's physical plant, not a measure of profits. The court is further satisfied that the budgeted "surplus" that TCP&L generates is used to improve and replace equipment and that any amount recognized over the budget is rolled into the following year's budget and similarly used for capital improvements. So long as the fees that TCL&P collects over and above daily operating expenses further the production of power for the citizens of Traverse City (whether as capital payments on the Department's physical plant or as improvements in the plant's infrastructure), it can not [sic] be convincingly argued that the primary intent of the city in operating TCL&P is the generation of a profit. See 1976 Op. Att'y Gen. 538, 538-40 (No. 5045). To conclude, as the plaintiffs argue, that reinvestment of money in the plant's infrastructure evidences a primary intent to recognize a pecuniary gain because it increases the book value of the plant, builds the city's equity in the utility complex, and creates a future profit that the city could realize by selling the plant to Consumers Power or another private utility, would doom all publicly operated undertakings to perpetual inefficiency if not inevitable failure. I do not find any indication in the Ross opinion that this was the intent of the legislature.

This Court also agrees that the Defendant City's operation of the Defendant Light and Power Department is a non-proprietary governmental function. Taylor v City of Detroit, 182 Mich App 583;

452 NW2d 826 (1989). Further, MCR 2.116(G)(4) requires that the non-moving party, in response to a (C)(10) motion, set forth specific facts, supported by affidavits, depositions, admissions or other documentary evidence, showing that there is a genuine issue for trial. Plaintiff has failed to adequately plead its case or provide evidence to support its claims. Plaintiff's Complaint is defeated by application of the governmental immunity doctrine.

However, Plaintiff seeks leave to amend its complaint. Pursuant to MCR 2.118(A)(2), leave to amend a complaint shall be freely given when justice so requires. Taylor, supra at p 586. Further, leave to amend the pleadings can be a defense to a summary disposition motion. MCR 2.116(I)(5). Plaintiff's proposed First Amended Complaint includes Count I - Misrepresentation, Count II - Quasi Contract, Count III - Statutory Duty, and Count IV - Violation of Consumer Protection Act.

Plaintiff has not pled facts showing that the tort alleged in Count I falls outside of the protection of governmental immunity. Smith, supra at p 591. Further, the alleged statutory violations described in Counts II, III and IV, do not state claims which fall within one of the statutory exceptions to governmental immunity. Smith, supra at p 591. Granting leave to amend, then, would not change this Court's ruling. Plaintiff's request for leave to amend its complaint is denied as a futile effort to defeat Defendants' motion.

For all the foregoing reasons, this Court hereby grants Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Harrison v Director of Dep't of Corrections, 194 Mich App 446, 450; 487 NW2d 799 (1992). Plaintiff's motion to strike is moot. Plaintiff's motion to amend is denied. This action is dismissed with prejudice. A judgment consistent with this decision and order should be submitted in a manner consistent with the procedure described at MCR 2.602(B)(3).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/28/94