



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

2017 APR 27 P 3:03

CARLINA HAYNESWORTH LEWIS,)	CASE NO. CV 17 875173	WINDOW 7
Plaintiff,)	JUDGE PAMELA A. BARKER	CLERK OF COURTS
v.)	<u>JOURNAL ENTRY AND OPINION</u>	
NORTHEAST OHIO REGIONAL SEWER)	<u>ON MOTION TO DISMISS OF</u>	
DISTRICT, et al.)	<u>DEFENDANT NORTHEAST OHIO</u>	
Defendants)	<u>REGIONAL SEWER DISTRICT</u>	
)		

This matter is before the Court on the Motion to Dismiss filed by Defendant Northeast Ohio Regional Sewer District's ("NEORSD") on 3/1/2017 ("Defendant's Motion"), and Plaintiff's Brief in Opposition filed on 3/27/17 ("Plaintiff's Brief").

As to NEORSD, the Complaint sets forth the following allegations relevant to Defendant's Motion: it may have performed work for Defendant, John Doe V, at a construction site located on Earle Avenue near Linn Drive (hereinafter the "Construction Site")¹; it performed services at the Construction Site,² and carelessly and negligently maintained the Construction Site in such a manner that there was a hole and unnatural accumulation of ice and a dangerous condition which was not open and obvious at the Construction Site³; it failed to warn of the dangerous condition at the Construction Site⁴; and as a proximate result of the dangerous condition at the Construction Site on January 31, 2015, Plaintiff slipped and fell and sustained

¹Plaintiff's Complaint, at ¶¶ 10, 19.

²*Id.* at ¶ 28.

³*Id.* at ¶¶ 29-31, 35.

⁴*Id.*, ¶ 34.

injuries.⁵ In Defendant's Motion, NEORSD asserts that it is immune from liability under Ohio Revised Code 2744.

When considering a motion to dismiss under 12(B)(6), a court must take all factual allegations in the pleading as true, and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

R.C. 2744 "generally shields political subdivisions from tort liability in order to preserve their fiscal integrity." *Riscatti v. Prime Props. Ltd. P'ship*, 137 Ohio St. 3d 123, 126, 2013-Ohio-4530, P15, 2013 Ohio LEXIS 2310, *6-7 (Ohio 2013). Once it is determined that a political subdivision is immune, it is entitled to dismissal.

Ohio courts apply a three-tiered analysis when determining whether a subdivision is entitled to immunity under R.C. 2744:

the first tier is to establish immunity under R.C. 2744.02(A)(1); the second tier is to analyze whether any of the exceptions to immunity under R.C. 2744.02(B) apply; if so, then under the third tier, the political subdivision has the burden of showing that one of the defenses of R.C. 2744.03 applies.

Lane v. Greater Cleveland R.T.A., 2014-Ohio-3917, P14, 2014 Ohio App. LEXIS 3948, *4-5 (Ohio Ct. App., Cuyahoga County Sept. 11, 2014).

As to the first tier, Plaintiff does not dispute that NEORSD has been recognized as, and is a political subdivision, and therefore, immunity is presumed under the statute. *See Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 144 Ohio St.3d 387, 2015-Ohio-3705, ¶ 1 ("The Sewer District, a political subdivision of the state of Ohio, was formed in 1972."); and *Sims v. Cleveland*, 8th Dist. Cuyahoga No. 92680, 2009-Ohio-4722, ¶12. Since NEORSD is a political

⁵ *Id.* at ¶¶ 36-42, 43-47.

subdivision presumed to have immunity, Plaintiff must demonstrate that one of the statutorily defined exceptions set forth in R.C. 2744.02(B) apply in order to proceed. *Id.*, at ¶ 15.

For purposes of the second tier analysis, Plaintiff points to, or states that there are two exceptions to immunity under R.C. 2744.02(B) that apply: the negligent performance of proprietary functions, R.C. 2744.02(B)(2); and the negligent failure to keep public roads open and in repair and the negligent failure to remove obstructions from public roads, R.C. 2744.02(B)(3).

Anticipating Plaintiff's reliance on the exception to immunity set forth in R.C. 2744.02(B)(2), NEORSD, in its Motion, construed or interpreted Plaintiff's allegations of negligence and carelessness in maintaining the "Construction site", as relating to "construction work", and not relating to any conduct by NEORSD in connection with the performance of a proprietary function. As NEORSD correctly points out, "the provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system" is a governmental function pursuant to R.C. 2744.01(C)(2)(1) and therefore, would not constitute a proprietary function so as to fall within the exception set forth in R.C. 2744.02(B)(2).

However, "R.C. 2744.01(G)(2) lists specific functions expressly designated as proprietary functions, and this list includes '[t]he maintenance, destruction, operation, and upkeep of a sewer system.' R.C. 2744.01(G)(2)(d)." *Nelson v. City of Cleveland*, 8th Dist. Cuyahoga No. 98548, 2013-Ohio-493, ¶ 18. "'Determining whether an allegation of negligence relates to the maintenance, operation, or upkeep of a sewer system or, instead, the design, construction, or reconstruction of a sewer system is not always a simple inquiry.'" *Id.* at ¶ 19, quoting *Essman*

v. Portsmouth, 4th Dist. No. 09CA3325, 2010 Ohio 4837, ¶2. In evaluating Defendant's Motion to Dismiss, all reasonable inferences must be made in favor of Plaintiff. It can be reasonably inferred that a "Construction Site", as Plaintiff has delineated the place or area where Plaintiff fell, includes a place where the maintenance, destruction, and/or upkeep of a sewer system is taking place or underway, as distinguished from the actual construction of a sewer system.⁶

Also anticipating Plaintiff's reliance on the exception to immunity set forth in R.C. 2744.02(B)(3), NEORSD, in its Motion, correctly cited to, and relies upon, *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792 for its proposition that ice on the roadway does not constitute an "obstruction" as that term is used in R.C. 2744.02(B)(3).⁷ Therefore, this Court agrees that NEORSD is immune from liability for its alleged maintenance of the Construction Site in such a manner that there was an unnatural accumulation of ice at it. However, Plaintiff's Complaint also includes an allegation that there was a hole at the Construction Site. A reasonable inference would be that in performing acts in furtherance of or for the maintenance, operation, or upkeep of a sewer system, NEORSD left the roadway in disrepair.

Although NEORSD disputes that the two exceptions that Plaintiff relies upon apply to rebut the presumption of immunity, it argues that even if one or the other or both apply, nonetheless R.C. 2744.03(A)(5) applies to provide it with a full defense that restores its immunity. That provision restores immunity where the alleged injury "resulted from the exercise of judgment or discretion in determining...how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with

⁶ See *Fink v. Twentieth Century Homes, Inc.*, 8th Dist. Cuyahoga No. 94519, 2010-Ohio-5486, at ¶¶ 28-38.

⁷ See, also, *Nelson v. City of Cleveland*, *supra*, at ¶¶ 35-38, citing, discussing, and relying upon *Howard* and *Engle v. Williams Cty.*, 6th Dist. No. F-07-027, 2008 Ohio 3852, to conclude that standing water on a roadway does not constitute an obstruction as that term is used in R.C. 2744.02(B)(3).

malicious purpose, in bad faith, or in a wanton or reckless manner." NEORSD submits that because Plaintiff claims that she was injured as a result of conditions existing on a construction site, it necessarily follows that it was exercising its judgment or discretion in determining how to use equipment, supplies, etc. at the construction site, and because Plaintiff has not alleged that NEORSD acted with malicious purpose, in bad faith, or in a wanton or reckless manner, it is immune from liability pursuant to R.C. 2744.03(A)(5).

However, the Eighth District Court of Appeals has considered application of R.C. 2744.03(A)(5) in the context of property maintenance, and specifically maintenance of a sewer, and has rejected it, explaining:

Courts have consistently held that sovereign immunity operates to protect political subdivisions from liability based on discretionary judgments concerning the allocation of limited resources. *Frenz v. Springvale Golf Course & Ballroom*, 8th Dist. No. 97593, 2012 Ohio 3568, citing *Hall v. Ft. Frye Local School Dist. Bd. Of Edn.*, 111 Ohio App.3d 690, 699, 676 N.E.2d 1241 (4th Dist.1996). This immunity, however, "is not intended to protect conduct which requires very little discretion or independent judgment." (Citations omitted.) *Id.* Courts have held that property maintenance, in general, does not involve "the type of judgment or discretion contemplated by R.C. 2744.03(A)(3)." *Frenz* at ¶22, quoting *Hall* at 702. More on point, the Fourth District Court of Appeals has held that a city's decision "regarding whether, when, and how to comply with its duty to maintain the sewer does not fall within the R.C. 2744.03(A)(5) exception." *Williams v. Gloucester*, 4th Dist. No. 10CA58, 2012 Ohio 1283, quoting *Malone v. Chillicothe*, 4th Dist. No. 05CA2869, 2006 Ohio 3268, ¶20.

Immunity pursuant to R.C. 2744.03(A)(5) relates to activities that require the balance of alternatives or making decisions involving an increased amount of official judgment or discretion. [Citation omitted.] Discretion, in reference to R.C. 2744.03(A)(5), involves the exercise of independent judgment and policymaking. [Citation omitted.] ***

*** Decisions involving the proper maintenance of the sewer or drainage system is a proprietary act, which is mandatory and not discretionary. These decisions do not involve a high degree of discretion. Rather, they involve routine inspection and maintenance.

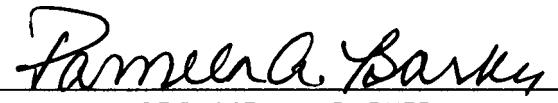
Nelson v. City of Cleveland, supra, at ¶¶28-30.

Accordingly, NEORSD's argument that R.C. 2744.03(A)(5) applies to restore immunity to it even if an exception under R.C. 2744.02(B) applies, is without merit. So, too, is NEORSD's argument that because Plaintiff alleges that her fall occurred at a construction site, she must be considered or deemed a trespasser who is owed no duty of care aside from refraining from willful, wanton, or reckless conduct that could cause injury.

COURT'S ORDER:

Accordingly, this Court **DENIES** Defendant's Motion.

DATED THIS 27th day of April, 2017.



JUDGE PAMELA A. BARKER