

ENTERED
MAY 18 2021

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CLIFTON COLONY APARTMENT	:	CASE NO: A1901768
CO., LTD., et al.,	:	
	:	Judge Alison Hatheway
Plaintiffs,	:	
v.	:	
	:	
JOHN R. JURGENSEN CO.	:	
	:	
And	:	
	:	<u>FINDINGS OF FACT, CONCLUSIONS</u>
THE CITY OF CINCINNATI	:	<u>OF LAW, AND ENTRY GRANTING</u>
	:	<u>DEFENDANT CITY OF CINCINNATI'S</u>
Defendants.	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
	:	<u>AND DENYING PLAINTIFFS' MOTION</u>
	:	<u>FOR RULE 56(F) RELIEF</u>

This Court previously ordered and adjudged on April 20, 2021 that the Court was entering (1) summary judgment in favor of Defendant City of Cincinnati based on governmental function immunity and (2) an entry denying Plaintiffs Clifton Colony Apartment Co., Ltd., Community Management Corporation Properties, and General Star Indemnity Company and Everest Indemnity Company (as Subrogees of Clifton Colony Apartment Co., Ltd. and Community Management Corporation Properties), hereinafter collectively referred to as "Plaintiffs", Motion pursuant to Rule 56(F) for extension of time to respond to Defendant City of Cincinnati's Motion for Summary Judgment. The Court, having reviewed the arguments and evidence presented on the papers, now makes the following findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The City of Cincinnati is a political subdivision existing under the laws of the State of Ohio.



2. The City of Cincinnati, through its Department of Transportation and Engineering (“DOTE”), retained and contracted with Defendant John R. Jurgenson Co. (“Jurgenson”) for a capital improvement project known as the HAM-West MLK Improvement Project PID # 87036 (“MLK Improvement Project”).

3. The MLK Improvement Project was an approximately \$6 million project which included construction of a realigned and widened roadway, sidewalks, driveways, and a multi-use path to improve accessibility and safety for vehicular, bicycle, transit and pedestrian traffic. MLK Boulevard is one of the City of Cincinnati’s main thoroughfares commonly used to provide both vehicular and pedestrian access to the University of Cincinnati and Children’s Hospital.

4. Beginning sometime prior to April 16, 2017, in connection with the MLK Improvement Project, Jurgenson was performing work on the northern side of MLK Boulevard West in the vicinity of Clifton Colony Apartments (“Apartments” or “Apartment Complex”). The Apartments are owned by Clifton Colony Apartment Co., Ltd. and managed by Community Management Corporation Properties.

5. In April 2017, General Star Indemnity Company and Everest Indemnity Insurance Company insured Clifton Colony Apartment Co., Ltd. and Community Management Corporation Properties.

6. On April 16, 2017, a heavy rainfall occurred, and rainwater flowed down the hill above the Apartments from the area of the MLK Improvement Project and flooded some of the buildings and property at the Apartment Complex. Plaintiffs allege that acts or omissions of the City and/or Jurgenson caused and/or contributed to the flooding at the Apartment Complex.

7. On April 20, 2017, an underground water main pipe located in the area of the MLK Improvement Project ruptured, and water flowed from the area of the MLK Improvement Project

down the hill above the Apartments and flooded some of the buildings and property at the Apartment Complex. Plaintiffs allege that acts or omissions of the City and/or Jurgensen caused and/or contributed to the flooding at the Apartment Complex.

8. The Apartments are located immediately adjacent to the right of way where Jurgensen was working on the MLK Improvement Project on April 20, 2017, and the flooding from the ruptured underground water main pipe during the MLK Improvement Project caused property damage to some of the buildings in the Apartment complex and business interruption to Plaintiffs.

9. The underground water main pipe had been installed in 1977 under the sidewalk on the north side of the existing West MLK Boulevard. It had an expected remaining 35-60 years of useful life, and there were no service requests for the twelve years prior to the commencement of the MLK Improvement Project. The scope of the MLK Improvement Project did not include removal, alteration, repair, or maintenance of the underground water main pipe. The water main pipe was to remain protected and undamaged by Jurgenson during the entirety of the MLK Improvement Project.

10. In response to the alleged damages from the flooding incidents, Plaintiffs brought the present action sounding in negligence and nuisance against the City of Cincinnati claiming the City was negligent in its supervision, performance, execution, management, coordination, and control of the work on the MLK Improvement Project. The City of Cincinnati denied liability.

11. On February 14, 2020 the City of Cincinnati filed a Motion for Summary Judgment pursuant to Rule 56 requesting a dismissal of all claims based upon political subdivision immunity.

12. On March 13, 2020 Plaintiffs filed a Motion for additional time to respond to the City of Cincinnati's Motion for Summary Judgment, also pursuant to Rule 56.

CONCLUSIONS OF LAW

13. A party should be granted Summary Judgment pursuant to Rule 56, when a review of the evidentiary materials, such as depositions and an affidavit, demonstrate: (1) no genuine issue as to any material fact remains to be litigated; (2) moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, in viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, and the conclusion is adverse to that party. *Temple v. Wean United Co.* (1977), 50 Ohio St.2d 317, 327. A Motion for Summary Judgment forces the non-moving party to produce evidence on any issue for which the party has the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111; see also, *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 295.

14. In opposing a summary judgment motion, the non-moving party may not rest upon the mere allegations or denials of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Reynoldsburg Motor Sales v. Columbus* (1972), 32 Ohio App. 2d 271, 274 (10th Dist. 1972). Summary Judgment is a favored “procedural device to terminate litigation and to avoid a formal trial where there is nothing to try.” *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1, 2-3. Indeed, the Supreme Court of Ohio has instructed that “granting a Summary Judgment should be encouraged in proper cases.” *North v. Pennsylvania R.R. Co.* (1967), 9 Ohio St. 2d 169, 171.

15. The Political Subdivision Tort Liability Act (“PSTLA”), codified in Revised Code Chapter 2744, dictates when a political subdivision or its employees may be liable in tort. Generally, political subdivisions and their employees have tort immunity when they are performing a governmental or proprietary function, as long as an exception to tort immunity does

not create liability. *Howard v. Miami Twp. Fire Div.* 119 Ohio St.3d 1, 2008 Ohio 2792, 891 N.E.2d 311 ¶ 18. (2008), citing ORC 2744.02(A)(1) and ORC 2744.02(B).

16. To determine whether a municipality, like the City of Cincinnati, has immunity pursuant to the PSTLA, courts employ a three-tiered analysis. *Evans v. City of Cincinnati, et al.*, 1st Dist. Hamilton No. C-120726 (May 22, 2013), ¶ 5; *Copeland v. City of Cincinnati, et al.*, 159 Ohio App.3d 833, 2005 Ohio 1179, 825 N.E.2d 681, ¶ 5. (1st Dist. 2005).

17. In the first tier, political subdivisions are generally granted immunity from liability for injury or death to persons in connection with a political subdivision's performance of a governmental or proprietary function. *Howard v. Miami Twp. Fire Div.* 119 Ohio St.3d 1, 2008 Ohio 2792, 891 N.E.2d 311 ¶ 18. (2008), citing 2744.02(A)(1). Once immunity is established, the second tier of the analysis requires that the court determine whether any of the exceptions to immunity listed in ORC 2744.02(B) apply to remove that immunity from the political subdivision. *Evans, supra.* at ¶ 5; *Copeland, supra.* at ¶ 5. If any of the exceptions to immunity in ORC 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in ORC 2744.03 apply that would reinstate immunity. *Id.*

18. Here, the allegations by Plaintiffs all stem from flooding incidents that occurred while Jurgensen, the City's retained contractor, was engaged in the HAM-West MLK Improvement Project, which was a \$6 million project that included the construction of a realigned and widened roadway, sidewalks, driveways, and a multi-use path to improve accessibility and safety for vehicular, bicycle, transit and pedestrian traffic. The construction of public improvement projects and road improvement projects are both clearly defined as governmental

functions pursuant to ORC 2744.01(C)(2)(e) and (l); thus, there is a presumption of immunity for the City of Cincinnati in this suit under both provisions.

19. ORC 2744.01(C)(2)(e) and ORC 2744.01(C)(2)(l) specifically define governmental functions to include:

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds...

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system...

20. None of the five exceptions found in ORC 2744.02(B) apply to remove the presumption of immunity afforded to the City of Cincinnati in this case.

21. The MLK Improvement Project can only be accurately described as a public road improvement project and/or public improvement project. Repair or maintenance of the underground water main was not included within the scope of the MLK Improvement Project. The water main was to simply remain protected and undamaged by Jurgensen during the entirety of the MLK Improvement Project. The fact that the water main was damaged as part of this public road and sidewalk improvement project does not transform the MLK Improvement Project into a utility venture. *See CAC Building Properties, L.L.C. v. Cleveland*, 2009-Ohio-1786, P32 (8th Dist.).

22. The City of Cincinnati was engaged in a governmental function when the subject flooding incidents occurred. Governmental immunity applies, entitling the City of Cincinnati to a dismissal with prejudice of all of Plaintiffs' claims and causes of action against the City of Cincinnati.

23. Rule 56(F) provides a means by which a party may seek a continuance on a motion for summary judgment in order to obtain affidavits opposing the motion or conduct discovery relevant to it. *Gates Mills Invest. Co. v. Pepper Pike*, 59 Ohio App.2d 155, 168 (1978). Rule 56(F) requires the party opposing the motion for summary judgment to submit affidavits with sufficient reasons stating why it cannot present by affidavit facts essential to justify its opposition. *Id.* at 169. Mere allegations requesting a continuance for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment. *Id.* The party must present a particularized factual basis indicating why further discovery is necessary to respond to the legal issues upon which the motion for summary judgment is predicated. *Id.*

24. The burden is on the party seeking to defer the court's action on a motion for summary judgment to demonstrate that a continuance is warranted. *Glimcher v. Reinhorn*, 68 Ohio App.3d 131, 138 (1991). Once that party satisfies its burden, the trial court may refuse the summary judgment motion, order a continuance to permit affidavits to be obtained in opposition to the summary judgment motion, grant a continuance for further discovery, or make such other order as is just. *Gates Mills*, supra, at 169. These alternatives are discretionary, not mandatory. *Id.* Further, “[w]here discovery proceedings would not, if allowed to proceed, aid in the establishment or negation of facts relating to the issues to be resolved, it is not an abuse of discretion for a court to grant a motion for summary judgment before such proceedings are completed.” *Glimcher*, supra, at 138, quoting *Ball v. Hilton Hotels* 32 Ohio App.2d 293, syllabus (1972).

25. “Whether a political subdivision is entitled to statutory immunity under ORC 2744 presents a question of law.” *Williams v. Glouster*, 4th Dist. Athens No. 10CA58, 2012-Ohio-1283,

¶ 15, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992–Ohio–133, 595 N.E.2d 862 (1992) and *Murray v. Chillicothe*, 164 Ohio App.3d 294, 2005–Ohio–5864, 842 N.E.2d 95, ¶ 11 (4th Dist.). Plaintiffs’ Complaint includes allegations involving the contract between the City of Cincinnati and Jurgensen, the nexus between the road/sidewalk improvement Project and the flooding, and the Project’s close proximity to the affected apartment buildings. The Complaint itself identifies the Project as the “HAM-West MLK Improvement Project PID #87036.” No amount of depositions or discovery will change the basic, fundamental fact that the City of Cincinnati was engaged in a road/sidewalk improvement project when the incident occurred, which is the City of Cincinnati’s only connection to the flooding incidents, and Ohio’s Political Subdivision Act entitles the City of Cincinnati to governmental immunity from liability.

ENTRY

Accordingly, pursuant to Rule 56 of the Ohio Rules of Civil Procedure, and the Court being in all ways sufficiently advised, Defendant City of Cincinnati’s Motion for Summary Judgment is GRANTED. All of Plaintiffs’ claims and causes of action against Defendant City of Cincinnati are dismissed with prejudice. Plaintiffs’ Motion for Extension of Time to Respond to Defendant City of Cincinnati’s Motion for Summary Judgment is DENIED.

SO ORDERED THIS 18 DAY OF MAY, 2021.



HON. ALISON HATHEWAY
JUDGE, HAMILTON COUNTY COURT
OF COMMON PLEAS

Local Rule 17 Endorsement:

/s/ Craig M. Schneider
Hon. Craig M. Schneider
Co-Counsel for Defendant City of Cincinnati

/s/ Kevin Tidd
Hon. Kevin Tidd
Co-Counsel for Defendant City of Cincinnati

/s/ Dean Rauchwerger
/s/ Geoffrey Waguespack
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