STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

SOUTHFIELD HOTEL BUSINESS, INC.,
and SOUTHFIELD HOTEL REAL ESTATE, LLC,
Plaintiffs,

v.

Case No. 18-169642-CB
Hon. James M. Alexander

CITY OF SOUTHFIELD, ET AL,
Defendants,

and

OAKLAND COUNTY WATER RESOURCES
COMMISSIONER'S OFFICE,
Cross-Plaintiff/Third-Party Plaintiff,

v.

MACALLISTER MACHINERY CO INC,
Cross-Defendants,

and

MACALLISTER RENTAL, INC, and
AIELLI CONSRUCTION COMPANY,
Third-Party Defendants.
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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant, Oakland County Water Resources Commissioner's Office's (OCWRC) motion for summary disposition.

According to Plaintiffs' Amended Complaint, Plaintiffs own and operate the Quality Inn hotel in Southfield. On or about November 8, 2016, a sewage water backup occurred through the lower floor drains of the hotel. Plaintiffs claim they suffered extensive damage as a result of

the sewage backup including replacing carpeting and personal property, having to close a portion of the hotel, and hiring third parties to make restorations and repairs. Plaintiffs claim that a second sewage backup occurred on January 11, 2017, and a third on March 30, 2017. Plaintiffs were damaged as a result of all three backups.

Plaintiffs claim that the sewage backups resulted from the work that was done by Defendants Aielli Construction Company and Macallister Machinery Co., Inc., on behalf of the City of Southfield and OCWRC. Plaintiff claims that in November 2016, Defendants made certain repairs to the sewer system, which included the installation of a bypass pump. In the summer of 2017, after the third backup event, Defendants installed a safety valve or back-flow preventer on the piping between the hotel and adjoining street. No sewage backups have occurred since Defendants installed the safety valve.

On these general allegations, Plaintiffs filed their Amended Complaint on claims of (Count I) liability under MCL 691.1417 (City of Southfield and OCWRC); and (Count II) negligence.

Defendant OCWRC now moves for summary of Plaintiffs' Amended Complaint under MCR 2.116(C)(7), (C)(8), and (C)(10). A (C)(7) motion considers whether a claim is barred, among other grounds, by a governmental immunity. A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.* at 120.[2]

[1] Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007);

Defendant argues that Plaintiffs' Amended Complaint should be dismissed against OCWRC because (1) the OCWRC is entitled to governmental immunity; (2) Plaintiffs failed to comply with the mandatory notice provisions; (3) Plaintiffs failed to plead in avoidance of governmental immunity; and (4) Plaintiffs are unable to establish liability on the part of the OCWRC.

Defendant first argues that they are entitled to summary of Plaintiffs' Amended Complaint because Plaintiffs did not comply with the mandatory notice provisions of MCL 691.1419(1). The cited statute provides:

> Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. The written notice under this subsection shall contain the content required by subsection (2)(c) and shall be sent to the individual within the governmental agency designated in subsection (2)(b). To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section.

Defendant argues that MCL 691.1419 is invoked in this case under MCL 691.1417, which provides that:

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

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citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

[2] In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

Defendant argues that since Plaintiffs did not comply with the notice requirements of MCL 691.1419, their claims are barred against the OCWRC. Plaintiffs allege that the first sewage event occurred on November 8, 2016. Therefore, Plaintiffs must have submitted a Notice of Claim to OCWRC on or before December 23, 2016. Defendant claims that it did not receive notice of the first backup event until February 23, 2016. Additionally, Defendant claims it did not receive notification of the second or third backup events until the original Complaint was filed on November 1, 2018.

In response, Plaintiffs argue that Defendant was notified of the March 30, 3016 sewage event on the date of the incident. Plaintiffs claim that Jeff Molino, Quality Inn's insurance adjuster, sent an email to Kelsey Cooke of OCWRC stated that another backup occurred. (Plaintiffs' Resp. Exhibit 2). Cooke responded to the email the following day, March 31, 2016, and stated, "I am sending this up to our management here to investigate and I will get back to you shortly." (Plaintiffs' Resp. Exhibit 3). Further, Plaintiffs claim that on April 13, 2017 (14 days after the third backup event), Joel Brown and Jeff Cripps from the OCWRC attended a meeting discussing the backups and possible solutions. As such, Plaintiffs argue that there is no dispute that Defendant had notice of the third backup event.

Plaintiffs also claim that Defendant had notice of the January 11, 2017 backup event. In a footnote, Plaintiffs allege that its agent, Jeff Molino, contacted Cooke on February 23, 2017 regarding the second backup event. Plaintiffs do not, however, attach said email or an affidavit from Molino stating that he sent an email regarding the second backup. Plaintiffs do not provide any evidence, or even reference, that they provided notice of the first backup event in their response.[3] As such, Plaintiffs have failed to establish an issue of material fact as to providing the

[3] There is evidence that the City of Southfield notified the OCWRC of the November 8, 2016 backup event on February 16, 2017, and the 1/12/2017 backup event on February 23, 2017. This notice does not, however, comply

proper notice of the first and second backup events. Based on the same, Plaintiffs claim for damage resulting from the first and second backup events are barred.

A question remains as to whether Defendant received proper notice as to the third backup event. Defendant claims that notice of the third backup event was not proper because Plaintiffs did not include their name, address, telephone number, address of the affected property, the date of discovery of the property damage, and a description of the claim as required by MCL 691.1419(2)(c). Further, Defendant argues there is no evidence that Molino was acting as Plaintiffs agent. Defendant argues that failure to strictly comply with the notice requirement bars Plaintiffs claim.

In response, Plaintiffs argue that their claim is not barred even if their notice was defective. MCL 619.1419(3) provides:

> A claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action under section 17 against a governmental agency notified under subsection (2) if the claimant can show both of the following:
> (a) The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1).
> (b) The claimant's failure to comply with the notice requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

Further, pursuant to MCL 691.1419(2):

> If a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing a notice of a claim that complies with subsection (1), the contacting agency shall provide the person with all of the following information in writing:
> (a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow a claimant to comply with the requirements.
> (b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).

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with MCL 691.1419(4), which requires a governmental agency who receives notice, but believes "a different or additional governmental agency may be responsible for the claimed property damage" to provide written notice of the claim to the additional governmental agency within 15 business days of receiving the notice.

As it relates to the third backup event, Plaintiffs attach an email dated March 30, 2017, from Molino to Cooke which stated, "I just want to let you know that the hotel lower level flood again today because of some sort of pump failure related to the sewer project." (Plaintiffs' Resp. Exhibit 2). Cooke responded on March 31, 2017, stating that she was sending the information to the OCWRC's management team to investigate. (Plaintiffs' Resp. Exhibit 3). Plaintiffs claim that Molino was acting as their agent and providing notice to Defendant. Based on the same, Plaintiffs argue that Defendant should have provided Plaintiffs with the information required for proper notice in compliance with MCL 691.1419(2), and did not.

The "primary objective when interpreting a statute is to discern the Legislature's intent. This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent. . . .' When the Legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted." *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012) (internal citations omitted). Further, "when the plain language of a statute requires particular notice as a condition for recovery, no 'saving construction' [is] necessary or allowed." *Id.* at 744.

Here, as previously stated, MCL 691.1419 provides that the *claimant* is not entitled to compensation unless the *claimant* notifies the governmental agency of a claim of damage in writing within 45 days. Further, MCL 691.1419(2) provides that *if a person who owns or occupies affected property* notifies a contacting agency, the contacting agency is to provide the person with the notice requirements in writing.

Black's Law Dictionary (11th ed.) defines claimant as "someone who asserts a right or demand"; "one who asserts a property interest in land, chattels or tangible things"; or "someone who asserts a right against the government."

Plaintiffs argue that Molino provided notice to the OCWRC, and the OCWRC failed to provide notice requirements in writing pursuant to MCL 691.1419(2). Plaintiffs' argument, however, falls short. MCL 691.1419 clearly states that the *claimant* must notify the government agency.[4] Further, MCL 691.1419(2) is triggered when a person who *owns or occupies* affected property notifies the contacting agency.

There is no evidence that Molino, owns or occupies the affected property or that he was acting as Plaintiffs' agent when he informed the OCWRC of the third backup.[5] Molino is an executive general adjuster with Globe Midwest Adjusters International; he was not employed by Plaintiffs. Further, it does not appear Molino was not contacting the OCWRC to assert a right or demand on behalf of Plaintiff, or to establish liability. As such, Molino could not have been acting as a claimant. To the contrary, in an email to the OCWRC dated March 27, 2017, he stated "[o]nce Southfield accepts liability, I will work directly with them and/or their insurance to resolve damages." (Plaintiffs' Resp. Exhibit B).

Based on the foregoing, the Court concludes as a matter of law that Plaintiffs did not comply with the notice requirements of MCL 691.1419 as it relates to the third backup event and Plaintiffs claims against the OCWRC are barred.[6] As such, Defendant OCWRC's motion for summary is GRANTED and Plaintiffs' Amended Complaint is DISMISSED against OCWRC.

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[4] The Notice of Claim submitted to the City of Southfield was sent on January 12, 2017 by Ennis Poota, General Manager of Southfield Quality Inn. (Defendant's Exhibit B). The attached letter states that Plaintiffs "are looking to the City of Southfield for payment of the costs necessary to repair any and all damages related to this sewage back-up."

[5] Again, Plaintiffs have not submitted an affidavit supporting their claims. Specifically, they have not provided any evidence to support a position that Molino was acting as their agent on their behalf.

[6] Based on the Court's ruling, it is not necessary to address Defendant's remaining arguments. However, assuming arguendo Plaintiffs satisfied the notice requirements based on Molino's emails, the Court would still grant summary disposition in Defendant's favor. If Molino was acting as Plaintiffs' agent, he admitted in his email to the OCWRC that the City of Southfield, not OCWRC was liable for the damage. As such, Plaintiffs would not be able to establish that OCWRC was the appropriate governmental agency or that it was liable for damages. Based on the foregoing, Plaintiffs' Amended Complaint would still be dismissed as Plaintiffs cannot establish and prove the requirements in MCL 691.1417(3).

IT IS SO ORDERED.

June 12, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge