

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STONE RIDGE MAINTENANCE ASSOCIATION, INC., Plaintiff,)	CASE NO. CV-11-758389
)	
-vs-)	JUDGE DICK AMBROSE
)	
CITY OF SEVEN HILLS, et al.,)	<u>JUDGMENT ENTRY</u>
)	<u>AND OPINION</u>
Defendants.)	

{¶1} Before the Court is Defendant’s, the City of Seven Hills (“Seven Hills”), Motion for Summary Judgment, filed October 5, 2012. For the reasons stated herein, Defendant’s motion is granted and Seven Hills is dismissed as a defendant in this case.

FACTS

{¶2} Plaintiff, Stone Ridge Maintenance Association, Inc. (“SRMA”), is the “homeowners’ association” for the Stone Ridge Townhouse Development in Seven Hills, Ohio. Defendant Landsong, Ltd. was the owner of the real estate on which the Stone Ridge Development was built. Defendants Landsong Engineering, Inc., Edward Janoviak, engineer at Landsong Engineering, and Defendant TY, Inc. designed, created, and engineered the Stone Ridge Development. Defendants Petros Homes, Inc. and Modern Poured Walls, Inc. were responsible for the building and construction of the development.

{¶3} The portion of the development at issue is located north of E. Dawnwood Road and south of Rockside Road. The crux of this case stems from water pouring out of two storm water discharge pipes, collectively creating an unnamed creek 45 feet below. This creek eventually makes contact with a hillside above which sit backyards, patios, and several condos of the Stone Ridge Development.

{¶4} The storm water sewer pipes creating the creek were designed, constructed, and installed before the Stone Ridge Development was built. SRMA claims that the velocity of the water's impact is eroding the hillside which, in turn, is causing damage to the condo owners' property, and will eventually cause damage to the condos themselves. SRMA's expert estimates that it will cost in excess of \$250,000 to repair and correct this erosion problem. In addition to the erosion problem, SRMA also claims that Seven Hills' sanitary sewer system is defective. Specifically, that sanitary sewage mixes with storm water runoff which then permeates into the creek and detention basin behind the condos resulting in foul odors.

{¶5} SRMA asserts that Seven Hills is responsible for maintaining the storm sewer pipes that eject the water that strikes the hillside supporting the condos. SRMA also contends that, Seven Hills is responsible for maintaining the unnamed creek running behind the condos. SRMA's rationale is that, even though there is no defined easement for the creek, Seven Hills has easements over the pipes which release the storm water creating the creek, and has an easement over the pipe that collects it downstream, thereby creating a de facto easement. Additionally, SRMA states that Seven Hills is responsible for maintaining a water diversion structure and detention pond downstream from the storm water discharge pipes because Seven Hills required those structures as

part of the construction of the Stone Ridge Development and because Seven Hills maintains an easement over them.

{¶6} Based on the above allegations, SRMA's Second Amended Complaint contains six counts against Seven Hills: 1) negligent operation, maintenance and upkeep of a storm sewer system; 2) continuing trespass or nuisance in the operation, maintenance or upkeep of storm sewer system; 3) request for preliminary injunctive relief due to the operation, maintenance or upkeep of the storm sewer system causing injury to SRMA's common property; 4) negligent operation, maintenance, or upkeep of sanitary sewer system; 5) continuing trespass or nuisance in the operation, maintenance or upkeep of sanitary sewer system; 6) request for preliminary and permanent injunctive relief due to the operation, maintenance or upkeep of sanitary sewer system causing injury to SRMA and its common property.

{¶7} Seven Hills argues that it is immune from liability as to all counts above because the erosion and noxious odor problems result from construction and design, not maintenance. In the alternative, Seven Hills argues that SRMA cannot present any evidence that Seven Hills was negligent in performing its maintenance duties.

LAW & OPINION

A. Summary Judgment Standard

{¶8} Summary judgment shall be rendered in favor of the moving party when, viewing all inferences in a light most favorable to the nonmoving party, 1) there is no genuine issue as to any material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion, which conclusion is

adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 1998 Ohio 389, 696 N.E.2d 201.

B. ORC 2744 et seq. – Political Subdivision Tort Liability Act

1. Counts I and III: Negligence and Injunctive Relief Involving the Storm Sewer System.

{¶9} Political subdivisions are not liable for damages in a civil action for injury, death, or loss to person or property caused by an act or omission of the political subdivision.

Hortman v. City of Miamisburg, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716,

¶10. The Ohio Supreme Court has invoked a three-tiered analysis to determine

whether a political subdivision is immune from liability for injury or loss to property.

Rankin v. Cuyahoga Cnty. Dep't of Children & Family Servs, et al., 118 Ohio St.3d 392,

2008-Ohio-2567, 889 N.E.2d 521, ¶8, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28

1998-Ohio-421, 697 N.E.2d 610 (1998), *vacated on other grounds, M.H. v. City of*

Cuyahoga Falls, 2012-Ohio-5336, ¶ 10.

{¶11} The first tier under R.C. 2744.02(A) sets forth the general rule that political subdivisions are entitled to immunity. *Hortman*, 110 Ohio St.3d 194 at ¶10. There is no dispute that Seven Hills is a political subdivision as defined under R.C. 2744.01(F).

Seven Hills is therefore entitled to a general grant of immunity pursuant to R.C.

2744.02(A).

{¶12} Under the second-tier of the statutory analysis, once immunity is established, a determination must be made as to whether any of the five exceptions to immunity listed under R.C. 2744.02(B) apply. *Cater*, 83 Ohio St.3d at 28.

{¶13} ORC 27744.02(B)(2) is the only exception to the immunity doctrine at issue in this case. This exception states in pertinent part: “political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivision.”

{¶14} Proprietary functions are enumerated under R.C. 2744.01(G) and include, among others, the maintenance, destruction, and upkeep of a sewer system. Conversely, governmental functions, which provide a political subdivision with immunity and are effectively the inverse of proprietary functions, are set forth under R.C. 2744.01(C). Governmental functions include such things as, the planning, design, construction, or reconstruction of a sewer system.

{¶15} With respect to SRMA’s claims arising out of negligence, the key issue is whether the alleged negligent performance by Seven Hills is connected to a proprietary function. This determination is a question of law, and SRMA has the burden of establishing that such a connection exists. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *Seikel v. City of Akron*, 191 Ohio App.3d 362, 2010-Ohio-5983, 946 N.E.2d 250, ¶ 19 (9th Dist.).

{¶16} The Supreme Court of Ohio has recently held, “a Complaint is properly characterized as a maintenance, operation, or upkeep issue when 'remedying the sewer problem would involve little discretion but, instead, would be a matter of routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration.' But the complaint presents a design or construction issue if 'remedying a problem would require a [political subdivision] to, in essence, redesign or reconstruct the sewer system.’” *Coleman v. Portage Cnty. Eng’r*, 133 Ohio St.3d 28, 2012 Ohio

3881, 975 N.E.2d 952, quoting, *Essman v. Portsmouth*, 4th Dist. No. 09CA3325, 2010 Ohio 4837, at ¶32-33.

{¶17} SRMA argues that maintenance is the appropriate classification of the deterioration of the hillside at issue by focusing on the excerpt, “general repair of deterioration.” First, SRMA contends that the creek running behind the condos is a de facto easement granted to Seven Hills because the creek connects two storm water pipes for which Seven Hills possess easements. Even if the Court were to accept this argument, the Court still finds that the nature of the deterioration of the hillside adjacent to the creek falls within the scope of a construction or design defect rather than a maintenance issue.

{¶18} The primary problem with labeling the deterioration of the hillside a proprietary function, i.e. maintenance, operation, or upkeep, is that SRMA calls for upgrades or reconstruction to remedy the problem, such as outlet protection to dissipate the water flow energy, outfall erosion protection, and/or energy dissipating structures. Moreover, the pipes discharging the storm water and the pipe that captures the water were all built prior to the construction of the condos at issue. Now, SRMA would require that Seven Hills amend the maintenance responsibility for this previously constructed storm water system to include abatement of any erosion caused by the subsequent construction of the Stone Ridge development.

{¶19} The Court finds that preventing further erosion of the hillside is not an issue involving routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration. In arriving at this conclusion, the Court need look no further than the remedy SRMA urges Seven Hills to undertake in order to cure a problem that arose

only after the land was reconfigured to accommodate the construction of condos – that is, the reconstruction of the hillside. Thus, Seven Hills is entitled to immunity because the deterioration at issue concerns a governmental function relating to planning, design, construction, or reconstruction. The Court therefore grants summary judgment in favor of Seven Hills with respect to Counts I and III of SRMA's Second Amended Complaint and as a result, these counts are dismissed..

{¶20} When the Court finds that no exceptions apply under ORC 2744.02(B), the Court need not address the third-tier of the analysis under R.C. 2744.02 (i.e., whether immunity can be reinstated if any of the defenses under R.C. 2744.03 apply). *GMAC v. City of Cleveland*, 2010-Ohio-79, ¶14 (8th Dist.). Accordingly, the Court declines to address the third-tier analysis with respect to SMRA's claims in Counts I and III.

2. Counts IV and VI: Negligence and Injunctive Relief Involving the Sanitary Sewer System.

{¶21} In Counts IV and VI, SRMA alleges negligence against Seven Hills based on noxious odors emanating from the unnamed creek and the detention basin located behind the condos. SRMA attempts to hold Seven Hills responsible for the noxious odors by claiming that Seven Hills has searched upstream from the creek for a leak in the sanitary sewer lines, but has been unable to locate any disrepair. This assertion, however, does not point to any specific factual evidence indicating Seven Hills failed to maintain the sanitary sewer system at issue. In fact, Seven Hills searching unsuccessfully for a problem with the sanitary sewer systems suggests there is no maintenance issue.

{¶22} SRMA's lone assertions that a noxious odor exists and that Seven Hills has unsuccessfully attempted to locate a problem with the sanitary sewer system does not raise an issue of fact. "When a motion for summary judgment is properly made and supported, the nonmoving party may not rest upon the mere allegations or denials of the pleadings. Instead, the burden shifts to the nonmoving party, and the nonmoving party's response must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 463, 2008 Ohio 87, 880 N.E.2d 88. Moreover, when a question of immunity under ORC 2744 is at issue, once a political subdivision has established a general grant of immunity, as is the case here, the burden shifts to the plaintiff to direct the court to an exception enumerated under 2744.02(B). *Conley*, 64 Ohio St.3d at 292.

{¶23} The Court finds that SRMA failed to point the Court to some evidence raising an issue of fact that a maintenance failure by Seven Hills is casually related to the noxious odor emanating from the creek and detention basin. This failure is fatal to SRMA's claim of negligence against Seven Hills. The Court therefore grants summary judgment in favor of Seven Hills with respect to Counts IV and VI of SRMA's Second Amended Complaint and as a result, these counts are dismissed.

3. Counts II and V: Continuing Trespass and Nuisance.

{¶24} A political subdivision can only be liable for negligence claims. See *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶19. Thus, SRMA's claims for trespass cannot survive summary judgment because they deal with intentional conduct, not negligence. Likewise, SRMA's claim for nuisance cannot

withstand summary judgment because it also does not sound in negligence.¹

Accordingly, Seven Hills is entitled to judgment as a matter of law on Counts II and V of SRMA's Second Amended Complaint and as a result, these counts are dismissed.

CONCLUSION

{¶25} Based on the foregoing analysis, Defendant Seven Hills' Motion for Summary Judgment is granted. Counts I, II, III, IV, V, and VI of Plaintiff's Second Amended Complaint are therefore dismissed. The Crossclaim asserted by Modern Poured Walls, Inc. against Seven Hills remains pending.

IT IS SO ORDERED.

DATE: _____

JUDGE DICK AMBROSE

¹ *Warren v. Testa*, 461 N.E.2d 1354 (11th Dist.) (finding that “[a] nuisance does not rest on the degree of care used, for that presents a question of negligence (sic), but on the degree of danger existing even with the best of care. Thus a person who creates or maintains a nuisance is liable for the resulting injury to others without regard to the degree of care or skill exercised by him.”); *Selden v. City of Cuyahoga Falls*, 132 Ohio St. 223, 226, 6 N.E.2d 976, 978, citing 30 Ohio Jurisprudence, 310; 20 Ruling Case Law, 381; 46 Corpus Juris, 663 (stating that “negligence is a failure to use such care as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, while a nuisance is that which causes hurt, inconvenience, annoyance or damage to the rights of another or the public. The latter term is derived from the French word ‘nuire,’ meaning to (sic) hurt or annoy, and does not rest upon the degree of care used, but upon the injury done, irrespective of the care exercised.”). Furthermore, the General Assembly removed the only reference to nuisance in R.C. 2744.01 et seq. with the enactment of Senate Bill 106 (“S.B. 106”), effective April 9, 2003. Specifically, “nuisance” was removed from R.C. 2744.02(B)(3), the public roads immunity exception, and the General Assembly inserted “negligence” in its stead. Notably, S.B. 106 kept “negligence” in 2744.02(B)(2). The Supreme Court has found the legislature’s action in amending R.C. 2744.02(B)(3) to not be “whimsy but a deliberate effort to limit political subdivisions’ liability for injuries and deaths on their roadways.” *Howard v. Miami Twp. Fire Division*, 119 Ohio St.3d 1, 2008 Ohio 2792, ¶ 26, 891 N.E.2d 311. Courts must give meaning to every word used by the legislature. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008 Ohio 542, ¶33 882 N.E.2d 889. Therefore, the Court finds that the legislature only intended plaintiffs to have a cause of action sounding in negligence under R.C. 2744.01 et seq, as it was left in 2744.02(B)(2).