

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

FARM BUREAU GENERAL INSURANCE  
COMPANY OF MICHIGAN, a Michigan  
Corporation, Subrogee of Tayfur R. Ayalp,

Plaintiff,

v

Case No. 14-140129-CB  
Hon. Wendy Potts

T&J MECHANICAL HEATING  
& COOLING, INC.,

Defendant.

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OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY DISPOSITION  
PURSUANT TO MCR 2.116(C)(8) AND (10)

At a session of Court  
Held in Pontiac, Michigan  
On

JUL 25 2016

This matter is before the Court on Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). Pursuant to MCR 2.119(E)(3), the Court dispenses with oral argument.

For purposes of background information, Tayfur Ayalp, MD is the owner of a commercial building in Farmington Hills, Michigan. He uses a portion of the building for his plastic surgery practice and rents the remainder of the building to two tenants. This cause of action arose as a result of one of the four HVAC units on the roof of the building catching fire. Plaintiff Farm Bureau General Insurance Company of Michigan, as a subrogee of Ayalp, brought the instant action against Defendants T&J Mechanical and Dan Wood seeking to recover for the

damages incurred in the fire. Plaintiff's claim against Defendant Wood settled at case evaluation. Plaintiff asserts that T&J serviced the HVAC unit on the day of the fire and that the fire started a few hours after T&J evaluated the HVAC equipment. The claims against Defendant T&J assert a cause of action for negligence, breach of contract, and nuisance.

A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and a motion pursuant to (C)(10) tests the factual support of the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Defendant T&J first asserts that it is entitled to summary disposition of Plaintiff's claims for negligence and breach of contract because Plaintiff has not established that T&J's conduct was a cause in fact of the damages sustained in the fire. T&J claims that Plaintiff has not offered any evidence regarding the cause of the fire. Plaintiff's expert witness, Michael Roarty, believed that the fire originated in the northwest HVAC unit, but was unable to opine on the specific cause of the fire.

A prima facie negligence claim requires proof that the plaintiff's damages were caused by the defendant's negligence. *Skinner v Square D Co*, 445 Mich 153, 162 (1994). Defendant argues that summary disposition is appropriate because Plaintiff's claim that John Pappas, a mechanical contractor with more than 30 years' experience, removed the rollout switch is unsupported by fact. Defendant attaches the deposition testimony and affidavit of John Pappas, T&J's sole owner and employee, wherein he states that he never worked on the rollout switch on the unit at issue and that none of the work that he performed on the unit required removal of the rollout switch. Further, Defendant asserts that Pappas testified that he has never disabled a safety device in the course of his work.

In response, Plaintiff argues that Defendant's argument has no basis in fact or in law and that there is overwhelming direct and circumstantial evidence in the instant matter to present a

prima facie case of negligence to the jury. Plaintiff claims, without citing to deposition testimony or affidavits, that certain witnesses will testify to the cause of the fire and that it started in the HVAC unit. Plaintiff further argues, without citing specific evidence, that the direct and circumstantial evidence supports the clear conclusion that T&J is responsible for the loss.

“The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred. On the other hand, legal cause or ‘proximate cause’ normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or ‘proximate cause’ to become a relevant issue. We find that the plaintiffs here were unsuccessful in showing a genuine issue of factual causation. Accordingly, we need not and do not address legal cause or ‘proximate cause’ in this case.” *Skinner*, 445 Mich at 163 (citations omitted).

Viewing the evidence in the light most favorable to the plaintiff, the Court concludes that the facts do not manifest a genuine issue of factual causation. Plaintiff was required to set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. *Id.* Plaintiff has failed to do so in response to Defendant’s motion. Plaintiff has not demonstrated a genuine issue of material fact for trial as required by MCR 2.116(G)(4). Thus, Defendant’s motion for summary disposition of Plaintiff’s claims for negligence and breach of contract is granted and those claims are dismissed.

Defendant next moves for summary disposition of Plaintiff’s nuisance claim pursuant to MCR 2.116(C)(8). Defendant argues that summary disposition is proper because Plaintiff alleges that T&J created a nuisance when it repaired or serviced the HVAC system. Defendant

claims that nuisance is a condition and not an act or failure to act, and that Plaintiff has failed to plead a viable nuisance claim.

In response, Plaintiff claims that Defendant created an unsafe condition when Defendant removed the rollout safety limit switch, bypassed the safety limit switch, and/or failed to detect and correct the bypassed safety switch. “A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.” *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 191; 540 NW2d 297 (1995) (citations omitted).

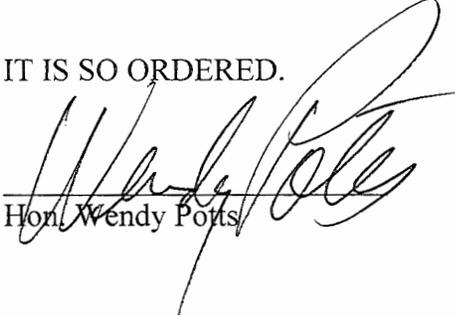
A motion under MCR 2.116(C)(8) is properly granted when the party opposing the motion “has failed to state a claim upon which relief can be granted.” MCR 2.116(C)(8); *Radtke v Everett*, 442 Mich 368, 373; n505 NW2d 155 (1993). In the Complaint, Plaintiff pleads the following as its nuisance claim: “21. On December 7, 2012 nuisance did exist on the property commonly known as 2499 Orchard Lake Road, in the City of Farmington Hills, County of Oakland, State of Michigan. 22. Defendants T & J Mechanical Heating & Cooling, Inc. and Dan Wood Plumbing and Heating Services, Inc. created the nuisance when it designed, constructed, fabricated, installed, repaired and/or services said HVAC system. 23. As a direct and proximate result of said nuisance, Plaintiff subrogor’s commercial structure and personal property contents contained therein sustained sever and permanent damage.”

In the Complaint, Plaintiff pled that T&J created the nuisance. Thus, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court concludes that Plaintiff’s nuisance claims is not so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. See *Cloverleaf Car Co, supra*. Thus, Defendant’s

motion for summary disposition pursuant to MCR 2.116(C)(8) of Plaintiff's claim for nuisance is denied.

This Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

  
Hon. Wendy Potts

Dated: **JUL 25 2016**