

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

GALE ANTHONY and	:	
ERNEST G. ANTHONY,	:	C.A. No. K14C-10-014 TBD
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF DOVER,	:	
	:	
Defendant.	:	

Submitted: December 17, 2014
Decided: January 29, 2015

ORDER

Upon Defendant's Motion to Dismiss.
Granted.

Kenneth J. Young, Esquire of Young & Malmberg, P.A., Dover, Delaware; attorney for the Plaintiffs.

Daniel A. Griffith, Esquire of Whiteford Taylor & Preston, LLC, Wilmington, Delaware; attorney for the Defendant.

WITHAM, R.J.

The matter before the Court is the Defendant's Motion to Dismiss the Plaintiff's Complaint pursuant to Delaware Superior Court Rule 12(b)(6). The Defendant holds that the City of Dover is not liable for Plaintiff's damages based on the Municipal Tort Claims Act, 10 *Del.C.* § 4011(a). For the foregoing reasons, the Defendant's motion is granted.

FACTS AND PROCEDURE

On October 15, 2012, Gale Anthony (hereinafter "Plaintiff") was walking on the sidewalk of State Street in Dover, Delaware, when she tripped and fell because a portion of the sidewalk was allegedly in a state of disrepair. The Plaintiff and her husband, Ernest G. Anthony (hereinafter "Plaintiff-husband", or collectively referred to as "the Plaintiffs") claim injuries of a fractured knee cap, minor abrasions and contusions, as well as loss of consortium and related damages.

The Plaintiffs filed their complaint on October 15, 2014. The Plaintiffs contend that because the sidewalk is owned by the City of Dover (hereinafter "Defendant"), it had the responsibility of maintaining the sidewalks so that they were safe for passers by. The Plaintiff states that because the sidewalk appears to have been in a state of disrepair for an extended period of time, that the Defendant is liable as a direct and proximate result for the Plaintiff's harm. The Defendant also asserts that Plaintiff-husband has suffered a loss of consortium based on his wife's injuries.

On October 29, 2014, the Defendant filed its motion to dismiss pursuant to Delaware Superior Court Rule 12(b)(6) and the Municipal Tort Claims Act, 10 *Del.C.* § 4011(a) and asserts that the Plaintiffs are barred from recovery based on sovereign

immunity. The Plaintiffs did not file a response.

STANDARD OF REVIEW

The Court's standard of review on a motion to dismiss is well-settled. When deciding a motion to dismiss, all factual allegations in the complaint are accepted as true.¹ If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.² That is, a motion to dismiss is decided on "whether a plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint."³ Consequently, dismissal will only be warranted when "under no reasonable interpretation of the facts could the complaint state a claim for which relief might be granted."⁴

DISCUSSION

The Delaware County and Municipal Tort Claims Act, 10 *Del. C.* § 4011, *et. seq.* ("the Act"), provides in pertinent part:

"Except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages. That a governmental entity has the power to sue or be sued, whether appearing in its charter or statutory

¹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

² *Id.*

³ *Id.*

⁴ *Hedenberg v. Raber*, 2004 WL 2191164 (Del. Super.).

enablement, shall not create or be interpreted as a waiver of the immunity granted in this subchapter.”⁵

A “governmental entity” is defined by the Act as “[A]ny municipality, town, county, administrative entity or instrumentality created pursuant to Chapter 8 of Title 22 or Title 9, . . .” Thus, the City of Dover is a governmental entity as defined by the code and entitled to immunity. 10 *Del. C.* 4011(b)(6) provides that a governmental entity will not be liable for any damage claim resulting from:

“Any defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk[. . .] including appurtenances necessary for the control of such ways including but not limited to street signs, traffic lights and controls, parking meters and guardrails.”

The Delaware Courts have held that a city is immune from suit due to damages from a sidewalk in disrepair.⁶ Further, the Plaintiff has not responded to the motion and thus failed to provide any reasoning for why her injuries should qualify as an exception to immunity, such as “1) motor vehicle/equipment violations; 2) public building construction/operation; and 3) sudden discharge of toxic/waste materials.”⁷

⁵ 10 *Del. C.* 4011(a).

⁶ *See generally, Gattis v. City of Wilmington*, 2003 WL 1365838 (Del. Super. Mar.17, 2003).

⁷ 10 *Del. C.* § 4012 provides: A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances: (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary. (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily

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Based on the express immunity provided to the Defendant by 10 *Del. C.* 4011(a), this Court must grant the Defendant's motion.

CONCLUSION

For the foregoing reasons, the City of Dover's Motion to Dismiss the claims against the City of Dover must be **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

by the public in connection with public outdoor recreation.

(3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.