

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35581
Y/ct

_____AD3d_____

Argued - May 25, 2012

WILLIAM F. MASTRO, A.P.J.
DANIEL D. ANGIOLILLO
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2011-04647

DECISION & ORDER

Nicholas Carbonaro, et al., appellants, v Town of
North Hempstead, et al., respondents.

(Index No. 12400/08)

William A. DiConza, Oyster Bay, N.Y., for appellants.

Richard S. Finkel, Town Attorney, Manhasset, N.Y. (Mitchell L. Pitnick of counsel),
for respondent Town of North Hempstead.

John Ciampoli, County Attorney, Mineola, N.Y. (Robert F. Van der Waag of
counsel), for respondent County of Nassau.

In an action, inter alia, to recover damages for injury to property, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Lally, J.), entered April 5, 2011, which granted the motion of the defendant Town of Hempstead and the separate motion of the defendant County of Nassau for summary judgment dismissing the complaint insofar as asserted against each of them and denied the plaintiffs' cross motion, in effect, for summary judgment on the issue of liability.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the motion of the defendant County of Nassau for summary judgment dismissing the complaint insofar as asserted against it, and substituting therefor a provision denying that motion; as so modified, the order is affirmed, with one bill of costs to the defendant Town of North Hempstead payable by the plaintiffs, and one bill of costs to the plaintiffs payable by the defendant County of Nassau.

The plaintiffs commenced this action against the defendants Town of North

Hempstead and the County of Nassau to recover damages resulting from the flooding of their residence on July 18, 2007. The plaintiffs allege that the flooding was caused by deficiencies in a storm drainage system, and that the Town and the County each own separate components of that system. The defendants separately moved for summary judgment dismissing the complaint insofar as asserted against each of them, and the plaintiffs cross-moved, in effect, for summary judgment on the issue of liability. The Supreme Court granted the defendants' separate motions, and denied the plaintiffs' cross motion.

A municipality is immune from liability "arising out of claims that it negligently designed [a] sewerage system" or storm drainage system (*Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781, 782; see *Fireman's Fund Ins. Co. v County of Nassau*, 66 AD3d 823, 824). However, a municipality "is not entitled to governmental immunity arising out of claims that it negligently maintained the sewerage system as these claims challenge conduct which is ministerial in nature" (*Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d at 782; see *De Witt Props. v City of New York*, 44 NY2d 417, 423-424; *Moore v City of Yonkers*, 54 AD3d 397; *Biernacki v Village of Ravena*, 245 AD2d 656, 657).

The Town established, prima facie, that it was not negligent in the maintenance of the relevant storm drainage facilities that were in its ownership and control, and in opposition, the plaintiffs failed to raise a triable issue of fact as to negligent maintenance of those facilities (see *Papadopoulos v Town of N. Hempstead*, 84 AD3d 768, 768-769; *Azizi v Village of Croton-on-Hudson*, 79 AD3d 953, 955; *Fireman's Fund Ins. Co. v County of Nassau*, 66 AD3d at 824; *Biernacki v Village of Ravena*, 245 AD2d at 657-658). Further, the evidence as to the Town's alleged failure to undertake certain improvements or renovations to the facilities related only to the design of the system, for which the Town may not bear liability (see *Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d at 782). In addition, any evidence relative to the theories of liability based on trespass and nuisance was not properly raised in the plaintiffs' cross motion, as those theories were not raised in the pleadings, nor did the plaintiffs seek to amend the pleadings (see *Barber v Daly*, 185 AD2d 567, 570). Accordingly, the Supreme Court properly granted the Town's motion for summary judgment dismissing the complaint insofar as asserted against it, and properly denied that branch of the plaintiffs' cross motion which was for summary judgment on the issue of liability against the Town.

However, the County failed to demonstrate its prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it. In particular, the County submitted no evidence as to the inspection or maintenance of the storm water storage basin during the relevant period prior to this incident and, thus, failed to eliminate a triable issue of fact as to whether the sole proximate cause of the occurrence was not related to any maintenance problems. Under these circumstances, the County was not entitled to summary judgment dismissing the complaint insofar as asserted against it (see generally *Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d at 783; *Zeltmann v Town of Islip*, 265 AD2d 407, 408). Accordingly, the Supreme Court should have denied the County's motion for summary judgment dismissing the complaint insofar as asserted against it regardless of the sufficiency of the opposing papers (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

However, the Supreme Court properly denied that branch of the plaintiffs' cross motion which was for summary judgment on the issue of liability against the County, as the plaintiffs failed to show, as a matter of law, that the County negligently maintained its facilities (*see Hongach v City of New York*, 8 AD3d 622). Since the plaintiffs failed to meet their initial burden, it is unnecessary to review the sufficiency of the opposition papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

MASTRO, A.P.J., ANGIOLILLO, AUSTIN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court