

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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ANASTASIO HATZIOANNIDES and SOPHIA
HATZIOANNIDES, JOHN TSIAKOS, BESSIE TSIAKOS,
ANASTASIOS ROUMELIOTIS, PENELOPE ROUMELIOTIS
PANAGIOTIS TRESKAS, OMORFOULA TRESKAS,
COSTAS LASCARIDES, IRENE LASCARIDES, PANAGIOTIS
LASCARIDES, ELVIRA LASCARIDES, DEMETRIO KEKOS,
FOTINI KEKOS, ANTONIA VASILAKOS, and VOULA
KYRIACOU,

Index No.: 673/02
Motion Date:12/6/07

Action No. 1

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
MUNICIPAL WATER FINANCE AUTHORITY, KEYSpan
CONSOLIDATED EDISON, INC., H.H.M. ASSOCIATES,
INC., C.A.C. INDUSTRIES, INC., and MAJOR SEWER-
WATER CORPORATION,

Defendants.

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LOCHAN JAIKARAN, KRISHNA JAIKARAN,
SALMA RANA, RAMESH HEMRAJ and ANDRE HEMRAJ,

Index No.: 7822/02

Plaintiffs,

Action No. 2

-against-

THE CITY OF NEW YORK, THE CITY OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
THE CITY OF NEW YORK BUREAU OF SEWER
OPERATIONS, THE NEW YORK CITY WATER FINANCE
AUTHORITY,

Defendants.

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LAZAROS KOSTINOS,

Plaintiff,

Index No. 9357/02

-against-

Action No. 3

THE CITY OF NEW YORK OFFICE OF THE PROPERTY
DAMAGE DIVISION COMPTROLLER,

Defendant.

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DANNY THALASSINOS, LUZ THALASSINOS, IOANIS
KOKOLIS and MARIA KOKOLIS,

Plaintiffs,

Index No. 4340/02

-against-

Action No. 4

THE CITY OF NEW YORK, THE NYC DEPARTMENT OF
ENVIRONMENTAL PROTECTION, THE NYC DEPARTMENT
OF TRANSPORTATION, THE NYC MUNICIPAL WATER
BOARD, THE NYC DEPARTMENT OF DESIGN AND
CONSTRUCTION, THE NYC BUREAU OF WATER &
SEWER OPERATIONS, THE NYC MUNICIPAL WATER
FINANCE AUTHORITY, THE NYC DEPARTMENT OF
GENERAL SERVICES, and CAC INDUSTRIES, INC.,

Defendants.

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LOCHAN JAIKARAN, KRISHNA JAIKARAN, SALMA
RANA, RAMESH HEMRAJ and ANDRE HEMRAJ,

Plaintiffs,

Index No. 24291/03

-against-

Action No. 5

HHM INDUSTRIES INC., and CAC INDUSTRIES, INC.,

Defendants.

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The following papers numbered 1 to 5 read on this Motion in Limine, by defendant, THE CITY OF NEW YORK and NEW YORK CITY MUNICIPAL WATER FINANCE AUTHORITY.

	<u>PAPERS NUMBERED</u>
Motion in Limine - Exhibits.....	1
Motion in Limine	2
Affirmation in Opposition - Exhibits	3
Affirmation in Opposition - Memorandum of Law.....	4
Affirmation in Opposition - Exhibits.....	5

The defendant, CITY OF NEW YORK and NEW YORK CITY MUNICIPAL WATER FINANCE AUTHORITY, having moved for an Order of this Court, in two separate Motions in Limine: (I) permitting defendant to amend their answer to assert the defense of governmental immunity; (II) precluding plaintiffs from proffering any evidence of subsequent repairs made to the sewers and water mains in question; (III) setting the measure of damages to property at the difference between the market value immediately before the damage and the market value after the damage, or the reasonable cost of repairs, whichever is less; and (IV) precluding the plaintiffs from offering any evidence of damages which are not the natural and probable consequence of the water main break.

The plaintiffs, THALASSINOS and KOKOLIS, having submitted opposition by their attorney; the plaintiffs, HATZIOANNIDES, TSIAKOS, ROUMELIOTIS, TRESKAS, LASCARIDES, KEKOS, VASILAKOS and KYRIACOU having submitted opposition by their attorney; and attorney for plaintiffs JAIKARAN, RANA, HEMRAJ and KOSTINOS having submitted opposition on behalf of all the plaintiffs in the consolidated actions.

The parties having appeared before this Court on December 6, 2007 and have presented oral argument in support of their respective motions, and this Court having considered all of the facts submitted herein, the branches of the motions seeking to amend the pleadings and assert the defense of governmental immunity are decided as follows:

**DEFENDANTS' REQUEST TO AMEND THEIR ANSWER
TO ASSERT THE DEFENSE OF GOVERNMENTAL IMMUNITY IS DENIED**

On the eve of trial, defendants request leave to amend their answer to assert the defense of governmental immunity.

CPLR §3025(b) provides:

“A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of

the parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” [CPLR §3025(b)]

Further, while granting or denying leave to amend a pleading is in the court’s discretion, leave should not be granted where the proposed amendment is palpably without merit. [See, Buckholz v. Maple Garden Apartments, LLC, 832 NYS2d 255 (2nd Dept. 2007); see also, Norman v. Ferrara, 484 NYS2d 600 (2nd Dept. 1985) (in cases where proposed pleading amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied); and Ricca v. Valenti, 807 NYS2d 123 (2nd Dept. 2005)].

Plaintiffs argue that not only does the defense of governmental immunity lack merit, but also the defendants have not established any reasonable cause for the delaying in seeking said amendment. The Court notes that while defendant herein has not offered any excuse for delay, delay alone is not a basis to deny leave to amend a pleading.

In Barnes v. Nassau County, 108 AD2d 50 (2nd Dept. 1985), the plaintiff therein argued that leave to amend should be denied because county defendants’ five year delay in seeking said amendment. The *Barnes* Court held that neither the fact that the motion was made on the eve of trial, nor the fact that the amendment may defeat the opposing party’s cause of action is, in and of itself, a sufficient ground for denying leave to amend. Rather, the issue is whether the proposed amendment was palpably improper or legally insufficient.

Accordingly, in determining whether the defendants herein should be permitted to amend their answer, this Court has to determine whether the defense of governmental immunity is meritorious and applicable as a matter of law.

**DEFENDANTS, CITY OF NEW YORK AND NEW YORK CITY
MUNICIPAL WATER FINANCE AUTHORITY, ARE NOT ENTITLED
TO INVOKE THE DEFENSE OF GOVERNMENTAL IMMUNITY**

It is well settled that absent a special relationship creating a municipal duty to exercise care for benefit of particular class of individuals, no liability may be imposed upon municipality. [See, O’Connor v. City of New York, 58 NY2d 184,447 NE2d 33 (Ct. App. 1983)]

Absent a special relationship between the injured party and the public entity which allegedly committed the negligent act or omission, a governmental agency cannot be held liable for negligent acts committed in the performance of its **governmental functions**. [emphasis added] [See, Sorichetti v. City of New York, 65 NY2d 461 (Ct. App. 1985)].

Case law has further held that in determining whether a municipality is entitled to governmental immunity, the Court must ascertain whether the entity was acting in a governmental capacity or in a proprietary capacity, as well as focus on the specific act or omission out of which the injury is claimed to happened and the capacity in which that act or

failure to act occurred. [See, K&S Realty Co. v. City of New York, 304 AD2d 349 (1st Dept. 2003)].

It is clear that public entities are not immune from negligence claims stemming from the performance of their proprietary functions. [See, Crosland v. New York City Transit Authority, 110 AD2d 148 (2nd Dept. 198) quoting Miller v. State of New York, 62 NY2d 506 (Ct. App. 1984)].

Furthermore, a distinction is drawn between discretionary and ministerial governmental acts. Discretionary acts, that is those involving the exercise of reasoned judgment, will not eliminate immunity. By contrast, ministerial acts, that is conduct requiring adherence to a governing rule, with a compulsory result, which may subject the municipality to liability. [See, Lauer v. City of New York, 95 NY2d 95, 733 NE2d 184, (Ct. App. 2000)]. The Court of Appeals went further to state that a ministerial breach does not give rise to municipal liability, rather it removes the issue of governmental immunity from a case.

With respect to the maintenance and repair of sewer and water mains, the municipality has a duty of maintaining same so as to avoid injury to abutting property owners and the public in general. [See, McCarthy v. City of Syracuse, 46 NY2d 194 (1871); Pet Prods. V. City of Yonkers, 290 AD2d 546 (2002); Biernacki v. Village of Ravena, 245 AD2d 656 (1997)]. Additionally, if a municipality has notice of dangerous condition or has reason to believe that pipes have shifted or deteriorated and are likely to cause injury, it must make reasonable efforts to inspect and repair defect. [See DeWitt Properties, Inc. v. City of New York, 377 NE2d 461 (1978)]. Accordingly, based upon the controlling principles of law, the defendants herein had a duty to maintain and repair the sewer and water main in question. In carrying out that duty, any actions, or inaction by the defendant would be ministerial in nature.

In order for this Court to determine if governmental immunity applies to the defendants herein, the Court must further ascertain whether the defendants' alleged failure to maintain the sewerage system and water main was a failure to act in its' governmental or proprietary capacity. It is undisputed that the defendants herein did not design or construct the water main in question, and as such a determination of governmental immunity regarding design or construction is not essential herein. Rather, whether defendants' maintenance and repair entitles them to said defense is the issue at hand.

In general, a purely governmental function is for the protection and safety of the public, while a proprietary function is a government activity which is essentially a substitute for or supplement to a traditionally private enterprise. [See, Sebastian v. State, 93 NY2d 790 (1999)]. When a municipality acts in a proprietary capacity, it is subject to the same duty of care as private individuals and institutions engaging in the same activity. [See, Dobin v. Town of Islip, 11 AD3d 577 (2004)]. To ascertain whether the municipality's complained of act, or inaction, falls within governmental or proprietary capacity, court must focus on the specific act or inaction

from which the injury was claimed to have happened. [See, Lemery v. Village of Cambridge, 290 AD2d 765 (2002)].

In Tappan Wire & Cable, Inc. v. County of Rockland, 7 AD3d 781 (2nd Dept. 2004), it was held that the County was not entitled to governmental immunity arising out of claims that it negligently maintained sewerage system as that claim challenged conduct which is ministerial in nature. Case law has further held that maintenance and repairs have been recognized as “completely proprietary acts”. [See, Johnson City Central School District v. Fidelity and Deposit Company of Maryland, et al, 272 AD2d 818 (2000) (quoting, Clinger v. New York City Transit Authority, 85 NY2d 957)].

Based on the foregoing, this Court finds that the defendants’ alleged negligence in maintaining and repairing the sewer system and water main in question falls under the defendants’ proprietary capacity. Furthermore, defendants had a duty to maintain and repair the sewer and water main in question, and any alleged actions or inactions would be ministerial in nature. Accordingly, the defense of governmental immunity is without merit.

The remaining branches of the motions were decided from the bench on December 6, 2007.

Dated: December 7, 2007

LAWRENCE V. CULLEN, J.S.C.