

**Nowak v County of Wayne**

2007 NY Slip Op 30881(U)

April 9, 2007

Supreme Court, Wayne County

Docket Number: 0056949/2005

Judge: John B. Nesbitt

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

**ORIGINAL**

ROBERT NOWAK and SHEILA NOWAK,  
DAVID DONK and DINA DONK.,

Plaintiffs,

-vs-

Index No. 56949

COUNTY OF WAYNE

Defendant.

---

APPEARANCES: Law Office of Rick S. Geiger, LLC  
(Rick S. Geiger, Esq., of counsel)  
*Attorney for the Plaintiff*

Boylan, Brown, Code, Vigdor & Wilson, LLP  
(A. Katherine Piccola, Esq., and James E. Metzler, Esq., of counsel)  
*Attorneys for Defendant*

**MEMORANDUM - DECISION**

John B. Nesbitt, J.

**I. Introduction**

Defendant moves for summary judgment dismissing the complaint in this action, which seeks money damages for property and personal injury allegedly caused by the defendant County of Wayne. The motion raises the issue regarding the role expert opinion plays in deciding whether summary judgment is appropriate.

**II. Background Facts**

For purposes of this motion, the salient facts may be briefly stated. The plaintiffs in this action are Robert and Sheila Nowak ("Nowaks"), who have owned and resided since 1980 in a single family residence at 12512 Lash Drive in the Town of Wolcott, Wayne County. Plaintiffs David and Dina Donk ("Donks") own an adjoining property at 12500 Lash Drive, also improved by a single family residence, in which they have resided since 1998. Lash Drive runs east off of Wadsworth

Road almost 2000 feet to a dead end. The Nowak residence sits east off of the dead end and the Donk residence sits some distance south of Lash Drive accessed by a driveway joining Lash Drive approximately two-thirds of the length of Lash Drive east of Wadsworth Road. Running east-west along the southerly boundaries of the Nowak and Donk properties is an old railroad bed presently owned by Rochester Gas and Electric Corporation (RG&E). Approximately three quarters of a mile east of the Nowak and Donk properties the railroad bed meets and runs through Lawville Swamp, which covers about twenty five acres. By agreement styled "Trail License" dated September 13, 2001, RG&E granted the defendant County of Wayne (the "County") a license to maintain and use the railroad bed for public recreational purposes. Pursuant to that agreement, the County made the railroad bed available for such purposes, the primary use during the winter months being snowmobiling.

On or about January 2, 2004, in response to complaints from snowmobilers that the trail on the railroad bed in the area of Lawville Swamp was iced over, the County deployed three of its employees with a tractor and backhoe to fix the problem. In doing so they dug out and removed part of a beaver dam situated on the south side of the railroad bed in the swamp area. When this happened, water previously held back by the dam started to flow upon the trail as well as the ditch along the south side of the railroad bed heading west towards the Nowak and Donk properties.

In their complaint, the Nowaks and Donks allege that the removal of the beaver dam constituted actionable negligence by the County, causing both property damage and personal injury.

Authorities describe the elements of actionable negligence in similar terms:

"The essential elements for an action in negligence are that the defendant was under a duty to protect the plaintiff from injury, that the defendant breached that duty, that the plaintiff suffered actual injury or loss, and that the loss or injury proximately resulted from the defendant's breach of the duty" (65 CJS Negligence §21).

"A plaintiff is not entitled to recover for negligence unless (1) the defendant owed the plaintiff a cognizable duty of care, (2) the defendant failed to exercise that duty, and (3) the plaintiff suffered injury as a proximate result of that failure" (79 NY Jur2d Negligence §9).

"The elements of negligence are a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, a causal connection between the breach and the plaintiff's injury, and actual injury. In the absence of any one of these elements, no cause for negligence will lie" (57A Am Jur2d Negligence §71).

For purposes of this motion only, defendant is willing to assume that plaintiffs make out a prima facie case of negligence regarding all elements of a negligence action except that of proximate cause. That is, first, defendant assumes that they owed plaintiffs a duty of care in the manner they handled the alleged problem caused by the beaver dam in icing over the snowmobile trail. Second, defendant assumes that they handled the problem negligently, disregarding a foreseeable risk to plaintiffs. Third, defendant assumes that the plaintiffs have damages relating to the excess of water in and about their residences. But notwithstanding such assumptions, the County argues that on the record now before the Court that it must find as a matter of law that there is no legally sufficient causal connection between the alleged negligence of the County and the damages claimed by the plaintiffs.

### III. Summary Judgment and the Judicial Function

We start with the general proposition that a party's right to a jury trial in a civil case is no less fundamental than it is in a criminal case. This right is guaranteed in the federal courts by constitutional and statutory mandate. Indeed, as far back as 1882, the first Justice Harlan was able to say that "[i]t has often been said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people" and it is "the province of the jury to pass upon the issues of fact [at issue] and the right of [a party] to have them do so" (*Hodges v Easton*, 106 US 408, 412 [1882]). Our state's commitment to the right to jury trial is no less. "This basic right guaranteed by the State Constitution and implemented by statutory mandate is one of substance and not mere form or procedure" (*Waldman v Cohen*, 125 AD2d 116, 121 [2d Dept 1987]). A Trial Judge must be very mindful of this fundamental right and not trespass upon the province of the jury to decide factual issues based upon the Judges's personal, albeit experienced, view of how those factual issues should be resolved.

This does not mean, however, that every grievance one citizen has against another needs to be or even should be resolved by trial, jury or otherwise. There are essentially two procedural devices by which a defendant may test the substantive merit of the plaintiff's claims to determine whether a trial is warranted. The first of these devices is a pre-trial motion under CPLR §3211(a)(7)

seeking dismissal of the complaint upon the ground that it fails to state a legally cognizable cause of action. Under such a motion, a plaintiff need only make sufficient allegations necessary to establish all the elements of a cognizable cause of action (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). The plaintiff need not make any evidentiary showing to support his allegations; indeed, the court will assume that he can when and if necessary. The court's limited function is to determine, taking everything the plaintiff alleges as true, whether the law allows any relief. If not, there is no point to any trial.

In this case, the County does not move pursuant to CPLR §3211(a)(7), essentially conceding for present purposes that plaintiffs state viable causes of action.<sup>1</sup> Rather, it moves for dispositive relief pursuant to CPLR §3212 for summary judgment dismissing the complaint in this action. In brief, summary judgment “means that the court, after going through the papers pro and con on the

---

<sup>1</sup> This case presents the converse of the usual situation involving beaver dams. Most often, it is the upland owner seeking removal of the beaver dam by the downstream owner because the beaver dam obstructs the flow of water from, and causes flooding upon, the upland (*see e.g. Frank v Garrison*, 184 AD2d 852 [3d Dept 1992][downstream owners have no affirmative duty to remedy conditions upon their property, such as beaver dams, which are of purely natural origin, even though such conditions may cause inconvenience or even damage to upstream owners]; *Bracy v King*, 199 Ga.App. 831, 406 SE2d 265 [Ga 1991][downstream owner owed no duty to upstream landowner to remove naturally occurring beaver dams, inasmuch as nothing indicated that downstream owner imported, trained, or assisted the beavers]. In this case, the claim made is based upon injury caused not by the existence of the beaver dam, but rather its removal. In *Dawson v Wade*, 257 Ga. 552, 361 SE2d 181 [Ga 1987], the Georgia Supreme Court held that a property owner of lands adjoining a creek enjoyed no prescriptive right to continued existence of beaver dams in that creek that were not his handiwork, notwithstanding that the dams had been in the creek for some 20 years and he found them useful for irrigation. No comparable New York precedent has been found on the same point, it would appear that the plaintiffs do state viable causes of action under New York law under the general principles discussed in *Grosso v Long Island Lighting Co.*, 102 Misc.2d 916 [Dist. Ct. Nassau Co. 1980] and *Seifert v Sound Beach Property Owners Association*, 60 Misc.2d 300 [Sup Ct Suffolk Co. 1969]:

“Where work is undertaken by a body authorized to perform a public service no action will lie against the party performing such work, so long as the authority is not exceeded and is properly exercised. But ‘liability does attach where the authority is negligently or improperly exercised, and where, by a reasonable exercise of the power given either by statute or the common law, damages might be prevented.’”

*Id.* at 304 (*quoting Seifert v City of Brooklyn*, 101 NY 136, 145).

motion, has found that there is no substantial issue of fact in the case and therefore nothing to try” (Siegel, New York Practice §278 [4<sup>th</sup> ed 2005]). In other words, a party may **allege** sufficient facts to state a cause of action to survive to a CPLR §3211(a)(7) motion to dismiss, but fail in **proof** of those allegations.<sup>2</sup> Summary judgment serves the salutary purpose of weeding from the trial calendar those cases where proof (or lack of it) on an essential issue of fact is so decisive as a matter of law that the court can dispose of the case without trial.

In relevant part, CPLR §3212(b) provides that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To “establish sufficiently” the cause of action or defense, “the moving party has an obligation to come forth with evidence, as upon a trial ... [and] make a *prima facie* showing of entitlement to judgment as a matter of law” (7 Weinstein-Korn-Miller, New York Civil Practice §3212.09 [2d ed]). Stated more helpfully,

“The fundamental question with respect to a motion for summary judgment is whether the pleadings, affidavits, and exhibits in support of the motion are sufficient to overcome the opposing papers, and to justify finding, as a matter of law, either that there is no defense to the action or that the action or defense is without merit. Summary judgment in favor of a plaintiff may and should be granted if on the same proof, undisputed, the plaintiff would be entitled to a directed verdict at trial. If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, the issue is for the fact finders to decide at trial, and not for determination by a judge on motion. ... Summary judgment must be denied the defendant if it is shown that there are issues of fact supporting an actionable claim” (97 NY Jur2d Summary Judgment §16).

---

<sup>2</sup> In a summary judgment motion, “it is the duty of the Court, not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues from immaterial ones” (Wanger v Zeh, 45 Misc2d 93 [1965], aff’d 26 AD2d 729 [3d Dept 1966]).

The meaning of the phrase “as a matter of law” in the context of a trial motion for a directed verdict under CPLR 4401 guides a court deciding a pretrial summary judgment motion for similar relief.<sup>3</sup>

The only stated criterion is that the movant is entitled to judgment ‘as a matter of law.’ The standard has been phrased in these general terms to recognize the limitless variety of fact situations that can invoke it. The judge may grant the motion, which of course takes the case out of the jury’s hands, only when convinced that the jury could not find for the other party by any rational process; when, in support of the party against whom it proposes to order judgment, the court can find ‘no evidence and no substantial inferences’: when reasonable minds reacting to the evidence could not differ and would have to conclude just one way. The court must accept as true all of the evidence offered by the party against whom the motion for judgment aims, and must even resolve in that party’s favor all questions relating to the credibility of witnesses’ (Siegel, *New York Practice* §402, p.689 [4<sup>th</sup> ed]).

Judges must also be cognizant of an important practical difference between a pretrial motion for summary judgment and a trial motion for a directed verdict. In the latter case, “the trial judge has had the benefit of observing the comportment of the witnesses, which is of material aid in gauging their credibility, while the summary judgment judge must make a determination on papers alone” (7B McKinneys Consol. Laws CPLR 3212, C3223:5 at p.13). For this and other reasons, judges are regularly reminded that summary judgment is a “drastic remedy and should not be granted where there is any doubt as to the existence of triable issues” (*Dal Construction Corp v City of New York*, 108 AD2d 892, 894 [2d Dept 1985]). “Issue finding rather than issue determination is the key to the procedure” (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1958]). Summary judgment is the procedural equivalent of a trial and should only be granted where “no reasonable view of the evidence” supports a claim or defense; for if “varying inferences are possible ..., the issue is one for the jury” (*Eddy v Syracuse University*, 78 AD2d 989, 990 [4<sup>th</sup> Dept 1980]). Accordingly, not only must the proof offered by the party opposing a motion for summary judgment “be accepted as true”

---

<sup>3</sup> “The justification for granting a motion for summary judgment before trial under CPLR 3212 ... depends on whether the showing is such as would warrant the granting of a CPLR 4401 motion for judgment during trial. The grant of the CPLR 4401 motion depends in turn on whether, if the case were to go to the jury and the jury were to find the other way, the judge would have to grant judgment notwithstanding the verdict under CPLR 4404” (Siegel, *New York Practice* §408 [4<sup>th</sup> ed]).

(*Durkin v Long Island Power Authority*, 37 AD3d 400 [2<sup>nd</sup> Dept 2007], “however improbable” (*Plastoid Cable Corp v TFI Companies*, 55 AD2d 930 [2<sup>nd</sup> Dept 1977]), such proof must be viewed “in the light most favorable” to that party (*Wallace v Waterpointe at Oakdale Shores, Inc.*, 248 AD2d 383 [2<sup>nd</sup> Dept 1998]), including favorable inferences that may be drawn therefrom that are at least arguable (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). Underlying all this is the notion that “[a] remedy that precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one that should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a ‘day in court’” (*Wanger v Zeh*, 45 Misc2d 93, 94 [Sup Ct NY Co 1965] *aff’d* 26 AD 729 [3<sup>rd</sup> Dept 1966]), *quoted in* 7B McKinney’s Consol. Laws CPLR 3212, C3212:1).

#### IV. Proof Of Causation

Defendant contends that plaintiffs fail to produce sufficient evidence showing a causal link between the beaver dam removal on January 2, 2004, and the damages claimed by the plaintiffs. Defendants rely principally if not exclusively upon the affidavit of James McIntosh, offering an opinion as an expert in the field of civil and environmental engineering, encompassing the subfields of hydrology, hydrogeology, and hydraulics. After a site inspection, and research into and consideration of relevant empirical data, Mr. McIntosh reached three conclusions with regard to the Nowak residence. First, although the Nowak residence has been and continues to be adversely affected by high ground water and standing surface water, there is “no direct evidence” that the related damages and conditions are “the result of the alleged flooding incident giving rise to this action.” Second, such damages and conditions are consistent with and largely caused by “ongoing and/or longstanding soil, structural, and water drainage issues” unrelated to the alleged flooding incident. Third, some or all of the water damage and associated conditions are “longstanding” and ostensibly predating the “alleged flooding incident,” thus logically eliminating a causal link between the two.

The first conclusion is unremarkable. *Direct evidence* is commonly defined as “that which tends to establish one or more of the principal facts in issue without the intervention of evidence of any other fact,” whereas *circumstantial evidence* is “direct evidence of a collateral fact, that is, of

a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred” (Prince, Richardson on Evidence §4-301 [Farrell 11<sup>th</sup> ed 1995]).<sup>4</sup> The closest one could come to “direct evidence” in the circumstances of this case would be tracing of the flow of water by dye or other technique from the beaver dam to plaintiffs’ properties. The second and third conclusions rest upon inductive reasoning, concluding that other conditions were and continue to be the source and cause of plaintiffs’ damages, and by negative inference, excluding the “alleged flooding incident” as a source or cause.

Regarding the Donk property, Mr McIntosh opines flatly that “[there] was no evidence of damage caused by flooding at the time of the site visit[s]” on March 17 and March 22, 2006. Consistent with his discussion of the Nowak property, Mr. McIntosh states that natural conditions relating to the property’s relative low elevation and wetland soils make “positive water drainage away from the Donk residence challenging during periods of high ground water.” While noting no evidence of contamination of the water system, he questions the amount of separation between the water and septic systems in light of the “prolonged high ground water table and hydric soils” as possibly inadequate “to prevent the cross-contamination of the drinking water source by the leachate system.

The plaintiffs do not present any expert opinion that would tend to causally link the beaver dam removal with the damages they claim.<sup>5</sup> Rather, their argument may be summed up by the popular wisdom that “you don’t need a weatherman to know which way the wind blows” or, in the circumstances of this case, which way the water flows (see Bob Dylan, *Subterranean Homesick Blues*, on *Bringing It All Back Home* [Columbia Records 1965]). Their argument presents as one

---

<sup>4</sup> The use of circumstantial evidence in law implies application of the intellectual discipline of logic theory, which generally concerns the “rules of inference that preserve truth (or confer probability) in the inference of conclusions from premises” (Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument By Analogy*, 109 Harv. L. Rev. 923, 988 n. 191 [1996]).

<sup>5</sup> Defendant correctly points out that plaintiff’s expert report is insufficient to establish such a causal connection, and his opinion on the subject is not based upon any technical expertise or empirical investigation. His report may be relevant on the damages issue, but not on proximate cause.

of logical induction; (1) The properties did not experience or suffer from water damage prior to January 2, 2004 - the date of the dam breach - but did on and after January 2, 2004. (2) Nothing occurred on or after January 2, 2002, that would otherwise account for the water damage caused on January 2, 2004, and by the recurring intermittent flooding thereafter. (3) The law of gravity dictates that the natural flow of water be downhill. (4) The release of water resulting from the dam breach was at an elevation higher than plaintiffs' properties and that water was observed flowing in the general direction of plaintiffs' properties.<sup>6</sup> Thus, argue plaintiffs, the only reasonable conclusion is that the dam breach caused the flooding of plaintiffs' properties and created a condition or conditions that cause recurring intermittent flooding that was not experienced prior to January 2, 2004.

On their face, and on the issue of proximate cause, the merits of the parties' arguments seemingly present the quintessential issue of fact to be resolved at trial by the appropriate trier of fact. Defendants argue, however, that the opinion of their expert trumps the lay opinion presented by the plaintiffs as a matter of law. Expert opinion, however, does not bind the trier of fact unless the subject matter is one for experts only (*see generally* Prince, Richardson On Evidence §7-302 [Farrell 11<sup>th</sup> ed 1995]).<sup>7</sup> If the subject is not reserved for experts, the trier of fact is not bound to accept expert opinion even if uncontradicted, and decides what weight to give to such opinion (Id at §7-306)..

Is the subject matter now at issue for experts only? Neither the submissions by counsel nor research by the Court reveals any New York decisional authority directly on point. Other jurisdictions appear to be of different minds. For example, in *Alost v United States* (73 Fed. Cl. 480 [2006]), property owners brought suit against the United States seeking just compensation for the alleged taking of their property by frequent, intermittent flooding on their lands or rise of groundwater levels caused by a river navigation project of the Army Corps of Engineers. In affirming the trial court's dismissal of the action after trial, the appellate court wrote:

---

<sup>6</sup>The Court gleans this apparent fact from the topographical maps and related exhibits submitted upon this motion.

<sup>7</sup>For example, "[i]n medical malpractice litigation, 'unless the alleged act of malpractice falls within the competence of a lay jury to evaluate, it is incumbent upon the plaintiff to present expert testimony in support of the allegations to establish a prima facie case of malpractice (Id. at §7-302[b][ii], citing *Martinelli v Hessikeil*, 132 AD2d 691 [defendant granted summary judgment in medical malpractice actions, expert medical opinion is required to demonstrate merit]).

“Plaintiffs must demonstrate by a preponderance of the evidence that the Project directly and proximately caused more frequent flooding or flooding of a longer duration than that which occurred prior to the project. Here, the only evidence the plaintiffs presented with regard to the cause of the overflow flooding on their land was lay testimony, both their own and others. The court finds that this testimony is entitled to little weight. ‘Causation of flooding is a complex issue which must be addressed by experts.’ (*Hendricks v United States*, 14 Cl. Ct. 143, 149 [1987]; see also *Herriman v United States*, 8 Cl. Ct. 411, 420 [1985]). In contrast, the court finds that [the defendant’s] expert opinion testimony is reliable, probative, and persuasive on the issue of causation. Moreover, the plaintiffs’ affidavits [received at trial as evidence of their contents] are vague and generalized descriptions of the conditions on their land that simply allege that there have been more floods after the Project and that they believe the increased flooding is caused by the Project (73 Fed. Cl. at 495).<sup>8</sup>

To be compared is *Ponce de Leon Condominiums v DiGirolamo* (238 Ga. 188, 232 SE2d 62 [1977]), where the Georgia Supreme Court held a jury could rely on non-expert testimony and exhibits regarding flooding and reject expert testimony to the contrary. In that case, a landowner brought suit against the developer of adjacent condominiums, claiming that the construction caused his property to receive unnaturally large quantities of surface water. The landowner demonstrated that he had experienced no significant accumulation of surface waters on his property prior to the condominium development, but thereafter there was pooling of water and silt upon his property. Said the Court:

“[Defendant argues] that all of the expert testimony introduced at trial was to the effect the engineering design ultimately utilized by [defendant] could not in theory have resulted in the accumulation or discharge of surface water upon [plaintiff’s] property in excess of that which existed under natural conditions prior to the development. The jury, however, was authorized to conclude otherwise from the nonexpert evidence introduced, the photographic evidence of the conditions existing before and after development, and their own site inspection during trial” (232 SE2d at 65).

In the absence of any dispositive New York authority on the subject, this Court will not add to the categories already existing in New York where expert testimony is required to establish a

---

<sup>8</sup> In rejecting plaintiffs’ lay testimony, the court noted that it agreed “with the government that this type of *post hoc, ergo propter hoc* reasoning is not sufficient to establish causation” (Id. at 495 n. 14)(citations omitted). This phrase “denotes the fallacy of confusing sequence with consequences” (Garner, *A Dictionary Of Modern Legal Usage* [2d ed 1995]).

*prima facie* cause of action. The Court holds that causes of flooding are not always such a complex issue that their determination must be consigned in all instances to the technical competence of experts. This, of course, does not mean that expert testimony may not be helpful to the finder of fact, nor that, under particular circumstances, such testimony may be so compelling as to outweigh as a matter of law lay testimony and anecdotal evidence to the contrary. Upon the record now before the Court, the Court cannot reach the conclusion that the plaintiffs' evidence is insufficient as a matter of law. A full trial record may justify a different conclusion.

### V. Conclusion

Summary judgment is appropriate only when all the facts and reasonable inferences from those facts, viewed in the light most favorable to the nonmoving party, show that there is no triable issues as to each of the essential elements of the causes of action. So viewed, and upon the record before the Court, the defendant's motion for summary judgment must be denied.<sup>9</sup>

Dated: April 9, 2007  
Lyons, New York



---

JOHN B. NESBITT  
Acting Supreme Court Justice

---

<sup>9</sup> The Court has considered the discrete argument that the medical and potential medical damages claimed by certain of the plaintiffs cannot be linked to the property conditions even if such conditions were caused or exacerbated by the defendant. The Court regards this as a trial issue as well.