

**Cooper v City of New York**

2007 NY Slip Op 31642(U)

June 8, 2007

Supreme Court, New York County

Docket Number: 0108727/2006

Judge: Eileen A. Rakower

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.

RAKOWER

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

Index Number : 108727/2006

**COOPER, CLIFFORD ALLEN**

VS.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 001

DISMISS ACTION

PART 5

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1</u>
Answering Affidavits -- Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):


DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**

JUN 15 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/8/07



**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
CLIFFORD ALLEN COOPER,

Plaintiffs,

Index No.  
06108727/06

- against -

Decision and  
Order

CITY OF NEW YORK CITY and NYC DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for property damage he allegedly suffered from flooding following storms in March and April 2005. Plaintiff served a summons and complaint dated June 22, 2006 and The City of New York and NYC Department of Environmental Protection (“City”) served an answer dated August 14, 2006. City makes this motion to dismiss the complaint in its entirety for failure to state a cause of action upon which relief may be granted pursuant to CPLR 3211 (a)(7). Plaintiff fails to file opposition to this motion served on April 26, 2007.

When considering a motion to dismiss, the court in *Leon v. Martinez*, 84 N.Y.2d 83 (1994), held that:

the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit.

Further, the court found that when assessing the sufficiency of the complaint in stating a cause of action:

a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint...and the criterion is whether the

proponent of the pleading has a cause of action, not whether he has stated one.

Plaintiff's first cause of action alleges damages to real and personal property because the City "failed to provide timely notification of flooding to at-risk downstream residents along Esopus Creek." Plaintiff, by his second cause of action, alleges that the City had a duty to "draw down the Winter/Spring reservoir level" and "failed to maintain safe operations of the Ashokan Dams by its operations policy of maintaining full reservoir levels." Plaintiff contends further that City had a duty to formulate a flood plan and flood control procedures to consider flooding impacts.

Initially, City contends that New York law does not impose upon it a duty to "warn a property owner of conditions on the owner's own land, nor does the City have a duty to warn of natural and transitory conditions like storms." Additionally, City asserts that it is immune from liability for its discretionary exercise of its governmental function. City concludes that none of plaintiff's causes of action state a cause of action upon which relief can be granted and the complaint should be dismissed in its entirety.

City's contention that a dam owner is not liable where the dam does not worsen the conditions that would exist had the dam never been constructed is supported by *Iodice v State of New York*, 277 AD 647 (4<sup>th</sup> Dep't), aff'd, 303 NY 740. There, the court found that "a dam owner has the right to let nature take its course, *i.e.*, the right to permit flood waters to go over his dam where the volume of water cast into the channel below the dam does not exceed the volume coming in above the dam." *Id.*, at 649-650. The complaint does not allege that the dam somehow failed, creating a greater total volume of water than that which would naturally have occurred had there been no dam. Indeed, City provides data that demonstrates that water entered the Ashokan reservoir in a greater volume and in a shorter time than it left the reservoir during the rainstorms of April 2005. Thus, the dam did not make the flooding worse for Mr. Cooper and there can be no liability allocated to City.

City disputes the remaining causes of action, establishing that City had no duty to establish a flood control plan or procedures, that it owed no duty to plaintiff here, and that City had no duty to draw down the reservoirs in anticipation of rains and

snow melt. Finally, City rightfully contends that it is immune from liability where its action or inaction involves the governmental exercise of discretion in policy matters, such as a decision not to promulgate release regulations and requirements for its reservoirs.

Wherefore, it is hereby

ORDERED that defendants' motion to dismiss for failure to state a cause of action upon which relief can be granted is GRANTED without opposition.

This constitutes the decision and judgment of this court.

Dated: June 8, 2007



Eileen A. Rakower, J.S.C.

**FILED**  
JUN 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK