

**Anderson v Town of Kirkland**

2007 NY Slip Op 34408(U)

November 2, 2007

Supreme Court, Oneida County

Docket Number: 01-0311

Judge: Samuel D. Hester

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David R. Diodati, Esq.  
Attorney for Defendant County of Oneida  
23 Genesee Street  
New Hartford, NY 13413

Coughlin & Gerhart, L.L.P.  
By: Richard B. Long, Esq.  
Attorneys for Defendants Mark and David Strobino  
as Executors of the Estate of Louis Strobino, and  
Mark and David Strobino as Executors of the  
Estate of Eleanor Strobino  
20 Hawley Street  
Binghamton, NY 13902-2039

Noel Strobino  
Pro Se Defendant  
Box 392  
Clark Mills, NY 13321

**SAMUEL D. HESTER, J.**

**DECISION, ORDER AND JUDGMENT**

This proceeding involves a number of claims against the various defendants by various plaintiffs arising from several events of flooding in 2000 and 2001 of the Oriskany Creek in the Town of Kirkland and in the vicinity where highway Route 5 crosses Oriskany Creek. Initially, plaintiffs filed separate actions against the various defendants, as follows:

Eugenia Anderson and Anderson's Attic v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2001-0311; RJI No. 32-01-0153;

Ellen Carroll, Carroll's Collectibles v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2425; RJI No. 32-00-1252;

Bradley M. Czerkies, Sr., Precision Unlimited Car Care v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2001-0310; RJI No. 32-01-0157;

Joseph F. Dispirito and Cyberdyne v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2001-00406; RJI No. 32-01-0192;

Theresa Gallucci, Theresa's Variety Shoppe v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2432; RJI No. 32-00-1273;

Mary Harrison [and] Leroy Harrison v. Town of Kirkland, County of Oneida,

Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2001-00309; RJI No. 32-01-0143;

Ann Joseph, Abe Joseph, Ann's Collectibles at the Antique Galleries v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2423; RJI No. 32-00-1232;

Anthony Karrat, Lody Karrat, Anthony's v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2429; RJI No. 32-00-1263;

James R. Montana v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2424; RJI No. 32-00-1246;

Cheryl Ptak v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2427; RJI No. 32-00-1258;

Jeanette Roberts v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2426; RJI No. 32-00-1256;

Edith Serianni, Kirkland Seneca Antique Galleries, Randy Schaal as Trustee for the Bankruptcy of Edith Serianni v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2000-2430; RJI No. 32-00-1242; and

Heidi Werner, H.J.E. Realty, Inc. v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton; Index No. 2001-0308; RJI No. 32-01-0150.

By decision of the Honorable John G. Ringrose, J.S.C. dated May 30, 2002 these actions were consolidated and by letter decision and order dated February 26, 2003, the following was

designated as the official caption for the consolidated action:

“Eugenia Anderson, Anderson’s Attic, Ellen Carroll, Carroll’s Collectibles, Bradley Czerkies, Sr., Precision Unlimited Car Care, Joseph F. Dispirito, Cyberdyner, Theresa Gallucci, Theresa’s Variety Shoppe, Leroy Harrison, Ann Joseph, Abe Joseph, Ann’s Collectibles at the Antique Galleries, Anthony Karrat, Lody Karrat, Anthony’s, James R. Montana, Cheryl Ptak, Jeanette Roberts, Edith Serianni, Kirkland Seneca Antique Galleries, Randy Schaal as Trustee for the Bankruptcy of Edith Serianni, Heidi Werner, H.J.E. Realty, Inc., Plaintiffs v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton, Defendants.”

The court ordered that in all subsequent matters that the case shall be referred to as “Anderson, et al v. Town of Kirkland, et al, proceeding under Index No. 2001-0311; RJI No. 32-01-0153.”

By order dated May 28, 2003, (Ringrose, J.), the caption of the consolidated action was amended to substitute Mark and David Strobino, as Executors of the Estate of Eleanor Strobino.

In addition to the above described consolidated action, the following actions have been considered in relation to the pending motions:

Melvin Bonsel, Dorothy Bonsel and M&D Bonsel v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Mark and David Strobino, as Executors of the Estate of Eleanor Strobino, and Noel Strobino; Index No. 2002-001653; RJI No. 32-03-0943; and

Dave Barrone and Clifford Fuel Co., Inc. v. Town of Kirkland, County of Oneida, Eleanor Strobino, Mark and David Strobino, as Executors of the Estate of Louis Strobino; Index No. 2002-1700; RJI No. 32-07-0141.

By stipulation filed on June 12, 2003, counsel for the plaintiffs, and counsel for defendants Town of Kirkland, County of Oneida and the Estates of Louis and Eleanor Strobino, agreed that Noel Strobino should be added as a party defendant in the consolidated case and the two above described cases and counsel stipulated that the complaints be amended to add the claims against Noel Strobino.

By order dated December 30, 2004, (Ringrose, J.) the court granted plaintiffs' motion to amend the complaint in the consolidated action and provided that the second amended complaint annexed to the order be filed and served. The copy of the second amended complaint annexed to the order set forth the following preamble:

“The Plaintiff Eugenia Anderson, Anderson’s Attic, Anderson’s Attic and the other consolidated defendants [sic] (being . Ellen Carroll, Carroll’s Collectables [sic], Leroy Harrison, Eugenia Anderson, Anderson’s Attic, Anthony Karrat, Anthonys Café, James Montana, Precision Unlimited Car Care Inc., Cheryl Ptak, Ann and Abe Joseph, Anns Collectables [sic] at the Antique Galleries, Joseph Dispirito, Cyberdyne, Edith Serianni, Kirkland Seneca Antique Galleries, HJE Realty, Theresa Gallicci [sic], Theresa’s Variety Shope [sic], and Jeanette Roberts, ), by their attorney, Woodruff Lee Carroll P.C. allege and complain of the Defendants, Town of Kirkland, County of Oneida,, individually, and Mark and David Strobino as executors of the Estate of Louis Strobino, Mark and David Strobino as executors of the Estate of Eleanor Strobino, Noel Strobino as follows:”

Noticeably absent from the preamble of the second amended complaint are the following plaintiffs listed in the captions of the underlying actions: Bradley Czerkies, Sr., Lody Karrat, and Heidi Werner.

Paragraph one of the second amended complaint refers to the underlying actions that named the following defendants: Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, and the Village of Clinton. As counsel for the above defendants have not complained that by virtue of the second amended complaint Bradley Czerkies, Sr., Lody Karrat, and Heidi Werner have abandoned their causes of action against said defendants, the court will consider the claims of Bradley Czerkies, Sr., Lody Karrat and Heidi Werner as to the defendants sued in the underlying actions, i.e. Town of Kirkland, County of Oneida and the Estates of Louis and Eleanor Strobino. As the Village of Clinton was not named as a

defendant in the second amended complaint, and has not appeared, the court presumes that no claims exist with regard to this defendant. As to defendant Noel Strobino who was not a party to the underlying thirteen actions consolidated by letter decision and order dated February 26, 2003, and as it appears to the court that defendant Noel Strobino was not made a party to the consolidated action until service of the second amended complaint, the court hereby finds that no claims have been asserted against defendant Noel Strobino by the following plaintiffs: Bradley Czerkies, Sr., Lody Karrat and Heidi Werner. Even if claims had been asserted against defendant Noel Strobino by the above plaintiffs, these plaintiffs are similarly situated with the other plaintiffs listed in the second amended complaint and the reasoning of any determinations by this court adverse to plaintiffs with regard to all claims against defendant Noel Strobino by the plaintiffs named in the second amended complaint applies to these plaintiffs. Further, even if plaintiff Lody Karrat had asserted a claim against defendant Noel Strobino, it has been discontinued by stipulation by the Executor of his Estate.

In addition, the following plaintiffs have discontinued by stipulation their claims against defendant Noel Strobino: Joseph F. Dispirito and Cyberdyne, Ellen Carroll and Carroll's Collectibles by the Executor of the Estate of Ellen Carroll, Theresa Gallucci and Theresa's Variety Shoppe by the Executor of the Estate of Theresa Gallucci, Anthony Karrat and Anthony's Café, James Montana and Randy Schaal as Trustee for the Bankruptcy of Edith Serianni. By order dated March 7, 2007, the court dismissed all claims asserted by Ann's Collectibles at the Antique Galleries against defendant Noel Strobino. Plaintiffs Eugenia Anderson and Anderson's Attic discontinued by stipulation all of their claims asserted against all defendants. Even though the claims of Eugenia

Anderson and Anderson's Attic have been discontinued in their entirety, for the purposes of the record, the court will continue to use the caption, index number and RJI number of that action. At oral argument on the instant motions, counsel for plaintiffs and counsel for the County of Oneida reported that the plaintiffs had discontinued by stipulation all claims asserted against the County of Oneida.

As a matter of housekeeping, by order of the court dated February 8, 2007 the following substitutions were made:

Barbara Mazur as Executor of the Estate of Ellen Carroll for Ellen Carroll,  
Anthony Karrat as Executor of the Estate of Lody Karrat for Lody Karrat and  
Anthony Gallucci as Executor of the Estate of Theresa Gallucci for Theresa  
Gallucci.

At motion term on November 14, 2006 the cases of Melvin Bonsel, Dorothy Bonsel and M&D Bonsel v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Mark and David Strobino, as Executors of the Estate of Eleanor Strobino, and Noel Strobino; Index No. 2002-001653; RJI No. 32-03-0943 and Dave Barrone and Clifford Fuel Co., Inc. v. Town of Kirkland, County of Oneida, Eleanor Strobino, Mark and David Strobino, as Executors of the Estate of Louis Strobino; Index No. 2002-1700; RJI No. 32-07-0141 were consolidated with the existing consolidated case by bench decision and order. Melvin Bonsel, Dorothy Bonsel and M&D Bonsel have since discontinued their claims against defendant Noel Strobino and at a term of this court on April 5, 2007, counsel for plaintiffs stipulated that the Town of Kirkland and the County of Oneida were not served in the action brought by Dave Barrone and Clifford Fuel Co., Inc. Also, Noel Strobino is not a defendant in the action brought by Dave Barrone

and Clifford Fuel Co., Inc.

Thus, in light of the foregoing and for purposes of the instant motions, the consolidated caption of this case shall be:

Eugenia Anderson, Anderson's Attic, Barbara Mazur as Executor of the Estate of Ellen Carroll, Carroll's Collectibles, Bradley M. Czerkies, Sr., Precision Unlimited Car Care, Joseph F. Dispirito, Cyberdyne, Anthony Gallucci as Executor of the Estate of Theresa Gallucci, Theresa's Variety Shoppe, Leroy Harrison, Ann Joseph, Abe Joseph, Ann's Collectibles at the Antique Galleries, Anthony Karrat, Anthony Karrat as Executor of the Estate of Lody Karrat, Anthony's, James R. Montana, Cheryl Ptak, Jeanette Roberts, Edith Serianni, Kirkland Seneca Antique Galleries, Randy Schaal as Trustee for the Bankruptcy of Edith Serianni, Heidi Werner, H.J.E. Realty, Inc., Melvin Bonsel, Dorothy Bonsel, M&D Bonsel, Dave Barrone and Clifford Fuel Co., Inc., Plaintiffs v. Town of Kirkland, Mark and David Strobino as Executors of the Estate of Louis Strobino, Mark and David Strobino as Executors of the Estate of Eleanor Strobino and Noel Strobino.

At oral argument on the instant motions, counsel for the parties and Noel Strobino, pro se, stipulated that the copy of the second amended complaint annexed to the moving papers of the Town of Kirkland would be considered the complaint in the consolidated action upon which the motions are based with the exception of claims related specifically to those brought by Melvin Bonsel, Dorothy Bonsel and M&D Bonsel, particularly because of the difference in geographic location of the real property involved in that action as compared to the location of the real property in the actions consolidated by letter decision and order dated February 26, 2003. The pleadings applicable to the "Bonsel" claims are included in both court exhibit 1 marked for identification on August 14, 2007 and court exhibit 31 marked for identification on August 29, 2007. The allegations in the second amended complaint filed by Melvin Bonsel and Dorothy Bonsel and M&D Bonsel are identical to those discussed below.

Plaintiffs' second amended complaint alleges that the various plaintiffs suffered damages arising from flooding in 2000 and 2001 to their property in the Town of Kirkland. The second amended complaint also alleges that defendants, the Estate of Louis Strobino and the Estate of Eleanor Strobino (hereinafter collectively referred to as the Strobino Estates), owned what is termed by plaintiffs as the "Clark Mills Dam" at the time of the 2000 and 2001 floods, and that subsequently ownership of the property on which the "dam" is located was transferred to defendant Noel Strobino. Although the second amended complaint incorrectly identifies the "dam" as being south of highway Route 5, other pleadings and documents submitted to the court indicate that the "Clark Mills Dam" is north of where highway Route 5 crosses Oriskany Creek. According to the second amended complaint, the "dam" was formerly used for supplying water power to a sawmill, grist mill and a factory "many decades ago," and said dam is in poor repair, dangerous and unsafe.

Plaintiffs' first cause of action alleges negligence against the defendant Town of Kirkland based upon the claim that the Town "assumed a duty and owed a special duty to inspect and maintain the Creek and the dam, to remove debris repair said dam, dredge the creek and otherwise." Plaintiffs' second cause of action also alleges negligence against the Town of Kirkland and appears to be identical to the first cause of action, except that it claims that the Town "failed to maintain the creek, the dykes, remove the debris from the Creek and around the dam, dredge the Creek and otherwise perform such acts as are required by law to prevent said Creek from flooding and obstructing Route 5 and the surrounding roads and was otherwise negligent." The third cause of action is one against the County of Oneida, which was discontinued by stipulation as indicated above. The fourth cause of action is styled as one alleging negligence against the Strobino Estates

based upon a claim that “defendants had a duty and assumed a duty and owed a special duty to remove or bypass said dam, to maintain the Creek and the dam, to remove debris and to repair said dam and were subject to the duties to the landowners upstream and downstream of said dam.” The fifth cause of action by plaintiffs is for “additional negligence of the dam owners” but appears to contain the same allegations as contained in the fourth cause of action against the Strobino Estates. The second amended complaint does not contain a sixth cause of action. The title given to the seventh cause of action is “The Abnormally Dangerous Condition, Use and Conduct against all Defendants” and apparently is based upon a claim that said dam is in an “abnormally dangerous condition.” The eighth cause of action alleges a “nuisance” claim of a private nuisance against all defendants. The ninth cause of action alleges a “claim for public nuisance against all defendants.” The tenth cause of action is a “claim for trespass to land against all defendants.” The eleventh cause of action is a “claim for trespass to chattels against all defendants.” The twelfth cause of action is against defendant Noel Strobino and seeks an injunction “requiring said Noel Strobino to commence taking the necessary steps to remove said dam, including permits etc. or in the alternative that restitution be made for the expenses of removing or bypassing the dam, an order be issued for removal or bypassing of said dam.”

The answer of defendant Town of Kirkland sets forth general denials and various affirmative defenses including the court’s lack of jurisdiction, failure to state a cause of action, immunity, acts of God and the acts of a third party over which the defendant Town of Kirkland had no control, statute of limitations, and failure to mitigate damages. The answer of the Strobino Estates alleges general denials and various affirmative defenses including failure to state a cause of action, statute

of limitations, assumption of risk by plaintiffs, lack of proximate cause, failure to mitigate damages, acts of God and/or acts of third parties over which defendants Strobino Estates had no control. The answer of defendant Noel Strobino alleges general denials and the affirmative defense that the “dam” “is not capable of contributing to the flooding problem in the Town of Kirkland.”

Before the court are a number of motions initiated by the filing of a notice of motion for summary judgment dated April 25, 2007, filed on April 26, 2007, whereby the Strobino Estates seek summary judgment dismissing plaintiffs’ complaint. For reasons which will become evident, it is necessary for the court to set forth the chronology of the filing of the various motions and documentation which accompanied each motion. The motion by the Strobino Estates was accompanied by the affirmation of Richard B. Long, Esq. dated April 20, 2007 to which are attached a number of exhibits including the affidavit of Richard R. Church sworn to on April 19, 2007, an engineer retained by the Strobino Estates in this matter, to which are also attached a number of exhibits.

On June 4, 2007, plaintiffs filed a notice of cross motion for “Partial Summary Judgment” to which is attached a document entitled “AFFIDAVIT IN SUPPORT OF OF [sic] MOTION CROSS MOTION FOR ORDER GRANTING PARTIAL SUMMARY JUDGMENT.” This document was signed by Woodruff Carroll, plaintiffs’ attorney, and is dated June 3, 2007. Although entitled an affidavit and containing the language “sworn to before me this 6/3/2007,” this document does not contain the signature of a notary public. The document also has thereon the handwritten note “the plaintiff hereby certifies the affidavit is true and accurate.” The document does not contain the language required by CPLR § 2106 as the affirmation of an attorney admitted to practice law.

Also submitted with the cross motion is a document entitled “REPLY TO MOTION FOR SUMMARY JUDGMENT OF THE ESTATES AND CROSS MOTION FOR SUMMARY JUDGMENT,” which includes a document apparently executed by Woodruff Carroll, Esq. stating that it is an “affidavit in support of my cross motion for summary judgment and in opposition to the motion of the defendant Strobino estates motion for summary judgment.” Although this document also contains an indication that it is intended to be an affidavit, there is no signature of a notary public acknowledging the signature of Carroll. While the document contains the statement “the undersigned certifies that the aforesaid are true and accurate to the best of his knowledge,” the document fails to qualify as an affirmation of an attorney admitted to practice law as set forth in CPLR § 2106. Attached to the papers is an affidavit of Theodore Hromadka, who apparently is an engineer hired as an expert by plaintiffs, which bears a copy of a signature of Mr. Hromadka and an original June 1, 2007 signature of Woodruff Carroll as the notary public who took the signature of Mr. Hromadka. The papers also contain a number of exhibits. In addition, the following documents were included but not directly attached to any other papers:

- Flood Insurance Study prepared by the Federal Energy Management Agency dated October 3, 1984;
- “Discussion of the Effects of Dam and Sediment Removal at NYS Route 5 over Oriskany Creek” dated October 22, 1998;
- “Discussion of the Potential Effects to Land and Property Downstream of the Flood Abatement Project” dated March 22, 1999;
- deposition of John Joseph Homburger held on April 18, 2006;
- deposition of John Harding held on May 2, 2006;
- deposition of Stephen Zywiak held on September 21, 2006;

- handwritten affidavit of Heidi Werner sworn to on a date that is illegible;
- the combined FEMA graph, “Oriskany” [sic] County map, old Clark Mills survey, old dam survey, and “J. Mawer” survey.

Defendant Noel Strobino submitted an affidavit in opposition to plaintiffs’ motion for partial summary judgment sworn to on August 2, 2007 with exhibits annexed thereto. At oral argument on August 14, 2007, counsel for plaintiffs stated that plaintiffs’ cross motion for partial summary judgment is directed against the Strobino Estates only, not Noel Strobino or the Town of Kirkland. Therefore, the court has not considered Noel Strobino’s August 2, 2007 affidavit on any of the motions.

The court notes that it was advised by the attorney for the Strobino Estates that no reply would be submitted because such defendants would rely upon their original motion papers.

Also on June 4, 2007, plaintiffs filed a cross motion to “strike the testimony of Richard Church or order a Frey hearing on the same.” This filing was accompanied by a document entitled “AFFIDAVIT IN SUPPORT OF OF [sic] MOTION CROSS MOTION FOR STRIKE THE TESTIMONY OF RICHARD CHURCH OR ORDER A FREY HEARING ON THE SAME.” The document bears the signature of Woodruff Carroll but does not contain the signature of a notary public. As with the other documents, this document also carries the following statement: “[t]he plaintiff certifies that the foregoing is true and accurate,” but otherwise does not contain the language necessary to qualify the document as an affirmation of an attorney admitted to practice law pursuant to CPLR § 2106. In response to the cross motion, Richard B. Long, Esq., on behalf of the Strobino

Estates, filed an affirmation in opposition dated June 12, 2007.

By filing dated June 27, 2007, defendant Noel Strobino, pro se, moved for summary judgment dismissing plaintiffs' second amended complaint. Accompanying the filing is the affidavit in support of the motion by Noel Strobino sworn to on June 27, 2007, with a number of exhibits attached thereto. In response thereto, plaintiffs filed a document entitled "AFFIDAVIT OF WOODRUFF LEE CARROLL IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF NOEL STROBINO," which is signed by Mr. Carroll and contains the legend "Sworn to before me this \_\_\_\_ day of August, 2007." It is not signed by a notary public. However, the document does contain the following language: "I hereby certify the above under penalties of perjury." Therefore, the court concludes that the document satisfies the requirements for an affirmation of an attorney admitted to practice law pursuant to CPLR § 2106.

At this time, the court shall dispose of a procedural issue raised by plaintiffs' attorney. Counsel objects to Noel Strobino's motion alleging that Mr. Strobino made a motion for summary judgment in the past and that he should not be allowed to make another one. By notice of motion dated November 30, 2004 Noel Strobino, pro se, moved for summary judgment against the plaintiffs who had asserted claims against him in the second amended complaint. By order of the court dated April 28, 2005, the Honorable John G. Ringrose, J.S.C. denied the motion without prejudice. As the motion was denied without prejudice, plaintiffs' attorney has no basis to object to the instant motion brought by Noel Strobino.

On June 28, 2007, the Town of Kirkland filed a cross motion for summary judgment seeking dismissal of plaintiffs' second amended complaint and denying plaintiffs' motion for partial

summary judgment. This filing is accompanied by the affidavit of J. William Savage, Esq., sworn to on June 28, 2007, which annexed thereto copies of the pleadings and copies of what appears to be all of the notices of claim filed by plaintiffs against the municipality. The motion is also accompanied by the affidavit of Annette Foley, sworn to on June 27, 2007. In response, on August 6, 2007 plaintiffs submitted an “AFFIDAVIT OF WOODRUFF LEE CARROLL IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT OF THE TOWN OF KIRKLAND” which is signed by Woodruff Carroll and contains the legend “Sworn to before me this \_\_\_\_ day of August, 2007.” It is not signed by a notary public. However, the document contains the following language: “I hereby certify the aforesaid under the penalties of perjury” and the court concludes that the document satisfies the requirements for an affirmation of an attorney admitted to practice law pursuant to CPLR § 2106. In reply, the Town of Kirkland submitted the affirmation of J. William Savage, Esq. dated August 13, 2007.

On August 7, 2007, the court and counsel for the other parties received from plaintiffs’ counsel a banker’s box of documents which, among other things, included the “affidavit” of plaintiffs’ counsel in opposition to the cross motion for summary judgment of the Town of Kirkland and the “affidavit” of plaintiffs’ counsel in opposition to the cross motion for summary judgment of Noel Strobino. The box also contained the following three motions:

1. cross motion for order allowing supplementation and amendment of all notices of claim to conform to the 2001 notices, the record to date, the latest amended complaint and to allow correction of any technical defects by said amendments;
2. cross motion to allow most recent Mawer survey and state dam inspection reports; and

3. cross motion for partial summary judgment on causation and summary judgment as to Werner and Bonsel claims against Noel Strobino.

Included within the box was a loose collection of documents which were not attached to any specific motion papers, including seventy-six photographs, six affidavits and, in addition, a copy of an affidavit of Theodore Hromadka II, notarized in the State of New York by Woodruff L. Carroll on August 4, 2007. Also included were copies of easements, deeds and minutes of the Town of Kirkland Board, and the deposition transcripts of a number of individuals. Also included in the box was the affidavit of D. L. Mowers dated July 29, 2007, which contains what appears to be a copy of a signature of Mr. Mowers and the August 3, 2007 original signature of Woodruff Lee Carroll acting as notary public. The box of documents contained various other maps and documents apparently relating to the flooding situation. On August 8, 2007 the court received a letter dated August 7, 2007 from the attorney for the plaintiffs which included copies of the deposition transcripts of Mark Strobino, Noel Strobino and David Strobino, with the explanation that the document submission was delayed as the office copier was out of order. Also included in this submission was an original affidavit of Theodore V. Hromadka notarized in the State of New York by Woodruff L. Carroll on August 4, 2007.

On August 10, 2007 the court received a motion of the plaintiffs filed on August 9, 2007 entitled:

“NOTICE OF CROSS MOTION BY PLAINTIFF [sic] TO HAVE THE ANSWERING PAPERS TO NOEL STROBINO’S MOTION FOR SUMMARY JUDGMENT ALSO BE ALLOWED AS THE ANSWERING PAPERS TO THE MOTION FOR SUMMARY JUDGMENT BY THE STROBINO ESTATES IN SO FAR AS THEY APPLY TO THE CHURCH

AFFIDAVIT AND TO ALLOW ALL PARTIES IN LIGHT OF THE COMPLEXITY OF THE MATTERS TO SUBMIT FURTHER PROOF, PLEADINGS AND MEMORANDUMS FOR A REASONABLY AGREEABLE TIME AFTER HEARING.”

The cross motion was accompanied by the affidavit of Woodruff Lee Carroll, which is sworn to on August 9, 2007 and signed by a notary public. The motion was also accompanied by a third affidavit of Theodore V. Hromadka, this one being sworn on August 4, 2007 and containing the signature of a notary public in the State of California. In response to the motion, on August 13, 2007 the court received the affirmation of Richard B. Long, Esq. on behalf of the Strobino Estates.

Also, on August 10, 2007, defendant Noel Strobino delivered a letter to the court in which he formally objected to the documents which were notarized by Woodruff Lee Carroll, attorney for plaintiffs, for affiants who were not present when the documents were notarized. This objection relates to the following affidavits: the affidavit of Paul H. Griggs dated July 5, 2007 and notarized by Woodruff Lee Carroll on August 3, 2007; two of the affidavits of Theodore V. Hromadka, one notarized by Woodruff Lee Carroll on June 1, 2007 and one notarized by Woodruff Lee Carroll on August 4, 2007; and the affidavit of Dennis L. Mowers notarized by Woodruff Lee Carroll on August 3, 2007.

The return date for all motions was scheduled by the court for August 14, 2007. At that time, the court made an attempt with counsel for the various parties to clarify the various submissions in order to establish which documents were being submitted in response to the various motions. At that time, the court inquired of Mr. Carroll whether or not he had signed the Hromadka and Mowers affidavits without the presence of either of the indicated individuals. Mr. Carroll admitted that he

had signed the Hromadka affidavits of June 1, 2007 and August 4, 2007, in New York, while Mr. Hromadka was in California. He also admitted that he signed the affidavit of Dennis L. Mowers on August 3, 2007 when Mr. Mowers was not in his presence.

The initial issue presented on the motion for summary judgment brought by the Strobino Estates is what documents will be considered by the court in light of the manner of execution of the documents and the manner that the documents were presented to the court. Defendants object to the court considering one or more of the affidavits of Theodore Hromadka submitted by the plaintiffs: (1) because two of the affidavits of Hromadka were improperly signed by plaintiffs' counsel as a notary public and (2) because the affidavits sworn to on August 4, 2007 were not timely or appropriate submissions. As indicated above, counsel for plaintiffs has admitted that the affiant, Mr. Hromadka, was not in his presence when he signed them as a notary public. The guidelines for notaries public issued by the Secretary of State contain the following:

“The practice of taking acknowledgments and affidavits over the telephone, or otherwise, without the actual, personal appearance of the individual making the acknowledgment or affidavit before the officiating notary, is illegal. The attention of all notaries public is called to the following judicial declarations concerning such misconduct: ‘The court again wishes to express its condemnation of the acts of notaries taking acknowledgments or affidavits without the presence of the party whose acknowledgment is taken for the affiant and that it will treat serious professional misconduct the act of any notary thus violating his official duty.’ (*Matter of Napolis*, 169 App. Div. 469, 472).”

Based upon these guidelines, the conduct of plaintiffs' attorney is improper and may be a violation of Executive Law § 135-a (2). However, there is no claim by the defendants that the signature of Theodore Hromadka is not genuine. Therefore, to avoid undue prejudice to the plaintiffs by the

conduct of plaintiffs' counsel, the court will consider the affidavit of Theodore Hromadka "sworn to on" June 1, 2007 in connection with appropriate motions.

As indicated above, plaintiffs' attorney has submitted two additional affidavits of Theodore Hromadka, both "sworn to" on August 4, 2007, one in New York by plaintiffs' attorney acting as notary public and the other in California. These affidavits are identical to the affidavit of June 1, 2007 except that there have been added three additional pages consisting of five numbered paragraphs and "conclusions." A copy of the "New York" affidavit was included in the box of documents delivered to the court on August 7, 2007 and the original "New York" affidavit was submitted to the court by letter received on August 8, 2007. The "California" affidavit was attached to plaintiffs' motion filed on August 9, 2007 and received by the court on August 10, 2007. The Strobino Estates object to the court's receipt of these two affidavits on the basis that the submissions of the Hromadka affidavits, with the additional language included, is in effect a sur-reply to the Strobino Estates' motion for which no permission was requested, and is an attempt by counsel for plaintiffs to supplement its original opposition to the motion by the Strobino Estates' for summary judgment. The court concludes that the submission of the two affidavits of Mr. Hromadka containing additional statements and information are in violation of the provisions of CPLR § 2214, which provides only for notice of motion and supporting affidavits, answering affidavits, and reply affidavits. Plaintiffs submitted answering papers (denominated a "reply") to the Strobino Estates' motion for summary judgment which included the affidavit of Mr. Hromadka "sworn" to on June 1, 2007. It is not appropriate to submit additional affidavits from the same person with additional information without permission of the court. Furthermore, the filing of the "California" affidavit

with the court on August 10, 2007 for a motion returnable on August 14, 2007 is not timely, in violation of CPLR § 2214 (b). Therefore, the court will not consider the two affidavits of Mr. Hromadka which are “sworn to” on August 4, 2007.

Because of common issues, the court will consider together the motion by the Strobino Estates for summary judgment against the plaintiffs and the motion by Noel Strobino for summary judgment against the plaintiffs remaining in the action against him and will refer to these defendants as the Strobino defendants. Both motions deny allegations that the “Clark Mills Dam” has caused and will continue to cause damage to the property of plaintiffs.

In connection with the motions of these defendants, the court will consider the documents and materials submitted by the Strobino Estates indicated above, the affidavit in support of summary judgment of Noel Strobino sworn to on June 27, 2007 and the exhibits annexed thereto. Because of the haphazard manner by which the plaintiffs have submitted documents and materials to the court, it is difficult for the court and counsel for the other parties to determine exactly what submissions should be considered in connection with these motions for summary judgment. The court will consider the documents attached to “REPLY TO MOTION FOR SUMMARY JUDGMENT OF THE ESTATES AND CROSS-MOTION FOR SUMMARY JUDGMENT” indicated above. The parties have stipulated that a certain video tape apparently taken by the police department of the Town of Kirkland, which was marked as court’s exhibit 2 at oral argument, be accepted by the court as part of the record. In addition, the court ruled at oral argument that a certain New York State dam inspection marked as exhibit 4 and the revised topical survey of Mowers dated June 21, 2007 (court’s exhibit 28) be considered part of the record. However, the court will not consider the

undated “affidavit” of Woodruff Carroll, apparently signed by Mr. Carroll, and annexed to “REPLY TO MOTION FOR SUMMARY JUDGMENT OF THE ESTATES AND CROSS MOTION FOR SUMMARY JUDGMENT.” As noted above, this document does not qualify as an affidavit because it does not contain the signature of a notary public and is not an affirmation of an attorney admitted to practice because it does not include the language required by CPLR § 2106. The court will consider as part of the record the undated “AFFIDAVIT OF WOODRUFF LEE CARROLL IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF NOEL STROBINO,” on the basis that this document satisfies the affirmation requirements of CPLR § 2106. In order to avoid prejudice to plaintiffs, the court will consider the following documents and materials based upon the reference to them by the affidavit of Theodore Hromadka sworn to on June 1, 2007:

- deposition of Melvin Bonsel held on May 10, 2005 and May 11, 2005 (court’s exhibit 22);
- deposition of Abraham Joseph held on February 9, 2005 and February 22, 2005 (court’s exhibit 19); and
- affidavit of Heidi Werner sworn to on August 3, 2007 (court’s exhibit 5).

At issue in the plaintiffs’ claims against the Strobino defendants is a structure located in Oriskany Creek in an area where the Strobino defendants, at various times, were the owners of the land abutting the creek in that area. The record contains evidence that the structure, or a similar structure, has existed in that area as early as 1874 and that the current structure was in existence in 1915. While the structure has been referred to as the “Clark Mills Dam” it has been identified in the record as the “Strobino Dam,” a “spillway,” and a “diversion dam.” The record indicates that the

structure is not a dam in the commonly accepted sense of that word, because it does not fully block or impound water flowing in Oriskany Creek. Instead, the structure consists of a low barrier across the creek, which has served to divert water into a narrow canal where the water was used to turn a water wheel to provide power for a mill or factory located adjacent to the canal. Construction of the structure is such that water continues to flow over the barrier at all times, with a portion of the water being diverted into the canal. For purposes of consistency, the structure will be referred to as the “Clark Mills Dam.”

The Clark Mills Dam is located downstream from plaintiffs’ property. In this area, Oriskany Creek flows from south to north. Therefore, the Clark Mills Dam is north of Route 5 and the property belonging to plaintiffs. It is undisputed that, in the area near where Oriskany Creek crosses highway Route 5, significant flooding has occurred for many decades.

With respect to the Strobino defendants, the second amended complaint alleges that in the spring and summer of 2000 and 2001 water repeatedly overflowed the banks of Oriskany Creek, flowing into property located in the Town of Kirkland. Plaintiffs allege that the dam is in poor repair in that water is leaking through it due to wash out, erosion and scouring. Also, plaintiffs allege that

“the area behind the dam has silted up and filled with sediment and been silted up and filed [sic] with sediment and debris for many years and is causing various hydrologic effects in the creek that are causing the creek to accumulate sediment upstream for a substantial distance, displacing the water that would normally be within the creek bed and causing the flooding. Said silting/ sedimentation/flooding has been and is substantially aggravated and worsened by the debris that is collecting around the sluice ways and openings in the said dam and the creek bed itself in shallow places.”

The second amended complaint concludes that the hydrologic effects caused by the dam over time

are the cause of the flooding and damage to the property of plaintiffs.

The Strobino defendants seek to dismiss plaintiffs' second amended complaint as to them on the basis that the Clark Mills Dam is not the proximate cause of the damage caused by the flooding in the years 2000 and 2001. The moving papers of the Strobino defendants have limited their claim for summary judgment to the issue of proximate cause. The court notes that such defendants have not specifically raised an issue concerning the scope of duty owed by such defendants to the plaintiffs. Accordingly, the court has not considered the issue of whether the defendants owed a duty to plaintiffs under the facts and circumstances alleged by plaintiffs in this case.

Defendants rely upon the affidavit of Richard R. Church sworn to on April 19, 2007 and the underlying information and observations of defendant Noel Strobino, the testimony of a hydrologist from the New York State Department of Transportation, John Harding, and an engineer of the New York State Department of Transportation, Stephen Zywiak. Church was retained by the Strobino Estates in 2002 to determine the cause of the flooding and to determine what role, if any, the Clark Mills Dam played in the flooding. His resume is attached to his affidavit and indicates that he has had extensive training and experience in river and stream hydrology and hydraulics, stream flow analysis, and design, construction and maintenance of hydraulic structures. Plaintiffs have not challenged Mr. Church's qualifications to render an expert opinion. The Church affidavit which incorporates his report or "Engineering Work Product" concludes that

“[b]ased upon [his] knowledge and experience with glaciated stream basins and alluvial fans (basins), [his] field investigations, [his] review and analysis of the NRCS contour maps, [his] review of aerial photographs of flooding at different dates, [his] review of EBT

depositions, and [his] analysis of flood water surface profiles, it is [his] opinion with engineering certainty that the flooding of Rte. 5, and the portions of the Bonsel golf course was caused by overflow of flood water from the alluvial fan and braided stream area located 6,400 feet to 8,100 feet upstream of the dam and 3,300 to 5,000 feet upstream of Rte. 5.”

He also states with “complete certainty that the dam does not cause sedimentation in Oriskany Creek upstream of the dam nor is there any sediment behind the dam . . . that the water surface immediately behind the dam has no effect on the water surface” in the vicinity of Rte. 5 and that to “a reasonable degree of engineering certainty . . . the dam is stable and not in any danger of structural failure or any danger to downstream property owners.”

The affidavit of Richard R. Church sets forth the materials he reviewed and the tools he used to conduct his study, including the following:

1. documents pertaining to the flooding conditions in the Town of Kirkland produced by state, federal and local public agencies;
2. survey contour maps produced by a federal agency for use in evaluating flooding in the Oriskany Creek watershed;
3. the contour maps and ground elevations were used in conjunction with a computer program entitled “HES RAS River Analysis System” which allowed him to analyze flood water elevations and water surface profiles in the Oriskany Creek;
4. subsurface soil information obtained by the New York State Department of Transportation;
5. the deposition testimony of several individuals, including Noel Strobino, Steve Zywiak, John Harding and John Homburger;
6. visits to the Oriskany Creek water shed basins for a full day on four occasions;
7. investigation of details of the log jam of 2000;

8. FEMA flood study maps dated 1984;
9. various photographs; and
10. all current environmental, federal and state laws concerning procedures and permits for flood control projects.

According to Church, based upon these resources, he prepared what he has termed an “Engineering Work Product” which contains the detailed analysis of his findings and conclusions indicated above. A significant part of the Church analysis is based upon his conclusion that the property at issue in the area in the Town of Kirkland near Route 5, which has historically flooded, is located in what is termed an “alluvial basin.” His definition of that is a “stream location where suspended stream material, such as rock, gravel, sand, silt and wood float debris, is deposited because of flatter channel grades and slower water velocities.” This basin is approximately 6,400 to 8,100 feet upstream of the dam and 3,300 to 5,000 feet upstream of Route 5. He concludes that “Kirkland and Rte. 5 are located within a historic, in geologic time, and continuously active alluvial deposition area. Consequently that area is continuously subject to flooding.” Essentially, his opinion is that deposition of sediment is caused when a steeper upstream grade naturally becomes flatter, and creates the alluvial fan over a long period of time, by repeated storms and deposits. In the present case, the steeper upstream grade is in the opposite direction from the plaintiffs’ property from the Clark Mills Dam. With regard to the Clark Mills Dam, Church notes that it was built prior to 1917 for the purpose of diversion of water for mill operation and is not a flood control or flood retention dam. According to Church, the dam is no longer operational and lacks its original control gates, and has four outlets. He states that the condition of the dam allows a continuous flushing of sediment

providing no opportunity for sediment and gravel to accumulate behind the dam or upstream of the dam. The “Engineering Work Product” or report attached to the Church affidavit contains a separate analysis with regard to the claims by Melvin and Dorothy Bonsel, the owners of a golf course at the time of the 2000 and 2001 floods. According to Church, this property is somewhat distinct from the property of other plaintiffs because of its location, existence of a man-made ditch, and the presence of a “brook” which flows near the golf course which has an additional effect.

In addition to the affidavit of its experts, the Strobino Estates submit in support of its position the deposition testimony of three state officials and Noel Strobino. An environmental analyst employed by the New York State Department of Environmental Conservation testified at his deposition that a federal flood study done in 1998 concluded with alternative plans for solving the flooding problem in Kirkland but contained no finding that the Clark Mills Dam was the cause of flooding or a recommendation that the dam be removed. Stephen Zywiak, an engineer with the New York State Department of Transportation, testified that, in his opinion, the cause of the flooding in 2000 and 2001 was due to the fact that the location is in a flood plain and the only other factors that contributed to this cause are rainfall and snow melting. Defendant Noel Strobino, at his deposition, testified that he had a lifetime of familiarity with Oriskany Creek and observed the creek’s conditions by walking the banks between the Clark Mills Dam and the Route 5 bridge over the creek at least 100 times. While a college student, he performed geological field studies of the creek. Mr. Strobino observed the log jam that existed in 2000 and noted that portions of it forced the water of the creek out of its banks but there was no causal relationship between the “spillway” and the creation of the log jam. Mr. Strobino gave an opinion that the Clark Mills Dam had nothing to do with the flooding

episodes in the Town of Kirkland and that the cause of the flooding was due to the fact that the area in question was located in a designated flood plain, and all of the plaintiffs are located within the boundaries of that designated flood plain. At the deposition, plaintiffs' counsel asked Mr. Strobino if he had an opinion as to whether or not there has been a deposition of sediment in an area behind the dam over time. He replied "no" because the Clark Mills Dam or spillway is designed to facilitate a rapid flow of water at all times around the back of the spillway. He stated that it is a self-cleaning device and when the top of the spillway becomes choked with debris or branches, the water level rises automatically and flushes the debris away from the dam.

The Strobino Estates and plaintiffs included the reports of John Harding prepared in 1998 and 1999, respectively, indicated above, in support of their respective positions. The 1998 document contains the following conclusion "[w]ith dam and sediment removal the creek will revert to nearly original conditions over the shortest period of time and afford the greatest improvement to current flooding conditions associated with the higher probability storms (two year storms, five year storms, etc.)." The report also notes that "[l]ittle affect will be afforded by the proposed dredging and dam removal work for the larger flooding events associated with low probability storms." The 1999 document states that

“[t]he creek flows into and out of the dam impoundment with minimal flow retarding effects provided by the dam structure. During moderate and lesser flows, the greater water stays within the banks of the channel and passes through the impoundment area. For flows greater than moderate, a percentage of flooding by passes the dam structure. The percentage of the flow that by passes the dam increases as flood levels rise, to the point where the dam has negligible influence on flood levels.”

A portion of the deposition of Mr. Harding is set forth in the papers submitted by the Strobino

Estates. At his deposition, it was noted that his proposal regarding removal of the Clark Mills Dam and dredging of the creek was rejected by the New York State Department of Transportation. He also noted that the proposal includes a water surface elevation chart which states that even if the creek were dredged from the dam to 100 feet upstream of the bridge, either at a depth of two feet or four feet, there would be no difference in the water surface elevation if the dam was removed or if it was left in place. Mr. Harding stated that he did not see a correlation between the log jam of 2000 and the Clark Mills Dam because the location of the log jam was upstream of the dam. In connection with the studies done by Mr. Harding, Mr. Zywiak testified that at one point a decision was made not to remove the Clark Mills Dam or the sediment because there would not be a significant improvement in the vicinity of the Route 5 bridge. Mr. Zywiak stated that “even removing the dam down to the lower elevation, the bridge site was so far back from the channel that gradient of the slope, the bottom of the channel would not have been impacted back at the bridge.”

Defendant Noel Strobino in support of his motion for summary judgment has submitted an extensive affidavit in which he refers to the Church affidavit and includes photographs and a detailed narrative concerning the history of the Clark Mills Dam and the flooding in the vicinity of plaintiffs’ property. Concerning the log jam, he states that in the spring and summer of 2000 and 2001, a huge log jam, several hundred feet in length and bordered on the creek, approximately 3,000 feet upstream from the Route 5 bridge, caused the waters of the creek to overflow and be diverted to the east and west over several thousand feet out of the channel and then rejoin the creek at points downstream. He stated that he personally witnessed the diversion of the creek by the log jam and included photographs to show the direction in which the creek was diverted. Mr. Strobino conducted several

measurements and observation of the physical characteristics of the stream and the Clark Mills Dam. He concludes from these studies “that a clear, wide, deep and open stream channel, free from any obstruction to flow exists directly upstream” from the Clark Mills Dam. He also observed the existence of a deteriorated earthen dam approximately 2,500 feet upstream or south of the Route 5 bridge, which coincides with the site of one of the major log jams, and that the earthen dam completely blocked the flow of the creek and that its existence had a marked effect on the present day flow of the creek.

In opposition to the motions by the Strobino defendants, plaintiffs rely upon the affidavit of Theodore V. Hromadka. It states that he is an expert in the field of surface water hydrology and includes his resume which shows that he has extensive experience as a certified professional hydrologist, a licensed civil engineer, and a licensed “geoscientist.” His analysis, as indicated by the affidavit, is that the Clark Mills Dam slowed the flow of water in the creek causing sediment to deposit in the channel. In turn, the deposition of sediment raises the level of the bottom of the creek which flattens the channel bottom of the water course. He states that this process has been occurring since the installation of the dam structure in the water course. His affidavit indicates that he visited the creek, observed sediment build up behind the dam, and reviewed photographs of the area. Mr. Hromadka refers to an 1874 survey map, the deposition testimony of Melvin Bonsel, Abraham Joseph and Heidi Werner and the 1984 study of the federal agency which established that the properties in question are in a designated flood plain. There is no indication from the affidavit that Hromadka conducted any specific tests or measurements to analyze the cause of the flooding. His affidavit concludes that the dam structure was a substantial factor and proximate cause of the

flooding which is the subject of plaintiffs' complaint.

The affidavit of Abraham Joseph attached to plaintiffs' papers contains the statement that the creek had filled up with sediment over the years. The affidavit of Heidi Werner contains the statement that she has observed sediment in the creek north of the bridge. The Bonsel affidavit states that there is sedimentation at the bridge but does not state what caused this sedimentation.

Plaintiffs have included in their moving papers an assessment prepared by the "Soil Conservation Service" which consists of a document which is unsigned and contains the statement that the dam upstream from the Route 5 bridge is contributing to the depth and length of sediment such that an analysis of the impact is being done. The document sets forth several alternative solutions to the flooding problem, all of which involve the construction of structures in the creek upstream from the Route 5 bridge but makes no mention of removal or other action with regard to the Clark Mills Dam.

The claims of plaintiffs are based upon a theory that sediment filled the channel and that the accumulation of sediment is the cause of the flooding which occurred in the years presented. The Strobino defendants have set forth the analysis of its expert and other proof to establish that, while there may have been accumulation of sediment, it was not caused by the Clark Mills Dam, but by the characteristics of the creek in the vicinity of the properties of the plaintiffs. The position of the Strobino defendants is supported by the evidence of its qualified expert, Richard R. Church, the observations of defendant Noel Strobino, and the other studies and conclusions included in the papers of such defendants. The Strobino defendants have established a prima facie showing that, as a matter of law, the existence of the structure or dam located in the creek adjacent to the property

of the Strobino defendants is not the cause of the flooding of plaintiffs' property in 2000 and 2001, and that there is no question of fact with regard to such causation.

Once a moving party establishes such a prima facie case, it is then incumbent upon the non-moving party to come forward with proof in evidentiary form to establish the existence of a question of fact. (*See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) In the present case, the court concludes that plaintiffs have failed to sustain the burden and present sufficient evidence to establish a question of fact. Plaintiffs necessarily rely upon the opinion of their expert which is contained in the Hromadka affidavit sworn to on June 1, 2007. While the affidavit of the expert contains opinions and conclusions, there is no factual basis provided upon which the conclusions and opinions are based. The record established that the expert did not conduct any independent investigation or scientific testing or analysis of the conditions of Oriskany Creek in the vicinity of the Route 5 bridge. Further, the affidavit of the expert does not contain any mention of the Church affidavit and other documentation submitted by the Strobino defendants in support of their motions. Conflicting expert opinions often create a question of fact and credibility for a jury. An expert opinion that is unsubstantiated and speculative and lacking an evidentiary basis does not create such a triable issue of fact. (*See Lynn G v Hugo*, 96 NY2d 306, 310 [2001].)

It is undisputed in the record that flooding in the area of plaintiffs' property has been occurring over many decades. The record contains several causes of the flooding including rainfall, melting snow and log jams, none of which have any relationship to the existence of the Clark Mills Dam. Common sense dictates that a stream that flows over earth will naturally cause silt and sediment to be carried with it and be carried downstream. The best example is the Mississippi River

and the “delta” that has been formed at the mouth of the river where it meets the Gulf of Mexico. Downstream riparian owners cannot be held liable for the accumulation of sediment because the accumulation of sediment over time occurs naturally. It is pure speculation to conclude that the structure adjacent to the Strobino property caused the entire amount of sediment to collect, and the degree to which it contributed to the accumulation of sediment is pure speculation. Accordingly, plaintiffs’ have failed, as a matter of law, to sustain the burden of establishing a question of fact with respect to the issue of causation of the flooding in the years 2000 and 2001. Therefore, the court finds that defendant Strobino Estates and defendant Noel Strobino are entitled to summary judgment against plaintiffs dismissing their second amended complaint in its entirety as to such defendants and are further entitled to dismissal of any cross claims asserted by the co-defendants.

With regard to defendant Town of Kirkland, plaintiffs’ second amended complaint alleges causes of action for negligence, private nuisance, public nuisance and trespass, based upon claims by plaintiffs that the Town assumed a duty and owed a special duty to inspect and maintain the creek and the “dam,” to remove debris and to remove and repair said “dam,” dredge the creek and otherwise. The causes of action are based upon the claim by plaintiffs that the Town failed to act or perform duties to the plaintiffs with regard to the flooding conditions. The Town of Kirkland moves for summary judgment to dismiss plaintiffs’ second amended complaint based upon its contention that it has no duty to plaintiffs to take affirmative acts with regard to Oriskany Creek and the conditions causing flooding of plaintiffs’ property. The affirmation of Woodruff Carroll, attorney for the plaintiffs, asserts that the Town assumed a duty to maintain the creek by virtue of it passing resolutions, purchasing easements and performing maintenance on Oriskany Creek in years

prior to 2000. It is undisputed that the Town had acquired certain easements and has, in years prior to 2000, taken action to remove log jams along the creek.

The Town of Kirkland has met its burden of establishing that it had no special relationship with plaintiffs and plaintiffs have failed to raise an issue of fact for trial. Under this theory, a municipality has no liability to a resident unless a special relationship exists. Such a relationship

“exists only where the municipality has violated a duty commanded by a statute enacted for the special benefit of particular persons, where it has voluntarily assumed a duty that was justifiably relied upon by those who benefitted therefrom, or where it has assumed positive direction and control under circumstances in which a known, blatant and dangerous safety violation exists.”

(*See Davis v County of Onondaga*, 31 AD3d 1156, 1157 [4<sup>th</sup> Dept 2006].) In the absence of a special duty owed by the Town of Kirkland to plaintiffs, plaintiffs’ causes of action against the Town are insufficient as a matter of law.

Also, there is no indication from the record that plaintiffs are making a claim that they suffered damage as a result of affirmative acts on the part of the Town of Kirkland.

*Goldstein v County of Monroe* (77 AD2d 232, 235 [4<sup>th</sup> Dept 1980]) states the following:

“[i]t is clear that before liability can be imposed on a municipality performing a governmental function there must be an affirmative act which either causes or sets in motion a chain of events leading to the injury (*Schuster v City of New York*, 5 NY2d 75; *Dunham v Village of Canisteo*, 303 NY 498). Further, a municipal corporation is not liable for failure to restrain waters between banks of a creek or keep a channel free from obstructions it did not cause (*O’Donnell v City of Syracuse*, 184 NY 1; *Coonley v City of Albany*, 132 NY 145; *Seaman v Mayor, Aldermen & Commonalty City of N.Y.*, 80 NY 239).”

*See also Office Park Corp. v Onondaga County*, 64 AD2d 252, 258 [4<sup>th</sup> Dept 1978].

In conclusion, defendant Town of Kirkland is entitled to an order granting its cross motion

for summary judgment dismissing plaintiffs' claims and any cross claims asserted against it.

Plaintiffs also assert a cause of action for trespass against the defendants. However, they have failed to make a showing that the water flowing down Oriskany Creek is somehow under the control of any of the defendants. Trespass is an intentional harm, at least to this extent:

“while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does or which he does so negligently as to amount to willfulness” (citations omitted).

(See *Phillips v Sun Oil Co.*, 307 NY 328, 331 [1954].) In these motions for summary judgment, plaintiffs have failed to demonstrate these necessary elements to establish a case in trespass.

Plaintiffs also assert a claim of public and private nuisance. There is no evidence in the record to show that the flooding was caused by the negligence or intentional conduct of any of the defendants, a necessary element in a cause of action for a private nuisance. (See *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564 [1977].) Likewise, the plaintiffs' cause of action for public nuisance must fail in the absence of a showing by plaintiffs that any of the defendants are responsible for the flooding which affects plaintiffs or other persons in the vicinity of Oriskany Creek. The flooding has been caused by forces of nature and not the acts or omissions of third parties.

As a result of the decision of the court, it is not necessary to discuss in detail the remaining motions and cross motions filed by plaintiffs, as those motions and cross motions have necessarily been determined herein.

**NOW**, therefore, based on the foregoing, it is hereby

**ORDERED** that the motion for summary judgment brought by Mark and David Strobino, as Executors of the Estate of Louis Strobino, and Mark and David Strobino, as Executors of the Estate of Eleanor Strobino, is hereby granted; and it is further

**ORDERED** that the cross motion for partial judgment filed by the plaintiffs against Mark and David Strobino, as Executors of the Estate of Louis Strobino, and Mark and David Strobino, as Executors of the Estate of Eleanor Strobino, is hereby denied; and it is further

**ORDERED** that plaintiffs' motion seeking to strike the testimony of Richard Church or order a Frey hearing on the same is hereby denied; and it is further

**ORDERED** that the motion for summary judgment brought by defendant Noel Strobino is hereby granted; and it is further

**ORDERED** that the cross motion for summary judgment brought by defendant Town of Kirkland is hereby granted; and it is further

**ORDERED** that plaintiffs' cross motion for order allowing supplementation and amending of all notices of claim to conform to the 2001 notices, the record to date, the latest amended complaint, and to allow correction of any technical defects by said amendments is hereby denied; and it is further

**ORDERED** that plaintiffs' cross motion to allow the most recent Mawer survey and dam inspection reports is hereby granted; and it is further

**ORDERED** that the cross motion for partial summary judgment on causation and summary judgment as to Werner and Bonsel claims against defendant Noel Strobino is hereby dismissed; and

it is further

**ORDERED** that plaintiffs' cross motion for an order to have the answering papers to Noel Strobino's motion for summary judgment also be allowed as the answering papers to the motion for summary judgment by the Strobino Estates insofar as they apply to the Church affidavit and to allow all parties in light of the complexity of the matters to submit further proof, pleadings and memorandums for a reasonably agreeable time after hearing is hereby denied; and it is further

**ORDERED AND ADJUDGED** that the action of "Eugenia Anderson and Anderson's Attic v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;" Index No. 2001-0311; RJI No. 32-01-0153, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of "Ellen Carroll, Carroll's Collectibles v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;" Index No. 2000-2425; RJI No. 32-00-1252, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of "Bradley M. Czerkies, Sr., Precision Unlimited Car Care v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;" Index No. 2001-0310; RJI No. 32-01-0157, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of "Joseph F. Dispirito and Cyberdyne v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;" Index No. 2001-00406; RJI No. 32-01-0192, is

hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Theresa Gallucci, Theresa’s Variety Shoppe v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2432; RJI No. 32-00-1273, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Mary Harrison [and] Leroy Harrison v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2001-00309; RJI No. 32-01-0143, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Ann Joseph, Abe Joseph, Ann’s Collectibles at the Antique Galleries v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2423; RJI No. 32-00-1232, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Anthony Karrat, Lody Karrat, Anthony’s v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2429; RJI No. 32-00-1263, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “James R. Montana v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2424; RJI No. 32-00-1246, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that in the action of “Cheryl Ptak v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2427; RJI No. 32-00-1258, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Jeanette Roberts v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2426; RJI No. 32-00-1256, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Edith Serianni, Kirkland Seneca Antique Galleries, Randy Schaal as Trustee for the Bankruptcy of Edith Serianni v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2000-2430; RJI No. 32-00-1242, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Heidi Werner, H.J.E. Realty, Inc. v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Eleanor Strobino, Village of Clinton;” Index No. 2001-0308; RJI No. 32-01-0150, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that the action of “Melvin Bonsel, Dorothy Bonsel and M&D Bonsel v. Town of Kirkland, County of Oneida, Mark and David Strobino, as Executors of the Estate of Louis Strobino, Mark and David Strobino, as Executors of the Estate of Eleanor Strobino, and Noel Strobino;” Index No. 2002-001653; RJI No. 32-03-0943, is hereby dismissed;

and it is further

**ORDERED AND ADJUDGED** that the action of “Dave Barrone and Clifford Fuel Co., Inc. v. Town of Kirkland, County of Oneida, Eleanor Strobino, Mark and David Strobino, as Executors of the Estate of Louis Strobino;” Index No. 2002-1700; RJI No. 32-07-0141, is hereby dismissed; and it is further

**ORDERED AND ADJUDGED** that all claims in the consolidated action of “Eugenia Anderson, Anderson’s Attic, Barbara Mazur as Executor of the Estate of Ellen Carroll, Carroll’s Collectibles, Bradley M. Czerkies, Sr., Precision Unlimited Car Care, Joseph F. Dispirito, Cyberdyne, Anthony Gallucci as Executor of the Estate of Theresa Gallucci, Theresa’s Variety Shoppe, Leroy Harrison, Ann Joseph, Abe Joseph, Ann’s Collectibles at the Antique Galleries, Anthony Karrat, Anthony Karrat as Executor of the Estate of Lody Karrat, Anthony’s, James R. Montana, Cheryl Ptak, Jeanette Roberts, Edith Serianni, Kirkland Seneca Antique Galleries, Randy Schaal as Trustee for the Bankruptcy of Edith Serianni, Heidi Werner, H.J.E. Realty, Inc., Melvin Bonsel, Dorothy Bonsel, M&D Bonsel, Dave Barrone and Clifford Fuel Co., Inc., Plaintiffs v. Town of Kirkland, Mark and David Strobino as Executors of the Estate of Louis Strobino, Mark and David Strobino as Executors of the Estate of Eleanor Strobino and Noel Strobino;” Index No. 01-0311, RJI No. RS-01-0153, are hereby dismissed insofar as they may be different than as set forth above; and it is further

**ORDERED** that a copy of this decision, order and judgment shall be filed in each of the above-captioned actions; and it is further

**ORDERED** that defendant Town of Kirkland’s counsel shall file this decision, order and

judgment, together with the underlying documentation, with the Oneida County Clerk's office within ten days of the date of this decision, order and judgment, and shall serve a copy of the filed decision, order and judgment upon all counsel and defendant Noel Strobino, pro se, with notice of entry thereon, within ten days of the date of filing.

The foregoing constitutes the **Decision, Order and Judgment** of the court.

**E N T E R.**

Dated: November 2, 2007  
at Rome, New York.

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Hon. Samuel D. Hester  
Justice of the Supreme Court