

<b>Siewert v Greater Atlantic Beach Water Reclamation Dist.</b>
2009 NY Slip Op 30134(U)
January 9, 2009
Supreme Court, Nassau County
Docket Number: 3507/06
Judge: William R. LaMarca
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## SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA  
Justice

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DAVID W. SIEWERT,  
Plaintiff,  
-against-  
GREATER ATLANTIC BEACH WATER  
RECLAMATION DISTRICT,  
Defendant.

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INDEX NO: 3507/06  
Action #1

FRANK LIVECHI,  
Plaintiff,  
-against-  
THE ATLANTIC BEACH SEWER DISTRICT and  
THE GREATER ATLANTIC BEACH WATER  
RECLAMATION DISTRICT,  
Defendants.

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INDEX NO: 16433/06  
Action #2

ANN MARIE H. WALSH and JOHN F. WALSH,  
Plaintiffs,  
-against-  
THE TOWN OF HEMPSTEAD, THE  
INCORPORATED VILLAGE OF ATLANTIC  
BEACH SEWER DISTRICT and THE GREATER  
ATLANTIC BEACH WATER RECLAMATION  
DISTRICT,  
Defendants.

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INDEX NO: 16770/06  
Action #3

Motion Sequence #3, #4  
Submitted October 30, 2008

NEAL FLOMENBAUM, M.D. and MRS.  
MEREDITH FLOMENBAUM,  
Plaintiffs,  
-against-  
THE GREATER ATLANTIC BEACH WATER  
RECLAMATION DISTRICT,  
Defendant.

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INDEX NO: 288/07  
Action #4

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**ANDREW GASPAR and NINA GASPAR,  
Plaintiffs,**

**INDEX NO: 11514/07  
Action #5**

**-against-  
THE TOWN OF HEMPSTEAD, THE  
INCORPORATED VILLAGE OF ATLANTIC  
BEACH, THE ATLANTIC BEACH SEWER  
DISTRICT, THE GREATER ATLANTIC  
BEACH WATER RECLAMATION DISTRICT,  
Defendants.**

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**BETH GARNETT, MILES GARNETT and  
PAULA GARNETT,**

**INDEX NO: 16838/06  
Action #6**

**-against-  
THE DEPARTMENT OF PUBLIC WORKS, THE  
GREATER ATLANTIC BEACH WATER  
RECLAMATION DISTRICT, THE COUNTY OF  
NASSAU, THE TOWN OF HEMPSTEAD,  
Defendants.**

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**The following papers were read on these motions:**

**TOWN's Notice of Motion.....1  
GARNETT Affidavit in Opposition.....2  
COUNTY's Response to TOWN's Motion.....3  
TOWN's Affirmation in Support (Reply).....4  
VILLAGE's Notice of Motion.....5  
WRD Affirmation in Opposition.....6**

**Requested Relief**

Defendant in Action #3, #4 and #6, THE TOWN OF HEMPSTEAD (hereinafter referred to as the "TOWN") , moves for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaints, cross claim and

counterclaims in said actions against it, on the ground that the TOWN has no jurisdiction over the sewer system in Atlantic Beach, New York. Subsequently, the defendant in Action #3 and #4, THE INCORPORATED VILLAGE OF ATLANTIC BEACH (hereinafter referred to as the "VILLAGE"), moves for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaints, cross claim and counterclaims in said actions against it, on the ground that the VILLAGE has no jurisdiction over the sewer system in Atlantic Beach, New York. The motions are determined as follows:

#### **Background**

The plaintiffs in the various proceedings commenced the respective actions for alleged damages to their respective properties caused by a sewer backup that occurred in the Atlantic Beach area on October 14, 2005. The TOWN contends that it did not own, operate, maintain, manage, control, inspect, supervise or repair the sewer system in Atlantic Beach, New York. In support of the motion to dismiss, the TOWN has offered the affidavit of Sheila Dausher, the Records Access Officer of the Highway Department for the TOWN, who contends, based upon her access to records of the TOWN and her knowledge of the sewer/waste water facilities owned and maintained by the TOWN, that it did not have any contact with or jurisdiction over any sewer/waste water facilities in Atlantic Beach, New York. Ms. Dausher also notes

that her search of records of the TOWN Highway Department revealed no letters of complaints as to roadway flooding in the areas of the respective plaintiffs' properties for three (3) years prior to October 14, 2005. The TOWN asserts that the sewer system/district in Atlantic Beach, New York, is under the jurisdiction of the GREATER ATLANTIC BEACH WATER RECLAMATION DISTRICT (hereinafter referred to as the "WRD"), a co-defendant in the actions herein, which the TOWN asserts was established pursuant to Chapter 516 of the Law of 1928 and which gives to their Commissioners "autonomy" regarding the DISTRICT, an autonomy that the TOWN can neither exercise concurrently nor overrule if the TOWN Board disagrees. The TOWN argues that the DISTRICT's Commissioners retain their autonomy over the DISTRICT despite the TOWN Law because it was not created by the TOWN under its statutes, citing only *Crouch v. Funk*, 263 AD719, 30 NYS2d 649 (2<sup>nd</sup> Dept. 1941). The Court has read *Crouch*, and it offers little guidance on the issue of the Commissioners' autonomy. However, the TOWN urges that it is entitled to summary judgment, as a matter of law, because there are no questions of fact as to the TOWN which requires a trial.

In the actions against the VILLAGE, the plaintiffs contend that the VILLAGE, like the TOWN, failed to properly inspect and maintain the sewer system, and that the VILLAGE had an inadequate drainage system in the subject area which was

overpowered by heavy rain and flooding and caused or exacerbated the backup problems in the sewer system , which resulted in property damage to the plaintiffs' homes. Like the TOWN, the VILLAGE contends that it did not own, operate, maintain, manage, control, inspect, supervise or repair the sewer system in Atlantic Beach, New York. The VILLAGE also alleges that the WRD had jurisdiction over the sewer district in Atlantic Beach. The VILLAGE submits the affidavits of Emily Siniscalchi, the VILLAGE Clerk, who states that the VILLAGE does not own, operate, maintain, manage, control, inspect, supervise or repair the sewer system in Atlantic Beach, New York.

The GARNETT plaintiffs contend that the TOWN is responsible for the damage to the plaintiffs' property because the TOWN regulates the construction of all private sewers by virtue of the enabling statute found in , Article 12 of McKinney's Consolidated Laws under Town Law §198 entitled District and Special Improvements, which delineates the powers of the town boards with respect to improvement districts. It is the GARNETTTS' theory that the heavy rains and flooding on October 14, 2005 raised the water table in the area, and the resulting hydrostatic pressure caused the sewer seepage that flooded the entire lower level of their home. The GARNETTTS argue that the TOWN is acting in a proprietary capacity, as opposed to a governmental capacity, and, therefore, it is subject "to the duty of care as private

individuals and institutions engaging in the same activity”, citing *Delhi v. Delhi* 47 AD3d 1117, 849 NYS2d 716 (3<sup>rd</sup> Dept. 2008).

The WRD opposes the VILLAGE’s request for summary judgment as premature and contends that the various plaintiffs and the VILLAGE should be deposed to pinpoint the source of water on the various properties that were affected. The WRD also alleges the VILLAGE had an inadequate drainage system that caused or contributed to the burden placed upon the WRD’s pipes and system.

In support of its’ position, the WRD has offered the affidavits of William Kelly and William Seevers. Mr. Kelly, a WRD employee for more than thirty (30) years and the current Superintendent of WRD, contends that the only complaints the WRD received were from areas near VILLAGE drains and catch basins. Mr. Kelly states there were no clogged or broken pipes in the WRD system. Mr. Seevers, a certified hydrologist, states that the VILLAGE’s drainage system was inadequate, that it drained too slowly or not at all, and that the inadequate drainage system caused the ground water table to rise, which caused the standing water to infiltrate the sewer pipe system.

### **The Law**

The statutory scheme established for the creation and maintenance of a sewer district reinforces the view that a sewer district is a mere department of town

government and not an independent corporate entity; that the powers conferred by statute on a commissioner of a sewer district are merely administrative in nature and are not powers exercised as if districts were governmental units separate and independent from town government (Town Law § 198; *Belinson v Sewer District #16 of the Town of Amherst*, 65 AD2d 912, 410 NYS2d 469 (4<sup>th</sup> Dept. 1978)). The operation and maintenance of a sewer district is a duty imposed by statute upon a town board of a town within which the district is located, and such operations and maintenance are acts of the town and therefore, the town board and the town could be sued for negligence in operating and maintaining the sewer district (Town Law §61; *Berean v Town of Lloyd*, 5 AD2d 924, 172 NYS2d 301 [3<sup>rd</sup> Dept. 1958]). A town board has control over special districts except where a board of commissioners is especially created (*see, Berean v Town of Lloyd, supra*).

Here, the plaintiffs raise the issue as to whether or not TOWN has control over the sewer/water district, WRD. While the TOWN has submitted the above noted affidavits, the statutory scheme raises viable issues as to whether or not the TOWN is liable for the alleged negligence by WRD. The Court notes that the affidavit of WRD's expert, William Seevers, does refer to the system as the "Town's" system.

Case law holds that evidence of flooding caused by the back flow of a sewer system, standing alone, is insufficient to maintain an action against a municipality to

recover for injury to property (emphasis added) (*Linden Towers Cooperative No. 4, Inc. v City of New York*, 272 AD2d 587, 709 NYS2d 825 [2<sup>nd</sup> Dept. 2000]). Indeed, once the government undertakes to provide a sewer/drainage system, it is entitled to qualified immunity for its design/plans, even if the design chosen is inadequate to restrain all waters on the surface (*Tri-Municipal Sewer Commission*, 160 AD2d 677, 553 NYS2d 455 [2<sup>nd</sup> Dept. 1990]). However, the qualified immunity is negated by a design which creates a nuisance since no reasonable basis supports such a result (*Uppington v City of New York*, 165 NY 222, 59 NE 91 [C.A. 1901]).

“The law is clear that a municipality is not liable for its failure to install a drainage system that adequately disposes of surface waters”. *Vanguard Tours, Inc. v. Town of Yorktown*, 83 AD2d 866, 442 NYS2d 19 (2<sup>nd</sup> Dept. 1981). However, a municipality may be liable for its failure to exercise ordinary care in maintaining its drainage system (*Biernacki v Village of Ravena, supra*). A plaintiff must show that the municipality either affirmatively breached a duty or that the municipality was actively negligent (*Biernacki v Village of Ravena, supra*). While a municipality is not required to anticipate unusual conditions (*see, Wood v State*, 122 Misc 860, 202 NYS 340 [Court of Claims, 1923]), it must keep its drainage system in repair (*Gibson v State*, 187 Misc 931, 64 NYS2d 931 [Court of Claims 1946]).

Based on the foregoing, the Court finds that the WRD has raised raise issues

of fact as to the VILLAGE's involvement in the alleged damage to plaintiffs' property and that additional discovery is needed to inquire into whether the VILLAGE's drainage system caused or exacerbated the sewer backup and the damages incurred by the plaintiffs herein.

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. *See, Hellinger v Law Capital, Inc.*, 124 AD2d 182, 509 NYS2d 50 (2<sup>nd</sup> Dept. 1986); *Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

After a careful reading of the submissions herein, it is the judgment of the Court that neither the TOWN nor the VILLAGE has met its respective burden for summary relief, and that those parties that oppose the motions have raised issues of fact that preclude the granting of the motions herein. Accordingly, it is hereby

**ORDERED**, that the TOWN's motion for summary judgment is denied; and it is further

**ORDERED**, that the VILLAGE'S motion for summary judgment is denied; and it is further


**ORDERED**, that all parties are directed to proceed with all scheduled

discovery in accordance with the directions of Special Referee, Honorable Burton Joseph, and when complete, a Certification Conference will be held before the undersigned .

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 9, 2009

  
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WILLIAM R. LaMARCA, J.S.C

TO: David W. Siewert  
Plaintiff Pro Se in Action #1  
60 Vernon Avenue  
Atlantic Beach, NY 11509

Bisogno & Meyerson, LLP  
Attorneys for Plaintiff Frank Livechi, Action #2  
7018 Fort Hamilton Parkway  
Brooklyn, NY 11228

Ruffo Tabora Mainello & McKay, PC  
Attorneys for Plaintiffs Ann Marie H. Walsh and John F. Walsh, Action #3  
3000 Marcus Avenue, Suite 1W10  
Lake Success, NY 11042

Thelen Reid Brown Raysman & Steiner LLP  
Attorneys for Plaintiffs Neal Flomenbaum, MD and Mrs. Meredith Flomenbaum, Action #4  
900 Third Avenue  
New York, NY 10022

Ruffo Tabora Mainello & McKay PC  
Attorneys for Plaintiffs Andrew Gaspar and Nina Gaspar, Action #5  
3000 Marcus Avenue, Suite 1W10  
Lake Success, NY 11048

Miles Garnett, Beth Garnett and Paula Garnett  
Plaintiffs in Action #6  
66 Wayne Avenue  
Atlantic Beach, NY 11509

**ENTERED**  
JAN 20 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Joseph J. Ra, Esq.  
Attorney for Defendant Town of Hempstead in Action #3, #4 and #6  
Hempstead Town Hall  
1 Washington Street  
Hempstead, NY 11550

John P. Humphreys, Esq.  
Attorney for Defendant The Incorporated Village of Atlantic Beach in Actions #3 and #4  
3 Huntington Quadrangle, Suite 102S  
Melville, NY 11747

D. Sweeney & Associates, PLLC  
Attorneys for Defendant Greater Atlantic Beach Water Reclamation District in Action #1,  
#2, #3, #4, #5 and #6  
426 Bedford Road  
Pleasantville, NY 10570

Lorna B. Goodman, Esq.  
Nassau County Attorney  
Attorney for Defendant Nassau County in Action #6  
One West Street  
Mineola, NY 11501