

**Maurischat v County of Nassau**

2009 NY Slip Op 30684(U)

March 17, 2009

Supreme Court, Nassau County

Docket Number: 002570/01

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND  
Justice Supreme Court

-----x  
HANS MAURISCHAT AMD ERIKA MAURISCHAT

Plaintiffs,

-against-

COUNTY OF NASSAU,

Defendants.  
-----x

TRIAL PART: 19  
NASSAU COUNTY

INDEX NO: 002570/01

MOTION SEQ. NO: 04

SUBMIT DATE: 2/4/09

The following papers having been read on this motion:

- Notice of motion..... 1
- Opposition..... 2
- Reply..... 3

The defendant County of Nassau moves for the following forms of alternative relief: an order pursuant to CPLR§3212 granting summary judgment dismissing the plaintiffs' complaint; *or* an order pursuant to CPLR §3126(2) precluding the plaintiff's from offering any evidence at trial for their failure to disclose demanded documents; *or* an order pursuant to CPLR §3126(3) dismissing the plaintiff's complaint for their failure to produce demanded discovery; *or* an order dismissing the within complaint for the plaintiffs failure to comply with requirements of General Municipal Law §§50-(e) and 50(i).

The plaintiffs herein are the owners of a residence located at 16 Grist Mill Road, Manhasset, New York (*see* Affirmation in Support at Exh. A). In 1993, the plaintiffs commenced an action wherein they alleged that the defendant, County of Nassau [hereinafter the County], was negligent in failing to properly maintain a culvert opening situated in a drainage pond known as Pepper Mill Pond (*id.*). The plaintiffs claimed that as a result thereof, the opening became obstructed causing the pond to overflow onto their property and thereby causing damage thereto (*id.*). In March of 1998, this action was settled whereupon the parties thereto executed a Stipulation of Settlement and a Stipulation of Discontinuance (*id.* at Exh. B). The Stipulation of Discontinuance provided the following:

“IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for all the parties to the above entitled action, that whereas no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above entitled action be, and the same hereby is discontinued, without costs to either party as against the other. This stipulation may be filed without further notice with the Clerk of the Court. (*id.*)”

Thereafter, in 2001 the plaintiff’s commenced the within action sounding in nuisance and wherein they assert that the culvert was constructed in such a manner that the opening thereof was particularly directed toward the plaintiffs’ property causing water to flow directly thereon (*id.* at Exh. D). The plaintiffs seek monetary damages, as well as injunctive relief restraining and enjoining the defendant from “directing, discharging, and deflecting the flow of water from the culvert onto claimants’ property” (*id.* at Exh. C).

On June 26, 2006, the County interposed a motion for summary judgment which sought dismissal of the within complaint (*id.* at Exh. E). The central contention posited by the County was that inasmuch as the previous action was settled the within action was consequently barred by the doctrine of *res judicata* (*id.*). By order dated July 11, 2002, the motion was granted and the complaint was dismissed [Segal, J.] (*id.*). This decision was appealed by the plaintiffs and by Decision and Order dated May 12, 2003, the Appellate Division, Second Department, reversed the decision of Justice Segal and reinstated the complaint (*id.* at Exh. G). In its decision, the Appellate Division noted that the County failed to provide a copy of the settlement documents and accordingly stated the following:

“it cannot be determined if the settlement and discontinuance of the prior action was on the merits or with prejudice to relitigation of the discontinued claim, or if the parties otherwise intended the settlement and discontinuance to have preclusive effect”(*id.*).

The defendant has now interposed the instant application again seeking a grant of summary judgment predicated upon the doctrine of *res judicata*. The County contends that while the file relevant to the prior action was misplaced and previously unavailable for production to and inspection by the Court, same were recently recovered and are provided herein for the Court's review (*id.* at ¶¶7,8,9; *see also* Exh.B ). The County asserts that the documents clearly indicate that the prior action was settled “on the merits and in satisfaction of all of plaintiff's claims concerning the subject culvert” and therefore the instant action is barred by *res judicata* (*id.* at ¶9).

The doctrine of *res judicata* functions to preclude a party from litigating a “claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter” (*Josey v Goord*, 9 NY3d 386 [2007] quoting *Matter of Hunter*, 4 NY3d 260 [2005]). Under the transactional analysis approach employed by the courts of New York to determine the applicability of the doctrine, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*Josey v Goord*, 9 NY3d 386 [2007], *supra* quoting *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]).

As noted above, the prior action was not resolved by the rendering of a final judgment but rather was concluded by a Stipulation of Settlement and a Stipulation of Discontinuance executed by and between the parties herein. A stipulation of discontinuance is accorded *res judicata* effect so as to bar relitigation as to the prior causes of action where the stipulation of discontinuance is effected “with prejudice” (*Van Hof v Town of Warwick*, 249 AD2d 382 [2d Dept 1998]; *Singleton Management, Inc. v Compere*, 243 AD2d 213 [1<sup>st</sup> Dept 1998]; *Southampton Acres Homeowners Association, Inc. V Riddle*, 299 AD2d 334 [2d Dept 2002]; *North Shore-Long Island Jewish Healthcare, Inc. v Aetna US Healthcare, Inc.* 27 AD3d 439 [2d Dept 2006]).

Thus, in determining the County's within application the Court has carefully reviewed the above-referenced Stipulation of Discontinuance and in applying the foregoing principles to the contents thereof finds that inasmuch as said discontinuance was not executed “with prejudice”, it therefore is not afforded the preclusive effect of *res judicata* (*Van Hof v Town of Warwick*, 249 AD2d 382 [2d Dept 1998], *supra*; *Singleton Management, Inc. v Compere*, 243 AD2d 213 [1<sup>st</sup> Dept 1998], *supra*; *Southampton Acres Homeowners Association, Inc. V Riddle*, 299 AD2d 334 [2d Dept 2002], *supra*; *North Shore-Long Island Jewish Healthcare, Inc. v Aetna US Healthcare, Inc.* 27

AD3d 439 [2d Dept 2006], *supra*).

Therefore, based upon the foregoing that branch of the motion interposed by the County made pursuant to CPLR §3212 seeking an order granting summary judgment based upon the doctrine of *res judicata* is hereby DENIED.

The County moves pursuant to CPLR§3126(2) for an order precluding the plaintiffs from introducing any testimonial or documentary evidence which has yet to be produced *or* for an order pursuant to CPLR§3216(3) dismissing the plaintiffs' complaint due to their repeated failure to comply with court-ordered disclosure (*id.* at ¶¶11,22,26,31).

During the course of the within litigation counsel for the respective parties appeared for various conferences including, *inter alia*, the preliminary conference on November 15, 2001, a compliance conference on June 22, 2004 and a certification conference on December 20, 2004 (*id.* at Exhs. J,L,M). Counsel for the County contends that in accordance with the various directives contained in the orders issued relative to the foregoing conferences, the plaintiffs were required to provide the following: specific dates of the alleged property damage; pictures of the property; dollar amounts of the alleged property damage; and all previous documents relative to the prior action commenced in 1993 (*id.* at ¶15). Counsel contends that to date, the only discovery demands with which the plaintiffs have complied is with respect to the production of photographs and that all other demands remain outstanding (*id.* at ¶¶18,19).

The County argues that given plaintiff's willful failure to produce the demanded discovery as ordered by the Court, they should either be precluded from offering any proof at trial with respect to property damage or alternatively the within complaint should be summarily dismissed (*id.* at ¶¶23,25,26,31). Counsel for the plaintiff opposes the application and contends that contrary to the County's contentions, all demanded discovery has been provided as ordered (*see* Affirmation in Opposition at ¶¶22,24-33).

It is well settled that while the nature and extent of the penalty to be assessed pursuant to CPLR§3126 is a matter typically left to the sound discretion of the trial court, the draconian measure of striking a pleading or precluding the introduction of evidence should only be imposed upon a showing that the conduct of a party was willful or contumacious (*DeCinto v Ahmed*, 276 AD2d 463 [2d Dept 2000]; *Moran v Franklin General Hospital*, 214 AD2d 707 [2d Dept 1995]).

In rendering a determination on this branch of the County's application, the Court has

reviewed the orders issued in connection to the above-referenced conferences, the terms of which the defendant claims the plaintiffs have wilfully disregarded.

The Preliminary Conference Order issued on November 15, 2001 required the plaintiff to provide a “further” Bill of Particulars which indicated the beginning date of the alleged incident, itemized property damage and notice (*see* Affirmation in Support at Exh. J). The record herein indicates that on or about December 4, 2001, the plaintiffs served the required Bill of Particulars upon the defendant which stated that the alleged nuisance began at “on or about the time of the construction of the culvert” and that “the nuisance continues and has continued to damage the Plaintiff’s [sic] property on a daily basis” (*see* Affirmation in Opposition at Exh. 1). Further, recited therein is a detailed description of the property damage alleged to have been caused by the construction of the culvert (*id.*).

As to the compliance conference held on June 22, 2004, the order thereafter issued required the plaintiff to produce “premise liability coverage and documents” and “copies of EBT transcripts, pleadings, any discovery responses per prior action as available” (*see* Affirmation in Support at Exh. L). Annexed to plaintiff’s affirmation in opposition is a copy the plaintiff’s liability coverage which was provided to the defendant on or about August 6, 2004 (*see* Affirmation in Opposition at Exh. 2).

Finally, the stipulation executed at the certification conference held on December 20, 2004 stated that “documents from prior action (settled in the 90’s) remain outstanding. Plaintiff to provide copies of EBT transcripts, pleadings, discovery responses, if uncovered and available” (*see* Affirmation in Support at Exh. M). Counsel for the plaintiff contends that, on numerous occasions, he has advised counsel for the defendant that he was unable to locate the documents relevant to the prior action and thus was unable to provide copies thereof (*see* Affirmation in Opposition at ¶28).

Having carefully reviewed the record, the Court finds that the plaintiffs herein have complied with the disclosure directives as contained in the various and above-referenced conference orders. Further, there has been no showing that the plaintiffs have engaged in conduct which could in any respect be characterized as willful or contumacious warranting the imposition sanctions as embodied in CPLR §3126 (*DeCinto v Ahmed*, 276 AD2d 463 [2d Dept 2000], *supra*; *Moran v Franklin General Hospital*, 214 AD2d 707 [2d Dept 1995], *supra*; *see also Sisca v City of Yonkers*, 24 AD3d 531 [2d Dept 2005]; *Garcia v Kraniotakis*, 232 AD2d 369 [2d Dept 1996]).

Based upon the foregoing, that branch of the defendant's motion made pursuant to CPLR §3126(2) seeking an order precluding the plaintiffs from introducing at trial evidence which has yet to be produced and that branch of the defendant's motion interposed pursuant to CPLR §3126(3) and which seeks an order striking the plaintiff's complaint for failure to comply with court-ordered discovery are both DENIED.

The Court now addresses the final portion of the defendant's application, which seeks an order dismissing the within complaint on the basis that the plaintiffs served a defective notice of claim in contravention of General Municipal Law §§50-e, 50-i (*see* Affirmation in Support at ¶¶34,35,36).

In support of this branch of the defendant's application, counsel for the County challenges both the timeliness and substance of the notice of claim served by the plaintiffs (*id.*). As to the substance of the notice of claim, the County contends that same "fails to state the time when the alleged damage occurred" and is thus ineffective within the purview of General Municipal Law 50-e (*id.* at ¶35). The County additionally argues that the notice served by the plaintiff was not done so within the ninety days following the accrual of the claim and was untimely (*id.* at ¶36).

General Municipal Law §50-e (2) sets forth the following requisites for a notice of claim: the notice must be sworn to by the claimant; it must provide the name and post office address of each claimant and his or her attorney; it must recite the nature of the claim and the time, place and manner in which the claim arose; and the notice must set forth the items of damages and or injuries claimed to have been sustained so far as then practicable (*Brown v City of New York*, 95 NY2d 389 [2000]; *Rosenbaum v City of New York*, 8 NY3d 43 [2006]). "Reasonably read, the statute does not require 'those things to be stated with literal nicety or exactness'" (*Brown v City of New York*, 95 NY2d 389 [2000], *supra* quoting *Purdy v City of New York*, 193 NY 521 [1908]).

As articulated by the Court of Appeals, the test with respect to the sufficiency of a notice of claim "is merely whether it includes information sufficient" to enable the implicated municipality to investigate the claims therein alleged (*Brown v City of New York*, 95 NY2d 389 [2000], *supra*). Therefore, in determining whether a claimant has complied with the mandates as set forth in the statute, the court should "focus on the purpose served by a Notice of Claim: whether based upon the claimant's description municipal authorities can locate the place, fix the time and understand the nature" of the claims (*id.*).

Upon review of the record, this Court finds that the notice of claim served by the plaintiffs satisfies the demands of the statute and is sufficiently specific. The notice in issue is properly sworn and contains the requisite addresses (General Municipal Law §50-e [2]). Further, the notice adequately describes the nature of the claim, as well as the time, place and manner under which it arose and states that “The County of Nassau in constructing the culvert, wrongfully directed, diverted, and deflected the flow of waters from the culvert onto Claimants’ premises thereby causing substantial erosion, washing away, scouring, and loosening of Claimants’ land, and destruction of trees and shrubbery” (see Notice of Claim at ¶2). Finally, the notice duly sets forth damages alleged to have been sustained and that same are ongoing (*id.* at ¶3).

As to the defendant’s remaining contention that the notice of claim was untimely in contravention of General Municipal Law §50-e, the Court finds same to be equally unavailing. “It is well established that compliance with General Municipal Law §50-e is not required where the plaintiffs seek equitable relief to abate and enjoin a nuisance and the demand for money damages is incidental to the requested injunctive relief” (*Stanton v Town of Southhold*, 266 AD2d 277; see also *Rist v Town of Cortlandt*, 56 AD3d 451 [2d Dept 2008]). In the instant matter, while the plaintiffs are seeking money damages, said damages are indeed incidental to their prayer for equitable relief whereby the plaintiffs demand that the County be enjoined “from directing, discharging, and deflecting the flow of water from the culvert onto claimants’ property” (see Notice of Claim at ¶4).

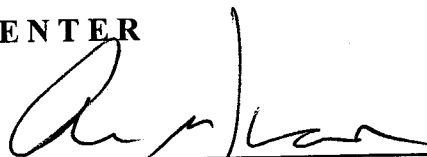
Thus, based upon the foregoing, that branch of the application interposed by the County which seeks dismissal of the plaintiffs’ complaint based upon their failure to serve a notice of claim in accordance with General Municipal Law §50-e and 50-i is hereby DENIED.

All other applications not specifically addressed herein are deemed denied.

This constitutes the decision and order of this Court.

DATED: March 17, 2009

ENTER



HON. ARTHUR M. DIAMOND

J. S.C.

**ENTERED**  
**MAR 23 2009**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

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