

Mendik v The Inc. Vil. of Lattingtown

2009 NY Slip Op 31185(U)

May 18, 2009

Supreme Court, Nassau County

Docket Number: 5694-08

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

**TODD MENDIK, JULIE MENDIK and TODD LANSING,
MENDIK 2001 TRUST,**

Plaintiff(s),

- against -

**THE INCORPORATED VILLAGE OF LATTINGTOWN
and THE COUNTY OF NASSAU, jointly and severally,**

Defendant(s).

TRIAL/IAS PART 8

INDEX NO. 5694/08

**MOTION SEQUENCE
NO. 1 & 3 & 4**

**MOTION SUBMISSION
DATE: March 24, 2009**

The following papers read on this motion:

Notice of Motion	X
Amended Notice of Motion	X
Notice of Cross Motion	X
Affirmation	X
Affirmation in Reply	X
Reply Affirmation	X
Memorandum of Law	X

Upon the foregoing papers, the motion by the defendant, County of Nassau, for an Order pursuant to General Municipal Law §§50-e and 50-l and CPLR §§3211(a)(7) and 3211(a)(5), dismissing plaintiffs' summons and complaint and any and all cross-claims for failure to state a cause of action and as barred by the statute of limitations; the amended notice of motion by the defendant Incorporated Village of Lattintown for an Order pursuant to CPLR §3211(a)(5) and (a)(7) and New York General Municipal Law §§50-e and 50-l granting defendant The Incorporated Village of Lattintown's motion to dismiss the plaintiff's complaint as against this moving defendant and the cross motion by the plaintiffs for an Order pursuant to CPLR §3212 granting plaintiffs partial summary judgment and pursuant to CPLR §3025(b) permitting plaintiffs to amend the Verified Complaint to the extent the Court deems it necessary, are all determined as hereinafter provided:

The instant action arises out of the collapse of a 150 foot section of a six foot brick wall on the north side of the plaintiffs' property located at 355 Lattintown Road, Lattintown, New York on July 18, 2007.

The respective municipal defendants in support of their respective applications contend that the plaintiffs have failed to comply with the provisions of §50-e(1) of the General Municipal Law. In pertinent

part, said section provides:

"§50-e. Notice of claim

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate."

In support of the defendant County of Nassau's application, said defendant submits an affidavit of Judith Merkel. Ms. Merkel's affidavit sets forth:

"JUDITH MERKEL, being duly sworn, deposes and says:

1) I am employed by the Office of the Nassau County Attorney located at 1 West Street, Mineola, New York 11501.

2) As part of my job duties I open the mail for the Office of the Nassau County Attorney, stamp the mail as to the date and time it is received by the office and enter all mail received by this office into a computer tracking system under the name of the claimant and/or plaintiff.

3) If a notice of claim is received by this office, I open a new file in the computer tracking system under the claimant's name. I put a docket into the newly opened file indicating that a notice of claim was received by this office, along with the date and the method of receipt (i.e., certified or registered mail).

4) Additionally, when I open a new file in the computer tracking system, the computer program automatically assigns a file number to the new claim and records the date that such file was officially opened.

5) Moreover, after opening a new file in the computer tracking system, I scan the notice of claim received by this office into the computer tracking system. The scanned notice of claim appears as a PDF entry within the system. Lastly, I sort the mail that has already been logged into the computer tracking system so that I may provide it to the appropriate recipient.

6) I was asked to conduct a search of this office's computer tracking system to determine if there is any record of receipt of a notice of claim from Todd Mendik, Julie Mendik and/or Todd Lansing Mendik 2001 Trust, for damages alleged to have been caused by the County of Nassau on July 28, 2007, when a 150 foot section of a six foot brick wall collapsed on the north side of the property at 355 Lattingtown Road, abutting Lattingtown Road.

7) As a result of my search, I attest that I found no record of receipt of a

notice of claim with regard to Todd Mendik, Julie Mendik and/or Todd Lansing Mendik 2001 Trust, from July 18, 2007 to the present. Additionally, I found that no notice of claim regarding said individuals was ever scanned into the computer tracking system.

8) My search further revealed that the first entry which appears in the computer tracking system under the file Todd Mendik, Julie Mendik and/or Todd Lansing Mendik 2001 Trust, is a record of service of a summons and complaint on March 31, 2008. The computer system indicates that the file with regard to this case was recorded as first opened on March 31, 2008, when the summons and complaint was received and shows no evidence that a notice of claim was ever received with regard to this matter."

The defendant Incorporated Village of Lattingtown submits an affidavit of Kathleen F. Picoli. Ms. Picoli's affidavit states:

"KATHLEEN F. PICOLI, being duly sworn, deposes and says:

1. I have been employed with the Village of Lattingtown (the "Village") for the past 21 years and have served as the Village's Clerk and Treasurer since 1989.

2. In my capacity as Village Clerk and Treasurer, I am responsible for opening all of the mail that is sent to the Village. In my absence, the Deputy Clerk Treasurer, Jan Hagner, will open the Village's mail and leave it on my desk until I return.

3. Upon receipt of a Notice of Claim, I immediately send a copy of the documents to the Village's attorney and to the Village's insurer.

4. I also retain a copy of all Notices of Claim for the Village's own files.

5. At the request of the Village's counsel in this lawsuit, I conducted a search of the Village's files to determine whether there is any record of the Village receiving a Notice of Claim from Todd Mendik, Julie Mendik and/or the Todd Lansing Mendik 2001 Trust, for damages alleged to have occurred on July 18, 2007, when a section of a brick wall collapsed on the north side of the property located at 355 Lattingtown Road, abutting Lattingtown Road.

6. As a result of my search, I can attest that there is no record of the Village receiving a Notice of Claim with regard to Todd Mendik, Julie Mendik and/or the Todd Lansing Mendik 2001 Trust, from July 18, 2007 to the present. Moreover, I do not recall the Village ever receiving such a Notice of Claim from or on behalf of Todd Mendik, Julie Mendik and/or the Todd Lansing Mendik 2001 Trust, during such period.

7. There is no evidence that the Village received a Notice of Claim with regard to this matter prior to the filing of this lawsuit."

The plaintiffs in opposition to the respective municipal defendants' requested relief, submit the

affidavit of plaintiff Todd Mendik which in pertinent part provides:

"9. On July 18, 2007, following the collapse of the wall, I contacted Michael Douso, the Village's Street Commissioner, to inform him of the collapse and to request that he inform all of the proper persons, including the Village's attorneys and County officials. I also asked him to address the need for the replacement of the wall and informed him that I considered the Village and/or the County to be responsible for its replacement.

10. On July 20, 2007, I memorialized my conversations by serving Mr. Douso with a notice of our claim that Mr. Douso circulated to Village and County officials, including the Village Clerk, the Village's attorneys and Mr. Ribeiro. See my July 20, 2007 letter to Mr. Douso, attached hereto as Exhibit 2.

11. On July 20, 2007, Mr. Douso sent a letter to Mr. Ribeiro and others in the County's Department of Public Works, in which Mr. Douso informed Mr. Ribeiro of the dangerous condition caused by the wall collapse and detailing the cause of same. He further asks Mr. Ribeiro to contact him to discuss the repair of the catch basin and wall. See Douso's July 20, 2007 letter, attached hereto as Exhibit 3."

The referenced July 20, 2007 letter of Mr. Mendik sets forth:

"July 20, 2007

Mr. Michael Douso
Commissioner of Highways
Incorporated Village of Lattintown
Locust Valley, New York 11560

RE: Wall Collapse Mendik Residence

Dear Mr. Douso:

As per our recent conversations over the past few days regarding the failure of the drainage system that collapsed a section of the brick wall along my property line, I appreciate you contacting the Town Attorney's, as well as the Deputy Commissioner of Highways for Nassau County. This is a very serious situation that needs to be addressed. As I told you, I have contacted my insurance company and my attorney regarding the incident. My insurance adjuster and their engineer have met me on the site and I have had two other engineers that I asked to come to inspect the damage.

I should receive input from all parties by early next week. At the moment I am having someone protect the site with orange construction fencing to help maintain the site and keep people off of my property.

My only request at the time is that you copy me on all correspondence regarding this incident. You can either mail it to my home address or fax it to me at 516-676-3526.

If you need to reach me or have questions, don't hesitate to call me at 917-848-1421. Thank you again for your quick response and we'll speak soon.

Sincerely,

_____/s
Todd Mendik"

Thereafter, by letter dated July 20, 2007, Mr. Douso sent a letter to the County of Nassau which stated:

"July 20, 2007

Nassau County Department of Public Works
1194 Prospect Ave.
Westbury, NY 11590

Attn: Commissioner Raymond Riberio
Deputy Commissioner Joseph L. Davenport
James Ahern, Civil Engineer

RE: Wall collapse on Lattingtown Road during 7/18/07 rain event

Dear Sirs,

We have left messages with Mr. Davenport and Ahern's offices to advise them of a dangerous situation. On Wednesday July 18, 2007 during a heavy rain, a 100 ft section of a 6ft brick wall collapsed onto Lattingtown Road in Lattingtown. The collapse was caused by the malfunction of a catch basis adjacent to the wall which is owned and maintained by the County. The collapse is located near the residence located at 355 Lattingtown Road just beyond St. Johns Church. Please contact us immediately about the repair of this catch basis and wall. I can be reached by cell phone at 516-721-4563.

Sincerely,

_____/s
Michael Douso
Street Commissioner"

By correspondence dated February 19, 2008, the County of Nassau by its Commissioner of Public Works responded to the Village of Lattingtown which stated:

"February 19, 2008

Mr. Michael Douso
Street Commissioner
299 Lattingtown Road
P. O. Box 488
Locust Valle, New York 11560

RE: Lattingtown Road

Dear Mr. Douso:

This is in response to your July 20, 2007 letter regarding drainage in the vicinity of 355 Lattingtown Road, Lattingtown.

Over the past several months, we have reviewed record plans and visited the site. No record was found for the construction of the catch basin or culvert, but they showed to be existing on a 1928 plan to improve Lattingtown Road. Our maintenance crews have pumped the catch basis dry to facilitate an examination of the system. We intend to remove the existing catch basis and replace it with one that will increase the capacity to accept street runoff and overland flow. The topographic survey will begin shortly, and we anticipate construction for summer 2008.

With regard to the toppled wall, we disagree with the statement that the catch basis caused the failure. The buildup of water during this major storm even occurred on private property, within a Village drain easement.

Please call this office if additional information is needed.

Very truly yours,

_____/s
Raymond A. Riberio, P.E.
Commissioner of Public Works"

The plaintiffs contend, amongst other things, that the foregoing constitutes proper notice pursuant to the provisions of §3(c) of General Municipal Law §50-e. Said section sets forth:

"(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received."

Of significance to the plaintiffs' application, in light of the fact that a municipal hearing was not held is that the recipients of the respective correspondence be a "proper person" to receive such notice (see *General Municipal Law §50-e(3)(a) and (3)(c)*). In reply, the County of Nassau has established that the proper person pursuant to §11-4.0 of the Administrative Code is the County, Executive, Clerk of the Board of Supervisors, County Clerk, County Treasurer or the County Attorney. The Village of Lattingtown submits an affidavit from Michael Douso wherein Mr. Douso states that he is not authorized to accept legal process on behalf of the Village of Lattingtown. As such, the respective correspondence were not served upon proper papers as set forth in General Municipal Law §50-e as to the respective municipal defendants.

The plaintiffs in the instant action allege four causes of action in the plaintiffs' Verified Complaint.

Said causes of action set forth:

"AS AND FOR A FIRST CAUSE OF ACTION

17. Plaintiffs repeat and reallege paragraphs (1) through (16) of this Complaint with the same force and effect as if more fully set forth at length herein.

18. Lattingtown and Nassau County have been negligent, careless and reckless in the maintenance and ownership of the Drainage Easement and Drainage Area, thereby causing the catch basin located therein to malfunction.

19. The malfunction of the catch basin caused the Brick Wall to collapse.

20. As a result of Defendants' negligence, carelessness, and recklessness, Plaintiffs have been damaged in the amount of nine hundred thousand (\$900,000) dollars.

AS AND FOR A SECOND CAUSE OF ACTION

21. Plaintiffs repeat and reallege paragraphs (1) through (20) of this Complaint with the same force and effect as if more fully set forth at length herein.

22. Plaintiffs have no adequate remedy at law to address the injury caused by Defendants.

23. Plaintiffs are entitled to an injunction compelling Defendants to repair, fix and restore the Wall at the sole cost and obligation of the Defendant.

AS AND FOR A THIRD CAUSE OF ACTION

24. Plaintiffs repeat and reallege paragraphs (1) through (23) of this Complaint with the same force and effect as if more fully set forth at length herein.

25. By reason of the negligence, carelessness, and recklessness of Defendants in failing to control and regulate the discharge of water in the Drainage System, Defendants damaged the Brick Wall and intentionally and willfully entered upon Plaintiffs' land, and invaded the plaintiffs' interest in their exclusive possession of the property.

26. As a result of Defendant's trespass, Plaintiffs have been damaged in the amount of nine hundred thousand (\$900,000) dollars.

AS AND FOR A FOURTH CAUSE OF ACTION

27. Plaintiffs repeat and reallege paragraphs (1) through (26) of this Complaint with the same force and effect as if more fully set forth at length

herein.

28. As a result of the acts and omissions committed by the Defendants, the collapse of th wall has and continues to contaminate the Real Property.

29. Defendants' unreasonably, intentionally, and negligently contaminated the Real Property by its negligence, carelessness, and recklessness.

30. The collapse of the Brick Wall and the resulting nuisance were caused solely by reason of the Defendants' acts and omissions.

31. As a result of Defendants' Nuisance, Plaintiffs have been damaged in the amount of nine hundred thousand (\$900,000) dollars."

Notwithstanding the respective municipal defendants' contentions addressed to the plaintiffs' Second Cause of Action, said action sounds in equity which does not require a Notice of Claim pursuant to the provisions of General Municipal Law §50-e. As such, from the four corners of the verified complaint, the plaintiffs state a cause of action for injunctive relief in the Second Cause of Action (see, **Mastrocola v County of Nassau**, 248 AD2d 684, 671 NYS2d 278 (Second Dept., 1998).

Based upon all of the foregoing, the defendant County of Nassau's application for an Order pursuant to General Municipal Law §§50-e and 50-l and CPLR §§3211(a)(7) and 3211(a)(5), dismissing plaintiffs' summons and complaint and any and all cross-claims for failure to state a cause of action and as barred by the statute of limitations and the defendant Incorporated Village of Lattingtown's motion for an Order pursuant to CPLR §3211(a)(5) and (a)(7) and New York General Municipal Law §§50-e and 50-l granting defendant The Incorporated Village of Lattingtown's motion to dismiss the plaintiff's complaint as against this moving defendant, are both respectively **granted** as to the plaintiffs' First, Third and Fourth Causes of Action.

In light of the foregoing, that branch of the plaintiffs' motion which seeks an Order pursuant to CPLR §3025(b) permitting plaintiffs to amend the Verified Complaint to the extent the Court deems it necessary, is **denied without prejudice to renew** upon completion of the Court Ordered discovery.

SO ORDERED.

DATED: 5/18/2009

Log S. Mahan
.....
J.S.C.
ENTERED
MAY 20 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE