

**Castle v Rynkiewicz**

2010 NY Slip Op 31164(U)

May 12, 2010

Sup Ct, Wayne County

Docket Number: 69763/2010

Judge: Daniel G. Barrett

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At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 21<sup>st</sup> day of April, 2010

Present: Honorable Daniel G. Barrett  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

REBECCA M. CASTLE

Plaintiff,

-vs-

DECISION  
Index No. 69763

2010

THOMAS J. RYNKIEWICZ  
LAURA A. RYNKIEWICZ and  
TOWN OF SODUS

Defendants

Appearances: Plaintiff by attorney George A. Schell, Esq.  
Defendants Thomas J. Rynkiewicz and Laura A. Rynkiewicz by attorney Robert A. DiNieri, Esq.  
Defendant Town of Sodus by attorney Matthew J. Duggan, Esq.

This matter having come on to be heard before the Court pursuant to a summary judgment motions filed by Defendants Rynkiewicz and the Town of Sodus.

Oral argument was had on April 21, 2010 and the Court reserved decision at said time.

Statement of the alleged facts is necessary in order to properly interpret the statutory and the case law regarding the issues raised by the summary judgment motions.

Defendants, Rykiewicz were owners of 8341 Brick Church Road, Sodus, New York. Said Defendants entered into a purchase contract with Plaintiff on or about April 11, 2008. The contract included the standard well and septic inspection provisions. On June 12, 2008 the Plaintiff was contacted by her realtor to inform her the septic system had been inspected by the Town of Sodus Code Enforcement Officer and the system failed. Thereafter, sellers' realtor faxed a letter to both attorneys and the Plaintiff's realtor to confirm the failed inspection. Sellers' realtor then faxed a letter to buyer's realtor and to all the parties attorneys that the sellers agreed to install the septic system at their own expense and the same would be done by Lancaster Trucking and Excavating. Some time between June 12, 2008 and June 24, 2008 a replacement septic system was installed. Thereafter the Code Enforcement Officer of the Town of Sodus inspected it and issued a certificate of compliance on June 24, 2008. The closing took place on July 1, 2008.

Approximately February, 2009 Plaintiff noticed there was an area in the backyard where snow was not accumulating. In April the snow was gone and it was apparent to the Plaintiff that the septic system was not operating correctly. Plaintiff contacted the contractor, Lancaster, to evaluate the problem.

On or about May 1, 2009 Plaintiff spoke with Al Hendrikse, Sodus Code Enforcement Officer, regarding the problem and he indicated he would speak to Lancaster Construction.

On or about May 11, 2009 Plaintiff hired a licensed architect. Said architect advised the Plaintiff the septic system was not installed correctly and did not meet the appropriate state regulations. On May 12, 2009 Plaintiff contacted Al Hendrikse again regarding his conversations with Lancaster.

On May 14, 2009 a meeting was held with the Code Enforcement Officer, Lancaster Construction, the architect, the Town Supervisor, Stephen Leroy, and a Town Councilman, Dale Pickering. Plaintiff alleges during that meeting that the Supervisor promised that the town engineer would design a new system and inspect it to make sure the new system installed by Lancaster Construction would comply with state regulations. Plaintiff also alleges that during that meeting the Code Enforcement Officer, Al Hendrikse, advised the system would be replaced without cost to the Plaintiff.

Plaintiff then filed a Notice of Claim on June 5, 2009. Thereafter, the Plaintiff had conversations with the insurance adjustor for the Town during the months of June and July of 2009. Eventually the insurance adjustor determined that the claim would be denied under the general liability policy but that it may be covered by the Town's public officials policy.

Plaintiff alleges she had discussions with the adjustor concerning the public officials policy and was advised that the claim would be paid within two weeks.

In July, 2009 Plaintiff attended a Town Board Meeting in which the Town Supervisor discussed Plaintiff's problems with the septic system and he reiterated that the septic system would be repaired. The only question was whether the cost of repair would be paid by the Town or the insurance

company.

Also in July, Plaintiff spoke with a Sharon Eggert, a Risk Management Investigator for Summit Risk, insurer for the Town, who inquired whether the check for the cost of repair should be issued to her or the Town of Sodus.

In the last week of July Town Supervisor, Stephen Leroy, and Code Enforcement Officer, Al Hendrikse, proposed that Lancaster would do the work, the Town would pay for the materials and the Plaintiff would pay the cost of hiring a licensed architect to design the new system.

On August 10, 2009, Plaintiff attended the 50-h hearing.

Despite assurances to the contrary, the carrier denied the claim on or about September 28, 2009.

After learning of the denial of the claim, the Supervisor approached the Plaintiff in an effort to resolve the situation. He advised her he wanted the carrier to pay the claim. He was contacting the Code Enforcement Officer to see if he could work out a plan with Lancaster Construction.

When Plaintiff asked Al Hendrikse why he did not follow the State Septic Regulations, it was explained that the Town did not require compliance with state regulations in many aspects and that this was a way to save money for Town residents.

The Town subsequently sent a letter to the Plaintiff indicating that the system was not in compliance and it would have to be replaced by her.

In a letter dated November 17, 2009, the New York Department of State, Division of Code Enforcement Administration expressed concerns to the Code Enforcement Office Al Hendrikse, about the Town's administration and enforcement of the New York State Uniform Fire Prevention Building Code and the Secretary of State's Regulations.

The following concerns were raised:

1. replacement of failed septic system is an activity which requires a permit. There is no evidence the Town required a permit.
2. that the septic system is required to be designed by a New York State licensed professional engineer and the Town did not require that.
3. the owner is required to submit engineering drawings of the septic system showing compliance with State Public Health Law. The Town did not require these.

Also Plaintiff claims under Section 98-11 of the Sodus Town Code, the Code Enforcement Officer has the power to enforce the Public Health Law and Regulations and did not do so with respect to the Lancaster Construction installed septic system.

Defendants' Rynkiewicz's Motion for Summary Judgment is based on the fact that said Defendants had no control, input or specialized knowledge as lay persons regarding the installation of a septic system. However, Rynkiewicz's did hire Lancasters to construct the septic system and, of course, the Town, did inspect the same. Said Defendants have a cross claim against the Town of Sodus.

The basis for the relationship between the Defendants and the Plaintiff is the sale contract for the Defendants' home. Said contract provides in paragraph 11 seller represents that the property is in full compliance with all zoning and building ordinances for use as a residential property. However, that was not the case when the septic system was inspected by Code Enforcement Officer of the Town of Sodus. And, in fact, it is still not the case as the system has been deemed unacceptable both by the State of New York and Town of Sodus after the Town received the letter from the State in November, 2009 that the system was not acceptable.

The addendum to said contract provides for inspection of the septic system, which of course was done. The Town Code Enforcement Officer failed the system. Said addendum provided that the buyer and seller have three calendar days to enter into a written agreement addressing the buyer's objections and if an agreement cannot be reached then buyer or seller may cancel the contract. On June 12, 2008 the Plaintiff was contacted by her realtor advising that the septic system had failed the inspection. The Plaintiff then received a copy of a faxed letter from sellers' realtor to both attorneys and the Plaintiff's realtor determining the failure to the system. Later that day a letter was faxed by sellers' realtor to the attorneys for the parties and the buyer's realtor advising that sellers had agreed to install a new septic system at their expense.

The Defendants' Rynkiewicz are liable to the Plaintiff for any breach of the sale and purchase contract. The sale and purchase contract required that the property be in compliance with the zoning code of the Town and the septic system was not in compliance. Either the sellers or the buyer could have withdrawn from the contract at the time the inspection

failed. However, subsequent correspondence by the sellers' realtor advised the sellers were going to, in fact, install a new system. Once the sellers took on that obligation, they owed a duty to the Plaintiff to be in compliance with all codes and regulations. That, in fact, did not happen.

Therefore, Defendants' Rynkiewicz motion is denied

With regard to the Motion for Summary Judgment by the Town of Sodus, the same is based upon two arguments:

1. Plaintiff's action is barred by the one year and ninety day statute of limitations which applies to negligent actions against municipalities.

2. that the issuance of the Certificate of Compliance was a governmental function which the Town of Sodus may not be held responsible for damages.

With regard to point one, Section 50-l (1) of the General Municipal Law requires that any action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based. Section 50-e (1) (a) requires that the Notice of Claim be filed within ninety days after the claim arises.

In this particular case the Certificate of Compliance was issued by the Code Enforcement Office of the Town of Sodus on June 24, 2008. Defendant, Town of Sodus, takes the position that June 24, 2008 is when the cause of action accrued.

Plaintiff served a Notice of Claim on the Town of Sodus on June 5,

2009 and commenced her action on December 9, 2009. The Town alleges that the statute of limitations expired on September 22, 2009.

In the usual situation the above assertion by the Town would be correct. However, the issue is whether the Town was estopped from asserting the defense of the statute of limitations by its conduct in relation to the Plaintiff.

It is notable that the Town of Sodus does not in any way refute the Plaintiff's recitation of her contacts with the Town of Sodus, including conversations with the Code Enforcement Officer, Town Supervisor, the insurance adjustor and their assertions that the matter would be resolved in the Plaintiff's favor.

In the case of Corona v. Gallinger, 242 A.D 2d 961 the homeowners contracted to have a house built and had been issued a Certificate of Occupancy and subsequently discovered defects in the house. They went to the Town of Manlius to inquire of the Code Enforcement Officer whether he had gone over the plans with a fine tooth comb as he had previously asserted. What the Plaintiffs found out was that the Code Enforcement Officer/Building Inspector had actually looked at plans for a different house and the Building Inspector admitted he had never actually inspected the house prior to issuing the Certificate of Occupancy.

Thereafter, Plaintiffs filed a Notice of Claim which was more than ninety days after the issuance of a Certificate of Occupancy. The Court held that a Defendant may be estopped from asserting the statute of limitations if the Defendant is engaged in fraud, deception or misrepresentation citing the Court of Appeals Decision in Sincusky v Saeli,

44 N.Y. 2d 442. The Court went on to state that the estoppel was especially warranted, since Plaintiff's allegations were uncontradicted concerning the course of conduct by the Town's Building Inspector and the Plaintiff's due diligence in commencing the action. The Court went on to state that the delay was caused by the Town's own affirmative acts, misrepresentations and/or omissions and it was, or should have been on notice of the acts or omissions of its own Building Inspector and it cannot be said the Plaintiffs haven't suffered prejudice thereby.

In another case, Roscigno v. Town of Mount Kisco, 210 A.D. 2d 573, the Court held that a Defendant may be estopped from asserting the statute of limitations as a defense when the Defendant, through fraud, misrepresentation or deception, induced the Plaintiff to refrain from commencing a timely law suit. The Court found that the Defendant had offered nothing to contradict the Plaintiff's assertion and the insurance adjustor assured him that his claim would be resolved without the need of litigation. The Court further found that the Plaintiff acted with due diligence in commencing the action once the statute of limitations had expired.

In Kraysi v. A.H. Robbins Company, 697 F. 2d 1366, the Court concluded that the facts that were alleged by the Plaintiff could, if proven, estop the Defendant from pleading and relying upon the statute of limitations as a complete defense. The Court further concluded that the issue of equitable estoppel was inappropriate for summary judgment as there existed genuine issues of material fact to be resolved at trial. The Court also stated that the question of whether the Plaintiff exercised due diligence in commencing the law suit when the facts became known was also a question of fact unsuited for summary judgment.

Therefore, as to the defense of statute of limitations by the Town of Sodus there are questions of fact that have to be resolved, as set forth above. Therefore summary judgment is denied on that ground.

As to the second point that the Town owes no duty to any individual and if they did, it would be to the Defendants' Rynkiewicz and not to Plaintiff, Rebecca M. Castle.

Under normal circumstances there is no duty to a particular individual and if there is it is to the individual or individuals seeking a service from the Town such as the issuance of a Certificate of Compliance and/or Certificate of Occupancy which in this case the Town argues would be Defendants' Rankiewicz.

The Fourth Department in the case of Garrett v. Holiday Inns, 58 N.Y. 2d 253, stated that duty could be found if there was a special relationship existing between the claimant and the municipality. That special relationship exists if the municipality has violated a duty commanded by statute enacted for the special benefit for a particular person, where the municipality has voluntarily assumed a duty, the proper exercise of which was justifiably relied upon by persons benefitted thereby or where it assumes positive direction and control under circumstances in which a known, blatant and dangerous safety violation exists. In this case there is a question of fact regarding a special relationship. It is again notable that Defendant, Town of Sodus, does not refute or contradict the Plaintiff's recitation of the facts concerning her interaction with the Town, including the Code Enforcement Officer, Town Supervisor and Insurance Adjustor. Certainly, taking the facts as alleged by the Plaintiff, the Town could have created a special duty to the Plaintiff by acknowledging that

they were at fault and that in fact the Town would take care of the matter either on their own or through their insurance company. The Court concluded that a special duty is found when a special relationship exists between the municipality and an individual class of persons, warranting the imposition of the obligation to use reasonable care for that person's benefit. A municipality is therefore liable when it has violated its duty commanded by statute and acted for the special benefit of a particular person or persons or where the municipality has voluntarily assumed the duty, the proper exercise of which was justifiably relied upon for that person's benefit thereby or where it assumes the positive direction and control under circumstances which a known blatant and dangerous safety violation exists.

In this case therefore, there are questions of fact such as whether the Town had a special relationship with the Plaintiff, whether in fact it had a duty to the Plaintiff and whether in fact the Town breached that duty.

Therefore, summary judgment on behalf of the Town of Sodus is hereby denied.

Dated: May 12, 2010  
Lyons, New York



Daniel G. Barrett  
Acting Supreme Court Justice

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WAYNE COUNTY SUPREME AND COUNTY COURT