Nusblatt v County of Nassau
2010 NY Slip Op 33600(U)
December 20, 2010
Supreme Court, Nassau County
Docket Number: 21349/09
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

x

EDWARD NUSBLATT and JOANN WEISBORD,

Plaintiff(s),

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, VILLAGE OF HEWLETT NECK, WOODMERE FIRE DISTRICT, WOODMERE FIRE DEPARTMENT, WOODMERE VOLUNTEER FIRE DEPARTMENT INC., WOODMERE FIRE DEPARTMENT, INC., HEWLETT BAY FIRE DISTRICT. HEWLETT FIRE DEPARTMENT, HEWLETT FIRE DEPARTMENT OF HEWLETT BAY FIRE DISTRICT, HEWLETT FIRE DEPARTMENT EXEMPT ASSOCIATION, INC., LONG ISLAND WATER CORPORATION AND LONG ISLAND WATER CORPORATION D/B/A LONG ISLAND AMERICAN WATER,

Defendant(s).

x

Index No. 21349/09

Motion Submitted: 10/22/10
Motion Sequence: 003, 005, 006, 007, 008, 009

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XXXXXX
Answering Papers..XX
Reply..XXXXXX
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's................................X

Motion by defendants Woodmere Fire District, Woodmere Volunteer Fire Department i/s/a Woodmere Fire Department, and/or Woodmere Fire Department, Inc. ("the Woodmere defendants") for summary judgment dismissing the complaint is granted.

Cross-motion by defendant County of Nassau ("County") for summary judgment dismissing the complaint and all cross-claims is granted.

Cross-motion by defendant Hewlett Bay Fire District, s/h/a Hewlett Bay Fire District, Hewlett Fire Department, Hewlett Fire Department of Hewlett Bay Fire District, and Hewlett Fire Department Exempt Association, Inc. ("Hewlett Bay"), for summary judgment dismissing the complaint and all cross-claims is granted.

Cross-motion by defendants Long Island Water Corporation and Long Island Water Corporation d/b/a Long Island American Water ("LIWC") for summary judgment dismissing the complaint and all cross-claims is granted in part and denied in part, as set forth below.

Cross-motion by defendant Town of Hempstead ("Town") for summary judgment dismissing the complaint is granted.

Motion by defendant Village of Hewlett Neck for summary judgment dismissing the complaint and all cross-claims is granted.

In this action plaintiffs seek compensatory damages from all defendants in connection with a fire that took place at their home at 960 Smith Lane, Hewlett Neck, New York on July 23, 2008, at approximately 6:15 a.m. The fire began on the porch at the southerly portion of the premises. Both plaintiff Weisbord and her neighbor called 911 to report the fire. Plaintiffs claim that the initial small fire was able to spread throughout the entire premises and destroy it and its contents, because of the following:

(1) inoperable communications systems due to damage to the emergency response system that occurred months before the fire;

(2) delay in response due to initial dispatch of firefighters to incorrect address;

(3) inadequate water pressure from the premises garden hose first used;

(4) inoperable fire hydrants and the lack of adequate water pressure from the fire hydrants.

In their complaint plaintiffs allege four causes of action. The first, for negligence, is against all defendants. The second, for breach of contract, is against the County and the Town. The third is for breach of contract against LIWC. The fourth alleges that plaintiffs are third-party beneficiaries of contracts between the defendants. Plaintiffs commenced this action in October, 2009, and some discovery took place before defendants made the instant summary judgment motions.

Summary judgment is the procedural equivalent of a trial (***S.J.Capelin Assoc., Inc. v. Globe Mfg. Corp.***, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (***Matter of Suffolk County Dept. of Social Services v. James M.***, 83 N.Y.2d 178, 182, 630 N.E.2d 636, 608 N.Y.S.2d 940 (1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (***Giuffrida v. Citibank Corp.***, 100 N.Y.2d 72, 82, 790 N.E.2d 772, 760 N.Y.S.2d 397 (2003); ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations [***Zuckerman***].

As a general rule, a municipality may not be held liable for injuries resulting from negligence in the performance of a governmental function absent a special relationship (see ***Kodryanu v. City of New York***, 274 A.D.2d 376, 709 N.Y.S.2d 627 [2d Dept., 2000]). This general rule applies to police protection, fire protection, and even ambulance service (**Laratro v. City of New York**, 8 N.Y.3d 79, 82-82, 861 N.E.2d 95, 828 N.Y.S.2d 280 (2006); ***Dixon v. Village of Spring Valley***, 50 A.D.3d 943, 856 N.Y.S.2d 243 [2d Dept., 2008]). A fire district may not be held liable for alleged negligence by its employees, absent a special relationship (***United Services Auto. Assn. v. Wiley***, 73 A.D.3d 1160, 904 N.Y.S.2d 436 (2d Dept., 2010); ***Howell v. Massapequa Fire District***, 306 A.D.2d 317, 760 N.Y.S.2d 679 [2d Dept., 2003]).

The elements of a special relationship are the following:

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (***McLean v. City of New York***, 12 N.Y.3d 194, 201, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009), quoting ***Cuffy v. City of New York***, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 513 N.Y.S.2d 372 [1987]). It is plaintiffs' heavy burden to establish the existence of a special relationship (***Dixon v. Village of Spring Valley, supra***).

A member of the public may not maintain an action against one contracting with a municipality to furnish water at hydrants, unless an intention appears that the provider is to be answerable to individual members of the public as well as to the municipality (***H.R. Moch Co., v. Rensselaer Water Co.***, 247 N.Y. 160, 164, 159 N.E. 896, 62 A.L.R. 1199 [1928]).

The Woodmere defendants, the County, Hewlett Bay, and the Village of Hewlett Neck met their burden of establishing the absence of a special relationship with plaintiffs. Consequently the burden shifted to plaintiffs to raise a triable issue of fact.

In opposition, plaintiffs make various arguments. Primarily, they insist that the summary judgment motions are premature because disclosure from these defendants is necessary in order to enable plaintiffs to address the issue of a special relationship. However, the mere hope or speculation that disclosure might lead to relevant evidence does not suffice to oppose summary judgment (***Essex Ins. Co. v. Carpentry***, 74 A.D.3d 733, 904 N.Y.S.2d 78 (2d Dept., 2010); ***Andrews v. New York City Housing Authority***, 66 A.D.3d 619, 887 N.Y.S.2d 180 [2d Dept., 2009]).

Plaintiffs argue that the activities the municipal defendants were engaged in were proprietary in nature rather than governmental. The law cited above plainly states the opposite: fire protection is a governmental function. Plaintiffs further argue that the public entities are liable because they acted in bad faith or without a reasonable basis. There is no evidence in the record to support such a theory. Their final argument is a conclusory claim that issues of fact exist.

Overall, on this record plaintiff has failed to raise a triable issue of fact to establish the elements of a special relationship with any of the municipal defendants or fire districts, or the availability of any exception to the requirement of such a special relationship. Consequently the motions and cross-motions by the Woodmere defendants, the County, Hewlett Bay, and the Village of Hewlett Neck for summary judgment dismissing the complaint and all cross-claims against them must be granted as to all claims for negligence. Under these circumstances there is no need for the Court to consider the claims of some of these defendants regarding plaintiffs' notice of claim.

In addition, as there is no special relationship between the aforementioned defendants and the plaintiffs, all cross-claims for contribution against these defendants must also be dismissed (***Molley v. Aziz***, 154 A.D.2d 578, 546 N.Y.S.2d 407 [2d Dept., 1989]).

The principle of common-law indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it has paid to the injured party (***Bellefleur v. Newark Beth Isreal Medical Center***, 66 A.D.3d 807, 808, 888 N.Y.S.2d 81 [2d Dept., 2009]). As the "special relationship" doctrine protects these municipal defendants and fire districts from liability as a wrongdoer, all cross-claims for common law indemnification against these defendants must also be dismissed.

The cross-motion by the Town is on a different footing. The Town focuses on allegations in the complaint that it was negligent in managing the water supply and water

pressure system. The Town, by its Commissioner of the Department of Water, responds that it does not own, control, operate, maintain or manage the water infrastructure, including any fire hydrants, at the accident location. The Town states that water service to that area is provided by LIWC. This makes out a *prima facie* case of no negligence on the part of the Town with respect to the water pressure issues, and plaintiffs have failed to raise a triable issue of fact to the contrary.

The Town did not address the allegations of negligence against it regarding the fire protection and prevention dispatch and response systems. However, there has been no showing on this record that the communications systems used herein had any connection to the Town, and plaintiffs have not raised a triable issue of fact as to the existence of such a connection.

Based on the foregoing, the Town's motion for summary judgment dismissing all claims against it for negligence must be granted. All cross-claims against the Town for contribution and common-law indemnification must also be dismissed.

The Court has reviewed the second cause of action wherein plaintiffs allege that they paid taxes to the Town and/or County for fire protection, a contract was formed thereby, and the Town and/or County breached the contract. Plaintiffs have no such cause of action. Citizens owe a duty to the government to pay taxes; this duty is not founded on contract or agreement. It operates "*in invitum*" (**see *Matter of Legum v. Goldin***, 55 N.Y.2d 104, 107, 432 N.E.2d 772, 447 N.Y.S.2d 900 [1982]). Under these circumstances both the Town and the County are entitled to summary judgment dismissing the second cause of action.

Moving on to the cross-motion papers by LIWC, this defendant correctly cites ***H.R. Moch Co., Inc v. Rensselaer Water Co. , supra***, for the long-established proposition that a member of the public may not maintain an action against one contracting with a municipality to furnish water at hydrants, unless an intention appears to the contrary in the contract itself. LIWC has produced its contract or Tariff for water service in Hewlett Neck for the relevant date (Exhibit A to Garelle Reply Affirmation). LIWC quotes the Tariff at Leaf No. 55-56:

P. 1.2 The Corporation shall not be responsible for any personal injury or property damage resulting in any way from the supplying or use of water service . . . .

1.3 The Corporation will use reasonable diligence to maintain a continuous and uninterrupted supply of water, but should the supply be interrupted, or become faulty, or fail, the Corporation shall not be liable for any damage to person or property resulting from such interruption, fault or failure.

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This language in the agreement between LIWC and Hewlett Neck for water service mandates the conclusion that LIWC and Hewlett Neck never intended LIWC to be answerable to an individual member of the public for any loss ensuing from the failure to fulfill the promise to provide water service (***H.R. Moch Co., Inc. v. Rensselaer Water Co., supra***). Consequently LIWC has established a *prima facie* case that it is entitled to summary judgment dismissing plaintiffs' fourth cause of action against LIWC, based on third-party beneficiary status to the LIWC/Hewlett Neck Tariffs.

In opposition, plaintiffs argue that an exception to ***Moch*** applies where "the contracting party, in failing to exercise reasonable care, launches an instrument of harm" (***Espinal v. Melville Snow Contractors Inc.***, 98 N.Y.2d 136, 140, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002], discussing ***Moch***). However, ***Moch*** was clear: "What we are dealing with at this time is a mere negligent omission, unaccompanied by malice or other aggravating elements. The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong"(***Moch*** at 169). The Court finds that plaintiffs have failed to raise a triable issue of fact that LIWC launched an "instrument of harm." Accordingly, LIWC is entitled to summary judgment dismissing the fourth cause of action.

What remains is the plaintiffs' third cause of action against LIWC for breach of their own contract with LIWC for the provision of water service to their residence. In the complaint plaintiffs allege that they pay monthly fees to LIWC for a proper water supply, yet when plaintiff Nusblatt and an unidentified fire fighter tried to use the garden hose to quench the fire in its early stages, there was inadequate water pressure. As to this cause of action, LIWC has not produced a copy of such contract. In addition, the moving affidavit of Mr. Kern, LIWC's Director of Operations, contains puzzling discrepancies, such as the notation that LIWC increased water flow at 7:01 AM on the morning of the fire to 960 Spruce Lane, rather than 960 Smith Lane. The record also contains some contradictory information about water pressure on the morning of the fire.

On this record, defendant LIWC has not made out a *prima facie* case for judgment dismissing the third cause of action. Consequently, this cause of action against LIWC is severed and continued.

The foregoing constitutes the Order of this Court.

Dated: December 20, 2010
Mineola, N.Y.

J. S. C.

ENTERED
DEC 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE