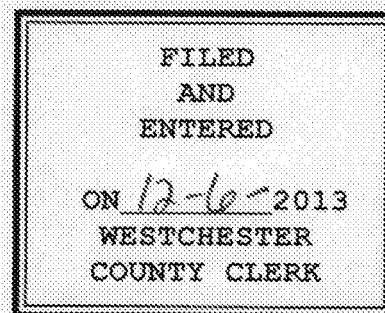


Reisdorph v City of Peekskill
2013 NY Slip Op 33765(U)
December 5, 2013
Supreme Court, Westchester County
Docket Number: 55138/2012
Judge: William J. Giacomo
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----X
RICHARD REISDORPH and JOAN RIESDORPH,
Plaintiff,

-against-

Index No. 55138/2012
DECISION & ORDER

THE CITY OF PEEKSKILL and HOWARD JOHNSON and
DIANE JOHNSON,
Defendants.

-----X
THE CITY OF PEEKSKILL,
Third-Party Plaintiff,

-against-

HOWARD JOHNSON and DIANE JOHNSON,
Third-Party Defendants.

-----X
The following papers numbered 1 to 44 were read on plaintiffs' motion for a permanent injunction and The City of Peekskill's cross motion to dismiss the complaint.

PAPERS NUMBERED

Notice of Motion/Affidavit/Exhibit A-H/Memo of Law	1-11
The Johnson's Affirmation in Opposition	12
Notice of Cross Motion/Affirmation/Exhibits A-Y	13-39
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Factual & Procedural Background

Plaintiffs reside at 330 Depew Street in the City of Peekskill in a home they have occupied for more than 45 years. Their property lies between Depew Park to the east and

the Hudson River to the west. The property is bisected by a natural stream running in a general north/south direction. The stream originates in Depew Park and runs downhill to an open channel through several properties before passing beneath Depew Street and re-entering the stream that bisects plaintiffs' property. Several hundred feet south of the property the stream passes beneath Requa Street in a culvert designed for that purpose. The water then continues down to the Hudson River.

Plaintiffs claim that prior to The City of Peekskill's ("the City") "Depew Park Drainage Project" (the "Drainage Project") they would experience occasional, minor overflows of the stream, typically during a hurricane and other intense rain events. These overflows would briefly cover a small portion of the southerly end of their property and then quickly dissipate.

In 2001, the City undertook the Drainage Project in and around Depew Park. The project involved piping the open drainage way between the Park and Depew Street, while doubling the number of pipes used to carry the drainage beneath Depew Street on the plaintiffs' property. Plaintiffs' expressed concerns to the City about the impact of this work on their property and were told that there would be less water discharged on their property upon the completion of the project. Plaintiffs were also told that the City would clear the Requa Street culvert of accumulated trees, leaves, trash and debris which had historically been clogged and which risked storm water backup and flooding on their property. The culvert entrance is on property owned by defendants/third party defendants Howard and Diane Johnson.

On August 28, 2011, during Hurricane Irene, plaintiffs' property was inundated with water causing a flood in their basement 4 feet in depth. Also a large brown lake formed behind their house.

Plaintiffs commenced this action against the City seeking to recover for property damage claiming that the flooding is a continuing nuisance and trespass. In their complaint, plaintiffs allege that the Drainage Project significantly increased the water flowing on to their property. Further, they claim they were misled by the City regarding the project. Plaintiffs also allege that the City failed to properly remove the debris from the Requa Street culvert as it had promised. When plaintiffs learned that the Requa Street culvert is on the Howards' property they added the Howards as defendants in this action. In their second cause of action plaintiffs allege they have suffered \$94,592.26 in property damages.

After being served with the complaint, the City commenced a third party action against the Howards. The City noted that in 2003, it made several attempts to gain access to the culvert on the Howards' property in order to remove debris but the Howards would not permit the City on to the property. Nevertheless, the City notes that the Howards are responsible for the maintenance and cleaning of the culvert. In 2006, the City again unsuccessfully tried to gain access to the culvert.

On June 25, 2011, the City issued a code violation to the Howards regarding the blocked culvert and demanded that the culvert be cleaned by August 1, 2011. On August 23, 2011, another violation was issued when the culvert remained blocked.

By Decision and Order dated May 7, 2012, the City of Peekskill City Court (William Maher, J.) found the Howards guilty of violating section 491-11 of the Code of the City of Peekskill for their failure to clear the blocked culvert.

Plaintiffs now move for summary judgment declaring that the City is liable for the flooding of their property and an order directing it to abate the storm water flow to that which predated the Drainage Project and send this case to a hearing on damages. In support of their motion, plaintiffs submit the affidavit of Richard J. Riesdorph, P.E., a New York State licensed Professional Engineer (who is also their son) who detailed the City's negligence in the implementation of the Drainage Project and the adverse impact of that negligence. It was Riesdorph's opinion that the City's piping of what had been an open watercourse above the property, its doubling of the number of pipes discharging on to the property and its replacement of corrugated pipes with "smoothwall" pipes under Depew Street, have dramatically increased the velocity and erosive impact of the storm water traversing the property. Further, the failure of the City to ensure that the Requa Street culvert be properly maintained by the Johnsons resulted in additional flooding.

In opposition, the City argues that there are issues of fact which preclude summary judgment in this matter. First, the City notes that the flooding which caused the plaintiffs' property damage occurred during Hurricane Irene which, until Hurricane Sandy, was the largest and most expensive natural disaster in the history of the state. The City also argues that there is no objective proof that there was an increase in the water's volume or velocity on plaintiffs' property. Finally, the City argues that there is no proof that the lack of maintenance of the Requa Street culvert caused flooding to plaintiffs' property. Rather, the flooding could have been caused by Hurricane Irene.

The Johnsons also oppose plaintiffs' motion on the ground that it is premature since discovery is not complete.

With respect to the Johnsons' opposition, the plaintiffs note that they merely submitted an attorney affirmation which is of no probative value.

The City cross moves for an order dismissing the complaint on the ground that the alleged nuisance and trespass was created in 2002 as a result of the Drainage Project and the action is barred by the statute of limitations since plaintiff did not commence this action one year and ninety days after the alleged negligent design and installation of the storm drainage system. The City also claims that it is immune from suit because the design and installation of the storm drainage system was a discretionary act, therefore, it cannot be held liable even if plaintiffs can establish negligence. The City also argues since the Howards are responsible for maintaining their portion of the watercourse, it cannot be held liable for their failure to maintain the Requa Street culvert.

In opposition to the cross motion, the plaintiffs argue that the action is not time barred because this case is not based solely on negligence but also on a claim of continuing trespass and nuisance. Plaintiffs also argue that each flood is a new occurrence and the one year period starts after each one. Therefore, this action is timely. Plaintiffs further argue that the City is not immune from suit because municipalities are not immune from suit for negligent maintenance of their sewer systems. Further, even if the City is immune here it affirmatively assured plaintiffs that the Drainage Project would not increase the water on their property. Therefore, the City assumed a duty to plaintiffs which they breached.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (See *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Plaintiff's Motion for Summary Judgment and Injunctive Relief.

To the extent relevant, CPLR 6301 provides that:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

It is settled law that a party seeking a preliminary injunction pursuant to CPLR 6301 "must prove three things: (1) likelihood of his ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) a balancing of equities" in his favor (*Albini v. Solork Associates*, 37 A.D.2d 835 [2d Dept. 1971]).

Here, plaintiffs have not established entitlement to summary judgment seeking injunctive relief. Notably, there are questions of fact regarding whether the Drainage Project increased the volume and velocity of water causing the water flow to exceed the stream's natural boundaries and/or whether the flooding was caused solely by Hurricane Irene. Thus, plaintiffs have not demonstrated a likelihood of success on the merits. Moreover, since it is not clear that the Drainage Project was the cause of the flooding experienced by plaintiffs they cannot establish irreparable injury in the absence of injunctive relief. Further, plaintiffs request for monetary damages in this lawsuit capable of calculation does not constitute irreparable harm (see *Scotto v. Mei*, 219 AD2d 181 [1st Dept 1996]). Finally, in view of the factual issues in this case, the balancing of the equities is not in favor of plaintiffs.

Accordingly, plaintiffs' motion for summary judgment and seeking injunctive relief is DENIED. (See *Byrne Compressed Air Equip. Co. v Sperdini*, 123 A.D.2d 368, 506 N.Y.S.2d 593 [2nd Dept 1986]) [Because defendant raised issues of fact a claim for a permanent injunction can have only be issued after a full trial as it cannot be resolved on the basis of the papers submitted.]).

The City's Cross Motion to Dismiss

The City seeks to dismiss the complaint on the ground that the action is time barred as the Drainage Project was completed in 2002 and any alleged negligence could only have occurred then and not in 2011 when the flooding occurred. However, in view of the question of fact regarding the causation of the flooding on plaintiff's property and, if caused by the City, whether the flooding is a continuing trespass and nuisance during heavy rains the question of whether the action is time barred is a question of fact. (See e.g.

Bloomingdales, Inc. v New York City Tr. Auth., 52 A.D.3d 120, 859 N.Y.S.2d 22 [1st Dept 2008]).

With respect to the City's claim that the complaint must be dismissed because it is immune from liability and the Johnsons are responsible for clearing the Requa Street culvert not the City, plaintiffs have raised a question of fact regarding whether the City in its 2002 letter to plaintiffs assumed the responsibility of ensuring there would be less water on plaintiffs' property and that the Requa Street culvert would be cleared. In a May 1, 2002, letter written by Director of Public Works Richard M. DiMarzo, in response to plaintiffs' letter to the Mayor setting forth their concerns about the Drainage Project, Mr. Di Marzo stated in relevant part "I can assure you that even though the pipes are larger, the amount of water will be less." With respect to the Requa Street culvert, Mr. DiMarzo stated "The inlet to the pipe under Requa Street will be cleaned out as the jobs near completion." Yet, the Requa Street culvert was never cleaned by the City.

Based on the foregoing, the City's cross motion to dismiss the complaint is DENIED.

The parties are directed to appear in Settlement Conference Part on February 24, 2014 room 1600 at 9:30 a.m. for further proceedings.

Dated: White Plains, New York
December 5, 2013


HON. WILLIAM J. GIACOMO, J.S.C.