SUPREME COURT-STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY
Present: HON. ROBERT M. BERLINER
Justice of the Supreme Court

----------X

DAVID KATZ,

Plaintiff(s),

-against-

THE TOWN OF CLARKSTOWN, NEW YORK, ALEXANDER J. GROMACK, as Supervisor of the TOWN OF CLARKSTOWN, TOWN OF CLARKSTOWN DEPARTMENT OF ENVIRONMENTAL CONTROL, RALPH LAURIA, as Deputy Director of TOWN OF CLARKSTOWN DEPARTMENT OF ENVIRONMENTAL CONTROL,

Defendant(s).

----------X

ORDER

Index No.: 035560/2012

Motion Date: 02/01/2012

The following papers, numbered 1-4, were read on this motion by the defendants for an Order dismissing the complaint, or, in the alternative, dismissing certain causes of action:

Notice of Motion/Affirmation(Exhibits A-E)-1-2
Affirmation in Opposition(Exhibit A)-3
Reply Affirmation-4

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

The plaintiff herein owns a house within the territorial limits of the defendant Town of Clarkstown (hereafter "Clarkstown" or "Town"). In anticipation of the approach of tropical storm Irene in August, 2011, plaintiff was ordered by the appropriate officials of Clarkstown to evacuate his home. The plaintiff, anticipating the worst, took steps to try and prevent damage to his house and belongings by the approaching storm, including moving many of his belongings from the lowest level in the house to an upper level.

Unfortunately, the lower level of plaintiff's house sustained severe water damage, but the plaintiff's foresight in moving much of his property upstairs saved a substantial

amount of his property from sustaining any damage. The property on the second level remained undamaged. However, shortly after the storm subsided, the contractors hired by the plaintiff to repair the lower level of the house advised him that the property upstairs, while so far unscathed, might be effected by the water in the downstairs, the mold, the debris that might be created by the repairs downstairs, and the like, and therefore suggested to the plaintiff that while the renovation was going on, he move all his belongings outside so as to prevent damage and to allow them to be aired out in the natural air.

Prior to doing so, the plaintiff spoke to a police officer of Clarkstown who was patrolling his neighborhood. He first inquired of the police officer as to whether the property would be safe on his driveway, where he intended to put it, and was assured by the officer that the area would be patrolled, since many people were doing the same thing. Plaintiff then inquired as to when the town would next be doing a bulk garbage pickup, since, obviously, he didn't want his belongings thrown out. In the presence of the plaintiff, the officer spoke to defendant Lauria, who told the officer, who in turn told the plaintiff, that bulk pickups would not take place within the town for at least a week. No doubt relying on that information, plaintiff placed his belongings on his driveway, only to have same removed by the town the next day as part of a bulk garbage pickup. Apparently, and unbeknownst to the plaintiff, defendant Gromack, the supervisor of the Town, had directed that all property left outside be removed as a health and safety issue. Attempts by the plaintiff to retrieve his property were not successful, and the instant lawsuit ensued.

Plaintiff timely filed a notice of claim, which clearly states in Paragraph 2 thereof: "The nature of the claim: Loss of personal property sustained by Claimant as a result of the premature and inappropriate bulk garbage removal on or about August 31. 2011 following Tropical Storm Irene." The notice of claim is dated November 29, 2011.On March 30, 2012, a hearing was held pursuant to Section 50-H of the General Municipal Law. No testimony was elicited from the plaintiff other then to those claims raised in his notice of claim. However, the complaint in this action, dated October 5, 2012, includes a negligence cause of action and a cause of action for "negligent infliction of emotional distress".

The defendants now move, pre answer, to either dismiss the complaint in it's entirety, to dismiss the complaint against certain of the defendants in it's entirety, or to dismiss one of the causes of action in it's entirety.

Defendant seeks to dismiss as against defendant Town of Clarkstown Department of Environmental Control, alleging that as a department within the Town of Clarkstown it has no independent legal standing. The defendant has made out a prima facie entitlement

to this relief, and the plaintiff does not oppose this portion of the application, and therefore it is granted.

Defendant also seeks to dismiss as against the individual defendants, Gromack, the town supervisor, and Lauria, the deputy director of the town's Department of Environmental Control. Again, the defendants have made out a prima facie entitlement to this relief, and the plaintiff does not oppose this portion of the application, and therefore it is granted.

Thus, the only remaining defendant is the Town of Clarkstown. The Town moves to dismiss the entire complaint against it under the theory that the Town owed the plaintiff no duty of care. In the alternative, the Town avers that the cause of action for the negligent infliction of emotional distress must be dismissed, since it was not set forth in the plaintiff's notice of claim. Of course, if the court were to grant defendant's motion on the lack of duty of care, the alternative position is rendered moot.

The defendant cites numerous cases setting forth what must be established by the plaintiff in order to sustain liability as against a municipality. Admittedly, the position taken in various cases have varied from department to department, and even within the Second Department itself. Therefore, this court found that the case recently decided by the Court of Appeals, *McLean v. City of New York*, 12 N.Y.3d 194 (2009), succinctly and clearly summarizes the current state of the law in order for the plaintiff to prevail.

The *McLean* court held that the "agency of government is not liable for the negligent performance of a governmental function in the absence of a special duty to the injured person, in contrast to a general duty owed to the public." (emphasis supplied). The court went on to state that "Discretionary governmental actions may never be a basis for tort liability, while ministerial acts may support liability only where a special duty is found." (emphasis supplied). It should be noted that the *McClean* case involved clearly incorrect information given to the plaintiff by a City of New York worker, as to whether a particular day care center had any complaints filed against it. The city worker responded in the negative when, in fact, the center did have complaints against it. Plaintiff, relying on these statements, registered her child, who was subsequently injured at the center. Are the facts much different here, where the plaintiff relied on erroneous information given to him by a town employee as to when bulk pickup would commence?

Thus, it is a two fold test. If the court finds that the actions of the Town were discretionary, there can be no basis for liability, and the case is over. If, on the other hand, the court finds the actions to be ministerial, then the plaintiff must still establish a special relationship to prevail.

The court finds that the plaintiff has failed on both grounds. The court finds that the

actions of the town supervisor in directing the bulk pickup to start immediately constitute a discretionary act on his part, and therefore cannot be the basis of any tort liability.

However, the court is constrained to note that even if the court had found his actions to be ministerial, it would still grant defendant's application, since the plaintiff failed to establish the "special relationship" required by *MCClean* and it's predecessors. The *McClean* court quoted *Pelaez v. Seide*, 2 N.Y.3d 186 (2004) in setting forth the requirements: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or 3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation." *McClean*, at 199. The plaintiff has failed to establish either.

The motion is granted. The complaint is dismissed.

This constitutes the decision and order of the court.

Dated: New City, New York
April 9, 2013

ENTER:

ROBERT M. BERLINER, J.S.C.

To:

Condon & Associates, PLLC
Joseph A. Maria, P.C.