K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC
2014 NY Slip Op 32884(U)
May 2, 2014
Sup Ct, Westchester County
Docket Number: 54201/2011
Judge: Charles D. Wood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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

----------X

K-F/X RENTALS & EQUIPMENT, LLC
DECORATOR'S DEPOT, INC., AND DAVID WEINMAN,

Plaintiffs,

DECISION & ORDER
Index No. 54201/2011
Sequence No. 1, 2 and 7

-against-

FC YONKERS ASSOCIATES, LLC, AND P.J. HERMAN, LLC.,

Defendants.

----------X

P.J. HERMAN, LLC,

Third-Party Plaintiffs,

-against-

CITY OF YONKERS,

Third-Party Defendant.

----------X

WOOD, J.

The following documents numbered 1-107 were read in connection with: (1) plaintiffs' motion for summary judgment; (2) third party defendant City of Yonkers' motion for summary judgment; and (3) defendant FC Yonkers Associates, LLC's cross motion for summary judgment:

Plaintiffs' Motion for Summary Judgment (Seq.1)	
Plaintiffs' Notice of Motion, Counsel's Affirmation, Exhibits.	1-21
Defendant P.J. Herman LLC's Affirmation in Opposition, Exhibits.	22-30
Plaintiffs' Counsel's Reply, Exhibits.	31-43
Third Party Defendant City of Yonkers' Motion for Summary Judgment (Seq. 2)	
Third Party Defendant City of Yonkers Motion for Summary Judgment, Klemperer Affirmation, Exhibits, Memorandum of Law.	44-65

Defendant P.J. Herman LLC Counsel's Affirmation in Opposition, Exhibits.	66-83
Third Party Defendant City of Yonkers Counsel's Reply Affirmation, Exhibits.	84-86

Defendant FC Yonkers Associates, LLC's Cross Motion for Summary Judgment (Seq.7)	
Notice of FC Yonkers Associates, LLC's Cross Motion for Summary Judgment, Counsel's Affirmation, Exhibits, Memorandum of Law.	87-96
Plaintiffs' Counsel's Affirmation in Opposition, Exhibits.	97-101
FC Yonkers Associates Inc. Reply Memorandum of Law, Counsel's Reply Affirmation, Exhibits.	102-107

Plaintiffs commenced this action by the filing of a summons and complaint on or about August 12, 2011. On February 7, 2013, defendant P.J. Herman LLC ("defendant PJ") commenced a third party action solely against the City of Yonkers, third party defendant ("the City") by filing a summons and complaint with the Westchester County Clerk's Office. On August 22, 2013, plaintiffs filed the Note of Issue.[1]

This is an action by plaintiffs to recover damages sustained on or about March 11, and April 15, 2011, from water damage due to flooding of the property located at 291 Tuckahoe Road, Yonkers, where plaintiffs' businesses are located ("subject premises"). Defendant FC Yonkers Associates, LLC's ("defendant FC") property is located directly above and in the rear of the subject premises northeast of the New York State Thruway Exit 6A. Defendant PJ's property is located directly below and adjacent to the subject premises at 10 Hermann[2] Place (Defendant PJ maintains that plaintiffs' property actually abuts Defendant PJ's property). According to plaintiffs, on the dates

---

[1]On August 6, 2013, the court issued a Trial Readiness Order directing that any motion for summary judgment must be served within 60 days following the note of issue, this deadline was extended to November 21, 2013.

[2]Throughout the papers and exhibits appear spellings of "Herman", "Herrmann" and "Hermann." Since it appears to be the most frequently used, the court will use one r and two n's.

that water damage occurred, it had rained, the rain water accumulated, backed-up or otherwise flooded the subject premises due to the negligence of defendants. Plaintiffs allege that an illegal drain pipe was improperly installed on defendant PJ's property that was supposed to connect to two twin 72 inch diameter corrugated metal culverts buried under the property that carry water away from the subject premises and surrounding area out to the Sprain Brook. Said pipe was placed at an angle to the twin culverts, but was not properly connect to the culverts thereby creating a weak point in the pipes. One of the two twin culverts was crushed at this weak point, which caused a visible depression/sinkhole on the property that would get worse after every rain event. Plaintiffs contend that further crushing of the pipe was caused by an individual working on defendant PJ's property that would dump construction debris into the depression/sinkhole after every time it rained, for a period of years, in an attempt to conceal the depression. This dangerous and defective condition prevented surface water from properly draining away from the subject premises, which caused a back-up/flood of the subject premises.

Plaintiffs contend that also contributing to the flood was the redirection of water by defendant FC's installation of a drainage pipe on the hillside above the subject premises in order to keep its property dry while it built a retaining wall for the Ridge Hill Development it was constructing at the time of these incidents. Plaintiffs claim that defendant FC concealed these pipes on their property in the hillside by cutting them short and burying them in the dirt. Therefore, based upon the foregoing, plaintiffs maintain that defendants had knowledge of the defective conditions on each of their properties making them joint and severally liable for plaintiffs' damages. Further, in the third party complaint, Defendant PJ (the third party plaintiff) accuses the City (the third party defendant)

of negligence in the installation and maintenance of sewer and drainage easements, as well as the culvert inlets on and intersecting Hermann Place which caused flooding.

Plaintiffs bring the instant motion for summary judgment against defendants FC and PJ. Alternatively, plaintiffs' motion seeks to strike defendant PJ's Answer due to the alleged violation of at least eight discovery orders and/or to preclude /estop defendant PJ from offering any evidence at trial with respect to taking a contrary position than that taken by defendant PJ at the City of Yonkers violation hearings relating to this incident.

Defendant FC cross moves for summary judgment and to dismiss plaintiffs' complaint as against defendant FC in its entirety, or alternatively denying plaintiffs' motion for summary judgment against defendant FC, and granting a Frye hearing to strike the plaintiffs' engineering expert's affidavit and to preclude him from testifying at trial regarding the causes of the March and April 2011 flood that allegedly caused plaintiffs' damages.

The City has brought a motion for summary judgment against defendant PJ, asserting (among other things) that defendant PJ's pleadings make broad general conclusory allegations that the City failed to adequately maintain and control drainage and prevent flooding.

NOW based upon the foregoing, the motions are decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New

York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v. Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (*Marconi v. Reilly,* 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v. Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v.Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

The elements of negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A violation of a state statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance, constitutes only evidence of negligence (Elliot v. City of New York, 95 NY2d 730 [2001]). A defendant will not be liable for a dangerous or defective condition on its property unless it created the condition, or had actual or constructive notice of its

existence and a reasonable time to remedy the defect (Deborah Goldin v. H. Charles Riker and New Life Mgmt, Inc., 273 AD2d 197,198 [2d Dept 2000]).

Plaintiffs' Motion for Summary Judgment (Seq.1)

Plaintiffs claim that defendant PJ cannot dispute that its property was maintained in a condition dangerous to plaintiffs in light of its guilty plea and fine payment for the violations it received from the City acknowledging the existence of the dangerous condition, ie, the crushed culverts. In support of the instant motion for summary judgment, plaintiffs' theory is that since defendant PJ agreed to repair the crushed pipes on its property, that was actually an acknowledgment of a violation of the state statute, and thus, defendant PJ is negligent per se and is absolutely liable for plaintiffs' damages.

The record shows that indeed on March 14, 2011, Defendant PJ was issued three violations by the Department of Housing and Buildings, City of Yonkers. Defendant PJ was cited for violations including violating the Property Maintenance Code of New York State, Section 507, Storm Drainage for flooding of Tuckahoe Road, St. Mary's Cemetery & Herman Place (Exh. G), and failing to file for required building permits. On March 22, 2001, defendant PJ was ordered to file plans for repairs for the broken twin corrugated metal pipe culverts. Not all papers were submitted by PJ, as a result a summons was issued on April 4, 2011. On April 25, 2011, an inspection by the City of Yonkers Department of Housing and Buildings, of Defendant PJ's premises found violation of discharge of sewerage to the surface on the ground. Plaintiffs argue that defendant PJ accepted the responsibility for the creation of the dangerous condition that caused the flooding of the subject premises.

Moreover, plaintiffs argue that defendant PJ knew or had reason to know that one of the two twin culverts on its property were crushed causing water to back-up unto the subject premises. However, Joseph Deglomoni (one of the owners of defendant PJ, the corporate entity which was formed to acquire and manage the property at 10 Hermann Place when it was purchased in 2005), testified that prior to March of 2011, he never observed any drainage or flooding issues with respect to his property or the neighboring property, nor did he have knowledge of anyone complaining about the drainage. According to Deglomoni, the first time he became aware of any flooding problems was when he received a call from someone at the City of Yonkers Building Department after the March 11, 2011 flooding incident. However, plaintiffs retort that defendant PJ owned the property for six years, and in that time, had reasonable opportunity to inspect the premises and remedy any defective conditions located thereon. Plaintiffs point to the testimony of Vincent A. Massaro, Senior Professional Engineer for the City, in that his investigation revealed that the crushed pipe on PJ's property was preventing the proper flow of water away from the subject premises.

Regarding defendant FC's liability, plaintiffs contend that during the construction of the Ridge Hill Project by defendant FC, temporary pipes were installed on defendant FC's property to redirect surface water away from its property and onto the subject premises while a retaining wall was being constructed for the water. Plaintiffs claim that the pipes were installed in 2008, were never removed and were cut shorter to be concealed in the hillside. Plaintiffs submit that a principal of the company, Steven Kirshoff, personally witnessed these pipes spewing large amounts of water onto the subject premises within days after the flood events, and defendant FC attempting to conceal these pipes by cutting them and burying them in the dirt. Plaintiffs maintain that the installation of these pipes was improper, which contributed to the flooding of the subject premises and plaintiffs'

damages.

Based on this record, by no means are the facts uncontrovered, *inter alia* : the alleged crushed pipes on defendant PJ's property caused the flood; defendant PJ created the condition leading to the crushed pipes; defendant PJ had actual or constructive notice of the condition leading to the crushed pipes; or that PJ installed the pipes. Rather, there are multiple unresolved dispositive issues to consider here. Moreover, plaintiffs have failed to make a sufficient showing that defendant PJ is estopped from disputing its liability for plaintiff's damages, or that defendant PJ's alleged failure to maintain its property free from dangerous and defective conditions was a direct and proximate cause of these flood events. Likewise, with regard to defendant FC's liability (more fully discussed below in cross-motion), plaintiffs have failed to make a sufficient showing that defendant FC contributed to the causation of the flood on the subject premises. Consequently, and for all of the above reasons, plaintiffs have failed to make a prima facie showing of entitlement to summary judgment on the issue of liability as to both defendants PJ and FC. Since plaintiffs failed to make a prima facie showing of entitlement to judgment as a matter of law there is no need to consider the sufficiency of the opposition papers (Mials v. Millington, 110 AD3d 966 [2d Dept 2013]). However, even assuming that plaintiffs had established entitlement to summary judgment, they would not be entitled to summary judgment.

In opposition to the summary judgment motion, defendant PJ submits that the summary judgment should be dismissed, as there are many facts in issue. Indeed, defendant PJ submits a litany of genuine issues of fact. The dates of the floods are in itself an issue, as plaintiffs' allege two separate floods on March 11, 2011 and April 15, 2011, but Massaro, the City's Senior Professional Engineer, testified that he was sent to check on flooding on or about March 7, 2011. Defendant PJ

represents that they have always challenged the City's findings that the only cause of the flood was the constricted drainage pipes on the PJ property. Defendant PJ argues that it is an out of possession landlord of this property whose monthly inspections included looking at the rental buildings, greeting tenants and walking around the property. Further, Defendant PJ points out that Massaro's testimony is hearsay, in that an unnamed person allegedly said "It's been going on for years, every time it rains we fill it in with construction debris and that his supervisor asked him to keep any eye on it" (Exh D. at 62-64). Further, as to the cause of the floods, defendant PJ states that Massaro, DeGlomini, and LaMontanaro all testified that there was an area under the Thruway ramp, adjacent to Hermann Place, where there was a culvert with inlet and outlet pipes, and there was overgrown vegetation and other debris was constricting the outlet pipes. Likewise, defendant PJ' s expert, Thomas A. Mierzwa, P.E., opined that an ongoing condition in the basin area caused a build up of debris over time clogged the outlet pipes and causing the water level to rise, which the City was apparently aware of. Moreover, defendant PJ argues that there is no stated finding that the alleged drainage pipes were the sole cause of the flooding or that defendant PJ had actual or constructive knowledge of the pipes or that defendant PJ created the condition.

Certainly there is an open question as to whether a compromised drainage pipe on PJ's property caused the flooding or whether it was a culvert/inlet under the Thruway abutting Herman Place and directly across from plaintiffs' property. Moreover, defendant PJ argues that pleading guilty to having a dangerous condition on the property and paying a fine is in no way the identical issues presented in this lawsuit. Another item in dispute is the size of the sinkhole, and the significance of it on defendant PJ's property.

Based upon the foregoing, the court concludes that defendant PJ provided a non-negligent

(on its part) explanation for the flooding of plaintiffs' property, and raised several genuine issues of fact that cannot be determined by the court in this motion. Different theories of liability and negligence have been presented by the parties, and a trier of fact will need to determine liability. As for defendant FC, its position will be discussed in its cross motion for summary judgment.

FC's Cross Motion for Summary Judgment (Seq. 7)

Generally, a court has discretion to supervise discovery (Rivers v. Birnbaum, 102 AD3d 26 [2d Dept 2012]). As a threshold issue, the court will consider defendant FC's late cross-motion of summary judgment, as good cause has been shown (discovery is ongoing) for not filing within the court's deadline, and no prejudice has been shown. In addition, the issues in FC Yonkers' cross motion are similar as the issues in plaintiffs' motion for summary judgment, namely whether defendant FC caused the March and April 2001 floods.

Moreover, plaintiffs argue that defendant FC failed to disclose its expert Gerhard Schwalbe, P.E. until November 15, 2013, three months after the Note of Issue was filed, and only after plaintiffs filed their motion for summary judgment. However, a court is not divested of its discretion to consider an affidavit submitted by that party's experts in context of a timely motion for summary judgment, despite the fact that the offering party did not disclose the expert's identity pursuant to CPLR 3101 (d) prior to the filing of the notice of issue and certificate of readiness (Rivers v. Birnbaum, 102 AD3d 26 ,42 [2d Dept 2012]). Based upon the foregoing, the court, it its discretion shall accept defendant FC's expert, as no prejudice has been shown.

Turning to the merits of defendant FC's cross motion, they submit that various civil engineers who were involved in investigating the floods all concluded that defendant FC 's construction of the Ridge Hill Development did not cause the floods. As such, they maintain that there cross-motion

for summary judgment should be granted given there is no question of fact in this regard. Defendant FC has offered the affidavit of Gerhard Schwalbe, P.E., the Engineer of Record for the Ridge Hill Development project from 2005 to 2012, who opined that there is no causal nexus between defendant FC's construction of the Ridge Hill Development and the March and April 2011 floods. Mr. Schwalbe concurs with the City's Engineering's conclusion that the floods were caused by the crushed culvert on defendant PJ's Herman's property.

In opposition, plaintiffs offer an affidavit from Solomon Rosenzweig, P.E., who has a bachelor's degree in civil engineering and has been a civil engineer for over thirty years. He opines that the floods were caused by the increased storm water being redirected onto the subject premises from the discharge pipes located on FC's property. Defendant FC contends that Mr. Rosenzweig is not qualified to render an opinion on the civil engineering issues, as his expertise lies in structural design, repairs, deterioration, concrete structures and steel structures, and that his conclusions lack scientific analysis or engineering validity.

In light of the facts presented, and the testimony of the engineering experts, including plaintiffs'(as determined below), defendant FC has not met is burden, nor have plaintiffs met their burden for summary judgment as there are genuine questions of fact whether FC's construction of the Ridge Hill Development or groundwater coming from the pipe on FC's property caused or contributed to the March and April 2011 flood that allegedly caused plaintiffs' damages. Here, in viewing the evidence for motion sequences 1 and 7, submitted in support of each movant's motion, in light most favorable to the respective nonmoving party, there are triable issues of fact as to the each.

Based on the foregoing, summary judgment is denied to plaintiffs as against defendant FC,

and defendant FC's cross motion for summary judgment is also denied.

Frye Hearing

Defendant FC argues that Rosenzweig, the plaintiffs' engineering expert, does not provide any engineering substance to support his conclusions, his affidavit and resulting opinions are "junk science" conjecture and speculation and thus defendant FC requests that the court conduct a Frye hearing to strike his affidavit in its entirety and preclude him from testifying at trial regarding the cause of the March and April 2011 floods that allegedly caused the plaintiffs' damages. Plaintiffs maintain that the demand for a Frye hearing is without merit as Rosenzweig is qualified to render an opinion as to defendant FC's contribution to the flooding of plaintiffs' property, and his opinion is based upon reliable and sound engineering practices.

"Whether or not expert testimony is admissible on a particular point is a mixed question of law and fact addressed primarily to the discretion of the trial court. As a general rule the expert should be permitted to offer an opinion on an issue which involves a 'professional or scientific knowledge or skill not within the range of ordinary training or intelligence (Shi Pei Fang v Heng Sang Realty Corp., 38 AD3d 520, 521 [2d Dept 2007]). Where expert testimony does not involve anything novel or experimental, it does not warrant a preliminary Frye hearing. "*Frye* is not concerned with the reliability of a certain expert's conclusions, but instead with 'whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable' ... Put another way, [t]he court's job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for the expert's theory" (Lugo v New York City Health and Hospitals Corp., 89 AD3d 42, 56 [2d Dept 2011]). "[G]eneral acceptance

does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions' " (Zito v. Zabarsky, 28 A.D.3d 42, 44, [2d Dept 2006]). "The fact that there [is] no textual authority directly on point to support the [expert's] opinion is relevant only to the weight to be given the testimony, but does not preclude its admissibility" (Zito v. Zabarsky, 28 A.D.3d at 46; Lugo v New York City Health and Hospitals Corp., 89 AD3d 42, 57 [2d Dept 2011]. "Hence, where a plaintiff's qualified experts offer no novel test or technique, but intends to testify about a novel theory of causation, where such opinion is supported by generally accepted scientific methods, it is proper to proceed directly to the foundational inquiry of admissibility, which is whether the theory is properly founded on generally accepted scientific methods or principles" (Ratner v McNeil-PPC, Inc., 91 AD3d 63, 73 [2d Dept 2011]).

Here, since there is no particular novel methodology at issue for which the Court needs to determine whether there is general acceptance, the inquiry here is more whether there is an appropriate foundation for the expert's opinions. The theory of causation of plaintiff's expert was based upon more than theoretical speculation, or junk science (as FC claims). Plaintiffs offer Rosenzweig's CV detailing his extensive knowledge and experience in waterproofing, runoff management, groundwater management, leak detection and storm water management. Rosenzweig's opinion does not appear to be based on any novel principles, in that a landowner cannot drain water from its property onto the property of another by artificial means, such as pipes or ditches (Kossof v. Rathgeb-Walsh, Inc., 3 NY2d 583[1958]. Plaintiffs have shown that there is a foundation for Rosenzweig's opinion, *inter alia,* it is based on his inspections of the subject

premises and surrounding area, conversations with plaintiffs, review of the records and his knowledge and experience in storm water management, and his 30 years experience as a civil engineer (Ratner v. McNeil-PPC, Inc., 91 AD3d 63 [2d Dept 2011]). On the other hand, FC failed to state exactly how Rosenzweig's affidavit is deficient and or what calculations should have been conducted, and merely states in conclusory fashion that his opinion is based on junk science. Accordingly, Rosenzweig's Affidavit satisfies the Frye test in this case without the need for a hearing on the issue. The court will allow Rosenzweig to testify as an expert, and allow the process of cross-examination to assist the trier of fact in its role to weigh the opinions of competing experts. Obviously, the parties retain their right to raise particularized objections at trial, as the testimony develops and is elicited.

The City's Motion for Summary Judgment (Seq. 2)

Regarding a municipality like the City of Yonkers, the standard to prevail on a summary judgment motion is that an owner must prove by presenting competent evidence: (1) that the municipality either affirmatively breached a duty owed; or (2) that the municipality was actively negligent in its maintenance of its sewer system and as a direct result of such negligence it caused the sewer back-up and overflow (Azizi v. Village of Croton, 79 AD3d 953 [2d Dept 2010]). The City asserts that the third party complaint fails to allege any specific affirmative acts of negligence committed on the party of the City which caused or contributed to the subject flooding. According to the City, the flooding to the subject property took place during severe weather conditions with heavy rains and flooding occurring throughout Yonkers. Moreover, the City's involvement with 10 Hermann Place solely arose out of its investigation into complaints of flooding from the neighboring properties occupied by St. Mary's Cemetery (which originally accused Ridge Hill of diverting more

water off its property across the Thruway and into the cemetery), and thus the City was monitoring floods in the area.

The City offers an affidavit from Massaro, the City's Senior Professional Engineer, who opined that based upon his investigation, the flooding of the subject premises in 2010 and in March and April of 2011 was not caused by a City owned sewer or drain, but by factors outside the control of the City, specifically related to the unpermitted and collapsed piping located on 10 Hermann Place (PJ's property) which is a privately owned property (Exh. R). The City submits that PJ's general allegations that the City failed to maintain drainage along Hermann Place and allowed hazardous conditions to exist are insufficient as a matter of law to state a cause of caution against the City.

Furthermore, the City moves for judgment dismissing this action as a matter of law based on the prior written notice requirement of Section 24-11 of the Charter of the City of Yonkers, which is a condition precedent to the commencement of an action against a municipality.

Section 24–11 of the Charter of the City of Yonkers provides in pertinent part that:

(1) No civil action shall be maintained against the city ... for ... injury to person ... sustained in consequence of any street ... sidewalk ... or any portion of any of the foregoing ... being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the Commissioner of the Department of Public Works ... by certified or registered mail ...(Lawler v City of Yonkers, 21 Misc 3d 1108(A) [Sup Ct 2006] affd, 45 AD3d 813, 847 NYS2d 121 [2d Dept 2007]). General Municipal Law § 50-e(4) permits localities to require prior notice of defective, unsafe, dangerous or obstructed condition at any street, highway, bridge, culvert, sidewalk or cross walk as a condition to the commencement of an action to recover damages (Walker v Town of Hempstead,

84 NY2d 360 [1994]).

Based upon the foregoing, the court finds that the City prima facie has established its entitlement to judgment by demonstrating that it did not have prior written notice of the alleged condition, nor bore the responsibility for the creation of the alleged defect. Defendant PJ's complaint fails to allege that the City had prior written notice of the alleged defective sewer/storm drainage condition which they attribute to their flooding of the subject premises. In addition, the City properly set forth in its Eleventh Affirmative Defense in its Verified Third Party Answer that defendant PJ's Amended Complaint, and Third Party Complaint fail to allege sufficient facts to state a cause of action in relation to the prior written notice required by Yonkers Charter Section C24-11 and Local Law No. 3-2001. Massaro, Engineer for the City, testified that he has worked for the City since 2002, and part of his job is to investigate floods. Massaro stated that after November 2010 there were no other problems relating to flooding in or around the subject area until the big flood of March 2011. He stated that he had no knowledge of any complaints between November 2010 and March 2011. Based upon the record, the City has established that it has not received prior written notice in proper form and in accordance with Yonkers Charter Section C24-11.

Once a municipality establishes lack of prior written notice, the burden shifts to plaintiffs to demonstrate that a triable issue of fact exists as to whether the City received prior written notice or that either exception to prior written notice requirement applies (Yarborough v. City of New York, 10 NY3d 726,728 [2008]). "A municipality that has adopted a 'prior written notice law' cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies (Sola v. Village of Great Neck

Plaza, —NYS2d—, 2014 NY Slip Op. 01447 [2d Dept March 5, 2014]). Courts have recognized only two exceptions to the statutory rule requiring prior written notice, namely where the locality created the defect or hazard through an affirmative act of negligence or where special use confers a special benefit upon the locality, which is absent in these circumstances (Levy v. City of New York, 94 AD3d 1060 [2d Dept 2012]). The requirement that municipalities receive prior written notice of an alleged defect before liability can be imposed are to be "strictly construed", as it is a limited waiver of sovereign immunity in derogation of common law (McCarthy v. City of New York, 54 AD3d 828 [2d Dept 2009]).

In opposition, plaintiffs have failed to submit sufficient evidence to establish the existence of a triable issue of fact as to whether there was such prior written notice. There has been no showing of a prior written notice of the alleged defect or dangerous condition. To support its position that the City possessed knowledge of the conditions, defendant PJ asserts that the November 9, 2010 email from the Thruway Authority's Jack Hohman to Massaro was carbon copied to then Commissioner of Public Works, John Liszewski . Defendant PJ mistakenly proclaims that this was written notice to the statutorily prescribed person, as the City acknowledged the notice and acted upon it. However, defendant PJ's contention that the municipality had actual knowledge or constructive notice of the alleged defect, even if correct, cannot satisfy statutory requirement of written notice to a municipality, and does not relieve a party from that notice requirement, (Pagano v. Town of Smithtown, 74 AD3d 1304 [2d Dept 2010] [letter regarding general poor condition of sidewalks written more than three years before accident did not constitute prior written notice]; Archeson v. City of Mount Vernon, 6 AD3d 468,[2d Dept 2004] [letter written by plaintiff to mayor complaining of poor condition of

roadway did not constitute prior written notice]). Moreover, Defendant PJ has failed to establish that the City created the alleged defective drainage through an affirmative act of negligence. Nor is there any evidence of a special use in this matter. Accordingly, defendant PJ failed to raise a triable issue of fact as to whether either of the recognized exceptions to the prior written notice requirements apply. In view of the foregoing, the motion by the City for summary judgment is **GRANTED**.

Disclosure/Preclusion/Fees

Plaintiffs' motion regarding defendant PJ's failure to provide disclosure and failing to obey court conference orders, thus seeking that defendant PJ's Answer be stricken, or a preclusion order, are made in violation of Westchester Supreme Court Differentiated Case Management Protocol, and thus, the court declines to consider this branch of plaintiffs' motion.

Further the City's application for fees due to its contention that this suit was brought in bad faith and is frivolous(in its opinion) has no basis in law or fact, and therefore is denied.

NOW THEREFORE, it is hereby

ORDERED, that the parties are directed to appear at a settlement conference on June 23, 2014 at 930 **a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.**

All matters not herein decided are denied. Plaintiffs are directed to serve a copy of this Decision and Order, with notice of entry, upon defendants, within 10 days of such entry. This constitutes the Decision and Order of the court.

Dated: May 2, 2014
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: Matthew S. Aboulafia, Esq.
Aboulafia Law Firm, LLC
Attorneys for Plaintiff
228 East 45th St. Suite 1700
New York, New York 10017

Nicholas Kauffman, Esq.
Wilson Elser Moskowitz Edleman & Dicker, LLP
Attorneys for defendant FC Yonkers Associates, LLC
150 E. 42nd Street
New York, NY 10017

Jayne F. Monahan, Esq,
Burke,Gordon & Conway
Attorneys for Defendant P.J. Herman LLC
10 Bank Street, Suite 790
White Plains, New York 10606

Michelle H. Klemper, Esq,
Associate Corporation Counsel
Attorneys for 3rd Party Defendant City of Yonkers
40 South Broadway
City Hall, Room 300
Yonkers, New York 10701