SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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KEITH CRAFFEY, individually and as a representative of A CLASS OF RARITAN BAY CLAMMERS, including MEMBERS OF THE BAYMEN'S PROTECTIVE ASSOCIATION, et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF WASTEWATER TREATMENT, and ABC fictitious municipal and corporate bodies and businesses,

Defendants.

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DECISION AND ORDER
Index № 150616/14
Mot. Seq. No. 001

KATHRYN E. FREED, J.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	E-Filing Document NUMBERED
NOTICE OF MOTION AND AFFIDAVIT with EXHIBITS	2, 5
PLAINTIFF'S AFF. IN OPPOSITION with EXHIBITS and BRIEF	9, 10, 11, 12
DEFENDANTS' REPLY AFFIRMATION	15

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants The City of New York, City of New York Department of Environmental Protection (NYC DEP), and Bureau of Wastewater Treatment (together, the City) move, under motion sequence number 001, for an order, pursuant to CPLR 3211 and/or CPLR 3212, granting summary judgment in favor of the City and dismissing the complaint in its entirety.

Plaintiffs Keith Craffey, individually, and as a representative of A Class of Raritan Bay

Clammers, including Members of the Baymen's Protective Association, and 73 named individuals and two business entities, Certified Clam Company and J. T. White Management Co., LLC (collectively, plaintiffs, unless otherwise indicated), commenced this action for damages by filing their summons and complaint in the office of the New York County Clerk on or about January 23, 2014. Plaintiffs are licensed commercial fisherman and businesses, whose livelihoods and trade are based upon the harvesting and sale of clams from Raritan Bay and from Sandy Hook Bay. Their lawsuit arises from the devastating impact of Superstorm Sandy on plaintiffs, collectively and individually, after it struck the New York metropolitan area on October 29, 2012.

It is undisputed that, on October 26, 2012, in anticipation of high winds, flooding and degraded water quality along New Jersey's coast, the New Jersey Department of Environmental Protection (NJDEP) issued an administrative order closing Raritan and Sandy Hook Bays, and prohibiting the harvesting of shellfish from coastal waters as of sunrise on October 29, 2012, and continuing until further notice. Aff. in Opp., Exhibit A. It is also undisputed that the additional storm waters caused by the massive hurricane overwhelmed and exceeded the capacity of the City's wastewater system, most of which consists of a combined system in which pipes convey both wastewater and storm water runoff. Notice of Motion, ¶ 6. When this occurred, a number of affected wastewater treatment plants in the City's five boroughs permitted raw, untreated sewage and other hazardous wastes and pollutants to spill into the surrounding tidal and navigable waterways. The currents and tides then carried the contaminants into the Raritan and Sandy Hook Bays, where they adversely affected the shellfish, including the clams, in those coastal areas.

The NJDEP maintained the ban on harvesting shellfish along parts of the New Jersey coastline until February 2013 in the Sandy Hook Bay, and until April 15, 2013 in the Raritan Bay.

According to plaintiffs, the harvesting ban severely impacted their livelihoods, both during the temporary closures and permanently, because by the time the last restrictions were lifted in April, the goodwill they had established with their customers over the years, had been irreparably damaged. There was now a stigma associated with clams from these two bays, and plaintiffs' customers began to purchase clams from other sources.

On or about January 28, 2013, plaintiffs filed notices of claim with the NYC DEP, the statutory precondition to the commencement of a tort action against New York City and/or one of its agencies or departments. *See* General Municipal Law [GML] § 50-e. The City issued GML §50-h hearing notices in order to conduct preliminary inquiries of the claimants. After consenting to a request from plaintiffs' counsel to adjourn the start of the hearings in order to give the claimants time to compile and/or recreate records lost in the hurricane (*see* Notice of Motion, Exhibit E, letter dated March 8, 2013), Caffrey and one other plaintiff, Richard Gardner (Gardner), appeared and were questioned by the City about the circumstances described in their notices of claim. *Id.*, at Exhibit G, Caffrey transcript.

When the City and plaintiffs were unable to settle, or otherwise resolve the claims in the allotted time, plaintiffs commenced the instant action charging the City with negligence, gross negligence, negligent maintenance and action, and with permit violation, based on their alleged duty to prevent its sewage treatment facilities, even upon the occurrence of this type of superstorm, from spilling and discharging raw, untreated, contaminated and hazardous waste into the tidal waterways, and to prevent injury and damage to plaintiffs. The City responded with service of the instant motion to dismiss the complaint in its entirety.

The City contends that the complaint warrants dismissal, in whole or in substantial part, due

to a lack of compliance with GML §§ 50-e and i, in that 44 of the named plaintiffs failed to file notices of claim. Given that the filing of a proper and timely notice of claim is a condition precedent to commencement of an action against the City, their failure to do so mandates dismissal with respect to those 44. The City also asserts that, because only plaintiffs Craffey and Gardner both filed notices of claim and appeared for GML 50-h hearings, and because the City did not waive its right to conduct hearings with respect to the remaining 26 plaintiffs who had filed notices of claim, the complaint must also be dismissed as to those additional plaintiffs.

Next, the City contends that it has absolute immunity from liability for injuries sustained by plaintiffs because it, including the NYC DEP and Bureau of Wastewater Treatment, cannot be held liable for the performance of their governmental functions absent evidence of a special duty to the injured plaintiffs. In that the parties did not have the required special relationship, plaintiffs cannot avoid dismissal with empty allegations of "special duty."

Finally, the City asserts that plaintiffs do not have standing to maintain a cause of action for violating its permits to operate its wastewater systems.

In opposition, plaintiffs assert that the City does, in fact, owe them a duty, special or otherwise, not to foul the waterways and coastal shellfish beds with raw, untreated sewage, and they cite the Federal Water Pollution Control Act (Clean Water Act) (33 USC § 1251 *et seq.*) in support of their position. The Clean Water Act, which was enacted to ensure the quality of water in order to, among other things, "provide for the protection and propagation of fish, shellfish . . ." (*Id.* at § 1251 [a] [2]), also provides for monitoring the discharge of pollutants into the waterways.

Applying the Clean Water Act to the instant facts, plaintiffs assert that defendants are the entities charged with controlling the discharge of pollutants into the surrounding waterways. The

City, NYC DEP in particular, is, therefore, responsible for the release of some 1.5 billion gallons of untreated sewage containing fecal coliform into the waterways on and around October 29, 2012, when Superstorm Sandy struck. Plaintiffs insist that the migration of contaminated sewage into the Raritan and Sandy Hook Bays occurred because the City failed to adhere to strict, nondiscretionary standards (in accordance with the Clean Water Act) in its treatment of raw sewage prior to discharge. The City's failure to perform the ministerial tasks necessary to avoid discharging these substances, constituted a breach of its duty to plaintiffs as well as to the general public.

Plaintiffs explain further that, by its own admission, the City knew that its combined sewer system was inadequate, and that the system routinely failed to contain untreated sewage during heavy rain events. As evidence of this knowledge, they submit a copy of a consent order, dated and effective March 12, 2012 (Consent Order), resolving claims brought by New York State's Department of Environmental Conservation (the Department) against the City of New York and NYC DEP. The Department had charged the City and NYC DEP with violating Article 17 of the Environmental Conservation Law (ECL) and 6 NYCRR Part 750, *et seq.* (Aff. in Opp., Exhibit E). Included among the charged violations, were claims pertaining to the amount of permissible pollutant discharge into natural waterways, and the effects of combined sewer overflows. Combined sewer overflows, commonly referred to as "CSOs," occur each time wet weather conditions cause the combined flow of sewage and increased stormwaters to overwhelm and exceed the system's combined sewer capacity and discharge into surrounding waterways.

The plaintiffs point out that the Consent Order, which references prior agreements with the same defendants aimed at controlling water pollution, states, in relevant part:

> "3. Pursuant to its authority to protect the waters of the State, the Department administers the State Pollutant Discharge Elimination System ("SPDES") permit program, ECL §17-0801, *et seq.* In general, the SPDES program prohibits any discharge of pollutants to the waters of the State without a permit establishing pollutant limitations and treatment requirements. Thus, SPDES permits set certain effluent parameters, determined according to ECL §17-0809 and 6 NYCRR Part 750-1.11, in order to avoid contravention of mandated water pollution control requirements and water control standards ("WQS"). Those conditions address not only the allowable range of parameters for discharge of pollutants to waters of the State, but also the manner in which the permittee is to operate, maintain, monitor and report on its regulated facilities and activities."

In addition to civil penalties, the City and NYC DEP agreed, as of March 12, 2012, to expend certain sums on projects and programs listed in the Consent Order, including Environmental Benefit Projects aimed at "abat[ing] or reduc[ing] CSOs or to address the wet weather water quality impacts of CSOs in and around New York City" (Consent Order § III, A).

Plaintiffs contend that, because a clear intent of the Clean Water Act and New York's Environmental Conservation Law was to require the City to prevent raw and untreated sewage from being discharged into the surrounding tidal waterways and contaminating, among other things, the subject shellfish beds, the City owed plaintiffs, as the owners of exclusive rights to harvest clams in the Raritan and Sandy Hook Bays, and others similarly situated, a special duty not to cause harm, by negligence or otherwise, to the natural resources which form the foundation of their livelihoods.

Moreover, according to plaintiffs, even if they were not owed a special duty, the City, nevertheless, had a duty, at least since the execution and effective date of the Consent Order, to maintain its sewage system in a way that would alleviate the amount of CSOs and raw sewage that might enter into and pollute the Raritan and Sandy Hook Bays. Had the City complied with the terms of the Consent Order, or taken reasonable steps consistent with the Clean Water Act and Environmental Conservation Law to alleviate the problem, steps which are part and parcel of the

operation of the City's combined sewage system, plaintiffs may not have been harmed. Plaintiffs maintain that, since the City was negligent, it cannot be granted summary judgment dismissing the claims against it.

Plaintiffs ask this court to conclude that dismissal is unwarranted because, based on the pleadings, which must be viewed in a light most favorable to them, together with the documentary evidence, questions of fact exist as to: (1) whether the City owed them a duty to prevent the discharge of sewage, even upon the arrival of Superstorm Sandy; and (2) whether the CSOs/discharge occurred due to the negligent and improper operation and maintenance of the City's sewage treatment system. If that is the case, the City is not entitled to governmental immunity because the challenged conduct is ministerial in nature. *See Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781, 782 (2d Dept 2004), *appeal dismissed* 3 NY3d 738 (2004).

As to the balance of the City's arguments, plaintiffs do not directly respond to the City's assertion that they lack standing to prosecute a cause of action for permit violation,[1] and they do not meaningfully dispute that 44 of them failed to file notices of claim. What they do contest is the City's insistence that the claims of the 26 named plaintiffs, who did not appear for a GML § 50-h hearing, require dismissal. Plaintiffs explain that the reason they were not produced is because their attorney spoke with counsel for the City about the futility of questioning the remaining claimants and waiving further GML § 50-h hearings, because they would have nothing to add to what had been testified to by Craffey and Gardner.

It is well settled that, when plaintiffs fail to comply with statutory preconditions to

[1] Plaintiffs' response is that "[t]he permit violation is only alleged in order to demonstrate and establish the threshold to which the City's conduct must be measured," referring to the Clean Water Act and Article 17 of the ECL. Aff. in Opp., ¶¶ 56, 69-71.

commencing an action against the City, the complaint filed by them, or on their behalf, must be dismissed. *See* GML § 50-e; *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59 (1984). Accordingly, the complaint is dismissed as to the 44 plaintiffs who failed to file notices of claim.[2] As to the 26 plaintiffs who timely filed notices of claim, but who did not appear for a hearing, this Court need not reach questions of waiver, or the effect of their nonappearance at GML § 50-h hearings,[3] because, as explained below, the complaint is subject to dismissal based on governmental immunity.

It is evident that the underlying substantive facts are largely undisputed. The City's combined sewer system was overwhelmed by Superstorm Sandy and significant amounts of raw, untreated sewage containing, among other things, fecal coliform, was discharged into the waterways, and contaminated the shellfish beds in the Raritan and Sandy Hook Bays. Despite the unfortunate consequences to plaintiffs, the central issues before the court pertain to questions of law, not fact, rendering summary judgment appropriate at this juncture. *See* CPLR 3212; *Sillman v Twentieth Century-Fox Film Corp.*, 3NY2d 395, 404 (1957).

> "In an action against a municipality such as [the City], it is the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care. Under the public duty rule, although a municipality owes a general duty to the public at large to perform certain governmental functions, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created. This is an offshoot of the general proposition that to sustain liability against a municipality, the duty breached must be more than that owed the public generally"

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[2] A notice of claim must be served within 90 days after the claim arises (GML § 50-e [1] [a]), and plaintiffs here, offer no evidence that any of the 44 sought leave to file late notices of claim.

[3] The City's attorney offers a different perspective on the conversation with plaintiffs' counsel, and submits a copy of a letter reserving the City's right to conduct the remaining hearings. Notice of Motion, Exhibit F).

Middleton v Town of Salina, 108 AD3d 1052, 1053 (4th Dept 2013) (internal quotation marks and citation omitted); *see also Valdez v City of New York*, 18 NY3d 69 (2011). Proof that a governmental entity owed a special duty to plaintiffs requires a showing that:

> "(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."

Cuffy v City of New York, 69 NY2d 255, 260 (1987) (citations omitted).

To this end, plaintiffs assert that the duty owed to them by the City "exclusively related to the New Jersey natural resources for which they are exclusively licensed to harvest" (Aff. in Opp., ¶ 57). Their assertion is inadequate. Plaintiffs also suggest that the question before the court is not whether they have "technically" included some "magic" words identifying the City's duty to them as "special" or "personal" (*Id.*), but whether the City had, and breached, its duty: to prevent its sewage treatment facilities, "even upon a power failure, flood or storm," from discharging raw, untreated sewage into the surrounding tidal waterways; to prevent its sewage from causing injury to the natural resources; and "to protect the health, welfare and well-being of others, including plaintiffs" *Id.*, at ¶ 53. Plaintiffs' very argument constitutes an admission on their part that they have not adequately pleaded the existence of a special duty or relationship between them and the City.

Furthermore, in the clear absence of facts establishing a special relationship or duty, the question turns to whether the City is immune, by virtue of it being a governmental entity, from the claims of negligence. *See Sebastian v State of New York*, 93 NY2d 790, 793 (1999).

In support of their respective positions, each party relies on *Tappan Wire & Cable, Inc. v County of Rockland, supra*, the above-cited negligence action in which the plaintiff sustained

damages due to the effects of a hurricane and resulting power failure. Evidently, the power failure caused a sewage overflow and flood condition which damaged plaintiff's property. In *Tappan*, as in the action before this court, sewage overflows had occurred on prior occasions due to wet weather conditions.

The *Tappan* court ultimately denied the municipal defendant's motion to dismiss the negligence claims on the ground of governmental immunity. In rendering its decision, the court explained that New York distinguishes between cloaking a governmental entity with "immunity from liability arising out of claims that it negligently designed the sewer system," and properly denying governmental immunity in instances where the negligence claims arise from an entity's maintenance of the sewage system in which "the challenge[d] conduct . . . is ministerial in nature" (*Id.*, at 782). The *Tappan* court then found that, because that the claimed negligence involved the County's purported failure to follow through with the previously recommended removal of an abandoned railroad crossing and the replacement of old culverts, the acts and/or omissions were ministerial, rather than discretionary, in nature. It, therefore, denied the County's affirmative defense of governmental immunity (*Id.*).

Plaintiffs' reliance on the outcome in *Tappan*, as mandating a denial of the instant motion on the same grounds, is misplaced. Despite plaintiffs' attempt to circumvent the City's immunity from liability for the damaging effects of Superstorm Sandy by categorizing as ministerial tasks the steps the City might take to prevent, or reduce, the amount of CSO/sewage discharge into its surrounding waterways during wet weather events, such events are not ministerial. It is clear from plaintiffs' allegations and arguments, and confirmed by the documentary evidence, that the steps relate to the overall design and reconfiguration of the City's combined sewer system to control the

overflow and discharge of untreated, raw sewage "even upon a power failure, flood or storm." Aff. in Opp., ¶ 53). Since these steps are discretionary, not ministerial, governmental immunity protects the City from any failure to take these steps prior to Superstorm Sandy.

Plaintiffs' opposition, based on the details of Superstorm Sandy's devastation, together with unsubstantiated allegations, conclusory assertions, and expressions of speculation, is insufficient to forestall judgment and dismissal of the complaint. *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980).

Therefore, in accordance with the foregoing, it is:

ORDERED that the motion by defendants The City of New York, City of New York Department of Environmental Protection and Bureau of Wastewater Treatment for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 6, 2015

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ENTER:

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT