461 Broadway, LLC v Village of Monticello
2015 NY Slip Op 32809(U)
July 2, 2015
Supreme Court, Sullivan County
Docket Number: 2014-1745
Judge: Stephan Schick

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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461 Broadway, LLC,

Plaintiff,

-against- **DECISION & ORDER**

Village of Monticello,

Defendant,

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Motion Return Date: June 10, 2015
RJI No.: 52-36006- 2014
Index No.: 2014-1745

Appearances: Jacob Billig, Esq.
Billig, Loughlin & Baer
PO Box 1447
Monticello, NY 12701

Ralph L. Puglielle, Jr., Esq.
Drake Loeb
55 Hudson Valley Ave.
New Windsor, NY 12553

Schick, J.:

This matter comes before this Court by way of Plaintiff's motion to reargue, dated June 9, 2015.

Plaintiff argues that the Court misapprehended Plaintiff's argument and overlooked certain distinguishing facts.

Plaintiff argues that

5. The facts of the instant matter provide clear distinction from the facts and decision in *Klein v City of Yonkers*, 53 NYS2d 1011. One in *Klein*, the acts of negligence occurred on private property. Here the Village's negligent maintenance of the

sewage pipe was in the public domain.

6. The basis for this distinction is very logical. When the municipality's negligent maintenance occurs in the public domain, the plaintiff, a private citizen, is not in a position to know when the Village's continuing duty had been breached; let alone, know to do something about it.[1]

This rationale is irrelevant.

Kiernan v. Thompson, 134 A.D.2d 27 (3rd Dept. 1987), was decided by the Third Department based upon the municipality creating the dangerous situation through its own affirmative acts, thereby breaching its "continuing duty to maintain its public sidewalks in a reasonably safe condition."[2]

Moreover, the decision specified affirmative acts, not "an active participant in a negligent act," as argued by Plaintiff.[3] Furthermore, the affirmative acts of the municipality only served to negate the municipality's prior notice provision.

The Third Department actively distinguished "*Klein*[4] and *Nebbia v County of Monroe* (92 AD2d 724, lv denied 59 NY2d 603 ..." noting that "... unlike the occurrence in Klein and Nebbia, where the acts of negligence occurred on private property, the act creating the unsafe condition in the case at bar occurred in the public right-of-way."

The Court's use of the phrase "public right of way" is crucial. Unlike Plaintiff's use of "public domain," "the public right of way" refers to roads and side walks. As the Court of Appeals noted in its affirmance of the Third Department's decision:

It is well established that a municipality is under a continuing duty to

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[1]Plaintiff's motion to reargue, paragraph 6.

[2]Kiernan v. Thompson, 134 A.D.2d 27, 29 (3rd Dept. 1987).

[3]Plaintiff's reply affirmation, paragraph 3, bullet point 4.

[4]*Klein v. Yonkers*, 53 N.Y.2d 1011 (1981)

> maintain its public roadways in a reasonably safe condition ...[5]

This is further reinforced in *Sniper v City of Syracuse*, 139 A.D.2d 93, 96 (4th Dept. 1988), in which the Fourth Department specifically found that

> It is the continuing duty of the municipality to maintain its rights-of-way in a reasonably safe condition which distinguishes the facts of this case from those of Klein (supra) and Nebbia (supra). There is no continuing duty on the part of a municipality to insure the safety of buildings after certificates of occupancy are issued or to maintain lateral sewer lines.

See also *Madden v Town of Greene*, 36 Misc. 3d 852 (S.Ct. Chenango Co. 2012), affirmed in *Madden v. Town of Greene*, 64 A.D.3d 1117 (3rd Dept. 2009).

Nebbia v. County of Monroe, 92 A.D.2d 724 (4th Dept. 1983), app den'd 59 N.Y.2d 603 (1983), is directly on point. Nebbia sued

> ... alleging that defendant and its agents had severed his lateral line from the main sewer line in June, 1979 causing sewage to back up on his property in May and June of 1982.[6]

The Fourth Department found that

> Special Term properly dismissed plaintiff's complaint since plaintiff failed to commence this action within one year and 90 days after the severance of his lateral line.

The Court clearly explained that

> In *Klein v City of Yonkers* (53 NY2d 1011, 1013), the Court of Appeals stated that, in interpreting section 50-i of the General Municipal Law, "the limitation period begins to run upon the

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[5]*Kiernan v. Thompson*, 73 N.Y.2d 840, 841 (1988)

[6]*Nebbia v. County of Monroe*, 92 A.D.2d 724, 725 (4th Dept. 1983)

happening of the event, irrespective of when the action accrued".

The event upon which plaintiff's case is based is not the backup of sewage on his property in 1982, but the severance of his lateral line in June, 1979 which caused plaintiff's property damage.

It would be difficult to find a case more on point.

This Court will not address Plaintiff's arguments alleging that the sewer line may have been damaged or destroyed by vehicular traffic as this argument was not previously raised in the original motion papers.

Nor will this Court address either parties allegations regarding the propriety of their motion practice and service.

Accordingly, this Court is satisfied that it is under no misapprehension of law or fact and it is hereby

ORDERED, that Plaintiff's motion for reargument is denied.

This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

SO ORDERED

Dated: Monticello, NY
July 2 , 2015

ENTER

HON. STEPHAN G. SCHICK, JSC

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