Schabel v Stillwell
2016 NY Slip Op 31963(U)
July 8, 2016
Supreme Court, Suffolk County
Docket Number: 12-37932
Judge: Joseph Farneti

COPY

SHORT FORM ORDER

INDEX No. 12-37932
CAL. No. 15-00540OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-23-15 (003 & 004)
MOTION DATE 9-10-15 (005)
ADJ. DATE 9-10-15
Mot. Seq. #003-MotD
#004-XMG
#005-XMD

---X

GLENN G. SCHABEL and ANITA SCHABEL,

Plaintiffs,

- against -

RICHARD DOUGLAS STILLWELL and CARLA J. MESQUITA and TOWN OF HUNTINGTON,

Defendants.

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Upon the following papers numbered 1 to 60 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 31; 32 - 39; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 40 - 49; 50 - 60; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs for partial summary judgment on the issue of liability is granted to the extent of granting partial summary judgment in their favor and against defendant Richard Douglas Stillwell on the issue of liability, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Town of Huntington for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion by defendants Richard Douglas Stillwell and Carla J. Mesquita for summary judgment dismissing the complaint and all cross claims against them is denied.

Plaintiffs Glenn and Anita Schabel commenced this action to recover damages for injury to real property located at 37 Weinmann Boulevard in Melville, New York. Plaintiffs allege that their neighbors to the east, defendants Richard Douglas Stillwell and Carla J. Mesquita, who own the real property known as 29 Springs Drive in Melville, New York, illegally removed a number of large trees, shrubs, and wooded brush from the hillside above plaintiffs' property, and illegally re-graded the higher property causing erosion, storm water runoff and flooding of the lower property. Plaintiffs allege private nuisance, negligence, and "per se liable" against defendants Stillwell and Mesquita. Glenn G. Schabel and Anita Schabel also allege defendant Town of Huntington caused damage to their property by improper drainage on Springs Drive in Melville, New York. Issue has been joined, discovery is complete and a note of issue was filed on March 24, 2015.

Plaintiffs now move for partial summary judgment as to liability as against all defendants. In support of the motion, plaintiffs submit, among other things, the pleadings, affidavits of Glenn G. Schabel and Richard W. Gibney, a registered landscape architect and certified arborist, various photographs, plea minutes in the *People of the State of New York v Richard D. Stillwell*, under HUTO 1227-12, 1228-12, and 1229-12, certified meteorological records, various estimates, and a letter from Liberty Mutual dated August 10, 2012.

The Town of Huntington cross-moves to dismiss the complaint and all cross claims against it, maintaining that no prior written complaints were made to the Town and that any acts or omissions of the Town were not the proximate cause of plaintiffs' alleged damages. In support of the motion, the Town submits, among other things, the pleadings, deposition transcripts of Glenn Schabel and Richard Stillwell, plaintiffs' response to the Town's notice to admit, and the note of issue.

Defendants Richard Stillwell and Carla Mesquita cross-move to dismiss plaintiffs' complaint and the Town's cross claim. In support of the motion, Stillwell and Mesquita submit, among other things, an affidavit of Richard Stillwell, the pleadings, and the deposition transcripts of Glenn Schabel and Richard Stillwell.

The 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

At the outset, both the plaintiffs' and the Town's motion are timely. However, the cross motion by Stillwell and Mesquita, which was not served until September 8, 2015, is untimely (*see* CPLR 2103 [b], 2214 [b], 2215 [a]). The Court, therefore, lacks jurisdiction to entertain it (*see* ***Fortanasce v Meyrowitz***, 141 AD2d 606, 529 NYS2d 993 [2d Dept 1988]; ***Morabito v Champion Swimming Pool Corp.***, 18 AD2d 706, 236 NYS2d 130 [2d Dept 1962]). Moreover, the Court's own rules clearly provide that the Court will not consider the merits of any papers, including opposition, cross-moving or reply, which appear to have not been interposed in accordance with the CPLR. The motions were marked submit on September 10, 2015. Letters, telephone conversations with court personnel, and a later stipulation dated September 22, 2015 by all the parties, but not so-ordered, are without effect.

Plaintiffs have established their *prima facie* entitlement to summary judgment in their favor against defendant Stillwell, but not Mesquita or the Town of Huntington. Plaintiffs' submissions show that defendant Richard Stillwell pled guilty to and was convicted on April 16, 2014, in the Third District Court of Huntington, of illegally clearing and re-grading his property and causing debris to flow onto plaintiffs' property. More specifically, Stillwell pled guilty to violating Huntington Town Code Chapter 87 § 84, which provides:

> It shall be unlawful to regrade, alter or change the contour or topography of any land, or to fill depressions or excavate land including hillside areas, without a grading permit having been issued by the Department of Engineering Services. In no event shall the Department issue a grading permit which will result in a final grade greater than one on three.

He also pled guilty to violating Huntington Town Code Chapter 186 § 8A, which provides:

> It shall be unlawful for any person or business entity to cause, permit or allow the removal, destruction, or substantial alteration of any landmark tree, large tree, medium tree or more than three small trees or woodland, within a one year period, without first obtaining a permit from the Department.

Finally, defendant Stillwell pled guilty to violating Huntington Town Code Chapter 133 § 1C, which provides:

> It shall be unlawful for any person or business entity to cause, suffer, permit or allow an accumulation of sand, gravel, cinders, topsoil, mud, earth, vegetation or other material to be located, placed or deposited in such a manner so as to enable the material to flow, drift, discharge or stream onto any public street, highway, roadway, sidewalk, drain, gutter, right-of-way, easement or other public place or public improvement, or onto any private land within the Town of Huntington.

Collateral estoppel applies, as the issues are identical and Stillwell had a full and fair opportunity to contest the criminal proceedings. Thus, he is precluded from re-litigating the same issues in a civil action (***S.T. Grand, Inc. v City of New York***, 32 NY2d 300, 344 NYS2d 938 [1973]). Additionally, plaintiffs' expert witness, Richard W. Gibney, a New York State registered landscape architect and ISA certified arborist, opines in an affidavit:

> Your upland neighbor's actions to raise the grade and clear the previously existing gentle slope of trees and vegetation exposed the soil and de-stabilized the newly formed steep slope making it vulnerable to concentrated storm flows during extreme events as occurred on August 10, 2012 and the days following, resulting in a significant debris-filled mudslide onto your property and pool.

Even if the Court were to consider the untimely cross motion, defendant Stillwell has not raised a triable issue of fact. Stillwell admits that he pled guilty "in an effort to avoid a protracted legal battle." Stillwell argues that ***Gilberg v Barbieri*** (53 NY2d 285, 441 NYS2d 49 [1981]) precludes a finding of collateral estoppel, because the Town charges are only petty offenses at the violation level. However, unlike ***Gilberg***, where the defendant pled guilty to a violation of harassment, and the civil case alleged against him involved assault and battery with a demand for damages in the amount of $250,000.00, both the criminal case and the instant civil case involve the same conduct, and the damages alleged are significantly under a quarter of a million dollars. Moreover, consideration must be given to such factors as "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in applicable law and foreseeability of future litigation" (***Schwartz v Public Adm'r of County of Bronx***, 24 NY2d 65, 298 NYS2d 955 [1969]). Here, Stillwell was represented by counsel in the local District Court, knew at the time of his plea that the civil matter was pending, pled guilty to a total of $2,100.00 in fines, and does not challenge the voluntariness of his guilty pleas. Thus, Stillwell had a full and fair opportunity in the criminal proceeding to litigate the issues herein. Accordingly, collateral estoppel applies.

Even if collateral estoppel did not apply, Stillwell's admissions in his deposition testimony that he removed "like five trees," growth and bushes below his deck, and re-graded the property, all without permits, establishes plaintiffs' entitlement to summary judgment, especially when coupled with Glenn Schabel's deposition testimony that the damage to his property occurred 10 days after the re-grading and there was never a problem with storm water run-off in the previous 16 years. Additionally, upon seeing the damage from August 10, 2012, Stillwell testified he offered "to have it fixed." Moreover, plaintiffs' expert's affidavit establishes Stillwell's liability on each of plaintiffs' three cause of action, as the expert opines the cause of plaintiffs' property damages was the the upland neighbors' actions in re-grading the property.

Stillwell's argument that the alleged damage was caused by an act of God is without merit. "If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God: nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the

operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'act of God,' or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God" (***Michaels v New York Cent. R. Co.***, 3 Tiffany 564, 571, 30 NY 564 [1864]). A defendant's conduct can be excused when the storm was an act of God, and the resulting damage, under the particular circumstances, could not have been prevented by human care, skill, and foresight (***Abarca v Clarks Shoes***, 81 AD3d 675, 916 NYS2d 183 [2d Dept 2011]). Here, Stillwell's admitted acts, coupled with plaintiffs' expert's affidavit, establish plaintiffs' entitlement to summary judgment on the issue of liability. Accordingly, as the motion is without timely opposition, plaintiffs have established their entitlement to summary judgment on the issue of liability against defendant Stillwell. No such showing has been made as to defendant Mesquita.

The Town of Huntington has established its entitlement to summary judgment dismissing the complaint and cross claims against it. Plaintiffs allege inadequate drainage on Springs Road resulting in storm water runoff which caused damage to their property. Evidence of flooding caused by sewer system is insufficient to maintain action for negligence against a municipality (***Hongach v City of New York***, 48 AD3d 622, 779 NYS2d 559 [2d Dept 2004]). As to any allegation of negligence in the design of the drainage system, it is well-settled that a municipality is immune from liability arising out of claims that it negligently designed a sewerage or drainage system (***Gugel v County of Suffolk***, 120 AD3d 1189, 992 NYS2d 543 [2d Dept 2014]; ***Bilotta v Town of Harrison***, 106 AD3d 848, 965 NYS2d 174 [2d Dept 2013]). As to any claim to negligence in maintaining the system, the Town also enjoys immunity (***Biernacki v Village of Ravena***, 245 AD2d 656, 664 NYS2d 682 [3d Dept 1997]). Additionally, plaintiffs must establish that the Town had prior written notice of an alleged dangerous condition, and that the Town's failure to inspect or repair such condition was the proximate cause of the alleged injuries (***Bilotta v Town of Harrison***, 106 AD3d 848, 965 NYS2d 174).

Huntington Town Code 174-3 (A) provides:

> No civil action shall be maintained against . . . the Town of Huntington, its elected officials, public officers, agents, servants and/or employees . . . for damages or injuries to person or property sustained by reason of any highway, bridge, culvert, street, sidewalk or crosswalk owned, operated or maintained by the town or owned, operated or maintained by any improvement or special district therein being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the specific location and nature of such defective, unsafe, out of repair, dangerous or obstructed condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways in accordance with 174-5 hereof and there was thereafter a failure or neglect within a reasonable time to repair or remove the defect, danger or obstruction complained of. In no event shall . . . the Town of Huntington, its elected officials, public officers, agents, servants and/or employees . . .

> be liable for damage or injury to persons or property in the absence of such prior written notice. Constructive notice shall not be applicable or valid.

As the allegations potentially involve a culvert, which is defined as "a transverse drain," the prior written notice law also applies (*see also* ***Braun v Village of New Square,*** 3 AD3d 513, 770 NYS2d 743 [2d Dept 2004]). 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 (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841[2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], *citing* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). Any prior verbal complaints or other internal documents generated by the Town are insufficient to satisfy the statutory requirement (*see* ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). Similarly, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (*see* ***Amabile v City of Buffalo***, *supra*; ***Wilkie v Town of Huntington***, *supra*; ***Cenname Town of Smithtown***, *supra*). Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of an alleged defect (***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; *see also* ***Gonzalez v Town of Hempstead***,124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Chirco v City of Long Beach***, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]).

The affidavit of Michael Kaplan established that there was no prior written notice of the alleged defect filed with the Town, as required by the Town ordinance. The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a town is sufficient to establish that no prior written notice was filed (***Velho v Village of Sleepy Hollow***, *supra*; ***Petrillo v Town of Hempstead***, 85 AD3d 996, 998, 925 NYS2d 660 [2d Dept 2011]; ***Pagano v Town of Smithtown***, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]; ***LiFrieri v Town of Smithtown***, 72 AD3d 750, 752, 898 NYS2d 629 [2d Dept 2010]). In opposition, plaintiffs failed to raise a triable issue as to whether either of the exceptions to the prior written notice requirement apply. The affirmative negligence exception is limited to work by a municipality that immediately results in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Oboler v City of New York***, 8 NY3d 888, 889, 832 NYS2d 871 [2007]). Here, plaintiffs failed to proffer evidence in admissible form that the Town's alleged negligence caused or immediately resulted in damage to their property (*see* ***Yarborough v City of New York***, *supra*; ***Denio v City of New Rochelle***, 71 AD3d 717, 895 NYS2d 727 [2d Dept 2010]; ***McCarthy v City of White Plains***, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]). Thus, plaintiffs having failed to raise an issue of fact by submitting evidence in admissible form to show that the defendant either affirmatively created the condition causing plaintiff's damages or made a special use of the property, defendant Town is entitled to summary judgment.

Plaintiffs oppose the Town's motion but admit, in their response to defendant Town of Huntington's notice to admit, "that they never contracted or communicated with the Town of Huntington during the requested time period, complaining about drainage at or near plaintiff's property." As discussed above, the opposition to the Town's motion by defendants Stillwell and Mesquita is untimely. In any event, Stillwell testified at his deposition that he did not make any complaints to the Town regarding drainage on his property prior to the subject incident. Even if the Court were to consider the late opposition papers by Stillwell and Mesquita, the lack of prior written notice to the Town establishes the Town's entitlement to summary judgment dismissing plaintiffs' complaint and the co-defendant's cross claims.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: July 8, 2016

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**