

Salitan v Town of Yorktown

2017 NY Slip Op 33468(U)

March 8, 2017

Supreme Court, Westchester County

Docket Number: Index No. 63261/12

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

Dispo

To commence the 30 day 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
MICHAEL SALITAN, M.D.,

Plaintiff,

-against -

THE TOWN OF YORKTOWN,

Defendant.
-----X

LUBELL, J.

DECISION & ORDER

Index No. 63261/12

Sequence No. 2 & 3

The following papers were considered in connection with **Motion Sequence #2** by plaintiff and the cross-motion by defendant, **Motion Sequence #3**, for summary judgment in their respective favors:

| PAPERS | NYSCEF |
|---|---------|
| NOTICE OF MOTION/AFFIDAVIT/MEMORANDUM OF LAW/ EXHIBITS A-CC | 25-58 |
| NOTICE OF MOTION/AFFIRMATION/MEMORANDUM OF LAW/ EXHIBITS A-L | 59-73 |
| AFFIRMATION IN OPPOSITION/MEMORANDUM OF LAW/ EXHIBITS A-I/AFFIDAVIT | 77-89 |
| AFFIRMATION IN OPPOSITION/EXHIBIT A-L/ MEMORANDUM OF LAW IN OPPOSITION | 90-103 |
| REPLY AFFIRMATION/EXHIBITS A-E | 104-111 |
| AFFIRMATION IN SUPPORT/EXHIBIT A/ MEMORANDUM OF LAW | 112-114 |
| LETTER/CORRESPONDENCE TO JUDGE | 115 |
| LETTER/CORRESPONDENCE TO JUDGE | 116 |

Plaintiff, Michael Salitan, M.D. ("Dr. Salitan"), is the owner of the residential parcel located at 1225 Baptist Church Road, Yorktown Heights, New York, 10598 (the "Premises") consisting of approximately five acres of land upon which there sits a residential dwelling, a pond, dam and waterfall and through which there flows a stream.

Plaintiff brings this action in the nature of trespass, nuisance and negligence (the First, Second and Third Causes of Action, respectively) against the Town of Yorktown ("Yorktown") to recover for alleged property damage.

In connection with the claim of trespass, plaintiff asserts by way of its Verified Complaint dated August 16, 2013, that Yorktown intentionally and knowingly permitted the installation of an "illegal drainage system" on the Premises which "diverts water by an illegal storm drain located on Baptist Church Road, into a catch basin through a pipe, which flows out in torrents onto the Premises" (Complaint ¶32) "caus[ing] water to be diverted through artificial means onto [the Premises]" (Complaint ¶33) which is "continuous, repetitious, and reoccurs each and every time there is rainfall" (Complaint ¶35) causing "excess water, silt and other debris [to] . . . flow[] onto the Premises causing plaintiff to sustain[] damages, including but not limited to, the erosion of the land, stream, waterfall and pond located on the Premises, excessive amounts of silt [] onto and [] deposited on the Premises (Complaint ¶39) for which plaintiff seeks injunctive relief and damages (Complaint ¶43).¹

As and for its Second Cause of Action, nuisance, plaintiff alleges Yorktown "caused water, silt and debris to be diverted artificially through an Illegal Drainage System onto the Premises" (Complaint ¶45). "Defendant Yorktown's Illegal Drainage System, which includes an illegal storm drain, a catch basin, and a pipe, pours water, silt and debris out onto the Premises each and every time there is measurable rainfall" (Complaint ¶46) causing "interference with Plaintiff's property which is substantial in nature and constitutes a nuisance" (Complaint ¶47), "is wrongful and unreasonable" (Complaint 48), "cause[s] damage to plaintiff's property continuously and repetitiously by eroding the soil, depositing silt onto the property and into the stream, pond and waterfall, increasing the level of the pond so as to flood into plaintiffs residence and damage plaintiff's home, disrupt the wildlife living on the Premises" (Complaint ¶49).

By virtue of its negligence claim, the Third Cause of Action, plaintiff alleges that Yorktown breached its duty to Plaintiff "by negligently collecting and diverting water onto the Premises through an Illegal Drainage System" (Complaint ¶56) and "failure to remove the Illegal Drainage System" (Complaint ¶57) causing "excess water [to be] collected and diverted onto the Premises eroding the soil, depositing silt and other debris onto the Premises and into

¹ The demand for injunctive relief has since been rendered moot.

the stream, pond and waterfall, increasing the level of the pond so as to flood into plaintiffs residence and damage plaintiffs home, harm the wildlife living on the Premises and significantly decreasing the value of the Premises" (Complaint ¶58).

Plaintiff's Notice of Claim reads as follows:

2. The nature of the claim is:

Michael Salitan's claim against The Town of Yorktown is for damages sustained to Claimant's property through trespass and through the creation of a nuisance: by the Town of Yorktown, its agents, servant, or employees, and for common law negligence of the Town of Yorktown, its agents, servant or employees in permitting on Town Property, the installation of an illegal storm drain adjacent to the driveway at 1195 Baptist Church Road, and the Town's failure to remedy the poor condition of Baptist Church Road, which has resulted in inter alia destructive run-off of water onto 1225 Baptist Church Road.

The Town of Yorktown has caused and failed to control the destructive flow of water onto 1225 Baptist Church Road, resulting in permanent damage to Michael Salitan's property, including inter alia, erosion and degradation of the pond and stream on Mr. Salitan's property and silt buildup in the pond, stream, and on the stone wall on Mr. Salitan's property.

3. The time when, the place where, and the manner in which the claim arose:

The damage has occurred since prior to 2010 and continues to occur on Mr. property at 1225 Baptist Church Road, Yorktown, Heights, NY 10598. The damage is continuous and ongoing. Mr. Salitan's claims arise each and every time his property is damaged, which occurs each and every time there is measurable rainfall and his property is eroded and damaged by flooding and silt buildup.

4. The items of damage or injuries claimed are for: The damages include, but are not limited to, erosion, silt buildup, and degradation of the property located at 1225 Baptist Church Road, Yorktown Heights, NY 10598.

Although there is a question of fact as to whether the Notice of Claim was filed with the Town Clerk of the Town of Yorktown (compare Affidavit of Diana L. Quast, sworn to August 18, 2016 and NYCEF Doc 65 [Notice of Claim stamped "Town Clerk's Office, November 16, 2011, Town of Yorktown NY]), the Court need not resolve that issue.

It is well established that:

"A municipality is immune from liability arising out of claims that it negligently designed [a] sewerage system' or storm drainage system (Tappan Wire & Cable, Inc. v. County of Rockland, 7 AD3d 781, 782 [2004]; see Fireman's Fund Ins. Co. v. County of Nassau, 66 AD3d 823, 824 [2009]). However, a municipality 'is not entitled to governmental immunity arising out of claims that it negligently maintained the sewerage system as these claims challenge conduct which is ministerial in nature (Tappan Wire & Cable, Inc. v. County of Rockland, 7 AD3d at 782 [citations omitted]).

(Carbonaro v. Town of N. Hempstead, 97 AD3d 624, 624-25 [2d Dept 2012]).

Here, a fair reading of the Notice of Claim and Verified Complaint reveals that the thrust of Plaintiff's complaint deals with the installation of the drainage system and defendant's failure to remove same. Such allegations go to the design and/or other "deficiencies" (see Carbonaro v. Town of N. Hempstead, *supra*) of the drainage system and not a failure to maintain same. As such, defendant's motion to dismiss is granted (see Watt v. County of Albany, 140 AD3d 1260, 1261 [3d Dept 2016] ["when and where [drainage systems] shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion"]). As argued by defendant, nowhere does plaintiff allege that the drainage system degraded over time or was not properly maintained by the Town. The sole contention is that the installation and refusal to remove the

drainage system caused damage by virtue of the discharged water passing over his land (Complaint ¶¶32,35, 47, 57).

Given the circumscribed nature of these allegations and the immunity that the defendant enjoys with respect thereto, summary judgment is granted in favor of defendant and against plaintiff as to all causes of action.

That being the case, it is immaterial whether defendant, upon its motion, or plaintiff, upon his, has otherwise made out a prima facie case for summary judgment in their respective favors and whether, in response, the opposing party has properly raised triable issues of fact regarding same. Likewise irrelevant to the disposition of this action is whether the drainage system is or was buried, whether damage to plaintiff's property was caused by the failure of design (for which defendant enjoys immunity) or maintenance and repair (for which it may be held liable), whether defendant enjoyed a prescriptive easement and, if so, whether it exceeded the bounds thereof, and whether the drainage system sat on town property or not.

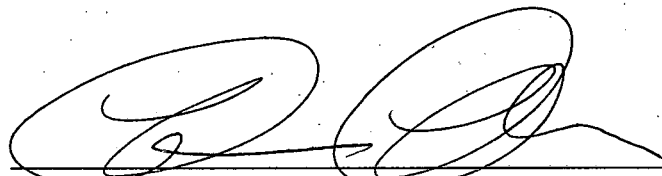
Based upon foregoing, it is hereby

ORDERED, defendant's motion for summary judgment is hereby granted and the complaint is dismissed in all respects; and, it is further

ORDERED, that plaintiff's motion for summary judgment is denied as moot.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
March 8th, 2017



HON. LEWIS J. LUBELL, J.S.C.

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