Spindola v Westchester Joint Water Works
2018 NY Slip Op 34170(U)
January 14, 2018
Supreme Court, Westchester County
Docket Number: 55565/2016
Judge: Terry Jane Ruderman
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To commence the statutory time 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

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EDITH B. SPINDOLA and
HUGO SPINDOLA-FRANCO, M.D.,

Plaintiffs,

-against-

WESTCHESTER JOINT WATER WORKS,

Defendant.

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DECISION and ORDER
Sequence Nos. 1
Index No. 55565/2016

RUDERMAN, J.

The following papers were considered in connection with the motion of defendant Westchester Joint Water Works for summary judgment dismissing the complaint on the ground that as a matter of law it may not be held liable:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - E	1
Affirmation in Opposition, Exhibits 1 - 4	2
Reply Affirmation	3

This action seeks compensation for property damage sustained by plaintiffs following a water main rupture under the roadway in front of their home. Specifically, plaintiffs allege that on January 26, 2015 at approximately 10:30 a.m., a water main under Union Avenue in Harrison, New York ruptured and thousands of gallons of water entered the driveway, garage and basement of plaintiffs' home at 13 Union Avenue, damaging personal property and the structure of the home, including heating, electrical and plumbing systems. Defendant Westchester Joint Water Works ("WJWW") is the Public Benefit Corporation that operates the water system. Plaintiff

alleges that WJWW was notified of the situation immediately, but that it took several hours before the flow of water was stopped.

In moving for summary judgment, defendant characterizes the event as a spontaneous rupture not caused by any negligence, contends that it engaged in reasonable maintenance and inspection of the system's pipes, and argues that, in any event, prior written notice is required for a valid claim against it, and that no such notice was received regarding the water main on Union Avenue in Harrison. It submits the affidavit of its business director, David Birdsall, to establish the lack of prior written notice, and the affidavit of its Terrence O'Neill, its Chief Plant Operator, to establish defendant's maintenance program for its grid of pipes, including visual inspections, audio pitch analysis, and regular hydrant flushing, to establish the lack of negligence in its inspections or maintenance.

In opposition, plaintiffs submit (1) photographs displaying the flooding and work they say was performed by defendant to repair their damaged asphalt driveway, (2) minutes from meetings of defendant's Board of Trustees, which in August 2013 mentioned under the category of an "operations status report" that it was "continu[ing] to work with member municipalities to replace older/vulnerable service lines in areas that are planned for paving" and (3) minutes from meetings during July 2014 reflecting plans for paving related projects, and the Trustees' approval of $150,000 for "service line, valve and hydrant replacements related to Town of Harrison Paving Plans."

Plaintiffs argue that defendant has not met its burden of establishing its right to judgment as a matter of law. They observe that defendant acknowledges the fact of the water main rupture, and that defendant's submissions fail to establish the cause of the rupture. They point to the

Board meeting minutes to establish that before the incident in question, defendant recognized the presence of "older/vulnerable service lines." They add that defendant acknowledged its liability by its voluntary replacement of plaintiffs' asphalt driveway.

Analysis

"A water company . . . has the duty of maintaining and repairing its water mains so as to avoid injury to abutting property owners and the public generally" (*De Witt Properties, Inc. v New York*, 44 NY2d 417, 423 [1978]). "Municipal corporations are held to the same duty of care as the private supplier of water" (*id.* at 423-424). However, "[t]he operator of a municipal water system . . . is not liable . . . solely because flooding occurred (*Guidarelli v City of Schenectady*, __ AD3d __, 2018 NY Slip Op 08995, 2018 NY App Div LEXIS 8951, *5 [3d Dept 2018]). The municipality "cannot be held liable for injury unless it is shown that the injury was caused by negligence in the installation or maintenance of the system" (*De Witt Properties v New York*, 44 NY2d at 424). "Thus if the municipality has notice of a dangerous condition *or has reason to believe that the pipes have . . . deteriorated* and are likely to cause injury, it must make reasonable efforts to inspect and repair the defect" (*De Witt Properties*, 44 NY2d at 424 [emphasis added]).

The operator of a municipal water system may also be liable in negligence "if the evidence demonstrates that, upon receiving notice of the water main break, it failed to make reasonable efforts to inspect and repair the defect" (*Guidarelli v City of Schenectady*, __ AD3d __, 2018 NY Slip Op 08995, 2018 NY App Div LEXIS 8951, *6 [3d Dept 2018] [internal quotation marks and citations omitted]). It may, however, be entitled to summary judgment dismissing an action where it submits to the court unchallenged proof that it made reasonable

efforts to repair the problem. In *Malfatti v 13 Grammercy Park S. Corp.* (259 AD2d 420 [1st Dept 1999]), the defendants were granted summary judgment dismissing the complaint because "[t]he evidence establishe[d] that the City employees promptly responded to the notification of a water leak and immediately commenced work to stop it[, and] [p]laintiffs have not demonstrated how those actions were deficient or that the leak could have been stopped any sooner" (*Malfatti*, 259 AD2d at 421).

The movant's burden in moving for summary judgment is to establish its right to relief as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Cir.*, 64 NY2d 851 [1985]). "All of the evidence must be viewed in the light most favorable to the plaintiff, as the opponent of the motion for summary judgment, and all reasonable inferences must be resolved in her favor" (*Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903, 903 [2d Dept 2012]). To prove its non-negligence as a matter of law, defendant relies on an affidavit describing its maintenance program for its grid of pipes and mains. However, when read in the light most favorable to plaintiffs, and given the existence of some evidence indicating that some of the system's pipe may be in a deteriorated condition, the absence from the O'Neill affidavit of any indication of the condition of the broken water main or whether its condition had any relation to the cause of the pipe's rupture precludes a determination of non-negligence as a matter of law. The affidavit does not establish as a matter of law that defendant's maintenance program satisfied its duty of maintaining and repairing its water mains so as to avoid injury to abutting property owners (*see De Witt Properties v New York*, 44 NY2d at 423).

The affirmation of counsel for defendant asserts that WJWW, as a Public Benefit

Corporation, is entitled to prior written notice of any dangerous or defective condition. It cites, in support, *Ferris v County of Suffolk* (174 AD2d 70 [2d Dept 1992]), in which the defendant Town successfully argued that the condition precedent created by the prior written notice law of Town Law § 65-a(2) and Brookhaven Town Code § 84-1 required summary judgment dismissing the complaint against it. However, here, defendant offers no specific code, statute or other authority to support its bare assertion that under these circumstances it is entitled to prior written notice of the claimed condition as a condition precedent. In the absence of any such support for its claim, defendant has failed to establish a right to summary judgment on this ground as well.

In view of the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is denied, and it is further

ORDERED that all parties are directed to appear on Monday, February 25, 2019 at 9:30 a.m., in the Preliminary Conference Part of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 14, 2018

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.