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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RAY LaBARBERA, DIANE DELLA GRECA, ANHU LI and XIN WEI XU,

Plaintiffs,

-against-

THE VILLAGE OF SLEEPY HOLLOW, HIETKAMP, INC. & SAFECO INSURANCE COMPANY OF INDIANA,

Defendants.

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DECISION & ORDER
Sequence Nos. 1, 2
Index No. 68942/2016

RUDERMAN, J.

The following papers were considered in connection with the motion pursuant to CPLR 3212 by (1) defendants The Village of Sleepy Hollow (the "Village") and Hietkamp, Inc. ("Hietkamp") for summary judgment dismissing the first two causes of action of the complaint, brought against them by plaintiffs Ray LaBarbera and Diane Della Greca, and all cross claims asserted against them (sequence 1); and (2) by defendant Safeco Insurance Company of Indiana, Inc. ("Safeco") for summary judgment dismissing the third cause of action of the complaint, brought against it by Anhu Li and Xin Wei Xu (sequence 2):

Papers - Sequence 1	Numbered
Notice of Motion, Amended Notice of Motion, Affirmation, Affidavits, Exhibits attached to Affidavits, Memorandum of Law, Exhibits A - N	1
Affirmation in Opposition, Exhibits 1 - 6	2
Reply Affirmation, Memorandum of Law, Exhibit A	3
Sequence 2	
Notice of Motion, Affirmation, Affidavit, Memorandum of Law, Exhibits A - E	1
Affirmation in Opposition, Exhibits A- B	2
Reply Affirmation	3

Plaintiffs commenced this action to recover damages for property damage sustained as a result of water damage to the premises located at 10 Anderson Avenue, in Sleepy Hollow, New York, occupied by plaintiffs Ray LaBarbera and Diane Della Greca and owned by plaintiffs Anhu Li and Xin Wei Xu. The complaint alleges that on or about October 4, 2015, the plaintiffs' premises, in particular the basement and the first floor apartment rented by plaintiffs LaBarbera and Della Greca, sustained damage as a result of water leaking and emanating from an aboveground pipe and hose used by defendant Hietkamp in connection with its contract with the Village to perform maintenance and repairs of the Village's water mains. Plaintiffs allege that at approximately 5:00 A.M. on October 4, 2015, plaintiff LaBarbera awoke to step into three inches of water in his bedroom and soon discovered the apartment to be flooded with water.

The complaint further alleges that defendant Safeco had issued a home insurance coverage policy for the premises that was in full force and effect on October 4, 2015. According to the complaint, following the incident on October 4, 2015, plaintiffs Li and Xu filed a claim with Safeco which was subsequently denied. This action was commenced after the denial of the claim. Defendant Safeco served its verified answer and cross claims on January 12, 2017, and defendants Village and Hietkamp served their verified answer on or about February 2, 2017.

Defendants Village and Hietkamp now move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them. The Village contends, inter alia, that plaintiffs' claims are barred by the written notice requirement of the Village Code. Further, it contends that it cannot be held liable for acts conducted in the performance of a governmental function. Hietkamp argues that it did not owe a contractual or

statutory duty to plaintiffs. It also argues that it lacked either actual or constructive notice of any defective condition at that location. Defendants assert that since there are no genuine issues of material fact, they are entitled to judgment as a matter of law. Further, defendants argue that they are entitled to summary judgment dismissing Safeco's cross claims as academic in light of their establishing their prima facie entitlement to dismissal of the complaint.

Defendant Safeco moves pursuant to CPLR 3212 to dismiss the third cause of action in the complaint brought against it by plaintiffs Li and Xu, sounding in breach of contract. Safeco argues that the plaintiff Li and Xu's claim was properly denied pursuant to policy exclusions.

Analysis

When a defendant moves for summary judgment, it has the initial burden to make a showing that, if unrebutted, establishes that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). On a motion for summary judgment dismissing a complaint, all of the evidence must be viewed in the light most favorable to the opponent of the motion and all reasonable inferences must be resolved in that party's favor (*see Boyd v Rome Realty Leasing Ltd.*, 21 AD3d 920, 921 [2d Dept 2005]).

The defendant Village argues that the plaintiffs' claims are barred by the prior written notice requirements of the Code of the Village of Sleepy Hollow. Section 276-1 of the Village's Code provides, in relevant part, "No civil action shall be maintained against the Village of Sleepy Hollow for damages or injuries to person or property . . . unless written notice of such defective, unsafe, dangerous or obstructed condition . . . was actually give to the Village Clerk of the Village." Here, through the affidavit of Anthony Giacco, the Village Administrator, the Village

established that no prior written notice of the condition was ever provided to it as was required by the Code (*see* Village Code of the Village of Sleepy Hollow, § 276-1; *Yarborough v City of New York*, 10 NY3d 726, 727 [2008]).

However, an exception to the prior written notice requirement exists when the municipality has caused or created a defect or dangerous condition through an affirmative act of negligence (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Santelises v Town of Huntington*, 124 AD3d 863, 865-866 [2d Dept 2015]; *White v Village of Hempstead*, 41 AD3d 709, 710 [2d Dept; 2007]; *Tumminia v Cruz Construction Corp.*, 41 AD3d 585 [2d Dept 2007]; *Schuman v City of New York*, 304 AD2d 643 [2d Dept 2003]; *Combs v Village of Freeport*, 139 AD2d 688 [2d Dept 1988]; *Freeman v County of Nassau*, 95 AD2d 363 [2d Dept 1983]). In fact, the Second Department has held that an issue of fact precluding summary judgment may exist regarding an affirmative act of negligence by a municipality as a result of its contractor's actions (*see Tumminia v Cruz Construction Corp.*, 41 AD3d at 586; *see also Santelises v Town of Huntington*, 124 AD3d at 866; *Combs v Village of Freeport*, 139 AD2d at 689; *Hill v Fence Man, Inc.*, 78 AD3d 1002, 1004 [2d Dept 2010]). Further, since it is well-settled that a municipality owns its streets and water mains and has a nondelegable duty to maintain them in a reasonably safe condition (*see Lopes v Rostad*, 45 NY2d 617, 623 [1978]; *DeWitt Props. v City of New York*, 44 NY2d 417, 425 [1978]; *Hill v Fence Man, Inc.* 78 AD3d at 1004 [2d Dept 2010]; *Combs v Village of Freeport*, 139 AD2d at 689), it cannot avoid liability on the ground that it was caused by an independent contractor as part of a greater municipal improvement project (*see Combs v Village of Freeport*, 139 AD2d at 689; *see also Tumminia v Cruz Construction Corp.*, 41 AD3d at 586).

Here, in support of their motion, defendants rely on, inter alia, the deposition testimony of Hietkamp's general foreman, Janusz Grabowski, and the testimony of the project manager engineer with Dolph Rotfeld Engineering, Daniel Peluso, who was assigned to the Village water main relining maintenance project during the relevant period. Defendants also offer the affidavits of Daniel Peluso and Anthony Giacco, the Village Administrator. According to Giacco, on or about June 2, 2015, the defendant Village awarded defendant Hietkamp a contract to clean and line existing water mains in the Village. According to Peluso, during the cleaning/relining of the water mains, residents would be provided temporary water service through the use of bypass pipes connected to service hoses. According to Peluso, prior to the subject water leak, the service line hoses had not been connected to the residences on Anderson Avenue, including the plaintiffs. In his affidavit in support of this motion, Peluso further alleged that the service hoses, while connected to the temporary bypass pipes, had not yet been turned on and the residences on Anderson Avenue were still being supplied with water from the main water line. Grabowski, Hietkamp's foreman, also testified that the temporary bypass pipe was shut off from its connection to the fire hydrant and that there was no water running through the temporary bypass pipe when he left the worksite on October 2, 2015. Accordingly, defendants argue that this undisputed record does not raise a triable issue of fact as to whether the Village or Hietkamp caused or created a defective condition.

In opposition, plaintiffs rely on their deposition testimony, in addition to the affidavit of plaintiff LaBarbera and the affidavits of two neighbors, Michael Arpi and Julio Sosa. Plaintiff LaBarbera testified that at approximately 5 A.M. on October 4, 2015, he awoke to step into three inches of rising water in his bedroom. LaBarbera discovered the entire apartment to be

submerged in water. Upon further investigation, LaBarbera observed that water had seeped into the foundation of the premises, the basement and into the plaintiffs' first floor apartment. In fact, he testified that the foundation wall was crumbling. When investigating to determine the source of the water, LaBarbera observed a service hose that had been left against the foundation "on full blast." According to plaintiff, the water had created "a big hole" in the foundation that measured "more than three feet" deep.

Both Arpi and Sosa asserted that on Saturday October 3, 2015, they observed water coming out of the temporary bypass pipe and the service hoses while Hietkamp's employees were still at the jobsite. In fact, they both stated that they saw Hietkamp employees on the plaintiffs' property with the hose attached to the bypass pipe on October 3. According to Sosa, the hose had been left on the lawn approximately two to three feet from the plaintiffs' house. When they went over to the premises to assist the plaintiffs after the flooding on October 4, they both observed that the lawn was very wet and they saw water still coming out of the hose that was hooked up to the bypass pipe. Contrary to the contentions of the Village and Hietkamp, based upon this testimony and the sworn statements, the plaintiffs have proffered sufficient evidence to demonstrate that an issue of fact exists as to whether the Village created a defect through Hietkamp's employees' actions and whether the affirmative negligence exception to the prior written notice rule applies, precluding the granting of summary judgment (*see Tumminia v Cruz Construction Corp.*, 41 AD3d at 586).

Moreover, a municipal contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition (*see Brown v Welsbach Corp.*, 301 NY 202 [1950]; *Santelises v Town of Huntington*, 124 AD3d 863, 865 [2d Dept 2015]; *Losito v City of*

New York, 38 AD3d 854 [2d Dept 2007]). Here, Hietkamp failed to meet its burden of proving its prima facie entitlement to judgment as a matter of law where, even though contractual obligations alone will not subject a contractor to tort liability as to a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), it failed to eliminate all triable issues of fact as to whether, in allegedly failing to exercise reasonable care in the performance of its duties, it launched a force or instrument of harm, and thereby subjected itself to liability to the plaintiffs (*see Espinal v Meliville Snow Contrs.*, 98 NY2d at 140; *Hill v Fence Man, Inc.* 78 AD3d at 1005; *George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009]).

Defendants summarily argue that, because plaintiffs cannot identify the source of the water that flowed out of the temporary bypass pipes and service line hoses, plaintiffs have failed to raise a triable issue of fact. However, the open question regarding the source of the water does not defeat the existence of a triable issue of fact. Rather, an issue exists as to whether Hietkamp employees, leaving the bypass pipe and hose unattended while connected to a water source, launched an instrument of harm that might subject it to liability. In fact, Peluso's affidavit clearly stated that the service hoses were connected to the temporary bypass pipes and left next to the street curb. The testimony of both Arpi and Sosa that they observed water coming out of the hose on the day prior to the subject incident and hours later after the flooding occurred directly conflicts with the testimony of the defendants' witnesses and is enough to create an issue of fact. It is well-settled that credibility determinations are left to the fact finder and are not the function of a court deciding a summary judgment motion (*see SJ Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see also Vega v Restani Const. Corp.*, 18 NY3d 499, 505 [2012]). Accordingly, issues of fact exist precluding summary judgment.

Further, defendants' contention that the complaint should be dismissed on the basis that plaintiffs have failed to show that a special relationship existed between the Village and the plaintiffs such as would overcome the Village's governmental immunity must also fail. It is well-settled that "a government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises. In contrast, a [municipality] will be deemed to have been engaged in a govermental function wehn its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*Turturro v City of New York*, 28 NY3d 469, 477-478 [2016]). When a municipality acts in a proprietary as opposed to a governmental capacity, it is subject "to the same duty of care as private individuals and institutions engaging in the same activity" (*Schrempf v State of New York*, 66 NY2d 289, 294 [1985]) and will be subject to liability under well-settled principles of tort law (*see Miller v Sate of New York*, 62 NY2d 506, 511 [1984]; *Herrera v Long Island Power Auth.*, 141 AD3d 561, 563 [2d Dept 2016]). In fact, the "defense has no applicability where the [municipality] has acted in a proprietary capacity, even if the acts of the [municipality] may be characterized as discretionary" (*Turturro v City of New York*, 28 NY3d at 479; *see Connolly v Long Island Power Auth.*, 30 NY3d 719, 728 [2018]; *Matter of World Trade Ctr.*, 17 NY3d 428, 432 [2012]).

Contrary to the defendant's contentions, where a municipality maintains a water system to provide water to its residents, the maintenance and repair of water mains has been deemed to constitute a proprietary function (*see DeWitt Props. v City of New York*, 44 NY2d 417, 423-24 [1978]; *Layer v City of Buffalo*, 274 NY 135, 139 [1937]; *D&D of Delhi, Inc. v Village of Delhi*, 47 AD3d 117 [3d Dept 2008]; *see also Billera v Merritt Const., Inc.*, 139 AD3d 52, 57 [3d Dept

2016]). Accordingly, repair and maintenance of the Village's water mains constituted a proprietary function, and it is not necessary for plaintiffs to demonstrate a special relationship between them and the Village. Moreover, notably, the Village did not assert the defense of governmental immunity as an affirmative defense in its pleadings. Accordingly, defendants are not entitled to summary judgment on this basis.

Since the defendants have failed to meet their prima facie burden of demonstrating entitlement to summary judgment, and they may be found to have caused plaintiffs' damages, they are not entitled to summary judgment dismissing the cross claims for common law indemnification and contribution asserted against them by Safeco (*see Amit v Hineni Heritage Ctr.*, 49 AD3d 574 [2d Dept 2008]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Accordingly, the defendant Village and Hietkamp's motion should be denied in its entirety.

Turning to Safeco's motion, Safeco argues that giving the plain and ordinary meaning of the exclusion provisions mandates the granting of summary judgment in its favor. More particularly, Safeco argues that the policy's exclusionary language is unambiguous regardless of whether or not it applies to exclusions listed under the water damage exclusion.

The "General Exclusions" provision of the policy at issue provides:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affect a substantial area.
>
> 3. Water Damage, meaning:
> a. (1) Flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, storm surge, or spray from any of these, whether or not driven by wind, including hurricane or similar storm; or

(2) Release of water held by a dam, levy, dyke, or by a water or flood control device or structure;

b. water below the surface of the ground, including that which exerts pressure on, or seeps or leaks through a building, wall, bulkhead, sidewalk, driveway, foundation, swimming pool, hot-tub or spa, including their filtration and circulation systems or other structure.

c. water which escapes or overflows from sewers or drains located off the Described Location; or

d. water which escapes or overflows from drains or related plumbing appliances on the residence premises. However, this exclusion does not apply to overflow and escape caused by malfunction on the residence premises, or obstruction on the residence premises, of a drain or plumbing appliance on the residence premises;

Where the provisions of an insurance policy are clear and unambiguous, they should be given their plain meaning (*see Goldman & Sons v Hanover Ins. Co.,* 80 NY2d 986 [1992]; *Commissioners of State Ins. Fund v Insurance Co.*, 80 NY2d 992 [1992]; *Reynolds v Standard Fire Insurance Co.,* 221 AD2d 616 [2d Dept 1995]). However, before an insurance company is permitted to avoid coverage, it must satisfy the burden of establishing that the exclusion language is not just clear and unmistakable, but that it applies in the particular case and that it is subject to no other reasonable interpretation (*see Seaboard Sur. Co v Gillette Co.,* 64 NY2d 304, 311 [1984]; *Vantage of Jackson LLC v Everest National Ins. Co.,* 85 AD3d 900 [2d Dept 2011]; *Junius Dev Inc. v NY Marine*, 48 AD3d 426 [2d Dept 2008]). Any ambiguities in the terminology used in an exclusion clause must be resolved in favor of the insured (*see Hudson v Allstate Insur. Co.,* 25 AD3d 654 [2d Dept 2006]; *Miller v Continental Ins. Co.*, 40 NY2d 675, 677 [1976]; *Cantanucci v Reliance Ins. Co.*, 43 AD2d 622, 622-623 [2d Dept 1973], *affd for reasons stated below* 35 NY2d 890 [1974]; *see also DePaolo v Leatherstocking Coop Ins. Co.*,

256 AD2d 879 [3d Dept 1998]; *Trupo v Preferred Mut. Ins. Co.* 59 AD3d 1044 [4th Dept 2009]).

Here, Safeco has failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating that the exclusion applies. Safeco's denial letter specifically provides that the claim was being denied because the cause of the damage was "surface water" which was excluded from the policy. Notably, however, the policy of insurance does not contain a definition of the term "surface water." The definition of surface water may be limited to that which is naturally occurring, or conversely, may include water introduced from a non-naturally occurring source.

According to LaBarbera, when investigating the source of the flooding water, he observed water coming "full blast" out of the service hose that was connected to the temporary water line. An argument can be made that the leaking water was not surface water resulting from natural sources such as "floods, waves, tidal water, tsunami, seiche, overflow of body of water, storm surge or spray" as provided for in the exclusion provision. In fact, a mere reading of the general exclusions provision demonstrates that this exclusion can be construed as relating only to acts of nature and naturally occurring sources of water — such as floods, waves, tidal water — rather than the improper and/or inadequate installation and maintenance of pipes and hoses by a contractor. This is further supported by paragraph 3(d) of the exclusion provision which provides that "the exclusion does not apply to overflow and escape caused by malfunction on the residence premises or obstruction on the residence premises of a drain or plumbing appliances on the resident premises." At the very least, the language relied upon by Safeco is ambiguous and subject to conflicting interpretations. Accordingly, Safeco has failed to establish that the exclusion language is subject to no other reasonable interpretation. Therefore, the ambiguity in

the terminology must be resolved in favor of the plaintiffs herein, and Safeco's motion must likewise be denied.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, regardless of whether it is specifically referred to here.

In light of the foregoing, it is

ORDERED that defendants' Village of Sleepy Hollow and Hietkamp, Inc.'s motion for summary judgment dismissing the complaint (Motion Seq. No. 1) is denied; and it is further

ORDERED that defendant Safeco Insurance Company of Indiana's motion for summary judgment dismissing the third cause of action (Motion Seq. No. 2) is denied; and it is further

ORDERED that all parties shall appear for a conference in the Settlement Conference Part, Courtroom 1600, on October 30, 2018, at 9:15 A.M.; and it is further

ORDERED that counsel for the defendants' Village of Sleepy Hollow and Hietkamp, Inc. shall serve a copy of this decision and order, with notice of entry, upon all parties within five days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
October 1, 2018

HON. TERRY JANE RUDERMAN, J.S.C.