

Brown v City of Albany
2019 NY Slip Op 34714(U)
December 16, 2019
Supreme Court, Albany County
Docket Number: Index No. 19-905894
Judge: L. Michael Mackey
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

STEPHANIE BROWN,

Plaintiff,

-against-

DECISION
AND
ORDER

THE CITY OF ALBANY,

Defendant.

(Supreme Court, Albany County, Motion Term, December 16, 2019)

Index No. 19-905894

(RJI No. 01-19-133224)

(Justice L Michael Mackey, Presiding)

APPEARANCES: McGlinchey Stafford, PLLC
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MACKEY, J.:

Plaintiff Stephanie Brown ("plaintiff") commenced this negligence action to recover for property damage sustained on July 5, 2018 when a sewerage system owned and maintained by defendant the City of Albany (the "City") backed up and flooded the first floor of plaintiff's residence at 190 Marion Avenue with raw sewage. The action was commenced

by the filing of a summons and complaint on September 6, 2019. An amended complaint was filed on October 28, 2019. A General Municipal Law § 50-h examination of plaintiff was taken by the City on November 26, 2019. Issue has not been joined. The City now moves pursuant to CPLR §§ 3211(a)(1) and (7) to dismiss the amended complaint.

On a pre-answer motion pursuant to CPLR § 3211(a)(7) to dismiss for failure to state a cause of action, the Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see, Leon v Martinez, 84 NY2d 83, 87 [1994]; see, also, Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Graziano v County of Albany, 3 NY3d 475 [2004]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus.” Landon v Kroll Lab. Specialists, Inc., 22 NY3d 1, 6 [2013] [internal quotation marks and citations omitted]; accord Vermont Mut. Ins. Co. v McCabe & Mack, LLP, 105 AD3d 837, 839 [3rd Dept. 2013]; see, Stone Ridge Country Props. Corp. v Mohonk Oil Co., Inc., 84 AD3d 1556, 1557 [3rd Dept. 2011]). A motion pursuant to CPLR § 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d at 326).

A municipality is immune from liability “arising out of claims that it negligently designed [a] sewerage system” (Tappan Wire & Cable Inc. v County of Rockland, 7 AD3d 781, 782 [2nd Dept. 2004]; see, Fireman’s Fund Ins. Co. v County of Nassau, 66 AD3d 823 [2nd Dept. 2009]). However, a municipality is not immune from liability arising out of claims

that it negligently maintained the system (Brandenburg v County of Rockland Sewer Dist. # 1, State of N.Y., 127 AD3d 681 [2nd Dept. 2015]; see, De Witt Props. v City of New York, 44 NY2d 417, 423–424 [1978]; Watt v County of Albany, 140 AD3d 1260, 1261 [3rd Dept. 2016]; 461 Broadway, LLC v Vill. of Monticello, 144 AD3d 1464 [3rd Dept. 2016]; Zarlin v Town of Clarkstown, 102 AD3d 865, 866 [2nd Dept. 2013]; Carbonaro v Town of N. Hempstead, 97 AD3d 624, 625 [2nd Dept. 2012]; Moore v City of Yonkers, 54 AD3d 397 [2nd Dept. 2008]; Tappan Wire & Cable, Inc. v County of Rockland, 7 AD3d at 782; Biernacki v Village of Ravena, 245 AD2d 656, 657 [3rd Dept. 1997]; see, also, McCarthy v City of Syracuse, 46 NY 194, 196–97 [1871]; Seifert v City of Brooklyn, 101 NY 136 [1889]; Pet Prods. v City of Yonkers, 290 AD2d 546, 547 [2nd Dept. 2002]; Biernacki v Village of Ravena, 245 AD2d 656 [3rd Dept. 1997]; Sgarlata v City of Schenectady, 77 Misc.2d 481, 486–487 [Sup. Ct. Schenectady County 1974]).

Reading plaintiff's amended complaint broadly as pled, plaintiff alleges, *inter alia*, that the City owned, maintained and/or controlled certain stormwater collection and sewage disposal systems in the vicinity of Marion Avenue (where plaintiff lives); that on July 5, 2018, a significant rainfall occurred; that the City failed to properly inspect, maintain and/or repair the subject sewerage system; and that, as a result, the sewerage system backed up and raw sewage overflowed into the first floor of plaintiff's residence and damaged her property. Plaintiff also alleges that the City had prior written notice of the defective system.

Here, to the extent plaintiff seeks recovery of damages for the City's alleged negligent design of the drainage or sewerage systems in, around or near plaintiff's residence, such claim must be dismissed as a matter of law. Caselaw makes clear that this claim is not

cognizable as against the City due to municipal immunity.

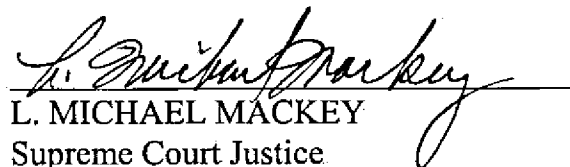
However, the Court determines that plaintiff's claim for negligent maintenance or repair of the drainage or sewer systems near plaintiff's property survives dismissal. The Court rejects the City's argument that plaintiff's testimony at her General Municipal Law § 50-h hearing "utterly refutes" plaintiff's factual allegations or conclusively establishes a defense as a matter of law. Therefore, that branch of the City's motion seeking dismissal of plaintiff's claims for negligent maintenance or repair of sewer or drainage systems in her vicinity is denied.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the plaintiff. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.


SO ORDERED.

ENTER.

Dated: ^{Albany}
Troy, New York
December 16, 2019


L. MICHAEL MACKEY
Supreme Court Justice

Papers Considered:



12/18/2019

- (1) Notice of Motion dated September 30, 2019;
- (2) Affirmation of Robert Magee, Esq., dated September 30, 2019, with exhibits annexed;
- (3) Memorandum of Law dated September 30, 2019;

- (4) Amended Verified Complaint dated October 28, 2019, with exhibit annexed;
- (5) Affirmation of Robert Magee, Esq., dated September 30, 2019, with exhibits annexed;
- (6) Affirmation of Marc J. Lifset, Esq., dated October 28, 2019;
- (7) Memorandum of Law dated October 29, 2019;
- (8) Affirmation of Robert Magee, Esq., dated November 13, 2019, with exhibits annexed;
- (9) Affirmation of Marc J. Lifset, Esq., dated December 9, 2019, with exhibits annexed;
- (10) Memorandum of Law dated December 9, 2019.