

**State Farm Fire & Cas. Ins. Co. v Brooklyn Union
Gas Co.**

2020 NY Slip Op 30876(U)

February 11, 2020

Supreme Court, Richmond County

Docket Number: 151090/2014

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X HON. THOMAS P. ALIOTTA

STATE FARM FIRE & CASUAL INSURANCE
COMPANY, a/s/o CHARLES CACCESE,

DECISION AND ORDER

Plaintiff,

Action #1 ¹
Index No.: 151090/2014
Motion No.: 4398 – 001

-against-

THE BROOKLYN UNION GAS COMPANY
d/b/a NATIONAL GRID NEW YORK,

Defendants.

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
CHARLES V. CACCESE and
CHARLES V. CACCESE, Jr.,

Plaintiffs,

-against-

Action #2
Index No.: 100927/2014
Motion No.: 4390 – 004
4421 – 005

NATIONAL GRID, THE BROOKLYN UNION GAS
COMPANY D/B/A NATIONAL GRID, THE CITY
OF NEW YORK AND THE NEW YORK CITY FIRE
DEPARTMENT,

Defendants.

-----X

Recitation, as required by CPLR 2219[a], of the following papers numbered “1” through
“12” were fully submitted on the 4th day of December 2019.

**Papers
Numbered**

Notice of Motion for Summary Judgment (Action No. 1)
by Defendants THE BROOKLYN UNION GAS COMPANY
d/b/a NATIONAL GRID i/s/h/a NATIONAL GRID, and THE
BROOKLYN UNION GAS COMPANY d/b/a NATIONAL
GRID s/h/a THE BROOKLYN UNION GAS COMPANY
d/b/a NATIONAL GRID against Plaintiff STATE FARM FIRE
& CASUALTY COMPANY a/s/o CHARLES CACCESE,
with supporting papers, Exhibits (dated October 17, 2019)1, 2

¹ Action #1 and Action #2 have been consolidated for joint discovery and joint trial pursuant to a So-Ordered
Stipulation dated May 31, 2016.

Affirmation in Opposition by Plaintiff STATE FARM FIRE & CASUALTY COMPANY a/s/o CHARLES V. CACCESE to the Motion for Summary Judgment by Defendants THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID i/s/h/a NATIONAL GRID and THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID s/h/a THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID, with Exhibits and Memorandum of Law (dated November 22, 2019)3

Reply Affirmation by Defendants THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID i/s/h/a NATIONAL GRID, and THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID s/h/a THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID, with Exhibit (dated December 2, 2019).....4

Notice of Motion for Summary Judgment (Action No. 2) by Defendants THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID i/s/h/a NATIONAL GRID, and THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID s/h/a THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID with Exhibits (dated October 17, 2019)5, 6

Affirmation in Opposition by Plaintiffs CHARLES V. CACCESE and CHARLES V. CACCESE, Jr. to the Motion for Summary Judgment by Defendants THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID i/s/h/a NATIONAL GRID, and the BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID s/h/a THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID, with Exhibits and Memorandum of Law (dated November 22, 2019)7

Reply Affirmation by Defendants THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID i/s/h/a NATIONAL GRID, and the BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID s/h/a THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID, with Exhibit (dated December 2, 2019)8

Notice of Motion for Summary Judgment by Defendants
 THE CITY OF NEW YORK and THE NEW YORK CITY FIRE
 DEPARTMENT, with Supporting Papers, Exhibits
 (dated October 18, 2019)9, 10

Affirmation in Opposition by Plaintiffs CHARLES
 V. CACCESE and CHARLES V. CACCESE, Jr. to
 the Motion for Summary Judgment by Defendants THE
 CITY OF NEW YORK and THE NEW YORK CITY
 FIRE DEPARTMENT, with Exhibits and Memorandum of Law
 (dated November 22, 2019)11

Reply Affirmation by Defendants THE CITY OF
 NEW YORK and THE NEW YORK CITY FIRE
 DEPARTMENT (dated December 3, 2019)12

Upon the foregoing papers, the motion (No. 4398-001) by defendant THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NEW YORK in Action No. 1 for summary judgment dismissing the complaint by STATE FARM FIRE & CASUALTY INSURANCE, a/s/o CHARLES CACCESE is denied, as is the motion (No. 4390-004) by defendants THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY i/s/h/a NATIONAL GRID, and THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID NY s/h/a THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID in Action No. 2. The motion (No. 4421-005) by defendants THE CITY OF NEW YORK and THE NEW YORK CITY FIRE DEPARTMENT in Action No. 2 for summary judgment dismissing the complaint is granted as hereinafter provided.

FACTS

Plaintiffs, State Farm Fire & Casualty Insurance Company (hereinafter "State Farm"), Charles V. Caccese, and Charles V. Caccese, Jr. (hereinafter "Caccese" and "Caccese, Jr.") commenced these actions to recover damages for injuries sustained by them after a gas explosion

occurred at their residence located at 101 Delaware Street in Staten Island. It appears that on January 29, 2014, Caccese, who was not home at the time, received a phone call from his son, Caccese Jr., who advised him that he smelled gas in the house and that there was fire department activity on the street. When Caccese arrived home, he saw a National Grid truck and fire department vehicles on the street. He alerted a New York City firefighter that he smelled gas in his home, and firefighter Jose Saenz asked Caccese where his sewer trap was located. They both proceeded to walk downstairs to his basement to the utility room. When Caccese flipped the switch to turn on the light, an explosion occurred causing both Caccese and Caccese, Jr. to sustain serious personal injuries.

Prior to the explosion, it appears that there were reports of an immense gas odor existing throughout the neighborhood where the Caccese residence is located. Defendant, Brooklyn Union Gas d/b/a National Grid (hereinafter "National Grid") responded to the reports regarding the gas odor, and defendant New York City Fire Department (hereinafter "FDNY") dispatched multiple FDNY units to investigate the area and the complaints. It further appears 15 homes were evacuated due to the immense odor of gas and positive gas meter readings in the area of 14 Delaware Street and the adjacent streets and homes. It was subsequently confirmed that there was a break in the gas main in front of 14 Delaware Street and that the gas had apparently traveled uphill through the sewer lines along Delaware Street.

Procedurally, Caccese commenced an action on or about May 19, 2014, against National Grid, The City of New York (hereinafter "THE CITY") and the FDNY (Index No. 100927/2014). Caccese subsequently commenced a second action against National Grid (Index No. 100803/2015) on June 16, 2015. Caccese Jr. commenced his own separate action (Index No. 100692/2015) against National Grid, the City and FDNY on May 19, 2015, and then another

separate action against National Grid in Kings County (Index No. 7705/2015) on June 16, 2015. These four actions were consolidated under Index No. 100927/2014 pursuant to a So-Ordered Stipulation dated November 4, 2015, and are referred to as Action No. 2. State Farm, a/s/o Caccese commenced a separate action on or about December 3, 2014, against National Grid (Index No. 151090/2014) and is referred to as Action No. 1.

National Grid now moves (Motion No. 4398-001) for summary judgment in Action No. 1 dismissing State Farm's complaint and contends that the claims of negligence against it were not the proximate cause of the subject incident, and therefore it cannot be held liable for damages incurred as a result of said gas incident. According to National Grid, the issue of proximate cause can be decided as a matter of law where only one conclusion can be drawn from the established facts, *i.e.*, that Caccese's own negligence was the proximate cause of the subject gas incident.

In support, National Grid submits the affidavit of an expert engineer/consultant, Frank Schwalje, who reviewed the pleadings and records relative to the subject gas incident and concluded that the sole cause of gas entering Caccese's basement was the result of Caccese's violation of both the New York City Building Code (Chapter 29; Section 2901.1) and the New York City Plumbing Code (Chapter 10; Section 1002.3 Subsection 1) when he altered the sewer trap at his residence by removing the solid sewer cap and replacing it with a flood guard on the street side of the trap.² As a result, gas was present in the sewer line and ignited when Caccese flipped the light switch upon entering his basement.

According to Schwalje, the subject building and plumbing codes require residential buildings to have sewer traps installed to prevent sewer gases from entering the residence from

² Caccese had previously retained a plumber to install a flood guard on the plumbing main drain line because he had flooding problems in his basement.

the sewer mains installed in the street. Schwalje further explained that a sewer trap is a fixture in the main drain line that traps a small volume of water between the plumbing fixtures and the main drain line to the sewer. The trapped water, or standing water, functions, *inter alia*, as a barrier through which no sewer gas can penetrate. There is typically a sewer cap on the house side and street side of the trap, to allow for access to address various situations, including clogs. The sewer cap on the street side of the trap is a barrier between the trap and the sewer system.

Here, Schwalje indicated that Caccese's plumber removed the solid sewer cap on the street side of the sewer trap and replaced it with a flood guard which is prohibited by The City's plumbing code. The flood guard device functions as a drain to allow the draining of any liquid that may be around the sewer trap and has a float that will raise and seal when there is any backflow of liquid from the sewer system to prevent flooding in the area around the sewer trap. However, according to Schwalje, when there is no backflow of another device, the float is not raised and there is nothing to prevent air or gases from traveling freely through the flood guard device between the sewer system and the residence. Schwalje opined that the installation of a flood guard device on the street-side of a sewer trap defeats the purpose of the trap, as it allows any gases that are present in the sewer mains to enter the residence through the flood guard. It was Schwalje's opinion that if the sewer trap had a solid cap or another device that maintained a seal, gas would have been prevented from entering Caccese's plumbing system by the sewer trap, in spite of the severe gas leak that had occurred that day down the street from Caccese and the explosion would never have occurred.

National Grid also submits copies of the deposition transcripts of, *e.g.*, National Grid and FDNY employees who were on-site at the time of the gas event, and fire incident reports, leak investigation reports, and photographs of the subject premises, all of which are said to

corroborate the claim that it was Caccese's actions that proximately caused the explosion. In particular, the testimony of FDNY Chief Mark Egan and Fire Marshall Zackary Fletcher and incident reports completed by them, all confirm that the sewer cap had been altered and a flood-guard device was installed on the street side of the sewer trap at the Caccese residence in violation of New York City Building and Plumbing Codes and that such violations were the sole proximate cause of gas entering the Caccese residence. According to National Grid, Caccese admitted during his deposition that he had retained a plumber to install a flood guard or check valve on the plumbing main drain line because he had flooding problems in the basement. National Grid argues that Caccese's actions were the proximate cause of the subject gas incident and not the actions of the moving defendants. Accordingly, it cannot be held liable for damages resulting from Caccese's negligence.

In opposition, State Farm argues that National Grid has failed to establish its *prima facie* right to summary judgment since material issues of fact remain that must be resolved by the trier of fact. In particular, State Farm argues that the root cause for the explosion was a gas leak from the sewer main located down the street from the Caccese residence, which had migrated into the entire sewer system on Delaware Street. In addition, State Farm argues that there are multiple issues regarding the sufficiency and appropriateness of National Grid's emergency response to the gas main leak along Delaware Street and whether such response caused and/or contributed to this loss, *e.g.*, residential evacuation procedures and proper instructions regarding the use of electrical devices and other potential ignition sources, including shutting off electricity to the homes in that area. Accordingly, summary judgment must be denied.

In support, State Farm submits the Fire Accident Report completed by Fire Marshal Zackary Fletcher, which included an interview with Aaron Choo, National Grid's Manager of

Gas Operations, regarding the events leading up to the subject incident. According to Mr. Choo, a cast iron gas main had broken, possibly due to age and weather, causing the immense odor that overcame the area where Caccese's home was located. State Farm also submits the deposition transcript of FDNY Fire Chief Mark Egan which also confirmed that prior to the Caccese incident, gas was leaking into the sewer system on Delaware Street. In regard to the FDNY's response, Chief Egan stated that all of the firefighters were checking the streets perpendicular to Delaware Street from Richmond Road, and were using gas meters to check for gas in each of the houses, including basements, traps and any conduits coming into the homes.

State Farm further submits the deposition transcript of William Abell, a witness from National Grid who was present at the location on the date in question, along with hundreds of fire personnel. Mr. Abell testified that prior to the subject gas explosion, customers from all over the area were calling about gas leaks. Mr. Abell further stated that National Grid was in the process of taking the sewer caps off to let the gas out into the atmosphere. According to Mr. Abell, the main gas line had leaked on the day of the explosion. He described the main as old, antiquated and rotted, and opined that a pipe in that condition was not safe. He also indicated that the area near Delaware Street is known as gas leak-prone area, because the infrastructure is aged and needs to be changed, and that this condition had been documented in statistical records at National Grid. Mr. Abell testified that the subject gas leak was about 500-600 feet in size and that he had not seen one of this magnitude during his 37 years with National Grid.

State Farm also submits the expert affidavit of an engineer, Paul Angelides, who reviewed the pleadings and records pertaining to the subject gas incident and concluded that the cracked main discovered along Delaware Street and the resulting gas leak was caused by the

long-term deterioration of the gas main which had surpassed its useful service life. He opined that natural gas leaks had been a known, recurring, and progressively worsening problem along Delaware Street, as evidenced by the extent of prior repairs which was evident upon his inspection of the area. Mr. Angelides stated that it would have been a reasonable precaution to carefully monitor the gas main for potential leaks, especially during the winter when the likelihood of damage is increased, or to replace the deteriorated and leak-prone pipe. Accordingly, in his opinion, the failure by National Grid to adequately monitor or replace the gas main is an omission on the part of National Grid that was the root cause of the leak and the resulting explosion within the Caccese premises. It was Mr. Angelides' opinion that contrary to National Grid's contentions, the evidence does not support the theory that the installation of the flood guard device was the sole proximate cause of the subject explosion.

This expert further opined that an additional factor that contributed to the explosion was the operation of the light switch within the insured's basement. According to this expert, given the fact that the FDNY had accompanied Caccese into the basement, the firefighter should have followed all necessary precautionary safety measures, *e.g.*, pertaining to electrical appliances, light switches and other ignition sources, and that the failure of FDNY personnel to ensure that no appliances or switches were operated at that time is a contributing factor to the occurrence. State Farm argues that in view of the above opinion, material issues of fact exist requiring the denial of summary judgment in favor of National Grid.

In Action No. 2, National Grid moves (No. 4390-004) for summary judgment dismissing Caccese and Caccese Jr.'s complaint and contends that it has established its *prima facie* right to dismissal of the complaint as against it. National Grid submits identical arguments and relies on the same exhibits as those submitted in its motion (No. 4398-001) in Action No. 1 against State

Farm and Caccese. National Grid argues again that the alleged claim of negligence against it was not the proximate cause of the incident, and therefore it is entitled to summary judgment.

In opposition, Caccese argues that National Grid's summary judgment motion must be denied since material issues of fact exist which must be resolved by the trier of fact. Caccese also relies on the expert affidavit of Paul Angelides, which had been submitted by State Farm, wherein Mr. Angelides concluded that the cracked gas main along Delaware Street and the resulting natural gas leak were the cause of the explosion at the Caccese residence. According to this expert, the cracked gas main was caused by long term deterioration of the gas main, which had surpassed its useful service life. According to National Grid's own street leak investigation reports and witness statements, natural gas leaks in this area were a known, recurring and progressively worsened problem that should have been monitored by National Grid for potential leaks, especially during the winter when the likelihood for damage is increased. Thus, National Grid's failure to properly monitor the aging main was a factor that caused the resulting explosion.

In addition, this expert notes that the concentration of gas recorded in the sewer manholes of numerous buildings in the area, along with reports of "very strong odors" within a 3-block radius of 101 Delaware Street made it prudent and reasonable for the buildings in that area to be evacuated. Alternatively, at the very least, the building occupants should have been alerted of the leak investigation and informed not to use any electrical devices or other potential ignition sources.

Mr. Angelides further opined that investigation reports completed by National Grid and the FDNY both revealed that high gas concentrations capable of supporting combustion were found within 142 Delaware Street and numerous sewer manholes along Delaware Street and

Overlook Avenue. Such findings, according to Mr. Angelides, contradict National Grid's expert's conclusions that the installation of a flood guard at the Caccese residence was the sole proximate cause of the presence of gas at the subject location and the subsequent explosion. Caccese argues that the conflicting expert testimony regarding the cause of the subject gas explosion renders summary judgment inappropriate. In addition, proximate cause is an analysis that should generally be decided by the jury.

Caccese also argues that in spite of the presence of National Grid and the FDNY at the scene for at least 1 ½ hours prior to the explosion, and the large concentration of gas recorded in the sewer manholes along with very strong odors, none of the emergency personnel at the scene implemented any emergency response or directed the residents to evacuate the buildings, nor did anyone inform residents not to use any electrical devices or any other potential ignition sources. In fact, Caccese should never have been permitted to remain in his home under the circumstances present at that time. According to Caccese, each of the above are aggregate factors that must be evaluated in determining the proximate cause of the subject explosion. In view of the existence of these factors, National Grid is not entitled to summary judgment dismissing the complaint and its motion must be denied.

In a separate motion (No. 4421-005), the City and the FDNY move for summary judgment dismissing the complaint and argue that (1) that there is no special relationship existing between the City and plaintiffs; (2) the City is immune from liability for discretionary decisions in the provision of fire department services; (3) any claims of special duty and/or negligent design, maintenance and/or repair of the City's sewer system must be dismissed since these claims were not contained in the Notice of Claim; and (4) all causes of action brought by Charles Caccese Jr. are barred by the Statute of Limitations.

The City and the FDNY contend that no cause of action exists against either defendant for decisions made during an emergency operation unless a special relationship existed between these defendants and the plaintiff. However, plaintiffs have failed to allege the existence of any special duty in their Notice of Claim or within their complaint. Accordingly, any claims regarding the alleged breach of that duty must be dismissed. These defendants further contend that even if a special duty was properly raised in the pleadings, plaintiffs cannot prove the existence of a special duty in order to impose liability for the actions or omissions of the municipality.

These defendants argue that fire protection is a governmental function for which there can be no liability without the existence of a special relationship between the plaintiffs and the municipality. In this case, the City argues that plaintiffs have failed to submit proof establishing the elements required regarding the existence of a special duty, *e.g.*, there were no conversations between the FDNY and Caccese that can be construed as a promise, nor were there any other factors suggesting that the FDNY assumed a duty generating a justifiable reliance by plaintiff. In fact, the firefighter present at the scene merely asked where the sewer trap was located and said: "let's go take a look" when they were in Caccese's living room. In addition, proof further indicates that another firefighter was coming with a gas meter, but that Caccese was already on his way to the basement and immediately turned on the light switch, which caused the explosion to occur. Caccese was acting on his own accord, and not at the direction of the FDNY or anyone else.

The City and the FDNY further argue that even if plaintiff was able to establish a special duty, these defendants are entitled to dismissal of the complaint based on the governmental immunity defense for discretionary actions committed by its employees, even if the conduct

complained of was negligent. Here, it is argued that the firefighters were making discretionary judgments as to the gas odor condition and how best to manage the circumstances and that there is no set manner of how to approach such a situation. Moreover, the decision-making of the firefighters concerning its management of a particular emergency or the subject gas odor situation undoubtedly requires the exercise of discretion and judgment. Accordingly, any of the FDNY's decisions in the present situation were inherently discretionary, and therefore, not actionable.

Finally, the City and the FDNY argue that any claims regarding design, maintenance and/or repair of the sewer system must be dismissed since these claims were not raised in the Notices of Claim. Even if they were raised, there is no proof that the City had notice of the existence of any dangerous or defective condition that would have warranted the implementation of additional safety measures. Accordingly, these claims must be dismissed.

In opposition, Caccese and Caccese, Jr. contend that material issues of fact exist which require the denial of the motion by the City and the FDNY. More particularly, Caccese contends that the City and the FDNY assumed a special duty to plaintiffs when the firefighters were present in the Caccese home and asked Caccese to show them the location of the sewer trap. According to plaintiffs, in doing this, they "launched an instrument of harm" by creating a new and increased hazard to plaintiffs by their actions and inactions. Moreover, they breached that special duty by placing plaintiffs in harm's way by failing to warn them of the ultra-hazardous and life-threatening risks to which they were exposed, and by failing to remove them from the subject premises. According to Caccese, a jury can easily decide that he justifiably relied upon the firefighter's statements and actions when they proceeded to the basement to check the sewer trap during a gas leak. In addition, Caccese was never warned by the firefighter regarding the

dangers of turning on a light switch prior to turning on the light. Accordingly, Caccese argues that the requirements for a “special duty” have been met.

Caccese further argues that even if the special duty requirements have not been met, the requirements should be modified in the current situation due to the fact that plaintiffs should have been evacuated from the premises. Instead, the firefighters invited Caccese further into the zone of danger. Moreover, the electrical power to the homes in that area should have been shut off to further reduce the risk of a horrible gas explosion. Caccese also argues that plaintiffs’ Notices of Claim are sufficiently particular to give the City and the FDNY notice regarding the claims of negligence against them, thereby allowing them to properly investigate the claims against them, regardless of their failure to include the words “special duty” either in the Notices of Claim or in their complaint.

DISCUSSION

It is well established that the proponent of a summary judgment motion must make a *prima facie* showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). The failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once that initial burden has been satisfied, however, the burden shifts to the party opposing the motion to produce sufficient evidence to raise a triable issue of fact (*id.*). Accordingly, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat the motion (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Nevertheless, since summary judgment represents the procedural equivalent of a trial, the presence of any significant doubt as to whether or not there is a material issue of fact, or

where an issue of fact is merely “arguable”, the motion must be denied (*see Phillips v. Kantor & Co.*, 31 NY2d 307, 311 [1972]).

Here, while National Grid has met its burden of establishing its *prima facie* right to judgment, State Farm and Caccese have submitted satisfactory proof raising triable issues of fact regarding the issue of proximate cause. Accordingly, National Grid’s motions (Nos. 001 and 004) must be denied.

It is axiomatic that “a defendant’s negligence qualifies as a proximate cause where it is ‘a substantial cause of the events which produced the injury’” (*Turturro v. City of New York*, 28 NY3d 469, 483 [2016]) “[P]roximate cause is generally an issue for the trier of fact, so long as ‘the court has been satisfied that a prima face case has been established’ and the evidence could support various reasonable inferences” (*id.* at 483-483). Moreover, there may be more than one proximate cause of any injury (*see Argentina v. Emery World Wide Delivery Corp.*, 93 NY2d 554, 560 n 2 [1999]). Where various reasonable inferences could be drawn from the evidence presented, the determination of proximate cause must be left to the jury (*see Alexander v. Eldred*, 63 NY2d 460, 468 [1984]). Here, while there is much debate over the “sole” proximate cause of the explosion at the Caccese residence, the parties’ submissions, including the conflicting expert affidavits regarding the cause of the subject explosion, all result in the creation of triable issues of fact and further issues of credibility which are for a jury to determine (*see Francis v. Basic Metal, Inc.*, 144 AD2d 634 [2d Dept. 1999]). In addition, there are triable issues as to whether the actions of either party amounted to negligence and, if so, their comparative responsibility for the ensuing explosion. The facts are also in dispute in regard to the extent of the gas leak, and the gas readings throughout the neighborhood. Accordingly, National Grid’s motions (Nos. 001 and 004) must be denied.

The Court reaches a different conclusion, however, in regard to motion (No. 005) by the City and the FDNY in Action No. 2. The Court agrees that the unopposed application by the City and the FDNY dismissing the complaint by Charles V. Caccese, Jr. as untimely must be granted since the action was commenced after the expiration of the Statute of Limitations.³

With regard to the remaining portion of the motion, in the opinion of this Court, the City and the FDNY have met their *prima facie* burden of establishing their right to judgment as a matter of law by submitting satisfactory proof regarding their claim of governmental function immunity and that no special duty existed between them and the plaintiffs. In opposition, plaintiffs have failed to rebut that showing and raise a triable issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

“When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose” (*Applewhite v. Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). If a municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty (*see Applewhite*, 21 AD3d at 426). Since police and fire protection are examples of long-recognized, quintessential governmental functions” (*Matter of World Trade Ctr Bombing Litig.*, 17 NY3d 428 [2011]), plaintiff must plead and prove the existence of a special duty beyond the obligation owed to the public at large (*see Valdez v. City of New York*, 18 NY3d 69 [2011]).

Here, plaintiffs have failed to plead the existence of a special duty between themselves and the municipal defendants in their Notices of Claim or in their complaint. Accordingly, dismissal of the complaint is warranted based on that alone (*see Carter v. City of New York*, 38

³ Caccese Jr.’s action was commenced by filing on May 28, 2015, which is 30 days after the one-year and 90 day Statute of Limitations, which expired on April 29, 2015.

AD3d 702 [2d Dept. 2007]). Nevertheless, assuming, *arguendo*, that a special duty had been pleaded, in the opinion of this Court, there is no proof that a special duty existed between the plaintiffs and the municipal defendants beyond any obligation owed by it to the public at large.

In order to establish a duty owed to plaintiff, all of the following elements must be pled and proven: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality and the injured party; and (4) the parties' justifiable reliance on the municipality's affirmative undertaking (*see Cuffy v. City of New York*, 69 NY2d 255 [1987]). In particular, based on the record submitted herein there was very little communication between the firefighters and Caccese, other than the firefighter asking Caccese the location of the sewer trap and saying "let's go take a look." In addition, it was Caccese who led the firefighter down the stairs to the basement. Moreover, there were no assurances made by the firefighter to Caccese, or any actions that can be construed as suggesting that the firefighters were performing any tasks for Caccese beyond the tasks they were performing for all of the homes in Caccese's neighborhood in accordance with policies and procedures to be followed under the circumstances (*see e.g., Ewadi v. City of New York*, 117 AD3d 439 [1st Dept. 2014]; *Brown v. City of New York*, 73 AD3d 1113 [2d Dept, 2919], where vague words such as "hold on", or "don't worry" and "I am going to take care of it", did not constitute an assumption by the municipal defendants to act on behalf of the injured party). Similarly, in this case, the interaction of the firefighters with Caccese and the words used by them, do not constitute an assumption of a special duty. Accordingly, plaintiffs' motion fails in that regard.

Finally, even if Caccese had satisfied his burden of establishing the existence of a special duty in this case, a municipality, nonetheless, acting in a discretionary governmental capacity may rely on the “governmental function immunity defense” (Valdez v. City of New York, 18 NY3d 69, 75 [2011]). That defense provides immunity for the exercise of discretionary authority during the performance of a governmental function, even where the conduct complained of was negligent (*see id.* at 75-77). Once it is determined that a governmental act is discretionary, *i.e.*, the product of reasoned judgment, the municipality is entitled to absolute immunity. It is not for the trier of fact to second-guess discretionary governmental action, nor is a municipal defendant answerable in damages for the injurious consequences of such action, even when negligent (*id.* at 76).

Here, the facts are sufficient to establish that the actions taken by the firefighters in regard to the subject gas leak were discretionary actions taken during the performance of their governmental function. As can be gleaned from the deposition testimony of the fire department personnel, the firefighters were faced with varying circumstances as they inspected the neighborhood and each particular home. The testimony of firefighter Jose Saenz indicates that every call regarding a fire or gas odor/leak is treated differently, depending on the presenting circumstances, and every emergency is treated on a case-by-case basis. Accordingly, the decision-making process of the firefighters under the present circumstances undoubtedly required the exercise of discretion and judgment and, therefore, the City and the FDNY are entitled to immunity in this case. Plaintiffs have submitted no proof sufficient to rebut the Court’s findings regarding the municipal defendants’ judgment and discretion in this case.

Finally, the City and the FDNY are entitled to dismissal of plaintiffs’ claims regarding the design, maintenance and/or repair of the sewer system since there are no allegations

regarding such claims in the Notices of Claim or in the complaints. Moreover, there has been no proof submitted establishing that these defendants had any notice of any defective or dangerous condition warranting the implementation of any additional safety measures (*see* Weiss v. Fote, 7 NY2d 579 [1960]).

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion (No. 001) in Action No. 1 by defendants THE BROOKLYN UNION GAS COMPANY d/b/a National Grid NEW YORK is denied; and it is further

ORDERED that the motion (No. 004) in Action No. 2 by defendants THE BROOKLYN UNION GAS COMPANY d/b/a National Grid NY i/s/h/a National Grid, and THE BROOKLYN UNION GAS COMPANY D/B/A National Grid NYs/h/a THE BROOKLYN UNION GAS COMPANY D/B/A National Grid is denied; and it is further

ORDERED that the motion (No. 005) in Action No. 2 by defendants THE CITY OF NEW YORK and the NEW YORK CITY FIRE DEPARTMENT is granted in its entirety, and the complaint and all cross-claims against them are hereby severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

DATED: February 11, 2020