

<b>Admiral Indem. Co. v City of New York</b>
2021 NY Slip Op 31626(U)
May 14, 2021
Supreme Court, New York County
Docket Number: 161952/2014
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 52**

*Justice*

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ADMIRAL INDEMNITY COMPANY A/S/O 308 WEST  
103RD STREET CORP.

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

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INDEX NO. 161952/2014  
MOTION DATE N/A  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this subrogation action, defendant City of New York (City) moves, pursuant to CPLR 3212, for summary judgment, seeking an order dismissing the plaintiff Admiral Indemnity Company's (Admiral) complaint.

**BACKGROUND**

Admiral, as subrogee of 308 West 103rd Street Corp. (Owner), commenced this action seeking damages due to a water main break that occurred on January 25, 2014. The water main was underneath the street adjacent to 308 West 103rd Street. According to the complaint, on that date, the water main malfunctioned and released large quantities of water into the building. Further, Admiral alleges that the defendant City owned and maintained the water main and that it was the City's negligence that caused the flooding. Admiral seeks \$322,819.51 in damages.

At the completion of discovery, the City moves for summary judgment on the ground that it did not have actual or constructive notice of a dangerous condition and, therefore, has no liability as a matter of law. The City further argues for the timeliness of its motion.

## **DISCUSSION**

### **Defendant's motion is timely**

The City argues that its motion is timely under the Governor's emergency toll of court proceedings. Admiral filed its note of issue February 20, 2020. According to its submission, the City had 31 days remaining on the 60-day time period to make a motion for summary judgment when the Governor's toll became operative on March 20, 2020.

Admiral's opposition does not oppose the City's motion on this ground and is silent on the question of timeliness. According to the court's records, the City's motion was submitted on December 2, 2020. The court finds, based upon the facts submitted by the City, and the lack of opposition on this point, that the motion is timely.

### **The Summary Judgment Standard**

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988][citation omitted]). “[A]verments merely stating conclusions, of fact or of law,

are insufficient' to 'defeat summary judgment'" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004][citations omitted]).

### **Actual or constructive notice**

The City argues that it did not have actual or constructive notice of a defective condition that caused the alleged damage. According to the City, its liability would arise out of its ownership of its water ways, "much like a private water company" (City affirmation in support at 6). The City further argues that the "maintenance and repair of water mains is traditionally performed by private businesses, such as water companies and, thus, where a municipality maintains a water system to provide water to private customers, it constitutes a proprietary function" (City memo in support at 6, citing *De Witt Props. v City of New York*, 44 NY2d 417, 423-424 [1978]); Thus, the municipality cannot be held liable for injury resulting from the water system unless "it is shown that the injury was caused by negligence in the installation or maintenance of the system" (*id.* at 424). The Court of Appeals in *Dewitt* further states:

"Thus, if the municipality has notice of a dangerous condition or has reason to believe that the pipes have shifted or deteriorated and are likely to cause injury, it must make reasonable efforts to inspect and repair the defect"  
(*id.*).

The City explains:

"Potable water is usually made available to the consumer through a system of underground conduits composed of 'mains'— large pipes intended to serve an entire street or neighborhood — and 'service lines'— smaller pipes which are connected to the main and intended to serve the individual consumer"

(*id.*). "[I]t is settled in this State that unless there is some warning of a possible defect the public or private supplier of water is not obligated to tear up the streets to inspect its pipes" (City memo in support at 8, citing *Gillette Shoe Co. v City of New York*, 86 AD2d 522, 524 [1st Dept 1982][internal citations omitted]).

The City takes the position that holding the City liable for anything other than its own negligence here would lead to an unreasonable standard, “making it the de facto insurer of its water works” (*id.* at 11). The standard is one of reasonable care which, the City argues, was satisfied by the City’s showing that it did not receive notice of a defective condition such as to cause the alleged property damage sustained by the Owner. According to the City’s motion papers, the Department of Environmental Protection (DEP) records returned by the pre-occurrence record search reveal that DEP responded to all complaints for the subject location. The City submits the results of this pre-occurrence record search, a service request, two completed work orders, and one Daily Activity Report, as prima facie evidence that it did not have notice of the alleged defective condition. This search is described in Kevin Harmon’s (Harmon) affidavit, the DEP claims specialist that performed this search.

Finally, the City argues that it did not cause or create the alleged defective condition of the pipe. The City concludes that the evidence shows that the City had no involvement with the subject pipe within the record search performed by the DEP for the requisite two-year search until the date of incident. Exhibit E. As such, no evidence exists that the City caused or created an immediately apparent condition under *Yarborough v City of New York*, 10 NY3d 726, 726-28 [2008] (City affirmation in support at 10).

Admiral argues in opposition that there is ample evidence in the case at bar that defendant was negligent in the construction of the water main. Admiral relies on New York precedent that the municipality can be liable “only for negligence in original construction or subsequent maintenance” of its water system (*Biancaniello v Town of Colonie*, 261 AD 161, 162 [3d Dept 1941], citing *Jenney v City of Brooklyn*, 120 NY164 [1890]). Admiral argues that, at the very least, there is an issue of fact regarding defendant's negligence in the construction of the

water main by installing it directly on top of a large piece of bedrock, without proper bedding, which caused it to fail prematurely.

According to NYC DEP Water Main Break Report (Wenig affirmation, exhibit A), prepared by David McDonald (McDonald), on January 25, 2014, a 12-inch diameter cast iron water main ruptured in front of 310 West 103rd street, New York, New York. The report describes the rupture as being a "4 ft. longitudinal break" (*id.* at 1). The "Observations" section of the report provides information concerning "Objects in Contact with Main," and, underneath, the box for "rock" is checked (*id.*; Mitts affirmation, exhibit G at 50 [McDonald deposition testimony.]).

McDonald, defendant's deposition witness, testified that objects found to be in contact with a water main can have an impact on the cause of the break (*id.* at 47). McDonald further testified that the subject water main was found to be installed directly on top of a 10 foot by 5-foot piece of bedrock (*id.*). According to McDonald, the DEP standard for installation of water mains is that there should be at least 3 feet of clean fill surrounding the water main (*id.* at 52). When asked to describe "clean fill", McDonald responded as follows: "It's sifted. There are no rocks" (*id.* at 53) According to McDonald, rocks cause pressure on the water main (*id.* at 54). The ground moves when the temperature changes, which causes the rocks to make contact with the water main (*id.*). The external force of the rocks can cause pressure and damage the water main (*id.* at 54-55).

According to McDonald, when the water main was installed in 1960 (page 59, line 2), its life expectancy was 100 years (page 59, line 20). McDonald testified that this water main was "pretty new compared to pipes in the City" (page 60, line 7) and that it should have lasted longer unless something happened to cause it to break (page 60, line 12).

The City retained T. Rao Tipirneni (Tipirneni), a metallurgist, to evaluate the water main and determine the cause of its failure. In his report, Tipirneni concluded:

“Based on the above evidence, it can be metallurgically concluded that no material defects were noted and no significant loss of wall thickness from corrosion was present. This suggests that the cast iron pipe had possibly failed due to some external forces acting on the pipe such as heavy external loading, frost loads, or soil movement”

(affirmation in opp at 4).

In his report for the Department of Environmental Protection

(DEP), Tipirneni additionally concluded that “it appears the fracture occurred on the bottom, based on the given orientation of the pipe” (Wenig affirmation, exhibit B at 1).

In support of its motion, Admiral submits the affidavit of Alan E. Fidellow (Fidellow), a professional engineer. He inspected the subject water main and surmised that “[a]t 54 years of age, the water main failed well within its reasonably expected useful life. As such, the water main’s failure is considered significantly premature” (Wenig affirmation, exhibit C, ¶ 5). In his affidavit, Fidellow “agree[d] with Mr. Tipirneni that the failure was caused by external forces acting on the pipe (Wenig affirmation, exhibit C, ¶ 6). He found that the rupture along the bottom of the water main was not caused by a material defect or significant corrosion.<sup>1</sup> Specifically, Fidellow states: “The break was located on the bottom of the pipe. The orientation of the pipe was confirmed from the scene photographs and the location of the 2” tap hole for feeding water to the adjacent building” (¶ 4). Fidellow agrees with McDonald that it is standard construction practice to install a water main in clean fill, and not directly on bedrock, without any rocks to “provide uniform support, level out irregularities, avoid point loading and accommodate underground earth movement . . . prevent external forces from damaging the water main, particularly during freeze-thaw cycles” (*id.*, 7).

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<sup>1</sup> Although there is a dispute about whether the hole was in the bottom or the top of the water main, this is not a material question that would require a trial in this case

Admiral relies on the DEP Standard Sewer and Water Main Specifications to argue that the installation of the subject water main was not done according to the specifications, which led to its premature damage. The DEP Standard Sewer and Water Main Specifications, August 1, 2009, § 4.02.4(A)(2) provides the following regarding the minimum required clearance between a water main and rock (see Exhibit "D"):

(2) Rock shall be excavated throughout the entire length and depth of the water main trench two (2) feet wider than the outside diameter of the pipe and at least six (6) inches deeper than the outside diameter of 30-inch and smaller pipe, nine (9) inches deeper than the outside diameter of 36-inch pipe and twelve (12) inches deeper than the outside diameter of 42-inch and larger pipe. (Where the bottom of trench is in rock, the pipe shall be supported on a minimum of six inches of select granular fill bedding in filler fabric wrap, or on concrete cradle, carried to the rock bed, as shown on the Water Standard Drawings or as directed by the Engineer.) Projections of rock, which come within six (6) inches of the outside of any portion of the pipe barrel or bell, or within one (1) foot of any hydrant standpipe or elbow shall be removed. (See Section 5.27 [Rock Excavation]) (Wenig affirmation, exhibit D).

Fidellow opines, to within a reasonable degree of engineering and scientific certainty, that the water main failed prematurely due to external forces created by its improper installation directly on top of a large piece of bedrock, without proper bedding. Mr. Fidellow further confirms that it is a long-established standard construction practice for underground pipes, including water mains, to be installed on a bedding of at least six inches of fill or crushed gravel, without any rocks. "A water main should never be installed directly on top of a large piece of bedrock, as testified to by Mr. McDonald" (Wenig affirmation, exhibit C, para 9).

In reply, the City argues that it was not negligent in the installation of the water main and that it was not the City's negligence that caused the water main to break. The City argues that there is no evidence that the pipe was negligently installed and that Admiral's reliance, for this position, on expert testimony is tenuous, at best. According to the City, the only witness with personal knowledge of the condition of the pipe is McDonald, "a supervisor at DEP who

responded to the scene immediately after the pipe burst” (affirmation in reply at 7). The City cites McDonald’s testimony on the condition and placement of the pipe:

“Q. How much pavement did you have to remove to locate the water main?

A. After we located the water main, it was four feet to the top of the main, we found a crack which is called a longitudinal break. Basically, it’s a straight-line crack.

Q. What’s the significance of that to your investigation?

A. Caused the crack?

Q. Yes.

A. I’d say wear and tear”

(Mitts affirmation, exhibit G at 18-19).

McDonald further testified about the crack in the pipe:

“Q. The longitudinal crack, how big was it?

A. If I can recall, approximately four-foot long.

Q. Do you remember on what side the crack was? Was it top, bottom?

A. Top.”

(Mitts affirmation, exhibit G at 20).

McDonald testified about the presence of objects in contact with the water main:

“Q. So then you noted here that there was a rock in contact with the water main. Can you describe that rock?

A.: Yes, that rock was under the main.

Q. How big was this rock?

A. If I can recall, large.

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Q. That rock, that piece of bedrock was in contact with the water main?

A. Yes.

Q. The water main was resting on top of the rock?

A. From my observation, it was very close to the water main.

Q. Does that put any type of external force on the water main?

A. No.

Q: Does it put any stress on the water main?

A.: If the rock is on top of the main, it puts stress, but if it’s on the bottom, no.

Q. If it’s in contact with that rock?

A. No, nothing”

(Mitts affirmation, exhibit G at 47-48).

Significantly, McDonald testified that there are instances where the bedrock underneath the water main supports the pipe:

“A. Yes. There were instances where they have bedrock and not able to get the dirt under the main. When there’s bedrock under the main, that acts as support, as a cradle on the main, but if there is bedrock on top of the main it will cause the main to collapse. I observed there were no rocks on top of the main”

(*id.*, at 53).

McDonald further testified with respect to the necessity of surrounding brand new water mains with clean fill, as opposed to water mains already in the ground:

“Q. When a water main is installed, should there be rocks in contact or close to the water main?

A. If it’s in the bottom, brand new water main, no rock.

Q. If you’re repairing a water main?

A. If it’s an existing water main and there are bedrocks, well, the bedrock stays where it’s at”

(*id.* at 54).

McDonald testified that there was approximately a one-inch space between the bedrock and the water main, and there were pebbles in that space. He further testified that there were no rocks on top of the main. (*id.* at 53).

The City argues that Admiral unsuccessfully uses expert opinion to attempt to undermine McDonald’s testimony. Specifically, McDonald is the only fact witness who observed the pipe at the time of the accident, and no expert saw the pipe at the time of the break. In fact, the first time any expert observed the pipe was five years after it had been removed,

The court is mindful of the legal standard that the City is not the insurer of any and all damage caused by a flooding water main. That, instead, there must be proof of the City’s negligence in order for the City to be found liable for such damage. Here, the court finds that the City did not have notice of the defective condition. The water main was under the ground and the City had no obligation to unearth it unless there was a warning. In this case, there was no warning until the pipe flooded the Owner’s premises, and, at that point, the City unearthed the pipe.

Further, in the case before the court, there is no question of fact as to the City’s liability concerning the creation of the defective condition (*see Beltran v Navillus Tile, Inc.*, 108 AD3d

414 [1<sup>st</sup> Dept 2013]). The City may be liable in negligence for damages caused by the break if the break was due to its negligence, either in the construction or maintenance of the water main” (*Foltis, Inc. v New York*, 287 NY 108, 112 [1941]; see also *Jenney v Brooklyn*, 120 NY 164, 167 [1890][the City is liable where it is established that “the injury was occasioned by an omission of duty on the part of the municipality, in that it failed to use reasonable care in the erection and construction of the hydrant”]).

Here, based upon the DEP Water Main Break Report, McDonald’s testimony, the affidavits of both the City’s expert and the plaintiff’s expert, there is no evidence sufficient to establish the existence of material issues of fact that the City was negligent when it installed the pipe on bedrock in 1960. According to McDonald, the water main was installed in 1960. No one, including the experts, offers any regulations or specifications from that time requiring clean fill around the pipe. In fact, McDonald testified that “[b]rand new water main, no rock,” however, once the pipe is in the ground, if it is on bedrock, it stays that way: “[i]f it’s an existing water main and there are bedrocks, well, the bedrock stays where it’s at” (Mitts affirmation, exhibit G at 54). There is no testimony or evidence of any kind undermining this position. The specifications offered by plaintiff are from 2009,<sup>2</sup> and they are consistent with McDonald’s testimony that water mains are now constructed with clean fill. Thus, although it might be standard practice today to install water mains surrounded by clean fill, there is no testimony that this was the mandate in 1960, when the subject pipe was installed. Despite McDonald’s testimony, which is corroborated by the experts that “[g]enerally, a water main should last longer than that unless something happened and causes a break” (Mitts affirmation, exhibit G at 60), there is simply no evidence that the city acted negligently when it installed the water main, 54 years before its break, in 1960.

On these grounds, the court, grants the City's motion for summary judgment.

### **Res Ipsa Loquitur**

Admiral argues that the doctrine of res ipsa loquitur applies to the facts in this case, permitting a finding of negligence by the City. A plaintiff seeking to rely on this doctrine must establish three elements:

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and (3)] it must not have been due to any voluntary action or contribution on the part of the plaintiff”

(*Ever Win, Inc. v I-10 Indus. Assoc., LLC*, 74 AD3d 735, 737 [2d Dept 2010][internal quotation marks and citation omitted]).

Here, Admiral argues that the doctrine has been applied to water mains and cites the Second Department's finding in *Ever Win, Inc.*:

“The evidence was legally sufficient to establish that the event was of a kind was ordinarily does not occur in the absence of someone's negligence. As this Court observed on the prior appeal, the doctrine of res ipsa loquitur ‘has been applied to water main breaks . . . and this type of event has frequently been cited as a typical example of a case where the doctrine is commonly applicable”

(*id.* at 737[internal quotation marks and citations omitted];).

Admiral further argues that the City had exclusive control of the water main and there is no proof that the Owner contributed to the break.

In reply, the City relies on the *Biernacki v Village of Ravena*, 245 AD2d 656 [3d Dept 1997], in which the Third Department found that the flooding of the plaintiffs' premises by an overflow of the sanitary and storm sewer system was not enough to hold the municipality liable, that, instead, “an owner must show that the municipality either affirmatively breached a duty owed or that it was actively negligent and the negligence caused the flooding” (*id.* at 657; *see also Linden Towers Coop. #4 v City of New York*, 272 AD2d 587, 587 [2d Dept 2000][“Evidence

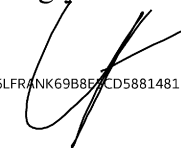
of flooding caused by the backflow of a sewer system, standing alone, is insufficient to maintain an action against a municipality to recover damages”]).

Here, the court finds that the doctrine is not applicable to the facts of this case. The evidence supports a finding that the City was in exclusive control of the water main, that Admiral’s subrogor did not take any action that caused the damage to the water main, however, there is nothing support a finding that this type of break occurred only as the result of a person’s negligence. The City’s witness, McDonald, testified that this break was the result of wear and tear. There is no evidence supporting a presumption or inference of negligence on the part of the City. The court, therefore, grants the City’s motion on this ground. The court need not reach a resolution on the questions concerning the notice of claim.

In accordance with the foregoing, it is

ORDERED that defendant City of New York’s motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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5/14/2021  
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE