

Sontag v GV Holding LLC

2022 NY Slip Op 34480(U)

March 23, 2022

Supreme Court, Rockland County

Docket Number: Index No. 033895/2020

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory
time period 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.

-----X
ISRAEL SONTAG, ARIE RABINOWITZ and
CHANA MOSES,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 033895/2020

GV HOLDING LLC, GRANDVIEW
ENTERPRISES LLC, SHIMMY'S
ENTERPRISE, INC, SCOTT PERRI
LANDSCAPING INC., the VILLAGE OF
MONTEBELLO and the VILLAGE OF WESLEY
HILLS,

Motion Sequences # 2, 3 and 4

Defendants.
-----X

The following papers, filed on NYSCEF, were read on Defendant Village of Wesley Hills' motion to dismiss the Complaint as against it, Defendant Village of Montebello's motion to dismiss the Complaint as against it, and Plaintiffs' cross-motion for leave to file a late notice of claim and file an amended complaint:

Notice of Motion/Affirmation in Support/Exhibits(A-C).....	NYSCEF Doc. Nos. 71-75
Reply Affirmation.....	139
Notice of Motion/Affirmation in Support/Exhibits(A-C).....	82-86
Reply Affirmation/Exhibit(A)	140-141
Notice of Cross-Motion/Affirmation in Support/Sontag Affidavit in Support/Rodi Affidavit in Support/Exhibits(A-L)/Exhibits(A-C)/Exhibits(A-E).....	115-138
Rosedale Affirmation in Opposition/Exhibit(A)	142-144 ¹

¹ Plaintiff submitted a "Reply affirmation in Support of Cross-Motion" and supporting documents thereto on December 15, 2021, which the Court deems both a reply in connection with a cross-motion not provided for under the CPLR and sur-reply submitted in violation of the

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

Plaintiffs filed this Complaint against the Defendants for alleged damages on their real properties caused by Defendants' actions and/or omissions. The Complaint alleges the following: Plaintiffs own properties in the Village of Wesley Hills, County of Rockland, New York. A drainage easement traverses one or more of the Plaintiffs' properties in the Village Wesley Hills and continues over the municipal boundary into an adjacent subdivision site located in the Village of Montebello. Certain site clearing, tree clearing, and excavation for drainage installations began on this subdivision of property located at 216 Grandview Avenue in the Village of Montebello, owned jointly by Defendants GV Holding LLC and Grandview Enterprises LLC ("216 Grandview Property"). Plaintiffs' properties are located adjacent to the 216 Grandview Property. On or about July 9, 2020, the Deputy Village Engineer of the Village of Wesley Hills issued an invalid and void permit to the non-village defendants in connection with said work being done on the 216 Grandview Property. This work resulted in excessive noise on Plaintiffs' properties, unhealthy layer of dust covering Plaintiffs' decks and backyards, invasion of Defendants' personnel and equipment onto their properties, and destruction of trees, vegetation, and a stone wall on Plaintiff Sontag's property. The Complaint further alleges that both Defendants Village of Wesley Hills and Village of Montebello (collectively, "Defendant Villages") had duties to regulate and supervise the acts of the other defendants so that no harm or damage was inflicted upon the Plaintiffs' properties. Based upon those allegations, Plaintiffs seek against the Defendant Villages money damages in the amount of no less than \$1 million, punitive damages in an amount no less than \$1 million; injunctive relief directing them to cease-and-desist from any trespass, property damage, and any other activity violating plaintiffs' rights; and injunctive relief directing the Defendant Villages assuming and performing their ministerial duties.

Now, before the Court are the Defendant Villages' respective motions to dismiss the Complaint as against them and Plaintiffs' cross-motion to file a late notice of claim and file an amended complaint. First, the Court reviews Plaintiffs' application.

Court's Part Rules, as leave of the Court was neither sought nor granted. Therefore, the same was not considered in connection with these applications.

I. Plaintiff's Cross-Motion to File a Late Notice of Claim and Amended Complaint

When a party makes a motion to amend a pleading under CPLR § 3025(b), the same “shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” “Leave to amend a pleading should be freely given (see CPLR 3025[b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit.” *Douglas Elliman, LLC v Bergere*, 98 AD3d 642 [2d Dept 2012][internal citations and quotations omitted]. Furthermore, it is within the Court’s “broad discretion” whether to grant leave to amend. *Tarek Youssef Hassan Saleh v 5th Ave. Kings Fruit & Vegetables Corp.*, 92 AD3d 749, 750 [2d Dept 2012]. “The defendants cannot legitimately claim surprise or prejudice, where the proposed amendments were premised upon the same facts, transactions or occurrences alleged in the original complaint.” *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27-28 [2d Dept 2008][internal citations omitted].

Here, the Court in its discretion denies the portion of Plaintiffs’ motion seeking leave to file an amended complaint. Plaintiffs failed to provide the proposed amended pleading clearly showing the changes or additions to be made in the complaint, as required under CPLR 3025(b). Nor did Plaintiffs even explain the changes or additions that would be included in the amended complaint. As such, the Court is unable to discern whether Plaintiffs’ intended amendments are palpably insufficient or patently devoid of merit or would prejudice the Defendants. Next, the Court determines whether to grant Plaintiffs’ request to file a late notice of claim.

“In determining a motion for leave to serve a late notice of claim or to deem a late notice of claim timely served *nunc pro tunc*, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant was an infant at the time the claim arose and, if so, whether there was a nexus between the claimant’s infancy and the delay in service of a notice of claim, (3) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim and for the subsequent delay in seeking leave to serve a late notice of claim, and (4) the public corporation was substantially prejudiced by the delay in its ability to maintain its defense on the merits. The determination to grant leave to serve a late notice of claim lies within the sound discretion of the Supreme Court[.]” *Hudson v*

Patel, 146 AD3d 758, 759 [2d Dept 2017], *lv to appeal dismissed*, 30 NY3d 987 [2017][internal quotations and citations omitted]. “A factor that should be accorded great weight is whether the public authority acquired actual knowledge of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter.” *Matter of Alvarez v New York City Hous. Auth.*, 97 AD3d 668, 669 [2d Dept 2012]. “The very purpose of the notice is to provide a municipality with an opportunity to investigate the claim against it, and seek to adjust the claim before a civil action is brought.” *Ragland v New York City Hous. Auth.*, 201 AD2d 7, 13 [2d Dept 1994]. Furthermore, “the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued.” *N.M. v Westchester County Health Care Corp.*, 10 AD3d 421, 422 [2d Dept 2004].

Here, Plaintiffs filed their motion to file a late notice of claim on December 3, 2021. The factual allegations in the Complaint occurred around June 2020-July 6, 2020. Plaintiffs served a notice of claim upon Defendant Wesley Hills on November 5, 2021. Given these operative dates, this application is beyond one year and ninety days after the cause of action accrued in June 2020-July 6, 2020. Although Plaintiffs’ counsel argues that Defendant’s actions are a continuing wrong, the allegations in the notice of claim served on November 5, 2020 fail to support that theory. *See Kaufman v Vill. of Mamaroneck*, 286 AD2d 666, 667 [2d Dept 2001][“a cause of action involving the issuance of a building permit accrues when the permit is issued and does not constitute a continuing wrong”]. Although Plaintiff Sontag also seeks to file a notice of claim pertaining to acts occurring in September 2021, those factual allegations are *not* in the Complaint herein and happened almost a year after this action was commenced. Based upon the foregoing, the Court is unable to grant Plaintiffs leave to file a late notice of claim with respect to the claims in this action or deem the previously served notice of claim timely served *nunc pro tunc*. As such, Plaintiffs’ cross-motion is denied in its entirety. Next, the Court reviews Defendant Village of Wesley Hills’s and Defendant Village of Montebello’s respective motions to dismiss.

II. Defendants Village of Wesley Hills’s and Village of Montebello’s Motions to Dismiss

Defendant Village of Wesley Hills seeks dismissal under CPLR § 3211(a)(7) for Plaintiffs’ failure to state a cause of action against it. Specifically, it argues that the Complaint fails to allege

that a notice of claim was filed and, further, that Plaintiff failed to file the same. It also argues that its issuance of any permit to any party is a discretionary act that it is not liable for under the doctrine of governmental immunity. Defendant Village of Wesley additionally argue that the Complaint fails to allege any special relationship or duty running between Plaintiffs and itself. It also highlights that the Complaint does not allege any specific statutory or regulatory violations. Meanwhile, Defendant Village of Montebello's arguments for dismissal under CPLR § 3211(a)(7) are largely similar to those of Defendant Village of Wesley Hills. Therefore, the Court reviews both the Defendant Villages' motions in tandem.

“In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Integrated Const. Services, Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162 [2d Dept 2011][internal citations and quotes omitted]; *see also Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus.” *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]. “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.” *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Matter of Chet's Garage, Inc. v Village of Goshen*, 161 AD3d 727, 731 [2d Dept 2018].

“Governmental immunity under the decisional law of this State does not attach to every act, but when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant generally is not answerable in damages for the injurious consequences of that action.” *Haddock v New York*, 75 NY2d 478, 484 [1990]. Furthermore, “[l]iability will not be imposed upon a governmental body for injuries sustained by individuals where the statute or regulation alleged to have been violated by the governmental body defines a standard of care for the general welfare only.” *Browne v Hempstead*, 110 AD2d 102, 105 [2d Dept 1985]. As explained by the Court of Appeals:

“The elements of this ‘special relationship’ are: (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's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (see, *Shinder v State of New York*, 62 NY2d 945, 946; see also, *Sorichetti v City of New York*, supra, p 469; cf. *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507).” *Cuffy v New York*, 69 NY2d 255, 260 [1987].

Meanwhile, “[t]he extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought.” *Matter of North Fork Mgt. & Maintenance, LLC v New York State Dept. of Labor*, 98 AD3d 514 [2d Dept 2012]. “Thus, mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial.” *N.Y. Civ. Liberties Union v State*, 4 NY3d 175 [2005].

As an initial matter, the Court notes that the Complaint fails to clearly identify the real property or properties owned by each Plaintiff in the Village of Wesley Hills. Only after reviewing the parties’ motion papers did the Court learn that Plaintiff Sontag owns 7 Martha Drive. Nonetheless, the Court is still unaware as to which property/properties Plaintiff Rabinowitz and Plaintiff Moses own in the Village of Wesley Hills. Plaintiffs seek relief sounding in tort and a mandamus against the Defendant Villages. For the following reasons, the Court finds that the Complaint fails to state a cause of action against the Defendant Villages.

As for the allegations pertaining to Defendant Village of Wesley Hills, the Complaint merely alleges that Plaintiffs own property in the Village of Wesley Hills, that a municipal drainage easement traverses one or all of the Plaintiffs’ properties, and that the Deputy Village Engineer of the Village of Wesley Hills issued a permit to non-village Defendants to perform certain work adjacent to the Plaintiffs’ properties. As for the Defendant Village of Montebello, the Complaint merely contends that the property which was being worked on by the other defendants is located in the Village of Montebello. These allegations fail to form any cognizable legal theory against the Defendant Villages because Plaintiffs fails to allege any damages resulting from their ministerial acts. Rather, Defendant Village of Wesley Hills’s alleged issuance of a permit is a discretionary act. See *Dinerman v Poehlman*, 237 AD2d 483 [2d Dept 1997]. Furthermore, Plaintiffs fail to

allege any specific statutory or regulatory violation by the Defendant Villages resulting in harm to their properties. Although Plaintiffs allege the existence of a municipal drainage easement running on Plaintiffs' properties located in the Village of Wesley Hills, the Complaint lacks any allegations regarding Defendant Village of Wesley Hills's actions or inactions concerning its duty to maintain the easement. *See Mangusi v. Town of Mt. Pleasant*, 19 AD3d 656 [2d Dept 2005]. Rather, the Complaint alleges that Plaintiffs' properties were damaged by certain unidentified drainage installations on the adjacent 216 Grandview Property by the non-village defendants.

The Complaint also seeks relief sounding in a mandamus to compel against the Defendant Villages. Although Plaintiffs seek the Court to issue an order for injunctive relief against the Defendant Villages to assume and perform their ministerial regulatory duties, Plaintiffs' Complaint fails to allege their clear legal right to the relief sought. Rather, the Complaint makes the blanket allegation that the Defendant Villages "had the obligation to duly regulate and supervise the acts of the other defendant so that no harm or damage was inflicted upon the plaintiffs." Complaint ¶ 20. Therefore, Plaintiffs fail to allege facts to support a claim sounding in mandamus. Thus, in affording the Complaint a liberal construction, accepting the factual allegations as true, and according to the Petitioner with every favorable inference, the Court finds that the allegations against the Defendant Villages fail to fit within a cognizable legal theory.

Based upon the foregoing, it is

ORDERED that Plaintiffs' cross-motion is denied in its entirety; and it is further

ORDERED that Defendant Village of Wesley Hills's motion to dismiss the Complaint is granted and the same is hereby dismissed as against Defendant Village of Wesley Hills; and it is further

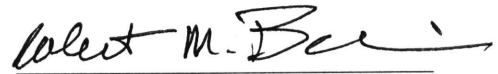
ORDERED that Defendant Village of Montebello's motion to dismiss the Complaint is granted and the same is hereby dismissed as against Defendant Village of Montebello; and it is further

ORDERED that the Plaintiffs and remaining defendants are hereby advised of a **live in-courtroom status conference** scheduled for a **March 28, 2022 at 10:30 am**.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
March 23, 2022

ENTER



HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF