Tully v City of Glen Cove

2012 NY Slip Op 30393(U)

February 9, 2012

Supreme Court, Nassau County

Docket Number: 004151-09

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 004151-09

MOTION SUBMISSION
DATE: 11-17-11

MOTION SEQUENCE
NOS. 3, 4, 5

RICHARD TULLY,

Plaintiff,

-against-

CITY OF GLEN COVE, COUNTY OF NASSAU,
PHILIP SCIUBBA and KATHLEEN KRAEMER,

Defendants.

PHILIP SCIUBBA and KATHLEEN KRAEMER,

Third-Party Plaintiff,

-against-

ELLWOOD ESTATES,

Third-Party Defendant.

PHILIP SCIUBBA and KATHLEEN KRAEMER,

Second Third-
Party Plaintiffs,

-against-

ROBERT S. MOSKOW and ROBERT S.
MOSKOW REAL ESTATE,

Second Third-
Party Defendants.

The following papers read on this motion:

Notice of Motion and Affirmation (No. 3)	X
Notice of Motion, Affirmation, and Exhibits (No. 4)	X
Notice of Motion, Affirmation, and Exhibits (No. 5)	X
Reply Affirmation (County)	X
Reply Affirmation (City of Glen Cove)	X
Affidavit in Opposition (Plaintiff)	X
Memorandum of Law in Support (City of Glen Cove)	X
Affidavit of Elizabeth Mestres	X
Affirmation in Reply	X

By separate motions, defendants City of Glen Cove ("City"), County of Nassau ("County") and defendants Philip Sciubba and Kathleen Kraemer, each move, pursuant to CPLR 3212, granting them summary judgment dismissal of plaintiff, Richard Tully's complaint.

The motions are determined as herein set forth below.

This action arises out of property damage allegedly sustained by the plaintiff, Richard Tully, as a result of flooding which occurred on his property located at 37 Ellwood Street in Glen Cove, New York. The alleged flooding occurred on August 11, 2008 and August 15, 2008. As best as can be determined from the papers submitted herein, the underlying facts are as follows:

Plaintiff is the owner of 37 Ellwood Street, a property that has been owned by his family since 1987. In 2002, the defendant City of Glen Cove approved the subdivision of a lot adjacent to plaintiff's property into three plots for

development. According to the plaintiff, prior the development of the adjacent property, there always existed trees which helped contain the runoff water from flowing down the hill from Margaret Street. Although the plaintiff, together with other local residents, objected to the idea of a subdivision on Margaret Street at a Planning Board Meeting held by the City of Glen Cove, the developers, third party defendants Robert Moskow and Ellwood Estates, Inc., proceeded to build three houses on the approved subdivision. According to the plaintiff's testimony, many concerns were brought to the attention of the board members at the meeting including the concern as to what would happen to the runoff water due to rainstorms from Margaret Street to the surrounding lower grade properties if the trees were cut down for the subdivision. The Planning Board apparently assured the residents that there would be proper drainage systems installed during the development of what would be called "Ellwood Estates."

The house abutting plaintiff's property, 39 Ellwood Street, has a long driveway with access on Ellwood Street. The other two houses have access on Margaret Street and do not abut plaintiff's property. All three houses are uphill of the plaintiff's property. The three houses were eventually sold. Defendants Sciubba and Kraemer purchased 39 Ellwood Street, the house which abuts plaintiff's property.

Prior to the development of the subdivision, Margaret Street ended in a dead end with a wall at its base. A drainage pipe owned and maintained by the defendant City of Glen Cove was imbedded in the wall along the side of Margaret Street. Surface water flowed down Margaret Street to the dead end and ran along the wall to the drainage pipe where it would travel underground downhill to an exit on Ellwood Street. During the course of the development, a portion of the wall was removed. The dead end of Margaret Street, instead of ending at a wall, now ended with a common driveway that lead to the two new houses which were built on Margaret Street. What remained of the wall now flanked the driveway on either side and was decorated with stone. The drainage pipe was still there, but the wall that directed water to the pipe was no longer there.

As a result of the removal of the wall, surface water running down Margaret Street would sometimes run down the common driveway of the two new houses at the end of Margaret Street and pool on the driveway. Once the drywell located on the driveway filled to capacity, the surface water would spill over the driveway and onto the defendants Sciubba and Kraemer's property, cascading down the hill embedded with stones that exists behind the defendants Sciubba and Kraemer's property and onto the plaintiff's property.

On August 11, 2008, a severe rainfall resulted in surface water traveling down Margaret Street, overwhelming and bypassing the City owned drainage pipe, traveling onto the common driveway for the two Margaret Street houses, and then overflowing onto the defendants Sciubba and Kraemer's property. From there, the surface water continued downhill along the edge of the defendants Sciubba and Kraemer's property along side a fence, eroded away dirt at a low point where the properties of a common neighbor, the defendants, and the plaintiff Tully met, and entered plaintiff Tully's property causing the damage complained of.

Such an event had never occurred prior to August 11, 2008. Plaintiff alleges that due to the heavy rainstorm on August 11, 2008, the water flowed through an artificial "channel" – i.e., the area, the space between the fence which borders the Sciubba's property and the fence which borders the property of their common neighbor, identified as Alex – that was directed towards the plaintiff's house from the end of Margaret Street, breaking through plaintiff's fence on his property, through the basement door and into his house, ruining the finished basement and personal property.

A few days after the first flooding of plaintiff's home on August 11, 2008, another heavy rainstorm occurred, flooding the house for the second time on August 15, 2008.

Upon the instant motions, the defendants all seek summary judgment dismissal of plaintiff's complaint.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt. Inc. v. Gincherman*, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

For the sake of clarity, this Court will address each motion separately and in turn.

County's Motion

Initially, it is noted that the plaintiff does not substantively oppose the County's motion for summary judgment. Nonetheless, even in the absence of any opposition by the plaintiff, the Court is not relieved of its obligation to ensure that the movant

demonstrated it's entitlement to the relief requested (*see Zecca v. Ricciardelli,* 293 AD2d 31 [2nd Dept. 2002]).

The County's principal argument in support of it's motion is that it does not have jurisdiction over the alleged accident location and thus it cannot be held liable in negligence. Based upon the documentary proof submitted herein, including the City's response to the Notice to Admit wherein the City admits that it "maintains and owns Margaret Street and owns and maintains any surface water drainage structures/systems on Margaret Street in the Incorporated City of Glen Cove" (Motion, Ex. K), the sworn affidavit of William Mahoney, the highway maintenance supervisor for the County Department of Public Works from November 2001 to September 2010 wherein he states, *inter alia*, that the "[County] does not own or maintain any drainage facilities on Margaret Street or Ellwood Street in the vicinity of 37 and 39 Ellwood Street" (*Id.*, Ex. L), this Court finds that the County has properly established that it does not have any jurisdiction over the drainage facilities on Margaret Street that allegedly caused the flooding of plaintiff's residence or otherwise over the location of the plaintiff's accident (*Schulman v City of New York*, 190 AD2d 663 [2nd Dept. 1993]).

In opposition, the plaintiff fails to present any admissible evidence sufficient to create a triable issue of fact, or to constitute a defense that would defeat the

County's motion. Thus, the County's motion is herewith granted (*Lorenz Diversified Corp. v. Falk*, 44 AD3d 910 [2nd Dept. 2007]; *Takeuchi v. Silberman*, 41 AD3d 336 [1st Dept. 2007]).

Notably, while the City opposes the County's motion on the grounds that the City never installed nor does it maintain drainage on the private property, this argument does not serve to defeat the *County's prima facie* case particularly in light of the fact that the City (in its response to the Notice to Admit) "maintains and owns Margaret Street and owns and maintains any surface water drainage structures/systems on Margaret Street in the Incorporated City of Glen Cove." The City did not present any evidence to defeat the County's evidence that it did not maintain or control the water containment or flow in the area of the flooding complained of, and that the County was not involved with the approval process for the development of Ellwood Estates.

Therefore, the County's motion for summary judgment is granted.

<u>Sciubba and Kraemer's Motion</u>

Defendants Sciubba and Kraemer assert three bases for summary judgment. First, they submit that the plaintiff never responded to their demand for a Bill of Particulars and as such he should be precluded from offering evidence as to those particulars demanded. Second, defendants argue that their property did not divert

water onto the plaintiff's property through artificial means and further that the improvements to their plot of land were made in a good faith attempt to enhance the usefulness of the property; thus, they argue that they cannot be held liable for the natural flow of surface water across their property. Lastly, defendants argue that the evidence establishes that the removal of the wall on Margaret Street, without adequate drainage measures, caused the massive increase in the size of the watershed which spilled onto the plaintiff's property; any development on their property was not the proximate cause of the plaintiff's flooding.

At the outset, the court notes that the failure to comply with a demand for a bill of particulars cannot form the basis of a summary judgment motion by the defendants at this juncture; the remedy for a plaintiff's failure to comply with a demand for a bill of particulars (CPLR 3042[c]) is a motion to compel compliance or for penalties pursuant to CPLR 3042(d) (*McCraith v. Wehrung*, 42 AD2d 825 [4th Dept. 1973]; *Vandoros v. Kovacevic*, 79 Misc.2d 238 [App. Term 2nd Dept. 1974]). A "bill of particulars" is an amplification of a pleading, supplying more detail and therefore affording the adverse party a more thorough picture of the claim being particularized. It is designed to limit the proof and prevent surprise at the trial (*State of New York v. Horsemen's Benevolent and Protective Ass'n*, 34 AD2d 769 [1st Dept. 1970]). The bill is supposed to offer a more expansive statement of the pleader's contentions rather

than the evidentiary basis upon which they rest. Under subdivision (c) of CPLR 3042, defendants' remedy for plaintiff's failure to serve a bill at all is to

> move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.

If plaintiff does not respond in any way at all within the 30-day period, a start may already have been made towards a finding of willfulness. This, however, cannot form the basis of a motion for summary judgment at this juncture.

As to defendants' more substantive basis for summary judgment, this Court finds that having submitted, *inter alia*, the affidavit of Vincent Ettari, PE, an engineer who reviewed the testimony of all parties, the photographs identified at various depositions, various maps, surveys, plans and studies, and performed an inspection of the defendants' premises, Margaret Street and the entire water shed leading to plaintiff's house, as well as analyzed the two storms occurring in August 2008, the defendants Sciubba and Kraemer have established their prima facie entitlement to judgment as a matter of law.

In opposition, however, the plaintiff produces evidentiary proof in admissible form, including the deposition testimony of the defendants themselves, that is sufficient to establish the existence of material issues of fact that require a trial.

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Specifically, plaintiff points to the defendants' own testimony confirming that they were aware of the inadequacies of the drainage systems on their property and that they participated in the development of their property with respect to driveways and patios and other general improvements to their plot of land. At his oral examination before trial, defendant Sciubba testified that his property was prone to flooding when it rained and that as a consequence he replaced four to six hundred pounds of dirt each time his property flooded. Sciubba also testified that he alerted the City of Glen Cove about the inadequate drainage on his lot. Further, Sciubba also testified that, in a good faith attempt to enhance the usefulness of the property, he made improvements to the plot of land. With this testimony on the record, this Court finds that there remain questions of fact as to whether the defendants' failure to require and install an effective storm water drainage system at all contributed to the flooding that the plaintiff suffered. The defendants' evidence, including the expert affidavit, does not effectively dispel this issue of fact.

Further, in opposition, plaintiff proffers an agreement dated May 21, 2003 entered into by Ellwood Estates, Inc. and Josephine Tully (plaintiff's mother and prior owner of the plaintiff's residence) which states in full as follows:

> Ellwood Estates, Inc., without agreeing to any liability in regards to damages done to the basement property of Josephine Tully, at 37 and 37-A Ellwood Street, Glen Cove, New York property, And in the interest of forestalling any

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> protracted litigation regarding the events of February 21 and 22nd 2003, Ellwood agrees to pay Josephine Tully $2,196.00 dollars for damages caused to her finished basement by water on February 21 and 22nd, 2003.
>
> The parties understand that the construction of Ellwood Estates property which adjoins the property of Josephine Tully is continuing at the present time. If the construction activity causes future damage to the property of Josephine Tully, Ellwood will assume liability if the damages are a result of their construction activity.
>
> *It is understood that the final site plan approval is presumed to have been properly engineered to allow for proper drainage of water so as not to adversely impact the neighboring properties and in particular the property of Josephine Tully of 37 and 37-A Ellwood Street Glen Cove, New York.*
>
> During the interim period between now and final completion and issuance of Certificate of Occupancy, Ellwood agrees to do everything necessary to prevent water damage to the property of Josephine Tully during the remaining construction phase of Ellwood Estates. (Emphasis Added).

While it is clear that the agreement was entered into between the plaintiff's mother and Ellwood Estates (the development where the defendants purchased their home in 2004), and further, although the agreement pre-dates the defendants' purchase of their home, this Court finds that in light of this agreement, there remains an issue of fact as to whether the plaintiff's property was prone to flooding as a result of the development of the defendants' lot. In the absence of any evidence by the defendants who admittedly were aware of the inadequacies of the drainage systems on their property, and participated in the development of their property with respect to driveways and patios and other general improvements to the plot of land, there

remains an issue of fact as to whether or not they were required to install or demand that barriers or drainage system were installed on their lot to ensure that the plaintiff's abutting property was never again flooded.

Therefore, defendants, Sciubba and Kraemer's motion for summary judgment dismissal of plaintiff's complaint is herewith denied.

City of Glen Cove's Motion

Plaintiff's theory against the City is that the City was "negligent in the design, approval, installation and maintenance of the drainage system which was created to contain the flood waters."

Defendant, City of Glen Cove, asserts four primary bases for summary judgment. First, that it did not receive any prior written notice of the alleged defect or of any obstruction in their drainage system. Second, plaintiff's claims that the City was negligent in approving the subdivision application is time-barred. Third, plaintiff's claims that the City negligently approved the subdivision and/or negligently designed and/or maintained the drainage system on Margaret Street must be dismissed for his failure to include them in his Notice of Claim and his failure to allege inadequate drainage on Margaret Street in the Complaint. Lastly, the City is entitled to discretionary immunity for its decision to approve the subdivision and from liability arising out of claims that it negligently designed the public drainage system.

Initially, it is noted that defendant's Notice of Claim and it's prior written notice arguments are insufficient to establish a basis for summary judgment. The purpose of the notice of claim is to enable the City to investigate claims and obtain evidence promptly (*see e.g., State v. Waverly Cent. Sch. Dist.*, 28 AD2d 628 [3rd Dept. 1967]). Defects in the contents of the notice, not shown to prejudice the defendant, such as an omission of how the claim arose or the items of damage, have been held curable or disregardable (*Brown v. City of New York*, 95 NY2d 389 [2000]). Furthermore, and for these reasons, also equally insufficient is defendant's argument that plaintiff's claims are time barred. Defendant City argues that plaintiff's claims for negligent approval of the subdivision and negligent design and maintenance of the drainage on Margaret Street is time barred as a result of his failure to assert said claims in the Notice of Claim.

The City's argument that it did not receive any prior written notice of an alleged defective condition pertaining to the inadequate drainage on plaintiff's lot or of an alleged defect or obstruction in the City drainage system is unavailing in this case. Negligent design or construction by a municipality is active negligence, and notice of the resulting defect is not a condition precedent to suit (*Hughes v. Jahoda*, 75 NY2d 881 [1990]); *Meyer v. Town of Brookhaven*, 204 AD2d 699 [2nd Dept. 1994]; *Kiamie v. Town of Huntington*, 166 AD2d 634 [2nd Dept. 1990]).

The City's argument that it is entitled to discretionary immunity for its decision to approve the subdivision and that it is immune from liability arising out of claims that it negligently designed the public drainage systems is equally unavailing. It is true that under the doctrine of qualified immunity, the City may not be held liable unless it is established that the approval of the development of the Ellwood Estates subdivision and/or drainage structures were designed without adequate study or based upon an unreasonable design decision (*Friedman v. State of New York*, 67 NY2d 271, 284 [1986]; *Weiss v. Fote*, 7 NY2d 579 [1960]). In New York State, it is well settled that a governmental unit is not required to provide a drainage system sufficient to dispose of all surface waters flowing as a result of the natural drainage, grading and paving of streets (*Fox v. City of New Rochelle*, 240 NY 109 [1925]; *Friedland v. State*, 35 AD2d 755 [3rd Dept. 1970]; *Beck v. City of New York*, 16 AD2d 809 [2nd Dept. 1962]). Liability may attach, however, if the governmental unit collects surface water into channels and discharges it onto private property (*Fox v. City of New Rochelle*, supra; *DiRienzo v. State of New York*, 187 AD2d 879 [3rd Dept. 1992]).

Here, the defendant City as the movant bears the burden of establishing its prima facie entitlement to judgment as a matter of law. Yet, the City proffers no credible evidence such as an expert affidavit, that the approval of the Ellwood Estates development and the drainage structures were designed with ample study and were based upon a reasonable design decision and it is therefore immune from liability on

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any design basis. On the contrary, the evidence herein confirms that the City was an active participant in approving the development abutting plaintiff's property. Indeed the record herein confirms that in 2002, defendant City approved the development of the Ellwood estates subdivision and further, as a condition of its approval, the City required that "prior to the issuance of any building permits, a detailed drainage plan must be submitted to and approved by the City of Glen Cove Department of Public Works." Notably, the City fails to provide any such application or approval that it issued in support of its motion for summary judgment.

Moreover, in light of the settlement agreement reached by and between plaintiff's mother and the developer of the subdivision, *supra*, which states in pertinent part, that "it is understood that the final site plan approval is presumed to have been properly engineered to allow for proper drainage of water so as to not adversely impact the neighboring properties" and in particular that of the plaintiff herein, this Court is not convinced that the City exercised ordinary care to prevent the consequences of approving the Ellwood Estates development and as such are immune from liability arising out of plaitniff's claims that they negligently designed and/or approved the development (*cf. Siefert v. City of Brooklyn*, 101 NY 136, 144–145 [1886]; *Tappan Wire & Cable, Inc. v. City of Rockland*, 7 AD3d 781, 783 [2nd Dept. 2004]).

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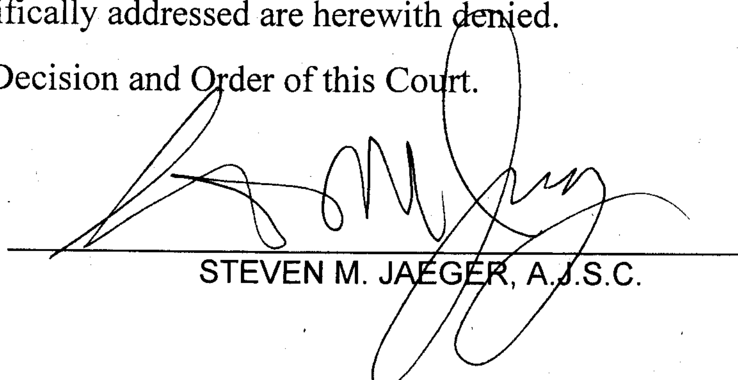
Therefore, having failed to make a prima facie showing of entitlement to judgment as a matter of law, this Court denies the City's motion for summary judgment, without regard to the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

The parties remaining contentions have been considered by this Court and do not warrant discussion.

All applications not specifically addressed are herewith denied.

This shall constitute the Decision and Order of this Court.

Dated: February 9, 2012



STEVEN M. JAEGER, A.J.S.C.

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