SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ALICE MOISE and LEON MOISE, **Part C-2**

Plaintiffs, **Present:**

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAN TAYLOR, INC., **Index No. 102632/09**

Motion Nos. 754-003
1148-004

Defendants.

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The following papers numbered 1 to 6 were marked fully submitted on the 9th day of May, 2012:

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant Dan Taylor, Inc. (Affirmation in Support)	1
Plaintiff's Opposition to Dan Taylor, Inc.'s Motion for Summary Judgment (Attorney's Affirmation and Memorandum of Law in Support)	2
Notice of Motion for Summary Judgment by Defendants City of New York and New York City Department of Environmental Protection (Affirmation in Support)	3
Plaintiff's Opposition to the City's Motion for Dismissal and/or Summary Judgment (Attorney's Affirmation and Memorandum of Law in Support)	4
Reply Affirmation of Dan Taylor, Inc.	5
Reply Affirmation of the City Defendants	6

MOISE v. CITY OF NEW YORK, et. al.,

Upon the foregoing papers, defendants' motions are denied.

Plaintiffs, the owners of 347 Elvin Street, Staten Island, New York, commenced this action to recover damages against defendants Dan Taylor, Inc. (hereinafter "DTI"), the City of New York and its Department of Environmental Protection (hereinafter collectively "DEP") for trespass and common-law negligence after the severance of the water line servicing their home on August 19, 2008 terminated their access to clean municipal water (*see* Plaintiffs' Verified Complaint, DTI's Exhibit A). It is undisputed that on the foregoing date, DTI, a plumbing contractor, was performing work for the homeowner of 970 Manor Road which involved, *inter alia,* plugging the existing "tap" in the street and installing a new tap to accommodate a larger service line to those premises (*see* DTI's Exhibit D, pp 10-15, 33-35). It is also undisputed that 970 Manor Road is situated directly behind plaintiffs' home.

After obtaining all of the necessary DEP, DOT (Department of Transportation) and DOB (Department of Buildings) permits, DTI excavated a trench exposing the existing water line, shut off the water and, as mandated, waited at the site for DEP to inspect the tap. [1] Shortly after turning off the water supply to what it presumed was 970 Manor Road, DTI learned from plaintiffs' daughter that water service to their house on Elvin Street had also been interrupted. While waiting for the DEP inspector to arrive, DTI allegedly performed further excavations and found a "T" connection to the

[1] According to the deposition testimony of DTI and DEPS' witnesses, only DEP may install a new tap. In addition, a DEP inspector must be "on site" to witness the plumber cut the old tap in order to ensure that it is not reusable.

tap running to 970 Manor Road. It is undisputed that this connection facilitated the supply of water to plaintiffs' residence as well. When the DEP inspector arrived at the site, he instructed DTI to cut the tap[2].

Both the deed and the DEP "tap card"[3] for ***347 Elvin Street*** (*see* Plaintiffs' Exhibits11 and 19) reveal that plaintiffs' premises have an easement for the supply of water from the service line leading into 970 Manor Road. Plaintiffs allege that they were subsequently given a quote of $10,000.00 by DTI to install a new water line to their premises, which they declined. Then, after allegedly being threatened by the DEP with fines in excess of $10,000.00, the latter undertook to rectify the problem itself by installing a new water line directly to plaintiffs' premises. As a result, service was restored.[4]

In support of summary judgment dismissing the complaint against it, DTI argues that it cannot be found liable to plaintiffs for the intentional tort of trespass (plaintiffs' first cause of action), since it never intended to cut-off plaintiffs' water. Rather, that act (*i.e.*, cutting the tap) was made at the direction of DEP. Further, DTI claims that it had no knowledge of plaintiffs' easement, since the "tap

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[2]DEP Inspector Johnnie Santiago testified at his December 1, 2010 deposition (*see* TDI's Exhibit G) that he directed the tap to be cut under the mistaken impression that the "T" connection was illegal.

[3]The "tap card" provides the location and approximate size of the water tap servicing a location.

[4]Defendants' claim that water service was fully restored within three days; plaintiffs' assert that they did not enjoy the use of clean water until weeks later.

card" for ***970 Manor Road*** did not reflect any easement.

With respect to plaintiffs' second cause of action (for negligence), DTI claims that it owed plaintiffs no contractual duty, and that none can be implied under the facts of this case. Moreover, DTI maintains that it exercised reasonable care in the performance of its site duties (*i.e.*, cutting the tap at DEP's direction and in conformity with the "tap card" for 970 Manor Road). It further maintains that it neither (1) "launch[ed] a force or instrument of harm"; (2) violated any detrimental reliance plaintiffs could have reposed in its contract with the homeowner at 970 Manor Road, of which plaintiffs had no knowledge; or (3) attempted to displace the latter homeowner's duty to exercise reasonable care in the maintenance of its premises (*cf.* Espinal v. Melville Snow Contrs, 98 NY2d 136). In this regard, DTI notes that there is no evidence to indicate that the owner of 970 Manor Road owed plaintiffs any duty with regard to this work, which was limited in scope and bore no known relationship to plaintiffs' premises on the next block. In the alternative, DTI argues that even if the court should find that it owed a duty to plaintiffs, DTI possessed neither actual or constructive knowledge that its acts could affect plaintiffs' water supply because, *inter alia*, even when exposed, there was no indication that the water line in question ran to plaintiffs' house. Finally, DTI argues that to whatever extent plaintiffs allege that it may be held vicariously liable for the "acts of its servants" (here, the DEP); (*see* Plaintiffs' Complaint, paras 46-48; DTI's Exhibit A), no agency relationship existed between itself and the latter. To the contrary, DTI maintains that it was working and being paid solely by the homeowner of 970 Manor Road, and that the cutting of the

tap was performed under DEP's direction and control.

"The essence of trespass is the invasion of a person's interest in the exclusive possession of land" (Zimmerman v. Carmack, 292 AD2d 601, 602), and may be said to arise "when[ever] a party's easement is obstructed or infringed upon" (Bloomingdales, Inc. v. New York City Tr Auth., 52 AD3d 120, 124, [*citations omitted*], *affd* 13 NY3d 61). Here, it appears conceded that plaintiffs held an easement for water services encumbering 970 Manor Road, and that the easement was infringed upon by the actions of these defendants, including DTI, which was physically present and actually cut the tap which resulted in the loss of service underlying plaintiffs' claim for damages.

It is well settled that summary judgment is a drastic remedy and should never be granted where there is any doubt as to the presence of triable issues (*see* Andrew v. Pomeroy, 35 NY2d 361; Kolivas v. Kirchoff, 14 AD3d 493). Thus, the initial burden is on the moving party to demonstrate, by proof in admissible form its right to judgment as a matter of law (*see* Alvarez v. Prospect Hosp., 68 NY2d 320; Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065). Further, the court in such cases is enjoined to evaluate the facts in the light most favorable to the party opposing the motion (*see* Martin v. Briggs, 235 AD2d 192).

In the instant case, several factual issues exist which preclude summary judgment, not the least of which is based on the deposition testimony of DEP Supervisor Roger Zuniga (*see* plaintiffs' Exhibit 14, pp 30-31). Zuniga testified that DTI admitted to him that it accidentally cut the line later found to be servicing plaintiffs' premises while excavating at 970 Manor Road prior to DEP's arrival.

This is contrary to DTI's version of events. It maintains that any interruption in plaintiffs' water service was due solely to DEP's direction to cut the exposed tap. Also relevant is the deposition testimony of DEP's Johnnie Santiago, which directly conflicts with that of DTI's Dan Taylor as to whether or not they discussed the "T" connection observed at the site, and whether Taylor ever advised him of the latter's knowledge of the prior interruption of plaintiffs' water service (*see* Plaintiffs' Exhibit 13, pp 37, 64, 121). Accordingly, this Court cannot find as a matter of law that DTI is entitled to dismissal of the complaint.

Turning to the DEP's motion for dismissal of the complaint for failure to state a cause of action (*see* CPLR 3211[a][7]) or, in the alternative, summary judgment, it is a rule of long-standing that "[t]he sole criterion [in determining a motion to dismiss under CPLR 3211(a)(7)] is whether the pleading states a cause of action...[And] if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, [the] motion...will fail" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275; *see* LoPinto v. JW Mays, Inc., 170 AD2d 582). Notably, whether or not plaintiff may prevail upon the merits is of little direct concern, as the issue on such a motion is limited to ascertaining whether the pleading states a cause of action, not whether there is evidentiary support for the complaint. This sheds light upon the hornbook principle of law that the complaint must be liberally construed in the light most favorable to the plaintiffs and all of its factual allegations accepted as true on a motion to dismiss pursuant to CPLR 3211(a)(7) (*see* Guggenheimer v. Ginzburg, 43 NY2d at 275).

Looking strictly within the "four-corners" of this complaint, it is clear that plaintiffs have stated a cause of action against the DEP sufficient to withstand dismissal under CPLR 3211(a)(7) (*see* Cohn v. Lionel Corp., 21 NY2d 559, 562 [whether or not plaintiff will be able to prevail at trial is not a pertinent consideration on a motion to dismiss for failure to state a cause of action]). In operating a water works system distributing water to its inhabitants for a price, the DEP is acting in a private or proprietary capacity rather than in a governmental capacity, and thus may be held liable under the same rules that apply to private corporations performing the same task (*see* Canavan v. City of Mechanicville, 229 NY 43, 476-477; Layer v. City of Buffalo, 2754 NY 135, 139). Here, a triable issue of fact clearly exists as to whether, *e.g.*, the DEP's site inspector was apprised of the prior loss of service to plaintiffs' premises before directing that the tap be cut. In any event, he acknowledged at his EBT that he mistakenly believed that the "T" connection was illegal. Given the presence of, *e.g.*, the credibility issues referred to above, the municipal defendants have also failed to demonstrate their right to judgment as a matter of law.

Accordingly, it is

ORDERED that the motions are denied.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: August 8, 2012