

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

UNITED STATES OF AMERICA, et al.,
Plaintiffs

Case No. 1:02-cv-107
Spiegel, J.
Litkovitz, M.J.

vs

BOARD OF HAMILTON COUNTY
COMMISSIONERS, et al.,
Defendants

**ORDER RE: REQUEST
FOR REVIEW BY
SHIMON BEN-HUR**

This matter is before the Court on the Request for Review of the denial of a Sewer Back Up (“SBU”) claim by Shimon Ben-Hur (Doc. 635) and the Metropolitan Sewer District of Greater Cincinnati (“MSD”)’s response thereto (Doc. 648). Mr. Ben-Hur seeks compensatory damages from MSD for water backup into his basement. On January 23, 2014, the Court held a hearing on Mr. Ben-Hur’s request for review at which Mr. Ben-Hur and Tom Fronk, MSD Engineering Technical Supervisor, testified.

I. Background

Mr. Ben-Hur’s request for review is filed under the Sewer Back Up¹ program (formerly known as the Water-in-Basement [WIB] Claims Process Plan) (Doc. 131, Consent Decree, Exhibit 8). The Plan states in relevant part:

Subject to the requirements of this Plan, occupants who incur damages as a result of the backup of wastewater into buildings due to inadequate capacity in MSD’s Sewer System (both the combined and the sanitary portions) can recover those damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD’s negligent maintenance,

¹The “Water-In-Basement” program has been renamed the “Sewer Back Up” program to more accurately reflect MSD’s responsibility for sewage backups caused by inadequate capacity in MSD’s sewer system. *See* Doc. 452 at 4; Doc. 454 at 16.

destruction, operation or upkeep of the Sewer System. The Claims Process is not intended to address water in buildings caused by overland flooding not emanating from MSD's Sewer Systems or caused by blockages in occupants' own lateral sewer lines.

(Doc. 131, Consent Decree, Exhibit 8 at 1). In determining the cause of SBU, MSD must exercise its good faith reasonable engineering judgment and consider the following non-exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Exhibit 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.*

II. Evidence presented

Mr. Ben-Hur is the owner of rental property located at 5219 Hunter Avenue, Norwood, Ohio. Mr. Ben-Hur's basement flooded following a rain event that occurred the weekend of July 6-7, 2013. At the time, his tenant was on vacation and not at the property. When she returned on July 9, she discovered water damage in the basement and contacted Mr. Ben-Hur and MSD. Mr. Ben-Hur filed a claim with MSD for property damage as a result of the incident. On August 15, 2013, MSD denied Mr. Ben-Hur's claim, finding no evidence that the backup was caused either by a problem originating in the public sewer or from a break in the house lateral in the public right-of-way for which MSD would be responsible.

Mr. Ben-Hur disputes MSD's finding and contends there is evidence that the backup was caused by a discharge of the main sewer line. Mr. Ben-Hur presents a letter from his tenant which describes her observations upon returning to the property on July 9, 2013. The letter states

that the MSD cleaning crew came to the property on July 16, 2013, removed the finished floor, removed the water-damaged items, and sanitized the basement. Mr. Ben-Hur's tenant asserts these actions indicate the City is responsible for the water damage. (Pl. Hearing Exh. 1). Mr. Ben-Hur states that his basement has flooded in the past, which he believes was due to a sewer backup. (Doc. 635 at 2-3). Mr. Ben-Hur further states that his next door neighbor at 5215 Hunter also experienced a flooded basement the weekend of July 6-7, 2013, and received compensation from MSD for personal property damages. (Doc. 635 at 2-3).

Mr. Ben-Hur presents several MSD "Service Request Forms" in support of his claim. (Pl. Hearing Exh. 3). The form dated July 7, 2013, concerns a call to MSD from Mr. Ben-Hur's neighbor at 5211 Hunter Avenue reporting water in his basement. (*Id.* at 1). *See also* Doc. 648, Exh. B. MSD's on-site inspection the following day revealed "No Main Sewer Trouble." (*Id.*) However, the "comment" section of the form states, "10 houses on street had B/U [backups] this weekend." (*Id.*).

The Service Request Form relating to 5219 Hunter Avenue – Mr. Ben-Hur's property – indicates an on-site inspection was performed on July 10, 2013, and showed signs of water in the basement. (Pl. Hearing Exh. 3 at 2). The "comment" section of the form states that the "neighbor @ #5211 reported SBU 7/7/11" and there was no mainline sewer trouble at that time. The matter was referred to MSD's Tom Fronk for investigation, who subsequently identified no sewer mainline capacity issues. (*Id.*) *See also* Doc. 648, Exh. A. The other Service Request Forms for five additional properties on Hunter Avenue show sewer main line overloads in June 2010 and March 2008. (Pl. Hearing Exh. 3 at 3-7).

Finally, Mr. Ben-Hur presents several photographs in support of his claim. The first

photograph depicts what Mr. Ben-Hur describes as a one-way valve attached to a manhole cover on a neighbor's property which is intended to, but has not prevented sewer backups. (Pl. Hearing Exh. 4). Other photos depict the basement flooring and other items that were removed from Mr. Ben-Hur's basement and the remediation work Mr. Ben-Hur subsequently performed. (Doc. 635 at 16-28; Pl. Hearing Exh. 2). Mr. Ben-Hur obtained two estimates for the needed restoration work and seeks damages in the amount of \$4,750 for the remediation of the property. (Doc. 635 at 7).

MSD presents evidence that in response to the phone call from Mr. Ben-Hur's tenant, MSD investigated the possible SBU at 5219 Hunter Avenue. Mr. Fronk presented evidence that approximately two inches of rain fell the morning of July 6, 2013. (Def. Hearing Exh. 1). Mr. Fronk testified that although the crew that responded to 5211 Hunter Avenue noted in the "comment" section of the Service Request Form that 10 houses on Hunter Avenue experienced backups the weekend on July 6-7, 2013, MSD did not receive any reports of widespread backups on Hunter Avenue for that weekend. (*Id.*) Rather, only two properties reported basement flooding the weekend of July 6-7: 5219 Hunter Avenue (Mr. Ben-Hur's) and 5211 Hunter Avenue, which reported water in the basement to MSD on July 7, 2013. MSD responded to 5211 Hunter Avenue the following day and found no evidence of trouble in the main sewer line. (Doc. 648, Exh. B). MSD states it has not received or paid any claim associated with the July 7, 2013 incident for the property at 5211 Hunter.

MSD states that its investigation of the incident at 5219 Hunter Avenue (Mr. Ben-Hur's property) likewise showed no water damage due to problems with MSD's sewer system. Mr. Fronk testified that the normal indicia of SBU were not present because there was no debris

found on the steps or walls of the manholes; there was only one other reported backup on the weekend in question, which was found to not be related to a sewer backup; and the two houses adjoining Mr. Ben-Hur's home, which are at the same elevation, reported no backups. (Def. Hearing Exh. 2). Mr. Fronk also testified that the Service Request Forms presented by Mr. Ben-Hur for the 2008 and 2010 dates suggest the residents on Hunter Avenue are aware of the SBU Claim program, but did not report backups on the weekend of July 6-7, 2013. In addition, MSD states that contrary to Mr. Ben-Hur's statement, they received no claim of SBU at 5215 Hunter on July 6th or any other day in the relevant time period. Finally, Mr. Fronk testified that the manhole cover depicted in Plaintiff's Hearing Exhibit 4 is actually a "clean out" that provides MSD with an access point to the building sewer; it is not a prevention device as Mr. Ben-Hur alleges.

III. Resolution

As an initial matter, the Court notes that under the Consent Decree that governs the Court's review of SBU appeals, "MSD's provision of cleanup services under this program does not constitute an admission of liability by MSD with regard to any claims that the occupant may have against MSD for real or personal property damage caused by the building backup." (Doc. 131, Exh. 7 at 4). MSD will provide cleanup services when doubt exists about the cause of the backup after an initial investigation based on the health risks posed by floods and water damage to a residential property. Therefore, the fact that MSD provided this cleaning service to the property at 5219 Hunter Avenue does not establish that basement flooding was caused by inadequate capacity in MSD's sewer lines.

Under the SBU program governed by the Consent Decree, homeowners who seek review

of the denial of an SBU claim bear the burden of proof of showing that the backup of wastewater into their property was due to inadequate capacity in MSD's sewer system and not due to blockages in the occupant's own lateral sewer lines or overland flooding. (Doc. 131, Consent Decree, Exhibit 8 at 1). Here, Mr. Ben-Hur has not established that the water backup into his basement was caused by inadequate capacity in MSD's sewer system. The evidence before the Court shows the contemporaneous investigation of the main sewer line in relation to 5211 Hunter Avenue, which is the only other property on Hunter Avenue reporting basement flooding during the relevant time period and which occurred in the closest proximity in time to the rain event on the weekend of July 6-7, 2013, disclosed no evidence of any signs of sewer discharge.

Although the MSD Service Request Form for 5211 Hunter Avenue indicated that 10 other houses on the street experienced backups, there is only evidence of two homes reporting a backup: 5211 and 5219 Hunter Avenue. One would expect that if the backups were as widespread as indicated by the Sewer Request Form, many more homes would have reported basement flooding to MSD. However, this did not occur. The evidence and testimony presented by MSD establish the flooding at Mr. Ben-Hur's property was not caused by a discharge in the main public sewer line.


The question left unanswered in this case is how water infiltrated the basement at 5219 Hunter Avenue. As indicated at the hearing, there was a significant amount of rain that fell in a short period of time on July 6, 2013, and given the amount of rainfall there was likely groundwater saturation. Whether the flooding of Mr. Ben-Hur's basement was caused by faulty or porous pipes leading to his house, unauthorized storm water connections to the sanitary

building/lateral line², footer drains/tiles draining into the building lateral sewer line, or some other source is simply unknown. Unfortunately, there is often no scientific evidence conclusively establishing the cause of basement flooding in many of the cases presented to the Court. The Court is not unsympathetic to homeowners such as Mr. Ben-Hur who experience flooding issues such as those occurring in this case. The Court appreciates Mr. Ben-Hur's frustration at reading an MSD form indicating "10 houses on street had B/U [backups] this weekend," only to be later advised that MSD is not responsible for the damage to his home. Yet, this Court is bound by the terms of the Consent Decree in this matter, which places the burden of proof on the homeowner to show that a capacity-related public sewer problem was the cause of the damage to his property. The undersigned is responsible for ensuring that any costs for damages to an individual's private property that must be paid by MSD (and ultimately the rate payers of Hamilton County) under the Consent Decree are the result of the backup of wastewater onto the property due to inadequate capacity in MSD's sewer system. Where, as here, the preponderance of the evidence does not establish that the damage to Mr. Ben-Hur's basement was caused by inadequate capacity in the MSD sewer system, the Court is constrained to deny Mr. Ben-Hur's claim.

Therefore, the Court denies Mr. Ben-Hur's appeal in this case.

IT IS SO ORDERED.

Date: 2/25/14



Karen L. Litkovitz, Magistrate Judge
United States District Court

²Under Section 1201a of the MSD Rules and Regulations, removal of direct or indirect unauthorized storm water connections to a sanitary sewer line is the responsibility of the property owner.