

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, et al.,
Plaintiffs

vs

BOARD OF HAMILTON COUNTY
COMMISSIONERS, et al.,
Defendants

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

**ORDER RE: REQUEST
FOR REVIEW BY
WILLIAM A. DATTILO**

This matter is before the Court on the Request for Review of the denial of a Sewer Back Up (“SBU”) claim by William A. Dattilo (Doc. 644), the Metropolitan Sewer District of Greater Cincinnati (“MSD”)’s response thereto (Doc. 654), Mr. Dattilo’s Notice of Filing Declaration in Support (Doc. 665), Mr. Dattilo’s memorandum in support of his appeal (Doc. 667), and MSD’s supplemental response and memorandum in opposition to Mr. Dattilo’s request for review (Doc. 677). On February 28, 2014, the Court held a hearing on Mr. Dattilo’s request for review at which Mr. Dattilo, Ms. Eileen Ogle, and Mr. Tom Fronk, MSD Engineering Technical Supervisor, testified. The parties were granted permission to supplement the record with post-hearing briefs; to date, no supplemental briefs have been filed.

Mr. Dattilo’s request for review is filed under the Sewer Backup¹ 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

¹The “Water-In-Basement” program has been renamed the “Sewer Backup” 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.

damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD's negligent maintenance, 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.*

I. Evidence presented

Mr. Dattilo is the owner of the property located at 3463 Muddy Creek Road, Cincinnati, Ohio. Mr. Dattilo's basement flooded following a rain event on July 10, 2013. Mr. Dattilo submitted a claim to MSD under the SBU claims program requesting \$34,992 as compensation for damage to his real and personal property. Included with Mr. Dattilo's claim was a letter explaining his damages and a set of ten photographs showing the flooding on Muddy Creek Road and his property on July 10, 2013. (Doc. 654, Exhs. C, D).

MSD denied Mr. Dattilo's claim, finding that the cause of the basement flooding was overland flooding from an intense rainfall on July 10, 2013, rather than a backup from the public sewer. MSD concluded that it was therefore not responsible for the damages claimed.

Mr. Dattilo disputes MSD's finding and contends two causative factors contributed to the

flooding of his basement – overland flooding and overflow from the sewer manholes in the street in front of his house. Mr. Dattilo presents photographic evidence showing water bubbling up out of two manhole covers in the street in front of his house. (Dattilo Exh. 7).² He also presents the declaration of John A. Westerheide, a registered professional engineer with engineering training and knowledge in the area of sewers and sewer systems. (Doc. 665, Westerheide Decl. at ¶ 1). Mr. Westerheide examined the court filings by MSD, the correspondence from MSD on Mr. Dattilo’s claim, the plans and drawings of the sewer system for Muddy Creek Road, the photo of Muddy Creek Road the day of the flood, and the Google map of the area. Mr. Westerheide states that because Mr. Dattilo’s house had a backflow prevention device, “it appears that there was no sewer back up into his house through his sewer connector as a result of the flood.” (*Id.* at ¶ 4). Instead, Mr. Westerheide opines, to a reasonable degree of certainty, that the sewer overflow joined the overland waters in flooding Mr. Dattilo’s basement:

The photograph, however indicates that sewerage water was bubbling up out of a combined storm/sanitary sewer on the day of the flood. This flowage indicated that the sewer system on Muddy Creek could not handle the volume of water on the day of the flood- July 10, 2013. Some amount of this flowage added to the overland flooding that entered the Dattilo basement.

(*Id.* at ¶ 5). Mr. Dattilo also presented evidence that the water flowed from the street to the left side of his house, which is approximately one foot lower in elevation than the street, down to the back of his house, and down his recessed driveway. (Dattilo Exhs. 4, 6, 10). He testified that the force of the water pushed through his garage door and entered his basement.

Mr. Dattilo argues that MSD is jointly and severally liable for the entirety of the damage to

²Ms. Ogle testified that she took the photographs of Muddy Creek Road on July 10, 2013, which were presented as evidence at the hearing. (Dattilo Exhs. 7, 8, 9).

his property because the basement flooding was caused by both overland flooding and the overflow from the sewer drain in the street in front of his house for which MSD is responsible. He contends that where two tortfeasors or two independent causes result in an indivisible injury, each party contributing to the injury is jointly and severally liable for the injury. (Doc. 667, citing *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982); Restatement of Torts § 433A(2)). Mr. Dattilo concludes that because the damage caused by the overland flooding and MSD's sewer overflow is indivisible, MSD is liable for the property damage sustained.

In response to Mr. Dattilo's request for review, MSD contends that overland flooding, and not a sewer surcharge, was the cause of the flooding to Mr. Dattilo's property. MSD presents evidence that on July 10, 2013, nearly two inches of rain fell in less than one hour on soil that was already saturated by nearly five inches of rain that had fallen in the first nine days of July. (Doc. 654, Exh. E). As a result of this rainfall, MSD received numerous calls reporting alleged sewer backup incidents, including one from Mr. Dattilo. When an MSD employee arrived at Mr. Dattilo's house, the MSD employee learned that Mr. Dattilo had already contacted Brock Restoration to conduct cleaning services, and Brock was already onsite pumping water out of the basement.³

MSD had previously installed at its own expense on Mr. Dattilo's property a Sewer Backup Prevention Program (SBUPP) device, which includes a whole house grinder pump⁴ and

³At the hearing of this matter, MSD represented that regardless of the outcome of Mr. Dattilo's request for review, MSD would compensate Mr. Dattilo for the cleaning expenses he incurred by hiring Brock Restoration.

⁴These "pumping systems" are installed to break the direct connection between a property's private sewer line and the public mainline sewer. Instead, wastewater from the property is redirected to a holding tank and is then pumped into the mainline sewer by means of a motorized pump. (Doc. 131, Consent Decree, Exhibit 6 at 4).

check valve⁵. The pump is designed to isolate the building's plumbing fixtures from possible public sewer surcharge, and together with the check valve, prevents a sewer backup through the building's plumbing. Because an SBUPP prevention device is installed on Mr. Dattilo's property, the matter was referred to Tom Fronk, MSD Engineering Technical Supervisor, for further investigation. (Doc. 654, Exh. A).

Mr. Fronk testified that on the evening of July 10, 2013, he went to Muddy Creek Drive to investigate the complaint of basement flooding made by Ms. Ogle, who lives at 3609 Muddy Creek Road, three houses down from Mr. Dattilo's property. Mr. Fronk testified that all signs pointed to a large overland flooding event and not a sewer backup. He testified that Muddy Creek Road sits in a valley at a lower elevation than the surrounding hillsides. He testified that there was a large amount of run off from the hills and land surrounding Muddy Creek Road as a result of previous rains in early July which saturated the soil.

Mr. Fronk also testified that after MSD's SBUPP maintenance contractor Winelco conducted an inspection of the SBUPP device at Mr. Dattilo's property on July 19, 2013, the pump was found to be in good working order. Mr. Fronk concluded that the SBUPP pump would have prevented any backup from the public sewer into Mr. Dattilo's basement (Doc. 654, Exh. B), a conclusion with which Mr. Dattilo's engineering expert agreed.

In addition, Mr. Fronk testified that Mr. Dattilo himself acknowledged there was a large amount of overland flooding when he made his initial claim with MSD. In a letter accompanying

⁵These so-called "backflow preventers" are mechanical devices installed in the private building plumbing or the private sewer "lateral" (a pipe that runs from a building to the public sewer pipe). Backflow preventers allow wastewater to flow away from the property and block wastewater from flowing into the property and backing up into the building. (Doc. 131, Consent Decree, Exhibit 7 at 4).

his SBU claim to MSD, Mr. Dattilo stated that “the flooding was massive and came from the street, flowed around the back and down into [his] garage and basement.” He also stated that “there was over 4 feet of standing water in the basement” and that the water “tore through” his garage door. (Doc. 654, Exh. C).

Mr. Fronk testified that because of the contours and higher elevation of the ground surrounding Mr. Dattilo’s property in relation to the lower elevation of the two sewer manholes which are depicted as “bubbling” in front of Mr. Dattilo’s house, he believed any discharge of sewage from the manhole covers would not have flowed into Mr. Dattilo’s basement; rather, the sewage would have flowed downstream and away from Mr. Dattilo’s property. (MSD Hearing Exh. 1). However, Mr. Fronk acknowledged that he is not an expert on water flow; rather, he based his opinion on his years of experience working for MSD.

MSD contends that because Mr. Dattilo’s property was protected by a SBUPP device, no wastewater backed up into his basement from the public sewer. MSD asserts that the evidence shows overland flooding caused the damage to Mr. Dattilo’s property and because damages from overland flooding are not recoverable under the Consent Decree, Mr. Dattilo’s claim for damages associated with the July 10, 2013 flooding incident should be denied. MSD further argues that even if the sewer water mixed with overland flood waters to infiltrate Mr. Dattilo’s basement, joint and several liability is inapplicable in this case because the alleged overflow from the public sewer was not a proximate cause of the damage to Mr. Dattilo’s property. Mr. Fronk testified at the hearing that the manholes in front of Mr. Dattilo’s property are lower in elevation than the property itself and that absent the widespread flooding, any flow from these manholes would have flowed away from Mr. Dattilo’s home with the slope of the street. MSD argues that but for the

widespread overland flooding on Muddy Creek Road on July 10, 2013, none of the alleged flow from the manhole would have ever reached Mr. Dattilo's property and MSD cannot be held jointly and severally liable for the flooding damage to his property.

II. Resolution

There is no dispute that any sewage water that may have entered Mr. Dattilo's basement did not emanate from the building lateral connected to his basement. Both Mr. Fronk's testimony and the declaration of Mr. Westerheide indicate the SBUPP device installed by MSD prevented any sewage backup into the basement via the building lateral.

The preponderance of the evidence shows that both sewage water from the backed up manholes on Muddy Creek Road and overland flooding from the surrounding hillsides and streets entered Mr. Dattilo's basement. Mr. Westerheide opined that "some" amount of the sewage water overflowing from the manholes added to the overland flooding that entered Mr. Dattilo's basement, although he did not indicate the quantity. In contrast, Mr. Fronk testified that the elevation and contours of the land abutting Mr. Dattilo's property made it unlikely that any sewer water flow from the manhole entered the Dattilo property. Given the evidence of widespread overland flooding and Mr. Fronk's admitted lack of expertise on water flowage, the Court is persuaded by Mr. Westerheide's declaration that it is more likely than not that some indeterminate amount of sewage water that backed up from the public sewer through the manhole covers mixed with the overland flooding from the surrounding hillsides and streets and entered Mr. Dattilo's property after his garage door was breached by a rush of water coming down his driveway.

In view of the Court's finding that both sewage water from the backed up manholes on Muddy Creek Road and overland flooding from the surrounding hillsides and streets entered Mr.

Dattilo's basement, the next question to be answered is whether the damage sustained as a result of the combination of the two are compensable under the Consent Decree.

MSD argues that because Mr. Dattilo's damages were caused by overland flooding, and not by wastewater backing up into his basement from the public sewer, he is not eligible for compensation under the terms of the Consent Decree. MSD contends "the SBU program is . . . intended to compensate for basement backups⁶ that arise from a lack of capacity in the public sewer" and "[o]verland flooding is explicitly excluded from the terms of the Consent Decree." (Doc. 677). MSD's position raises the following issue: Are damages that are caused by sewage water entering a home via overland flooding, and not via a backed up building lateral, compensable under the Consent Decree? The answer is "yes" where the overland flooding emanates from MSD's sewer system.

The Consent Decree defines "Water-in-Basement(s)" [now called Sewer Backup] as "any release of wastewater from Defendants' Sewer System to buildings that (i) is not the result of blockages, flow conditions, or malfunctions of a building lateral or other piping/conveyance system that is not owned or operationally controlled by Defendants; and (ii) is not the result of

⁶To the extent MSD seems to suggest that the Claims Program is limited to sewer water backing up into a basement from the building sewer lateral, the Court notes that MSD's own information on the SBU Program recognizes that inadequate capacity in MSD's sewer system can cause a backup in the public sewer, forcing excess water to overflow from manholes. See <http://sbu.msdc.org/sbu/page/what-causes-backups.aspx>:

[D]uring wet weather, some parts of the sewer system carry large amounts of rainwater in addition to wastewater.

If the combined amount of rainwater and wastewater is more than the pipes can carry, the water stops flowing forward and begins to back up. Excess water may get pushed out of the pipe through manhole lids and through private building sewer pipes (sometimes called a "sewer lateral" or "house tap") that connect buildings to the sewer system.

When this happens, basements and lower levels can get flooded with the sewage/rainwater mixture.

overland, surface flooding not emanating from Defendants' Sewer System.” (Doc. 131, Consent Decree at 18). Similarly, Exhibit 8 to the Consent Decree⁷ which governs the SBU claims process sets forth the “Scope of WIBs Covered” as follows:

The Claims Process will only reimburse damages arising from basement backups caused by inadequate capacity in MSD's Sewer System or that are the result of MSD's negligent maintenance, destruction, operation or upkeep of the Sewer System. MSD will not pay claims for damages caused by WIBs arising from blockages in occupant's lateral lines or arising from overland flooding not emanating from MSD's Sewer System.

(Doc. 131, Consent Decree, Exhibit 8 at 2).

The evidence in Mr. Dattilo's case establishes there was a “release of wastewater from [MSD's] Sewer System” into Mr. Dattilo's home. The damage he sustained should be compensable unless it was the result of or arose from “overland flooding not emanating from MSD's Sewer System.” This raises the question: what is “overland flooding not emanating from MSD's Sewer System”?

In interpreting this phrase of the Consent Decree, the Court must examine the four corners of the decree. *Shy v. Navistar Intern. Corp.*, 701 F.3d 523, 532 (6th Cir. 2012) (quoting *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). As the Sixth Circuit in *Shy* noted:

“[C]onsent decrees bear some of the earmarks of judgments entered after litigation” and that “[a]t the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.” *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986). It is this resemblance to contracts that requires that the scope of a consent decree “be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to” the consent decree. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Therefore, while [the defendant's] argument that the parties' original intent was to permanently reduce [the defendant's] retiree healthcare costs *might be*

⁷Section XIII of the Consent Decree incorporates Exhibit 8 by reference. (Doc. 131, Consent Decree at 47).

relevant in a motion to modify the consent decree, the interpretation of the consent decree as written should focus only within the four corners of the consent decree.

701 F.3d at 530 (emphasis added).

The Consent Decree defines WIB/SBU as “*any* release of wastewater from Defendants’ Sewer System to buildings that . . . is *not* the result of overland, surface flooding *not emanating from Defendants’ Sewer System.*” (Doc. 131, Consent Decree at 18) (emphasis added). The Claims Process does not allow reimbursement for damages “caused by WIBs . . . arising from overland flooding *not emanating from MSD’s Sewer System.*” (Doc. 131, Consent Decree, Exhibit 8 at 2) (emphasis added). The phrase “overland flooding” is qualified by the phrase “not emanating from MSD’s Sewer System.” The plain language of the Consent Decree, therefore, excludes compensation for WIB/SBU resulting from overland, surface flooding that does “not emanate” from MSD’s public sewer. If the parties to the Consent Decree intended to prohibit compensation for damages caused by *all* overland flooding, as MSD contends, the inclusion of the term “not emanating from MSD’s Sewer System” would be mere surplusage. Indeed, the other components of the SBU Program consistently qualify when overland or surface flood water is not the responsibility of MSD: “overland/surface water flooding *not coming from the Metropolitan Sewer Districts collection system* is not the responsibility of the Metropolitan Sewer District. . . .” (Doc. 131, Consent Decree, Exh. 7, App. A). The language of Consent Decree excluding overland flooding “not emanating from MSD’s Sewer System” necessarily contemplates circumstances where overland flooding in fact “emanates” from MSD’s Sewer System. Thus, where the public sewer discharges from the cover of the manhole and flows over ground and into a building, the terms of the Consent Decree cover any subsequent claim for damages.

Accordingly, the Consent Decree does not bar claims for overland flooding which emanates from MSD's Sewer System.

Was the sewage water bubbling up from the manhole covers on Muddy Creek Road "overland flooding" emanating from MSD's Sewer System? The evidence in this case leads to the conclusion: "yes." As previously indicated, Muddy Creek Road lies in a valley and is surrounded by hillsides. The evidence presented indicates that runoff from the surrounding hillsides flowed down to Muddy Creek Road and was significant enough to overwhelm the capacity of the public sewer system. The photographic evidence and declaration from Mr. Dattilo's expert indicate that the public sewer discharged some amount of sewer water out of the top of the public sewer manhole to the surrounding area. The fact that additional overland flooding that did not emanate from the public sewer combined with the sewer water/overland flooding that did emanate from MSD's manhole does not, in itself, prohibit Mr. Dattilo's claim for damages.

Nevertheless, MSD argues that even if the Consent Decree covers overland flooding emanating from the sewer system, Mr. Dattilo must still show that the alleged overland flooding from the sewer was a proximate cause of his injuries. (Doc. 677 at 3). MSD contends that the overland flooding from the surrounding hillsides and streets, independent of any sewer overflow, was so widespread and overwhelming that it would have caused Mr. Dattilo's damages on its own, and therefore the alleged sewer overflow cannot be considered a proximate cause of Mr. Dattilo's damages under Ohio law. *Id.* (citing negligence cases). However, in assessing MSD's liability in this case, the Court is constrained to follow the dictates of the Consent Decree, which does not incorporate Ohio negligence law.

Examining the four corners of the Consent Decree in this case, there is nothing in the language of the Consent Decree that limits recovery where the evidence shows that damages were concurrently caused by a combination of overland flooding emanating from MSD's Sewer System and overland flooding not emanating from MSD's Sewer System. The language of the Consent Decree does not require that SBU be the sole or greater cause of the damages sustained, or that damages should be apportioned where damages are caused by both SBU and overland flooding not emanating from MSD's Sewer System. Under the terms of the Consent Decree, homeowners "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. . . ." While the SBU claims process "is not intended to address water in buildings caused by overland flooding not emanating from MSD's Sewer Systems," Mr. Dattilo has presented evidence establishing that he incurred damages to his basement "as a result of" or "caused by" overland flooding emanating from MSD's public sewer due to inadequate capacity of the system. The express terms of the Consent Decree permit recovery for a release of wastewater from MSD's Sewer System to a building under this scenario. Therefore, Mr. Dattilo's appeal is sustained.⁸

In this case, it is impossible to know how much of the damage to Mr. Dattilo's basement was caused by overland flood water/sewer water emanating from MSD's overloaded sewer system and how much was caused by the overland flooding not emanating from the public sewer. In the

⁸The Court recognizes that there have been other appeals of SBU claims where the Court has denied the claim based on insufficient evidence to establish a cause other than "overland flooding not emanating from MSD's Sewer System." However, given the evidence from Mr. Dattilo's engineering expert and the photographs establishing that SBU from MSD's public sewer was a concurrent cause of the damages to Mr. Dattilo's property, Mr. Dattilo's claim must be sustained under the unique circumstances of this case.

past, Magistrate Judge Hogan determined that where there was evidence of damage from both SBU and overland flooding not emanating from MSD's Sewer System, MSD was held responsible for the entirety of the damage. *See* Docs. 474, 475, 476, 477. In accordance with the precedent established by Judge Hogan, MSD is responsible for the damages sustained by Mr. Dattilo.

In view of this finding, the parties are given leave to supplement the record with evidence of the fair market value of the items for which Mr. Dattilo seeks compensation.⁹ The parties are granted **thirty (30) days** within which to submit their supplemental filings.

The Court declines to speculate as to whether the parties to the Consent Decree actually intended that damages from "any" overland flooding should be precluded under the claims process. The language of the Decree states otherwise and the Court is constrained to follow the dictates thereof. As the Court previously advised the parties in connection with the damages provision of the Consent Decree (Doc. 599 at 25), nothing in this Order should be construed as barring the parties to the Consent Decree from seeking an amendment or modification thereof to clarify their intentions regarding the scope of the overland flooding issues raised above.

IT IS SO ORDERED.

Date: 3/20/14



Karen L. Litkowitz, Magistrate Judge
United States District Court

⁹As the Court advised the parties at the hearing of this matter, the measure of damages is not purchase price or replacement price, but it is the value of the item on the date of loss (*i.e.*, the depreciated value).