SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT **PART** 5

Justice

Index Number : 151959/2012
FORT IV GROUP L.P.
vs.
642 W. 172ND STREET LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8-6-13

_____, **J.S.C.**
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

FORT IV GROUP, L.P.,

Plaintiff,

-against-

624 W/ 172ND STREET, LLC, GUS SCOURARAS, DOUGLASTON MANGAGEMENT CORP., AND THE CITY OF NEW YORK,

Defendants.

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DECISION/ORDER
Index No. 151959/2012
Seq. No. 002

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	3-4
REPLYING AFFIDAVITS	5
EXHIBITS	
OTHER	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

The City of New York (the "City"), moves pursuant to CPLR§3211, for dismissal of the complaint and/or pursuant to CPLR§ 3212 for summary judgment, based on plaintiff's failure to comply with GML § 50-e and §50-I. Plaintiff opposes. Additionally, defendants "642 West 172nd Street, LLC, Gus Scourfaras, and Douglaston Management Corporation Corp," ("co-defendants"), argue that if the Court grants the City's motion with regard to plaintiff's claims against the City, their cross-claim against the City should not be dismissed and should be permitted to continue as a third-

party action against the City.

After a review of the papers presented, all relevant statues and case law, the Court **denies** the motion.

Factual and procedural background:

The instant case emanates from extensive property damage allegedly caused by sewer water which has been consistently flooding into the back yard of the subject property located at 280 Washington Avenue in New York County. The subject property is a multiple dwelling comprised of 37 residential units and 6 commercial premises. Plaintiff alleges that said flooding has severely impacted its operation of the subject property, and has also impeded the use and enjoyment of it by both residential and commercial occupants therein. It also alleges that the presence of sewer water is unsightly as well as potentially hazardous to the occupants' health and safety.

Consequently, plaintiff filed its Notice of Claim on February 15, 2012, alleging property damage in the amount of at least $25,000.00 (see Notice of Claim annexed to the instant motion as Exhibit "A"). However, said Notice of Claim fails to provide a specific date and time of the incident, alleging instead that the incident is "continuous and ongoing." *Id.* It further alleges that water has been in the subject premises for "one year (plus)." *Id.*

On April 27, 2010, plaintiff served a Summons and Complaint on the City. (See Exhibit "B"). Said complaint fails throughout to provide a specific date that the flooding commenced. On May 15, 2012, the City served its Answer and Combined Demands, including a Demand for a Bill of Particulars. Co-defendants served their respective Answers. On September 21, 2012, plaintiff served a Bill of Particulars in response to co-defendants' Demands. No Bill of Particulars in response to the City has yet been received. Plaintiff's aforementioned September 21, 2012 Bill of

Particulars indicates that the "alleged incident has been continually on-going for the past 10 years, starting on or about 2002."

Positions of the parties:

The City argues that plaintiff's complaint warrants dismissal for failure to comply with the requirements of General Municipal Law§ 50-e and§ 50-i. It argues that GML§ 50-e(1)(a) mandates that a Notice of Claim be filed within 90 days of the date on which the claim arose and such timely filing is a condition precedent to bringing a suit against a municipality. The City asserts that in the instant case, plaintiff's Bill of Particulars indicates that the cause of action likely accrued sometime in 2002. Thus, notwithstanding that said Notice of Claim indicates that the alleged offense is "continuous and ongoing," while disclosing that water has been present on the property for "one year plus," (See Exhibit "A"), plaintiff should have filed said Notice of Claim by May 15, 2011 (90 days after).

The City also asserts that since the date stamped on plaintiff's Notice of Claim is February 15, 2012, even if the Court did not find that plaintiff's cause of action accrued in 2002, the latest possible accrual date is February 15, 2011, in that water must have been on the premises since that date. Thus, calculating based upon that date, plaintiff should have filed its Notice of Claim within 90 days thereafter, or by May 15, 2011. However, it did not do so until February 15, 2012, and also, without leave of court. The City also argues that having failed to timely file a Notice of Claim and having also failed to request leave to serve a late Notice of Claim within the statute of limitations period, plaintiff is now precluded from commencing its action against the City. The City also argues that plaintiff failed to comply with GML§ 50-5(2), as its Notice of Claim lacks the requisite specificity, in that it fails to provide an actual date the incident occurred.

Plaintiff responds that in an action for equitable injunctive relief against a municipality, the Notice of Claim requirements as set forth in GML§ 50-5 are obviated. It argues that in determining the primary relief sought, the court is not limited to the contents of the Notice of Claim, but to the Complaint as a whole, considering the full scope of both documents. Plaintiff asks that the Court consider its Fourth Cause of Action which alleges that the City has engaged in conduct constituting a nuisance. Additionally, its Eight Cause of Action asserts that the conduct exhibited by the City constitutes negligence and the Twelfth Cause of Action alleges that the City continuously trespasses on plaintiff's property. Consequently, plaintiff argues that its Complaint seeks injunctive relief so that the nuisance, negligence and trespass are abated.

Plaintiff further argues that in an action where a tort is continuous and reoccurring, resulting in successive causes of action not tied to [a] single negligent act of the municipality, the action is deemed timely commenced. Plaintiff also argues that the City is not entitled to dismissal pursuant to CPLR§ 3211, in that an Answer has been served and issue has been joined. Furthermore, plaintiff argues that the City is not entitled to summary judgment because such relief is premature in that the City has failed to dispose of all triable issues of fact.

It should be noted that co-defendants join in all of the arguments raised in the affirmation in opposition of plaintiff's counsel. Furthermore, they contend that they have asserted a cross-claim against the City for contribution and common law indemnification, and the City has not moved to dismiss said cross-claim. They argue that if the City had any intention of moving to dismiss the cross-claim, it was required to clearly state that such relief was being sought in its notice of motion, which it obviously failed to do. Moreover, co-defendants argue that "it is appropriate that the City did not move for such relief with regard to the cross-claim, given that it is well established that there

is no requirement that a notice of claim be filed under General Municipal Law 50-e with regard to the indemnification claims of a co-defendant and/or third-party against a municipality" (see Aff. in Opp., ¶ 4).

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D. 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

"To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim " (*Brown v. City of New York*, 95 N.Y.2d 389, 392 [2000]; see also GML§ 50-e). The General Municipal Law requires that the notice set forth, among other things, "the nature of the claim," and "the time when, the place where and the manner when the claim arose" (GML§50-e[2]; see *Brown v. City of New York*, 95 N.Y.2d at 393; *Palmer v. Society for Seaman's*

Children, 88 A.D.3d 970, 971[2d Dept. 2011]). "The requirements of the statute are met when the notice describes the accident with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merit of the claim" (*Palmer v. Society for Seamen's Children*, 88 A.D.3d at 971.

Moreover, General Municipal Law§ 50-(1)(a) mandates that a Notice of Claim be filed within 90 days of the date in which the claim arose, and such timely filing is a condition precedent to bringing a suit against a municipality (see *Brown v. City of New York*, 95 N.Y.2d 392). In seeking to serve a late notice of claim, a claimant must seek and receive leave of the court to do so.

In the case at bar, the Court finds that the City has failed to establish a prima facie entitlement to summary judgment. The Court finds that the subject Notice of Claim cannot describe the incident with sufficient particularity. Indeed, it is almost impossible to determine periods of time with any degree of certainty, in that the alleged offense is "continuous and ongoing," and the water has been on the property for "one year plus." Moreover, the Court is aware that since plaintiff is alleging that the complained of condition was caused by the City's negligence or wrongful act(s), it was required to commence the action within one year and ninety days after the happening of the event upon which the claim is based (see GML§ 50-i(1). The Court is also well aware that having failed to timely file a Notice of Claim and also having failed to seek leave to serve a late Notice of Claim, plaintiff would normally be precluded from commencing an action against the City, and any action already commenced would be deemed a nullity, pursuant to GML§ 50-e and §50-i.

However, the Court finds plaintiff's continuing-wrong argument to be persuasive. The continuing-wrong or continuing violation doctrine tolls the limitations period to the date of the commission of the last wrongful act when there is a series of continuing wrongs (*Shelton v. Elite*

Model Mgt., Inc., 11 Misc.3d 345 (A), N.Y. Slip Op. 25492 (U)(Sup. Ct., N.Y. County 2005)). The doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct *(Id.)*. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs (*Sanchez de Hernandez v. Bank of Nova Scotia*, 76 A.D.3d 929 [1st Dept. 2010], *lv denied* 16 N.Y.3d 705 [2011]).

In the instant case, it is clear that the subject water leak has been a continuous nuisance which the City had a continuing duty to repair. Therefore, the Court finds that the City's failure to do so constitutes a continuing wrong that "is not referable exclusively to the day the original wrong was committed" (see *Kaymakcian v. Board of Mgrs. of Charles House Condominiums*, 49 A.D.3d 407 [1st Dept. 2008]; *1050 Tenants Corp. v. Lapidus*, 289 A.D.2d 145 [1st Dept.2001]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City's motion to dismiss the complaint is denied in its entirety; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 6, 2013

ENTER:

AUG 06 2013

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT