Lagala v Town of Brookhaven
2018 NY Slip Op 33037(U)
November 14, 2018
Supreme Court, Suffolk County
Docket Number: 20681/2011
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 20681/2011**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 07/20/17
Mot Seq 001 Mot D
Mot Seq 002 Mot D; RTC

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RAY LAGALA & STEPHANY LAGALA,

Plaintiffs,

-against-

TOWN OF BROOKHAVEN,

Defendant.

On the parties' motions, the Court considered the following papers:

1. Notice of Cross-Motion to Dismiss & Affirmation in Support dated October 18, 2016 and supporting papers;
2. Notice of Motion to Strike Answer & Affirmation in Support dated August 16, 2061 and supporting papers;
3. Plaintiff's Affirmation in Opposition dated April 10, 2017;
4. Defendant's Reply Affirmation in Further Support of Dismissal dated June 6, 2017; and upon due deliberation and full consideration; it is

ORDERED that defendant's cross-motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a claim is **granted in part, and denied in part** as follows; and it is further

ORDERED that plaintiffs' motion to strike defendant's answer pursuant to CPLR 3126, or in the alternative to compel additional discovery pursuant to CPLR 3124 is **granted in part, and denied in part** as follows; and it is further

ORDERED that the counsels' upcoming appearance on the compliance conference calendar is adjourned to Thursday, March 28, 2019 in accord with the following; and it is further

ORDERED that defendant serve a copy of this decision with notice of entry on plaintiffs' counsel by certified mail, return receipt requested forthwith.

I. FACTUAL BACKGROUND & PROCEDURAL POSTURE

This negligence action commenced by plaintiffs Ray & Stephany Lagala against the municipality Town of Brookhaven relates to their claims of negligence and property damage arising from flooding which occurred on or about March 30, 2010, at or near their property located on Swezeytown Road in the hamlet of Middle Island, Town of Brookhaven, County of Suffolk, New York. In their complaint, plaintiffs allege that the Town negligently designed, maintained or installed storm runoff catch basins, recharge basins, sumps or sewers in the vicinity of plaintiff's residence. During discovery, the plaintiffs further alleged their belief that Town negligently designed or installed the drainage/sewer system at the nearby Oak Pond Townhouse development commonly known as Stonegate, which they allege caused or contributed to the flooding at subject of this action.

The Town answered the complaint and has presently moved to dismiss the complaint for failure to state a cause of action.

II. SUMMARY OF THE PARTIES' ARGUMENTS

Defendant emphasizes a set of facts which they argue leads to the conclusion that 1. the Town cannot be held liable for negligence for a drainage or sewer system at Stonegate it does not own, operate, maintain, possess or control; 2. the Town's involvement at Stonegate arises out of an obligation imposed upon it by courts of competent jurisdiction, and thus were discretionary acts subject to municipal liability.

Supporting these arguments, defendant notes that this dispute traces its roots back to the original approval of the Stonegate site plan review and approval process which itself was the subject of litigation. In or around September 26, 1988 the Brookhaven Town Board initially denied Stonegate' site plan, resulting in a CPLR Article 78 proceeding challenging that denial on or about October 26, 1988. Supreme Court reversed that determination in a decision rendered on March 24, 1989. The matter further involved a federal action. The parties then resolved their dispute by stipulation entered on or about May 2, 1990, whereby *inter alia* the Town agreed to design Stonegate's drainage or sewer system. In furtherance of its obligations under the courts' orders and the parties' stipulation, the Town retained an engineering firm Nelson & Pope, who further involved an additional firm LMK Associates, Inc. who designed constructed and installed Stonegate's drainage system. The parties do not dispute that final approval of Stonegate's site plan occurred in 1994. Thus, defendant argues it made a discretionary policy choice to abide its bargained and agreed upon obligation and court order to design the Stonegate drainage system and cannot now be held liable on a negligence theory as it is immune.

Moving separately, plaintiff seeks to strike defendant's answer as a sanction for what it perceives to be willful and contumacious refusal by defendant to provide demanded discovery. More specifically, plaintiff has demanded production by defendant of a witness for examination before trial knowledgeable about the site plan review process for the Stonegate community's drainage and sewer system. Further, in advance of that proceeding, plaintiffs have requested production of a copy of the Town's planning department file concerning site plan approval. Despite Supreme Court ordering production by defendant of a witness knowledgeable on this area in 2015, plaintiff argues that defendant has failed to abide that order and provide discovery.

Plaintiff notes that in February 2015, defendant produced for deposition Mark Kelly, a Town Highway Dept. supervisor in charge of the vicinity in which plaintiffs and Stonegate resides. However, his testimony made clear to the parties that he was not a supervisor in that area when the Stonegate development was approved. As a result, Mr. Kelly could not provide actionable information to plaintiffs concerning the site plan review process for Stonegate or information regarding its drainage system prior to 2005.

At defendant's suggestion, plaintiff sought deposition of an engineer James DeKonig, employed by LMK Associates, Inc., one of the Town retained engineering firms involved in the design and construction of Stonegate's drainage system. However, plaintiff argues that witness also proved unhelpful since he was not the engineer assigned to or involved with the Stonegate project. Defendants have advised that the engineer who was is no longer employed by the engineering firm. Further, plaintiff has sought production of the Town's Stonegate site plan approval file via FOIL to no avail, with the Town responding that after a search no responsive documentation was located. As a result, plaintiff moves seeking to sanction defendant, or in the alternative, compel defendant to produce a knowledgeable witness and a copy of the requested documentation.

III. DISCUSSION

A. Dismissal for Failure to State a Claim

Defendant seeks to dismiss plaintiffs' complaint making two distinct arguments. First, defendant generally argues that it cannot bear any liability sounding in negligence for drainage or sewers it neither owns, operates or controls. Defendant is correct in this regard. Going even further, defendant alternatively argues that the Town is immune from liability for a discretionary governmental function. That argument must be unsuccessful as explained below.

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Nonnon v. City of New York***, 9 NY3d 825, 827; ***Leon v. Martinez***, 84 NY2d 83, 87–88; ***Paolicelli v. Fieldbridge Assoc., LLC***, 120 AD3d 643, 644; ***Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.***, 131 AD3d 601, 603 [2d Dept 2015]). Nonetheless, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (***Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.***, 132 AD3d 811, 812 [2d Dept 2015]).

"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (***Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP***, 38 AD3d 34, 38).

The test of the sufficiency of a pleading is 'whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments'" (***Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.***, 122 AD3d 901, 902,

998 NYS2d 107, 108 [2d Dept 2014]).

Reading plaintiffs' complaint broadly as pled, plaintiffs claim the Town negligent both for negligent design and maintain or failure to properly install or repair drainage or sewers in, around or in the vicinity of their residence. In the parties' briefing and during discovery, it appears they have focused on the Stonegate development. However, plaintiffs' counsel has also made clear that the complaint also incorporates reference to two separate sumps or recharge basis situated at either end of the plaintiff's development or subdivision. This saves plaintiff's complaint from complete dismissal.

As regards the law of municipal immunity, a municipality is immune from liability "arising out of claims that it negligently designed a sewage system (***Tappan Wire & Cable, Inc. v. County of Rockland***, 7 A.D.3d 781, 782, 777 N.Y.S.2d 517; *see* ***Fireman's Fund Ins. Co. v. County of Nassau***, 66 A.D.3d 823, 824, 887 N.Y.S.2d 242). However, a municipality "is not entitled to governmental immunity arising out of claims that it negligently maintained the sewerage system as these claims challenge conduct which is ministerial in nature" (***Tappan Wire & Cable, Inc. v. County of Rockland***, 7 A.D.3d at 782, 777 N.Y.S.2d 517; *see* ***De Witt Props. v. New York***, 44 N.Y.2d 417, 423–424; *see also* ***Brandenburg v County of Rockland Sewer Dist. #1***, 127 AD3d 681, 681-82, 7 NYS3d 300, 301 [2d Dept 2015]; ***Gugel v County of Suffolk***, 120 AD3d 1189, 1190, 992 NYS2d 543, 544 [2d Dept 2014]).

Correspondingly, for plaintiffs to recover under a theory of negligent inspection or maintenance of the storm drainage system, the plaintiffs must demonstrate that the defendants had " 'notice of a dangerous condition or ha[d] reason to believe that the pipes ha[d] shifted or deteriorated and [were] likely to cause injury,' that the [defendants] failed to 'make reasonable efforts to inspect and repair the defect,' and that such failure caused the plaintiffs' injuries" (***Bilotta v Town of Harrison***, 106 AD3d 848, 849, 965 NYS2d 174, 175-76 [2d Dept 2013]; ***Holmes v Inc. Vil. of Piermont***, 54 AD3d 809, 863 NYS2d 774, 776 [2d Dept 2008]).

Here, the motion record presently before the Court makes clear that the branch of plaintiff's complaint seeking recovery of damages for the Town's alleged negligent design of all drainage or sewer systems in, around or near plaintiffs' residence must be dismissed as a matter of law. Caselaw makes clear that this claim is not cognizable as against the Town due to municipal immunity.

Accordingly, as a result that aspect of defendant's motion to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7) is **granted** and plaintiff's claims against defendant the Town for negligent design of sewers or drainage near their residence are hereby **dismissed**.

However, an entirely different result is required on defendant's remaining assertion of immunity against plaintiff's claims. Precedent clearly holds that under the doctrine of governmental function immunity that " 'government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.' " Therefore, even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority" (***Davila v City of New York***, 139 AD3d 890, 894, 33 NYS3d 306, 311 [2d Dept 2016], *lv to appeal denied*, 28

NY3d 914 [2017]). The difference between ministerial or discretionary acts is described thusly: " 'discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result' " (***Katz v Town of Clarkstown***, 120 AD3d 632, 634, 990 NYS2d 880, 881-82 [2d Dept 2014]; ***Haddock v City of New York***, 75 NY2d 478, 484 [1990]; ***Idlewild 94-100 Clark, LLC v City of New York***, 27 Misc3d 1006, 1022, 898 NYS2d 808, 821 [Sup Ct, Kings Co. 2010][holding that where the law requires an entity or officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to its or his or her own judgment as to the propriety of the act, the duty is ministerial in character]).

Applying that reasoning to this matter, the Court determines that plaintiff's remaining claim for negligent installation or maintenance of drainage or sewer systems near plaintiff's premises survives dismissal on defendant's erroneous claim of immunity. In the first instance, the Court is unconvinced that the Town's determination pursuant to stipulation and court order constitutes a discretionary function as argued. Instead, given no authority to the contrary by either party, this Court is of the view that adherence to and in furtherance of court mandated and binding agreement constitutes a ministerial function in view of prevailing precedent, taking the Town's decision to approve the siting, construction and installation of drainage in or around plaintiffs' property out from underneath municipal immunity claims. Moreover, speaking more generally, the Town has not presently disputed that it owns, operates or maintains drainage or sewage in the plaintiffs' vicinity. Thus, the complaint as presently pled narrowly survives dismissal.

Therefore, that branch of defendant's motion seeking dismissal of plaintiff's claims for negligent installation, maintenance or repair of sewers or drainage systems in their vicinity is **denied** and those claims remain viable.

B. Discovery Motion Practice

Plaintiff's motion for sanctions or to compel must be **granted in part** premised on the present posture. This action has pended in Supreme Court since 2011, with the parties entering a Preliminary Conference Order governing the conduct of pretrial disclosure on November 8, 2012, over 6 years ago as of this writing. Further, the defendant was ordered by a prior justice of this Court to provide discovery to plaintiff in 2015. To date, defendant has neither provided the requested disclosure, nor provided a persuasive or compelling explanation for its failure to do so.

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' " (***Astudillo v MV Transp., Inc.***, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus, it has often been said that for "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore

court orders with impunity" (***Jones v LeFrance Leasing Ltd. Partnership***, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

The test to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason (*see* ***Andon v. 302–304 Mott St. Assoc.***, 94 NY2d 740, 746, 709 NYS2d 873). However, discovery demands which are unduly burdensome, lack specificity, or seek privileged and/or irrelevant information are improper and will be vacated (*see* ***Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.***, 78 AD3d 752, 753, 910 NYS2d 654; ***Bell v. Cobble Hill Health Ctr., Inc.***, 22 AD3d 620, 621, 804 NYS2d 362; ***Lopez v. Huntington Autohaus***, 150 AD2d 351, 352, 540 NYS2d 874; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 850, 968 NYS2d 122, 123–24 [2d Dept 2013])

It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (***Crazytown Furniture v. Brooklyn Union Gas Co.***, 150 AD2d 420, 421, 541 NYS2d 30; *see* Seigel, N.Y. Prac. § 345; CPLR 3101[a]; ***Herbst v. Bruhn***, 106 AD2d 546, 483 NYS2d 363; ***Andon v. 302–304 Mott St. Assocs.***, 94 NY2d 740, 746, 709 NYS2d 873; ***Palermo Mason Constr. v. AARK Holding Corp.***, 300 AD2d 460, 751 NYS2d 599; ***Vyas v Campbell***, 4 AD3d 417, 418, 771 NYS2d 375, 376 [2d Dept 2004]).

The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. Public policy strongly favors the resolution of actions on the merits whenever possible' " and the drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (*see* ***Moray v. City of Yonkers***, 72 AD3d 766, 898 NYS2d 470; ***Pirro Group, LLC v. One Point St., Inc.***, 71 AD3d 654, 655, 896 NYS2d 152; ***Dank v. Sears Holding Mangt. Corp.***, 69 AD3d 557, 892 NYS2d 510; ***Palomba v Schindler El. Corp.***, 74 AD3d 1037, 1037, 903 NYS2d 137, 138 [2d Dept 2010]). On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]). "Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (***Javeed v 3619 Realty Corp.***, 129 AD3d 1029, 1033, 12 NYS3d 219, 223 [2d Dept 2015]; ***Mangru v Schering Corp.***, 90 AD3d 621, 622, 933 NYS2d 897 [2d Dept 2011]).

It is also clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; ***Henry v Datson***, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; ***Stone v Zinoukhova***, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]).

The Second Department has clearly held that part compliance with discovery requests

may be sufficient to prevent preclusion or striking of pleadings noting that substantial compliance "with outstanding discovery requests, and [the inability to]to produce certain documents because they did not exist or were not in its possession" militates against granting an application to strike a defendant's answer (***Maffai v County of Suffolk***, 36 AD3d 765, 766, 829 NYS2d 566, 567 [2d Dept 2007]: *see also* ***Euro-Cent. Corp. v Dalsimer, Inc.***, 22 AD3d 793, 794, 803 NYS2d 171, 173 [2d Dept 2005][response to plaintiff's notice for discovery and inspection asserting that the documents requested by the plaintiff do not exist, are not in his possession, or cannot be located suffices since defendant cannot be compelled to produce documents which do not exist or are not in his possession]; ***Sparks Assoc., LLC v N. Hills Holding Co. II, LLC***, 74 AD3d 1183, 1184, 904 NYS2d 157, 158 [2d Dept 2010][motion court providently exercised its discretion in denying motion to strike pleadings or to preclude offer of evidence at time of trial where defendant adequately established the documents sought by the either were already produced or were represented not to exist]).

Lastly, a motion to compel discovery under CPLR 3124 should be denied where the document demands are overly broad, vexatious, and tend to confuse, rather than sharpen, the central issue of negligence (***Brandes v N. Shore Univ. Hosp.***, 1 AD3d 550, 551, 767 NYS2d 666, 667 [2d Dept 2003]).

Here, premised upon this Court's granting dismissal of plaintiff's negligent design claims, plaintiff's outstanding document demands for the production of the original Stonegate drainage and sewer system site plan approval file by the Town are no longer germane, relevant or material to the continued prosecution of this action. Thus, this Court **denies** plaintiff's motion to the extent it seeks to sanction defendant or compel it to produce that material in the alternative, since at the present posture that avenue of inquiry no longer could reasonably be calculated to lead to relevant discoverable evidence on plaintiff's remaining and viable claims of negligent maintenance, repair or installation. Similarly, plaintiffs' outstanding request for production of an engineering witness possessing knowledge of the Stonegate site plan approval or installation/design of its sewer or drainage system is also **denied** for the same reasons.

That said, this Court remains troubled by prolonged manner which this matter has proceeded. Thus, to assist the parties' in hastening the conduct of discovery, the Court hereby orders the following:

ORDERED that plaintiff serve demands for discovery and inspect pertinent or germane to its remaining claims on defendant, including but not limited to document demands and/or notices to produce witnesses for examination before trial **on or before January 31, 2019**; and it is further

ORDERED that defendant produce responsive documentation or identify or designate knowledgeable witnesses for deposition within 30 days of acknowledged receipt of plaintiff's discovery demands or notices; and it is further

ORDERED that the parties shall have all pretrial disclosure complete prior to their next appearance on this Court's discovery compliance calendar, now adjourned to **March 28, 2019.**

Further, the parties are advised that the Court will not entertain any adjournments of this appearance or the above ordered deadlines **absent good cause shown**.

The foregoing constitutes the decision and order of this Court.

Dated: November 14, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**