| **Vacation Vil. Homeowners Assn., Inc. v Town of Fallsburg** |
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| 2022 NY Slip Op 31537(U) |
| April 20, 2022 |
| Supreme Court, Sullivan County |
| Docket Number: Index No. 1241-2018 |
| Judge: Stephan G. Schick |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF SULLIVAN**

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Vacation Village Homeowners Association, Inc., Plaintiffs,

- against -

Town of Fallsburg, Fallsburg Waste Water Plant, T/Fallsburg Water and Wastewater Dept., T/Fallsburg Dept. Of Public Works, Loch Sheldrake Sewer District, Loch Sheldrake Wastewater Treatment Plant, and Lochmor Municipal Golf Course a/k/a Lochmor Golf Course, Defendants.

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**DECISION & ORDER**
Index No.1241-2018
Index No. 0368-2019

Scott Pere, Josef Brandler, Lisa Coates, Jacob Lerman & Arthur Farkas, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

Town of Fallsburg, Fallsburg Waste Water Plant, T/Fallsburg Water and Wastewater Dept., T/Fallsburg Dept. Of Public Works, Loch Sheldrake Sewer District, Loch Sheldrake Wastewater Treatment Plant, and Lochmor Municipal Golf Course a/k/a Lochmor Golf Course, Defendants.

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**DECISION & ORDER**
Index No.1253-2018
Index No. E2019-369

Appearances: Steven J. German, Esq.
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Schick, J.

This matter comes before this Court by way of Defendant's motion for summary judgment.[1] Plaintiff opposes the motion and cross moves for summary judgment. Defendant moves to

[1]Motion sequence number 9

dismiss the class action claim in motion sequence nine, the summary judgment motion, and Plaintiff moves separately to certify the class in motion sequence eight. Lastly, Plaintiff moves to strike the expert affidavit of George Knoeckin, Ph.D., which Defendant opposes.[2]

**Dismissal of Certain Defendants**
Defendant first argues that the claims against the Fallsburg Waste Water Plant, Town of Fallsburg Water and Wastewater Dept., Town of Fallsburg Dept. Of Public Works, Loch Sheldrake Wastewater Treatment Plant, and Lochmor Municipal Golf Course a/k/a Lochmor Golf Course must be dismissed as they are not corporate entities separate from the Town and some do not exist. As Plaintiffs concede this point, the actions against all entities other than the Town of Fallsburg are dismissed. The caption will be amended to avoid jury confusion.

**Negligence Claim**
Defendant argues that the claims of negligent design of the Loch Sheldrake Wastewater Treatment Plant are barred by the doctrine of governmental immunity in design of public works. Defendant further argues that the claims of negligent operation lack factual basis and refers to the affidavit of Michael Herbert. The affidavit of George Knoecklein is proffered to support the argument that Evans Lake suffered no damage.

In opposition Plaintiff proffers the affidavits of David Matthews, Ph.D., CLM, and Kevin Draganchuk, P.E., both of whom, shockingly, arrive at a different opinion regarding causation and effects.

As succinctly stated by the Second Department in *Barbuto v. Winthrop Univ. Hosp.*,[3]

> The motion papers [present] a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution (citations omitted.)

Accordingly, both motions are denied on this issue.

**Strict Liability**
Defendant argues that a claim for strict liability may not be maintained in the absence of a statutory basis for such claim. This is incorrect. As noted by the Court of Appeals,

> [i]mposing strict liability upon landowners who undertake abnormally dangerous activities is not uncommon... The policy consideration may be simply put: those who engage in activity of sufficiently high risk of harm to others, especially where there are reasonable even if more costly alternatives, should bear the cost of harm

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[2]Motion sequence 10.

[3]*Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 624 (2d Dept. 2003).

caused the innocent (citations omitted).[4]

There are six factors to be considered in determining if an activity is abnormally dangerous:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes."[5]

Courts have found that "... set[ting] off a total of 194 sticks of dynamite at a construction site which was only 125 feet away from the damaged premises...[6]" was abnormally dangerous. However, a factory's use of active caustic chemicals that resulted in acidic emissions was not abnormally dangerous.[7] Illegal hunting while trespassing on private land was found not abnormally dangerous.[8] "...[T]he installation or maintenance of a propane gas storage tank, transmission system and fixtures does not constitute an ultrahazardous activity so as to impose absolute liability...[9]"

There was insufficient evidence to provide strict liability in an action in which a hydraulic landfill project pumped, under high pressure, a mix of 85% water and 15% sand, 24 hours a day onto a park site, creating a 50 acre lake which, after eleven days, resulted in shifting the land underneath a nearby home, and, five days later, shifting the land underneath another home, and seven months later, shifting the land under a a third home.[10]

Considering the factors relative to an abnormally dangerous activity: There is in this matter a risk of harm to land and people, however, the risk can be eliminated by the exercise of reasonable care. A sewage treatment plant is a matter of common usage: they are in most developed municipalities. The placement of the activity is appropriate to the place in which it is carried on,

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[4] *Doundoulakis v Hempstead*, 42 NY2d 440, 448 (1977).

[5] *Doundoulakis v Hempstead*, 42 NY2d 440, 448 (1977).

[6] *Spano v Perini Corp.*, 25 NY2d 11, 14 (1969)

[7] *DeFoe Corp. v Semi-Alloys, Inc.*, 156 AD2d 634, 635 (2d Dept 1989)

[8] *Mikula v Duliba*, 94 AD2d 503, 507 (4th Dept 1983)

[9] *Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 263 AD2d 335, 339 (3d Dept 2000)

[10] *Doundoulakis v Hempstead*, 42 NY2d 440 (1977)

as the treatment facility is for the Town of Fallsburg, Evans Lake is within the Town of Fallsburg, and Vacation Village is a user of the sewage treatment facility. And, finally, the value to the community cannot be overstated.

The bar is very high for the imposition of strict liability in cases of abnormally hazardous activity, and this Court declines to find that maintenance of a sewage treatment facility qualifies as such. Accordingly, this claim is dismissed.

**Trespass**
Defendant argues that the Town has an easement which is a complete defense to the easement claim, and, even if one cannot be found, by virtue of the existence and use of the outfall pipe for more than ten years, the Town has acquired a prescriptive easement to maintain the outfall pipe.

Plaintiff argues that the town's defenses are "hypothetical," that this Court has already made a ruling that there is no prescriptive easement, and that "there is no dispute" regarding the landowners's consent to the Town's use of Evans Lake.

However, there are questions of fact regarding the existence of an easement,[11] written or prescriptive, as well as of the landowners's participation in a municipal sewage system that drained into a lake located upon their property since before their subdivision was built.[12] Furthermore, contrary to counsel's statement, colloquy and questioning by a Court is part of oral argument, not part of the order. Accordingly, as there are questions of fact regarding trespass, both motions are denied on this point.

**Nuisance**
Defendant's arguments for summary judgment on the nuisance claim are supported by the affidavit of Dr. George Knoecklein to demonstrate the reasonableness of the Town's actions. In response, Plaintiffs again proffer the affidavits of David Matthews, Ph.D., CLM, and Kevin Draganchuk, P.E.. While there is a credibility battle between experts, the question must go before a trier of fact.[13] Accordingly, both motions are denied on this point.

**Claims Based upon Golf Course Maintenance**
As Plaintiff concedes to the dismissal of this claim, the cause of action is dismissed.

**Class Action Claim**

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[11]Affidavit of Steven Vegliante, paragraphs 8, 12; George Bold affidavit; Affidavit of Menachem Husarsky, paragraph 13

[12]See 1989 Dedication and conveyance documents; Wasson deposition pages 17, 19, 13; Afffidavit of Steven Vegliante.

[13]*Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 624 (2d Dept. 2003).

The Third Department recently, and comprehensively, considered this question in *Burdick v Tonoga, Inc.*, 179 AD3d 53, 56 (3d Dept 2019), considering the very questions raised in the motion practice before this Court.

> As proponents of the class action, plaintiffs bore the burden of demonstrating that five prerequisites can be met ... The issues in this case stem from Supreme Court's determination with regard to three of these prerequisites — namely, "[whether] there are questions of law or fact common to the class which predominate over any questions affecting only individual members; [whether] the claims or defenses of the representative parties are typical of the claims or defenses of the class; . . . and [whether] a class action is superior to other available methods for the fair and efficient adjudication of the controversy" ...
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> The commonality prerequisite "requires predominance of common questions over individual questions, not identity or unanimity of common questions, among class members" (Ferrari v Natl. Football League, 153 AD3d 1589, 1591, 61 N.Y.S.3d 421 [2017]). "[C]ommonality cannot be determined by any mechanical test and . . . the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" ... "[C]ommonality is not merely an inquiry into whether common issues outnumber individual issues but rather whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" ... The common issues must be "capable of class wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke" ... As such, the focus is whether the proposed class action will "generate common answers apt to drive the resolution of the litigation" (citations omitted).

Although, as noted by Defendant, the individual homeowners may have differing damage issues relative to their location in the development, the overwhelming common questions revolve around Defendant's actions within the sewage treatment facility and the impact those actions on Evans Lake. Again, as noted by the Third Department in *Burdick*,

> [d]efendant's argument that individual class members will have different damages, though likely true, does not alter this conclusion. Even if, after determining the answers to these common questions, it becomes clear that "questions peculiar to each individual may remain" or that there are varied damages suffered among class members, class certification is still permissible (citations omitted.)[14]

Pursuant to the five requirements found in CPLR §901, this Court finds that the class of persons, all homeowners in Vacation Village Homeowner's Association, Inc, as of April 5, 2017, is so

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[14] *Burdick v Tonoga, Inc.*, 179 AD3d 53, 58 (3d Dept 2019).

numerous that joinder of all parties is impracticable; that there are questions of law and fact common to the class which predominate over any questions affecting only individual members; that the claims or defenses of the representative parties are typical of the claims or defenses of the class; that the representative parties will fairly and adequately protect the interests of the class; and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Accordingly, the request for class certification is granted.

**Punitive Damages**

Defendant argues that a claim for punitive damages cannot be maintained against a municipal defendant. Plaintiff opposes arguing that although courts disfavor punitive damages against a municipality, it is a fact dependent question for the jury.

In *Miller v Rensselaer*,[15] the Third Department clearly held that

> ... it is now well established that in section 1983 causes of action, punitive damages may not be assessed against a State or its political subdivisions ... Further, with respect to common-law causes of action, the same rule precluding assessment of punitive damages applies (citations omitted.)

The Third Department revisited the question in *Matter of Ken Mar Dev., Inc. v Dept. of Pub. Works of City of Saratoga Springs*, holding that "... no claim for punitive damages lies against a governmental entity (citations omitted.)[16]" Accordingly, the claim for punitive damages is dismissed.

**Request for Jury Trial**

Defendant argues that there is no right to a jury trial on equitable claims, such as a claim for injunctive relief, and when a claim for an injunction is joined with a claim for money damages, it waives the right to a jury trial on the money damages claim, as well.

Civil Procedure Law & Rules § 4102 (c ) specifically states,

> A party shall not be deemed to have waived the right to trial by jury of the issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction; or of the issues of fact arising upon a counterclaim, cross-claim or third party claim, by asserting it in an action in which there is no right to trial by jury.

"Where the plaintiffs join legal and equitable claims, the defendants are not deprived of their

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[15] *Miller v Rensselaer*, 94 AD2d 862, 862 (3d Dept 1983).

[16] *Matter of Ken Mar Dev., Inc. v Dept. of Pub. Works of City of Saratoga Springs*, 53 AD3d 1020, 1025 (3d Dept 2008)

right to a jury trial of the legal claims (citations omitted.)[17]" Accordingly, Defendant's motion is denied on this issue.

**Motion to strike the expert affidavit of George Knoeckin, Ph.D.**
Plaintiff moves to strike the expert affidavit of George Knoeckin, Ph.D., and proffers the affidavit of his own expert, David Matthews, Ph.D., CLM, to support the arguments. Again, while there is a credibility battle between experts, the question must go before a trier of fact.[18] Accordingly, Plaintiff's motion to strike the expert affidavit of George Knoeckin, Ph.D., is denied.

Wherefore, it is hereby

**ORDERED** that the actions against all entities other than the Town of Fallsburg are dismissed; and it is further

**ORDERED** that the captions of all four actions noted above will be amended to reflect the sole remaining defendant, the Town of Fallsburg; and it is further

**ORDERED** that Plaintiff's motion for class certification, with the designation of Plaintiffs Scott Pere, Josef Brandler, and Arthur Farkas as Class Representatives and appointing Steven J. German of German Rubenstein LLP Class Counsel, is granted; and it is further

**ORDERED** that Plaintiff's claim for strict liability is dismissed; and it is further

**ORDERED** that, on the issue of the trespass claims, both the motion for summary judgment and the cross motion are denied; and it is further

**ORDERED** that , on the issue of the negligence claims, both the motion for summary judgment and the cross motion are denied; and it is further

**ORDERED** that , on the issue of the nuisance claims, both the motion for summary judgment and the cross motion are denied; and it is further

**ORDERED** that Plaintiff's claims regarding golf course maintenance are dismissed; and it is further

**ORDERED** that Plaintiff's claim for punitive damages is dismissed; and it is further

**ORDERED** that Defendant's motion to strike the jury demand is denied; and it is further

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[17] *KNET, Inc. v Ruocco*, 145 AD3d 989, 992 (2d Dept 2016)

[18] *Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 624 (2d Dept. 2003).

**ORDERED** that Plaintiff's motion to strike the expert affidavit of George Knoeckin, Ph.D., is denied.

The Court has considered all other arguments and has found them to be without basis in law or fact.

**SO ORDERED**

Dated: Monticello, NY
April 20, 2022

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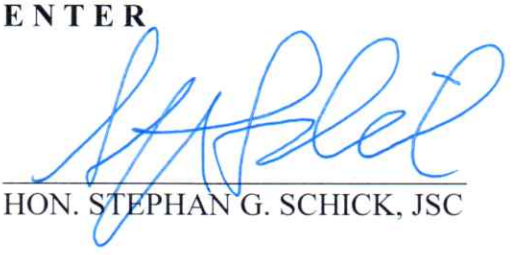

HON. STEPHAN G. SCHICK, JSC

Papers considered:

Motion sequence 8, Plaintiff's motion for class certification, filed December 17, 2021, and all associated filings.

Defendant's opposition to class certification motion, filed February 4, 2022, and all associated filings.

Motion sequence 9, Defendant's motion for summary judgment, filed December 17, 2021, and all associated filings.

Plaintiff's affirmation in reply, filed February 15, 2022, and all associated filings

Plaintiff's Cross motion filed February 4, 2022, and all associated filings.

Motion sequence 10, Plaintiff's motion to strike the expert affidavit of Dr. George Knoecklin, filed February 4, 2022, and all associated filings.

Defendant's affirmation in opposition, filed February 11, and all associated filings.