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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOSEF WINDISCH,

Plaintiff,

-against-

THE TOWN OF NORTH HEMPSTEAD,

Defendant.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 18849/08
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendant's Notice of Motion	01
Plaintiff's Opposition	xx
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In motion sequence number one, the Town of North Hempstead ("North Hempstead") moves for an order, pursuant to CPLR §3212, giving it summary judgment as to the Plaintiff's Complaint.

The Plaintiff commenced this action for damages sustained to his home located at 163 Coventry Avenue, Albertson, N.Y. (the "premises") and personal property therein due to the large accumulation of rainfall that entered his basement on July 18, 2007. Plaintiff contends the flooding and subsequent damages were caused by North Hempstead's negligent maintenance of the drains and sewer pipes.

Up until the July 17, 2007, North Hempstead notes the system adequately served the function for which it was designed and installed.

North Hempstead contends the flooding was caused by the large amount of sudden rainfall and the low-lying position of Plaintiff's premises.

First, the court would note that the North Hempstead's summary judgment motion is timely. North Hempstead's motion was required to be filed sixty (60) days after the Plaintiff's Note of Issue was filed (see Exhibit R annexed to Plaintiff's affirmation in opposition). Plaintiff's Note of Issue was filed on November 18, 2009 (see Exhibit Q annexed to Plaintiff's affirmation in opposition). North

Hempstead's motion was required to be filed on January 17, 2010. Since January 17, 2010 was a Sunday and Monday, January 18, 2010 was the Dr. Martin Luther King Jr. holiday and the courts were closed, North Hempstead's January 19, 2010 filing of the motion (see Exhibit B annexed to North Hempstead's reply affirmation) was timely (see General Construction Law § § 24, 25-a).

North Hempstead has offered the affidavit of George Wright, a meteorologist (see annexed and following North Hempstead's affirmation in support of its motion). Wright stated that 2.75 to 3.25 inches of rain fell from 7:00 a.m. to 9:00 a.m. on July 18, 2007 with continued rainfall thereafter for 3-6 inch totals. Due to the rain, there was widespread flooding in the region. Wright deemed the rainfall a once in every 50-year event.

North Hempstead also offered the affidavit of Donnamary Plante, a civil engineer with North Hempstead (see the affidavit following the Wright affidavit following North Hempstead's affidavit of support). Ms. Plante stated the storm drain systems are usually designed for five to ten year storms, and the North Hempstead's drainage system works well. She noted Plaintiff's premise is located in a low-lying area (see Exhibit L annexed to North Hempstead's motion). Due to the extraordinary severity of the July 18, 2007 storm, the rainfall was too intense for the drainage system to accommodate the large quantity of water falling in such a short period of time.

North Hempstead also offered the affidavit of Thomas P. Tiernan, the Superintendent of Highways for North Hempstead (following the Plante affidavit). Tiernan stated that the storm drains or catch basins are kept as obstruction free as possible by North Hempstead Highway Department foremen. Tiernan notes letters of complaint by one of Plaintiff's neighbors, Ms. Anne Page-Britton dated December 8, 2005 (see Exhibit M annexed to North Hempstead's motion) and December 4, 2006, which requested leaves and debris be cleaned from the storm drains in her area. Allegedly, the December 8, 2005 situation was addressed and the December 4, 2006 problem was not found to exist

(see Exhibit N, pg. 2, 12/6/06 8:40 update). Tiernan notes the Highway Department records from December 6, 2006 until July 18, 2007 show no further complaints in the area. Tiernan notes the flooding on July 18, 2007 was a Long Island wide problem since it was the "Storm of the Century."

Tiernan noted the fact that Plaintiff's premises was in a low point in a hilly area and the Plaintiff's downward sloping driveway added to the problem.

A municipality cannot be held liable to an adjacent property owner for constructing an insufficient sewer system alone in view of the fact that the municipality was not required to install any sewer at all, and if the municipality did so and the system was inadequate, this was an error in judgment committed in the exercise of quasi-judicial determination for which there was no redress by property owners nor can a municipality be rendered liable for damages caused by extraordinary and excessive rainfall (*Beck v City of New York*, 23 Misc2d 1036, *aff'd.* 16 AD2d 809 [1960]).

Thus, the duties of a municipality in adopting a general plan of drainage and determining when and where the sewers shall be built, of what size, etc., are of a quasi-judicial nature involving the exercise of deliberate judgment and large discretion which is not subject to revision by the court or jury in a private action for a particular lot of land not draining sufficiently (*Biernacki v Village of Ravena*, 245 AD2d 656 [3d Dept 1987]).

Although a municipality is immune from liability arising out of claims that it negligently designed a sewer system, a municipality is not entitled to governmental immunity arising out of claims that it negligently maintained the sewerage system as those allegations challenge conduct which is ministerial in nature (*Fireman's Fund Insurance Co. v County of Nassau*, 66 AD3d 823 [2d Dept 2009]; *Moore v City of Yonkers*, 54 AD3d 397 [2d Dept 2008]; *Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781 [2d Dept 2004]).

To sustain liability against a municipality, the duty breached must be more than the duty owed

the public generally (*see Florence v Goldberg*, 44 NY2d 189 [1978]).

The duty to maintain sewers and drains in good repair includes the obligation to keep them free of obstruction, and a municipality is liable for negligence in this regard to any person whose property is damaged whether the damage results from its failure to use reasonable diligence to keep its sewers and drains from becoming clogged or from its failure to remove any obstruction from a sewer or drain within a reasonable time after actual or constructive notice.

A municipality can be held liable for negligent maintenance of the sewage system if it has received notice of the dangerous condition or has reason to believe that the pipes have shifted or deteriorated and are likely to cause injury, it neglected to make reasonable efforts to inspect and repair the defect, and such neglect caused injury to the Plaintiff (*Holy Temples First Church of God in Christ v City of Hudson*, 17 AD3d 947 [3d Dept 2005]).

Mrs. Page-Britton's letters notwithstanding, North Hempstead has shown that the area did not normally flood, the catch basins were serviced reasonably and regularly and the water in issue was basically a "Noah's Ark" special–a storm of the century in terms of the amount of rain that overwhelmed the entire region as well as the drainage system near Plaintiff's premises.

The court has noted two prior complaints of Plaintiff's next door neighbor at 157 Coventry Avenue, Anne Page-Britton. Plaintiff has offered the post-North Hempstead motion (dated January 19, 2010) affidavit from Ms. Page-Britton dated March 15, 2010 (it is annexed to Plaintiff's affirmation in opposition following the affirmation of Stephen A. Strauss). Ms. Page-Britton states there was a constant build-up of trash, i.e., dirt, sand, weeds, leaves at the catch basins at the intersection of Albertson and Coventry Avenues near Plaintiff's property (see Exhibit L annexed to North Hempstead's motion) and Mrs. Page-Britton states she constantly called to complain, but no one ever responded.

She also reveals that in 2008, North Hempstead came to install new basins and Mrs. Page-Britton was told by an unidentified worker that the sewer pipes in the area were all clogged and broken.

Plaintiff's deposition testimony is revealing (see Exhibit E annexed to North Hempstead's motion; the following pages refer to that exhibit). Plaintiff's driveway pitches or slopes downward and the garage is attached to the house by the basement (pgs. 19, 20). During the intense rain, the water was over 5' deep and came over his retaining wall (p. 20). Prior to July 18, 2007, Plaintiff had no flooding problems (p. 29).

Plaintiff has objected to the use of George Wright's affidavit. Here, North Hempstead's expert Wright, was called in response to North Hempstead's summary judgment motion. North Hempstead did not alert Plaintiff's counsel to its North Hempstead's expert's presence, since North Hempstead hired the expert just prior to filing the motion. There would be ample time for North Hempstead to alert Plaintiff and to provide supplemental disclosure as to North Hempstead's expert if it were necessary. There was no effort by North Hempstead of intentional or willful failure to disclose nor a showing of prejudice by the opposing party (*see Rowan v Cross Country Ski and Skate, Inc.*, 42 AD2d 563 [2d Dept 1973]).

Assuming, *arguendo*, Wright's affidavit was not permitted, North Hempstead, without it, has met its burden.

Plaintiff also voices a complaint as to the North Hempstead employee called for deposition. A municipality, in the first instance, has a right to determine which of its officers or employees with knowledge of the facts may appear for deposition (*see Douglas v New York City Transit Authority*, 48 AD3d 615 [2d Dept 2008]). The fact that the Plaintiff was not pleased with the deposition of one of North Hempstead's employees (it is believed to be Kevin Williams; see Exhibit G annexed to North Hempstead's motion), did not preclude the Plaintiff from requesting additional North Hempstead

personnel with, in Plaintiff's view, superior knowledge. The point is now moot.

The deposition testimony and the affidavits clearly showed that the flooding experienced by Plaintiff was caused by extraordinarily heavy rains earlier that day, the low-lying location of Plaintiff's residence and the inability of the drainage system to handle the large amount of rain in a short period of time.

The mere happening of an event such as the flooding of property (the "mere" being an objective standard; subjectively, the court recognizes it can be very devastating to the homeowner) is insufficient to meet a property owner's burden of proof as to a municipality's negligence in connection with the maintenance of a sewer system; the owner must show that the municipality either affirmatively breached a duty owed or that it was actively negligent and the negligence caused the flooding (*Biernacki v Village of Ravena*, 245 AD2d 656 [3d Dept 2007]; *Holy Temples First Church of God in Christ v City of Hudson, supra*).

Here, the Plaintiff did not submit an affidavit of an expert and did not offer any proof tending to show that the installation and maintenance of the sewer system by North Hempstead was in any way negligent or that it caused flooding in his house. The Plaintiff's affidavit, the affidavit of non-party Anne Page-Britton and Plaintiff's attorney's affirmation merely offered speculation that North Hempstead was negligent and such negligence caused the flooding. such speculation does not raise issues of fact to defeat North Hempstead's motion.

Here, Plaintiff offers no competent nor expert evidence to support his theory that North Hempstead failed to maintain, i.e., clear the sewer drains, etc., the sewer system.

Here, there were no substantiated allegations that North Hempstead knew certain improvements were required in order to alleviate chronic flooding near Plaintiff's premises. As noted, Plaintiff had testified that prior to the July 18, 2007 incident, Plaintiff had no flooding problems (see Exhibit E, pg.

29 annexed to North Hempstead's motion).

North Hempstead has offered deposition testimony (including Plaintiff's) that the flooding sustained in Plaintiff's property was caused by heavy rains, the location of the Plaintiff's home in a low-lying area as well as a downward slope of his driveway that was attached to his basement where the water entered (*see Moore v City of Yonkers*, 54 AD3d 397 [2d Dept 2008]).

North Hempstead demonstrated its entitlement to judgment as a matter of law by submitting affidavits of an engineer and other employees establishing that it had no notice of a potentially dangerous condition and that it regularly inspected and maintained the subject sewer line (*see DeWitt Properties v City of New York,* 44 NY2d 417 {1978]). As such, North Hempstead's application for summary judgment is **granted**. It is hereby

ORDERED, that the Plaintiff's Complaint is dismissed.

This constitutes the Decision and Order of the Court.

DATED: May 11, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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