

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

ANDREW GASPAR and NINA GASPAR, X

Plaintiffs,

Index No.: 011514/07
Motion Seq...04, 05, 06, 07, 08
Motion Date...06/02/10

-against

XXX

THE INCORPORATED VILLAGE OF
ATLANTIC BEACH, THE ATLANTIC
BEACH SEWER DISTRICT and THE
GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Defendants.

THE GREATER ATLANTIC BEACH
WATER RECLAMATION DISTRICT, X

Third-Party Plaintiff,

-against-

THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC
BEACH,

Third-Party Defendants,

Papers Submitted: X

- Notice of Motion (Mot. Seq. 04).....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Notice of Motion (Mot. Seq. 05).....X

Affirmation in Opposition.....X
 Reply Affirmation.....X
 Sur-Reply Affirmation.....X
 Notice of Motion (Mot. Seq. 06).....X
 Notice of Cross-Motion (Mot. Seq. 08).....X
 Affirmation in Reply.....X
 Affirmation in Reply.....X
 Reply Affirmation.....X
 Order to Show Cause (Mot. Seq. 07).....X
 Affirmation in Opposition.....X

Upon the foregoing papers, the motion by the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, seeking an order of this Court, pursuant to CPLR § 2221 (e), “granting leave to defendant to renew this Court’s prior decisions dated January 9, 2009 and September 16, 2009 and, upon renewal, granting summary judgment pursuant to CPLR § 3212 in those actions and cross-claims against the Village in which the Village is a direct defendant; and for an order granting the Village summary judgment pursuant to CPLR § 3212 dismissing the third-party action and cross-claims against the Village in the third-party action” (Mot. Seq. 04); the motion by the Third-Party Defendant, The County of Nassau, seeking an order of this Court, pursuant to CPLR § 3212, granting summary judgment in favor of the said movant “. . . dismissing all claims and cross-claims against said Third-Party Defendant” (Mot. Seq. 05); the motion by the Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District, seeking an order of this court, pursuant to CPLR § 3212 “. . . granting summary judgment in favor of the Defendant, GREATER ATLANTIC BEACH WATER RECLAMATION DISTRICT, on the grounds that plaintiffs’ claims are without merit and

present no triable issues of fact for the jury, . . . dismissing plaintiffs' Complaint in its entirety, together with all cross and counter claims; and the motion by the Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District, seeking an order of this court, pursuant to CPLR § 3211, as to the Fourth Cause of Action of *Res Ipsa Loquitur*, on the ground that plaintiffs have failed to state a cause of action" (Mot. Seq. 06); and the motion by the Third-Party Defendant, The County of Nassau, seeking an order of this Court, pursuant to CPLR § 2201 (misidentified in the Notice of Motion as CPLR § 2001), staying the trial of the instant action pending the determination of the extant motions herein (Mot. Seq. 07); and the Cross-motion by the Plaintiffs, Andrew Gaspar and Nina Gaspar, seeking an order of this Court " . . . pursuant to CPLR § 3212 granting summary judgment against THE INCORPORATED VILLAGE OF ATLANTIC BEACH, THE ATLANTIC BEACH SEWER DISTRICT and THE GREATER ATLANTIC BEACH WATER RECLAMATION DISTRICT" (Mot. Seq. 08) are determined as herein provided..

Based upon all of the papers submitted for this Court's consideration, this Court, pursuant to CPLR § 2219 (a), makes the following findings of uncontroverted facts for the time period pertinent to the instant action:

No written Complaint or Notice of a Defective Condition of their sanitary sewer, surface water and/or storm water drainage systems was served or filed with any of the municipal Defendants or Third-Party Defendants prior to the October 2005 storms that are the subject matter of the instant action.

At all times pertinent to the instant action, the Plaintiffs, Andrew Gaspar and Nina Gaspar resided at the premises known and designated as 51 Wayne Avenue, Atlantic Beach, New York.

At all times pertinent to the instant action, the Plaintiff, Nina Gaspar, owned the aforesaid premises.

Wayne Avenue is a north-south thoroughfare which runs between Ocean Boulevard and Beech Street (Park Street) all of which roadways are located within the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach.

Wayne Avenue is maintained by the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach.

51 Wayne Avenue is located on the west side of Wayne Avenue between Ocean Boulevard and Beech Street.

The Plaintiffs, Andrew Gaspar and Nina Gaspar, allege that on October 14, 2005 and continuing thereafter, rainfall caused water infiltration into the Defendants' sewer system which caused overflow waste water and raw sewage to enter their house and flood their basement.

Beech Street (Park Street), which is located within the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, is the only street within The Incorporated Village of Atlantic Beach which is owned by the Third-Party Defendant, The County of Nassau and maintained by the said Third-Party Defendant.

The named Defendant, The Atlantic Beach Sewer District, has not appeared in the instant action.

The Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, is built on sandbars and was incorporated in the year 1962.

The Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District, a municipal entity, was established pursuant to Chapter 516 of the Laws of New York, 1928. The Greater Atlantic Beach Water Reclamation District is not an entity of the Incorporated Village of Atlantic Beach.

The Greater Atlantic Beach Water Reclamation District operates a sanitary sewer and waste water treatment system within The Incorporated Village of Atlantic Beach.

This System consists of a waste water treatment plant, three (3) substations and main lateral lines that are under the streets in The Incorporated Village of Atlantic Beach.

This system was built circa 1930 and the main lateral lines were made of terra cotta.

This system does not include the connections between individual residential homes and the lateral lines that run under the streets. There are approximately twenty (20) miles of The Greater Atlantic Beach Water Reclamation District's lateral lines within The Incorporated Village of Atlantic Beach terminating at The Greater Atlantic Beach Water Reclamation District's treatment plant.

The manhole covers that comprise this system had holes and some had multiple

perforations as part of the aerating of the system and the seals or the manhole covers themselves were not necessarily air or water tight.

Inflow/infiltration of water is an inherent factor in any underground sewer or drainage system.

Except for Beech Street (Park Street), The Incorporated Village of Atlantic Beach maintained a storm water drainage system for surface water runoff on the streets within the village.

The Village's storm water drainage system consisted of approximately fifty (50) stand-alone catch basins. Forty-one (41) of these stand-alone catch basins were leeching basins which collect water and allow it to disperse into the ground. In addition to these leeching basins there were nine (9) catch basins that tunneled water directly to and into Reynolds Channel.

The Village's storm water drainage system was not connected in any way to The Greater Atlantic Beach Water Reclamation District's sanitary sewer system.

The Nassau County Department of Public Works maintained the storm water drainage system for the surface water runoff for Beech Street (Park Street), which is a Nassau County-owned roadway within The Incorporated Village of Atlantic Beach. This storm water drainage system consists of catch basins along Beech Street (Park Street) which divert the collected water through pipes into Reynolds Channel.

The herein above described systems of The Greater Atlantic Beach Water

Reclamation District, The Incorporated Village of Atlantic Beach and The County of Nassau are separate and independent systems and are not in any way connected with or to each other.

The extraordinary amount of rainfall for either the ten (10) day period from October 6, 2005 through October 15, 2005 or the five (5) day period from October 11, 2005 through October 15, 2005, which fell upon The Incorporated Village of Atlantic Beach, corresponded to a once in a one hundred (100) year expected frequency of occurrence warranting the meteorological description of a “One Hundred (100) Year Storm.”

A motion brought pursuant to CPLR § 2221 (e):

(2) shall be based upon new facts not offered on the prior motion that would change the prior determination . . . ; and

(3) shall contain reasonable justification for the failure to present such facts on the prior motion.

The “Gaspar” action was commenced by the filing of a summons and complaint dated July 2, 2007. Issue was joined by service of Answers and Amended Answers by all Defendants, except the named Defendant, The Atlantic Beach Sewer District.

A third-party action was commenced by the Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District. Issue was joined by service of Answers and Amended Answers by the Third-Party Defendants.

A motion for summary judgment pursuant to CPLR § 3212 was made by The Incorporated Village of Atlantic Beach in the related actions joined for trial by an order of this Court, (LaMarca, J.) dated December 4, 2007. The said motion was made before

completion of discovery and filed before the commencement of the instant third-party action.

The herein above described summary judgment motion was denied by an order of this court, (LaMarca, J.), dated January 9, 2009, wherein the Court found that:

“ . . . additional discovery is needed to inquire into whether the VILLAGE’s drainage system caused or exacerbated the sewer backup and the damages incurred by the plaintiffs herein.”

A motion to reargue, pursuant to CPLR § 2221 (d), was made by The Incorporated Village of Atlantic Beach and granted by the Court which, upon reargument, adhered to its original decision by an order (LaMarca, J.), dated September 16, 2009.

Separate motions were made by The Incorporated Village of Atlantic Beach for leave, pursuant to CPLR § 3025 (b), to amend its various Answers in the related actions herein to assert affirmative defenses. Those motions were granted in their entirety by a single order of this Court (LaMarca, J.), dated October 16, 2009.

CPLR § 2221 (d) and (e) is a codification of the principles evolved through the case law of this state (*see Foley v. Roche*, 68 A.D.2d 558 [1st Dept. 1979]).

The purpose of reargument (CPLR § 2221 [d]) is not to serve as a vehicle to permit the unsuccessful party a further opportunity to argue the very questions previously decided herein (*see Fosdick v. Town of Hempstead*, 126 N.Y. 651 [1891]). Therefore, this Court herewith deems the motion of the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach as a motion for leave to renew its prior motion which resulted in an order of this Court (LaMarca, J.), dated January 9, 2009 and grants renewal thereof based

upon the discovery conducted herein subsequent to said motion and decision of this Court.

With respect to the motions of the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, The Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District, the Third-Party Defendant, The County of Nassau and the cross-motion of the Plaintiffs, ANDREW GASPAR and NINA GASPAR, the rule in motions for summary judgment has been stated by the Appellate Division, Second Department, in *Stewart Title Insurance Company v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 881 (2nd Dept. 1994):

“It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank v. McAuliffe*, 97 A.D.2d 607 [3d Dept. 1983]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324; *Zuckerman v. City of New York*, *supra*, at 562).”

Furthermore, a municipality is immune from liability arising out of claims that it negligently designed systems such as the sanitary sewer, surface water and storm water drainage systems which are the subject matter of the instant action (*see Fireman's Fund Ins. Co. v. County of Nassau*, 66 A.D.3d 823 [2nd Dept. 2009]).

Additionally, “a municipality owes no duty nor is it under compulsion of any kind to construct sewers for the disposal of surface waters” (*Beck v. City of New York*, 23 Misc.2d 1036, 1041 [Sup. Ct. Queens County 1960]). Furthermore, “a municipality cannot be held liable for its failure to provide a drainage system sufficient to dispose of surface waters flowing as a result of the natural drainage, the grading and paving of streets”. (*id.*)

However, a municipality is not entitled to governmental immunity arising out of claims that it negligently maintained such systems (*see Fireman’s Fund Ins. Co. v. County of Nassau*, 66 A.D.3d 823 [2nd Dept. 2009], *supra*).

The Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, The Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District and the Third-Party Defendant, The County of Nassau have collectively met their *prima facie* burden of proof by, *inter alia*, demonstrating that the flooding from the inordinate heavy rains that fell during the period of October 6, 2005 through October 15, 2005 was not the consequence of the movants’ active or passive negligence nor a breach of any duty owed to the Plaintiffs. Furthermore, the movants had no actual or constructive notice of the existence of any dangerous condition or reason to believe that there was any lack of integrity in or with their respective drainage systems.

The Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, The Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District and the Third-Party Defendant, The County of Nassau having met their respective

burdens, the herein above described burden shifts to the parties opposing the respective motions.

The Plaintiffs premise their cross-motion for summary judgment and their opposition to the respective motions for summary judgment upon allegations of trespass, private nuisance, negligence and *res ipsa loquitur* as set forth in the first four (4) causes of action in their Amended Verified Complaint.

In order to establish a cause of action for trespass, which is an intentional harm, a plaintiff must plead and prove that there was an act intended by the defendant which produced a direct, unlawful invasion upon the plaintiff's property (*see Phillips v. Sun Oil Co.*, 307 N.Y. 328 [1954]).

In order to establish a cause of action for private nuisance, which is also an intentional harm, a plaintiff must plead and prove an interference substantial in nature, intentional in origin, unreasonable in character, interfering with a person's right to use and enjoy land and caused by another's conduct in acting or failing to act (*see Weinberg v. Lombardi*, 217 A.D.2d 579 [2nd Dept. 1995]).

Mere speculation or conclusory allegations, as proffered by the Plaintiffs in opposition to the summary judgment motions herein, of improper maintenance, control, management and/or design causing blockage of waste water, storm water, sewage pipes, drains and facilities is insufficient to create a material issue of fact with respect to negligence, trespass or private nuisance.

The doctrine of *res ipsa loquitur* is a rule of evidence (see *Martinez v. City of New York*, 292 A.D.2d 349 [2nd Dept. 2002]) which permits an inference of negligence where as enunciated by our Court of Appeals in *Morejon v. Rais Const. Co.*, 7 N.Y.3d 203, 209 (2006):

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.” (internal quotation marks omitted.)

This Court finds and determines that the Plaintiffs’ opposition to the summary judgment motions does not meet the herein above first and second elements of the doctrine of *res ipsa loquitur*.

The Plaintiffs’ cross-motion for summary judgment and opposition to the motions for summary judgment is based upon bold, conclusory allegations and not accompanied by any evidentiary proof in admissible form.

Accordingly, the motions by the Defendant/Third-Party Defendant, The Incorporated Village of Atlantic Beach, the Defendant/Third-Party Plaintiff, The Greater Atlantic Beach Water Reclamation District and the Third-Party Defendant, The County of Nassau (Mot. Seq. 04, 05, and 06), all of which seek an order of this court, pursuant to CPLR § 3212, granting summary judgment in favor of the movants, dismissing the Plaintiffs’ Complaint and the cross-claims and Third-Party Complaint are **GRANTED** in all respects (*Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1067 [1979]).


Therefore, the above captioned action is herewith **DISMISSED** and the motion by the Defendant, The County of Nassau, for an order of this Court, pursuant to CPLR § 2201, staying the trial of the instant action (Mot. Seq. 07) is **DENIED** as moot.

Accordingly, the cross-motion of the Plaintiffs, ANDREW GASPAR AND NINA GASPAR, for an order of this Court, pursuant to CPLR § 3212, granting summary judgment in favor of the Plaintiffs is **DENIED** (Mot. Seq. 08).

Settle judgment on notice.

This decision constitutes the order of the court.

DATED: Mineola, New York
October 27, 2010



Hon. Randy Sue Marber, J.S.C.
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ENTERED

OCT 29 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**