

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

101

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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BARBARA MORROW et al.,

Plaintiff(s),

-against-

TOWN OF CHESTER,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. ~~96~~39/2012
Motion Date: December 15, 2014

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The following papers numbered 1 to 7 were read on this application by Plaintiffs to vacate this court's October 16, 2014 order of dismissal and to restore the case to the active calendar:

Notice of Motion - Affirmation / Exhibits - Affirmation / Exhibits	1-3
Affirmation in Opposition - Affidavit / Exhibits - Memorandum of Law	4-6
Reply Affirmation	7

This is an action to recover for damage to Plaintiffs' property resulting from flooding in the wake of Hurricane Irene and Tropical Storm Lee in August-September of 2011. The action was dismissed on October 16, 2014 when Plaintiffs' counsel failed to appear for a scheduled conference in the matter. Plaintiffs now move to vacate the dismissal and restore the case to the court's active calendar.

To vacate the order of dismissal and restore the case, Plaintiffs are required to demonstrate a reasonable excuse for the failure to appear and a potentially meritorious cause of action. *See, e.g., Hanscom v. Goldman*, 109 AD3d 964, 965 (2d Dept. 2013). Inasmuch as Defendant does not take issue with Plaintiffs' proffered explanation for the nonappearance, the court finds that Plaintiffs have sufficiently demonstrated the existence of a reasonable excuse for the default in failing to appear.

The issue is whether or not Plaintiffs possess a potentially meritorious cause of action. In an effort to demonstrate the existence of a meritorious claim, Plaintiffs have submitted the verified complaint, the verified bill of particulars, and a series of emails between themselves and Defendant's agents. According to Plaintiffs, these materials demonstrate that Defendant assumed a duty to maintain Seely Brook, a waterway running through or by their properties, and that Defendant's failure to clear Seely Brook of "debris and clogging" in timely fashion proximately caused the flooding damage complained of.

Defendant, in opposition, has submitted a detailed expert affidavit which purports to demonstrate *inter alia* that the Defendant Town of Chester does not own Seely Brook where it passes by or through Plaintiffs' premises; that Plaintiffs' premises are located in a flood plain; that Hurricane Irene and Tropical Storm Lee were storms of such magnitude, and the resulting flow of runoff water so immense, that the flooding which occurred would not have been obviated by any removal of debris, brush or sediment from Seely Brook or from Trout Brook, an adjacent waterway; and that no amount of improvement to Seely Brook will prevent the back-up it suffers from Trout Brook whenever major storms occur. In short, Defendant calls in question whether it

owed Plaintiffs any duty, and has demonstrated via expert affidavit that its breach of duty, if any, was not a proximate cause of the flooding damage to Plaintiffs' premises.

Plaintiffs, in reply, have chosen not to address Defendant's expert affidavit. On the strength of *Reices v. Catholic Medical Center of Brooklyn & Queens*, 306 AD2d 394 (2d Dept. 2003), they claim that the verified complaint and bill of particulars are sufficient to demonstrate the potential merit of their claim without an expert affidavit on the issue of causation. In the circumstances presented here, this court disagrees.

Where the matters in question are not within the ordinary experience of laypersons, an expert affidavit may be required to demonstrate merit. *See, Fiore v. Galang*, 64 NY2d 999, 1001 (1985); *Bistre v. Rongrant Associates*, 109 AD3d 778, 779 (2d Dept. 2013); *Rasmussen v. Niagara Mohawk Power Corporation*, 294 AD2d 862 (4th Dept. 2002). In *Bistre, supra*, a personal injury case based on allegations that a parking lot was improperly designed, the Second Department observed:

[T]he plaintiffs failed to submit any affidavit from an expert establishing the parking lot was improperly designed and that such design was a proximate cause of the injured plaintiff's injuries. The Court of Appeals has stated that expert opinion is required to demonstrate merit with respect to "matters [not] within the ordinary experience of laypersons" [cit.om.]. The claims presented here required an expert affidavit to demonstrate a potentially meritorious cause of action [cit.om.].

Bistre, 109 AD3d at 779. The *Bistre* Court held that in the absence of an expert affidavit demonstrating merit with respect to the elements of breach of duty and causation, it was error to vacate the prior order dismissing the plaintiff's case. *Id.*

In this court's view, *Bistre*, not *Reices*, establishes the requirements for Plaintiff's demonstration of merits here. Contrary to Plaintiffs' suggestion, this case for two reasons is not

a straightforward case of injury resulting from a defendant's failure to maintain premises.

First, concerning Defendant's alleged duty and breach of duty: Inasmuch as it appears that Defendant was not the owner of Seely Brook where it passed by or through Plaintiffs' property, Defendant's liability may not be predicated on simple negligence in the performance of its proprietary functions. The municipal Defendant's potential liability for the exercise, or non-exercise, of its governmental functions in this case is limited by virtue of principles articulated most recently in such cases as *Valdez v. City of New York*, 18 NY3d 69 (2011) and *McLean v. City of New York*, 12 NY3d 194 (2009). Defendant's potential liability is also limited by legal restrictions imposed on its ability to act with respect to Seely Brook, given the control over such waterways that is vested in the Department of Environmental Conservation under Title 6 of the Rules and Regulations of the State of New York (not to mention restrictions imposed by virtue of Plaintiffs' ownership of Seely Brook and/or the land surrounding it). Under the circumstances, Plaintiffs' demonstration of merits is incomplete without an explication of the legal and factual foundation for their claim with respect to the elements of Defendant's duty and its breach thereof.

Second, concerning causation: It seems hardly surprising that property located in a flood plain would be flooded by storms of such enormous magnitude as Hurricane Irene and Tropical Storm Lee. Defendant has established via detailed expert affidavit that the flooding which occurred would not in fact have been obviated by any removal of debris, brush or sediment from Seely Brook or from Trout Brook, an adjacent waterway, and that no amount of improvement to Seely Brook will prevent the back-up it suffers from Trout Brook whenever major storms occur – i.e., that Defendant's claimed breach of duty was not a proximate cause of the flooding damage

to Plaintiffs' premises. In view of the complex and highly technical considerations bearing on the determination of these issues, Plaintiffs' claim to the contrary that Defendant proximately caused the flood damage to their property is simply not a matter within the ordinary experience of laypersons. Hence, under applicable law, an expert affidavit is required to demonstrate the merit of Plaintiffs' claim on the element of causation. *See, Fiore v. Galang, supra; Bistre v. Rongrant Associates, supra; Rasmussen v. Niagara Mohawk Power Corporation, supra.*

Plaintiffs having failed to demonstrate the potential merit of their claim, their present application to vacate the order of dismissal and to restore the case to the court's active calendar must be denied. However, the denial is without prejudice to Plaintiffs' right to file a further motion, should they so choose, on papers including an explication of the legal and factual foundation for Defendant's liability herein, and a demonstration via expert affidavit that the specified breach of duty was a proximate cause of the flooding damage to Plaintiffs' premises.

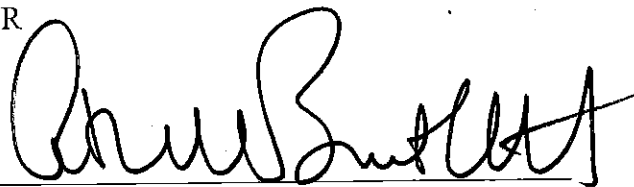
It is therefore

ORDERED, that Plaintiffs' motion is denied without prejudice as set forth hereinabove.

The foregoing constitutes the decision and order of this court.

Dated: February 4, 2015
Goshen, New York

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HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE