THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court

163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

NOTICE OF DECISION

CHARLES P BAUER ESQ
GALLAGHER CALLAHAN & GARTRELL P C
214 NORTH MAIN STREET PO BOX 1415
CONCORD NH 03302-1415

06-C-0509 Tarbell Administrator, Inc. v. The City of Concord

Please be advised that on 8/20/2009 Judge Conboy made the following order relative to:

Order-Motion for Summary Judgment ;
Order on Defendant's Motion for Summary Judgment

Please see attached order.

08/21/2009

William McGraw
Clerk of Court

cc: Friedrich K. Moeckel, Esq.

The State of New Hampshire

Superior Court

Merrimack County Courthouse
163 North Main Street, P.O. Box 2880
Concord, NH 03302-2880
(603) 225-5501

No. 06-C-0509

Tarbell Administrator, Inc.,
Trustee of the Tarbell Family Revocable Trust of 2003

v.

City of Concord

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, City of Concord (City), moves for summary judgment as to Counts II, IV, and V of the complaint filed by the plaintiff, Tarbell Administrator Inc., Trustee of Tarbell Family Revocable Trust of 2003. The plaintiff objects. After a hearing and upon review of the parties' submissions and the applicable law, the Court finds and rules as follows.

Background

For purposes of this order, the Court finds the following relevant facts. The plaintiff serves as trustee of the Tarbell Family Revocable Trust of 2003 ("the Trust"). The Trust owns a former mill building, Mill Place West ("the Property"), located at 479 North Main Street in Concord. The Property has been converted into twenty-one apartment units. Rattlesnake Brook flows under and through the Property. Since 1984,

Keystone Management Company, Inc. ("Keystone") has managed the Property on the plaintiff's behalf.

For over a century, Penacook Lake ("the lake") has served as a municipal water source for Concord. Tarbell Adm'r, inc. v. City of Concord, 157 N.H. 678, 580 (2008). The City manages and operates a water treatment facility adjacent to the lake. Id. An earthen dam and reservoir located between the lake and Rattlesnake Brook draws water into the treatment facility. Id. Removable flashboards on the top of the dam allow the City to control the level of water in the lake. Id. If the lake's water level exceeds capacity, an emergency spillway provides an outlet for the excess water and prevents a breach of the dam. Id. Water from the emergency spillway flows directly into Rattlesnake Brook. Id. If the lake's water level becomes too low to meet the city's needs, the City pumps water into the lake from the Contoocook River. Id.

After experiencing several years of drought-like conditions, the City hired Weston & Sampson in 2003 to conduct a Water Supply Sustainable Yield & Drought Management Study ("the Study"). Id. Weston & Sampson created the Reservoir Management Model ("the RMM") as a guide for when the City should pump water from the Contoocook River to maintain an adequate water supply. Id. The Concord City Council adopted and implemented the RMM in December 2004. Id.

The City followed the RMM's guidelines for approximately one year. Id. In October 2005, the area then began experiencing record rainfalls. Id. Although the City was scheduled to pump water from the river in January 2006 pursuant to the RMM, the unseasonably high level of the lake caused concern. Id. As a result, the superintendent of the Water Treatment Plant, James Donison, sought advice from Weston & Sampson in

December 2005. Id. Given the conditions of both the weather and the water supply, Weston & Sampson advised the City to deviate from the RMM and refrain from pumping water in January 2006. Id. The City heeded this advice. Id.

That same month, Weston & Sampson advised the City that it might be necessary to consider totally or partially removing the flashboards in the lake should the lake's elevation continue to rise. Id. City officials considered the advantages and disadvantages of removing the flashboards before deciding not to remove them. Id. at 681. In January 2006, the City sent advisory letters to all downstream property owners along Rattlesnake Brook advising them of the high lake level and the possibility that the lake would overflow the spillway into Rattlesnake Brook. See Obj. to Def's Mot. for Summ. J., Exh. 3, at 9.

From May 12 through May 16, 2006, New Hampshire received over eight inches of rain -- a record amount. Tarbell, 157 N.H. at 681. As a result of the excessive rainfall, the lake's water spilled over the emergency spillway and into Rattlesnake Brook. Id. For most of the day on May 14, 2006, the water flowed into Rattlesnake Brook without damaging the Property, but at approximately 7 p.m. the amount of water flowing through Rattlesnake Brook dramatically increased, bringing with it debris—including vegetation and rocks. Around that time, the brook and debris flowed onto the Property and into the apartment building, resulting in severe water damage.

On November 6, 2006, the plaintiff brought this action against the City, asserting five claims: (1) failure to construct a dam properly (Count I); (2) failure to maintain a drainage system properly (Count II); (3) failure to control/regulate water properly (Count III); (4) trespass (Count IV); and (5) nuisance (Count V). On November 13, 2007, the

Court granted defendant's motion for summary judgment on all counts, finding no genuine issue of material fact as to the City's discretionary function immunity. Tarbell, 157 N.H. at 682. The plaintiff appealed the Court's decision, and the New Hampshire Supreme Court affirmed as to Counts I and III, but reversed and remanded as to Counts II, IV, and V. Id. at 689. In affirming the Court's grant of summary judgment to the City on Counts I and III, the Supreme Court held that the City was entitled to discretionary function immunity for deciding: (1) not to do a controlled release of the lake's water; (2) not to remove the flashboards; and (3) to construct a dam in which Rattlesnake Brook was the lake's sole outlet. Id. at 685, 687.

Standard of Review

In deciding whether to grant summary judgment, the Court considers the pleadings, affidavits and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. Purdie v. Attorney General, 143 N.H. 661, 663 (1999). "Summary judgment may be granted only where no genuine issue of material fact is present, and the moving party is entitled to judgment as a matter of law." Id. (quotation and brackets omitted); see RSA 491:8-a, III (1997). An issue of fact is "material" if it affects the outcome of the litigation. Porter v. City of Manchester, 155 N.H. 149 (2007). To defeat summary judgment, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV.

Count II- Negligence in Maintaining Rattlesnake Brook

In Count II, the plaintiff alleges that the City negligently maintained Rattlesnake Brook by failing to clean out the debris that collected in the brook and culvert. The City argues that it is entitled to summary judgment on this claim because it had a plan or

policy in place regarding cleaning debris from the brook and culvert and, therefore, its actions under this plan or policy are entitled to discretionary function immunity. See Tarbell, 157 N.H. at 687 (observing, in dicta, that the City had not asserted and the Court did not find that the City had a plan or policy for maintaining the drainage systems and that, absent such a plan or policy, the City's alleged failure to maintain the draining systems did not qualify as a discretionary function entitled to immunity).

The parties have submitted conflicting affidavits on this issue. Viewing these affidavits and other evidence in the light most favorable to the plaintiff, the Court concludes that there is a genuine issue of material fact as to whether the City had a policy or plan for maintaining Rattlesnake Brook and its culvert. Accordingly, the Court declines to rule that the City is entitled to discretionary function immunity on Count II.

Alternatively, the City, in effect, moves to dismiss Count II because the plaintiff has failed to disclose, by the court-ordered deadline, its intent to present expert testimony to establish proximate causation, which the City argues is necessary for the plaintiff to meet its burden of proof. The plaintiff counters that expert testimony is unnecessary to establish proximate causation because the link between the City's alleged failure to clear the brook and culvert from debris and the damage to the Property is within the realm of common knowledge and experience. The plaintiff analogizes Rattlesnake Brook and its culvert to a bathtub, stating: "Everyone knows that water flows downhill. Everyone knows that if you do not keep your bathtub drain clean it will clog. Everyone knows that if the bathtub is full and the drain is clogged and the water is still running, then the tub will overflow." Obj. to Def's Mot. for Summ. J., 4.

Proximate cause involves both cause-in-fact and legal cause. Estate of Joshua T. v. State, 150 N.H. 405, 407 (2003). Cause-in-fact requires a plaintiff to establish that the damage would not have occurred without the negligent conduct. Id. Legal cause requires a plaintiff to establish that the negligent conduct was a substantial factor in bringing about the harm. Id. "Although the negligent conduct need not be the sole cause of the injury, to establish proximate cause a plaintiff must prove that the defendant's conduct caused or contributed to cause the harm." Id. at 408.

Expert testimony is required "where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." Lemay v. Burnett, 139 N.H. 633, 634 (1995) (quotation omitted). On the other hand, expert testimony is not required where the subject presented is within the realm of common knowledge and everyday experience. Silva v. Warden, N.H. State Prison, 150 N.H. 372, 374 (2003).

The Court is not persuaded by the plaintiff's argument that this matter can be analogized to an overflowing bathtub. Here, the event that originally elevated the lake's water level was the record amount of rain that fell over a four-day period in May 2006. To prevail, the plaintiff will have to establish that it was the City's alleged negligent failure to clean out the debris from the brook and culvert that was the cause-in-fact and legal cause of the damage to the Property, and not just the rainfall itself. An expert will be needed to help the court to assess how much damage would have occurred even if the City had cleared the brook and culvert of debris before the flood. An expert will also be needed to help the Court understand whether Rattlesnake Brook would have flooded, but for the debris that the City allegedly failed to clean out. Accordingly, the Court finds that

expert testimony would be required to establish that the City's alleged failure to clear out debris from the brook and culvert proximately caused the damage to the Property. Because the plaintiff has failed, by the court-ordered deadline, to disclose an expert, the plaintiff will be unable to prove that the defendant's alleged negligence proximately caused the damage to the Property. Therefore, Count II is DISMISSED. See Estate of Sicotte v. Lubin & Meyer, 157 N.H. 670, 675-76 (2008).

Count IV-Intentional Trespass

In Count IV, the plaintiff alleges that the flood of water and debris onto the Property constituted intentional trespass. In New Hampshire, a trespass is defined as "an intentional invasion of the property of another." Moulton v. Groveton Papers Co., 112 N.H. 50, 54 (1972). Accordingly, "an involuntary or accidental entry upon the land of another is not a trespass." White v. Suncook Mills, 91 N.H. 92, 98 (1940). To constitute an intentional tort, the tortfeasor must have known that his conduct was "substantially certain to result in injury." Thompson v. Forest, 136 N.H. 215, 219-20 (1992) (quotation omitted); see Restatement (Second) of Torts § 870, at 280 (1979). Mere knowledge and appreciation of risk is not sufficient to establish "substantial certainty." Thompson, 136 N.H. at 220.

The City argues that it is entitled to summary judgment on this claim because the plaintiff has failed to prove that: (1) the water and debris that invaded the Property originated from the City's property due to the City's acts or omissions; and (2) the invasion of the water and debris was intentional. The plaintiff asserts that the water and debris came from the lake, which belongs to the City, and that the invasion was intentional because the City knew that it was in a wet cycle and that damage would occur

if too much water flowed down Rattlesnake Brook, and yet "did nothing." Obj. to Def's Mot. for Summ. J., 8; Affidavit of Eaton W. Tarbell, Jr., at ¶ 13. The plaintiff argues that the City knew that an injury was substantially certain to result from its failure to act. See Thompson, 136 N.H. at 219-20 ("[I]f an actor knows that an injury is substantially certain to result from his act and he nevertheless completes the act, he is treated by the law as if he in fact desired to produce the injury.").

The Court observes that in light of the Supreme Court's ruling in this case, the only act or omission for which the City can be liable is its alleged failure to remove debris from Rattlesnake Brook and its culvert. See Tarbell, 157 N.H. at 685, 687. The Supreme Court has ruled that all of the other acts or omissions challenged by the plaintiff are entitled to discretionary function immunity. Id.

The Court finds that there is a genuine issue of material fact as to whether the water and debris that invaded the Property came from the City's property due to the City's failure to remove debris from the brook and culvert. The Court concludes, however, that the City is entitled to summary judgment on the plaintiff's trespass claim because the plaintiff has failed to show that the invasion of water and debris onto its property was intentional.

Viewing the evidence and all inferences in the light most favorable to the plaintiff, the Court finds that the plaintiff has failed to demonstrate that the City knew that its alleged failure to remove debris from Rattlesnake Brook and its culvert was "substantially certain" to cause water and debris to invade the Property. The only evidence in the record concerns the City's knowledge regarding the injury that could result from the City's decision not to do a controlled release of the lake's water or remove

the flashboards -- decisions for which the City is entitled to discretionary function immunity. See Tarbell, 157 N.H. at 685, 687. Absent evidence that the City knew that its alleged failure to remove debris from Rattlesnake Brook and its culvert was "substantially certain" to cause damage to the Property, the Court rules that the defendant is entitled to judgment as a matter of law. See Thompson, 136 N.H. at 219. Accordingly, the defendant's motion for summary judgment on Count IV is GRANTED.

Count V-Private Nuisance

In Count V, the plaintiff alleges that the City used its property in an unreasonable and unlawful manner. Once again, in light of the Supreme Court's ruling, the only act or omission at issue is the City's alleged failure to remove debris from Rattlesnake Brook and its culvert. See Tarbell, 157 N.H. at 685, 687.

"A nuisance arises from the use of property, either actively or passively, in an unreasonable manner." Shea v. City of Portsmouth, 98 N.H. 22, 27 (1953). A private nuisance exists when a defendant's unreasonable use of its property substantially and unreasonably interferes with the use and enjoyment of another's property. See Cook v. Sullivan, 149 N.H. 774, 780 (2003). To constitute a nuisance, the defendant's activities must cause harm that exceeds the customary interferences with land that a land user suffers in an organized society, and be an appreciable and tangible interference with a property interest. Id.

Viewing the evidence and all inferences from it in the light most favorable to the plaintiff, the Court concludes that the plaintiff has failed to prove that the City alleged failure to remove debris from the brook and culvert was unreasonable. Additionally, viewing the evidence and all inferences to be drawn from it in the light most favorable to

the plaintiff, the Court also finds that the plaintiff has failed to prove that the City's use of its property substantially and unreasonably interfered with the plaintiff's use of the Property. "The unreasonableness of an invasion of another's use and enjoyment of property "is determined from an objective point of view. The question is not whether the plaintiff . . . would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." Restatement (Second) of Torts, supra § 826, cmt. c. To establish that the City's use of its property has substantially and unreasonably interfered with the plaintiff's use and enjoyment of the Property, the plaintiff has relied upon the subjective opinion of one of its shareholders, Eaton W. Tarbell, Jr. Affidavit of Eaton W. Tarbell, Jr., at ¶ 16. Mr. Tarbell's subjective opinion that "the type of interference and damage [the Property] suffered is not the type of interference and damage that I would customarily suffer or expect to suffer," id., is insufficient, as a matter of law, to establish that the City's property use substantially and unreasonably interfered with the plaintiff's use and enjoyment of its property. Restatement (Second) of Torts, supra § 826, cmt. c

Because the plaintiff has failed to prove that the City's use of its property was unreasonable and that this use substantially and unreasonably interfered with the plaintiff's use and enjoyment of the Property, the City's request for summary judgment on Count V is GRANTED.

So ordered.

Aug. 20, 2009
Date

Carol Ann Conboy
Carol Ann Conboy, sitting by designation