

No. _____

In The
Supreme Court Of The United States

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EITAN SOBEL
Pro Se Petitioner

v.

THE CITY OF RUTLAND
Respondent

◆

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

◆

APPENDIX

◆

STATE OF VERMONT

SUPERIOR COURT SMALL CLAIMS
Rutland Unit

EITAN SOBEL
Plaintiff

v.

CITY OF RUTLAND
Defendant

ORDER

The above-entitled matter came on for hearing before the undersigned on July 31, 2017. Plaintiff, Eitan Sobel, was present in court and represented himself. Defendant was represented in court by Edward Adrian, Esq.

The issue before the court is: Is Plaintiff entitled to damages for Defendant's alleged negligent actions.

Based upon the filings and the credible evidence presented at trial, the court makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

Paintiff is the owner of an older home located on 55 Allen Street, Rutland, Vermont he purchased in 2008. Plaintiff is a physician employed by the Rutland Regional Medical Center located on Allen Street in Rutland. Plaintiff uses the property at 55 Allen Street as a rental unit and, generally, tries to find renters who are "travelers" for the hospital.

In April or May of 2016 Plaintiff had a problem with his house when the water meter "burst", given rise to water damages that necessitated his purchasing a new furnace. The house was not rented again until approximately November or December of 2016 when Plaintiff found a suitable tenant who was in residence on January 5, 2017. Tenant paid rent of \$850.00 a month.

On January 5, 2017 Plaintiffs tenant, Rosemary Gonzales, called Plaintiff to advise him that the basement had been flooded and there was an awful smell. Plaintiff immediately contacted the City of Rutland and members of the Rutland City Fire Department were dispatched to investigate. This was early in the morning before Plaintiff was scheduled to be on duty at the hospital at 11 a.m. It was determined that there had been a blockage in the main sewer line on Allen Street. Members of the Department of Public Works found the problem and flushed out the blockage. Plaintiffs pipes were the lowest and, therefore, the first to flood.

Plaintiff cleaned the basement to the best of his ability and incurred expenses he believes the City should be responsible for: four months of rent at \$660.00 a month when he was without a tenant = \$2,640.00; A-I Sewer bill = \$95.00 and \$392.45 - \$487.45; Plumber's bill = \$1,865.48; Home Depot bill \$98.83 and \$180.83 = \$279.66 for a total of \$5,272.59. Plaintiff is aware of the \$5,000.00 limit on small claims matters.

Jeffrey Wennburg, Commissioner of Public Works, testified credibly as to Rutland City's Policy as to maintenance and care of the City's sewer lines. Commissioner Wennburg is the Department Head for Public Works which

encompasses city streets, water, water treatment and waste water treatment and the infrastructure of the City of Rutland. Commissioner Wennberg has been in this position for the past four and a half years. There are approximately one-hundred miles of sewer lines within the City of Rutland.

Commissioner Wennberg testified credibly that the City does not perform routine inspections of sewer lines and that they only perform a once a year inspection of a line once a problem has occurred. He further testified that now that they have notice of the problem on Allen Street, this will be placed on their list for yearly routine maintenance.

CONCLUSIONS OF LAW AND ORDER

Plaintiff maintains Defendant was negligent in that they failed to routinely maintain the sewer line, and, due to this alleged negligence, Plaintiff has suffered damages. Defendant argues that they are immune to prosecution under the theory of municipal immunity and furthermore that the City of Rutland was not negligent and, therefore owes no damages to Plaintiff.

The City first argues that it is immune from liability under the discretionary function for acts essentially governmental in nature, unless that immunity is expressly waived. *Amy's Enterprises v. Sorrell*. 174 Vt. 623, 623 (2002) (citing *Denis Bail Bonds Inc. v. State* 159 Vt. 481, 484-85 (1993)). The common law doctrine of sovereign immunity has a long history in Vermont, protecting the State and municipalities from tort liability when the State or municipality performs a government function as opposed to a proprietary one. See *Graham v. Town of Duxbury*. 173 Vt. 498, 499

(2002). Maintaining water and sewer lines is a governmental function at both the State and municipal level and Plaintiff may not recover damages for negligence unless an exception to the immunity applies. Id. The City has an obligation to use reasonable diligence to maintain its sewer lines in a reasonable safe condition for the uses for which they were established. Here Plaintiff has failed to prove that the City has acted negligently in their maintenance of these lines and, therefore Plaintiffs claim is denied.

The court, however, will address the elements of negligence. To establish a cause of action for negligence, four elements must be proven:

1. The Defendant must owe a legal duty to conform to a certain standard Of conduct so as to protect the Plaintiff from an unreasonable risk of harm;
2. The Defendant must have committed a breach of this duty by failing to conform to the standard required;
3. The Defendant's conduct must be the proximate cause of the Plaintiffs injury; and
4. The Plaintiff must have suffered actual loss or damage. LANGLE V. KURKLE 146 Vt. 513, 517 (1986).

The first element the court will discuss is the duty owed. The court concludes that the City of Rutland owes a duty to its citizens and taxpayers to supply them with water and sewer facilities. There are over one hundred miles Of sewer lines within the City and these lines are very old and the City tries to

upgrade them to the best of their ability.

The second element of this negligence claim is whether or not the City breached this duty owed and, based upon the facts, this court cannot find that they have breached this duty. Commissioner Wennberg testified credibly that once they are made aware of a problem that they automatically place the street/area on an annual service for maintenance list. The City had no notice there had ever been a sewer backup at Plaintiffs property and, therefore, have no reason to annually maintain this area. As the court cannot find a breach of duty, the Plaintiffs claim fails.

Dated this 28th day of September 2017.

Hon. Jean H. Coloutti
Small Claims Judge

STATE OF VERMONT
SUPERIOR COURT CIVIL DIVISION
Rutland Unit Docket No. 527-10-17 Rdcv

Eitan Sobel,
Plaintiff
V.
City of Rutland, Vermont,
Defendant

DECISION ON APPEAL

This is an appeal from a judgment of the Small Claims Court. In the proceeding below, Plaintiff sought damages arising out Of flooding of his property due to a sewer backup. He alleged that Defendant negligently failed to maintain the sewer line. The trial court determined that Plaintiff had not met his burden of proving Defendant's negligence, and so granted judgment to Defendant.

Plaintiff s sole claim of error is that the trial court concluded the hearing and decided the case without affording him the opportunity to cross-examine Defendant's expert witness. While this is a fair critique, it is not reversible error. The record makes clear that the trial court gave Plaintiff a full opportunity to present his evidence and then to argue that evidence, before allowing Defendant to begin presenting its evidence. Plaintiffs evidence fell far short of what was required to establish a duty on the part of Defendant. Thus, the trial court could properly have granted judgment to Defendant pursuant to V.R.C.P. 52(c). Indeed, so complete was the failure of proof that it would have been reversible error for the trial court to have found that Plaintiff had established a duty. Mann v. Levin,

2004 VT 100, 17, 177 Vt. 261 (findings of fact will be upheld on appeal unless "there is no reasonable or credible evidence to support them").

On appeal, the court may affirm the trial court on any ground that fairly appears in the record below. See, e.g., *In re Handy*, 171 Vt. 336, 343 (2000) ("We will not reverse a lower court's decision if the record before us discloses any legal ground which would justify the result (citation omitted); *Buttolph v. Eriksson*, 160 Vt. 618, 619-20 (1993) ("Our rule is that we will affirm a ruling of a trial court upon any legal ground shown by the record") (quotation Omitted). Here, the total failure of Plaintiffs proof amply supports the trial court's decision. Thus, while it may have been error for the trial court to have concluded the hearing when and as it did, that error did not prejudice Plaintiff. Accordingly, the judgment is affirmed.

Electronically signed on March 15, 2018 at 12:27 PM pursuant to V.R.E.F. 7(d).

Samuel Hoar, Jr.
Superior Court Judge

STATE OF VERMONT
SUPERIOR COURT CIVIL DIVISION
Rutland Unit Docket No. 527-10-17 Rdcv
Sobel, Vs. City of Rutland VT

ENTRY REGARDING MOTION

Count 1, Appeal - Small Claims (527-10-17 Rdcv)

Title: Motion to Reconsider (Motion 2)
Motion to Reconsider (Motion 3)

Filer: Eitan Sobel

Attorney: Pro Se

Filed Date: March 20, 2018

No response filed

The motions are identical; both are DENIED. While the trial court erred in considering Mr. Wennberg's evidence without affording Plaintiff an opportunity to cross-examine, that error did not deny Plaintiffs right to a fair hearing. Plaintiff had ample opportunity to present his evidence; he completed that evidence and gave no indication of his intent to call Mr. Wennberg or anyone else as his witness. Thus, the trial court could properly have granted judgment at the close of Plaintiffs evidence, per Rule 52(c). Thus, notwithstanding the trial court's error, its judgment is amply supported on alternate grounds that appear on the face of the record below. Electronically signed on March 21, 2018 at 09:26 AM pursuant to V.R.E.F. 7(d).

Smanuel Hoar, Jr.

Superior Court Judge

Notifications:

Plaintiff Eitan Sobel

Edward G. Adrian (ERN 4428), Attorney for
Defendant City of Rutland, Vermont

ENTRY ORDER
SUPREME COURT DOCKET NO. 2018-114
APRIL TERM, 2018
VERMONT SUPREME COURT
FILED CLERK'S OFFICE
APR 18 2018

Eitan Sobel* v. City of Rutland
APPEALED FROM:
Superior Court, Rutland Unit
Civil Division
DOCKET NO. 527-10-17 Rdev

In the above-entitled cause, the Clerk will enter:

Plaintiffs motion for permission to appeal the above-captioned small claims action is denied. See 12 V.S.A. §5538 (providing that "[n]o appeal as of right exists to the Supreme Court" in small claims action); V.R.S.C.P. IO(e).

BY THE COURT:
Paul L. Reiber, Chief Justice
Marilyn S. Skoglundm, Associate Justice
Beth Robinson, Associate Justice
Harold E. Eaton, Associate Justice
Karen R. Carroll, Associate Justice