ALEXANDER G. PAPPAS, ESQ. (002512002)
RIVKIN RADLER LLP
21 Main Street, Suite 158
Court Plaza South – West Wing
Hackensack, NJ 07601
(201) 287-2460
Attorneys for Defendant
SUEZ Water New Jersey Inc. (f/k/a United Water New Jersey Inc. improperly identified in the Complaint as "Suez Environnement NA Inc.")

BARBARA CARUSO, Plaintiff, vs. CITY OF HACKENSACK, COUNTY OF BERGEN, STATE OF NEW JERSEY, COUNTY OF BERGEN HOUSING, HEALTH AND HUMAN SERVICES CENTER, SUEZ ENVIRONNEMENT NA INC., HOUSING AUTHORITY OF BERGEN COUNTY, JOHN DOE 1-10 (fictitiously named) and ABC Co., 1-10 (fictitiously named), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-521-15 CIVIL ACTION **ORDER**

THIS MATTER, having come before the Court upon the Motion of Rivkin Radler LLP, counsel for Defendant SUEZ Water New Jersey Inc. (formerly known as United Water New Jersey Inc.) hereinafter, "SWNJ" on notice to counsel for Plaintiff and the Court having reviewed the moving papers, and any opposition thereto, and having heard the arguments of counsel, if any, and for good cause having been shown;

IT IS ON THIS 20th day of January 20, 2017;

ORDERED that pursuant to R. 4:46-2 SUEZ's motion for summary judgment be granted and Plaintiff's Complaint be dismissed;

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within 7 days of receipt from the Court.

Christine Farrington

CHRISTINE A. FARRINGTON, J.S.C.

✓
____ Opposed

____Unopposed

For reasons set forth in the attached

3555894 v1

January 20, 2017
Re: Caruso v. City of Hackensack, et al.
Docket No. BER-L-521-15

These are motions for summary judgment pursuant to R. 4:46-2(c) filed on behalf of Suez Water New Jersey, Inc., the Housing Authority of Bergen County and Bergen County. This matter arises out of an alleged trip and fall at the County of Bergen Housing, Health and Human Services Center. Plaintiff, Barbara Caruso, has asserted allegations of negligence against the defendants County of Bergen, the Center, the Housing Authority of Bergen County, and SUEZ Water New Jersey Inc. ("SWNJ").

Plaintiff alleges she was lawfully on the premises, as a guest of the Center, a multipurpose facility that includes a homeless shelter, "traversing toward and onto the adjoining sidewalk," when she tripped and fell on a sub-ground vault housing SWNJ's water meter and water line for the Center, which she alleges is a dangerous condition, breaking her tibia. She asserts that the defendants were the owners and/or were in control of the operations of the premises, with responsibilities for its construction, remodeling, maintenance, repair, supervision, or upkeep. Plaintiff asserts that the defendants breached a duty owed to her, and were negligent in permitting the premises to exist in a "foreseeable hazardous and dangerous condition despite having notice of its existence." The Center

offers its guests temporary housing and social programs intended to help the guests find permanent residences and employment opportunities.

The Center is located at the corner of 120 South River Street and East Broadway in the City of Hackensack. The Center, and the surrounding grounds, are owned by the County. The Center grounds maintained by the Housing Authority and the County pursuant to a "Shared Services Agreement." At the time of her fall, plaintiff and another guest, John Secora, say they intended to walk from the Center to the corner of East Broadway and South River Street and cross to proceed to a bodega located on Hudson Street. They had been to the bodega at least once previously. Instead of accessing the sidewalk via the driveway, plaintiff and her companion, walked through the Center's parking lot, stepped over a curb, walked through a mulched area, passed through bushes, passed through two yellow hazard bollards, and stepped onto the concrete surface, which is the top of the vault housing the Center's water meter. The vault, located on the property of the County of Bergen, has two metal access doors in the corner of the concrete top which are level with the concrete and which can be locked by sliding a rod through the rebar handles over which plaintiff alleges she tripped. The concrete

surface is thirteen feet, five inches by eight feet, four inches. Two metal access doors are located in the corner of the concrete top at the vault. The doors are level with the concrete surface.

SWNJ is a privately-owned, regulated water utility company providing services to over 750,000 customers primarily in Bergen and Hudson Counties, NJ. SWNJ is regulated by the New Jersey Board of Public Utilities. The NJBPU is a regulatory agency with a statutory mandate to ensure safe, adequate, and proper utility services at reasonable rates for customers in New Jersey. See N.J.S.A. 48:2-25(a). SWNJ's obligations to its customers are set forth in its Tariff, which is approved by and filed with the NJBPU pursuant to N.J.A.C.14:3-1.3. Section 10 of the Tariff governs water meters. Section 10.2.(b) states:

> When the Company requires that meters shall be installed outside a building, the meter shall be placed in a convenient meter box or above-ground meter structure, often referred to as the meter housing. . . The meter housing shall be frost proof and either well drained or water tight and shall be provided with a strong cover fastened with a convenient locking device. The cover shall be kept clear of snow, ice, dirt or any other objects which might prevent easy access for reading, inspecting, testing, changing, and making necessary adjustments or repairs of the meter. This installation is subject to the approval of the Company. The cost of installing and maintaining the meter housing is the responsibility of the customer.

It is undisputed that SWNJ does not own, maintain, or control the vault, the inside service line, or the vault's doors. SWNJ owns only the water meter, which is located in the vault. It is further undisputed that the vault pre-dated the Center which it services. Richard Tecchio is the superintendent of production in the Haworth water treatment plant. (Tecchio Dep., 5:10-12). In his deposition, he testified that SUEZ' operations do not involve the installation of underground water vaults. (Tecchio Dep., 11:14-20.) He also testified that SUEZ does not own the vault depicted in P-1, nor does SUEZ own the contents of the vault. (Tecchio Dep., 11:21-12:2). Rather, they only own the meter. (Tecchio Dep., 12:2). Tecchio also testified that the owner makes the decision where the vault is placed. (Tecchio Dep., 17:8-18-9). He also testified that SUEZ does not contract with third parties to install the vault. (Tecchio Dep., 25:9-13). Tecchio also testified that SUEZ doesn't inspect the meter vaults. (Tecchio Dep., 22:18-23:1). In his deposition, Tecchio further testified that he has never seen that an access panel for a utility vault was marked or painted to make it more noticeable to pedestrians. (Tecchio Dep., 20:12-22:-3) He also testified that SWNJ never notified the County of Bergen that the vault access panels could pose a threat to pedestrians, nor that

SUEZ ever received any citations with regard to the vault or that it ever received the suggestion to build a fence around it. (Tecchio Dep., 36:23-38:2)

With regard to SWNJ, plaintiff must establish the utility had: (1) a duty of care by defendant towards plaintiff, (2) there was a breach of that duty, (3) causation, and (4) damages.

Since SWNJ did not own or control the vault, nor was it responsible for its maintenance, it cannot be held to have a duty to plaintiff. Plaintiff has further failed to show notice to SWNJ. It is well settled that where a utility has no actual or constructive notice of a defective utility it owns, controls or maintains there is no liability. Further, where no evidence exists that defendant's maintenance of its utilities fell short of generally accepted standards of care, the case should be dismissed. Fanning v. Montclair, 81 N.J. Super. 481, 482 (App.Div. 1963). Here SWNJ had neither ownership nor control and no notice of any alleged defect.

Plaintiff argues that SSWNJ failed to comply with the exact terms of its tariff. The court finds that the non-compliance, if any, is not germane to the issues of negligence, duty, or causation to this plaintiff.

Even were plaintiff asserting SWNJ was negligent in failing

to test or examine its water meter, plaintiff would have been required to prove SWNJ actions or inactions were related to some standard of care and feasibility. She has not done so.

In this matter, SWNJ did not receive any complaints concerning the concrete vault, or its doors prior to the alleged accident. The City, the County, and the Housing Authority's answers to interrogatories and deposition testimony reflect that they did not have notice of a defective condition.

Summary judgment is granted in favor of defendant, SUEZ Water New Jersey Inc.

Defendant Housing Authority which operates the center at which plaintiff was a guest moves for summary judgment on two grounds:

(1) plaintiff has failed to establish a "dangerous condition" of public property

(2) the Authority is entitled to immunity as to this claim.

The Bergen County Housing Authority is a body entitled to invoke the protections of the Tort Claims Act, N.J.S.A. 40A:12A-17. Ramapo Brae Condominium Association v. Bergen County Housing Authority, 328 N.J. Super. 561 (App. Div. 2000), aff'd o.b. 167 N.J. 155 (2001). The "Shared Services Agreement" between the Housing Authority and the County governs the maintenance of the

Center's premises. N.J.S.A. 59:4-2 provides:

> A public entity is liable for injury caused by a condition of its property if plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that either (a) a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition or (b) a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of it public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

Plaintiff has not established that the condition of which she complains was caused by an employee of the County or the Housing Authority in the course of their employment.

Movant argues that plaintiff's actions of using an area not intended for pedestrians establishes a lack of "due care" as a matter of law and therefore cannot be held to be a "dangerous condition". A "dangerous condition" does not exist simply because someone may be injured due to the presence of persons, or their activities taking place on public property. "If a public entity's property is dangerous only when used without due

care, the property is not in a 'dangerous condition.'" Garrison v. Township of Middletown, 154 N.J. 282, 287 (1988). In Garrison, a parking lot with an area of declivity was held not to be in a "dangerous condition" because it did not pose a "substantial risk" to normal lot users exercising "due care", though it allegedly caused a knee injury to the plaintiff when he tripped while playing in a football game held in the parking lot. Garrison, supra, 154 N.J. at 285, 293.

The Court explained that the "due care" part of the Tort Claims Act definition of "dangerous condition" means that an objective test is to be undertaken by a motion court as to whether it was reasonable for the activity in question to be undertaken.

In this case, plaintiff did not exercise due care. She chose to forge a shortcut through bushes, across a mulched area in a place where she admitted the lighting was poor, past yellow safety bollards to the area where she fell. Her decision to do so should not be made the responsibility of the Authority based on a claim that the landscaped area presented a "dangerous condition."

In Levin v. County of Salem, 133 N.J. 35, 44 (1993), a plaintiff was injured diving off a bridge into a nearby body of

water. As in this case, no fence was installed until after plaintiff's injury. The Court found that no "dangerous condition" existed with respect to the intended use of the property; the fact that an additional feature (the fence) might have prevented the injury did not establish that the premises, when built, were defective. Likewise, the courts have "consistently rejected the contention that dangerous activities of other persons on public property, even if reasonably foreseeable, establish a dangerous condition of the property itself." Burroughs v. City of Atlantic City, 234 N.J. Super. 208, 216 (App. Div. 1989). The Tort Claims Act recognizes that "as a public landowner (the entity) is not obliged to anticipate and protect against every conceivable dangerous activity by others. Rather (the entity) is entitled to assume that its property will be used with due care in a reasonably foreseeable manner." Daniel v. State, 239 N.J. Super. 563, 588 (App. Div. 1999). Lastly, when "it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not dangerous." Garrison at 290.

The fact that other persons may have at times decided to "cut through the bushes or landscaped area in questions does not

mean that such action by plaintiff can be deemed to be "with due care" for purposes of the Tort Claims Act.

The court finds the vault did not pose a dangerous condition and the failure of the County or the Authority to install a fence prior to the injury was not palpably unreasonable. "Palpably unreasonable conduct" is conduct that is patently unacceptable under any given circumstances. Kolitch v. Lindedahl, 100 N.J. 485 (1985). While the question of whether or not something was "palpably unreasonable" can be presented to the jury, the answer to this question may also be determined by a court on motion. Where the actions of a public entity clearly could not be found to be "palpably unreasonable" under the Brill standard, it is proper for the trial court to enter summary judgment. Farias v. Township of Westfield, 297 N.J. Super. 395, 404 (App. Div. 1997). Here, there has been no evidence of prior accidents involving people falling anywhere near this area in order to which would justify jury consideration of this issue. Schwartz v. Jordan, 337 N.J. Super. 550 (App. Div. 2001). In Schwartz, the court found that accidents at the incident location were relevant as to both "dangerous condition" notice and "palpably unreasonable" conduct, where municipal concern and attempts to rectify the condition were the direct result of such

accidents. No prior accidents or incidents were shown to have occurred at or near the landscaped area or the water meter cover plate which might support any claim that additional precautions were required prior to the accident. In Hawes v. New Jersey Department of Transportation, 232 N.J. Super. 160, 161 (Law Div. 1988), the administratrix of the estate of a trespasser who was struck and killed by a train while attempting to cross the train tracks brought suit against the department and the transit corporation. The court granted summary judgment in favor of the public entity defendants by holding that the railroad track themselves were not in a dangerous condition merely because the state department of transportation failed to erect fences or take other steps to prevent pedestrians from crossing the tracks. Id. at 164.

The court further finds the Authority is entitled to the plan and design immunity of the TCA with respect to any contention that its premises should have been constructed in a different manner. The plan and design immunity as set forth in the Tort Claims Act is intended to be perpetual. Once it attaches, no subsequent event or change of conditions shall render a public entity liable on the theory that the initial plan or design constitutes a dangerous condition. Comment to

N.J.S.A. 59:4-6. N.J.S.A. 59:4-6 provides:

> Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. See also Levin v. County of Salem, 133 N.J. 35, 46 (1993). The immunity is not lost if later knowledge or opinion indicates that the entity's design or plan may have been dangerous, or if later circumstances render the initial plan and structure dangerous. Russo Farms v. Board of Education, 144 N.J. 84, 111 (1996) (the immunity applies to allegations concerning liability based upon a failure to improve.)

The premises on which the Housing Authority operates were inspected and approved by the City of Hackensack years before the incident in which Caruso fell. The Board of Chosen Freeholders approved the design. Plaintiff argues that the plans she subpoenaed from the City of Hackensack are not signed by the architect. In light of the other evidence of approvals received by the project and the fact that the plans were signed by an engineer does not permit plaintiff to vault the Tort Claims bar.

Summary judgment is granted in favor of the Housing Authority of Bergen County.

The County of Bergen also moves for summary judgment. The County is also immune from liability under the provisions of the Tort Claims Act. The County provided site plan approval for the shelter, which is the site of plaintiff's accident. The plans delineate approval of the plan by the public entity via signature of the hired RSC Architects as the planners/architects for design of the homeless shelter. A review of the plans clearly shows that the water utility vault pre-existed and was part of the approved plans of the building of the homeless shelter. The Board of Chosen Freeholders approved the plans submitted by the RSC Architects. Accordingly, the location of the subject water utility vault in the grassy area between the sidewalk and the parking lot of the homeless shelter was a design feature approved by the governing body and therefore, subject to the design immunity of the Tort Claims Act. As such, summary judgment must be granted in favor of the County of Bergen.

The record is devoid of any proof that the County ever received actual or constructive notice of the dangerous condition, which allegedly caused plaintiff's injuries. The County's records indicate that there were no prior accidents from October 1, 2009 until August of 2013. In addition,

plaintiff herself testified that she had never seen anyone fall in the area of her accident prior to her fall. She had lived there for approximately one month prior to the accident and had never seen anyone fall over the vault.

Constructive notice is defined in N.J.S.A. 59:4-3(b):

> A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection (b) of section 59:4-2, only if the plaintiff establishes that the condition has existed for such a period of time and was such an obvious nature that the public entity in the exercise of due care should have discovered the condition and its dangerous character.

Plaintiff has failed to demonstrate that the condition existed for a sufficient period of time prior to the accident and that the condition was of such an obvious nature to warrant action on behalf of the County of Bergen. As such, there is no constructive knowledge. Likewise there is no palpably unreasonable conduct.

Summary judgment is granted in favor of the County of Bergen.