

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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X/kmg

_____AD3d_____

Argued - October 14, 2008

ROBERT A. LIFSON, J.P.
FRED T. SANTUCCI
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2007-09445
2008-00205

DECISION & ORDER

Peter Fusco, et al., respondents,
v State Farm Fire and Casualty Company,
a/k/a State Farm Insurance Company, appellant.

(Index No. 9547/04)

Purcell & Ingrao, P.C., Mineola, N.Y. (Lynn A. Ingrao of counsel), for appellant.

Robinson & Associates, P.C., Syosset, N.Y. (Kenneth L. Robinson of counsel), for respondents.

In an action, inter alia, to recover damages for injury to real property pursuant to Navigation Law § 181(1), the defendant appeals from (1) a judgment of the Supreme Court, Nassau County (Winslow, J.), entered August 29, 2007, which, upon a jury verdict and upon the denial of its motion, in effect, pursuant to CPLR § 4401 for judgment as a matter of law, made at the close of evidence, is in favor of the plaintiffs and against it in the principal sum of \$225,000, and (2) a supplemental judgment of the same court entered November 28, 2007, awarding the plaintiffs an additional principal sum of \$61,603.80 for attorney's fees, expert fees, costs and disbursements.

ORDERED that the judgment and the supplemental judgment are reversed, on the law, with costs, the defendant's motion, in effect, pursuant to CPLR 4401 for judgment as a matter of law is granted, and the complaint is dismissed.

December 30, 2008

Page 1.

FUSCO v STATE FARM FIRE AND CASUALTY COMPANY,
a/k/a STATE FARM INSURANCE COMPANY

In the summer of 2003, the plaintiffs noticed a stain on the liner to the swimming pool on their property. The plaintiffs had soil tests performed and discovered that the stain was caused by an oil discharge from their neighbor's pool heater. The neighbor contacted its insurance carrier, the defendant, State Farm Fire and Casualty Company, a/k/a State Farm Insurance Company, which also carried the plaintiff's homeowner's insurance.

The defendant paid for the full remediation of the oil spill, including removing and replacing the soil, excavating the plaintiffs' backyard, replacing the plaintiffs' pool, shrubs, driveway, fencing, and landscaping, and purchasing beach club membership for them. In addition, an aquifer was installed on the property to monitor the ground water.

The monitoring wells remained on the plaintiffs' property for two years, and by November 16, 2006, the New York State Department of Environmental Conservation issued a "No Further Action Letter" determining that the necessary clean-up and removal actions for the site had been completed, and the monitoring wells were removed.

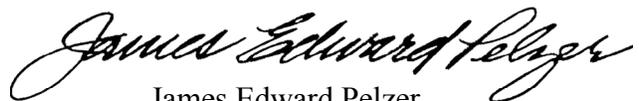
At trial, the plaintiffs contended that the value of their property was diminished due to the stigma of the oil leak. They presented evidence from a real estate appraiser purporting to establish that the stigma, as an indirect consequence of the spill, was a further measure of the damages suffered. The plaintiffs' appraiser, however, did not provide evidence of sales of properties that had oil leaks compared to properties that did not, rendering her opinion of diminution of value due to stigma highly speculative and conclusory (*see Hodge v Losquandro Fuel Corp*, 29 AD3d 861; *Putnam v State of New York*, 223 AD2d 872). The evidence at trial demonstrated that the plaintiffs had been made whole for their losses and that no permanent damages were sustained.

Contrary to the plaintiffs' contention, even viewing the facts in the light most favorable to the plaintiffs, there is no valid line of reasoning and permissible inferences which could lead rational persons to the conclusions reached by the jury upon the evidence presented at trial, which did not establish, prima facie, that any diminution of value of the property remained after the completion of the remediation (*see Antigua v City of New York*, 52 AD3d 751). Accordingly, the defendant's motion, in effect, pursuant to CPLR 4401 for judgment as a matter of law should have been granted and the complaint dismissed.

In view of the foregoing, there is no basis for the award of attorney's fees, expert fees, costs, and disbursements.

LIFSON, J.P., SANTUCCI, BALKIN and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court