

**Ryan v IM Kapco, Inc.**

2009 NY Slip Op 33216(U)

September 30, 2009

Supreme Court, Nassau County

Docket Number: 13522/06

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

EDWARD RYAN and MARGUERITE RYAN,  
Plaintiffs,

TRIAL / IAS PART 31  
NASSAU COUNTY

Index No. 13522/06

- against -

TRIAL

IM KAPCO, INC. and JIM O'BOYLE,  
Defendants.

This is action where the plaintiffs assert on September 2, 2005, the defendants failed to properly conduct a home inspection of 60 Hemlock Lane, Massapequa Park, New York, in particular the defendants failed to detect the roof rafters and master bedroom ceiling joints were undersized, and the premises were structurally unsound. The plaintiffs aver the subject premises underwent extensive remodeling, and they were concerned about its structural integrity, and they wanted a professional engineer to conduct the inspect of the subject premises to alert them to any structural issues. The plaintiffs maintain the defendant IM Kapco, Inc., doing business as HouseMaster of Long Island, a company specializing in home inspections, and the company represented to them their most experienced professional engineer do the inspection, and alert them to any structural issues. The plaintiffs state that person came to the subject premises, and just prior to beginning the inspection, they asked him to pay particular attention to the

structural issues, and he reassured them he would alert them to any structural issues. The plaintiffs assert the defendants owe the plaintiffs a duty of care, and the defendants breached that duty, and are grossly negligent by stating the roof rafters and master bedroom ceiling joints was satisfactory, and the premises were structurally sound. The plaintiffs claim they are damaged in the approximate amount of \$750,000.00. The defendants contend the plaintiffs signed numerous documents regarding the home inspection process, and the defendants did not perform an engineering analysis assessing the structural soundness of the premises, so the plaintiff's only recovery is limited to the \$700.00 cost of the inspection unless the plaintiffs can prove gross negligence. The Court conducted a nonjury trial of the matter.

#### FACT FINDINGS

The plaintiffs reside at 60 Hemlock Lane, Massapequa Park, New York which they purchased on November 1, 2005. The plaintiffs contacted IM Kapco, Inc., doing business as HouseMaster of Long Island when they anticipated entering into a contract for the purchase of 60 Hemlock Lane. The plaintiffs hired HouseMaster to inspect the subject premises. On September 2, 2005, Jim O'Boyle met the plaintiffs at 60 Hemlock Lane, they engaged in conversation, and O'Boyle inspected the premises, including the attic and the master bedroom. At the end of the inspection, O'Boyle provided the plaintiffs with a HouseMaster of Long Island report which stated, in part, the roof framing was satisfactory, and the subject premises were in satisfactory condition. The plaintiffs and

O'Boyle had a conversation about O'Boyle's assessment. On or about September 19, 2005, the plaintiffs entered into a contract of sale for the property, and subsequently purchased it.

The records of the Village of Massapequa Park rafters at 60 Hemlock Lane were installed in 1963. The Village of Massapequa Park inspected and approved those rafters.

The plaintiffs moved into the subject premises on January 2, 2006, and on the following day contacted another engineer to inspect the subject premises. On January 5, 2006, that engineer issued a one page report stating there was a slight problem with the roof rafters, and recommended putting in a knee wall at an approximate cost of \$500.00. On January 9, 2006, the plaintiffs retained another professional after the plaintiff wife found a sloping floor in a bedroom. That latter professional performed an inspection, and found the attic rafters were undersized, and recommended additional support for the roof, but did not state it was a major structural problem. This professional recommended the plaintiffs have "as built" plans drawn up which involve extensive engineering analysis beyond a home inspection.

### LEGAL CONCLUSIONS

Real Property Law § 444-b (5) provides:

"Home inspection" means the process by which a home inspector observes and provides a written report of the systems and components of a residential building including but not limited to heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior and interior components or any other related residential building component as recommended by the home

inspection council and implemented by the department through regulation to provide a client with objective information about the condition of the residential building. The home inspector shall clearly identify in the written report which systems and components of the residential building were observed. A home inspection shall not include an inspection for radon or pests.

Real Property Law § 444-b (4) provides: "Home inspector" means a person licensed as a home inspector pursuant to the provisions of this article." Real Property Law § 444-g (1) provides: "Every home inspector shall comply with the provisions of this article, and the rules, regulations and standards adopted pursuant thereto. The duty of every home inspector shall be to the client."

Real Property Law § 444-g (3) provides:

No later than five business days after the completion of a home inspection on behalf of a client, each home inspector shall provide such client with a written report of the findings of such inspection. The home inspection shall clearly identify in the written report which systems and components of the residential building were observed. Every such written report and the information contained therein shall be deemed confidential and shall not be disclosed without the express consent of the client; provided, however, that department representatives, conducting an investigation or other official business for the purpose of enforcing this article, shall have access to such reports and the information contained therein.

The plaintiffs executed a home inspection order and agreement. Under paragraph 1 of it, the agreement provides, in pertinent part:

The Inspection and Report are limited to specified visible and readily accessible Elements of the Dwelling at the time of the Inspection. The Inspection will not be invasive or technically exhaustive, and cannot detect latent or concealed defects, such as soil problems, drain-line blockage, or structural damage and other conditions that might exist within walls, ceilings, floors, or in other hidden, obstructed or inaccessible areas.

The evidence shows the plaintiffs spent \$15,000.00, two months having renovations done in the subject premises, and hired an architect, who went to the attic, but never told the plaintiffs about the undersized rafters.

The Second Department holds:

A clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy (*see Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821 [1993]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 553 [1992]; *Schietinger v Tauscher Cronacher Professional Engrs., P.C.*, 40 AD3d 954, 955 [2007]; *Canto v Ameri Spec Home Inspection Serv.*, 8 Misc 3d 130[A], 2005 NY Slip Op 51037[U] [2005]), none of which were demonstrated here

*Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 A.D.3d 809, 810-811, 862 N.Y.S.2d 513 [2<sup>nd</sup> Dept., 2008].

The Court of Appeals holds:

New York law generally enforces contractual provisions absolving a party from its own negligence (*Sommer v Federal Signal Corp.*, 79 NY2d, at 553, *supra*; *see, Melodee Lane Lingerie Co. v American Dist. Tel. Co.*, 18 NY2d 57, 69; *Ciofalo v Vic Tanney Gyms*, 10 NY2d 294, 297-298). Public policy, however, forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by "grossly negligent conduct" (*Sommer v Federal Signal Corp.*, 79 NY2d, at 554, *supra*). Used in this context, "gross negligence" differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing (*Sommer v Federal Signal Corp.*, 79 NY2d, at 554, *supra*).

*Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823-824, 595 N.Y.S.2d 381 [1993].

The Second Department holds, where there is no proof of grossly negligent conduct, the defendants' liability is limited to the cost of the inspection report (*see Clement v. Delaney Realty Corp.*, 45 A.D.3d 519, 845 N.Y.S.2d 423 [2<sup>nd</sup> Dept., 2007]). Here, the Court finds

the evidence shows the alleged failure to properly conduct the inspection of 60 Hemlock Lane, Massapequa Park, New York does not rise to the level of gross negligence (*see Clement v Delaney Realty Corp., supra*);

Accordingly, the provision limiting the defendants' liability is enforceable. This decision shall constitute the order and judgment of the Court.

So ordered.

Dated: September 30, 2009

ENTER:



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J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

**ENTERED**  
FEB 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE