

**Hamlet at Willow Creek Development Co. LLC v  
Northeast Land Development Corp.**

2006 NY Slip Op 30546(U)

January 27, 2006

Supreme Court, Nassau County

Docket Number: 007536/2005

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

TRIAL/IAS PART 14

THE HAMLET AT WILLOW CREEK DEVELOPMENT  
CO. LLC, MT. SINAI ASSOCIATES LLC and THE  
HOLIDAY ORGANIZATION, INC.,

Plaintiffs,

INDEX NO.: 007536/2005  
MOTION DATE: 11/23/2005  
MOTION SEQUENCE: 001  
and 002

-against-

NORTHEAST LAND DEVELOPMENT CORPORATION,  
PAV-CO ASPHALT INC., CARL ZORN, WILLIAM  
FEHR and FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND.

Defendants.

The following papers read on this motion:

Notice of Motion to Dismiss Complaint, Affirmation and Annexed Exhibits .....	1
Memorandum of Law in Support of Motion to Dismiss and Appendix "A" .....	2
Notice of Cross-Motion, Affirmation, Affidavit and Annexed Exhibits .....	3
Plaintiff's Memorandum of Law in Support of Cross-Motion for Partial Summary Judgment ..	4
Affirmation in Opposition to the Plaintiff's Motion for Summary Judgment .....	5
Reply Affirmation in Support of Plaintiff's Cross-Motion for Partial Summary Judgment .....	6
Plaintiffs' Reply Memorandum of Law in Support of Cross-Motion .....	7
Statement of Facts Pursuant to Rule 19-a .....	8
Statement of Facts in Opposition to the Plaintiffs' Rule 19-a Statement of Facts .....	9

Defendants Pav-Co, William Fehr and Fidelity and Deposit Company of Maryland have moved to dismiss plaintiffs' complaint pursuant to CPLR § 3221 (a)(1),(5), and (7) sic. Plaintiff's have cross-moved seeking conversion of defendant's motion to dismiss to a motion for

partial summary judgment pursuant to CPLR §§ 3211 (c) and 3212 for an order: in favor of plaintiffs for the sum of \$1,040,000 representing previously paid Environmental Fund fees; adjudging all defendants liable for the payment of all additional Environmental Fund fees determined to be due to the Town of Brookhaven; adjudging all defendants liable for any and all restoration costs, environmental penalties and other fees and expenses which may be incurred by The Hamlet; and for costs and disbursements. These motions are determined as follows.

Plaintiffs brought this action for breach of an excavation agreement relative to the development of real property seeking compensatory damages in the amount of \$10 million and punitive damages in the amount of \$20 million. Plaintiffs also pleads claims for conversion, unjust enrichment, and fraud. The final cause of action is for equitable subrogation.

Plaintiffs The Hamlet at Willow Creek Development Co., LLC (hereinafter "the Hamlet") and Mt. Sinai Associates, LLC (hereinafter "Mt. Sinai Associates") are the owner-developers of the Hamlet at Willowcreek Development (hereinafter the "Development"), a 177-unit residential subdivision and 18-hole golf course located in Mt. Sinai, Town of Brookhaven, New York. Pursuant to various resolution and approvals under the State Environmental Quality Review Act (SEQRA), the Brookhaven Planning Board, and other departments of the Town of Brookhaven, plaintiffs were authorized to remove approximately 1,650,000 cubic yards of excess fill from the development site.

On July 1, 2002, The Hamlet, on its own behalf and on behalf of Mt. Sinai Associates, entered into an agreement (the "Excavation Agreement") with defendant Northeast Land Development ("Northeast") for Northeast to perform all excavation, drainage and sewer related work in connection with the construction of the Development in accordance with the final engineering plan prepared by Sidney B. Browne & Sons dated December 2, 2001 (amended May 13, 2002), and in accordance with the terms of all of the SEQRA and zoning approvals issued by the Town of Brookhaven.

Northeast thereafter, plaintiffs allege and defendants do not deny, entered into a joint venture or partnership with defendant Pav-Co Asphalt Inc. ("Pav-Co") to perform and carry out the terms of the Excavation Agreement, which provides in pertinent part that:

- The contractor shall ... work pursuant to the final engineering plan prepared by Sidney B. Bowne & Sons....
- The Contractor is responsible for hauling away all excess material pursuant to the approved plan and as identified by Developer's engineer, estimated at 1.665 million cubic yards.
- The Contractor is responsible for paying any municipal fee (i.e., The Town of Brookhaven Joseph Macchia Environmental Preservation Capital Reserve Fund) directly to the Town and holds the Developer harmless from any fee responsibility for taking material off site. The fee is to be paid pursuant to Town of Brookhaven requirements.
- The Contractor shall not over excavate any area....
- All work is subject to inspection and written approval by municipal inspectors of the County of Suffolk and the town of Brookhaven.

Town officials calculated that an estimated sum of \$1,600,000 in removal fees would be due in connection with the development and required The Hamlet to provide a bond in the amount of \$1,665,000 pursuant to Section 53-5 of the Town of Brookhaven Joseph Macchia Environmental Preservation Capital Reserve Fund Law (hereinafter the "Environmental Fund"). Defendants Northeast and Pav-Co, as principals obtained and executed a "Performance Bond" in that amount with defendant Fidelity and Deposit Company of Maryland, as surety in favor of the Town of Brookhaven dated March 17, 2003. Defendants William Fehr, principal of Pav-Co, also provided his personal undertaking ("Personal Bond") to the Town of Brookhaven in the sum of \$1,500,000 as additional security for the payment of the Environmental Fund fees.

Plaintiffs claim that defendants materially breached the Excavation Agreement by over-excavating the construction site by some 300,000 to possibly 500,000 cubic yards of earth and refilling the area with uncompacted fill. In addition, plaintiffs allege that Northeast and Pav-Co have failed to pay the Environmental Fund fees in violation of the Excavation Agreement. On or about April 20, 2005 the Town of Brookhaven issued a stop work order. The Hamlet eventually paid the sum of \$ 740,000 to the Town on account of the environmental fees in order to continue work on the Development although, pursuant to the Excavation Agreement, it was the obligation of Northeast and Pav-Co. The Town has also charged additional environmental fees in the

amount of \$500,000 (\$250,000 of which has been paid into escrow by the Hamlet) plus penalties.

In addition, plaintiffs allege that defendants converted the alleged wrongfully removed excess fill and sold it to third parties thereby making a sizable profit, estimated by plaintiffs to be \$5,000,000 by reason of which defendants have been unjustly enriched.

As a procedural note, defendants purport to move under §§ 3221 (a)(1),(5) and (7) of the CPLR, however, it is clear from the argument and the fact that no such sections exists, a motion to dismiss pursuant to §§ 3211 (a)(1), (5) and (7) is intended.

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). The complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations accepted as true. Lo Pinto v. J.W. Mays, Inc., 170 A.D.2d 582 (2<sup>nd</sup> Dept. 1991).

Plaintiffs' breach of contract claim has been sufficiently plead however, movants allege that because Pav-Co and Fehr were never signatories to the Excavation Agreement there is no privity of contract. Majestic Mfg. Corp. v. L. Riso & Sons Bldg. Co., 27 N.Y.S.2d 845 (S. Ct. Queens County, 1940) aff'd 261 A.D. 1099 (1941).

New York law does not permit economic recovery absent privity of contract or "either a relationship of contractual privity . . . or a relationship sufficiently intimate to be equated with privity." Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 543 (1985); Securities Investor Protection Corp. v. BDO Seidman, LLP, 95 N.Y.2d 702 (2001). Such relationship may be evidenced by the knowledge and intent of the agent that its work product will be relied upon by the third party. White v. Guarente, 43 N.Y.2d 356 (1977).

Clearly, defendants Pav-Co and Fehr intended their joint venture with Northeast to benefit plaintiffs as evidenced by their execution of the Performance and Personal Bonds to perform the exact work which was called for in the Excavation Agreement between Northeast and The Hamlet. In New York v. Kalisch-Jarcho, Inc., 161 A.D.2d 252, 253 (1<sup>st</sup> Dept. 1990), the court held : "It is almost inconceivable that those professional engineers or architects who render their services in connection with a major construction contract would not contemplate that the

performance of their contractual obligations would ultimately benefit the owner of that development." As such plaintiffs have standing to bring this breach of contract action and the claim against movants stands.

In addition, Pav-Co and Northeast are joint venturers and are responsible for each other's conduct when acting within the scope of the joint venture. "As agents for each other, partners and joint venturers are jointly and severally liable to third parties for 'any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership'." Gramercy Equities Corp. v. Dumont, 72 N.Y.2d 560, 565 (1988); Partnership Law §§ 24 and 26.

Moreover, Pav-Co and Northeast's oral joint venture to perform the Excavation Contract does not bar plaintiff's breach of contract claim by placing it within the constraints of the Statute of Frauds. The express language of Section 1.2 of the Excavation Agreement requires the removal of the fill to be completed "as soon as practically possible... but no later than 18 months." This is sufficient to place the agreement outside of the scope of the Statute of Frauds because by its own terms it is capable of being performed within one year. Mann v. Helmsley-Spear, Inc., 177 A.D.2d 147 (1<sup>st</sup> Dept. 1992); General Obligations Law §5-701(a)(1). Furthermore, whether Pav-Co and Northeast's agreement could be performed within a year bears only on whether or not it can be enforced prospectively. Unicorn Enters. v. Stonewall Contr. Corp., 232 A.D.2d 404 (2d Dept. 1996). Where there has been part performance of a joint venture, the effect of the statute of frauds is to convert the relationship into a partnership at will (Williams v. Lynch, 245 A.D.2d 715 (3d. Dept. 1997)) and does not absolve Pav-Co of any alleged negligence or breach.

Turning to plaintiffs' conversion claim. Defendants argue that plaintiff's conversion claim is duplicative of its breach of contract claim and therefore cannot stand. Meese v. Miller, 79 A.D.2d 237, 244 (4<sup>th</sup> Dept. 1981). "Conversion is any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property." AMF, Inc. v. Algo Distributors, Ltd., 48 A.D.2d 352 (2d Dept. 1975); Independence Discount Corp. v. Bressner, 47 A.D.2d 756 (2d Dept. 1975). Defendants argue that plaintiff's conversion claim is duplicative of its breach of contract claim and therefore cannot stand. Meese v. Miller, 79 A.D.2d 237, 244 (4<sup>th</sup>

Dept. 1981). However, plaintiffs have alleged the necessary elements of a conversion claim: that defendants intentionally interfered with plaintiffs' property rights over the fill by failing to put it to its intended use. Id. More specifically by over-excavating the premises, failing to replace the necessary amounts of the removed fill, and selling it to third parties. This claim is independent of the breach of contract claim and therefore the conversion cause of action remains.

As for plaintiffs' fraud allegation, where a fraud claim directly relates to the breach of contract claim, there is no independent basis for a separate fraud cause of action. Giannisis v. Maniatis, 160 A.D.2d 629 (1<sup>st</sup> Dept. 1990) citing Miller v. Volk & Huxley, Inc., 44 A.D.2d 810 (1<sup>st</sup> Dept. 1974); Brumbach v. Rensselaer Polytechnic Institute, 126 A.D.2d 841, 843 (3d Dept. 1987). Plaintiffs allege that defendants Zorn and Fehr knowingly and falsely represented to Town of Brookhaven officials that no over-excavating or over-cutting had taken place. These statements were made in a meeting at which representatives of the Hamlet were present. In reliance on those statements, the Town resumed the processing of inspections and issuance of certain certificates which had been ceased. In addition, the Town allowed work on the Development to proceed and required The Hamlet to enter a written Interim Stipulation dated September 15, 2004 (The Hamlet at Willow Creek Development Co. LLC, et ano v. The Town of Brookhaven, et al (Suffolk County Clerk's Index No. 04-20639)) consenting to costly inspection and testing procedures necessary to confirm the lawfulness of the excavation. These circumstances are all part and parcel of the underlying breach of contract claim. Accordingly, the fraud claim is dismissed.

Finally, plaintiffs allege that by paying Northeast and Pav-Co's obligation to the Town of Brookhaven, they became equitably subrogated to the Town's rights for payment under the Performance Bond and Personal Bond.

Subrogation recognizes a right of recovery where 'one party pays a debt for which another is primarily answerable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made either under compulsion or for the protection of some interest of the party making the payment, and in discharge of an existing liability.' Medical Malpractice Ins. Asso. v. Medical Liability Mut. Ins. Co., 86 A.D.2d 476, 480 (1<sup>st</sup> Dept. 1982).

Plaintiffs have alleged and provided documentary evidence that the payment of the

Environmental Fund fees was Northeast and Pav-Co's responsibility. Movants have not denied this. Furthermore, plaintiffs plead that they were compelled to pay the fees in order to have the stop work order lifted and prevent further economic loss on the project. As such, the claim for equitable subrogation stands.

As for plaintiffs' cross-motion for partial summary judgment. It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact. Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 A.D.2d 880 (2<sup>nd</sup> Dept. 1994) *citing* Winegrad v. New York Univ. Medical Center., 64 N.Y.2d 851 (1985). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgement to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1985). "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. CLS CPLR § 3212(b).

Movants have made out a prima facie showing that, according to the terms of the Excavation Agreement, it was Northeast's obligation to pay all fees incurred in connection with the excavation to the Town of Brookhaven. Defendants Pav-Co and William Fehr's undertaking to secure performance of the excavation further proves the existence of a joint venture between Northeast and Pav-Co to execute performance of the Excavation Agreement and, more importantly, Pav-Co and Fehr's obligation to pay the Environmental Fund fees as well. Defendants have raised no triable issues of fact. That defendants Northeast and Carl Zorn debate the accuracy of the methods used by the Town to calculate how much excavation actually took place is of no import at present. The fact of the matter is that defendants agreed to be bound by the Town's calculations and to pay the fees. In addition, plaintiffs have provided documentary evidence that they paid the sum of \$740,000 to the Town of Brookhaven (Check No. 9174537416) and placed the sum of \$250,000 into an escrow account (Account No. 4024037089) for the benefit of the Town. As such plaintiffs are entitled to the return of these monies.

It is hereby ORDERED that partial summary judgment is granted in favor of plaintiffs

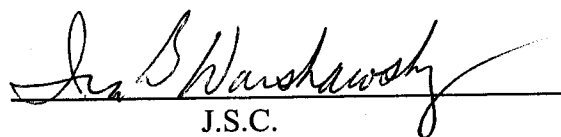
against defendants in the amount of \$ 990,000. It is also

ORDERED that the claim is severed to the extent that plaintiffs seeks further money thereby allowing plaintiff to proceed to trial on those remaining claims. It is also

ORDERED that defendants are adjudged liable for the payment of all additional Environmental Fund fees determined to be due to the Town of Brookhaven.

The remainder of plaintiffs' cross-motion is dismissed without prejudice.

Dated: January 27, 2006

  
J.S.C.

**ENTERED**

FEB 01 2006

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**