

**Bay St. Landing Home Owners Assoc., Inc.  
v PDR Bay St./St. George, LLC**

2007 NY Slip Op 30931(U)

April 24, 2007

Supreme Court, Richmond County

Docket Number: 0102089/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 102089/05  
Motion Nos.: 1 & 2**

**BAY STREET LANDING HOME OWNERS  
ASSOCIATION, INC.,**

*Plaintiff*

*against*

**DECISION & ORDER**

**PDR BAY STREET/ST. GEORGE, LLC,  
PHILIP RESSA and  
ESTATES AT BAY STREET LANDING LLC,**

**HON. JOSEPH J. MALTESE**

*Defendants*

**PHILIP RESSA,**

*Defendant/Third Party Plaintiff,*

*against*

**DOMINICK MARINO,  
LEIB PURETZ and TOVIA MERMELSTEIN,**

*Third Party Defendant.*

The following items were considered in the review of these motions for summary judgment

**Papers  
Notice of Motion and Affidavits Annexed  
Exhibits**

**Numbered  
1, 2  
Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 1 the plaintiff, Bay Street Landing Home Owners Association, Inc. (hereinafter “HOA”), seeks summary judgment in the amount of \$300,000 plus interest against the defendant, PDR Bay Street/St. George, LLC (hereinafter “PDR”), the former owners of 130 Bay Street Landing, Staten Island, New York (hereinafter “Premises”), Philip Ressa (hereinafter “Ressa”), a principal in PDR, and Estates at Bay Street Landing, LLC (hereinafter “Estates”), who purchased the premises from PDR. The plaintiff also seeks to dismiss the defendants counterclaims asserted against the HOA.

Defendant, Philip Ressa, a former principal in PDR and a guarantor on the Promenade Fund for the benefit of the HOA, as a third party plaintiff, sued Dominick Marino, another former principal in PDR and a co-guarantor under the Promenade Fund Agreement, along with Leib Poretz and Tovia Mermelstein, who are the principals in defendant Estates, as third party defendants.

In motion number 2, the third party defendants, Poretz and Mermelstein, cross moved for summary judgment in favor of the defendant, Estates, alleging that the Promenade Fund Agreement is not a “covenant running with the land” and is not valid in that it does not “touch or concern the land,” and/or that the plaintiff did not intend the obligation to pay a sum of money to be a covenant, but rather as a personal obligation of the defendants, PDR, Ressa and Marino, who should reimburse the plaintiff for the \$300,000 credit PDR received from their purchase price of the Premises. Moreover, they seek to disqualify Ressa’s new attorney, Robert S. Carroll, Esq., from acting as his counsel because he may be called as a witness in this case.

### **Facts**

On October 20, 2000, the plaintiff HOA and Bay Street/St. George, LLC, the predecessor to the defendant (PDR), entered into a Contract of Sale, where HOA agreed to sell to Bay Street/St. George, LLC real property consisting of Tax Block 1, a portion of Lot 275 and which is commonly known as 130 Bay Street Landing, Staten Island, New York (the “Premises”).

Pursuant to paragraph 27 of the Contract of Sale and a plan attached thereto, the Premises were to be developed as an integrated part of the Bay Street Landing condominium complex by the rehabilitation and/or construction of mid-rise condominium or cooperative luxury apartments.

On May 10, 2002, Bay Street/St. George, LLC assigned all of its right, title and interest in the Contract of Sale to the defendant, PDR.

On May 21, 2002, the transaction between HOA and PDR finally closed whereby PDR became the owner of the Premises. At the closing, HOA and PDR entered into an Amendment to a Restrictive Declaration of Bay Street Landing Home Owners Association, Inc (hereinafter “Declaration”). The Declaration was recorded on July 9, 2002 and, among other things, it provided in paragraph 17:

The covenants, restrictions, conditions, and provisions contained in this Agreement (whether affirmative or negative in nature) **shall constitute covenants running with the land** and shall bind every person having a fee, leasehold, or other interest in the Acquired Property to the extent that the **covenants, restrictions, conditions or provisions apply thereto and shall inure to the benefit of the parties and their respective successors and assigns** (emphasis added).

In paragraph 8 of the Declaration, PDR agreed to assume exclusive responsibility for the structural care, maintenance and repair of a portion of the promenade appurtenant to the Premises as defined in the Declaration as the “Promenade,” which is that portion of the promenade that abuts what is known as Pier 1 and extends 175 feet westerly from the eastern portion of the promenade. Specifically, that obligation was defined in the Declaration as the “Purchaser’s Maintenance Obligations.”

The Declaration also provides in paragraph 11 that:

**If the City or State of New York or the County of Richmond or any governmental or quasi-governmental entity (an “Authority”) (I) performs work on the Subject Promenade which materially improves the basic structural integrity of the Subject Promenade or (ii) assumes in a binding written confirmation to be effective on or before the date that is within one (1) year following the date of this Agreement, responsibility for the structural care, maintenance and repair of the Subject Promenade ... then Purchaser shall pay [\$300,000] to HOA ....**

In paragraph 10 of the Declaration, the Purchaser agreed to secure Purchaser's Maintenance Obligation and its obligation to make the \$300,000 payment (defined as the "Promenade Fund"):

Purchaser shall maintain a payment bond in form reasonably acceptable to the HOA and from a reputable insurance or surety company reasonably satisfactory to the HOA guarantying to the HOA payment of Three Hundred Thousand (\$300,000) Dollars (the "Promenade Fund"), which Promenade Fund shall be used to secure payment of Purchaser's Maintenance Obligations and payment to the HOA of the Promenade Fund pursuant to the terms of this Agreement.

At the closing of the sale of the Premises from HOA to PDR on May 21, 2002, PDR had not fulfilled its obligation to obtain such a bond. Instead, pursuant to an Escrow Agreement handwritten on May 21, 2002 and executed at the closing, PDR agreed to have its attorney, Richard Gabor, Esq. ("Gabor"), hold 14,500 shares of stock of Staten Island Bankcorp (the "Stock") until such time as PDR delivered the bond to the HOA in accordance with paragraph 10 of the Declaration. If PDR failed to deliver the bond to the HOA on or by June 25, 2002, attorney Gabor agreed to sell the Stock and hold the proceeds in escrow to secure payment of the Purchaser's Maintenance Obligations and the Promenade Fund.

Ressa and Marino, members of PDR, personally guaranteed the performance of the Purchaser's Maintenance Obligations contained in the Declaration and the payment by them of the Promenade Fund in accordance with the terms of the Declaration (the "Guaranty").

On September 10, 2004 PDR sold the Premises to Estates by a Bargain and Sale Deed. Part of the closing documents included an Assumption and Indemnification Agreement, whereby Estates assumed the obligation of PDR in connection with the \$300,000 Promenade Fund Escrow Agreement with the plaintiffs HOA, which Ressa and Marino had previously guaranteed on behalf of PDR.

Subsequent to Estates taking title to the Premises, the City of New York undertook the project to repair the promenade by employing a private contractor at the City's expense.

The affidavit of Barry Gendelman, the New York City Assistant Commissioner of the Bureau of Property Management and Leasing, Division of Real Estate Services in the Department of Citywide Administrative Services (hereinafter “DCAS”), sworn to on November 9, 2006, states that the work performed by DCAS and its independent contractor, Pile Foundation Construction Co., Inc. (hereinafter “Pile”), has materially improved the basic structural integrity of the Subject Promenade and has increased the lifespan of the piles underneath and supporting the Subject Promenade.

The plaintiffs, HOA, claim that since the work on the promenade was completed at the City’s expense, then pursuant to the Declaration, PDR as purchasers and/or Ressa as guarantor and/or Estates as the subsequent purchaser and current owner of the Premises shall pay to HOA \$300,000 pursuant to the terms of the Agreement dated October 20, 2000.

The defendants do not deny that the City repaired the promenade.

Defendants PDR and Ressa claim in an affirmative defense, that because they sold the Premises to Estates and entered into an Assumption and Indemnification Agreement on September 13, 2004 which transferred the obligation for the Promenade to Estates that they are no longer liable to the HOA.

The plaintiff HOA did not sign the Assumption and Indemnification Agreement, nor did the HOA release PDR, Ressa and Marino from their obligations.

Defendant Estates asserts an affirmative defense that a former president of the HOA, Robert Carroll, Esq., orally advised the representatives of Estates, before September 13, 2004, the date of the PDR to Estates closing, that HOA would not enforce the contractual obligation against Estates. Robert Carroll, Esq. has since become the subsequent attorney for the defendant Ressa.

The defendants, PDR and Ressa, assert affirmative defenses that HOA failed to name Marino as an indispensable defendant, who guaranteed the contractual obligation with respect to the Promenade Fund, in addition to defendant Ressa. Ressa has filed a third party complaint, naming Marino as a third party

defendant. Marino has never appeared or filed an answer to the third party complaint, and therefore is in default.

Ressa also filed a third party complaint against Poretz and Mermelstein, the two principals of Estates.

### **Conclusions**

All parties acknowledge that the work performed on the Promenade was conducted under the supervision of the NYC Department of Citywide Administrative Services (DCAS) at the City's expense.

Estates argues that they are not responsible to pay HOA the \$300,000 which was originally held in Escrow, payable to the "Promenade Fund" in the event the City or State of New York performed work which improved the structural integrity of the promenade. Their main argument is that the obligation to pay HOA was contained within a covenant that does not run with the land. Moreover, Estates claims that any obligation to pay would require PDR to pay HOA.

For a covenant to "run with the land" it must comply with certain legal requirements in order to be enforceable against successors in interest (*Neponsit Prop. Owners' Assn., Inc. v. Emigrant Indus. Savings Bank*, 278 N.Y. 248 [1938]; *Witter v. Taggart*, 78 N.Y.2d 234 [1991]; *328 Owners Corp. v. 330 West 86 Oaks Corp.* 2007 N.Y. Slip Op. 02788 [NY Ct. Of Appeals, 2007]). In *Neponsit*, the Court of Appeals held that three conditions must be met in order for a covenant to run with the land:

- “(1) it must appear that grantor and grantee intended that the covenant should run with the land;
- (2) it must appear that the covenant is one ‘touching’ or ‘concerning’ the land with which it runs;
- (3) it must appear that there is ‘privity of estate’ between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant”

Here, it is clear that the parties intent was that the covenant and obligation to pay HOA the \$300,000 contained in paragraph 11 of the “Purchaser Maintenance Obligations” was to run with land to successors and their assigns. This is evident by examining the “Amendment to a Restrictive Declaration of Bay Street Landing Home Owners Association, Inc.” which was executed with the closing documents when PDR purchased the property from HOA on September 10, 2004. Specifically, paragraph 17 of the declaration document states:

“The **covenants**, restrictions, **conditions** and provisions contained in this Agreement (whether affirmative or negative in nature) **shall constitute covenants running with the land and shall bind every person having a fee**, leasehold, or other interest in the Acquired Property to the extent that the covenants, restrictions, conditions, or provisions apply thereto **and shall inure to the benefit of the parties and their respective successors and assigns.**” (emphasis added)

The second *Neponsit* condition, that the covenant touches and concerns the land, is likewise met here. Although the issue covenant specifically speaks to the payment of funds to HOA if the “City or State of New York or the County of Richmond or any governmental or quasi-governmental entity (an “Authority”) (I) performs work on the Subject Promenade and which materially improves the basic structural integrity of the Subject Promenade.” As the subject promenade was the “water front” part of the real property, it not only touches and concerns the land, but is the land satisfying the second *Neponsit* condition.

Lastly, the third *Neponsit* factor, privity of estate, has been met as there exists a direct chain of title running from HOA to PDR to Estates. Since, all the *Neponsit* conditions have been met, the obligation to pay HOA the \$300,000, ran with the land at the transfer from PDR to Estates. Moreover, Estates also had constructive knowledge of the Declaration because it was duly recorded with the Clerk of Richmond County on July 9, 2002. Therefore, Estates purchased the property with notice of its obligations with respect to the Promenade Fund.

However, most importantly, Estates undertook the specific obligation to either build the Promenade or pay HOA the \$300,000 when it entered into the Assumption and Indemnification Agreement, whereby Estate undertook certain obligations in the Declaration, including but not limited to, “the requirement to

obtain and maintain...a payment bond...guarantying to the HOA payment of the 'Promenade Fund' in the amount of \$300,000."

The Assumption and Indemnification Agreement provided that Estates would "conclude negotiations with the HOA...so as to cause the HOA to release Ressa and Marino from all obligations under any guaranty made by either or both of them in favor of the HOA." The HOA never gave a release to Ressa or Marino, however, such a formal release was not required. HOA had knowledge of the assignment to Estates and never objected to it. That, in part, is why HOA named Estates as a co-defendant.

The HOA seeks the \$300,000 plus interest that was to be held in escrow to make those repairs to the Promenade, which was not necessary because the City of New York undertook that obligation. Accordingly, plaintiff wants the full value of its sale price from the defendants, PDR and specifically Ressa as guarantor, who was to post Staten Island Bankcorp (SIBT) stock into escrow, which was personally owned by defendant Ressa, which allegedly had a value in excess of \$300,000 when it was posted. However, SIBT was sold to Independence Bank, which in turn was sold to Sovereign Bank in 2005. Sovereign bought back all of the SIBT stock to include Ressa's stock, which Ressa claims only yielded \$210,000 net due to fluctuations in the stock market and broker expenses.

The guaranty was signed personally by both Ressa and Marino. Consequently, each of them is liable for the full \$300,000 obligation. HOA should have also named Marino as a co-defendant. Accordingly, Ressa seeks reimbursement or contribution from Marino in the event he is obligated to pay HOA.

Notwithstanding the fact that Ressa did not post the bond as originally required and since his alleged stock value was \$210,000 when sold and not over \$300,000 as believed, this court directed that he post the full \$300,000 in escrow pending a decision and judgment by this court. This court has received a letter confirmation that the \$300,000 escrow has been established. However, those issues may no longer be relevant as PDR and Ressa assigned those obligations in the Assumption and Indemnification Agreement to Estates. Estates has acknowledged that it was to repair and maintain the promenade if the City or other governmental authority would not do so at City expense.

Estates has postured that in the event the City paid for the repair to the promenade, it would not be liable for the \$300,000 to be paid back to HOA since that was a personal obligation undertaken by Ressa and Marino, and not a covenant running with the land. Such a position is illogical considering Estates signed an agreement acknowledging that it assumed the obligation from PDR and/or Ressa and Marino. While Estates argues that PDR, Ressa and Marino made enough profit to cover the \$300,000, this is not the issue. The fact is that Estates made the deal to build the Promenade or pay the \$300,000; now they must live by that deal.

The fact that the City of New York performed the obligation of building the Promenade at its own expense would constitute a windfall to the defendant Estates because they did not have to build it at their own expense. The argument of Estates that they did not know of their obligation under the Assumption and Indemnification Agreement is ludicrous and not credible, inasmuch as they were represented by counsel when the documents were executed.

The issue of disqualifying Robert Carroll, Esq., the new attorney for defendant PDR and Ressa, who had served as the President of the plaintiff HOA during the period of the resale from PDR to Estates, and who may have been a witness if this case went to trial is now moot. Any verbal statements he may or may not have said to Mr. Puretz and Mr. Mermelstein would not counter the written Assumption and Indemnification Agreement signed by the parties. Moreover, the statute of frauds, the parol evidence rule, together with the best evidence rule, would have precluded Mr. Carroll's statements. Accordingly, that application is dismissed as moot.

It is clear to this court that when the Bay Street Landing premises were resold from PDR to Estates, each of the parties were represented by counsel in an arms length transaction and that the closing took three days. Amongst the documents executed at the closing of title to Estates, was the Assumption and Indemnification Agreement, which clearly spelled out that the covenants were intended to run with the land and that the obligation to maintain the Promenade Fund was undertaken by Estates as the new owner. Moreover, Estates was put on constructive notice of the obligation as the declarations was filed with the County Clerk's office. The argument of Estates that the work on the promenade may not be the

improvement that was intended by the HOA to PDR is without merit. Estates has not presented one scintilla of evidence to demonstrate that it should retain a \$300,000 credit for future maintenance and improvement of the promenade, which the City of New York undertook to repair and maintain.

Accordingly, it is hereby:

ORDERED, that summary judgment is granted in favor of plaintiff, Bay Street Landing Home Owners Association, Inc., against the defendant, Estates at Bay Street Landing, LLC, and awards plaintiff damages in the amount of \$300,000, together with costs and disbursements; and it is further

ORDERED, that the actions against the defendants, PDR Bay Street/St. George, LLC and Philip Ressa, are dismissed with prejudice; and it is further

ORDERED, that the defendants' counterclaims and affirmative defenses asserted against plaintiff are dismissed; and it is further

ORDERED, that in accordance with the foregoing finding against Estates at Bay Street Landing, LLC, the third party action by Philip Ressa against Dominick Marino, Leib Poretz and Tovia Mermelstein is dismissed; and it is further

ORDERED, that all cross claims are similarly dismissed; and it is further

ORDERED, that the counterclaims of the third party defendants are also dismissed.

Settled judgment on notice to all parties.

ENTER,

DATED: April 24, 2007

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Joseph J. Maltese  
Justice of the Supreme Court