SHORT FORM ORDER

INDEX NO.: 0019508/2005
SUBMIT DATE: 2/7/2007
MTN. SEQ.#: 001

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 1/17/2007
MOTION NO.: MG;CASEDISP

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RICHARD WHEELER and JOYCE WHEELER,

Plaintiffs,

-against-

COLONY CLUB HOME OWNERS ASSOCIATION, INC.,

Defendant.

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RALPH A. HUMMEL, ESQ.
Attys. for Plaintiffs
137 Woodbury Road
Woodbury, NY 11797

MARC H. SCHNEIDER, PC
By: Ryan D. Mitola, Esq.
Attys. for Defendant
666 Old Country Road, Suite 412
Garden City, NY 11530

Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 16-22; Replying Affidavits and supporting papers 23-26; Other _____; it is

ORDERED that this motion by defendant, Colony Club Home Owners Association, Inc., for an order granting summary judgment in its favor dismissing the complaint of plaintiffs, Richard Wheeler and Joyce Wheeler, against it is granted and the complaint is hereby dismissed.

Plaintiffs are the joint owners in fee simple of property located at 7 Woodpath Drive, Northport, New York, which is located in the development known as the Colony

Club. The defendant is a home owners association that owns certain common property located in the Colony Club development. It was formed in furtherance of the Declaration of Covenants, Restrictive Easements, Charges and Liens (Declaration) and the By-Laws which were recorded in the Office of the Suffolk County Clerk on or about March 11, 1988. Plaintiffs' lot adjoins "common properties" which are defined in the Declaration and By-Laws as "certain areas of land other than individual Lots as shown on the filed subdivision map and intended to be devoted to the common use and enjoyment of the owners of the Properties." Although a limited one year warranty was provided by the seller and developer, My Mount at Fort Salonga, Inc., under the original purchase agreement, the warranty period had expired when plaintiffs, who were not original purchasers of their lot, acquired their ownership.

Plaintiffs commenced this action against defendant upon allegations that physical conditions on common properties in the development were causing the surface of the ground and the soil beneath "to sink and collapse at an accelerated, unnatural rate" and were causing water to collect on the ground of the common properties near and adjoining plaintiffs' property. Plaintiffs seek a declaratory judgment under the first cause of action declaring that the defendant has an obligation to repair the problems. Plaintiffs also seek recovery of compensatory damages under the second cause of action for negligence and under the third cause of action for nuisance. Defendant has moved for summary judgment in its favor, noting that the Offering Statement imposed upon the homeowners association the obligation to maintain and repair the common properties, including "the repair of damage to roadways, common walkways, drainage areas, gatehouse, tennis courts, pool, pool house, outdoor lighting and fences and sprinkler system; landscape maintenance . . . and snow removal of the roadways, common parking areas and driveways in the Development." In addition, the Declaration sets forth that the homeowners association is responsible for "landscape maintenance , including landscape maintenance within the lot lines of each Home; snow removal of the roadways and parking areas on the Common Properties and driveways on the Properties; maintenance of common walks, parking spaces, roadways and facilities comprising the Common Properties and maintenance of any pipes, wires or conduits located outside of any Home including common water and sewer lines located outside of the Homes." There is no stated obligation to perform repairs on property owners' driveways, however, nor is there any obligation set forth to re-grade the property of individual owners.

Plaintiffs submitted an affidavit from their expert, a hydrogeologist, whose investigation confirmed that the problem of soil subsidence on and near plaintiffs' property was not due to any leaks in the water service or irrigation systems. His report also indicates that the geology of the area "appears to be highly variable and contains numerous, discrete lenses of silt and clay that support the collection of precipitation that results in perched water" which "discharges at the ground surface in lower-lying

areas or may be under natural pressures which force the water to discharge at the surface at higher elevations." He concludes that the transport of soil by the subsurface movement of water "is due to regrading of the ground surface at the time the development was constructed."

To ascertain whether the defendant is responsible for any damage that may have been caused as a result of the manner in which the development was constructed, the provisions of the Declaration and By-Laws are determinative. Since the construction and interpretation of an unambiguous written contract is an issue of law within the province of the Court, a judicial declaration is an appropriate remedy where, as here, the rights and obligations of the parties are clearly set forth (*see* ***RAD Ventures Corp. v Artukmac***, 31 AD3d 412, 818 NYS2d 527 [2d Dept 2006]). Under the terms of the Declaration and By-Laws, the defendant has no duty to repair or re-grade the plaintiffs' driveway and, accordingly, the first cause of action must be dismissed. Moreover, the second cause of action in negligence must be dismissed because it fails to allege facts which, if proven, would establish that the defendant breached a duty of care independent of any purported contractual obligation (*see* ***Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.***, 14 AD3d 678, 790 NYS2d 143 [2d Dept 2005], citing ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 516 NE2d 190, 521 NYS2d 653 [1987]; ***Muldoon v Blue Water Pool Servs.***, 7 AD3d 496, 497, 775 NYS2d 583 [2004]). Likewise, plaintiffs failed to show the existence of an issue of fact as to their nuisance claim set forth in the third cause of action in view of the opinion of their own expert that the drainage problem "is due to regrading of the ground surface at the time the development was constructed."

Accordingly, the complaint must be dismissed.

DATED: 1 May '07

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION **[ ] NON-FINAL DISPOSITION**