

Craig v Nelson & Pope
2007 NY Slip Op 31287(U)
May 14, 2007
Supreme Court, Suffolk County
Docket Number: 0000858/1993
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-10-06
ADJ. DATE 12-4-06
Mot. Seq. # 003 - MG

-----X
JEFFREY CRAIG, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 NELSON & POPE, A PARTNERSHIP :
 CONSISTING OF ROBERT G. NELSON, :
 VICTOR BERT, VINCENT DONNELLY, :
 ARTHUR KOERBER and ROBERT G. NELSON, :
 JR. & SCHNURR, JOHN, PARTNERS & VIM :
 CONSTRUCTION CORP., :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19 - 24 ; Replying Affidavits and supporting papers 25 - 34 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by Nelson & Pope, a partnership consisting of Robert G. Nelson, Victor Bert, Vincent Donnelly, Arthur Koerber, Robert G. Nelson, Jr. & Schnurr, John, Partners, for summary judgment dismissing the complaint, pursuant to CPLR 3212, is granted.

The summons and verified complaint in this action were filed on or about January 14, 1993 and issue was joined by the filing of defendant's answer on or about March 1, 1993. Discovery has been completed, and the note of issue was filed on or about May 30, 2006.

This is an action for damages to real and personal property allegedly sustained by the plaintiff Jeffrey Craig (Craig), on or about August 19, 1991, when his property and house, located at 311 Round Swamp Road, Melville, Suffolk County, New York, flooded during "Hurricane Bob". Plaintiff alleges that the defendants Nelson & Pope, a partnership consisting of Robert G. Nelson, Victor Bert, Vincent Donnelly, Arthur Koerber, Robert G. Nelson, Jr., and Schnurr, John, Partners (hereinafter collectively referred to as Nelson & Pope) negligently created and approved plans, designs, drainage specifications and construction of a parcel designated as VIM Estates altering and changing the topography of Round

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Swamp Road, which it is alleged caused plaintiff's property to flood and caused damage to his real and personal property.

Defendants Nelson & Pope now move for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that: any actions of defendants were not the proximate cause of plaintiff's alleged damages in that the flooding occurred due to a storm known as "Hurricane Bob" which caused an intense amount of precipitation to fall in a short period of time; that plaintiff failed to submit expert evidence to establish the alleged negligence and further that there is no privity of contract, or any relationship, between the plaintiff and the defendant architects and plaintiff does not have standing to bring the within claim. In support of their motion defendants submit, *inter alia*, an affirmation of counsel, a copy of the pleadings, excerpts from the deposition testimony of Jeffrey Craig and an affidavit from Robert G. Nelson, Jr..

Plaintiff opposes the motion on the grounds that the defendants have not met their burden on a motion for summary judgment. Plaintiff argues that the negligent design of the roadway and failure to provide adequate drainage for naturally occurring surface water added water, during the storm, to the existing sumps and basins which overflowed and flooded plaintiff's property. Plaintiff also argues that the "Act of God" defense and the "privity" exclusion do not apply in the instant matter. Plaintiff submits in opposition, *inter alia*, an affirmation of counsel, three color photographs of the alleged flooding, copies of the deposition testimony of Jeffrey Craig from the General Municipal Law § 50-h hearing dated April 8, 1992 and his examination before trial dated September 27, 2004, and the deposition testimony of Robert G. Nelson, Jr dated September 1, 2005.

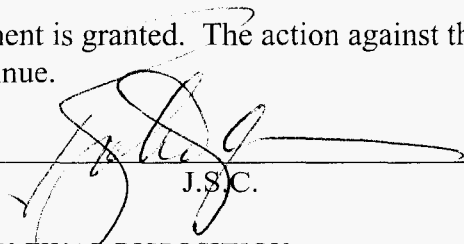
The gravamen of plaintiff's complaint is that the defendant's negligently planned, designed and supervised the reconstruction of the roadway and drainage on Round Swamp Road causing surface water run-off during the 1991 storm known as Hurricane Bob to accumulate in the drainage basins and flood his property. It is undisputed that the defendants Nelson & Pope entered into a contract with the Town of Huntington to provide design and engineering services in connection with redesign of Round Swamp Road and that Nelson & Pope prepared the plans and designs for the reconstruction of the roadway. It is undisputed that subsequent to the reconstruction, on August 19, 1991, plaintiff's house and property became flooded during a hurricane known as "Hurricane Bob". It is also undisputed that prior to the 1991 storm a portion of plaintiff's property had flooded in 1989 after a moderate to heavy rainstorm from what he assumed to be road run-off. With regard to the hurricane in 1991 plaintiff stated that he believed his property and house were flooded due to the sumps north of his property overflowing, however, he could not clearly distinguish what the source of the water was that came across his property. He stated that the water came in a sheet from the east side of Round Swamp Road across his neighbor's property on the north and onto his land and into his house. He stated that his neighbor, Theodore Bindrim, had called just prior to the flooding to warn him that the sumps were overflowing and moving across his property in the direction of plaintiff's land. Plaintiff testified that within minutes of his neighbor's call the water flooded his property and house. There is no dispute that the roadway reconstruction occurred south of plaintiff's property and that the sumps, which it is alleged overflowed, were located north and northeast of plaintiff's property. In addition, plaintiff does not challenge defendant Robert G. Nelson, Jr's affidavit stating that the elevation of Round Swamp Road goes downwards in the southerly direction and that plaintiff's property was the low point in the area coming from the north.

An engineer or architect may be held liable where his or her negligence has caused personal injury to another, courts however differentiate causes of action for personal injury from other causes of action due to differing public policy considerations (see, *McGee v City of Rensselaer*, 174 Misc2d 491, 663 NYS2d 949 [1997]). It is the responsibility of the courts to fix the orbit of duty and limit the legal consequences of wrongs to a controllable degree (see generally, *Tobin v Grossman*, 24 NY2d 609, 619, 301 NYS2d 554 [1969]; *Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363 [1977]). In general, courts hesitate to extend liability beyond reasonable limits and draw a distinction when a party not in privity with an alleged tortfeasor sues for an economic loss (*McGee v City of Rensselaer, supra*). Thus, in the absence of actual privity, or a relationship that is so close as to approach privity, there can be no recovery (see, *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424, 541 NYS2d 335 [1989]; *Widett v United States Fidelity & Guaranty Co.*, 815 F2d 885 [1987]) for an economic loss since it is well settled in New York that professionals are not liable either in tort or contract absent privity.

In addition, in order to prove negligence in design or construction the plaintiff must put forth expert testimony that the engineer or architect deviated from accepted industry standards (*Columbus v Smith & Mahoney, P.C.*, 259 AD2d 857, 686 NYS2d 235 [1999]). It was therefore incumbent upon the plaintiff to put forward evidence, through an expert, to establish an issue of fact regarding defendants' alleged negligence (see, *530 East 89 Corp. v Unger*, 43 NY2d 776, 402 NYS2d 382 [1977]) and to establish that the reconstruction work which occurred on Round Swamp Road south of plaintiff's property deviated from accepted industry standards and caused the sumps north of plaintiff's property to overflow. This, plaintiff failed to do. Indeed, in this matter, Mr. Nelson averred through his personal observations that plaintiff's property was a low point in the area coming from the north and plaintiff testified that on the day of the hurricane the water ran onto his property from the sumps on the north. In support of his position that the flooding was caused by the reconstruction of Round Swamp Road plaintiff submitted only his own belief and conjecture on this matter which is insufficient. A motion for summary judgment may not be defeated by the assertion of mere conclusory allegations, expressions of hope, or unsubstantiated assertions (*Grullon v City of New York*, 297 AD2d 261, 747 NYS2d 426 [2002]; *V. Savino Oil & Heating Co., Inc. v Rana Management Corp.*, 161 AD2d 635, 555 NYS2d 413 [1990]). It is the opinion of this court therefore that there is not sufficient evidence to conclude that the flooding which occurred on plaintiff's property after a hurricane was proximately caused by the design and reconstruction of Round Swamp Road south of plaintiff's property particularly where plaintiff testified that the water flowed onto his property from the north over his neighbor's property and it is uncontroverted that plaintiff's property was a low point in the area.

Accordingly, defendants' motion for summary judgment is granted. The action against the remaining defendant, VIM Estates, is severed and shall continue.

Dated: MAY 14 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION