SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 50**

EILEEN MOSKIE and JOSEPH MOSKIE,

INDEX NO.:013914/04

Plaintiffs,

MOTION DATE:10-25-07
-against- **SUBMIT DATE:10-25-07**
SEQ. NUMBER - 003
& 004

ARL DEVELOPMENT CORP., LEE RUDNITSKY, TOWN OF HEMPSTEAD and SIGNATURE CUSTOM HOMES,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 10-1-07..... 1
Notice of Cross Motion, dated 10-5-07.....2
Memorandum of Law, dated 10-5-07.....3
Reply Affirmation and Affirmation in Opposition Dated 10-16-07.....4
Reply Affirmation in Further Support of Cross Motion Dated 10-23-07.....5

The cross motion by plaintiff for summary judgment as to defendant Town of Hempstead (Town) is denied. The motion by the Town for summary judgment is granted and the action is dismissed as to the Town. CPLR §3212.

Plaintiffs contracted with co-defendant ARL Development Corp., (ARL) for the demolition of a structure on their property on Oak Street, Bellmore, and the construction of

a prefabricated home, the components for which were manufactured by co-defendant Signature Custom Homes, Inc., (Signature). Defendant, Rudnitsky is a principle of ARL.

Plaintiffs moved into the new home before the Certificate of Occupancy was issued and observed numerous construction defects. They engaged an engineer who performed and/or inspected and issued a detailed report of numerous defects.

Efforts at correction by ARL did not satisfy plaintiffs, thus they notified the Town's building department about the defects, with a copy of the engineer's report and requested that the Town withhold issuance of a Certificate of Occupancy until curative action was taken.

The Town refused to meet with plaintiffs' engineer and some four months after receipt of the engineer's report issued a final approval of the construction and a Certificate of Occupancy. There is a dispute as to whether the Town's inspector actually came to the premises on the stated date, based on plaintiff's contention that they had exclusive occupancy and control of the premises and the Town's inspector never did an inspection.

Having settled with the co-defendants, plaintiffs contend that they are entitled to damages from the Town based on a violation of a duty owed to them by the Town.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Frank Corp. v. Federal Ins. Co.*,

supra at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (see *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

The submission by the Town establishes entitlement to judgment thus shifting the burden to the opponent plaintiffs to rebut the movants' case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, plaintiffs have failed to establish the existence of triable issues of fact, the motion by the Town is granted and summary judgment is granted in favor of the Town. The cross motion is denied.

Municipalities are immunized from liability to third persons arising out of the performance of discretionary acts and a municipality is not liable for the injurious consequences of an action even if resulting from negligence or malice. Such immunity can be overcome upon a showing of a special relationship between the injured party and the municipality with the heavy burden imposed upon the injured party to establish the existence of such a relationship. *Abraham v. City of New York*, 39 AD3d 21 (2d Dept. 2007); *See also Rodriguez v. County of Rockland*, 43 AD2d 1026 (2d Dept. 2007).

The current body of law on this issue stems from *Garrett v. Holiday Inns Inc.*, 58 NY 2d 253 (1983) and *Pelaez v. Seide*, 2 NY3d 186 (2004).

A special relationship between an injured party and a municipality can be formed:

1. when the municipality violates a statutory duty enacted for the benefit of a particular class of persons;
2. when the municipality voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or
3. when the municipality assumes a positive direction and control in the face of a known blatant and dangerous safety violation. *id*, 199.

To base a relationship through breach of a statutory duty requires the governing statute to authorize a private right of action. No such claim is made here and there is no statutory authorization of a private right of action. *Abraham v. City of New York, Supra at 25*; *Okie v. Village of Hamburg*, 196 AD2d 228 (4th Dept. 1994). A statute enacted for the health and safety of the community at large does not confer a special duty on an injured person, *Marino v. Dwyer Berry Construction Corp.*, 146 AD2d 748 (2d Dept. 1989) *cf. Mclean v. City of New York*, 14 Misc. 3d 922 (Sup. Ct. NY Cty 2007) special statutory duty found in favor of children in day care facility.

The second alternative, voluntary assumption of a duty also fails. Here, there is no voluntary assumption of any duty by the Town and certainly no reliance by the plaintiffs upon performance by the Town of any act. The facts disclose that the plaintiffs were well aware of the construction defects based on their own investigation and observations and certainly did not rely on the Town's performance or conduct.

The requisites for finding a special relationship based on the second alternative noted above, *ie* voluntary assumption of a duty are set out in *Pelaez v. Seide, supra* 202. Included in such requirements but notably absent here are the requirement of a promise or action, and justifiable reliance by the plaintiffs on such affirmative undertaking.

Finally, there can be no liability based on item 3 above, the assumption by the Town of direction and control. To establish that the Town assumed a duty to plaintiffs requires a showing of (i) promises or actions of an affirmative duty to act on behalf of plaintiff (ii) knowledge on the part of the Town that inaction could lead to harm (iii) direct contact with the injured party and (iv) justifiable reliance on the Town's affirmative undertaking. *Kovit v. Est. of Katherine Hallums*, 4 NY3d 499 (2005). Plaintiffs do not meet these requirements and do not claim that the Town made any promises, took over control or that they relied in any way on Town conduct.

Distinguishable are cases where a person purchases a home in reliance on a Certificate of Occupancy that was issued under conditions which are tantamount to fraud. *See Garrett v. Holiday Inns Inc., supra* 262, where the court sustained a complaint which alleged the issuance of a Certificate of Occupancy with knowledge of blatant violations and reliance thereon by plaintiffs and *Corona v. Gallinger Real Estate Better Homes and Gardens, Inc.*, 168 Misc. 2d 429 (Sup. St. Onondaga Cty 1996), affirmed on decision below 242 AD2d 961 (4th Dept. 1997) where plaintiffs closed on the purchase of their home only to later learn that there was no building department inspection at all and that the plans submitted were for a different house.

Here, plaintiffs argue that there never was an inspection by the Town but at the juncture when the inspection supposedly took place, plaintiffs were already aware of the construction problems and had themselves sounded an alarm. Although the court does not condone the alleged conduct of the Town's building inspector, whether or not he actually performed an inspection is not a determining factor on the issue of summary judgment.

Based on the foregoing, the motion by the town for summary judgment dismissing the complaint is granted and the cross motion by the plaintiffs for summary judgment is denied. Since it appears that the co-defendants have settled with plaintiffs, this case requires no further Court intervention.

This shall constitute the Decision and Order of this Court

ENTER

DATED: October 29, 2007

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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