

**Windcrest at Galleria Home Owners Assn.,
Inc. v Smithtown Galleria II, LLC**

2007 NY Slip Op 33622(U)

November 8, 2007

Supreme Court, Suffolk County

Docket Number: 0034493/2006

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 3-27-07
SUBMITTED: 7-18-07
MOTION NO.: 002- Mot D

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WINDCREST AT GALLERIA HOME OWNERS
ASSOCIATION, INC., VIRGINIA BOLLA, JOAN
SCARLATA, LEON SYGADLO, PETER ECKSTEIN,
MARLENE ECKSTEIN and SCOTT A. MORGAN ON
BEHALF OF THEMSELVES AND ALL OTHER
SIMILARLY SITUATED,

RIVKIN RADLER LLP
Attorneys for Plaintiffs
926 Reckson Plaza
Uniondale, New York 11556-0926

Plaintiffs,

-against-

SINNREICH SAFAR & KOSAKOFF LLP
Attorneys for Defendant Nelson & Pope LLP
320 Carlton Avenue, Suite 3200
Central Islip, New York 11722

SMITHTOWN GALLERIA II, LLC, GREENVIEW
CAPITAL PARTNERS I, LLC, DICANIO GALLERIA,
LLC, GREENVIEW PROPERTIES, INC., AXELROD
& CHERVENY, ARCHITECTS, P.C., NELSON & POPE,
LLP., CHARLES GARGANO, VINCENT DICANIO,
LARRY C. GARGANO, PATRICK MCCANN,
KATHLEEN L. GARGANO, CARMEN GARGANO,
BETTY G. BOSE, "JOHN DOE #1" through "JOHN DOE
#10" and XYZ CORPORATION #1" through "XYZ
CORPORATION #10", the last twenty (20) names being
fictitious and unknown to the Plaintiffs,

CERTILMAN BALIN ADLER & HYMAN LLP
Attorneys for Defendants
Greenview Capital Partners I, Greenview Properties,
Inc., Charles Gargano, Vincent Dicanio, Larry C.
Gargano, Patrick McCann, Kathleen L. Gargano,
Carmen Gargano and Betty G. Bose
90 Merrick Avenue
East Meadow, New York 11554

Defendants.

FARBER BROCKS & ZANE, LLP
Attorneys for Defendants
Axelrod & Cherveny, Architects, P.C.
1565 Franklin Ave.
Mineola, New York 11501

LEWIS JOHS AVALLONE AVILLES, LLP
Attorneys for Defendants
Dicanio Galleria LLC and Smithtown Galleria II
425 Broad Hollow Road, Suite 400
Melville, New York 11747

Upon the following papers numbered 1 to 20 read on this motion for Preliminary Injunction; Notice of Motion and supporting papers 1-9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10-20; Replying Affidavits and supporting papers ;

ORDERED that this motion by Plaintiffs for a Preliminary Injunction directing the defendants to arrange for the contents of a recharge basin to be pumped into the Nissequogue River, and directing the defendants to arrange for all necessary permits and approvals from the New York State Department of Transportation and the New York State Department of Environmental Conservation for such pumping operations, and directing the defendants to arrange for the withdrawal of water from the recharge basin and the hauling offsite of such water when the Winderest at Galleria experiences a one-inch rainfall in a 24-hour period, and directing the defendants to prepare and submit plans for the reconstruction of a drainage system and recharge basin that complies with the Building Code of the Town of Smithtown is denied.

The complaint in this action seeks to recover, inter alia, damages alleging fraud and misrepresentation, breach of fiduciary duties, breach of contract and false advertising in connection with an offering plan for a development of 187 single-family homes in Smithtown, New York (the "Development"). The claims and facts alleged to support such claims involve a variety of different aspects of the project.

The plaintiffs allege, among other things, that the defendants made material misrepresentations respecting the construction of a storm water drainage system and abused their position as controlling members of the board of directors of the homeowners association by failing to disclose to the homeowners the nature of the defects in construction. It is alleged that such misrepresentations were made in the offering plan dated August 13, 1999 ("Offering Plan") wherein defendant, Smithtown Galleria II, (the "Sponsor") represented that the homes and common areas would comply with all plans, regulations and with the laws of the Town of Smithtown or any other entity having jurisdiction. In addition, the plaintiffs claim that the defendants' conduct is the proximate cause of recurring flooding in the Development. Plaintiffs contend that certain defendants engaged in faulty construction practices in the planning, design and construction of the storm water drainage system, as well as the planning design and construction of the roofs of each of the homes in the Development. The plaintiffs further claim that the defendants entered into an agreement with the Town of Smithtown to allow the storm water runoff from town lands to be introduced into the storm water drainage system of the Development. Plaintiffs argue that such an agreement represents a deviation from the standards of the Town of Smithtown Building Code and from good and accepted construction practices. Finally, the plaintiffs contend that, as a result, the storm water drainage system consistently overflows causing unhealthy and unsafe water conditions at the Development and results in damage to the plaintiffs and their property.

Plaintiffs have filed this order to show cause seeking immediate injunctive relief. Section 248-39(b) of the Smithtown Building Code requires that a "recharge basin without suitable means for overflow shall provide storage capacity for an eight-inch rainfall on the tributary area". The plaintiffs retained Mr. Kenneth J. Pritchard a professional engineer with the firm Dvirka and Bartilucci in or around November 2005 to conduct an engineering analysis of the drainage system at the Development. Mr. Pritchard submits an affidavit of his findings in support of plaintiffs' motion (the "Pritchard Affidavit"). He states that, in his expert opinion, the recharge basin has only half the capacity required by the Town of Smithtown, in clear violation of the Smithtown Building Code. He further contends that the potential high groundwater level was improperly measured by

certain defendants and that the recharge basin, which according to the Smithtown Building Code is to sit two feet above the potential high groundwater level, is sitting five feet below the required level. Furthermore, Mr. Prichard claims that the water collection system does not function as required by Section 248-39 of the Smithtown Building Code because there is not enough slope in the placement of the piping to keep the rainwater from backing up out of the collection pipes and flooding the streets and homes of the Development.

The various defendants oppose this motion. First, defendant Nelson & Pope (“N & P”), submits the affidavit of Victor Bert, a professional engineer licensed in the State of New York and a partner in N & P. In his affidavit, Mr. Bert contends that the drainage system was designed in accordance with the requirements and regulations of the Town of Smithtown. He claims that the elevation of the ground water and the design elevation of the bottom of the recharge basin was clearly “called out” on the face of the site plan drawings submitted to and approved by the Town’s Site Plan Examiner. Furthermore, N & P argues that, after the approval but prior to the commencement of construction, the developer retained a new engineering firm, Barret, Bonacci & Van Weele, P.C. (“Barret”) to supervise construction of the Development and that Barret discarded the N & P design and re-engineered the entire drainage system. Barret has not been made a party to this action. N & P argues that the Sponsor failed to inform subsequent purchasers of the changes made by Barret and that these changes occurred after N & P provided the Sponsor with the Engineer’s report and certification for the Offering Plan. N & P claims that the drainage system that it designed was never built and any flooding is the result of a complete redesign of “every element of the drainage system” for which N & P had no input, nor any responsibility for constructing. Mr. Bert argues in response to the Prichard Affidavit that statements made therein referring to the design, construction and placement of the drainage system lack merit since any review of the N & P’s plans in comparison to the site would show that the design by N & P was not what was constructed and placed at the Development.

Defendant Axelrod & Cherveney Architects, PC (“Axelrod”) also oppose plaintiffs motion. Axelrod contends that it had no involvement with the design or construction of the drainage system or the recharge basin which is the subject of this preliminary injunction motion. It further contends that the injunctive relief sought would direct the defendants as a whole to take certain actions in connection with the recharge basin. Axelrod argues that the drainage system had nothing to do with the architectural services which Axelrod performed on the Development and that it should not be subjected to an injunction to take corrective measures to repair it.

Greenview Properties Inc. (“GPI”), Betty Bose (“Bose”), and Patrick McCann (“McCann”), jointly submitted an opposition to this motion. These defendants join in the arguments raised by their co-defendants and contend that plaintiffs have failed to meet their burden for granting a preliminary injunction.

Defendants, Smithtown Galleria II, LLC, and Vincent Dicanio also submitted a joint opposition to this motion. These defendants argue that plaintiffs do not have standing to seek injunctive relief as they have not alleged or demonstrated that they have sustained special damages. These defendants also allege that the plaintiffs have not suffered recurring flooding as alleged in the complaint. They submit an affidavit from Larry A. Rubinson, P.E., President of R & W Engineers,

P.C. (the "Rubinson Affidavit") which states that he observed the Development several times, beginning April 5, 2007, and continuing through a nor'easter which occurred on April 15th and 16th 2007 and found no evidence of flooding or ponding of water in the Development. This opposition also includes climatological data for Islip, New York, for October 2005, the time when the plaintiffs claim the flooding began. This information shows that over 14 inches of rain fell that month, more than 10 inches of which fell in a 3-day period from October 11 - 14, 2005. Furthermore, a recent Newsday article attached to defendants' opposition papers as Exhibit C, makes reference to the water tables for the geographic area which includes the Development. It is alleged that these tables have risen and remain high as a result of the massive amount of rain which fell in October 2005.

Smithtown Galleria II, LLC, Greenview Capital Partners I, LLC;¹ Dicanio Galleria, LLC; Charles Gargano; Vincent Dicanio; Larry C. Gargano and Carmen Gargano also submitted a joint opposition to the motion. These defendants also join in the argument raised in the opposition submitted by Smithtown Galleria II, LLC and Vincent Dicanio, claiming that the plaintiffs do not have standing to seek the relief sought for failure to plead special damages. Furthermore, they claim that the photographs annexed to the plaintiffs' motion fail to demonstrate recurring flooding in the Development. There are no dates or other indicia of when the pictures were taken, and the plaintiff has failed to include affidavits from anyone with knowledge as to when the first, last or any recurring flooding in the Development occurred. Finally, these defendants argue that the claim of recurring flooding in the Development is belied by the recent rainfall referred to in the Rubinson Affidavit and reiterate the statements made therein.

A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers. The burden of proof is on the movant to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor (*see, Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 AD3d 334, 335 [and cases cited therein]). The purpose of a preliminary injunction is to maintain the status quo pending determination of the action (*see, City of Long Beach v Sterling Am. Capital, LLC*, 40 AD3d 902). A mandatory injunction, which is used to compel the performance of an act, is a drastic remedy that is rarely granted. "Mandatory injunctions are not favored and should not be granted, absent extraordinary or unique circumstances, when the status quo will be disturbed and the plaintiff will receive the ultimate relief sought pendente lite" (*see, Matos v City of New York*, 21 AD3d 936, 937; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728; *Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793).

Turning to the motion before the court, the court finds that the plaintiffs' allegations are insufficient to establish entitlement to a preliminary mandatory injunction. Since the record reveals many unresolved issues, it cannot be determined whether there is a likelihood that the plaintiffs will succeed on the merits (*see, Rosa Hair Stylists v Jaber Food Corp.*, supra at 794).

1. Note: apparently there is some confusion as to representation for Greenview Capital Partners I, LLC and Vincent Dicanio as their interests are listed as being represented by more than one law firm and in more than one opposition. Additionally, defendant Kathleen Gargano has not been listed as being represented in any of the oppositions now before the court, although she is represented in the Complaint by Certilman Balin Adler & Hyman LLP.)

Moreover, the plaintiffs have failed to meet their burden of showing that they would suffer irreparable injury absent the granting of this preliminary injunction. The irreparable harm must be shown by the moving party to be imminent, not remote or speculative (*see, Golden v Steam Heat, Inc.*, 216 AD2d 440, 442). The record reveals that, although the flooding first occurred in October 2005, the plaintiffs did not move for injunctive relief until March 2007, more than 14 months later. Furthermore, the plaintiffs have not submitted sufficient evidence to demonstrate that the rainfall leading to the flooding occurs with any frequency or regularity or that the likelihood of such an occurrence is imminent. Finally, the plaintiffs have failed to specify the particular defendant against whom injunctive relief is sought. They appear to be seeking an injunction against all of the defendants. However, in view of the conflicting evidence presented, it cannot be determined which defendants, if any, are responsible for the flooding. The court finds that it would be inequitable to grant an injunction that would require the defendants to correct a problem for which they may ultimately be found not responsible. Accordingly, the balancing of the equities does not favor the plaintiffs.

Weighing the conflicting considerations of the benefit to the plaintiffs and the harm to the defendants that would follow the granting of such a drastic remedy in this case (*see, Nat Holding Corp. v Banks*, 22 AD3d 471, 474), the court finds that the relief sought is not warranted. The motion is, therefore, denied.

HON. ELIZABETH HAZLITT EMERSON

DATED: November 8, 2007

J. S. C.