

LaBate v Urban Found. Eng'g LLC

2008 NY Slip Op 30481(U)

February 14, 2008

Supreme Court, Nassau County

Docket Number: 1486-04/

Judge: Kenneth A. Davis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

JOSEPH LABATE, MADELINE LABATE and
WATERS EDGE CONTRACTING CORP.,

Plaintiff,

SUBMISSION DATE: 12/17/07
INDEX No.: 11486/04

-against-

URBAN FOUNDATION ENGINEERING LLC,
PAUL W. GROSSER, P.W. GROSSER
CONSULTING INC. and ANTHONY
PASQUALE, P.E.

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... X
- Answering Papers..... XX
- Reply..... X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's..... X

Motion by defendant Urban Foundation/Engineering, LLC ("Urban") for summary dismissing plaintiff's claim and all cross-claims against it is granted.

Plaintiffs Joseph and Madeline LaBate had a home built on property located at 12 Barbara Lane in Glen Cove. Plaintiff Water's Edge Contracting Corp. ("Water's"), owned by Mr. Labate, was the general contractor for the initial construction of the Labate residence. Apparently after completion, the rear portion of the structure sank more than 10 inches (Complaint par. 5). Plaintiffs allege that they hired Vachris Engineering, PC ("Vachris"), through its employee defendant Anthony Pasquale, to stabilize the residence (Complaint par. 8).

Defendant Urban is a foundation contractor hired by Vachris, to install concrete piles at the residence in accordance with plans and specifications prepared by Vachris. Urban inspected the property in late January, 2001, and performed its services in

February and March of 2001, strictly in accordance with the plans and specifications.

Sometime thereafter the Labate residence continued to move. Urban revisited the premises in 2003. The Labates allege that they have been advised to demolish the residence because it cannot be repaired (Complaint, par. 19). They commenced this action in August, 2004. In their complaint they allege one cause of action against Urban, which they describe as a claim for negligence and a claim for fraud.

Plaintiffs admit that the claim for negligent installation of the piles is untimely as it was not commenced within three years from the date of completion of Urban's performance [CPLR 214(4); see *City School District of City of Newburgh v Hugh Stubbins & Associates, Inc.*, 85 NY2d 535, 538 (1995)]. Accordingly, Urban is entitled to summary judgment dismissing any claim of negligence as time-barred.

This leaves plaintiffs allegations of fraud, which arise from the letter of estimate by Urban to Vachris dated January 30, 2001. In that letter, in addition to providing the estimate for the services to be performed, Urban wrote the following:

We wish to advise you, that, in our opinion, the installation of these piles will not entirely solve the problem which presently exists. The fill which was placed before the structure was built was not properly compacted and is presently setting. The existing retaining wall system is not adequate to resist horizontal movement, so that the structure is presently settling and moving laterally.

Until a properly designed regrading and retaining system are in place, we suggest that the following be performed in addition to installation of the drained piles:

1. Install a water control system to collect rainwater etc. and direct same away from the structure, and rear area where fill exists.
2. Excavate and remove as much of the fill as can safely be removed at the rear and sides of the structure to reduce the load on the present retaining wall system.
3. Monitor the existing cracks in the structure and cellar floor slab to determine the rate of movement.

On the basis of this language, plaintiffs argue that Urban knew, but failed to disclose, that the piling system would not secure and stabilize the residence (Complaint, par. 14).

At his deposition, when questioned about whether he spoke to the Labates about the aforementioned statements in the letter, the partner for Urban testified, that he did communicate this information to the Labates, and that "[t]hey already knew that water was running out of the bank and that the fill had to be removed and that the retaining wall was leaning" (Febesh transcript, o. 137).

Assuming for the purposes of this motion only that the plaintiffs were never advised of, or never understood the import of, the above-quoted statement in the letter from Urban to Vachris, plaintiffs do not have a cause of action against Urban for fraud for several reasons.

A cause of action for fraud requires a misrepresentation of fact; an expression of opinion will not sustain an action for fraud [*Chase Investments, Ltd v Kent*, 256 AD2d 298 (2nd Dept. 1998) (representation that plaintiff would successfully obtain a zoning variance was an opinion); *Zanani v Savad*, 217 AD2d 696 (2nd Dept. 1995) (representation as to future real estate tax liability considered to be an estimate only); see also *Longo v Butler Equities II LP*, 278 AD2d 97 (1st Dept. 2000) (representations that company was seriously undervalued and could be profitably broken up were expressions of opinion and could not support claim of fraud); *Platus Corp. Pension Plan v Nazareth*, 271 AD2d 422 (2nd Dept. 2000) (overestimation of weekly gross revenue from a delivery route not actionable)]. Fraud is "not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future" [see *Channel Master Corp. v Aluminum Limited Sales, Inc.*, 4 NY2d 403, 408 (1958)]. Here Urban's statement to Vachris in the letter of estimate is clearly one of opinion and future expectation.

Moreover, a cause of action for fraudulent concealment requires, *inter alia*, an allegation that the defendant had a duty to disclose the material information [*Ozelkan v Tyree Brothers Environmental Services, Inc.*, 29 AD3d 877 (2nd Dept. 2006); *EB v Liberation Publications, Inc.*, 7 AD3d 566 (2nd Dept. 2004)]. Parties engaged in an arms-length transaction do not have any special duties of disclosure [see *Dembeck v 220 Central Park South, LLC*, 33 AD3d 491 (1st Dept. 2006)]. Although plaintiffs allege generally that Urban has contractual and common law duties to make such recommendations as were necessary to protect the Labate residence (Complaint, par.21(f)), that is exactly what Urban did, and it made those recommendations to the entity that was responsible for designing the plans and specifications.

Vachris admits that it prepared the plans and specifications, and it "categorically" denies that Urban was "negligent, incompetent, or in breach of its contract (Krieg affirmation in opposition, par. 9). It opposes Urban's motion simply because it states, in conclusory fashion, that numerous questions of fact exist. General allegations that are conclusory and unsupported are insufficient to defeat summary judgment [see *Keevan v Rifkin*, 41 AD3d 661 (2nd Dept. 2007) and *Wolf v Citibank*, 34 AD3d 574 (2nd Dept. 2006)].


Based on the foregoing, Urban's motion for summary judgment dismissing any claim of fraud against it in the complaint must be granted.

Urban further seeks dismissal of all cross-claims against it. Defendant DePasquale alleges a cross-claim against Urban for contribution based on fault. The critical requirement for apportionment by contribution is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought [*Raquet v Braun*, 90 NY2d 177,183 (1977)]. On this record, there has been no showing of any breach of any duty by Urban. Under these circumstances, Urban is entitled to summary judgment dismissing DePasquale's cross-claim against it.

This decision constitutes the order of the court.

Dated: _____

FEB 14 2008



KENNETH A. DAVIS

J.S.C.