SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

DR. BERNARD SCHAYES & JEANNE SCHAYES,
Plaintiffs,

- against -

LAURENCE SPIER, KELLY SPIER, DAVID K. LEEDS, UNIONWORK CARPENTRY, INC., MYLESTONE CONTRACTING, INC., DAVID K. LEEDS, LLC., MIGUEL WEINSTEIN, Defendants.

Index #022958/07

Sequence No. #001 #002
Part 40

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Upon the foregoing papers, defendants David Leeds, Mylestone Contracting, Inc. and David K. Leeds, LLC's motion and defendant Miguel Weinstein's cross-motion to dismiss the complaint pursuant to CPLR §3211 are determined as follows:

This is an action for property damage that occurred when plaintiffs' premises located 42 Pinewood Road, East Hills was flooded after severe rain storms on October 11 and 19 or 27, 2007. It is alleged by plaintiffs that storm run-off from two nearby properties on higher ground caused the damage. Both properties were in different stages of a construction project at the time.

Non-moving defendants Lauwrence and Kelly Spier are the owners of 20 Birch Drive, East Hills who are building a new home. Defendant Uniwork Carpentry, Inc. is their contractor and cross-movant Miguel Weinstein the architect.

Moving Defendant David Leeds and David K. Leeds, LLC are the purported owners of the property located at 10 Birch Drive where the prior house was removed to construct a new one. Defendant

Mylestone Contracting, Inc. is the contractor.

Plaintiffs claim the defendants had a duty to assure the appropriate retaining walls, drains, drywells, etc., were to be constructed to protect plaintiffs' property and other lower lying properties from storm run-off. Plaintiffs also assert defendants had notice of their respective duties and intentionally or negligently failed to perform them. Specifically, the non-moving defendants at 20 Birch Drive were given a fine after the first storm by the Village of East Hills.

Plaintiffs' first cause of action is based in negligence and intentional or reckless conduct. The second cause of action is for a permanent injunction compelling defendants to build all appropriate retaining walls, etc.

Defendant David Leeds moves to dismiss the complaint based upon documentary evidence that he is not the owner of 10 Birch Lane. David K. Leeds, LLC is the owner of record who received its building permit approval on October 30, 2007, after the subject storms. All three movants assert that no construction work at the property was performed until after that date, with the exception of tree removal.

Plaintiffs oppose their application to dismiss, maintaining that defendant Leeds personally has made guarantees to defendant Mylestone's insurance company for indemnification, that David K. Leeds, LLC and Mylestone are "shells" and that Leeds personally performed construction work in the nature of tree removal which was commenced prior to receiving the building permit.

Plaintiff Bernard Schayes submits an affidavit setting forth the gravamen of his claims. However, with respect to defendant David Leeds personally, plaintiff's assertion that defendant Leeds actually performed construction work at 10 Birch Drive is based upon information and belief, not actual knowledge. No explanation is provided.

Since defendant David Leeds is not the owner of the property nor did he seek the building and tree removal permits in his individual capacity, plaintiffs' complaint fails to state a cause of action against him That David Leeds personally may be obligated to indemnify Mylestone for its own negligence is irrelevant to this motion.

Furthermore, defendant Leeds is permitted under the Business Corporation Law and Limited Liability

Law to shield himself from liability.

Consequently, the complaint against David K. Leeds individually is dismissed.

As for plaintiffs' contention that defendant Mylestone's application must be deemed withdrawn because it has changed counsel, such a position has no support and the Court will consider the application upon the consent of Mylestone's new attorney.

Defendants David K. Leeds, LLC and Mylestone Contracting, Inc.,'s motion to dismiss are denied. Plaintiffs have asserted they began construction, including the removal of trees which could cause the storm run-off, prior to receiving the building permit approval.

Turning to defendant Miguel Weinstein's cross-motion to dismiss plaintiff's complaint against him pursuant to CPLR §3211(a)(1)(3) and (7), a motion under subsection 7 can be considered at any time (CPLR §3211(e)) and movant may offer evidentiary material, including an affidavit, without the motion 's conversion to one for summary judgment *(Meyer v. Guinta, 262 AD2d 463, [2nd Dep't 1999]; see also Olszewski v. The Waters of Orchard Park, 303 AD2d 995 [4th Dep't 2003])*.

Consequently, the application under subsection 1 based on documentary evidence alone is denied, as is subsection 3, legal capacity to sue *(see Ward v. Petrie, 157 NY 301)*. The undersigned will consider the cross-motion under CPLR §3211(a)(7).

Plaintiffs' complaint against cross-movant, the architect hired by defendants Laurence and Kelly Spier for the construction located at 20 Birch Drive, is based upon negligence, not contract law, for the breach of his duty to use due care in design and/or supervision of the construction project.

The duty of care is a question to be determined by the Court in the first instance as a matter of law *(Espinal v. Melville Snow Contractors, 98 NY2d 136)*.

The architect's duty of care extends to the client and to those members of a definable and limited class whose reliance upon his services could have reasonably been foreseen *(Gordon v. Holt, 65 AD2d 344; see also White v. Gurantee, 43 NY2d 356 (accountants)*.

Even if the action is cast as one for ordinary negligence rather than malpractice, foreseeability of the harm alone does not define the duty *(532 Madison Avenue v. Finlandia, 96 NY2d 280)*. The t

Court must access the scope of duty to comport with what is socially, culturally and economically acceptable to identify what people reasonably expect from another *(Darby v. Compagnie v. National Air France, 96 NY2d 343)*.

For instance, to find that cross-movant owed a duty of care to all person would impose an undue burden upon him *(see, e.g., Gilson v. Metropolitan Opera House, 5 NY3d 574)*.

Arguably, an architect may owe a duty of care to adjoining property owners to insure by virtue of his design or supervision over his work that he does not cause any damage to their properties since the parties who might be affected are finite and obvious.

However here, plaintiffs' property is separated from the property upon which cross-movant is associated by two other properties.

Nevertheless, it is alleged that since 20 Birch Drive is on higher ground than plaintiffs' property, at the very least defendant Weinstein as the architect knew or should have known after the first storm that their property was being flooded because of the Village fine against the Spiers.

Accordingly, the Court determines that defendant Weinstein had a duty to plaintiffs by virtue of actual or constructive notice of potential drainage problems. His cross-motion to dismiss the complaint is denied as is the application to dismiss the cross-claim (Seq. #002).

Dated: June 3, 2008

.....J.S.C.

ENTERED

JUN 10 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE