

**Middle Is. Plaza, LLC v General Consol.
Indus., Inc.**

2008 NY Slip Op 32887(U)

October 8, 2008

Supreme Court, Suffolk County

Docket Number: 12946/2005

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART XXXVI SUFFOLK COUNTY

copy

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
 -----X
 MIDDLE ISLAND PLAZA, LLC LITTLE ROCK
 CONSTRUCTION, INC. & PARVIZ FARAHZAD,

INDEX NO.: 12946/2005
 CALENDAR NO.: 200702495OT
 MOTION DATE: 6/27/2008
 MOTION NO.: 003 MD

Plaintiffs,

PLAINTIFFS' ATTORNEY:
 JEFFREY B. HULSE, ESQ.
 295 North Country Road
 Sound Beach, New York 11789

-against-

GENERAL CONSOLIDATED INDUSTRIES, INC.,

 Defendant.
 -----X

DEFENDANT'S ATTORNEY:
 WILSON, ELSER, MOSKOWITZ,
 EDELMAN & DICKER, LLP
 150 East 42nd Street
 New York, New York 10017-5639

Upon the following papers numbered 1 to 46 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 15-33 ; Replying Affidavits and supporting papers 34-37 ; Other 38-46 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (motion sequence no. 3) by the defendant for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint is denied.

This is an action to recover damages for alleged breach of contract and negligence by the defendant in failing to discover illegal contaminants in cesspools and leaching pools (drywells) on property known as the Middle Island Plaza Shopping Center prior to the plaintiffs' purchase of the premises in May 2002. The purchase contract for the property required the plaintiffs to perform environmental inspections prior to closing and contemplated remediation by the seller in the event that illegal contaminants were discovered.

By their complaint, the plaintiffs allege that they contracted with the defendant (inspection contract) to conduct a pre-closing Phase I environmental inspection of the property. In addition, the plaintiffs allege that the defendant held itself out as a licensed, expert environmental consultant qualified to perform Phase I and Phase II environmental site inspections and subsurface investigations to discover hazardous substances and illegal contaminants. The defendant's Phase I report of October 19, 2001 identified concerns for possible subsurface soil and/or groundwater contamination by illegal contaminants and recommended the performance of a further, Phase II, investigation. For additional consideration paid by the plaintiffs, the defendant conducted the Phase II investigation, which included taking soil or sludge samples for laboratory analysis, and rendered its Phase II report.

The plaintiffs allege that they closed title and purchased the premises in reliance upon defendant's Phase I and II reports, which did not indicate the existence of any illegal contaminants in any of the property's cesspools designated CP1, CP2, CP3, CP4, CP5 and CP8 and leaching pools (drywells) designated as LP(DW)10 and LP(DW)11. According to the plaintiffs, the cesspools and leaching pools (drywells) were in fact contaminated at the time of the defendant's investigation and reports and the plaintiffs had to engage a professional environmental consultant/clean up company to perform remediation work to remove and dispose of the illegal

contaminants and contaminated soil, all at the plaintiffs' sole cost and expense. The plaintiffs claim that the defendant was negligent in, among other things, failing to discover the existence of the illegal contaminants in the contaminated pools; failing to take proper soil and sludge samples; failing to properly analyze the samples taken; and failing to otherwise adhere to generally accepted standards in the industry. The plaintiffs further allege that had they been aware of the existence of the illegal contaminants, they would have demanded that the seller perform the remediation at the seller's sole cost prior to the closing of title or they would not have closed title. The plaintiffs seek to recover damages in the sum of \$150,000.00.

The defendant now moves for summary judgment on the grounds that there is no evidence that the toxins found on the property in 2004 were present in 2001 inasmuch as the original inspection and testing of the property in late 2001 and early 2002 revealed that the primary cesspools were free of contamination and the five drywells that were found to be contaminated were remediated and the matter was closed by the Suffolk County Department of Health Services by July 2002. The defendant asserts that the original Phase I environmental and physical site inspection was conducted pursuant to the requirements of the American Society for Testing and Materials (ASTM) E 1527-00, Standard Practice for Environmental Site Assessments, and that the original Phase II subsurface investigation soil and sludge samples were analyzed in accordance with Suffolk County Department of Health Services protocol. In support of its motion, the defendant submits the summons and complaint; its answer; the plaintiff's answer to interrogatories; the defendant's response to the plaintiff's first set of interrogatories; the deposition transcript of Parviz Farahzad; the deposition transcript of Tom Smyth on behalf of the defendant; and letters from the Suffolk County Department of Health Services.

A party seeking summary judgment must establish his or her position by evidentiary proof in admissible form sufficient to warrant judgment to that party as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

Initially, the Court notes that the defendant has failed to attach copies of the inspection contract between the parties herein and the aforementioned Phase I and Phase II reports for the Court's review and for determination of the defendant's motion with respect to the breach of contract claims. Therefore, the defendant's motion for summary judgment dismissing the plaintiff's second cause of action for breach of contract is denied (*see, CPLR R. 3212 (b)*).

With respect to the first cause of action for negligence, the defendant relies on its response to the plaintiff's first set of interrogatories and the deposition transcript of Tom Smyth, the president, CEO and sole owner of the defendant, to establish that in 2001 and 2002 the defendant's employees properly sampled, in accordance with industry standards of the American Society for Testing and Materials and Suffolk County Department of Health Services standards, the cesspools and drywells on the property that plaintiff planned to purchase. Mr. Smyth's testimony further reflected that based on the foregoing, defendant determined that the primary cesspools, C1 and C2, were not contaminated, such that the other, overflow, cesspools were not required to be sampled pursuant to standard protocol. The drywells that were found to be contaminated, numbers 4, 7, 9, 10 and 13, were remediated and the matter was considered to be

closed by the Suffolk County Department of Health Services by July 2002. Mr. Smyth further testified that since there was no contamination present in the primary cesspools, C1 and C2, in 2001, in the two years and three months since the property changed owners, something was introduced into the system, perhaps through renovation, that caused the contamination in 2004.

Expert testimony is required concerning the standard of care required of an environmental consultant when sampling cesspools and dry wells for Phase I and Phase II testing (*see, Tyree Organization, Ltd. v Cashin Associates, P.C.*, 14 Misc 3d 1220 (A), 836 NYS2d 490 [Sup Ct, Nassau County, Jan 22, 2007]). The acts of negligence as alleged herein do not fall within the competence of a lay jury to evaluate (*see, 530 East 89 Corp. v Unger*, 43 NY2d 776, 402 NYS2d 382 [1977]). Inasmuch as Mr. Smyth testified that he has not yet obtained his degree in environmental science and that he himself is not involved in the actual inspection and obtaining of samples, the defendant cannot rely on his deposition testimony as expert opinion in support of the instant motion (*compare, 470 Owners Corp. v Richard L. Heimer, P.E., P.C.*, 258 AD2d 558, 685 NYS2d 747 [2d Dept 1999]).

In any event, even if the Court were to accept Mr. Smyth's testimony as expert opinion, Mr. Smyth makes reference to the contents of documents that are not available for the Court's review. Without such documents, much of the testimony of Mr. Smyth as to which cesspools and drywells were tested, when they were tested, and the applicable standards is rather confusing. The defendant's response to the plaintiff's first set of interrogatories does not sufficiently ameliorate the deficiency. Notably, neither the deposition testimony nor the defendant's response to the plaintiff's first set of interrogatories adequately addresses the allegations of negligence by defendant in admittedly failing to submit a sample from DW 11 for analysis after the Phase II investigation when contamination was found in DW4 and DW7 samples and the defendant recommended the sampling and analysis of all the remaining drywells. Also, based on Mr. Smyth's testimony, the site inspections, taking of samples and preparation of documents were conducted by a former employee of the defendant, Matthew Boeckel, and no affidavit or deposition transcript from him has been submitted.

Therefore, the defendant has failed to meet its burden and the defendant's motion must be denied, regardless of the sufficiency of the opposition papers (*see, Winegrad v New York Univ. Med. Ctr., supra*).

Accordingly, the instant motion is denied.

PAUL J. BAISLEY, JR.

Dated October 8, 2008

J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION