

Lucchesi v Perfetto

2008 NY Slip Op 33119(U)

November 19, 2008

Supreme Court, Richmond County

Docket Number: 013465/03

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.013465/03
Motion No.:003, 004**

**MICHAEL LUCCHESI and
KIM LUCCHESI,**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**CESAR PERFETTO,
PATRICIA PERFETTO,
“ARCHITECT JANE DOE” and
“XYZ CONSTRUCTION COMPANY”,**

Defendants

The following items were considered in the review of these motions for 1) summary judgment, and 2) to amend an answer

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 6
Notice of Cross Motion and Affidavits Annexed	2
Affirmation in Opposition	7
Reply Affirmation in Support	3
Affirmation in Response	4
Reply Affirmation to Motion	5, 8
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiffs who purchased undeveloped land in 2001 are time barred from recovering damages in trespass, nuisance or negligence from the abutting property owners who raised the level of their adjoining land in order to build their house in 1996-1997 with the consent of the prior owner of the plaintiffs property and the approval of the New York City Department of Buildings.

The defendants, Cesar Pefetto and Patricia Perfetto, (“the Perfettos”) move this court pursuant to CPLR § 3212 for an order dismissing the plaintiffs’ complaint against them. The plaintiffs, Michael Lucchesi and Kim Lucchesi, (“the Lucchesis”) cross-move pursuant to CPLR

§ 3212 granting summary judgment in favor of the plaintiffs. The Perfettos motion is granted in its entirety, while the Lucchesis motion is denied in its entirety. The Perfettos motion to amend their answer pursuant to CPLR § 3025 is dismissed as moot.

In 1996, the Perfetto defendants purchased unimproved vacant land at 12 Gorge Road, Staten Island, New York (“Gorge Road”). The Perfettos began construction on their home in September of 1996. John Lucchesi owned the unimproved adjacent vacant land located at 161 Forest Road, Staten Island, New York (“Forest Road”). The Perfettos do not dispute that during the course of the construction of their home they back filled dirt on to Gorge Road. Additionally, the Perfettos maintain that John Lucchesi consented that some fill spill over on to his property located at Forest Road. The Department of Buildings (the “DOB”) issued a temporary certificate of occupancy on the Gorge Road property in 1997 and later issued a permanent certificate of occupancy in 1999 - 2000.

The plaintiffs, Michael and Kim Lucchesi acquired the Forest Road property from John Lucchesi on August 14, 2001 after the Perfettos completed their construction on Gorge Road. The Lucchesis sought to build a house and relied on a land survey from 1995 to draft their architectural plans that did not reflect the raised grade of the Gorge Road property in relation to their property. Prior to beginning construction the Lucchesis’ builder had an opportunity to inspect the property. He promptly alerted his clients that the grade appeared to be much higher than the 1995 survey indicated. The Lucchesis commissioned a second survey that confirmed the visual inspection of the builder that the grade between the properties was higher than the 1995 survey by several feet.

The Lucchesis contacted their architect with the results of the new survey that reflected the greater grade differential between the properties. The testimony of Michael Lucchesi, taken at a deposition reflects the following exchange:

Q. Did you ever have a discussion of putting in retaining

walls?

A. Yes

Q. When did you have that conversation?

Mr. Dashe: Objection to form. Are you still referring to the architect?

Mr. Suss: I will ask it again.

Q. With whom did you have a discussion about putting in retaining walls?

A. With my architect as well as my builder.

Q. When you had the discussion with Mr. Moss, was this while you were still developing the plans for your house?

A. Yes.

Q. What was the discussion you had with Mr. Moss regarding putting in retaining walls?

A. The discussion was that we needed a retaining wall in the back of the property, a small retaining wall.

Q. Was that the property that was adjoining the Perfetto property?

A. No. It is not the side adjoining our property, it is the back of my property.

Q. Was a retaining wall put in for the back of the that property?

A. No.

Q. Did you ever have a conversation with Mr. Tirro about retaining walls?

A. Yes.

Q. What was the sum and substance of the conversation with Mr. Tirro about retaining walls?

A. The same. We needed to put a retaining wall in the back of the property.

Q. Did Mr. Tirro ever tell you you should put a retaining wall on the side of the property adjoining the Perfetto property?

A. No.

Q. After this 2001 survey was done, did you ever have any more conversations with Mr. Moss about retaining walls?

A. Yes.

Q. What was the sum and substance of the conversation with Mr. Moss after the 2001 survey?

A. Well, we realized that there was a much higher grade and that a wall would need to be put in.

Q. Was, in fact, plans made to put a wall in?

A. Yes.

Q. Was, in fact, a wall put in?

- A. No.
- Q. What was the reason a wall wasn't put in?
- A. I didn't think that I should have the entire expense of putting in the wall.¹

Therefore, with full knowledge of the grade differential between the properties the Lucchessis chose to begin construction on their property without constructing a retaining wall on any side of their property.

In their 2003 complaint the Lucchesis allege claims against the Perfettos for: Nuisance; Trespass-Entering onto land; Trespass-Altering water drainage; and Negligence. The Lucchesis now argue that the continuing spill over of the fill initially poured by the Perfettos in 1996 to raise the grade of the Gorge Road property constitutes a continuous tort and trespass to land, thereby tolling the three year statute of limitations.

Before the court examines the merit of the Lucchesis claims, it must first determine whether their claims are time barred. CPLR § 214 states that actions relating to damage to property must be commenced within three years barring the existence of special circumstances.² The primary issue before this court is whether the plaintiff is entitled to a tolling of the statute of limitations.

The Perfettos contend that the Lucchesis are not entitled to a tolling of the three year statute of limitations. They argue that the pouring of the fill occurred with the knowledge of the prior owner of the property, John Lucchesi. Because the prior owner had knowledge of the grade change, the Perfettos maintain that John Lucchesi had three years to bring such an action pursuant to CPLR § 214. That three year period of time ran from 1996 - 1997 when the dirt fill placement was complete until 1999 - 2000, which is approximately two years prior to the

¹ Michael Lucchesi Transcript at p.15-17.

² CPLR § 214.

plaintiffs taking title to the premises. In essence, the plaintiff took title to their land subject to the existing conditions and not subject to a 1995 survey, which they erroneously relied upon.

The Lucchesis argue that the residual fill used to raise the Perfettos land continues to fall onto their property in heavy rain storms and thereby entitles them to a tolling of the statute of limitations based upon the theory of continuing tort. To support this argument the Lucchesis cite the Court of Appeals decision in *509 Sixth Avenue Corporation v. New York City Transit Authority*,³ which held that a subway line constructed under the plaintiff's property constituted a continuing trespass that gives rise to successive causes of action. In reaching that holding, the Court of Appeals reasoned that it was the permanent nature of the subway tunnel coupled with the plaintiff's lack of knowledge of the encroachment that supported the finding of a continuing trespass. The Court of Appeals found where “. . . an encroaching structure is a continuing trespass which gives rise to successive causes of action, except where barred by acquisition of title or an easement by operation of law.”⁴

However, *509 Sixth Avenue* is inapplicable in this case because it involved an underground trespass by a subway of which the plaintiffs had no knowledge. Here, however the spillover of water and dirt from nearly seven years prior to the commencement of this action does not constitute a permanent encroaching structure as it did in *509 Sixth Avenue*. Furthermore, the Perfettos maintain that because the Lucchesis took possession of their property after they raised the grade of their land, and after the DOB issued a certificate of occupancy, they were under no duty to prevent surface materials from their land from falling onto the Gorge Road property because the land was then in a quasi-natural state. Hence, the Perfettos are under no obligation to take steps to prevent surface materials from falling on to the Lucchesis land.⁵

³ 15 NY2d 48, [1964].

⁴ Id.

⁵ See, *Kossoff v. Rathgeb-Walsh*, 3 NY2d 583 [1958].

Assuming *arguendo* that the Lucchessis were entitled to a tolling of the statute of limitations, this court does not find that a cause of action exists in this action. The Lucchesis argue that this case is analogous to *Burk v. High Point Homes, Inc.*,⁶ where a trial court in 1960 found a land owner liable to a homeowner for damages caused by raising the grade of the abutting land. However, *Burk* is distinguishable from this case because it was brought timely within three years of the encroachment onto the plaintiffs property. But more importantly the plaintiffs in *Burk* were existing homeowners who did not purchase undeveloped land after the defendant increased the grade of the abutting property. The defendants in *Burk* changed the natural configuration of the neighboring plaintiffs developed property. Those facts are just the opposite of the facts in this case where the plaintiffs purchased undeveloped land adjacent to an existing house.

The Perfetto defendants, completed the grade change of their property several years before the Lucchesis purchased their property and began to construct their home on Forest Road. Furthermore, the issuance of a certificate of occupancy by the DOB after the pouring of fill to raise the Gorge Road property supports a finding by this court that the land existed in a quasi-natural state upon the purchase of the property by the Lucchesis. The difference in elevation was open and obvious to the Lucchesis when they purchased their land. It is only natural that water runs downhill and that in heavy storms erosion may occur. The Lucchesis could have taken steps to minimize or eliminate that condition by building a retaining wall or such other measures. The plaintiffs refused to do that and now ask this court to order that the defendants pay them to do so. For all the reasons outlined above this court will not grant such relief.

Accordingly, it is hereby

ORDERED, the Perfettos motion for summary judgment is granted and the complaint is hereby dismissed as against Cesar Perfetto and Patricia Perfetto, and the Clerk is directed to enter

⁶ 22 Misc2d 492, [Sup. Ct, Nassau County 1960].

judgment in favor of said defendants with costs; and it is further

ORDERED, that the cross-motion of the Lucchesis is denied in its entirety; and it is further

ORDERED, that the Perfettos motion to amend their answer is dismissed as moot.

ENTER,

DATED: November 19, 2008

Joseph J. Maltese
Justice of the Supreme Court