

Plotkin v J.J. Nazzaro Assoc., Ltd.

2008 NY Slip Op 33334(U)

December 1, 2008

Supreme Court, Suffolk County

Docket Number: 04-3811

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

P R E S E N T :

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5/20/08 (#007, #008, #009)
MOTION DATE 7/16/08 (#010)
ADJ. DATE 9/10/08
Mot. Seq. #007 - MG
Mot. Seq. #008 - MG
Mot. Seq. #009 - MotD
Mot. Seq. #010 - XMD

-----X
MICHAEL PLOTKIN, :
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Plaintiff, :
: :
: :
: :
- against - :
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: :
J.J. NAZZARO ASSOCIATES, LTD., WALTER :
KALUTA, CLAUDIA KALUTA, JOANNE P. :
PURCHLA, and JOHN DOE and/or JANE DOE, :
said individuals intended to be the owners and/or :
the contracted purchasers of 232 West Shore Road, :
Oakdale, NY, :
: :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 48 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12; 13-25; 26-33; Notice of Cross Motion and supporting papers 34-39; Answering Affidavits and supporting papers 40-42; Replying Affidavits and supporting papers 43; 44-45; 46;

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47; 48 ___; Other defendant Nazzaro Assoc.'s memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Michael J. Perrone and Kim M. Perrone s/h/a John Doe and/or Jane Doe (Mot. Seq. #007) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them, the motion by defendants Walter Kaluta and Claudia Kaluta (Mot. Seq. #008) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them, the motion by defendant J.J. Nazzaro Associates, Ltd. (Mot. Seq. #009) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them, and the cross motion by defendant Joanne Valva-Purchla s/h/a Joanne P. Purchla (Mot. Seq. #010) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against her, are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Michael J. Perrone and Kim M. Perrone s/h/a John Doe and/or Jane Doe is granted; and it is further

ORDERED that the motion by defendants Walter Kaluta and Claudia Kaluta is granted; and it is further

ORDERED that the motion by defendant J.J. Nazzaro Associates, Ltd. is granted to the extent of granting summary judgment dismissing the plaintiff's first, second, third, seventh, eighth, and ninth causes of action, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Joanne Valva-Purchla s/h/a Joanne P. Purchla is denied.

The plaintiff, who is the owner of residential property located at 337 Vanderbilt Boulevard, Oakdale, New York, commenced this action to recover damages for injury to his property caused by flooding and erosion. The plaintiff claims, in part, that during and after the construction of residences on adjoining properties, the defendants altered those properties so as to direct the flow of rain and surface water onto the plaintiff's property.

It appears that the plaintiff's property was previously part of a larger parcel owned by defendant J.J. Nazzaro Associates, Ltd. ("Nazzaro Assoc."), the easterly (rear) portion of which abutted West Shore Road. Sometime prior to January 23, 2003, the parcel was subdivided into four building lots, including the plaintiff's lot, on which there was an existing residence, and three unimproved lots on the easterly portion of the property now known as 232 West Shore Road, 236 West Shore Road, and 240 West Shore Road. Defendants Michael J. Perrone and Kim M. Perrone (s/h/a John Doe and/or Jane Doe) currently own the property located at 232 West Shore Road. Defendants Walter Kaluta and Claudia Kaluta currently own the property located at 236 West Shore Road. Defendant Joanne Valva-Purchla (s/h/a Joanne P. Purchla) currently owns the property located at 240 West Shore Road.

On or about July 10, 2002, the plaintiff and Nazzaro Assoc. entered into a written occupancy agreement pursuant to which Nazzaro Assoc. permitted the plaintiff to enter into possession of the

property located at 337 Vanderbilt Boulevard in anticipation of the closing of title on the premises and on certain conditions, including the plaintiff's agreement to accept the premises "as is" upon the closing of title. It appears that the plaintiff began to occupy the premises in or about July 2002.

Closing of title took place on or about January 23, 2003. Paragraph 22 of the parties' contract of sale states that

22. All prior understandings and agreements between SELLER and PURCHASER are merged in this contract. It completely expresses their full agreement. It has been entered into after full investigation, neither party relying upon any statements made by anyone else that is not set forth in this contract.

Paragraph 21 of the rider to the contract of sale provides, in part, as follows:

21. The Purchasers agree that they have waived the provisions of the Property Condition Disclosure Act, 2001 N.Y. Laws 5339-A, effective March 1 2002 * * *. The Purchasers hereby waive, release, and discharge all rights, claims and actions against the Sellers and against the real property resulting or arising from said Property Condition Disclosure Act. In the event this clause is void or unenforceable, Seller's damages are limited to \$500.00. This provision shall survive the closing of title.

It is undisputed that there was a chronic flooding problem in the area of the subdivision, in part due to the (low) elevation at which the plaintiff's residence had been built. To address the problem, the Town consolidated the three new lots to leave a low-lying wetlands area at the south edge of the property for drainage. Additionally, when Nazzaro Assoc. constructed the new homes on West Shore Road, it installed a catch basin and an infiltration system to capture rainwater in front of the most southerly of the new homes, with an overflow pipe to direct the water to the wetlands area. By letter to the Town of Islip Engineering Department dated January 10, 2003, the plaintiff acknowledged the "existing drainage and puddling situation at 337 Vanderbuilt [sic] Boulevard" and "that this situation existed prior to the construction of the new homes on West Shore Drive [sic]." Although the plaintiff concedes his knowledge of the flooding condition prior to the closing of title, he claims that the condition worsened when construction began on the adjoining lots and, in particular, that the water piped into the wetlands area would then flood his property as well.

The plaintiff alleges eighteen causes of action in his complaint. The first nine causes of action are pleaded against Nazzaro Assoc.: the first through third, alleging the failure to provide a property condition disclosure statement pursuant to article 14 of the Real Property Law, the fourth through sixth, alleging that by altering the land on the adjoining lots so as to cause the flooding of the plaintiff's property, Nazzaro Assoc. rendered the plaintiff's property unmarketable, uninhabitable, and worthless, and the seventh through ninth, alleging a breach of the contractual duty to sell the plaintiff's property in a marketable and habitable condition. The tenth through twelfth, thirteenth through fifteenth, and sixteenth through eighteenth causes of action allege, respectively, that Joanne Valva-Purchla, Walter Kaluta and Claudia Kaluta, and Michael J. Perrone and Kim M. Perrone altered their premises so as to

cause the flooding of the plaintiff's property. Walter Kaluta and Claudia Kaluta plead a self-styled "cross complaint" for common-law indemnification and contribution against the other defendants, and Michael J. Perrone and Kim M. Perrone likewise assert a cross claim for common-law indemnification and contribution against their co-defendants.

Michael J. Perrone and Kim M. Perrone, Walter Kaluta and Claudia Kaluta, and Joanne Valva-Purchla now separately move for summary judgment on the ground that they did not install the drainage system, nor did they by any artificial means divert or alter the natural flow of surface water onto the plaintiff's property.

The Court finds that Michael J. Perrone, Kim M. Perrone, Walter Kaluta, and Claudia Kaluta established their prima facie entitlement to judgment as a matter of law by demonstrating, through their respective affidavits, that they did not intentionally and in bad faith divert any surface water onto the plaintiff's property (*cf.*, ***Iglesias v Dazi***, 253 AD2d 515, 677 NYS2d 158 [1998]). "It is well settled that a landowner will not be held liable for damages to abutting property caused by the flow of surface water due to improvements to his or her land provided that the improvements were made in good faith to fit the property for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes or ditches" (***Tatzel v Kaplan***, 292 AD2d 440, 441, 738 NYS2d 863, 864 [2002]; *accord*, ***Kossoff v Rathgeb-Walsh, Inc.***, 3 NY2d 583, 170 NYS2d 789 [1958]). The plaintiff, in opposition, failed to raise a triable issue of fact. Accordingly, those defendants are entitled to summary judgment.

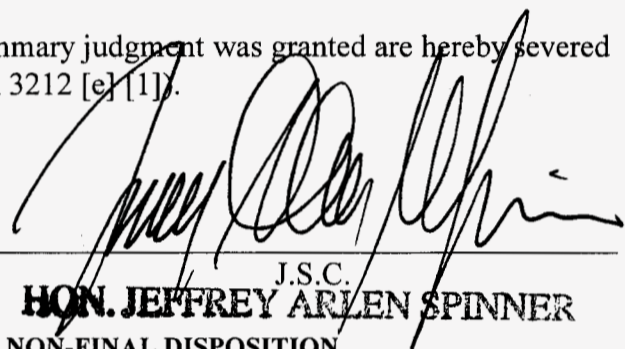
The cross motion by Joanne Valva-Purchla is denied as untimely, having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see*, CPLR 3212 [a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). In any event, the Court notes that the cross motion is supported only by an affirmation from her attorney, who lacks knowledge of the facts (*see*, CPLR 3212 [b]). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor * * * and he must do so by tender of evidentiary proof in admissible form" (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790, 791-792 [1979] [internal quotation marks omitted]; *accord*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Nor would the Court otherwise find dispositive of her cross motion the absence of proof that she was involved in the planning, design or implementation of the grading of the property or of the drainage system. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894, 895 [1992]).

Nazzaro Assoc. also moves for summary judgment, alleging that it had the right to improve the lots on West Shore Road to fit the property to a rational use irrespective of whether those improvements resulted in an increase in the flow of surface water onto the plaintiff's property, since it did not divert the water directly onto the plaintiff's property by artificial pipes or ditches, and that any claim based on its purported failure to disclose flooding conditions to the plaintiff prior to the plaintiff's purchase of the property either is waived or did not survive delivery of the deed.

The Court finds the showing by Nazzaro Assoc. sufficient to warrant the granting of summary judgment dismissing the plaintiff's first, second, and third causes of action. Not only was the plaintiff aware of the flooding condition prior to purchasing the property, but he also expressly waived the provisions of Real Property Law article 14 requiring the disclosure of such conditions. Likewise, as to the plaintiff's seventh, eighth, and ninth causes of action, the Court notes that the plaintiff agreed to accept the premises "as is" and that the contract of sale contained a merger clause, thereby extinguishing any claims the plaintiff might have had arising from the parties' contract (*see, e.g., Simone v Homecheck Real Estate Servs.*, 42 AD3d 518, 840 NYS2d 398 [2007]). As to the remaining causes of action, however, the Court does not view the applicable law as limiting a defendant's liability for damages to those situations where the defendant diverts surface water *directly* onto the plaintiff's property (*see, Zutt v State of New York*, 19 Misc 3d 1131[A], 866 NYS2d 96 [2006], *affd* 50 AD3d 1133, 856 NYS2d 245 [2008]; *Keller v State of New York*, 19 Misc 2d 794, 194 NYS2d 358 [1959]). Assuming then, for purposes of this motion, the truth of the plaintiff's claim that the water piped by the infiltration system into the wetlands area did ultimately drain onto his property—and Nazzaro Assoc. has offered no proof to the contrary—the Court is constrained to deny summary judgment as to the plaintiff's fourth, fifth, and sixth causes of action.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see, CPLR 3212 [e] [1]*).

Dated: DEC 01 2008



 J.S.C.
HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION