Hulse v Simoes
2009 NY Slip Op 30071(U)
January 9, 2009
Supreme Court, Nassau County
Docket Number: 18549/07
Judge: Daniel R. Palmieri
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[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL TERM PART: 47

MARION T. HULSE,

INDEX NO.: 18549/07

Plaintiff,

MOTION DATE:12-17-08
SUBMIT DATE: 12-17-08
SEQ. NUMBER - 004

-against-

JOSE SIMOES,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 11-24-08....................1
Affirmation in Opposition, dated 12-9-08....................2
Reply Affirmation, dated 12-12-08....................3

The defendant's motion pursuant to CPLR 3126 and CPLR 3212, dismissing the complaint for alleged spoliation of evidence or, in the alternative, precluding the use of any evidence from Joseph Schmitt, P.E., or for summary judgment dismissing the complaint for want of a prima facie case, is granted to the extent that summary judgment is granted to the defendant pursuant to CPLR 3212 and the complaint is dismissed. The other branches of the motion are denied as academic.

This is an action for property damage, specifically damage caused by rainwater run-off.

The plaintiff alleges, among other things, that this run-off was responsible for the collapse of an in-ground pool at her property located at 3 North Harbor Down, Miller Place, New York. The complaint alleges that defendant Jose Simoes, the owner of property lying directly to the south at 17 Griffen Court in Miller Place, significantly altered the topography of his premises and created the conditions which caused the water run-off. The alleged run-off caused the soil to become saturated, and the earth and support for the pool structure to be undermined, all of which caused its complete collapse in April of 2005.

The Court turns first to that branch of the motion that seeks summary judgment. Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

Initially, the Court agrees with the plaintiff that the Court cannot consider the affidavits of two experts advanced by the defendant in support of his motion.. These are the affidavit of Richard J. Baldwin, C.P.G., P.G., a certified and licensed professional geologist, and Troy Berliner, a home improvement contractor licensed in Nassau and Suffolk Counties for the installation of in-ground swimming pools. These experts were not identified prior to the completion of discovery, although a demand for expert disclosure had been made by the plaintiff, and defendant served these affidavits with the instant motion, which was made after the note of issue was filed. *Construction by Singletree, Inc. v Lowe,* 55 AD3d 861 (2d Dept. 2008); [1] *Colon v Chelsea Piers Mgt., Inc.,* 50 AD3d 616 (2d Dept. 2008).

Nevertheless, the defendant has presented sufficient other proof to warrant a finding that he is entitled to judgment as a matter of law. He presents the transcript of his own deposition and that of two non-party witnesses deposed during the course of discovery. These were Harold F. Tranchon, Jr., a surveyor, and Angelo Nicosia, a professional engineer. Both were hired to perform work on the defendant's premises. Defendant also presents the pleadings in the case, including the plaintiff's bill of particulars and supplemental bill of particulars.

Taken together, the foregoing indicates that the defendant did indeed change the topography of the land upon which he built his home, including, among other things, elevating

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[1] Notwithstanding the fact that this clearly is the law in the Second Department, by which this Court is bound, the undersigned agrees with Justice Carni's dissent that CPLR 3101(d) does not require disclosure for purposes of summary judgment, and that no specific time frame is given for such disclosure in any event.

the rear yard at the point it abutted the plaintiff's. These are the changes alleged to have caused the adverse water run-off that underlies the present action. However, all such changes were incident to a legitimate, good-faith purpose, *i.e.,* the construction of defendant's residence. Further, the plaintiff does not contend, and the proof does not indicate, that the water run-off of which the plaintiff complains was caused by any piping, ditches or culverts that were installed or created by the defendant during that construction, the purpose of which was to carry water off the defendant's property and on to the plaintiff's.

Rather, the water flow that allegedly damaged plaintiff's property was the result of its following a natural course, and the fact that this natural course was caused by the alteration of the topography does not provide a basis for liability to the plaintiff under New York law.

> "Under the common law adopted in this State, either proprietor can improve his land according to his own desire in any manner to which the land is suited, without being liable to the abutting owner for change in the flowage of the surface water... Both have equal rights to improve their properties, *come what may to the surface water*, provided, of course, that the improvements are made in good faith to fit the property to some rational use to which it is adapted, and that the water is not drained into the other property by means of pipes or ditches."

Kossoff v Rathgeb-Walsh, 3 NY2d 583, 588, 589-590 (1957) [emphasis supplied]; *see also, Baker v City of Plattsburgh,* 46 AD3d 1075 (3d Dept. 2007); *Tatzel v Kaplan,* 292 AD2d 440 (2d Dept. 2002); *Gollomp v Dubbs,* 283 AD2d 550 (2d Dept. 2001).

In response to this *prima facie* showing, the plaintiff has submitted the affirmation of her attorney, [2] that of an expert, Joseph Schmitt, P.E., and documentary evidence and

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[2] The Court has considered this statement as having evidentiary value, as he is the plaintiff's spouse, resides at the plaintiff's premises and has first-hand knowledge of the facts and circumstances of this matter.

photographs, with a CD purporting to show the extent of the water run-off on to plaintiff's property. However, there is no proof, or even a factual allegation, that the water run-off was caused by anything other than the changed topography of the defendant's property, which the authority cited above instructs is insufficient as a basis for liability. There is no proof or allegation that the defendant diverted water from his property on to the plaintiff's by means of pipes, ditches or other devices that would alter the natural flow of water given the topography of the land after the work on the defendant's property was completed. Nor does the plaintiff challenge the good-faith nature of the topographical changes made, all of which were part of the construction of the defendant's home. The fact that the defendant voluntarily installed a dry well to address the problem after this litigation began does not alter the foregoing. Finally, the plaintiff makes no attempt to distinguish the circumstances of this case from those found in the decisions cited above, which law was raised by the defendant in his moving papers. Accordingly, this Court is bound by the authority cited and must grant summary judgment to the defendant.

The other branches of the motion, which were premised on spoliation of evidence stemming from the replacement of the damaged swimming pool and repairs to the surrounding area, are denied as academic. The Court notes, however, that they would have been denied on the merits, as the defendant did not demonstrate that he would be unable to mount a defense to this case without an inspection of the plaintiff's pool. Indeed, the hiring of experts by the defendants (who do not aver that they were unable to reach a conclusion about what caused the collapse of the pool because they did not have a chance to look at it), the

photographs and other proof submitted on this motion by both parties indicated the reverse. *See, e.g., Kirschen v Marino,* 16 AD3d 555 (2d Dept. 2005).

This shall constitute the Decision and Order of this Court.

DATED: January 9, 2009

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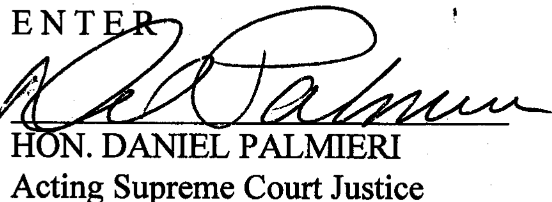

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
JAN 13 2009
NASSAU COUNTY
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