O'Csay v Yolo Equities Corp.

2009 NY Slip Op 31197(U)

June 1, 2009

Supreme Court, Columbia County

Docket Number: 07-0586

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

HUGES O'CSAY and JUDITH O'CSAY,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 07-0586
RJI NO. 19-07-3132

YOLO EQUITIES CORP., DOMINICK CAROPRESO, TAIT INCORPORATED DOING BUSINESS AS DAN TAIT, INC., EVERGREEN MOUNTAIN CONTRACTING, INC., GENE CORDON REALTY, INC. AND KAATERSKILL ASSOCIATES, LAND SURVEYING, ARCHITECTURE, AND ENGINEERING, P.C.,

Defendants.

Supreme Court Greene County All Purpose Term, May 18, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:
John P. Kingsley, PC
Attorney for Plaintiffs
329 Main Street
Catskill, New York 12414

McCabe & Mack, LLP
Christina Bookless, Esq.
Attorneys for the Defendant Dominick Caropreso
63 Washington Street
Poughkeepsie, New York 12602

TERESI, J.:

Plaintiffs and Yolo Equities Corp. (hereinafter "Yolo") entered into a contract for the purchase and sale of a parcel of real property located in Greene County, New York (hereinafter the "premises"). Prior to closing, plaintiffs engaged defendant Dominick Caropreso (hereinafter "Caropreso") to conduct a "home inspection" of the premises. Caropreso conducted the "home inspection", provided the plaintiffs a written report and the plaintiffs subsequently closed on their

purchase of the premises. Following the closing, plaintiffs found that the elevated deck, attached to the rear of the premises, is not properly supported. Plaintiffs commenced this action seeking damages due to the alleged deck defect.

For purposes of this motion, plaintiffs allege Caropreso conducted the "home inspection" in a negligent or grossly negligent manner in failing to find the deck defect or warn them of the defect. Issue was joined by Caropreso, and discovery is complete. Caropreso now moves for summary judgement dismissing the complaint against him or alternatively limiting his liability to the cost of the home inspection. Plaintiffs oppose the motion. Because Caropreso failed to demonstrate his entitlement to judgment as a matter of law, his motion is denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue". (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On a motion for summary judgment, the movant must establish by admissible proof, their right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact with "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]).

Defendant claims that he cannot be held liable in this action because of the limitations of liability contained in his "home inspection" contract with the plaintiffs. Caropreso, as a professional home inspector, is exposed to "tort liability for failure to exercise reasonable care,

irrespective of [his] contractual duties." (Kohl v. Green, 235 AD2d 671 [3d Dept. 1997] quoting Sommer v. Federal Signal Corp., 79 NY2d 540 [1992][internal quotations omitted]). However, a "clear contractual provision limiting damages is enforceable absent a special relationship between the parties, statutory prohibition or an overriding public policy." (Rector v. Calamus Group, Inc., 17 AD3d 960 [3d Dept. 2005]). The contract's provision limiting liability must be "expressed clearly and in unequivocal terms." (Rigney v. Ichabod Crane Cent. School Dist., 59 AD3d 842 [3d Dept. 2009] quoting Gross v. Sweet, 49 NY2d 102 [1979]).

In this case, between a home buyer and home inspector, no special relationship, statutory prohibition or public policy prevent Caropreso from limiting his liability. (Rector, supra; Peluso v. Tauscher Cronacher Professional Engineers, PC, 270 AD2d 325 [2d Dept. 2000]). However, Caropreso cannot limit his liability from plaintiffs' gross negligence claim. (Rector, supra).

Here, the specific contractual provisions at issue fail to properly limit Caropreso's liability. The contract between plaintiffs and Caropreso states that: Caropreso does "not make judgments on [the] adequacy of... flood plains... [or] soil analysis". The contract also limits its scope by stating "[t]his report is not intended to be exhaustive... [i]t is intended only as a general guide to help the client in making his own evaluation of the overall condition of the house." Plaintiffs claim Caropreso's negligence lies in his failing to determine and report that the premises' porch was not properly supported. The contract's limitations on liability, set forth above, do not state a clear and unequivocal limitation of such claimed negligence. The structural soundness of the premises' porch is simply not encompassed by the clear and unequivocal terms of the contract's "flood plain" or "soil analysis" limitations. Nor does the "general guide" limitation provide any basis to limit Caropreso's liability in this action, because it fails to state a

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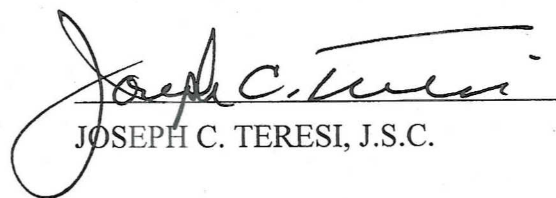
clear and unequivocal waiver of Caropreso's negligence liability. (Gross v. Sweet, 49 NY2d 102 [1979]).

Similarly, Caropreso has failed to demonstrate that his liability is limited to the cost of the home inspection. While numerous courts have limited home inspectors' liability to the cost of the home inspection. (Rector, supra; Peluso, supra; Schietinger v. Tauscher Cronacher Professional Engineers, PC, 40 AD3d 954 [2d Dept. 2007]). The home inspection contract in each case included a specific contractual provision limiting the home inspector's liability to the cost of the inspection. (Rector, supra; Peluso, supra; Schietinger, supra). Here, the home inspection contract between plaintiffs and Caropreso contains no language limiting Caropreso's liability to the cost of the home inspection. As such, Caropreso's motion seeking such limitation is unsupported on this record.

Accordingly, Caropreso has failed to demonstrate his entitlement to summary judgment as a matter of law, and his motion is denied.

All papers, including this Decision and Order, are being returned to plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. The parties are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.
Dated: June / , 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated April 27, 2009, Affirmation of Christina Bookless, Esq., dated April 27, 2009, with attached Exhibits "A" - "P".
2. Affidavit in Opposition of Judith O'Csay, dated May 11, 2009; Affirmation of John Kingsley, Esq., undated, with attached Exhibits 1-2.
3. Affirmation of Christina Bookless, Esq., dated May 15, 2009, with attached Exhibits "A" - "C".