

Estrada v Town of Brookhaven

2009 NY Slip Op 32901(U)

December 7, 2009

Supreme Court, Suffolk County

Docket Number: 04-8659

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 11-28-08

ADJ. DATE 11-2-09

Mot. Seq. # 003 - MG

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RAYMOND ESTRADA and MARLENA	:	DAVID K. LIEB, P.C.
ESTRADA.	:	Attorney for Plaintiffs
	:	376A Main Street
	:	Center Moriches, New York 11934
Plaintiffs,	:	
- against -	:	
	:	LEWIS JOHS AVALLONE AVILES, LLP
THE TOWN OF BROOKHAVEN and	:	Attorneys for Defendant Town of Brookhaven
STEVEN-VICTOR ASSOCIATES, LLC,	:	21 East Second Street
	:	Riverhead, New York 11901
Defendants.	:	

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers (003) 1 - 14 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-27 ; Replying Affidavits and supporting papers 28-29 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendant, Town of Brookhaven, pursuant to CPLR 3212 for summary judgment dismissing all claims asserted against it is granted and the complaint is dismissed with prejudice as asserted against the Town of Brookhaven; and the Town of Brookhaven is directed to serve a copy of this order with Notice of Entry upon the plaintiff and Steven-Victors Associates, LLC and the Clerk of the Calendar Department of the Supreme Court within thirty days of the date of this order, and the clerk is directed to place this matter on the ready trial calendar for an Inquest as to Steven-Victor Associates, LLP.

This is an action for property damage and personal injuries sustained by the plaintiffs, Raymond Estrada and Marlena Estrada, arising on or about January 10, 2003 and ongoing, due to the flooding by ground water into the basement of the plaintiffs' premises located at 51 President Road, Mastic Beach, New York. The plaintiffs have asserted causes of action against the Town of Brookhaven sounding in negligence premised upon their negligent approval and permitting construction of a basement at the premises without proper consideration and evaluation of the relevant ground water elevation levels applicable to the premises; trespass and continuing trespass; fraudulent concealment; negligent infliction of emotional distress; and intentional infliction of emotional distress.

By way of an order dated August 23, 2005 (Jones, J.) a default was granted against the defendant

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Steven-Victor Associates, LLC. and the matter was set down for an Inquest. By way of an amended order dated September 27, 2005 (Jones, J.), the Inquest was marked off the calendar without prejudice and deferred until the claims of the non-defaulting defendant are disposed of by trial or other means.

The Defendant Town of Brookhaven (Brookhaven) claims entitlement to an order granting summary judgment dismissing the claims asserted against it on the basis the plaintiff has not established a prima facie of negligence against Brookhaven. The Notice of Motion seeks summary judgment dismissing the complaint. At paragraph 2 of the attorney's affirmation, counsel asserts summary judgment should be granted in that the plaintiff has failed to set forth a prima facie case of negligence. At paragraph 35 of counsel's affirmation, it is set forth that the plaintiff failed to file a Notice of Claim within 90 days of the accrual of the claim and are thus plaintiffs are barred by GML §50(e)(1)(a). The defendant argues that the plaintiff is barred from commencing this action against the Town of Brookhaven as a municipality.

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the Notice of Claim; a copy of the summons and complaint; defendant's verified answer; a copy of the verified bill of particulars; a copy of a transcript of the hearing conducted pursuant to GML 50(h) of Raymond Estrada and Marlena Estrada on September 11, 2003; copies of the examinations before trial of Raymond Estrada and Marlena Estrada dated June 27, 2007 and James Esposito dated May 19, 2008; and a copy of the application for the building and zoning permit ZBA #470813.

In opposing this motion, the plaintiffs have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint; defendant's verified answer; a copy of the verified bill of particulars; copies of the transcript of the examinations before trial of Raymond Estrada and Marlena Estrada dated June 27, 2007 and James Esposito dated May 19, 2008; and a copy of the application for the building and zoning permit ZBA #470813; a copy of the deed for the premises dated July 24, 2002; a copy of the Notice of Claim; copies of the orders dated August 23, 2005 (Jones, J.) and September 27, 2005 (Jones, J.); and a copy of the letter dated June 2, 2003 from H2M Group concerning the mold testing at the home.

At their hearing pursuant to GML 50(h), Marlena Estrada testified that she owns the premises at 51 President Road, Mastic Beach with her husband, and they have lived there since July 24, 2002 and have two children ages five and twenty months. The property and house were purchased from Steven-Victor Associates. They first saw the house, a two-story colonial with four bedrooms, two and a half bathrooms, an attic and a basement, was for sale and looked at it in May or June 2002, and found it was completed except for the cabinets and rugs. The basement, which has four windows, is entered through a door in the kitchen by stairs that lead down. She stated they decided to purchase the home and signed a contract with the builder and were represented by counsel. They did not have an engineer's inspection of the property before the closing. They received no copy of the plans for the construction of the house and did not have a survey of the property done, although they did receive a copy of a survey at the closing. They did no research with the Town of Brookhaven concerning the property and did not obtain any documents from the Town. On January 3, 2003, about an inch of water covering about 90% of the concrete basement floor was noted so she called the builder, Steven Garrett, and followed up with letters to him. On January 10, 2003, she called ACE Home Inspection and Engineering. On January 12, 2003, Steven Garrett came to the house but offered no help. Art Wilson, a plumber from Main Street

Plumbing sent on Garrett's behalf, arrived on January 13, 2003 and put in a sump pump which it did not remedy the water problem. Between January 3rd and January 23rd she observed from about six to eight inches of water in the basement. In August 2003 she observed about two feet of water. She was given an estimate for a French drain and five pumps were installed in the basement by E&M Basement Waterproofing wherein the water was discharged onto a nearby lot, for which she received a summons from the Town of Brookhaven. They addressed the issue with the Town and were advised by the Town to install longer lines. They subsequently received another summons. The problem was never resolved with the French drains and E&M returned part of their payment. Norton Brothers, who did the original test bores, did some additional test holes and took some cultures due to mold. The H2M Group analyzed the mold problem on June 4, 2003 and advised that the water problem be had to be fixed. ACE Home Inspectors returned in April 2003 as cracks were noticed in the basement walls. She was told that a dry basement may be impractical for the area and that other homes located in the area do not have basements. At her examination before trial, she testified that the problem was finally corrected in October or November 2006 when Five Star Plumbing and Heating filled in approximately three feet of the basement. They removed the sheetrock and bleached the walls to eliminate the mold.

Raymond Estrada testified to the effect that he first noticed cracks in the basement when ACE inspectors came to the house on January 3, 2003. He was advised by E&M that the problems with the basement were coming from ground water as the water tables were too high. He was advised by an engineer from Ace Builders that filling in the basement was the recommended remedy for the water and mold problem.

The transcript of Joseph Esposito submitted by the Town of Brookhaven was taken to correct his deposition of August 9, 2007 which was stated by counsel to have been inaccurately transcribed. Therefore, questions and answers were submitted which "seemed accurate to both sides" as set forth in the subsequent transcript. Joseph Esposito testified to the effect that he has been the principal engineering inspector for the Town of Brookhaven for four years and prior to that was the building inspector beginning in 2000. He was not provided with a list of duties in terms of specific job performance as a building inspector and stated those duties were learned on the job. His job consisted of enforcement of the rules and regulation of the New York State Building Code and Town Ordinance Rules and Regulations for residential premises, whether for new home construction, or additions, or finalized work. If there was a problem in the field he would have contact with the Planning Department for the Town concerning things such as severe grade and flooding conditions. He had no involvement with permits and only becomes involved after the Town issues a permit. After a permit is issued, inspections were scheduled and he would become involved in the inspection. The property was assigned a numbered index card which indicated the work to be done and the location. On the back of the card are four basic spaces for him and other inspectors to either note deficiencies or mark an approval.

Relative to the premises located at 51 President Road, Mastic Beach, Mr. Esposito testified to the effect that he did the floor inspections and signed off on the Certificate of Occupancy for the house. He did not recall the inspection and described the adjacent road as small. He testified that the ground water lows were a very shallow depth and very close to the water table which is very high. As building inspector he reviewed the survey but did not carry the survey with him when he did his inspection of 51 President Road. He had been at 51 President Road four times. On the first visit he inspected the

foundation to ascertain that the foundation footprint was at least a close match based upon the survey, that the material looked satisfactory for New York Building Code requirement, and that damp proofing or tar on the outside of the foundation was in place. The second visit was a rough inspection wherein he looked at the wood framing, generalized construction, nail patterns, plumbing, roofing, siding, and windows and indicated that basically the exterior of the house would be finalized. He did not indicate the results of the second inspection. At the third visit, he performed an inspection of the insulation. If problems were observed at the second inspection, the corrections could be inspected at this third visit, but he did not set forth whether or not this was done. On the fourth visit, the heating system, electrical and plumbing were checked; the kitchen and bathrooms were observed to see if they were completed; and interiors were checked to ascertain they were finished pursuant to New York State Code. He recalled there being a basement in the house and inspected it on all four rough inspections. He testified to the effect that it is recommended that the furnace be raised on blocks in case a pipe bursts but there was no code requiring that it be raised as the code was implemented in January 2003 after the construction at 51 President Road. The Suffolk County Department of Health inspected the cesspools and the Town of Brookhaven did not.

Mr. Esposito testified to the effect that the cesspools are not permitted to be placed in the water table and must be two feet above it pursuant to the requirements of the County of Suffolk, and one foot above pursuant to Brookhaven Town requirements. The survey dated June 7, 1999 submitted to the building department and possibly to planning, called for one sanitary pool, two leeching pools, and one expansion pool for overflow of the two leeching pools. The survey indicated a minus 0.2 ground water elevation, meaning that whatever the data is, the point of elevation is lower than the reference point which is zero according to FEMA. In this instance the ground water level was 12.5 feet below ground-pretty close. On a survey for the property dated March 6, 2002, five leeching pools and three expansions were noted and the ground water elevation was 5.7 feet- a difference of 5.9 feet between the two surveys. He testified the difference was due to a new test hole being done and a significant change in ground water level, significantly higher, which changes the determination of whether or not there should be a spread footing based on New York State Building Code or if there should be no basement and the house should instead be built on a slab. When Mr. Esposito was asked what test holes were, he responded they were an exploratory dig into the ground a minimum of seventeen feet to observe the soil conditions, materials, and determined whether or not there is any ground water evident in the area. He stated the excavator that is doing the actual dig sometimes lies and they have had surveyors make errors which will give false indication for water depth. As to the application for a building and zoning permit dated November 15, 2001, Mr. Esposito indicated that it provided for three bedrooms and there was no restriction for a basement. Only if the planning department felt it was necessary or required would a building permit be required for a basement. It would have been indicated on the permit if it were a problem location. The planning department gave final approval or release for a residential lot on June 14, 2002.

The causes of action asserted against the Town of Brookhaven, as set forth in the complaint, are premised upon the Town's alleged negligent approval of and allowing the construction of a basement in the plaintiff's premises without proper consideration and evaluation of the relevant ground water elevation levels applicable to the premises. The causes of action against the Town of Brookhaven have been set forth as follows: a second cause of action sounding in negligence; a third cause of action sounding in nuisance; a fourth cause of action for trespass and continuing trespass; a fifth cause of

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action for fraudulent concealment; a sixth cause of action for negligent infliction of emotional distress; and a seventh cause of action for intentional infliction of emotional distress.

A certificate of occupancy is generally regarded as a final construction document, representing that the completed project has been reviewed and found to be in compliance with applicable fire and safety codes and is subject to whatever infirmities may exist in the previously issued building permit, Parisell et al v Zoning Board of Appeals of the Town of Fishkill, et al, 188 AD2d 712 [3rd Dept 1992]. The grant or denial of a building permit involves a discretionary governmental function, the exercise of which may not form the basis for liability in tort, and the issuance of a building permit presupposes compliance with building and zoning laws, see, Rickson et al v Town of Schuylers Falls, 263 AD2d 863 [3rd Dept 1999], wherein the court set forth that in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, the defendant would not be held liable for its failure.

“In the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for its failure to enforce a statute or regulation. A special relationship may arise in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation. The adoption of zoning ordinances and building codes by a municipality does not create a special relationship with its residents. Ordinances and codes enacted for the benefit of the general public do not, without more, give rise to a special relationship between a municipality and an individual.” Bell v Village of Stamford, 51 AD3d 1263 [3rd Dept 2008].

“With respect to members of the general public, no liability attaches for violation of a general duty owed by the town to the public at large. The issuance of a certificate of occupancy and /or building permit is a governmental function for which a municipality may not be held responsible for damages. The only exception to that general prohibition is when a special relationship exists between the municipality and the applicant. A duty is found when a special relationship exists between the municipality and an individual or class of persons, warranting the imposition of a duty to use reasonable care for those persons’ benefit. There are instances where a ‘special relationship’ may be imposed upon a municipality: This principle operates to impose liability where the municipality violates a duty commanded by a statute enacted for the special benefit of particular persons, where the municipality voluntarily assumes a duty, the proper exercise of control under circumstances in which a known, blatant, and dangerous safety violation exists,” Okie et al v Village of Hamburg, 196 AD2d 228 [4th Dept 1994].

In Okie et al v Village of Hamburg, supra, the defendant Village mistakenly issued a building permit to construct a residence within the boundaries of a flood-plain and erroneously issued a certificate of occupancy following construction in the absence of a “special relationship” between the municipality and the applicant. The court held that a local Flood Damage Prevention Ordinance does not create a special duty owing to persons located within the flood-plain. It further determined that for the purpose of its discussion, it made no distinction between the issuance of a building permit and the issuance of a certificate of occupancy, although they recognized material differences, the issuance of a

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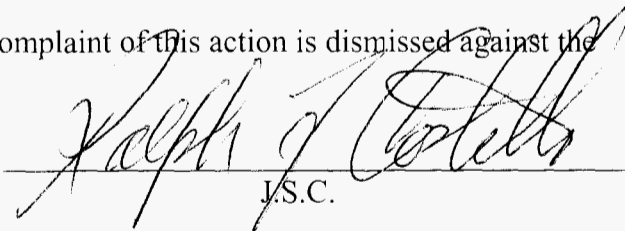
building permit or certificate of occupancy is a governmental function for which a municipality may not be held responsible for damages in the absence of a special relationship.

The granting of a building permit is a discretionary determination and the actions of the government in such instances are immune from lawsuits, Sposato v Village of Pelham et al, 275 AD2d 864 [2nd Dept 2000]. In Rottkamp et al v Young et al, 15 NY2d 831 [1965], the order of the trial court dismissing the complaint was affirmed by the Appellate Division which set forth, in part, that the action of the respondent in refusing to issue the permit, although erroneous, was discretionary and quasi-judicial in character, rendering him immune from liability therefor; that his power to issue a building permit should not be hampered in its exercise by the threat of suit for damages; that the policy considerations which protected a public officer dictated the same protection for the municipality whose interests were served by his acts, and that the granting or withholding of a building permit was an exercise of sovereign power. In Lloyd et al v Town of Wheatfield, 67 NY2d 809 [1986], the court also concluded that a municipality enjoys absolute immunity from suit in tort for damages based on the erroneous denial of a building permit; that that immunity was founded on public policy, and that such policy-based immunity applied even though the issuance of a building permit may be compelled in an article 78 proceeding by a writ of mandamus, see also, Green v Irwin et al, 174 AD2d 879 [3rd Dept 1991].

In the instant action, a special relationship has not been demonstrated between the plaintiff and the Town of Brookhaven, nor has the basis for a special relationship been set forth. The record clearly establishes that the builder applied for the permit and that the Town issued the permit and later the certificate of occupancy for the subject premises. This is not a situation in which the Town assumed a duty over and above that required of it by statute, and no affirmative representation was made concerning the water table, the survey or whether or not the basement would have flooding due to the water table. The plaintiffs did not make a specific inquiry to the Town for information peculiarly within the municipality's knowledge and did not receive erroneous information upon which they relied, see, Okie et al v Village of Hamburg, supra. The Town did not perform the surveys or take test bores to determine the water table and did not provide that information to the plaintiffs. The record does not support a claim against the Town for fraudulent concealment of information from the plaintiffs. Marlina Estrada testified that they did not have an engineer's inspection of the property before the closing; they received no copy of the plans for the construction of the house and did not have a survey of the property done, but did receive a copy of a survey at the closing and completed the transaction. They did no research with the Town of Brookhaven concerning the property and did not obtain any documents from the Town. Therefore, in the absence of a special relationship between the plaintiff and the Town of Brookhaven, the plaintiffs are barred from maintaining this action against the Town and the court refrains from making any determination concerning the defendant Town's further arguments for dismissal relative to untimeliness and as barred by the applicable statute of limitations.

Accordingly, motion (003) is granted and the complaint of this action is dismissed against the Town of Brookhaven with prejudice.

Dated: Dec 7, 2009


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION