

Labate v Vachris Eng'g, P.C.

2009 NY Slip Op 32945(U)

December 3, 2009

Supreme Court, Nassau County

Docket Number: 000628/04

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 23

JOSEPH LABATE, MADELINE LABATE and
WATERS EDGE CONTRACTING CORP.,

X

Plaintiffs,

-against-

Action #1

Index No.: 000628/04
Motion Sequence...01
Motion Date...10/16/09

VACHRIS ENGINEERING, P.C.,

Defendant.

JOSEPH LABATE, MADELINE LABATE and
WATERS EDGE CONTRACTING CORP.,

X

Plaintiffs,

-against-

Action #2

Index No.: 011486/04

URBAN FOUNDATION/ENGINEERING, LLC,
PAUL GROSSER, P.W. GROSSER CONSULTING,
INC. and ANTHONY D. PASQUALE, P.E.,

Defendants.

Papers Submitted:

X

Notice of Motion.....X

Affirmation and Affidavit in Opposition.....X

Reply Affidavit and Affirmation.....X

Upon the foregoing papers, the Motion by the Defendants, Vachris

Engineering, P.C. (“Vachris”) and Anthony DePasquale, P.E., (DePasquale) for summary judgment dismissing the complaints against them in Actions #1 and #2, respectively, is **DENIED**.

The Plaintiffs, Joseph Labate and Madeline Labate purchased vacant land and had a home built at 12 Barbara Lane in Glen Cove, New York. The Plaintiff, Waters Edge Contracting Corp. (“Waters”), was the general contractor for the initial construction of the Labate residence, and is owned by Mr. Labate. After its completion, the rear portion of the residence sank more than 10 inches (Complaint in Action #1 at par. 5; complaint in Action #2 at par. 6). The Plaintiffs commenced an action against their original architect, engineer, and contractors, and hired Vachris, through its employee Anthony DePasquale, “to stabilize and protect the Property and the Residence” (Complaint in Action #1 at par. 9; complaint in Action #2 at par.8).

The Vachris retainer agreement was addressed to the Plaintiff Waters and was executed by Mrs. Labate on January 9, 2001 (Exhibit DD annexed to the moving papers). According to Vachris and DePasquale, after their initial services were performed, the residence and slope were stable for a period of approximately two years. However, by mid-2003, the problems allegedly resumed. The Plaintiffs commenced Action #1 in January, 2004. Action #2 was commenced later in 2004.

In these actions, the Plaintiffs allege that Vachris and DePasquale failed to “properly take such steps, and make such recommendations as were necessary to protect the

Residence and Property from collapse and damage” (Complaint in Action #1 at par.16(f); complaint in Action #2 at par. 40(f)). In both complaints, in Actions #1 and #2, the Plaintiffs allege a hybrid cause of action for negligent remediation efforts/breach of contract by Vachris and DePasquale. In both actions, the Plaintiffs allege that “BUT FOR” Vachris’ and DePasquale’s conduct the Residence would not have collapsed (Complaint in Action #1 at par. 18; complaint in Action #2 at par. 42) (emphasis added). In addition, in the complaint in Action #2, the Plaintiffs allege an additional claim against Anthony DePasquale, individually, for misrepresentation regarding the work performed by Co-defendant, Urban Foundation/Engineering, LLC (“Urban”). The two actions have been joined for trial pursuant to a “So Ordered” stipulation.

The Defendant, DePasquale, is the sole defendant remaining in Action #2. By order dated February 14, 2008, the Defendant, Urban, was granted summary judgment dismissing the complaint against it. The Plaintiffs settled their claims against the Defendants Paul Grosser, an environmental engineer, and his firm, P.W. Grosser Consulting, Inc.

By way of background, in addition to Actions #1 and #2 herein, the Labates sued their architect, engineer, and two contractors in *Joseph Labate et al v Ray Caliendo* under Index # 9904/01. That action was settled for \$570,000. They also sued the seller of the property in *Joseph Labate, et al. v M&S/P Land Development Corp, et al.*, Index # 001627/04, alleging *inter alia*, that the property was not suitable for building because of, among other things, the fill on the Property and the water conditions (Complaint at par.15(f)).

According to Mrs. Labate, that action was “dropped” (Madeline Labate transcript, p. 20).

On this motion, the Defendants DePasquale and Vachris seek summary judgment dismissing all claims against them. Summary judgment is the procedural equivalent of a trial. *S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (see *Alvarez v Prospect Hosp.*, 68 N.Y.2d 329 (1986); *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980)). Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. (see *Alvarez* and *Zuckerman* above). A claim of professional negligence requires proof that there was a departure from accepted standards of practice, and that the departure was the proximate cause of the injury (*Travelers Indem. Co. v Zeff Design*, 60 A.D.3d 453 [1st Dept. 2009]).

In support of his motion, the Defendant, DePasquale, submits a voluminous 45-page affidavit wherein he states that he and Vachris “inherited” the “vertical and lateral movement of the house,” together with “drainage problems and the failed retaining walls”, and worked to “stabilize the situation” (DePasquale affidavit, at par. 24). DePasquale insists that at no time did he “guarantee successful results” (DePasquale affidavit at par. 38). He relies upon the Vachris’ Report dated January 28, 2001 (Exhibit EE annexed to the moving

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papers), wherein the conclusion reached is “there is a failure of the slope” (Vachris Report, p. 4). The Report provides alternative remedial recommendations, the first involving steps for “drainage remediation,” “unload the slope,” and “structure stabilization.” The second alternative remedial recommendation was for the construction of an “Intercept Wall” perpendicular to the direction of slide (Vachris Report at p.7).

The Defendants, Vachris and DePasquale further submit the testimony of Co-defendant Paul Grosser, the environmental engineer brought on board to help with groundwater drainage at the Labate property. Mr. Grosser testified that he knew of nothing that the Vachris firm did wrong (Grosser transcript at p.53), and that the conditions of the Labate property were not caused by Vachris (Grosser transcript at p. 104-105). Mr. Grosser further testified that the slope failure was a regional problem affecting the properties on either side of the Labate property (Grosser transcript at p. 115), and that the Labates tried to minimize costs and thereby refused to agree to various recommendations by the engineers (Grosser transcript at p. 78-80).

On this record, the Defendants Vachris and DePasquale have presented a *prima facie* case establishing the measures offered to remedy the sinking of the Labate residence, and their lack of negligence in recommending these measures. In addition, these Defendants have made a *prima facie* showing that the proximate cause of the structural instability of the Labate residence was due to the problems caused by those who preceded them at the Labate property, including the use of improper fill unsuitable to the support and drainage of the

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property and the design of the residence and its proximity to the wetlands of Dosoris Pond.

In opposition, the Plaintiffs submit the affidavit of their engineering expert, Von Rosenvinge, who alleges that DePasquale and Vachris failed “to take the necessary actions that a reasonably prudent engineer would use in developing a viable plan to save the Labates’ property and residence” (Von Rosenvinge affidavit at par. 4). This conclusion is based on the following claims:

(1) the Defendants did not use analytical methods ordinarily used by engineers in this situation, including commonly used computer programs to determine a limit equilibrium slope stability analysis;

(2) the failure to properly analyze the slope stability problem, and as a result, failure to implement the remedial measures necessary to stabilize the slope and save the property and residence, namely, failure to remove the heavy fill and replace it with a light weight fill and then re-grade the property;

(3) the failure to perform additional soil tests;

(4) the failure to recommend draining the slope and removing the existing fill between the house and the backyard to a slope of two horizontal to one vertical;

(5) the failure to advise the Labates of the seriousness of the instability of the slope;

(6) the refusal to accept advice of Engineer, Febesh, who advised implementation of a water control system to direct groundwater away from the structure and

heavy fill, and monitoring of the existing cracks in the structure and cellar floor.

The Plaintiffs' expert concludes by opining that "by focusing on stabilizing the residence rather than the property itself, DePasquale's and V.E.(Vachris)'s negligence was the proximate cause of the destruction of the Labate residence" (Von Rosenvinge affidavit at par. 13).

Whether or not the foregoing alleged acts took place and whether or not such alleged acts constituted negligence, are plainly questions of fact for the jury. The Defendants deny the validity of all of these items. However, the heart of the parties' dispute on this motion is whether the Plaintiffs have raised a triable issue of fact that these acts proximately caused the collapse of the Labate residence, which was already concededly in the process of collapsing when Vachris was retained.

In order to show proximate cause in a medical malpractice action, a plaintiff "must demonstrate 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury" (see *Alicea v Ligouri*, 54 A.D.3d 784, 785 [2nd Dept. 2008] quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 883 [2nd Dept. 2005]; *Flaherty v Fromberg*, 46 A.D.3d 743, 745 [2nd Dept. 2007]). In medical malpractice cases, the plaintiff's evidence may be deemed legally sufficient even if the plaintiff's expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the

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jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury (*Alicea* at 786; *Flaherty* at 745).

The Court finds that these causation principles from medical malpractice cases directly address the problem presented in this engineering malpractice case, where there is no doubt that the Defendants, Valchris and DePasquale inherited the sinking Labate residence. The question presented by this motion is whether the Plaintiffs have raised a triable issue of fact that the Defendants, Valchris and DePasquale's acts or omissions were a substantial factor in decreasing the Plaintiffs' chances of a better outcome. Viewing the evidence herein in the light most favorable to the Plaintiffs, the Court finds that the Plaintiffs have raised the requisite issue of fact on this question of proximate cause. To hold otherwise, because the residence was already sinking, would totally insulate professionals from liability for their acts and omissions regarding the sinking Labate residence.

Based on the foregoing the motion by the Defendants, Valchris and DePasquale, for summary judgment dismissing the claims against them in Actions #1 and #2, respectively, must be **DENIED**. As none of the parties have addressed the second cause of action against DePasquale in Action #2, this Court declines to do so as well.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
December 3, 2009

ENTERED



Hon. Randy Sue Marber, J.S.C.

DEC 09 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**