Sullivan-Parry v Pillar to Post, Inc.
2009 NY Slip Op 33422(U)
March 12, 2009
Supreme Court, Nassau County
Docket Number: 5753/06
Judge: William R. LaMarca

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY - PART 15

Present: HON. WILLIAM R. LAMARCA
Justice

BARBARA SULLIVAN-PARRY,

Plaintiff,

-against-

PILLAR TO POST, INC. and SUBURBAN CONSULTANTS LTD.,

Defendants.

Motion Sequence #3
Submitted December 19, 2008
XXX

INDEX NO: 5753/06

The following papers were read on this motion:

Notice of Motion and Supporting Exhibits "A" through"Y".....1
Affirmation in Opposition.....2
Reply Affidavit 3

Defendants, PILLAR TO POST, INC. (hereinafter referred to as "PILLAR") and SUBURBAN CONSULTANTS, LTD. (hereinafter referred to as "SUBURBAN"), move for an Order, pursuant to CPLR §3212, awarding them summary judgment and dismissing plaintiff's amended complaint, and granting them summary judgment on their counter-claim for costs and attorney fees. Plaintiff, BARBARA SULLIVAN-PARRY, opposes the motion, which is determined as follows:

This action stems from the alleged breach of a home inspection agreement in which plaintiff claims, *inter alia*, that the defendants made false representations and

negligently inspected the electrical systems at the subject premises located at 190 Ivy Street, Oyster Bay, New York. Defendant, PILLAR, is a Delaware corporation, engaged in the business of conducting professional home inspections. Defendant, SUBURBAN, is a New York corporation whose president is William P. Murphy, a licensed professional home inspector. SUBURBAN conducts its business pursuant to a franchise agreement with PILLAR (*Answer*, ¶4). In other words, PILLAR is the franchisor and SUBURBAN is the franchisee.

It is noted at the outset that, by Short Form Order dated November 29, 2007, the Court dismissed, with prejudice, all of plaintiff's claims against defendant William P. Murphy, the principal of defendant, SUBURBAN, on the grounds that "[n]either the complaint, proposed amended complaint nor the affidavit of plaintiff in opposition to the motion contain any allegations sufficient to demonstrate Murphy's dominion and control of the defendant companies in his individual capacity to warrant that the corporate from of the businesses should be disregarded." Accordingly, the caption of the case was changed to delete William Murphy's name. To the extent that defendants seek summary dismissal of plaintiff's claims as against William Murphy herein, their motion is denied as moot.

By the same Decision and Order, this Court also granted plaintiff's motion to file and serve a proposed amended complaint which "virtually mirror[ed] the original complaint". Plaintiff claims that, on or about April 5, 2005, non-party David M. Haggerty, a licensed real estate broker who plaintiff alleges in her complaint was purportedly acting on her behalf, engaged the services of the defendants to perform a pre-contract/pre-purchase inspection of the Premises pursuant to a written "Visual

Inspection Agreement" of the same date. Notably, the signature on said agreement is that of David Haggerty as "agent for client," i.e., the plaintiff herein. SUBURBAN executed the agreement as "an independently owned and operated Franchisee of Pillar to Post, Inc". The Inspection Agreement provided that, for the sum of $475.00, SUBURBAN would conduct a visual inspection of the premises which, among other things, included inspection of the electrical system and wiring at the subject premises and would provide plaintiff with a written report detailing the results. SUBURBAN agreed to conduct the visual inspection in accordance with the Standards of the American Society of Home Inspectors ("ASHI") and applicable State provisions. Specifically, the Agreement, *inter alia*, provided as follows:

a. The inspector does not offer an opinion as to the advisability or inadvisability of the property, its value or its potential use (Page 1, ¶1).

b. Not all conditions may be apparent on the inspection date due to weather conditions, inoperable systems, inaccessibility of areas of the Property, etc. Without dismantling the house or its systems, there are limitations to the inspection. Throughout any inspection, inferences are drawn which cannot be confirmed by direct observation. Clues and symptoms often do not reveal the extent or severity of problems (Page 1, ¶3).

c. Inspector is not responsible nor liable for the non-discovery of any patent or latent defects in materials, workmanship or other conditions of the property, or any other problems which may occur or may become evident after the inspection time and date (Page 1, ¶3).

d. Inspector is not an insurer nor guarantor against defects in the building and improvements, systems or components inspected. Inspector makes no warranty, express or implied, as to the fitness use or condition of the systems or components inspected. Inspector assumes no responsibility for the cost of repairing or replacing any unreported defects or conditions, nor is Inspector responsible or liable for any future failures or repairs (Page 1, ¶3).

e. Inspector and its employees are limited in liability to the fee paid for the inspection services and report in the event that Client or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, or for any other reason or claim that Inspector has not fully satisfied all of its obligations hereunder (Page 1, ¶4).

f. Inspections are done in accordance with ASHI Standards, are visual, and are not technically exhaustive.

g. Inspector will not dismantle any component or system;...will not inspect inaccessible or concealed areas of the property; will not enter dangerous areas of the property...Inspector examines a representative sample of components that are identical and numerous, such as electrical outlets, shingles, windows, etc. and does not examine every single one of these identical items, therefore, some detectable deficiencies may go unreported (Page 1, ¶5; Page2, ¶1).

h. Client guarantees Inspector a right to examine the subject matter and area of any claim and offer a resolution prior to Client's performance of remedial measures (except in the event of an emergency, or to protect for personal safety, or to reduce or avoid damage to property). This is a condition precedent to Client's claim (Page 2, ¶4).

I. THE INSPECTION REPORT DOES NOT CONSTITUTE A WARRANTY, GUARANTEE OR INSURANCE POLICY OF ANY KIND. THERE ARE NO WARRANTIES MADE AGAINST ROOF LEAKS, WET BASEMENTS, OR MECHANICAL BREAKDOWNS. THE REPORT IS A PROFESSIONAL OPINION BASED ON A VISUAL INSPECTION OF THE ACCESSIBLE AREAS AND FEATURES OF THE PROPERTY AS OF THE DATE AND TIME OF THE INSPECTION AND IS NOT A LISTING OF REPAIRS TO BE MADE. . .

The visual inspection of the home occurred on April 5, 2005. The written Inspection Report issued by the defendants indicated, in pertinent part, as follows:

ELECTRICAL SERVICE/PANEL

Service Entrance: Electrical components have been updated, appear professionally installed, and in functional condition. Electrical service consists of one (1) 150 amp copper service entrance cable servicing one

> (1) 150 amp main distribution panel located in garage...*Exterior electrical service entrance cable is not properly secured to building wall and worn/frayed presenting an electrical hazard...Advise further evaluation and repair/upgrade by a licensed contractor. (*Inspection Report*, p. 6).

Plaintiff claims that, in reliance upon defendants Inspection Report, she contracted to purchase the subject home and closed title on or about June 23, 2005. Subsequently, on or about September 22, 2005, she contacted an electrical contracting company, North Shore Electrical Contracting, Inc., to "perform minor electrical work, i.e., hang fixtures, new fans, etc. in her home". North Shore's report, dated October 11, 2005, states in pertinent part, as follows:

> ***Upon my arrival and commencement of work, I discovered there was aluminum wire in the dining room....
>
> Knowing the potential hazards, I inspected the home further and found that there was aluminum wire throughout the entire house and there are absolutely no ground wires protecting any receptacle or switch throughout the home due to the lack of a ground wire inside of the electrical panel. Copper tails were added to the switches and outlets throughout the home and were spliced to the aluminum wire with improper wire nuts.
>
> I discovered that the 2 electrical panels in the garage are wired in copper; but, they are not grounded and do not have a neutral as required by National Electrical Code. Upon further investigation (actually cutting the sheet rock open), I found concealed boxes above the garage panels hidden in the soffit were there are live copper and aluminum wires spliced together improperly. National Electrical Code dictates that you cannot conceal live wires and when splicing aluminum and copper you must use purple wire nuts.
>
> When the new panel was added to the existing panel in the garage they neglected to add a ground wire leaving the new panel unprotected and they did not bring the neutral wire to the old panel which is also a fire hazard.
>
> The aluminum wire which is throughout the home, was joined to the copper wire in the garage and attic at these two points, which would make it look like the house was wired in copper. It appears that an attempt was made to try and disguise that the home was wired with aluminum by

> changing inside of the garage to copper. This can be done if it is done as per the National Electrical Code by joining the copper and aluminum wire together with the proper (purple) wire nuts which are treated with a special chemical to prevent erosion of the two metals together. However, this was not done properly as now the condition is a potential fire hazard. (*Motion*, Exhibit "T").

Plaintiff claims that, in accordance with ASHI standards, defendants were required, *inter alia*, to inspect the electrical system and to describe the wiring methods and report on the presence of aluminum wiring; however, subsequent to purchasing the home, she learned of the presence of aluminum wiring, the lack of ground wires and the improper splicing of copper and aluminum wires throughout the home, which plaintiff alleges violated federal, state and local laws and constituted a dangerous and defective condition which was a fire hazard, all of which did not appear in the Inspection Report. It is plaintiff's position that the defective condition should have been obvious upon visual inspection of a professional home inspector and that she has been damaged by defendants' breach of contract, negligence, negligent misrepresentation, gross negligence, professional malpractice and deceptive trade practices. On the instant motion, defendants seek summary dismissal of plaintiff's complaint.

Summary judgment is the procedural equivalent of a trial (*Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A.1986]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of

triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (*Alvarez v Prospect Hosp.*, supra; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A.1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (*Zuckerman v City of New York*, *supra*).

Defendants assert three (3) bases for their summary judgment motion. First, that defendant PILLAR has no liability as the relationship between PILLAR and SUBURBAN is merely that of Franchisor-Franchisee. Second, that the alleged conduct of the defendants does not rise to the level of gross negligence, or even negligence. Lastly, that the plaintiff has breached the contract between the parties by failing to satisfy the condition precedent to suit.

By tendering, *inter alia*, the Visual Inspection Agreement signed by Haggerty, as agent of the plaintiff, the Inspection Report by defendants dated April 5, 2005, the Franchise Agreement as between defendants PILLAR and SUBURBAN, the various correspondence between counsel for the plaintiff and counsel for the defendants evidencing plaintiff's refusal to allow defendant, SUBURBAN, to examine the subject matter upon which plaintiff's claims are based, and the relevant ASHI Standards and Practices which, among other things, clearly and explicitly state that "Inspectors are NOT required to enter: (1) any area which will, in the opinion of the inspector, likely be dangerous to the inspector..." (*ASHI Standards and Practices*, ¶13.2[E][1]), it is the judgment of the Court that defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]).

Specifically, it is undisputed that the relationship between PILLAR and SUBURBAN is that of franchisor to franchisee. This relationship can not in and of itself sustain a determination as to PILLAR, the franchisor, for the alleged acts of the franchisee, SUBURBAN (*Matter of Realty World/Realty World Franchise Serv. Corp. v Shaffer*, 101 AD2d 708, 476 NYS2d 44 [4th Dept. 1984]). In order to hold the franchisor liable for the alleged acts of the franchisee, plaintiff is required to establish that (I) franchisor exercised complete dominion and control over the daily operations of the franchisee's business, and (ii) that such domination and control resulted in the plaintiff's injury (*see, Schoenwandt v Jamfro Corp.*, 261 AD2d 117, 689 NYS2d 461 [1st Dept. 1999]; *Hart v Marriott Intern., Inc.*, 304 AD2d 1057, 758 NYS2d 435 [3rd Dept. 2003]). The Franchise Agreement clearly shows that the relationship between the defendants herein is that of an independent contractor, and that defendant, PILLAR, did not have the right to control, direct or supervise SUBURBAN's daily operations. In the absence of proof that PILLAR exercised a high degree of control over SUBURBAN, there is no basis for holding PILLAR responsible for SUBURBAN's alleged misconduct (*Smith-Hoy v AMC Property Evaluations, Inc.*, 52 AD3d 809, 862 NYS2d 513 [2nd Dept. 2008]; *Matter of Realty World/Realty World Franchise Serv. Corp. v Shaffer*, *supra* at 708).

Moreover, it is apparent from a plain and simple reading of the Visual Inspection Agreement that:

> Inspector and its employees are limited in liability to the fee paid for the inspection services and report in the event that Client [Plaintiff herein] or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, or for any other reason or claim that Inspector has not fully satisfied all its obligations hereunder (Page 1, ¶4).

A clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 595 NYS2d 381, 611 NE2d 282 [C.A.1993]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 [C.A.1992]; *Schietinger v Tauscher Cronacher Professional Engrs., P.C.*, 40 AD3d 954, 838 NYS2d 95 [2nd Dept. 2007]). In the case at bar, defendants have demonstrated that none of the exceptions are applicable. Moreover, while a party may not limit its liability for damages caused by its own grossly negligent conduct (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, *supra*; *Sommer v Federal Signal Corp.*, *supra*; *Schietinger v Tauscher Cronacher Professional Engrs., P.C.*, *supra*), it is the judgment of the Court that defendants have also shown that their alleged failure to properly conduct the inspection clearly does not rise to the level of gross negligence (*Clement v Delaney Realty Corp.*, 45 AD3d 519, 845 NYS2d 423 [2nd Dept. 2007]; *L & S Motors, Inc. v Broadview Networks*, 25 AD3d 767, 808 NYS2d 777 [2nd Dept. 2006]). "Gross negligence" is "conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing" (*Mancuso v Rubin*, 52 AD3d 580, 861 NYS2d 79 [2nd Dept. 2008]). In the case at bar, the Court finds that the defendants performed their visual inspection of the subject premises (which plaintiff did not own at the time of the inspection), including the electrical system, in accordance with their Inspection Contract. In addition, plaintiff's own engineer's report, namely, North Shore Electrical Contracting's report, states, *inter alia*, that upon its inspection of the electrical system at the subject premise, on September 22, 2005, which plaintiff then owned, and its *removal* of the fixtures and actually *cutting through the sheetrock* in plaintiff's home,

were they able to discover that the home was wired with aluminum wiring with copper pigtailing. Clearly, by virtue of the Visual Inspection Agreement as well as pursuant to ASHI standards which define "dismantle" as "[t]o take apart or remove any component, device or piece of equipment that would not be taken apart or removed by a homeowner in the course of normal maintenance" (*Motion*, Exhibit "W", ASHI Standards and Practices), SUBURBAN was not obligated to remove fixtures or cut through sheet rock. SUBURBAN was not required to remove any fixtures or outlets, but merely to test a representative number of the outlets for functionality. It was not required to remove the electrical panel and inspect the wiring; nor was it required to enter into the attic which, as confirmed by plaintiff's engineer North Shore's report, was inaccessible, unsafe and "has only a scuttle hole (visual only)". Having demonstrated that their conduct, including their alleged failure to detect aluminum wiring, lack of ground wires or improper splicing that was, as per North Shore's reports, intentionally concealed and intentionally made to look like copper wiring, did not rise to such an extraordinary level of gross negligence, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that the exculpatory provision limiting the liability of the defendants is unenforceable.

Finally, defendants have also demonstrated that, in accordance with the terms of the Visual Inspection Agreement signed by the parties herein, including the plaintiff by virtue of her "agent" Haggerty, it is plainly evident that plaintiff was required to provide the defendant SUBURBAN with a right to inspect the subject defects and offer a resolution prior to the plaintiff's commencement of a lawsuit. The extensive correspondence between counsel for the parties herein makes it abundantly clear that

she failed to notify the defendants of any alleged claim for breach of contract or for defendant's negligent performance of the Agreement with regard to the electrical systems of the home prior to commencing this suit. She also failed to provide the defendants with an opportunity to cure the "other conditions" which she amended her complaint to include. Plaintiff's argument, advanced in opposition to defendants' prior cross-motion to dismiss plaintiff's complaint, that she was not required to notify the defendants and/or provide them an opportunity to offer remedial measures because of "emergency" - i.e., the condition constituted a potential fire hazard, is unavailing at this juncture. Defendants have furnished documentary evidence that during discovery, subsequent to this Court's prior decision, defendants learned that the plaintiff waited six (6) months to remedy the alleged "emergency" defects constituting a fire hazard - i.e., the improper wiring.

In light of defendants' showing of entitlement to judgment as a matter of law on all three bases, the burden shifts to the plaintiff, as the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v Prospect Hosp., supra*).

After a careful reading of the submissions herein in opposition to the motion, the Court finds that, plaintiff fails to raise an issue of fact thereby precluding a denial of defendants' motion for summary judgment dismissal of the complaint (*Cf, Lorenz Diversified Corp. v Falk*, 44 AD3d 910, 844 NYS2d 370 [2nd Dept. 2007]; *Takeuchi v Silberman*, 41 AD3d 336, 839 NYS2d 71 [1st Dept. 2007]).

Plaintiff's argument, that defendants motion for summary judgment is premature in light of the fact that the depositions of the parties have not yet been held, is

unpersuasive. Where the movant makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate the existence of a factual issue or to tender an acceptable excuse for the failure to do so (*Klein v New York*, 89 NY2d 833, 652 NYS2d 723, 675 NE2d 458 [C.A.1996]). The plaintiff can defeat summary judgment by demonstrating that facts essential to oppose the motion are in defendants' exclusive knowledge and possession and may be obtained by discovery (CPLR 3212[f]; *Bingham v Wells, Rich, Greene, Inc.*, 34 AD2d 924, 311 NYS2d 508 [1st Dept. 1970]). However, the "mere hope" that essential evidence may be uncovered is not enough (*Jones v Gameray*, 153 AD2d 550, 544 NYS2d 209 [2nd Dept. 1989]). Plaintiff is bound to show that there is a likelihood of discovery leading to such evidence (*Frierson v Concourse Plaza Associates*, 189 AD2d 609, 592 NYS2d 309 [1st Dept. 1993]). Absent this showing, the mere fact that plaintiff has not completed discovery, including the taking of depositions, does not preclude the grant of summary judgment to the defendants (*see e.g., Chemical Bank v. PIC Motors Corp.*, 58 NY2d 1023, 462 NYS2d 438, 448 NE2d 1349 [C.A. 1983]). The mere hope that further discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment (*Id.; see also, American Home Assur. Co. v Gemma Constr. Co.*, 275 AD2d 616, 713 NYS2d 48 [1st Dept. 2000]; *Lambert v Bracco*, 18 AD3d 619, 795 NYS2d 662 [2nd Dept. 2005]).

Plaintiff's argument with respect to defendant PILLAR, that there is a question of fact as to whether it exercised the requisite amount of supervision, direction or control, is also unavailing. Plaintiff fails to offer any proof whatsoever to substantiate her claim that PILLAR exercised dominion and control over defendant, SUBURBAN. As the party

opposing the motion, plaintiff bears the burden of submitting evidentiary proof in admissible form sufficient to create material and triable issues of fact (*Alvarez v Prospect Hosp.*, *supra*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v City of New York*, *supra*).

Plaintiff next argues that there is an issue of fact regarding whether she is bound by the terms of the inspection agreement in the first place. In her affidavit in opposition to defendants' motion, plaintiff claims that, not only was the subject inspection arranged by the *seller's* real estate broker who she never authorized to act as her agent, but she also never saw, received or executed the Inspection Agreement, nor was she made aware of its existence or any of its terms, prior to the time that she committed to purchase the premises. A party's affidavit in opposition to a summary judgment motion which contradicts her prior sworn testimony creates only a feigned issue of fact and is insufficient to defeat a properly supported motion for summary judgment (*Marcelle v New York City Transit Authority,* 289 AD2d 459, 735 NYS2d 580 [2nd Dept. 2001]; *Nieves v Iss Cleaning Servs. Group*, 284 AD2d 441, 726 NYS2d 456 [2nd Dept. 2001]). Here, not only do plaintiff's contentions contradict her allegations in her amended complaint, but her arguments are also unsupported by the very affidavit upon which she relies. Plaintiff states, in her affidavit in opposition to defendants' motion, in pertinent part, as follows:

> 6. ...I explained to [David M. Haggerty] that I could not consider the Premises sight unseen and, at least, would require a house inspection. Mr. Haggerty telephoned me...to say that he could arrange for an inspection...
>
> ***
>
> 8. [Haggerty] subsequently informed me...that the inspection had been arranged with a well known firm, Defendant [Pillar]...

> 9. The inspection took place...on or about April 5, 2005. At some point...the April 5, 2005 inspection report...was delivered either to my daughter or Scott Markowitz, Esq...., one of my attorneys.
>
> ***
>
> 14....I drove to and conferred with Mr. Markowitz, and returned to New Jersey with a copy of the Inspection Report that had been sent to him.

Clearly, plaintiff understood that this inspection was performed at her request and for her benefit. It was arranged at her request and the results thereof were delivered to her and/or her attorney well before the closing of title took place. The plaintiff, in her affidavit, does not deny authorizing the inspection to take place, receiving the Inspection Agreement, or accepting the Agreement without making any objection to its terms when she received it. It is well settled that one who accepts a written contract, in the absence of fraud or other wrongful act on the party of another contracting party, is presumed to know its contents and to assent to them (*Slater v Fidelity & Cas. Co. Of NY*, 277 AD 79, 98 NYS2d 28 [1st Dept. 1950]). Thus, plaintiff's argument that the Agreement not be binding against her is entirely unavailing.

Similarly her argument that there is an issue of fact as to whether she was required to satisfy the condition precedent therein, is also baseless. Plaintiff argues that the conditions in the home presented an "emergency" of which she was not required to provide the defendants an opportunity to examine the subject matter. She claims that this Court has previously denied defendant's prior motion to dismiss on this ground. However, it cannot be overlooked that that said motion was made prior to discovery. As defendants have demonstrated above, subsequent discovery has proven that the plaintiff failed to notify the defendants of any alleged breach of contract or negligent performance in defendant, SUBURBAN's, performance of the Agreement with regard to

the electrical systems of the home prior to commencing this suit. The plaintiff waited six (6) months to remedy the alleged "emergency" defects. Plaintiff has advanced no evidence to support her argument that the condition precedent set forth in the Inspection Agreement should not be enforced.

Plaintiff also fails to raise an issue of fact as to whether the exculpatory clause in the inspection agreement is enforceable. As stated above, a clear contractual provision limiting damages is enforceable absent a showing of gross negligence (*Smith Hoy v AMC Property Evaluations, Inc.*, *supra*). Public policy does not permit a party to insulate itself from liability for gross negligence but a contractual provision absolving a party from liability for ordinary negligence will be enforced particularly where the limitation makes the service more affordable, as in the context of a home inspection agreement (*see, Dicker v The Housemaster*, 11 Misc. 3d 1051A, 814 NYS2d 890 [Supreme Nassau Co. 2006] *citing Rector v Calamus Corp.*, 17 AD2d 960, 794 NYS2d 470 [3rd Dept. 2005]; *Ricciardi v Frank*, 170 Misc. 2d 777, 655 NYS2d 242 [2nd Dept. 1996]). Plaintiff's sole argument in opposition to the liability limiting provision in the agreement is that it is not sufficiently clear and unequivocal. Yet, this argument is entirely unsupported. Plaintiff submits the affidavit of Anthony V. Sorrentino, P.E., a professional engineer, who states, in pertinent part, as follows:

> 12. In my professional opinion, based on over 40 years of experience, the failure of Mr. Murphy to discover and report on the open and obvious presence of aluminum wiring throughout the Premises constitutes gross negligence, as it demonstrates the reckless disregard with which his entire inspection was performed, not only for the ease with which it should have been discovered, but also for the attendant consequences that this dangerous and defective condition could have led to.

13. Mr. Murphy's gross negligence in failing to discover and report on the presence of aluminum wiring in the Premises is further highlighted by his failure to discover and report on the obvious lack of adequate insulation in the attic, also indicated in my report, thus leading me to believe that Mr. Murphy either never entered the attic or inspected the attic with his eyes closed.

As stated above, in order to constitute "gross negligence" plaintiff must establish that defendant SUBURBAN's conduct "smacks of intentional wrongdoing" (*Kogan v Fenster*, 191 Misc. 2d 525, 744 NYS2d 628 [2nd Dept. App. Term 2002]). The Sorrentino affidavit fails to make this extraordinary showing. There is no evidence that the defendants intentionally wronged the plaintiff herein. Additionally, there is no indication that the Sorrentino affidavit is in compliance with the ASHI standards such that accessibility into the attic by the defendants is indicative of how safe and appropriate it was for them to enter therein. Defendants were not required to place themselves at risk pursuant to ASHI standards. The ASHI standards permit an inspector to make the subjective determination as to what he/she feels is accessible and safe.

Accordingly, based on the foregoing, the Court finds that any liability of the defendants would be limited to the sum paid for the pre-purchase inspection and report, to wit: $475.00 (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, *supra*; *Sommer v Federal Signal Corp.*, *supra*; *Schietinger v Tauscher Cronacher Professional Engrs., P.C.*, *supra*).

With regard to plaintiff's alleged "other conditions", plaintiff fails to offer any evidence that each of these conditions were either not included in the scope of the inspection or were improperly reported in the Inspection Report. Plaintiff's argument that "several acts of negligence with a foreseeably severe cumulative effect may, taken

together, constitute 'gross negligence'" is legally unsupported. The only act of negligence truly claimed by plaintiff is defendants failure to detect aluminum wiring in the plaintiff's home and, for the above stated reasons, the Court finds that such conduct does not rise to the level of "gross negligence" such that the exculpatory clause shall be deemed inapplicable herein.

Further, as this Court finds that the plaintiff has failed to raise an issue of fact as to her breach of contract claim, all of plaintiff's remaining causes of action which are merely duplicative of the breach of contract claim also fail. It is therefore,

ORDERED, that defendants' motion for summary judgment is granted and plaintiff's action is dismissed; and it is further

ORDERED, that the portion of defendants' motion that seeks summary judgment on the counter-claim for costs and attorney fees is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 12, 2009

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