

Bogad v 20/20 Inspections, Inc.
2010 NY Slip Op 31188(U)
May 17, 2010
Supreme Court, Richmond County
Docket Number: 102762/06
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 102762/06
Motion No.:002**

**AARON BOGAD and
ARLENE BOGAD,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**20/20 INSPECTIONS, INC.,
CRAIG DEMIZIO, and
CLAUDINE DEMIZIO,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers
Memoranda of Law	2

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

20/20 Inspections, Inc., the defendant, moves for an order dismissing the plaintiffs' complaint and any cross-claims asserted against it pursuant to CPLR § 3211(a)(1) and (7) and CPLR § 3212. The defendant's motion is denied.

Facts

The plaintiffs' retained the defendant to conduct an inspection in connection with their purchase of 235 Noel Street, Staten Island, New York. The plaintiffs allege that the defendant negligently inspected the subject property and failed to disclose various structural problems. The plaintiffs allege that this failure to disclose resulted in their expending substantial sums of money

to correct the defects that should have been reported by the defendant.

The defendant argues that the plaintiffs executed a Pre-Inspection Agreement that included a hold harmless provision for any “. . . major deficiencies and defects which are latent or concealed.” Furthermore, the defendant asserts that this same agreement includes a limitation of liability with respect to the “. . . cost of repairing or replacing unreported defects or deficiencies . . .” And because of the plaintiffs are subject to these provisions the defendant contends that it is entitled to summary judgment.

In opposition, the plaintiffs submit the report of William Coull, a structural-mechanical engineer. According to Coull, the report prepared by the defendant failed to properly identify the cause of the soft and uneven floor in the family room. Coull’s report indicates that the damage is readily attributable to water damage and should have been reported to the plaintiffs. And Coull further indicated that the defendant failed to identify a deficiency in the foundation height, which in his opinion is clearly evident. Coull states that even though this deficiency is causally connected to the flooding that ruined the plaintiffs’ flooring it is not mentioned in the defendant’s report.

Discussion

Summary judgment is a drastic remedy that will only be awarded where there is no triable issue of fact and the court can render a decision as a matter of law.¹ It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized carefully in the light most favorable to the party opposing the motion.²

¹ *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

² *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts, and showing that the cause of action has no merit. Once the moving party has met this obligation, the burden shifts to the party opposing the motion, who must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so.³

The defendant has come forward with admissible evidence that would entitle the defendant to summary judgment. William Daley's inspection report and pre-inspection agreement are admissible evidence as they are business records. The Appellate Division, Second Depart held in *Schietinger v. Taucher Cronacher Professional Engineers* that a clear contractual provision limiting damages absent a special relationship between the parties, a statutory prohibition, or an overriding public policy is enforceable.⁴ But a contractual provision cannot limit liability for party due to its own gross negligence.⁵

In *Schietinger* the Appellate Division, Second Department found that the engineering company's failure to disclose that the house's roof needed to be replaced, that the shingles were partially composed of asbestos, and that the sill plate was rotted did not rise to gross negligence. The defendant maintains that this court should follow this holding and dismiss the plaintiffs' claims.

The plaintiff distinguishes the facts of this case from *Schietinger* by arguing that the alleged defects that the engineer failed to disclose deficiencies with respect to the floor joists along the rear of the house. The plaintiff argues that “. . . the level of the deck in combination

³*GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965, [1985].

⁴ 40 AD3d 954, [2d Dept 2007].

⁵ *Id.*

with the height of the foundation, with the exterior soil being above the top of the foundation with the floor joists underground along the rear of the house in the family room is a ‘recipe for disaster’ constituting gross negligence.

In opposition, the plaintiffs direct the court’s attention to a Supreme Court, Nassau County case, *Sullivan-Parry v. Pillar to Post, Inc.*⁶ The Supreme Court found that there was an issue of fact as to whether gross negligence existed when the engineer inspector failed to observe and report the improper splicing of aluminum with copper wires; and the lack of ground wires. The court observed that both failures constituted a fire hazard and were violations of federal, state and local laws.

The plaintiffs argue that their case is analogous to the facts in *Sullivan-Parry*. Here, the plaintiffs argue that their expert found a disaster waiting to happen. Mr. Coull states that the readily observable fact that the exterior soil is above the top of the foundation has an effect on the integrity of the floor joists along the rear of the house. The plaintiffs further allege in their complaint that as a result the extensive water seepage due to deficiency in the foundation created a mold problem.

The defendant’s argument that *Sullivan-Parry* is inapplicable here is incorrect. The defendant incorrectly argues that the court in *Sullivan-Parry* found that the defendant committed acts of gross negligence by failing to observe the improper wiring. This is an incorrect characterization of the court’s holding. The court found that “. . . dismissal of the case was not warranted when giving the plaintiff every favorable inference. . . [the] allegations in the complaint and amended complaint . . . raise triable issues of fact which preclude dismissal of the action.”⁷ The court in *Sullivan-Parry* made no finding as to whether the engineer in that case

⁶ 18 Misc3d 1104(A), 2007 NY Slip Op. 52408(U).

⁷ *Id.*

committed acts of gross negligence. Rather, the court found that the plaintiff's allegations required evaluation by a jury.

Conclusion

On a motion for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties.⁸ Here, the plaintiffs have come forward with evidence that raise a triable issue of fact as to whether the actions taken by the defendant constitute gross negligence. The plaintiffs' inspector came forward with evidence that indicates that the defendant may have failed to observe and report a condition that led to the development of mold, a toxic substance. And deficiencies in the foundation that may have impaired the structural integrity of the joists supporting the rear of the house. As such, whether these alleged failures constitute gross negligence must be resolved by a jury.

Accordingly, it is hereby:

ORDERED, that 20/20 Inspections, Inc.'s motion for summary judgment is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3 on Wednesday, June 23, 2010 at 9:30 a.m. for a compliance conference.

ENTER,

DATED: May 17, 2010

Joseph J. Maltese
Justice of the Supreme Court

⁸ *Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385, [2d Dept 2003].