

**Melendez v Eisenhower Estates, Inc.**

2010 NY Slip Op 31298(U)

May 26, 2010

Sup Ct, Orange County

Docket Number: 9026-2007

Judge: Lewis Jay Lubell

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Status Conference June 16, 2010

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF ORANGE**

-----X

SARAH MELENDEZ and FERNANDO MELENDEZ,

Plaintiff(s),

-against -

EISENHOWER ESTATES, INC., SALOMON  
GALITZKY, FUSCO ENGINEERING, P.C.,  
and POST CONSTRUCTION, INC.,

Defendant(s).

-----X

**LUBELL, J.**

**DECISION/ORDER**

Index No. 9026-2007

Motion Date: 3/12/10

The following papers were considered in connection with this motion by defendant Fusco Engineering, P.C. for an Order pursuant to CPLR §3212 granting summary judgment dismissing the complaint and any cross-claims against Fusco Engineering and Land Surveying, P.C. s/h/a Fusco Engineering, P.C., the motion by defendant Post Construction, Inc. for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' complaint in its entirety as against the defendant Post Construction, Inc. and granting such other and further relief as the Court may deem just and proper, and the cross-motion of defendant Eisenhower Estates, Inc. and Salomon Galitzky for an Order granting summary judgment in their favor:

<b>PAPERS</b>	<b>NUMBERED</b>
Motion (Fusco)/Affidavit/Affirmation/Exhibits A-L	1
Motion (Post)/Affirmation/Affidavit/Exhibits A-F	2
"Cross-Motion" (Eisenhower/Galitzky)/Affirmation/ Affidavit/Exhibits A-J	3
Affidavits in Opposition (Plaintiff)/Affirmation/ Exhibits A-B	4
Memorandum of Law (Plaintiff)	5
Memorandum of Law (Fusco)	6
Memorandum of Law (Eisenhower/Galitzky)	7
Affirmation in Opposition (Fusco)	8
Reply Affirmation (Post)	9
"Second Reply"	10

Notwithstanding any determination earlier articulated by the

Court during the oral argument held in connection with these motions on March 12, 2010, but upon consideration of that argument and re-consideration of the written submissions, the Court now rules as herein indicated.

Plaintiffs, the owners of the single-family dwelling located at 38 Old Mountain Road, Port Jervis, New York (the "Premises"), bring this action against the various defendants for breach of warranty, negligence, and breach of contract to recover for damages allegedly incurred in connection with the Premises' defective septic system and faulty landscaping.

Plaintiff purchased the Premises on September 28, 2005 from defendant/contractor Eisenhower Estates, Inc. ("Eisenhower Estates"), of which defendant Salomon Galitzky is an employee and Vice President. Eisenhower Estates is sued in its capacity as seller of the Premises; defendant Galitzky as its "alter ego."

Defendants Fusco Engineering, P.C. ("Fusco") and Post Construction, Inc., a subcontractor of Eisenhower Estates and/or Galitzky, are sued in connection with their alleged negligent design and/or construction of, among other things, the septic system and landscaping to the Premises and in attempting to effect revisions, improvement, corrections and repairs thereto.

#### **MOTION BY FUSCO ENGINEERING, P.C.**

The Court finds that Fusco, a professional engineering firm, has come forward with sufficient proof in admissible form establishing entitlement to judgment in its favor as a matter of law. Among other things, Fusco has established, in the first instance, that it had been hired by defendant Galitzky to inspect the already installed septic system to confirm that work had been performed using standard construction practices and that it substantially conformed with the underlying plot plan. In response to same, however, plaintiff has failed to show that there exists any material questions of fact regarding same.

More particularly, plaintiffs have failed to make a showing that there exists a sufficient relationship between themselves and Fusco approaching privity such that Fusco can be held accountable to plaintiffs. Plaintiffs' reliance on Board of Managers of Astor Terrace Condominium v. Schuman, Lichtenstein, Claman & Efron, 183 A.D.2d 488 [1<sup>st</sup> Dept., 1992] and Goodman-Marks Associates, Inc. v. Westbury Post Associates, 70 A.D.2d 145 [2d dept., 1979]) in that regard as well as other cases addressing the issue is unpersuasive in light of the subsequent Court of Appeals determination in Parrott v. Coopers & Lybrand (95 N.Y.2d 479, 484 [2000][a "special relationship" is "a relationship so close as to approach that of privity"]) and the more recent Appellate Division, First Department, determinate in Sykes v. RFD Third Ave. 1 Associates,

LLC, 67 A.D.3d 162,167 [1<sup>st</sup> Dept., 2009][relationship approaching privity requires (1) awareness of defendant that statement is for a particular purpose; (2) reliance on statement by a known party furtherance of that purpose; and (3) some conduct linking defendant to the relying party and evincing its understanding of that reliance]) and the cases cited therein (see, Bri-Den Constr. Co., 56 A.D.3d 355 [1<sup>st</sup> Dept., 2008] ["prequalified bidders were simply not 'known' at the time of the complained-of conduct"]; Ford v. Sivilli, 2 A.D.3d 773, 774-775 [2d Dept., 2003] [no action by plaintiff real estate purchasers against architect and expediter hired by sellers because "[a]t best, the plaintiffs were part of an 'indeterminate class of persons who, presently, or in the future' may rely upon [the architect's and expediter's] alleged misrepresentations, which are not the equivalent of known parties"])).

Nor is the Court persuaded that plaintiffs have adequately demonstrated to this Court that facts essential to justify opposition may exist but cannot now be stated (CPLR 3212[f]) such that this motion should be stayed or denied, without prejudice, pending further discovery.

#### **MOTION BY POST CONSTRUCTION, PC**

In addition to the legal analysis rendered in connection with the Court's disposition of Fusco's motion, the Court finds that Post Construction, as sub-contractor of defendant Eisenhower Estates, has come forward with sufficient proof in admissible form establishing that it has no independent duty of care to plaintiffs (see, Board of Managers of the Riverview at College Point Condominium III v. Schorr Brothers Development Corp., 182 A.D.2d 664 [2d Dept., 1992]) and, in response, plaintiffs have failed to raise any material questions of fact in that regard nor any legal basis upon which to deny this motion pursuant to CPLR §3212(f). (

#### **MOTION BY EISENHOWER ESTATES, INC.**

Upon a reading of the cursory papers submitted in support of Eisenhower Estates' motion for summary judgment, the Court does not find that Eisenhower Estates has met its initial burden of establishing entitlement to judgment in its favor as a matter of law.

Therefore, the motion of Eisenhower Estates for summary judgment in its favor is denied.

#### **MOTION BY SALOMON GALITZKY**

Galitzky's motion for summary judgment is denied, without prejudice to re-application, following the close of disclosure. Plaintiffs have adequately demonstrated to this Court that facts essential to justify opposition may exist but cannot now be stated (CPLR 3212[f]) as to whether Galitzky can be held personally liable

in this action.

Based upon the foregoing, it is hereby

ORDERED, that, the motion by defendant, Fusco Engineering, P.C., for an Order pursuant to CPLR §3212, granting summary judgment dismissing the complaint and any cross-claims against Fusco Engineering and Land Surveying, P.C. s/h/a Fusco Engineering, P.C. is granted; and, it is further

ORDERED, that, the motion by defendant Post Construction, Inc., for summary judgment, pursuant to CPLR 3212, dismissing the plaintiffs' complaint in its entirety as against the defendant Post Construction, Inc. is granted; and, it is further

ORDERED, that, the cross-motion of defendant Eisenhower Estates, Inc. and Salomon Galitzky for an Order granting summary judgment in their favor is denied; and, it is further

ORDERED, that, all parties remaining in this action shall appear before the Court at 9:00 a.m. on June 16, 2010 for a Status Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Goshen, New York  
May 26, 2010

S/\_\_\_\_\_  
**HON. LEWIS J. LUBELL, J.S.C.**

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