

Radicella v Fawn Ridge Condo II

2010 NY Slip Op 32140(U)

August 10, 2010

Supreme Court, Richmond County

Docket Number: 104062/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 104062/08
Motion No.:002, 003**

JOSEPHINE RADICELLA,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

FAWN RIDGE CONDO II,

Defendant

The following items were considered in the review of the following motions: (1) for reargument; and (2) for summary judgment dismissing the complaint.

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

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

The plaintiff moves to reargue this court's decision and order dated November 2, 2009 that denied her motion for summary judgment. And upon reargument plaintiff argues that summary judgment should be granted in her favor. The defendant cross-moves for summary judgment dismissing the plaintiff's complaint and offers opposition to this court allowing reargument of the November 2, 2009 decision and order.

The plaintiff's motion to reargue is granted and upon reargument summary judgment is granted in her favor. The defendant's motion is denied.

The defendant argues that the plaintiff's motion for reargument must fail on its face as it was made more than thirty days after the November 2, 2009 decision and order was served on her with notice of entry. However, this argument must be rejected. Although a movant may not

have technically met the requirements for reargument, the granting of this relief is discretionary with the court in the interest of justice.¹ In this case the interests of justice require that this court reevaluate its prior decision and order. As such, reargument is granted.

Facts

The plaintiff is the owner of Unit 115 of Fawn Ridge II Condominium complex, commonly known as 60 Gervil Street, Staten Island, New York, which is a first level home as defined by the offering plan. The plaintiff alleges that the cement slab on which her home is constructed is sinking as a result of the erosion of the soil beneath her property.

According to the plaintiff she noticed that the partition wall between her living room and kitchen had begun to separate from the ceiling. After this discovery on April 3, 2007 the plaintiff contacted the condominium board expressing her concerns. The board responded by directing the plaintiff to hire her own contractor. The plaintiff consulted with her brother, Paul Culetta of Design Plumbing, who corresponded directly with the board. As a result of this intervention the board hired an engineer to evaluate the sinking slab in plaintiff's home.

The board hired Richard Jaszczak, P.E., who opined the following possible causes for the sinking of the slab:

1. An underground stream that is active and moving soil away from the building;
2. Poorly graded back fill that was not properly compacted;
3. Organic material (tree trunks) that were buried with back fill and now are decaying; or
4. Improperly installed grade beam.

¹ *Ruggiero v. Long Island Railroad*, 161 AD2d 622, [2d Dept 1990].

Jaszczak recommended further investigation that included cutting into the sinking slab and digging a test pit to investigate the sub soil.

The board conducted tests on the soil samples that resulted in a negative report for sewage, water and chlorine traces. Subsequently, the board informed the plaintiff that she should seek redress from her personal insurance carrier.

In support of her underlying motion for summary judgment the plaintiff annexed the expert report of Douglas N. Sickles, P.E., NSPE, NABIE, and a senior staff member of Heimer Engineering, P.C. Like Jaszczak, the engineer hired by the board, Sickles found that the underlying soil cannot support the slab under the plaintiff's unit. Additionally, Sickles found that the concrete slab was not reinforced with rebar or steel netting. Furthermore, Sickles discovered that while concrete slabs are typically four inches thick, the concrete slab beneath the plaintiff's unit was increased by adding an additional two inches of concrete on top of the original slab.

Sickles opined that the soil defects may extend beyond the plaintiff's unit to other common areas in the condominium development. Sickles based this opinion on his observation of the severity of cracks in the tennis court surface.

Additionally, the defendant submits the report findings of Rimkus Consulting Group, Inc. prepared by Mark A. Rhodes, Project Manager, Lizeth S. Pascua, Senior Consultant, and Joseph P. Buongiorno, P.E. The defendant's expert came to the following three conclusions:

1. The settlement in the interior of the residence was due to consolidation of the underlying soil caused by long term decomposition of organic material in the near surface soils.
2. The upper 1 ½ inch slab over the 3 inch slab appears to have been placed in an attempt to level the floor from settlement.
3. The decomposition of organic matter will continue to cause movements in the soil beneath the slab-on-ground unless remedial

measures are taken to stabilize the sub grade. We recommend that a comprehensive geotechnical investigation be conducted to determine the long term effects of the organic material decomposition prior to any repairs being made.

The defendant's expert offered the following analysis in the discussion portion of their report:

Settlement and poor soil sub grade conditions were also evident throughout the exterior of around Unit 60, which indicates that soil movement is not isolated to Unit 60. It is our opinion that decomposition of organic matter will continue to cause movements in the soil beneath the slab-on-ground unless remedial measures are taken to stabilize the sub grade. We recommend that a comprehensive geotechnical investigation be conducted to determine the long term effects of the organic material decomposition prior to any repairs being made.

The offering plan for the Fawn Ridge Condominium development defines common elements as follows:

The common elements of the Condominium will consist of all of the Condominium, except the Homes, including, but without limitation, outside walls, roofs and the Buildings, the land, buildings and improvements (other than the Homes) comprising the Condominium (including the land under the Homes and under the improvements), all utility or other pipes and material located outside of the Homes, roadways, grass areas, walks, and parking spaces.

Furthermore, Article III Section 6 of the By Laws of Fawn Ridge Condominium II states in pertinent part as follows:

Section 6. Repairs and Maintenance. All maintenance, repairs and replacements to the common elements of the property including but not limited to exterior walls, roof and roof members as well as all maintenance, repairs and replacements to any public utility lines

as are located in the common elements and serve one or more Homes, and exterior painting, repairs or maintenance shall be a common expense. . .

This court's prior decision and order found that the hole cut into the slab by the board's engineer to obtain soil samples constituted an issue of fact, and therefore, denied summary judgment in favor of the plaintiff. Such a reading of the evidence submitted by plaintiff's expert constitutes a misapprehension of the facts and requires reconsideration by the court.

Discussion

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.² It is well established that summary judgment should be granted only if there are no material and triable issues of fact. 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 in the light most favorable to the party opposing the motion.³

Here, the plaintiff submits the certified expert report of Douglas N. Sickles, P.E., as well as the letter report of Richard Jaszczak, P.E., the engineer hired by the board to conduct the examination of the plaintiff's unit. In each instance the professionals determined that the cause of sinking slab of concrete was due to defects in the soil beneath the condominium unit. The condominium offering plan in conjunction with Real Property Law § 339-e(3)(a) defines that the land beneath a condominium unit is a "common element." As such, the plaintiff has come forward with evidence sufficient to support a finding of summary judgment in her favor.⁴

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

³ *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

⁴ *See, Royal York Owners Corp. v. Royal York Associates, L.P.*, 43 AD2d 357, [1st Dept 2007].

The defendant's cross motion and arguments in opposition to the plaintiff's motion are unavailing. The defendant's position that the plaintiff make internal repairs to her home prior to remedying the soil is even against the recommendation of its own expert. Likewise, the defendant's arguments in support of dismissal pursuant to the business judgment rule are unavailing.⁵

Conclusion

Upon reconsideration, there are no issues of fact to justify a denial of plaintiff's motion for summary judgment. The evaluating engineers from both the plaintiff and the defendant acknowledge that the land beneath the plaintiff's condominium unit is slowly swallowing her home. In fact, the defendant's own expert recommends an extensive geotechnical investigation. In light of the evidence submitted, this court finds it reprehensible that the defendant has addressed the problem at a glacial pace.

Accordingly, upon reconsideration it is hereby:

ORDERED, that the plaintiff's motion for reargument is granted; and it is further

ORDERED, that the plaintiff's motion for summary judgment on her complaint and striking the defendant's answer is granted in its entirety; and it is further

ORDERED, that the defendant's motion for summary judgment is denied; and it is further

⁵ Id., *See also, Aglione v Stonegate at Grasmere Condominium I*, 170 AD2d 470, [2d Dept 1991].

ORDERED, that the plaintiff shall settle judgment on notice.

ENTER,

DATED: August 10, 2010

Joseph J. Maltese
Justice of the Supreme Court