SHORT FORM ORDER

INDEX No. 05-14957
CAL. No. 09-02357-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-9-2010
ADJ. DATE 7-23-2010
Mot. Seq. # 003 - MG
004 - XMG
Case Disp

CARL LAVORATA and SYLVIE LAVORATA,

Plaintiffs,

- against -

TOWN OF SMITHTOWN,

Defendant.

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TOWN OF SMITHTOWN,

Third-Party Plaintiff,

- against -

CEDAR KNOLLS COMMACK, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 97 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 16 ; Notice of Cross Motion and supporting papers (004) 17-33; Answering Affidavits and supporting papers 34-63 untabbed exhibits; 64-90 untabbed exhibits ; Replying Affidavits and supporting papers 91-95; 96-97 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (003) by the defendant, Town of Smithtown (hereinafter Town), for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice; and it is further

ORDERED that this cross-motion (004) by the third-party defendant, Cedar Knolls Commack, Inc. (hereinafter Cedar Knolls), for an order pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's complaint in the main action and dismissing the Town's third-party complaint is granted and the third-party complaint is dismissed with prejudice.

By order of this Court, dated May 26, 2010, the Town and Cedar Knolls were granted leave to renew their prior motions (001) and (002) upon submission of proper papers.

A Notice of Claim, dated June 28, 2004, was served by Carl Lavorata and Sylvie Lavorata (hereinafter plaintiffs) upon the Town based upon the Town's alleged negligent issuance of a certificate of occupancy for their premises located at 4 Pine Street, Commack, New York (hereinafter premises) and its April 5, 2004 denial of an application for a permit submitted on April 2, 2004 to construct a deck on their premises. The plaintiffs' claim monetary damages because they were required to test, excavate, remove and replace the backfill approved by the Town as originally installed at the premises.

The plaintiffs purchased the premises on July 11, 2002 and thereafter discovered a problem with poor drainage, inadequate fill, improper grading, water pooling and basement leakage, requiring the plaintiffs to take remedial action and suffer monetary damage and loss of enjoyment of their premises. They claim that the Town required Cedar Knolls, the builder of the plaintiffs' home, to design and install a tree-line near the boundary of the plaintiffs' premises and required grading of the premises causing the flow of surface water toward the plaintiffs' premises. They claim that such water flow traveled to an improper backfill area required by the Town around the footings and foundation of the plaintiffs' residence, and that the backfill could not properly absorb the surface water. On April 2, 2004, the plaintiffs submitted an application to the Town for a permit to build a deck on the rear of their residence on the originally installed and existing footings and backfill, which permit was denied. As corrective measures, the plaintiffs were required to redirect the flow of water on the premises, test, excavate, remove and replace improper backfill around the footings and foundation of the plaintiffs' residence.

The Town moves for summary judgment in its favor dismissing the complaint because the action is barred by the applicable statute of limitations; there is a lack of duty of care; there is a lack of proximate cause; the plaintiffs' lack standing; and the Town has immunity from suit. The Town commenced a third-party action against the third-party defendant Cedar Knolls for indemnification/ contribution.

Cedar Knolls moves for summary judgment dismissing both the complaint in the main action and the third-party complaint because the main action is barred by the applicable statute of limitations and by governmental immunity; there is no duty of care to the plaintiffs; the action is barred by a previous determination in arbitration adverse to the plaintiffs; the Town's claims against it are entirely dependant upon the plaintiffs' claims, and there is no cognizable theory on which the Town can claim contribution or indemnification from Cedar Knolls as the third-party defendant fulfilled its duty to the plaintiffs.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the

burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (003), the Town has submitted, inter alia, an attorney's affirmation; the affidavit of Allan Richards, dated June 2, 2010; copies of the Notice of Claim, summons and complaint, amended complaint, answer, third-party summons and complaint and answer; copy of the permit application; deed for the premises; building permit, dated September 14, 2001; Certificate of Zoning/Certificate of Occupancy; closing statement; copy of the transcript of the examination before trial (hereinafter EBT) of Carl Lavorata, dated March 18, 2008; and a letter dated October 21, 2003.

In support of motion (004), Cedar Knolls has submitted, inter alia, an attorney's affirmation; copies of the pleadings; undated letter of Carl Lavorata; letter, dated July 10, 2003; unsigned, undated two page letter; letter, dated July 22, 2003; copy of a judicial decision, dated January 23, 2006 (Mullen, J.); copy of Award of Arbitrator, dated September 19, 2006 (Italiano) and claimants' post-hearing brief.

The plaintiffs oppose these motions with multiple submissions, including, inter alia, an attorney's affirmation; affidavits of Carl Lavorata, dated June 30, 2010; copies of the EBT transcripts of Robert Bonerba (hereinafter Bonerba), dated June 3, 2009; John Bongino, dated September 2, 2009; Allan Richards, dated December 4, 2008; and Carl Lavorata, dated October 15, 2004, and March 18, 2008.

In the Arbitration Matter-Claimants' Post-Hearing Brief submitted by the plaintiffs, they claimed that subsequent to the purchase of their residence, they noted that topsoil placed in the areas surrounding the house washed away, nothing would grow in the backyard, sod placed in the front yard remained alive but did not properly take root and was continuously soaked after any rainfall. At the arbitration hearing the plaintiffs submitted various witnesses and claimed there was improper backfill which they had to remove and replace. They also claimed that there was a line of mature trees on the perimeter of their premises which the Town required must remain in place, which made the level of the ground where the trees were higher than the elevation of their residence's foundation, leaving a grade descending from the tree line to the residence and that Cedar Knolls did not properly grade the property, requiring a retaining wall with drainage pipes. The decision of the arbitrator, S. R. Italiano, dated September 19, 2006, denied all claims, including the claim in the amount of $95,500.00 for replacement of backfill, changing the foundation walls damp proofing, installation of stone walls, changing site grades and site drainage work, as the work covered in the plaintiffs' claim was not the contractual responsibility of Cedar Knolls.

The evidence indicates that on February 21, 2002, the Town issued to Cedar Knolls building permit #109419 for the construction of a new one-family dwelling on Lot #3 on Pine Street, Commack, New York. The certificate of occupancy for the premises was issued to Cedar Knolls by the Town Building Department on July 10, 2002. The plaintiffs closed on the premises at 4 Pine Street, Commack, New York on July 11, 2002 pursuant to a contract of sale entered into between Cedar Knolls and them. In December, 2002, the plaintiffs began to notice various drainage and flooding problems on the premises and some sinking in the yard and puddles of water in their basement due to a crack in the foundation and, in approximately late February 2003, upon being advised by their landscaper that there was a problem with the soil and drainage which was not acceptable to his standards, the plaintiffs had the Town Building Department inspector/engineer come to the premises. In about April or May 2003, the plaintiffs were advised by the Town, upon the digging of test holes and the holes filling with water, that everything (concerning the soil) was fine. On April 2, 2004, the plaintiffs submitted an application for construction of a deck which application was denied by the Town. The plaintiffs' landscaper had dug footings (in a different area from the holes previously dug) and a stop work order was issued by the Town as the soil was not proper for building purposes. The plaintiffs also had to build a retaining wall to address the water running from the trees on the property line into the rear yard. The plaintiffs argue that the Town should have called Cedar Knolls to have it replace the top soil and eliminate the problems they were experiencing and that the Town was negligent in issuing the certificate of occupancy to Cedar Knolls.

At his EBT Bonerba, on behalf of the Town, testified that its engineering department did an inspection at the plaintiffs' premises after the initial excavation wherein initial soil testing was done before construction could be started. The Town's engineering department requested that Cedar Knolls, the builder, dig until suitable soil and sand was reached for proper drainage. Skip McHugh (hereinafter McHugh), the Town's engineering inspector at the site on the first visit, told Cedar Knolls, the builder, to use its stockpiles of good clean sand in its back filling. There was junk soil which the builder was told to completely remove from the site. Junk soil was described as having too much clay or debris. Bonerba later learned that there had been problems with the basement which were addressed by the builder. When he went to the site after the plaintiffs submitted their application for a permit to build a deck, he noted ponding of water in the rear yard. When the landscaper excavated in the rear yard for the footings for the deck, Bonerba did not see any sand in the footing as backfill, as McHugh had instructed the builder to do. The Town's engineering department was responsible for looking at the backfill and making sure the soil had the proper drainage. The Town would not issue a certificate of occupancy until the builder provided an "Excavation Affidavit" averring that all unsuitable material has been removed from the site.

At his EBT John Bongino testified on behalf of the Town that he inspected the foundation at the plaintiffs' premises on February 25, 2002 and issued a report which indicated "foundation approved" after comparing the foundation to the survey. He also performed and approved the framing and plumbing inspections.

At his EBT Allan Richards testified that he prepared a report, dated April 2, 2004, in which he did not approve the holes for the footings for the deck at the plaintiff's premises. The holes were full of water. When he checked the soil he found wood chips and decaying organic matter as backfill to the foundation. He determined that the soil was unsuitable for supporting a footing and the plaintiffs would need an engineer or architect to redraw the plans to show either a deeper footing or some

solution to the soil problem. The plaintiffs, who were present at the inspection, advised him they were having problems since they moved in and could not even get grass to grow in the rear yard.

NEGLIGENCE

For an act or omission to constitute a tort there must exist a right and a duty and conduct constituting a breach of duty or a violation of a right (***Ilson et al v Incorporated Village of Ocean Beach et al,*** 79 AD2d 697, 434 NYS2d 272 [2nd Dept 1980]). In reviewing the evidentiary submissions of the parties, the Court finds that the Town has established prima facie entitlement to summary judgment dismissing the complaint as a matter of law as the plaintiffs have not raised a factual issue precluding summary judgment and dismissal of the complaint. The plaintiffs have no statutory right which was violated by the Town. The Town has governmental immunity concerning its denial of the subject permit and issuance of the certificate of occupancy. No special relationship existed between the plaintiffs and the Town and the Town owed no special duty to the plaintiffs. The Town did not proximately cause the damages claimed by the plaintiffs. The notice of claim was not timely filed and the instant action was not timely commenced.

GOVERNMENTAL IMMUNITY

"Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach" (***Mon et al v City of New York et al,*** 78 NY2d 309, 574 NYS2d 529 [1991]). "No public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it. Under the rule a distinction is drawn between a ministerial or nondiscretionary act from which liability ensues if done wrongfully, and a judicial or discretionary act for which the public officer is immune from liability even if the act is wrongful.... Sound reasons of public policy underlie the rule of immunity for public officers. To fasten responsibility for damages on a public officer for the exercise of judgment or discretion in favor of one disappointed by the result would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. In weighing the balance between the effects of oppressive official action and vindictive or retaliatory damage suits against the officer, the public interest in prompt and fearless determinations by the officer, based on his interpretation of the law and the facts before him, must take precedence. A public officer, haunted by the specter of a lawsuit, may well be subject to the twin tendencies of procrastination and compromise to the detriment of the proper performance of his duties.... It is sometimes said that the liability of a municipality is measured by the same rules applicable to the ordinary citizen. But an ordinary citizen is not called upon to make the kind of ... decision which an application for a building permit demands, and there still remain some areas of governmental action which cannot be questioned for reasons of policy by individual action. The granting or withholding of a building permit is an exercise of sovereign power, for which no liability should fall upon the municipality" (***Rottkamp et al v Young et al,*** 21 AD2d 373, 249 NYS2d 330 [2nd Dept 1964]). "Whether to grant a building permit is a discretionary determination and the actions of the government in such instances are immune from lawsuits" (***Broncati et al v City of White Plains, et al,*** 6 AD3d 476, 774 NYS2d 573 [2nd Dept 2004]; ***Dinerman v Poehlman et al,*** 237 AD2d 483, 656 NYS2d 41 [2nd Dept 1997]).

"Neither may municipal tort liability be predicated upon the discretionary acts of other municipal employees such as building inspectors, and person (sic) charged with the enforcement of building safety provisions or the issuance of a certificate of occupancy ..." (***Hussein et al v The City of New York et al,*** 25 Misc3d 1221A, 901 NYS2d 907 [Supreme Court of New York, Richmond County 2009]). The acts of granting building permits and issuing certificates of occupancy are discretionary municipal acts, and discretionary municipal acts may never be a basis for liability. ***McLean et al v City of New York,*** 12 NY3d 194, 878 NYS2d 238 [2009]; See also, ***Yan Shou Kong v Town of Huntington,*** 4 AD3d 419, 771 NYS2d 378 [2nd Dept 2004]).

Accordingly, the Court finds as a matter of law that the Town has governmental immunity for the issuance of the certificate of occupancy and the denial of the application for building a deck and, therefore, a negligence action may not be maintained against the Town.

DUTY AND SPECIAL RELATIONSHIP

The Town argues that it has no duty to the plaintiffs. As a general rule, a municipality may not be held liable for injuries resulting from the negligent performance of a governmental function absent a special relationship between the injured party and the municipality. When a municipality acts in a proprietary capacity, however, it is generally subject to the same duty of care as private individuals and institutions engaging in the same activity (***Dobin et al v Town of Islip et al,*** 11 AD3d 577, 783 NYS2d 64 [2nd Dept 2004]). As to the so-called 'special duty/special relationship rule, the Court in ***Hussein et al v The City of New York, et al,*** supra, held that it is per se inapplicable to "[g]overnment action if discretionary', ... and while its ministerial actions may serve as a basis for liability, this can only occur if the government violates a special duty owed to the plaintiff, apart from any duty to the public in general." Here the Court finds that the Town was acting in its governmental function and not in a proprietary capacity. The acts of issuing or denying a building permit and certificate of occupancy are discretionary acts, and there was no special duty owed to the plaintiffs apart from any duty to the public in general.

"To form a special relationship through breach of a statutory duty, the governing statute must authorize a private right of action. One may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme. If one of these prerequisites is lacking, the claim will fail ..." ***Hussein et al v The City of New York, et al,*** supra. There is a narrow class of cases in which a 'special relationship' can arise from a duty voluntarily undertaken by a municipality to an injured person. However, the Town did not owe a special duty to the plaintiffs, there was not statutory duty which the Town allegedly breached, and the Town did not voluntarily undertake a duty to the plaintiffs (see, generally, ***McLean et al v City of New York,*** 12 NY3d 194, 878 NYS2d 238 [2009]; ***Abraham v City of New York et al,*** 39 AD3d 21, 828 NYS2d 502 [2nd Dept 2007]). The adoption of zoning ordinances and building codes by a municipality does not create a special relationship with its residences, and ordinances and codes enacted for the benefit of the general public do not, without more, give rise to a special relationship between a municipality and an individual (***Bell v Village of Stamford,*** 51 AD3d 1263, 857 NYS2d 804

[3rd Dept 2008).

Accordingly, the Court finds that there was no special relationship between the plaintiffs and the Town; the Town owed no special duty to the plaintiffs; and the Town did not voluntarily undertake a duty to the plaintiffs.

STATUTE OF LIMITATIONS

General Municipal Law (hereinafter GML) §50-e 1.(a) provides that within ninety days after the claim arises on any action founded in tort, as a condition precedent to the commencement of an action, a notice of claim shall be served upon the municipality. Pursuant to GML §50-i, the action shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.

The plaintiffs' claim that the Town negligently issued a certificate of occupancy on July 10, 2002 after having negligently inspected the premises. It is undisputed that the certificate of occupancy was delivered to the plaintiffs at the closing of title on July 11, 2002. The plaintiffs were required to file the Notice of Claim within ninety days from the date of the alleged negligent act by the Town. (see, GML §50(i)). There is no claim that the plaintiffs moved for leave to file the Notice of Claim beyond the requisite time period. In fact, the letter of July 10, 2003 from Richard A. Pino, Esq. on behalf of the plaintiffs, addressed to Cedar Knolls, indicated that the letter would serve as formal notice of a claim being made under the limited warranty pursuant to the contract of sale, dated June 29, 2001, and stated, inter alia, improper drainage (rain and runoff water did not properly drain away from the house). According to the plaintiffs' submitted EBT testimony, they were aware of the puddles in the basement in December 2003 and noticed sinking of the property within six months after the closing of July 11, 2002, in addition to flooding in the yard. The Notice of Claim was filed on June 28, 2004, well beyond the statutory ninety days following the date of the closing and well beyond ninety days after the plaintiffs noted the flooding and sinking in their yard. The plaintiffs' complaint should have been filed within one year and ninety days of the accrual of the cause of action, i.e., October 9, 2003. This action was not commenced by filing the summons and complaint until June 28, 2005, well beyond the statutory period.

Accordingly, this action is deemed untimely and barred by the applicable statute of limitations.

As to motion (004), as the plaintiffs' main action against the Town has been dismissed, the Town's third-party action for contribution/indemnification against Cedar Knolls has been rendered academic and is also dismissed as a matter of law.

Dated: September 29, 2010

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION