

**Hamlet at Willow Creek Dev. Co., LLC v Northeast
Land Dev. Corp.**

2011 NY Slip Op 30646(U)

March 4, 2011

Supreme Court, Nassau County

Docket Number: 007536/05

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

THE HAMLET AT WILLOW CREEK DEVELOPMENT
CO., LLC, MT. SINAI ASSOCIATES, LLC, and
THE HOLIDAY ORGANIZATION,

Plaintiffs,

- against -

INDEX NO.: 007536/05
MOTION DATE: 11/9/10
SEQUENCE NO.: 18, 19
20, 21

NORTHEAST LAND DEVELOPMENT CORPORATION,
PAVCO ASPHALT INC., CARL ZORN, WILLIAM
FEHR, and FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Defendants.

The following documents were read on this motion:

- Plaintiffs' Motion for SJ against Northeast and Pavco for \$6,700,000, Fidelity for \$1,665,000 with post-judgment interest; pre-judgment interest on Restoration Claim of \$773,393 at 9% from June 8, 2006 to entry of judgment; Counsel Fees incurred by The Hamlet to lift Stop Work Order and remedy non-compliance with Chapter 53 of Brookhaven Town Code in sum of \$117,351.49 1.
- Plaintiff's Memorandum of Law in Support of Motion 2.
- Cross-motion by Northeast to vacate the Amended Judgment of this Court dated October 20, 2009, entered October 29, 2009 3.
- Memorandum of Law on behalf of Northeast and Carl Zorn 4.
- Motion by Fidelity and Deposit Company of Maryland for an Order Vacating the conditional judgment as set forth in the Amended Judgment of this Court dated October 20, 2009 5.
- Cross-motion by Pav-Co Asphalt, Inc. And William Gehr to Dismiss

Complaint	6.
Reply Affirmation of Robert Callica in Further Support of Plaintiffs’	
Motion	7.
Reply Memorandum of Law in Support of Plaintiff’s Motion	8.
Reply Affirmation of Howard M. Bergson in Further Support of	
Northeast and Carl Zorn	9.
Reply Affirmation of Steven G. Pinks in Further Support of Motions by	
Pav-Co and William Fehr	10.
Reply Affirmation of Kevin M. Gary in Further Support of Fidelity’s	
Motion	11.
Northeast and Zorn Rule 19 Statement of Agreed Facts	12.
Plaintiff’s Rule 19 Statement of Agreed Facts	13.
Pav-Co Rule 19 Counter-statement of Agreed Facts.	14.
Transcript of Oral Argument on November 9, 2010	15.

PRELIMINARY STATEMENT

Motion Sequence # 18

Plaintiff moves for summary judgment in favor of The Hamlet upon its “Remaining Claims” against defendants Northeast and Pav-Co, jointly and severally in the amount of \$6,700,000; against defendant Fidelity, for an unconditional judgment in the principal amount of \$1,665,000 together with post— judgment interest on the Environmental Fee Claim of \$891,607 at the statutory rate of 9% from May 30, 2006 through the date of entry of judgment by the Clerk of the Court; post judgment interest on the partial payment made by Pav-Co of \$125,000 on account of the Environmental Fee claim, at the statutory rate of 9% from May 30, 2006 through the date of payment, February 16, 2010, in the amount of \$41,718; and three – judgment interest on the Restoration Claim of \$773,393 at the statutory rate of 9% from the date of demands, June 8, 2006 through the date of entry by the Clerk of the Court. Plaintiff also seeks counsel fees incurred by The Hamlet in litigation with Town of Brookhaven to lift the “Stop Work Orders” and to remedy Northeast’s non— compliance with chapter 53 of the Brookhaven Town Code in the sum of \$117,351.49.

Motion Sequence # 19

Northeast moves for an order vacating the Amended Judgment of this Court dated October 20, 2009, and entered October 29, 2009, which modified the earlier judgment of the court dated May 20, 2006. The affirmation in support of the motion is also submitted in opposition to the motion by plaintiff for summary judgment. The basis for this motion is that the April 5, 1999 Aerial Topographic Survey, which form the basis for the calculation as to the amount of fill removed from Hamlet at Willow Creek by defendant Northeast, was inaccurate. The motion claims that a further analysis by Cashin Associates, P. C., which determined that an excess of 373,008 yd.³ over and above the earlier Brookhaven projection of 1.654 million cubic yards, was inaccurate and unreliable because the topographic survey was inaccurate. Northeast claims that a 2002 reading by means of a Tremble 5700 GPS, performed as a demonstration for the utility of this product, show that the 1999 topography was materially low at all 59 locations which were detected. The essence of the claim is that these findings can be extrapolated to show that the ground was 1.7 feet lower than was the interpretation of the topographical survey from 1999, and that therefore there was a very significant difference in the amount of fill which was actually removed from the site.

Motion Sequence # 20

Defendant Fidelity and Deposit Company of Maryland cross – moves for an order vacating, and/or renewing the conditional judgment against Fidelity contained in the Amended Judgment of this Court dated October 20, 2009. Plaintiffs claim against Fidelity is that they are equitably subrogated to the rights of the Town of Brookhaven had to the bond. Fidelity's motion asserts facts similar to those alleged in Motion Sequence # 19, that is, that the calculation of the amount of fill which was removed was based upon a false premise, that is the 1999 topographical survey. They also claim that there is no legitimacy to plaintiff's claim for \$773,393 for restoration or for counsel fees. Lastly, they claim that \$1,210,000 paid by Pav-Co must be credited against the penal sum of the

bond, reducing the maximum exposure of Fidelity to \$455,000, and that Northeast's counterclaim of \$234,230.61 precludes summary judgment in favor of plaintiff.

Motion Sequence # 21

This motion is by Pav-Co Asphalt, Inc. and William Fehr to dismiss the complaint and in opposition to plaintiff's motion for summary judgment. These moving parties contend that plaintiff has failed to produce evidence that either Pav-Co or Northeast has over excavated the site by 373,008 cubic yards, and that factual questions remain as to the elevation of the land when excavation began in 2002; the amount of material actually excavated; the value of the alleged material; costs associated with the "Restoration Claim"; and the reasonableness of attorneys' fees.

Plaintiff challenges the premise upon which the cross-motions are based, that the amount of fill removed from the site was never finally determined by the Town; asserting that Town made such a determination when it arrived at a settlement figure of \$1,926,516, representing the removal of 2,014,008 cubic yards. He challenges the concept that a single-line measurement of 1/3 mile, with 59 data points, is sufficient to conclude that the 1.7 ft. difference in elevation at those points can be extrapolated to a 186 acre site. The Town's determination of an over-excavation of 373,000 cubic yards, is the best conclusion available to the parties, and should not be upset by "newly discovered evidence" from 2002, which was never intended to constitute a topographical analysis of 186 acres, cannot be extrapolated to do so, and which, at the least, was able to be found with resort to due diligence years ago.

Oral Argument - November 9, 2010

The parties appeared for oral argument on November 9, 2010. Counsel for plaintiff noted that the underlying action, commenced in 2004, was essentially determined in 2006 by this Court, and that that determination was affirmed by the Appellate Division in 2009, modifying the earlier determination only to the extent of adding Fidelity as a party jointly and severally liable upon the condition of the failure to pay by Northeast and Pav-Co.

Counsel vigorously disputed the concept that what occurred in 2002, involving a demonstration of the product by a sales representative, constituted “newly discovered evidence” in 2010.

He went on to demonstrate the 59 points contained in a single straight line in one section of the 186 acre site, and indicated that it was not rational to extrapolate the finding in that small linear area, of a 1.7 foot lower ground level than was reflected in the 1999 topographical survey. Among the considerations was the fact that this parcel had been leased for farming after the a topographical survey and is just as likely that the difference in elevation may have been caused by the tenant creating interior work roads to enable him to get the various planting sites. Even if the 2002 measurement accurately reflected a 1.7 foot lower topography, it is insufficient for the court to extrapolate this situation to the entire parcel.

The Court does not find any substantial basis to reopen the previous determination as to the amount of over – excavation and the amount paid by plaintiff on behalf of defendants to the Town of Brookhaven. Counsel for defendants point to the affidavit of Bruce W. Flora, attached to the Cross-motion of Northeast, as sufficient to raise a question of fact requiring a further inquiry into the amount of fill removed from the 186-acre site. Bearing in mind that the GPS measurement in 2002 was never intended to be a topographical analysis of the entire parcel, but simply a demonstration of the capability of the product, Mr. Flora was required to make an assumption that the elevation in the 1999 topographical survey was consistent over the entire site, so as to reach a conclusion that there was 510, 136 cubic yards less soil on the site in 1999 than was assumed by plaintiff and Brookhaven. Thus dramatically impacting the excess removal determination by Brookhaven. The Court concludes that this assumption is not supported by any facts in the record, and is insufficient to raise a triable issue of fact. (*Shahid v. New York City Health & Hospitals Corp.*, 47 A.D.3d 800, 802 [2d Dept. 2008]).

In addition, the speculative nature of this analysis is contradicted by the testimony

of Zabdiel Blackman (Exh. "K" to Plaintiff's Motion, pp. 15 and 58) in which he describes the process by which they utilized Geomaps to analyze the topography at the commencement of the excavation and at the completion, by which comparison they were able to arrive at the computation of the amount of soil removed from the site.

Conclusions

The motions by defendants Northeast Land Development Corporation, Pav-Co Asphalt Inc., William Fehr, and Fidelity and Deposit Company of Maryland to vacate the Amended Judgment of this Court dated October 20, 2009 are denied.

Plaintiff's motion for the requested relief is determined as follows:

Plaintiff is entitled to Judgment against Northeast and Pav-Co on the issue of liability for payment of the value of 373,008 cubic yards of fill converted by these defendants. The matter is set down for a hearing on the value of 373,008 cubic yards of fill as the dates of removal from the site;

Plaintiff's motion for an unconditional judgment against Fidelity and Deposit Company of Maryland in the amount of \$1,665,000, less any payments made or services provided by Pav-Co, or any other defendant, whose performance was guaranteed under the terms of the bond, is granted;

The motion for the award of the hauling cost of 56,490 cubic yards of fill required to replace a portion of the over-excavated soil required by Town of Brookhaven for foundations and grading, together with interest at 9% from the date acquired is granted. The request for reimbursement for the cost of the 56,490 cubic yards is denied. The value of the 373,008 cubic yards to be assessed against Northeast and Pav-Co includes the value of the soil which would not have to be acquired if it had not been converted. The amount due for hauling costs of 56,490 cubic yards of fill will be considered at the same time as the hearing on the value of the 373,008 cubic yards of fill;

Plaintiff is entitled to interest on the amount of the Environmental Fee paid on behalf of defendants Northeast and Pav-Co in the amount of \$891,607, from May 30,


2006 through entry of judgment;

The Court directs that the parties appear for a hearing on April 5, 2011 for a hearing on the value of the 373,008 cubic yards of fill removed from the site and the haulage fees for 56,490 cubic yards required to be replaced for foundations and gradings.

To the extent relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: March 4, 2011


J.S.C.

ENTERED
MAR 09 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE