Goldstein v Chelsea Rose Constr. Corp.

2011 NY Slip Op 30807(U)

March 28, 2011

Supreme Court, Suffolk County

Docket Number: 07-1799

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX No. 07-1799
CAL. No. 10-01583CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-26-10; 9-23-10; 11-18-10
ADJ. DATE 12-16-10
Mot. Seq. # 003 - MG # 004 - XMG
006 - XMG

DAVID GOLDSTEIN and DEBRA GOLDSTEIN,

Plaintiffs,

- against -

CHELSEA ROSE CONSTRUCTION CORP. d/b/a THE DECK & PATIO COMPANY,

Defendant.

CHELSEA ROSE CONSTRUCTION CORP. d/b/a THE DECK & PATIO COMPANY,

Third-Party Plaintiff,

- against -

T&T MASONRY CORP., T&S UNITED, BRYAN MURPHY, KELLY VARLEY, CHARLES J. MURPHY and MARIE R. MURPHY,

Third-Party Defendants.

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Upon the following papers numbered 1 to 61 read on this motion and cross-motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of cross-motion and supporting papers 13 - 22; 23 - 43; Answering Affidavits and supporting papers 44 - 53 ; Replying Affidavits and supporting papers 54 - 55; 56 - 62; 63 - 64 ; Other memorandum of law ; it is,

ORDERED that for the purposes of this determination the motions and the cross-motion by the third-party defendants seeking summary judgment dismissing the third-party complaint against them are consolidated and decided together; and it is further

ORDERED that the motion (#003) by third-party defendant T&S United for summary judgment dismissing the third-party complaint against it is granted; and it is further

ORDERED that the cross-motion (#004) by third-party defendants Bryan Murphy, Kelly Varley, Charles Murphy and Marie Murphy for summary judgment dismissing the third-party complaint against them is granted; and it is further

ORDERED that the motion (#006) by the third-party defendant T&T Masonry for summary judgment dismissing the third-party complaint against it is granted.

This action arises out of property damage allegedly sustained by plaintiffs David Goldstein and Debra Goldstein on April 23, 2006, as a result of flooding to the basement of their home located at 7 Fieldway Court, Huntington, New York. The flooding allegedly occurred when water from an adjoining property flowed onto the Goldsteins' premises and through the well of their basement egress window. On January 9, 2007, the Goldsteins commenced an action against Chelsea Rose Construction Corp., d/b/a The Deck & Patio Company ("C&C"), which they had hired to perform extensive landscape and construction work to their premises, including the planting of shrubs and the installation of a patio and rear stone wall. The Goldsteins' complaint alleges they were fraudulently induced into entering the renovation agreement with C&C, and that C&C breached a contract to provide renovation and landscaping at the Goldsteins' property.

By way of a third-party complaint dated April 22, 2008, C&C impleaded the owners of the adjoining property, Bryan Murphy, Kelly Varley, Charles Murphy and Marie Murphy ("the Murphys"), as well as T&S United ("T&S") and T&T Masonry ("T&T"), which were hired by the Goldsteins to finish their basement and install the subject egress window. The third-party complaint alleges, among other things, that the Murphys permitted changes to their property, including the construction of a horse corral and the removal of vegetation, that increased the amount of surface water deposited upon the Goldsteins' property. It also alleges T&S hired T&T to construct the egress basement window on the Goldsteins' property, and that any damages sustained by the Goldsteins were as a result of T&S's failure to provide adequate supervision to T&T, and T&T's shoddy workmanship. The third-party complaint further alleges the third-party defendants are required to provide C&C with contribution or completely indemnify it against any damages awarded as a result of the underlying action.

T&S now moves for summary judgment dismissing the third-party complaint against it on the grounds it neither installed nor supervised the installation of the basement egress window, and there is no evidence the window or its well was negligently constructed or caused the alleged flooding. T&T moves for summary judgment on a similar basis, asserting that the flooding of the Goldsteins' property was not caused by any defects in the egress window or its well, but by the subsequent construction and excavation work at the Goldsteins' property conducted by C&C. The Murphys also move for summary judgment dismissing the third-party complaint. They argue no dangerous or hazardous condition existed on their property at the time of the alleged flooding, and that if such a condition existed they cannot be held liable for contribution or indemnification as they neither created nor had actual or constructive notice of its existence. C&C opposes both motions on the ground triable issues exist as to whether T&T and T&S negligently constructed the well of the egress window below the surface of the land, and as to whether the Murphys' construction of a horse corral caused excessive amounts of water to flow on to the Goldsteins' property. C&C submits, among other things, photographs, video clips of the subject property on the day of the alleged incident, and an expert affidavit by William Seevers, a professional hydrologist.

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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Graces v Karabelas***, 17 AD3d 633, 794 NYS2d 75 [2d Dept 2005]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]). However, in opposing summary judgment, mere conclusions and unsubstantiated allegations are insufficient to raise triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

A party seeking indemnification must prove not only that it was free of negligence, but also that the proposed indemnitor negligently contributed to the cause of the accident for which the indemnitee is liable to the injured party by virtue of some obligation imposed by law (*see* ***Lewis-Moore v Cloverleaf Tower Hous. Dev. Fund Corp.***, 26 AD3d 292, 810 NYS2d 70 [1st Dept 2006]; ***17 Vista Free Assocs. v Teachers Ins. & Annuity Assn. of Am.***, 259 AD2d 75, 80, 693 NYS2d 554 [1st Dept 1999]). Contribution or apportionment among tortfeasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tortfeasors share responsibility for an injury (*see* ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Rogers v Dorchester Assoc.***, 32 NY2d 553, 347 NYS2d 22 [1973]). "Although the right of apportionment may arise from a duty owed directly to the injured party or to the party seeking contribution, the critical requirement for apportionment is that the breach of the duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*see* ***DiMarco v New York City Health & Hosps. Corp.***, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]; *see also* ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 71 NY2d 599, 528 NYS2d 516 [1988]; ***Ambra v Awad***, 62 AD3d 732, 879 NYS2d 160 [2d Dept 2009]).

Moreover, a landowner will not be held liable for damage to an abutting property caused by the flow of surface water due to improvements to his/her land provided that the improvements were made in good faith to fit the property for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes and ditches (*see* ***Kossoff v Rathgeb-Walsh***, 3 NY2d 583, 170 NYS2d 789 [1958]; ***Hulse v Simoes***, 71 AD3d 1086, 899 NYS2d 268 [2d Dept 2010]). It is the plaintiff's burden to establish that the improvements on a defendant's land caused surface water to be diverted, that damages resulted from such diversion, and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the abutting property (*see* ***Moretti v Croniser Contr. Corp.***, 76 AD3d 1055, 908 NYS2d 132 [2d Dept 2010]; ***Baker v City of Plattsburgh***, 46 AD3D 1075, 847 NYS2d 300 [3d Dept 2007]; ***Gollomp v Dubbs***, 283 AD2d 550, 725 NYS2d 219 [2d Dept 2001]).

Here, the Murphys met their burden on the motion by submitting evidence that the installation of the horse corral was done in good faith, made rational use of their large backyard, and did not drain water on to plaintiffs' property by pipes, ditches or other artificial means (*see* ***Kossoff v Rathgeb-Walsh***, *supra*; ***Moretti v Croniser Contr. Corp.***, *supra*; ***Hulse v Simoes***, *supra*). Third-party defendant Charles Murphy testified he built the horse corral in 2001, that the only other addition to his yard consisted of a wooden stockade fence around its perimeter, and that prior to the alleged incident he received no complaints the corral caused flooding to the Goldsteins' property. The conclusory assertions of Mr. Seevers, including the alleged formation of erosion channels between the adjoining properties during the "five year storm" event that precipitated the flooding, are insufficient to raise a material issue as to whether the corral was built in bad faith, or whether artificial means were improperly used to divert water on to the Goldsteins' property (*see* ***Moretti v Croniser Contr. Corp.***, *supra*; ***Smith v Town of Long Lake***, 40 AD3d 1381, 837 NYS2d 391 [3d Dept 2007]; ***Gollomp v Dubbs***, *supra*; *cf* ***Long v Sage Estate Homeowners Assn., Inc.***, 16 AD3d 963, 792 NYS2d 219 [3d Dept 2005]).

T&T and T&S established a *prima facie* case of entitlement to summary judgment in their favor by submitting evidence that their work at the subject premises neither caused or contributed to the property damage sustained by plaintiffs (*see* ***Ambra v Awad***, *supra*; ***Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.***, 45 AD3d 792, 847 NYS2d 151 [2d Dept 2007]; ***Linares v United Mgt. Corp.***, 16 AD3d 382, 791 NYS2d 165 [2d Dept 2005]; ***17 Vista Free Assocs. v Teachers Ins. & Annuity Assn of Am.***, *supra*). The principals of T&S and T&T both testified at examinations before trial that the subject basement window was at least four inches above the grade of the land at the time of its installation, that they received no complaints about the window for approximately two years after its installation, and that their inspection of the window after the alleged flooding revealed that excavation of the property had so substantially altered its grade that the window was now located below the surface of the surrounding soil. Similarly, the Goldsteins testified they did not have any flooding problems in their basement or observe water pooling next to the basement egress window until after C&C commenced its work on their property, which involved the utilization of heavy machinery to remove trees and excavate soil in order to regrade their property.

In opposition, the photograph submitted by C&C depicting the level of the egress window below the grade of the land allegedly taken in November 2005 failed to raise a triable issue of fact requiring

denial of the motions (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*). The undated photograph was taken by an unidentified employee of C&C, and the speculative testimony of its principal, who admits he never visited the construction site until after the picture was taken, is insufficient to verify that the photograph accurately depicts the level of the egress window after its initial installation. Additionally, C&C failed to identify its expert in response to T&T's pre-trial demand for expert disclosure, and served the expert's affidavit for the first time within their opposition papers after the filing of the note of issue (*see* ***Safrin v DTS Russian & Turkish Bath Inc.***, 16 AD3d 656, 791 NYS2d 443 [2005]; ***Dawson v Cafiero***, 292 AD2d 488, 739 NYS2d 190 [2002]). In any event, the conclusory assertion of Mr. Seevers that the well of the egress windows should be at least five inches above the grade of the land is insufficient to raise a triable issue as to whether the window was negligently installed. Mr. Seevers, a hydrologist by profession, does not provide any statutory or regulatory basis for his assertion, and does not demonstrate whether he has any experience in the design, construction or installation of basement egress windows (*see* ***Matott v Ward***, 48 NY2d 455, 423 NYS2d 645 [1979]).

Accordingly, the motions by the third-party defendants for summary judgment dismissing the third-party complaint against them are granted.

Dated: March 28, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION