

**Dori v Rabco Eng'g, P.C.**

2011 NY Slip Op 32292(U)

August 19, 2011

Supreme Court, Nassau County

Docket Number: 7719/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 15 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**EZRA DORI**

**Plaintiff(s),**

**Index No. 7719/08**

**-against-**

**Motion Submitted: 6/14/11**

**Motion Sequence: 006**

**RABCO ENGINEERING, P.C. and ROBERT  
BENNETT,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....X

Defendants move this Court for an Order granting summary judgment against plaintiffs and dismissing the complaint. Plaintiffs oppose the requested relief.

This action sounds in negligence and professional malpractice as a result of defendants' alleged negligent inspection of their residence on May 6, 2005. Plaintiffs hired the defendants to inspect that property, in contemplation of purchasing it, and they eventually purchased the property relying on the defendants' report and advice. Plaintiffs specifically claim, among other things, that the defendants failed to adequately advise them of the extent of the severe mold condition beneath their siding and roof, and the improper application of Dryvit siding to the house. Plaintiffs seek to recover the monies expended "in the past and

the future” to remedy the conditions.<sup>1</sup>

By previous Decision and Order of this Court,<sup>2</sup> upon defendants’ motion to preclude plaintiffs from introducing evidence as to their damages claim on the ground that plaintiffs engaged in spoliation of critical evidence, this Court determined that plaintiffs will not be permitted to attempt to establish defendants’ liability for conducting an allegedly negligent home inspection through the testimony of an expert basing his or her opinion upon an inspection of the premises conducted after the remedial work commenced and/or was completed.

In that same Order, the Court found that evidence as to the condition of the house *at the time of inspection* (May 6, 2005) was, and remains, readily available to both parties. Thus, the Court determined that plaintiffs may utilize the services of an expert to testify about good and accepted standards related to conducting home inspections at that time, and what should, or should not, have been done during the May 6, 2005 inspection. Confining the proof to that issue, the Court further determined that defendants will be able to mount a meaningful defense thereto.

In the instant motion, defendants contend that they have established their entitlement to summary judgment as a matter of law because defendants did not breach any duty to plaintiffs, nor did they depart from any accepted industry/professional standard of care. Further, defendants claim that, as a result of this Court’s prior decision, plaintiffs will not be able to establish *prima facie* that any claimed breach was the proximate cause of the alleged damages sustained by them.

Plaintiffs assert that defendants’ inspection was negligent because the defective conditions in and on the premises were readily observable in the photographs taken by defendants as part of that inspection. Also, plaintiffs claim that defendants’ inspection report itself evidences the departures from good and accepted industry practices.

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<sup>1</sup>Prior to commencing this action, plaintiffs contracted with a company to repair the alleged damage that they discovered after they purchased the house on the December 5, 2005 closing date. Apparently, the contractor repaired the house by removing any and all rotted wood, replacing the roof, and replacing the Dryvit siding with vinyl siding. The repairs to the house were made during the period of time ranging from approximately April to August 2006, some two years prior to the commencement of this suit. Further according to plaintiffs, no pictures of the alleged damage were taken by them, or by their contractor, as repairs were being made to the premises. Plaintiff has produced handwritten proposals and receipts from the contractor outlining the work that was done to the premises, which total at least \$56,000.

<sup>2</sup>Dated February 23, 2011.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case the plaintiffs (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

It is also incumbent on the party moving for summary judgment, in this case the defendants, to demonstrate the merits of their defense by the submission of evidence in admissible form, not to merely point to gaps in the plaintiff's proof (*Alvarez v. 21<sup>st</sup> Century Renovations Ltd.*, 66 A.D.3d 524, 887 N.Y.S.2d 64 (1<sup>st</sup> Dept., 2009); *DeMilia v. DeMico Brothers, Inc.*, 294 A.D.2d 264, 741 N.Y.S.2d 873 (1<sup>st</sup> Dept., 2002); *Rothbard v. Colgate University*, 235 A.D.2d 675, 652 N.Y.S.2d 146 [3d Dept., 1997]).

In support of their motion, defendants have submitted, *inter alia*, the deposition testimony of defendant Bennett and the affidavit of Bart Rodi, a professional engineer who will testify as an expert witness on defendants' behalf at the time of trial. In his affidavit, Mr. Rodi states that he is a licensed New York State home inspector, and a member of the American Society of Home Inspectors ("ASHI").

Defendant Bennett, in his deposition testimony, recognizes the ASHI as an authority on the matter of home inspections, acknowledges that he refers to and follows the ASHI manual/guidelines in conducting home inspections, consults the outline of a past president of ASHI, and has taken ASHI courses.<sup>3</sup> Thus, it is clear to this Court that there exist standards of practice to be exercised in the home inspection industry, which, if not followed, may result in liability for breach of a duty owed to clients relying on such inspections.

It is noteworthy that defendants' expert, Mr. Rodi, acknowledges the existence of a duty owed by defendants to plaintiffs. Specifically, Mr. Rodi states "to a reasonable degree of engineering and professional certainty," that defendants performed the inspection of the premises in question "within the reasonable and applicable standard of professional care . . . ."

Mr. Rodi's conclusory affidavit does not, however, set forth the standards for the type of home inspection conducted in this matter. Mr. Rodi does not refer to any standards of practice of any professional organization, including ASHI, concerned with the matter of home inspections. Mr. Rodi simply refers to his "research into relevant code and statute

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<sup>3</sup>According to his testimony, defendant Bennett is not a member of ASHI.

provisions” and his experience as a basis for his conclusion that defendants performed the inspection “within the reasonable and applicable standard of professional care.”

Furthermore, Mr. Rodi’s statements that, “no evidence [has been] submitted by the Doris establishing that the conditions alleged by the Doris in this action were readily observable . . .” is not germane to this Court’s determination of a summary judgment motion. Even if plaintiffs were to be restricted at trial to proving the cost of the inspection as their only damage, the amount is irrelevant in the context of the instant motion.

Upon consideration of defendants’ submissions,<sup>4</sup> there exists a genuine issue of material fact, which is whether or not defendants breached their duty to plaintiffs during the course of the home inspection and ensuing report conducted in May 2005. It is defendants’ burden to establish their entitlement to summary judgment as a matter of law, which they have failed to do.

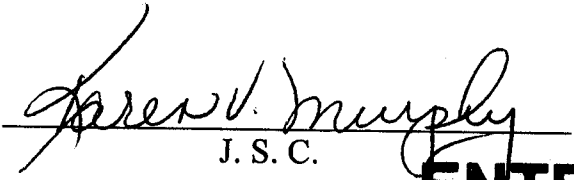
Since the defendants have failed to meet their *prima facie* burden, it is unnecessary to determine whether the plaintiff’s papers submitted in opposition are sufficient to raise a triable issue of fact (*See Levin v. Khan*, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); *Kjono v. Fenning*, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

Nonetheless, had defendants sustained their burden, the affidavit of plaintiffs’ expert, Alvin Ubell, raises a triable issue of fact as to whether defendants breached their duty to plaintiffs. Mr. Ubell points to various and specific portions of defendants’ inspection report as being sub-standard, and he cites to particular standards of practice adopted by the ASHI, which he asserts that defendants violated. Thus, it is the province of the trier of fact to assess and determine this “battle of the experts.”

Accordingly, plaintiffs’ summary judgment motion is denied.

The foregoing constitutes the Order of this Court.

Dated: August 19, 2011  
Mineola, N.Y.

  
J. S. C.

**ENTERED**

AUG 23 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

<sup>4</sup>The Court does not consider the Affirmation of plaintiff Ezra Dori as it is not in admissible form. Although Mr. Dori is a physician licensed to practice in the State of New York, he is a party to this action and, as such, may not submit an affirmation pursuant to CPLR § 2106.