STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

JAMES SURIANO and LISA SURIANO,

Plaintiffs,

-against-

JAMES J. MALTAIS, LILLIAN MALTAIS, LINDEN HILLS DEVELOPMENT CORPORATION, LINDEN HILLS HOMEOWNERS ASSOCIATION and RIFENBURG CONSTRUCTION, INC.,

Defendants.

RIFENBURG CONSTRUCTION, INC.,

Third Party Plaintiff,

-against-

CHAZEN ENGINEERING & LAND SURVEYING CO., P.C. and CHAZEN ENVIRONMENTAL SERVICES, INC.,

Third Party Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0743-08 Index No. 225060

Appearances: Timothy Nugent, Esq.
Attorneys For Plaintiffs
579 Columbia Turnpike
East Greenbush, NY 12061

Burke, Scolamiero, Mortati
& Hurd, LLP
Attorneys For Defendant and
Third-Party Plaintiff
Rifenburg Construction, Inc.
7 Washington Square
P.O. Box 15085
Albany, NY 12212-5085

Joshua A. Sabo, Esq.
Attorney For Defendant
Linden Hills Homeowners
Association
287 North Greenbush Road
Troy, NY 12180

DECISION/ORDER

George B. Ceresia, Jr., Justice

The above-captioned action arises out of a condition involving an unstable slope in a residential subdivision known as Linden Hills, located in the City of Troy, New York. The subdivision was developed in phases in the 1990s. The backyards of three of the parcels, 7, 9, & 11 Tracy Court, are located in close proximity to the upper edge of a fairly steep slope. It was discovered in the late 1990s that surface soils in the backyards of three parcels, 7, 9 and 11 Tracy Court, were beginning to shift down hill. Cracks had developed in the soil. Decks located on the parcels began to suffer physical damage and were falling down. There was a danger that home foundations would eventually be undermined, resulting in the homes being condemned. At some point, Richard Michel, a member of the Board of the defendant Linden Hills Homeowners Association ("LHHA"), was contacted by one of the effected homeowners. The LHHA subsequently contacted the original developers of the subdivision, James J. Maltais, Lillian Maltais and/or Linden Hills Development Corporation, to request that they undertake corrective action. When they failed to do so, the LHHA entered into a contract with the third party defendants (collectively referred to, for purposes of this motion, as "Chazen Engineering" or "Chazen") to prepare engineering drawings to address the problem. On January 31, 2007 the LHHA entered into a contract with the defendant and

third party plaintiff, Rifenburg Construction, Inc. ("Rifenburg Construction" or "Rifenburg") to perform the remedial work. The work was completed in May 2007. The plaintiffs own a residence located at the bottom of the same slope. Commencing in April 2007 they began to experience problems from water runoff, flooding, and soil erosion. The flooding allegedly rendered large portions of their property temporarily or permanently unusable, and depreciated its value. The plaintiffs have commenced the instant action upon causes of action of negligence, trespass and nuisance. The defendants LHHA and Rifenburg Construction have made motions for summary judgment.

A significant issue in this case relates to the question of who owns the land upon which a great portion of the remedial work was performed. The land in question (hereinafter the "Linden Hills parcel") is located between 7, 9 & 11 Tracy Court, at the top of the slope, and plaintiff's property, at the bottom. The LHHA maintains that it never acquired title to the Linden Hills parcel, and for this reason is not liable to the plaintiffs for the flood damage. The LHHA relies in part upon the following pre-trial deposition testimony of Richard Michel:

> Q. "Okay. Now, before I get to that point, as to what happened next, I am going to ask about who owned the property at that time. And I understand that there were some complicated details about that. Your attorney and I discussed this before today's deposition and he is going to give an explanation and we will see if that is agreeable to you; is that okay?
>
> A. Okay.
>
> Mr. Sabo: The deed to the slope as far as we can tell was never delivered to the Linden Hills Homeowners Association. There was a dispute in the 1990s around the time the deed was

> supposed to be delivered and there is nobody that we are able to find after an investigation who recalls ever receiving a deed. There is no deed on file with the county clerk and you can ask Mr. Michel, but I am sure he has no knowledge that the homeowners association ever received a deed.

A. I don't.

Q. Does that all fit with your understanding, sir?

A. Yes, yes, it does."

While a deed does not need to be recorded to convey title to real property, it is necessary that the deed be delivered to the transferee with intent to convey such title, and that the deed be accepted (M&T Real Estate Trust v Doyle, ___ NY3d ___, 2013 NY Slip Op 1996 [March 26, 2013]; see also Goodell v Rosetti, 52 AD3d 911, 913-914 [3rd Dept., 2008]). As indicated, the LHHA takes the position that because there is no deed on file in the office of the County Clerk, that it is not the owner of the Linden Hills parcel. Nonetheless, as set forth in the quoted portion of Mr. Michel's pre-trial deposition (supra), LHHA acknowledges that title to the property was supposed to been conveyed to LHHA in the 1990s. Under such circumstances, because it was contemplated that LHHA would acquire title to Linden Hills parcel, the Court is of the view that the LHHA should have presented evidence to demonstrate that it made a thorough search of its records to determine whether or not this had been accomplished. The mere fact that a single member of the LHHA (Richard Michel) has indicated that he is unaware whether the LHHA ever received a deed does not establish that this did not occur. Accordingly, the Court is of the view that the LHHA failed to satisfy its initial burden of proof on this motion to establish that it did not acquire title to the property through delivery to it of an unrecorded deed. Apart from the

foregoing, the Court notes that the plaintiffs have submitted a copy of an affidavit submitted in connection with an earlier motion in the instant action by defendant James Maltais, which was sworn to on March 11, 2009. Mr. Maltais states in paragraph 5 thereof, "[t]he parcel at issue was transferred to the homeowners association as of 1996." In the Court's view, this statement is sufficient to create a triable issue of fact with regard to whether a deed was delivered to LHHA.

Moreover, and irrespective of whether or not title of the Linden Hills parcel was conveyed to LHHA, it is well established that liability for a dangerous or defective condition "is generally predicated upon ownership, occupancy, *control or special use of the property*" (Battaglia v Town of Bethlehem, 46 AD3d 1151, 1154 [3rd Dept., 2007], quoting Turrisi v Ponderosa, Inc., 179 AD2d 956, 957 [1992], and citing Noble v Pound, 5 AD3d 936, 938 [2004], emphasis supplied)[1]. The foregoing language suggests that where a party creates a hazardous condition on property it occupies and/or controls (but does not own), that the party may still be held liable in negligence and/or nuisance. In this particular instance, there is uncontroverted evidence that LHHA occupied and/or exercised control over the Linden Hills parcel, from the standpoint that it unilaterally undertook action to remediate the unstable slope. In this respect, it is the Court's view, that irrespective of who may have been the fee owner of the property, the fact remains that LHHA acted in a manner demonstrating its occupancy, control and/or special use thereof.

With regard to the discharge of surface waters onto neighboring property "[a]

---

[1]The Battaglia case (supra) specifically dealt with causes of action of negligence and nuisance.

landowner in this State will not be liable for damages to abutting property for the flow of surface water resulting from improvements to his land "provided * * * that the improvements are made in good faith to fit the property to some rational use to which it is adapted, and that the water is not drained into the other property by means of pipes or ditches" (Cottrell v Hermon, 170 AD2d 910, 911 [3d Dept. 1991], quoting Kossof v Rathgeb-Walsh, 3 NY2d 583, 589-590, other citations omitted). "In other words, one will be liable if he or she diverts water onto an abutting premises by artificial means" (Long v Sage Estate Homeowners Ass'n, Inc., 16 AD3d 963, 965 [3d Dept., 2005]). This includes actions taken to contour land through use of a swale and berm (see id.).

The general plan with regard to the remediation project here, as gleaned from the pre-trial depositions, was to remove earth from behind the residences located at 7, 9 and 11 Tracy Court to a depth of several feet, and replace it with a lighter earthen material. In addition, artificial drainage was to be installed in such a way as to (1) channel surface storm water; and (2) carry subsurface water (from roof gutters and footing drains from the three residences). Initially, the plans called for the water to be collected and channeled into two swales lined with riprap[2], which would bring the water down to a riprap apron at the "project limit"(the down-slope boundary line of the Linden Hills parcel). A modification of the original plan was proposed, apparently by Rifenburg Construction, to collect water from roof and footing drains from the three residences (7, 9 & 11 Tracy Court), and, in lieu of discharging the water into two riprap lined swales, to carry the water downhill to the riprap

[2]Loose or broken stone.

apron via PVC pipe. The pre-trial deposition of Joseph Lanaro of Chazen Engineering, recites, in part, as follows with respect to a document identified as Exhibit 7:

"Q. Was that given to Chazen?

A. I believe it was, yes.

Q. And was that – did Chazen approve that?

A. I believe there was some correspondence relating to this and that this alternative was considered acceptable with certain provisions with regards to point of discharge. There was some comments made on it.

Q. All right.

A. It was not as formal as I would have liked, but nonetheless I believe there was some record of that. I believe there is another page to this too somewhere, but it is not attached (indicating).

Q. Can you explain in looking at it exactly what Rifenburg was proposing, your understanding?

A. The project had collected a few of the roof leaders and drains and channeled them down the hill with the riprap apron and a riprap channel and channeled them down the hill with a riprap swale with a stone apron at the bottom of two locations. And what they were proposing with this inquiry was to in lieu of having two channels go down the hill, pipe them together and have a pipe go down the hill with a riprap apron at the bottom.

Q. And that was okay with Chazen?

A. It was continuing the water down the hill in a controlled way and it had energy dissipation and level spare apron at the bottom.

Q. So as I understand it, as opposed to just having the water flow down the slope, coming in one large section, the proposal here was let's focus it and we will put it in these pipes, you know, I am being very basic, but is that what it is basically saying?

A. Yes, instead of having them coming down in multiple locations, have

it come down in one controlled location.

Q. Now, is it one or two, were there two pipes?

A. It started out as two and I believe it ended up as one." (Transcript of Joseph Lanaro Pre-trial deposition, pp . 60-62).

Russell Huta, an employee of Rifenburg Construction, and its project manager for the remediation work here, testified that the Linden Hills property would be contoured so that surface waters would flow towards the location where the piping discharged.[3]

Upon all of the foregoing, it appears from the record, that in the course of attempting to remediate the problem with regard to slope instability, the flow of surface waters (including that from roof drains and footing drains) was modified by artificial means to collect and channel the water to a point where it flowed off of the Linden Hills parcel. The Court is mindful that the defendants attempted to ameliorate any adverse consequences resulting from the channeling of surface water through installation of a stone apron. Nonetheless, the Court is of the view that there is a triable issue of fact that the water was artificially channeled downhill to the boundary line of the Linden Hills property, where it was discharged onto plaintiff's property.[4]

It is well settled that the elements of a cause of action for negligence are "(1) the

---

[3]It is unclear from the record how the modification (substituting PVC pipe for the riprap swales) was implemented: whether through use of two PVC pipes or through use of a single PVC pipe. Neither Joseph Lanaro of Chazen Engineering, nor Russell Huta of Rifenburg could state, for a certainty, whether one or two such pipes had been utilized.

[4]The Court is mindful that the record is replete with comments that the final as-built drainage system did not change the volume of surface water running down hill to plaintiffs' property. The Court understands the argument. But even assuming that this was true, there would still remain the issue of whether surface water was artificially channeled or funneled onto plaintiffs' property.

existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (Akins v Glens Falls City School Dist., 53 NY2d 325, 333; Keating v Town of Burke, 86 AD3d 660, 661 [3d Dept., 2011]). Contrary to the argument advanced by LHHA, the Court finds that it had a duty, in repairing the unstable slope, not to artificially channel surface water onto plaintiffs' property. There is evidence in the record that this duty may have been violated (as noted, through the channeling and/or piping of water to plaintiffs' property). Down hill flooding would have been a foreseeable consequence of the remediation work, if surface water was not handled properly. The installation of a stone apron at the discharge point on the Linden Hills Parcel, in the Court's view, only serves to raise a triable issue with regard to whether it effectively mitigated the artificial diversion of storm water. As such, the Court finds that there are triable issues of fact which preclude summary judgment.

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land" (Restatement [Second] of Torts § 821D [1979]). "The elements of such a private nuisance [] are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) *caused by another's conduct in acting or failure to act* (Copart Industries, Inc. v Consolidated Edison Co., 41 NY2d 564, 570 [1977], emphasis supplied). The Court finds that, at the very least, there is a triable issue of fact with regard to whether the plaintiffs suffered an interference of their right to use and enjoy their property without having their land flooded by surface water artificially channeled over or through it; and whether such interference was substantial.

For the foregoing reasons, the Court concludes that the motion of LHHA must be denied.[5]

Turning to the motion of Rifenburg Construction, said defendant maintains, inter alia, that because the work it performed was pursuant to a contract with LHHA, it owed the plaintiffs no duty, and is not liable to them in tort. It further argues that it may not be held liable in a situation where, as here, it reasonably relied upon, and followed, the plans and specifications prepared by Chazen Engineering. As stated in Espinal v Melville Snow Contractors, Inc., (98 NY2d 136 [2002]), "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" arising out of the work (id. at 138). There are three well-established exceptions: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (id., at 140, citations omitted). In addition, as said defendant points out, "[a] contractor that performs its work in accordance with contract plans may not be held liable unless those plans are 'so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous'" (Nichols-Sisson v Windstar Airport Serv., Inc., 99 AD3d 770, 772 [2d Dept., 2012], quoting (West v City of Troy, 231 AD2d 825 [3d Dept., 1996], other citations omitted).

---

[5]LHHA's motion did not specifically mention or address plaintiffs' cause of action sounding in trespass.

In this instance, the Court is of the view that Rifenburg demonstrated prima facie, that it exercised reasonable care in the performance of its work in following the plans approved by Chazen Engineering, under Chazen's supervision. The plaintiffs failed to demonstrate the existence of a triable issue of fact. Specifically, they have not demonstrated that the plans and engineering supervision were so patently defective as to place Rifenburg on notice that the project, if completed, would cause downhill flooding.[6] Nor have the plaintiffs demonstrated that there was any detrimental reliance on their part with respect to work performed by Rifenburg; or that Rifenburg had entirely displaced LHHA's duty with respect to the discharge of surface water down hill. There being no triable issues of fact, the Court finds that the motion of Rifenburg Construction for summary judgment as against the plaintiffs must be granted (see Nichols-Sisson v Windstar Airport Serv., Inc., supra).

The only cross-claim interposed against Rifenburg is that of LHHA for contribution and/or indemnification. Richard Michel of LHHA, in his pre-trial deposition testimony, acknowledges that Rifenburg performed its work in accordance with the plans prepared by Chazen Engineering. There is further support for this in the pre-trial testimony of Russell Huta (Rifenburg) and Joseph Lanaro (Chazen), and the affidavit of Rifenburg's expert Ernest J. Gailor, P.E. There is no claim or evidence in the record that Rifenburg failed to

---

[6]The report dated December 6, 2010 of plaintiff's expert Philip E. Koziol, P.E. does not change the result. Rifenburg was entitled to rely upon the plans prepared by Chazen, and there is no showing that the plans were so patently defective as to place Rifenburg on notice of a danger of down hill flooding.

perform the contract as required in the plans and specifications. Under such circumstances, the Court is of the view that Rifenburg has demonstrated, prima facie, that it is entitled to summary judgment dismissing the cross-claim of LHHA.

Lastly, the Court observes that Rifenburg, in the third party action, seeks judgment for indemnification and/or contribution against Chazen Engineering for any damages it may suffer in the primary action. Inasmuch as the Court is dismissing plaintiffs' complaint and the cross-claim of LHHA as against Rifenburg, the Court finds that the third party complaint must also be dismissed.

Accordingly, it is

ORDERED, that the motion of Linden Hills Homeowners Association for summary judgment is denied; and it is further

ORDERED, that the motion of Rifenburg Construction, Inc. for summary judgment is granted, and plaintiffs' complaint and the cross-claim of the Linden Hills Homeowners Association is hereby dismissed as against said defendant; and it is further

ORDERED, that the third party complaint be and hereby is dismissed.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the defendant Rifenburg Construction, Inc.. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: May 2, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated January 10, 2013 (Linden Hills Homeowners Association)
2. Affirmation of Joshua A. Sabo, Esq., dated January 10, 2013
3. Notice of Motion dated January 16, 2013 (Rifenburg Construction, Inc.)
4. Affirmation of Megan B. Van Aken, Esq., dated January 16, 2013, Supporting Papers and Exhibits
5. Affidavit in Opposition of Timothy Nugent, Esq. dated March 6, 2013 to Motion of Linden Hills Homeowners Association
6. Affidavit in Opposition of Timothy Nugent, Esq. dated March 6, 2013 to Motion of Rifenburg Construction, Inc.
7. Reply Affirmation of Joshua A. Sabo, Esq., dated March 13, 2013
8. Reply Affirmation of Judith B. Aumand, Esq., dated March 11, 2013

cc.:

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
677 Broadway
Albany, NY 12207-2996

James Maltais
Lillian Maltais
3004 Edisto Way
Indian Point, South Carolina 29707