

Bronxwood Home for the Aged, Inc. v City of New York
2016 NY Slip Op 31354(U)
June 9, 2016
Supreme Court, Bronx County
Docket Number: 300672/12
Judge: Norma Ruiz
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NEW YORK SUPREME COURT

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Index No. 300672/12

-----X
BRONXWOOD HOME FOR THE AGED, INC,

Plaintiff,

-against-

DECISION/ORDER
HON. NORMA RUIZ

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF DESIGN AND CONSTRUCTION

Defendants.
-----X

The following papers numbered 1 to 8 read on this motion, Summary Judgment
Noticed on 6/13/14 and duly submitted as No. ____ on the Motion Calendar of 1/26/15

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1-2
Answering Affidavits	3-5
Reply Affidavits	6
Memorandum of Law	7
Exhibits:	
Other: Stipulation of Settlement	8

Upon the foregoing papers, the foregoing motion(s) [and/or cross motion(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Haks Engineers Architects and Land Surveyors, P.C ("Haks"), move for summary judgment. Upon a review of the moving papers and opposition submitted thereto, the motion is denied.

In this action, the plaintiff Bronxwood Home for the Aged, Inc. ("Bronxwood Home") seeks to recover damages for property damage sustained as a result of subsurface water (ground water) infiltration into its basement which was allegedly caused by the defendants' negligence while working on the project known as the Reconstruction of Paulding Avenue, Phase II

("project"). In addition, the plaintiff seeks monies for future remediation costs in excess of 1.6 million dollars.

The project, which began in April 2010, involved the replacement of existing sewers and water mains, installation of catch basins, manholes, street lighting, and resurfacing of streets. It involved Barnes Avenue between Bronxwood Avenue and White Plans Road. This included Tilden Street, the location where Bronxwood Home was located. Defendant City approved the scope of the work and retained defendant Maspeth as the general contractor and defendant Haks as the resident engineer whose services included supervising the excavation and work performed by Maspeth.

Bronxwood Home is a nursing home located in a five story building with a basement that is used for laundry, recreation and dining. Bronxwood's property was damaged when ground water flooded into its basement. According to the plaintiff's time line, the defendants excavated the streets around Bronxwood in December 2010, installed new storm drains and moved some of the water lines. This work was completed during the last week of December 2010. On December 31, 2010, water began entering the cellar of Bronxwood Home at a foundation wall. It is alleged that the flooding began after the defendants completed and closed an excavation on Tilden Street, which runs along the North side of Bronxwood's building. After an extensive investigation, it was determined that the flood water was ground water and not City water (i.e. water from a main or a sewer).

Plaintiff alleges the defendants encountered groundwater when excavating the trench and failed to implement standard protective measures such as altering backfill materials in the trench and installing periodic low permeability barriers such as seepage plugs to isolate the groundwater (see plaintiff's Memorandum of Law at p. 3). Once groundwater entered the trench, the newly placed backfill, which consisted of permeable stone pipe bedding and sand backfill, served as a column to transmit groundwater in a downward sloping direction along Tilden Street towards the intersection with Barnes Avenue (see plaintiff's Memorandum of Law at p. 12). As such, their construction activities acted like a channel, or column, to divert the flow of groundwater along Tilden Street into the intersection adjacent to Bronxwood Home's facility at an incoming velocity faster than the ground water could flow out along Barnes Avenue. As the groundwater flowed down the trench it began collecting adjacent to plaintiff's facility, this caused the water

levels to rise, increased the hydrostatic pressure which in turn forced the groundwater through Bronxwood Home's concrete foundation (*id* at p. 3).

Defendant City produced Narendra Patel ("Patel") an engineer employed by the City of New York's Department of Design and Construction ("DDC") for a deposition. Patel as the Engineer in Charge, supervised both Haks' and Maspeth's work. He explained that the project involved a design phase and a subsequent construction phase. DDC approved the design before the project went up for bid.

In addition, Patel explained that the issue of groundwater was addressed during the design phase of the project. DDC hired non-party Tectonic to evaluate and determine whether or not a dewatering system would be necessary. Based on the City's and Tectonic's evaluation it was determined that a dewatering system was not needed at the subject location. Moreover, during the course of the project, the ground water levels were monitored by the project inspector, defendant Haks. Despite testifying that as per Tectonic's findings, a dewatering plan was not necessary, Patel conceded he saw water inside the trench (Patel deposition testimony at p. 42). Questioned when he saw the water, Patel explained that "once you hit ten, 11 feet [below ground level] you're going to see the water. If you dig only 6-foot (sic) you're not going to see the water" (*id*).

Omar Ockeh ("Ockeh") testified on behalf of defendant Haks. Ockeh stated that Maspeth performed the work and several Haks' employees supervised the work to ensure compliance with the contract drawings. At no time did he observe any problem with Maspeth's work. Nor did Ockeh believe that Maspeth failed to take precautions pertaining to groundwater.

It is undisputed that there came a time in which Maspeth encountered rock when excavating the trench. When asked to state the depth of the rock excavated, he referred to a document marked as an exhibit and responded that the total depth of the excavation was 11 feet 7 inches, but there was no notation that indicated the depth the rock was located (see Ockeh transcript at p. 53).

Ockeh was also questioned regarding the backfill to be used to fill the excavation. He stated that the same dirt could not be used. Instead, the contractor would bring new material in accord with the City's specifications and upon the City's approval, the new material would be used to fill the trench.

Maspeth produced Harvey Blatt ("Blatt") for a deposition. Blatt's testimony established that Maspeth began working on the project around April 2010, performing the work pursuant to the specifications set forth in its contract with the City. He indicated that upon a review of the borings provided to him by the City, there was no groundwater within the work area. In addition, Maspeth never encountered any ground water during its work at the project. While Blatt denied that Maspeth encountered water in the excavated trench, he did concede that there is groundwater throughout all the areas encompassed in the Paulding Avenue project.

When Blatt was questioned regarding backfill he stated, in contradiction to Ockeh's testimony, that it was the engineer's decision as to what material should be used. Either the existing material was reused, or if the engineer deemed such as unsatisfactory, then it would be replaced with clean fill or select granular fill, whatever the engineer choose. He explained that the City provides written specifications with respect to what material is acceptable for backfill. He further explained the differences as follows: clean backfill is soil that is mostly sand and if it gets wet, does not change characteristics; whereas silty soil is more difficult to compact (process of densifying soil) and if it gets wet, it changes characteristics (see Blatt deposition testimony at p.61-63). Assuming there was ground water, Blatt explained groundwater would pass through silty soil slower than clean fill (Blatt's deposition testimony at p.63).

Initially, all defendants moved for summary judgment, however, after the submission of the motions, the plaintiff settled its claims against the City defendants, as well as defendant Maspeth. In addition, the City and Haks mutually discontinued their cross claims against each other. Thus, the only remaining summary motion is that of Haks for dismissal of the plaintiff's complaint.

Haks' motion for summary judgment is on the grounds that it owed no duty to the plaintiff, a 3rd party to the contract between Haks and the City. Moreover, Haks contends it was not negligent. While Haks did not approve the design plans, it reviewed same to become familiar with the project. During the construction phase, Haks supervised the excavation and work performed by Maspeth, ensured general compliance with the City's specifications and contract requirements, as well as reported the quantities of labor and materials provided for payment purposes. The City allegedly maintained a supervisory role and performed routine inspections (once or twice per week) to ensure compliance with the contract requirements. According to Haks, at no time during the construction was groundwater encountered, nor were

there any problems observed during the excavation activities. Notwithstanding, Haks concedes that “it may very well be that the existence, origin, movement and course of the groundwater was altered as a result of the work on the Project” (Affirmation in Support of Motion at ¶ 22), however, it argues that it is “pure conjecture to attribute same to Haks’ services on the project” (*id.*). Haks further argues there is no evidence that it was negligent in carrying out its contractual obligations. Lastly, it contends that subject subsurface water near the vicinity of the plaintiff’s property was unseen, undefined, inherently unpredictable and any flooding into the plaintiff’s basement was not a result of anything Haks did or failed to do.

In support of the motion, Haks annexed the affidavit of its expert engineer, Anthony DePasquale P.E. (“DePasquale”). Upon reviewing: project documents, construction progress records, soil test boring logs from the construction drawings, pleadings, contract with the City, deposition transcripts, inspections of the construction area, the interior and exterior of the plaintiff’s property and field measurements, DePasquale opined that there is no evidence to “even suggest that Haks services departed from the governing standard of care or its contractual obligations to the City. He agreed that if there had been a change in the field conditions, such as encountering groundwater, as resident engineer for the project, Haks was obligated to report same to the City. DePasquale opined based on the allegations that groundwater was never encountered, this duty was never breached. He averred that “the origin, flow and precise operation of groundwater are inherently unpredictable and not typically subject to direct observation and proof” (DePasquale affidavit at paragraph 7). Moreover, as resident engineer, Haks did not have an obligation to independently verify the propriety of the design plan and specifications. Ultimately, this expert concluded that there is no evidence in the documents reviewed that supports the allegations that Haks services were performed in a negligent fashion.

Whether or not Haks owed the plaintiff, a non-contracting party to their contractual agreement with the City, a duty of care is a legal question for the court to decide. In the seminal case of *Church v Callanan Indus.*, 99 NY2d 104 (2002)], the Court of Appeals set forth the general rule that a contractor does not owe a duty of care to a non-contracting third party. However there are three exceptions to this general rule where a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof, in which case the promisor is subject to tort liability for failing to exercise due care in the execution of the contract (*id.*). The Court in *Church* identified those circumstances as: first, “where the promisor,

while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (99 NY2d at 111); second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (id.), and third, " where the contracting party has entirely displaced the other party's duty to maintain the premises safely " (id. at 112). Clearly, the only exception which may apply to the case at bar is the first exception which is commonly referred to as the "launching a force or instrument of harm" exception.

The court finds Hak's expert engineer's affidavit insufficient to meet its initial burden on a motion for summary judgment. It is deficient in numerous aspects. The deposition testimony of Patel further establishes that he saw water in the trench and that the trench was 11 feet 7 inches deep. According to the contract documents, the excavation was to be between 11 to 12 feet below grade. Patel testified that below 11 feet you will find groundwater. Haks' witness claimed Maspeth made the decision regarding what material was going to be used to backfill the trench. DePasquale's affidavit was silent with respect to this relevant deposition testimony, he did not discuss the boring test results for the location of ground water in the area of the excavation; how deep was the trench supposed to be pursuant to the contract and design plans; nor how deep the trench was actually dug. Thus he did not rule out the possibility of encountering groundwater. DePasquale did not dispute Patel's inference that the water he saw in the trench was groundwater. Additionally, the expert failed to opine what party was responsible for choosing the material for the backfill, nor did he discuss the appropriateness of the backfill actually used to fill the trench. As such, Haks failed to establish as a matter of law that it was not negligent in its performance of its contractual obligations. Thus, a jury must now decide these questions of fact before the court can determine whether or not Haks owed the plaintiff a duty of care under the "launching a force or instrument of harm" exception to the general rule that a contractor does not owe a duty of care to a non-contracting third party.

Accordingly, the motion is denied.

This constitutes the decision and order of the Court.

Dated: 6/9/16

Bronx, New York


Hon. Norma Ruiz