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| Bernardis v Town of Islip |
| 2018 NY Slip Op 31800(U) |
| July 30, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 08-9250 |
| Judge: Thomas F. Whelan |
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INDEX No. 08-9250
CAL. No. 16-01639OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1-6-17 (011)
MOTION DATE 1-31-17 (012)
MOTION DATE 2-15-17 (013, 014)
ADJ. DATE 2-26-18
Mot. Seq. #011 - MD # 013 - MotD
012 - MD # 014 - MD

-----X
ANTHONY BERNARDIS and ROSEANNE
BERNARDIS,

Plaintiffs,

- against -

TOWN OF ISLIP, JUDITH STEIN, Individually
and as Trustee of the 1999 Stein Trust and as a
Trustee of a Testamentary Trust, GWENDOLYN
ZEGEL As Trustee of a Testamentary Trust, and
KENNETH STEIN, III, as Trustee of a
Testamentary Trust,

Defendants.

BERNARD T. CALLAN, P.C.
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Central Islip, New York 11722

CHESNEY & NICHOLAS, LLP
Attorney for Defendant/Third-Party Plaintiff Islip
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Syosset, New York 11791

NEWFELD & O'LEARY
Attorney for Defendants J. Stein, Zegel and K.
Stein, III, as Trustees of the Testamentary Trust
370 Lexington Avenue, Suite 908
New York, New York 10017

-----X
TOWN OF ISLIP,

Third-Party Plaintiffs,

- against -

LoDUCA ASSOCIATES, INC., LoDUCA
ASSOCIATES and RICHARD LoDUCA,

Defendants.

CONGDON, FLAHERTY O'CALLAGHAN,
REID, DONLON, TRAVIS & FISHLINGER
Attorney for Defendant Judith Stein
as Trustee of 1999 Stein Trust
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Uniondale, New York 11553

MORRISON, MAHONEY LLP
Attorney for Third-Party Defendants LoDuca
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New York, New York 10271

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Bernardis v Town of Islip
Index No. 08-9250
Page 2

Upon the following papers numbered 1 to 301 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 57; 58 - 80; 81 - 110 - 134 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 135 - 163; 164 -190; 191 - 241; 242 - 246; 247 - 266; 267 - 273 ; Replying Affidavits and supporting papers 274 - 277; 278 - 281; 282 - 285; 286 - 288; 289 - 290 ; Other memorandum of law, 291 - 292; 293; 294 - 295; 296 - 297; 298; 299; 300 - 301 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#011) by defendants Judith Stein, Kenneth Stein, III and Gwendolyn Zegel, as trustees of a testamentary trust, and Judith Stein individually, the motion (#012) by defendant Judith Stein as trustee of the 1999 Stein Trust, the motion (#013) by third-party defendants LoDuca Associates, Inc., LoDuca Associates and Richard LoDuca, and the motion (#014) by defendant Town of Islip are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#011) by defendants Judith Stein, Kenneth Stein, III and Gwendolyn Zegel, as trustees of a testamentary trust and Judith Stein individually for summary judgment dismissing the complaint is denied; and it is

ORDERED that the motion (#012) by defendant Judith Stein as trustee of the 1999 Stein Trust for summary judgment is denied; and it is

ORDERED that the motion (#013) by third-party defendants LoDuca Associates, Inc., LoDuca Associates and Richard LoDuca for summary judgment dismissing the third-party complaint is determined as follow; and it is further

ORDERED that the motion (#014) by defendant Town of Islip for summary judgment dismissing the complaint is denied.

Plaintiffs Anthony Bernardis and Rosanne Bernardis, who own residential property located on 14 Terry Street in Sayville, New York, commenced this action seeking recovery for damage to their property caused by storm water runoff. The complaint alleges that defendant Town of Islip was negligent in the design, construction, and maintenance of the water drainage system near Terry Street and River Road in Sayville. It also alleges that defendants Judith Stein, individually and as trustee of the 1999 Stein Trust (hereinafter defendant Judith Stein), and Judith Stein, Kenneth Stein, III, and Gwendolyn Zegel, as trustees of a testamentary trust (hereinafter the Testamentary Trust defendants) improperly used dense aggregate and other materials to raise the grade of their properties, causing water flow onto plaintiffs' property. Subsequently, the Town of Islip asserted a third-party action against the LoDuca Associates, Inc., LoDuca Associates, and Richard LoDuca (hereinafter the LoDuca defendants), which constructed plaintiffs' residence, for fraud, contribution and indemnification. Specifically, the Town alleges that the third-party defendants were negligent in failing to properly install pilings to support the footings and foundation of the subject house.

The Testamentary Trust defendants move for summary judgment dismissing the complaint against them, arguing that as out-of-possession property owners, they are not liable for plaintiffs' alleged injuries. They also argue that plaintiffs have not established that their actions caused damage to plaintiffs' property. In support of the motion, the Testamentary Trust defendants submit, among other

Bernardis v Town of Islip

Index No. 08-9250

Page 3

things, copies of the pleadings, transcripts of the parties' deposition testimony, contract of sale for the subject property, a Town of Islip "Dwelling Construction Field Card," affidavits of Judith Stein, Kenneth Stein, Gwendolyn Zegel, and an expert affidavit of Aram Terchunian. Plaintiffs oppose the motion, arguing that triable issues of fact remain as to whether the Testamentary Trust defendant's actions contributed to the damage to plaintiffs' property.

Defendant Judith Stein moves for summary judgment dismissing the complaint against her, arguing that she may not be held liable for the purported diversion of surface water. In support of her motion, she submits, among other things, copies of the pleadings, a survey of the subject premises, the lease agreement and extensions of the lease agreement between her and Sayville Ferry Service, Inc., transcripts of the parties' deposition testimony, and her own affidavit. Plaintiffs oppose the motion, arguing that triable issues of fact remain as to whether Judith Stein's actions contributed to the damage to plaintiffs' property.

The LoDuca defendants move for summary judgment dismissing the third-party complaint against them, arguing that there is no evidence that they made false representations to obtain the certificate of occupancy for plaintiffs' residence from the Town of Islip. In support of the motion, they submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, the certificate of occupancy inspection report, permit application, and engineering report. The Town of Islip opposes the motion, arguing that triable issues of fact remain as to whether third-party defendants improper construction of the subject property was the cause of plaintiffs' damages. The Testamentary Trust defendants also oppose the motion, arguing the law of the case doctrine bars third-party defendant from seeking dismissal of the contribution claim, and that issues of fact remain as to the cause of plaintiffs' damages.

The Town of Islip also moves for summary judgment dismissing the complaint against it, arguing that plaintiffs' allegations of negligent maintenance are unsupported by the record, and that any finding that negligent maintenance of the water drainage system was a proximate cause of the alleged damage to their real property would be based on mere speculation. In support of its motion, the Town of Islip submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, the soil bore report, a map of the subject premises, an invoice from Lee's Dock Building for installation of piles for the subject property, records relating to plaintiff's insurance claim, and correspondence between plaintiff Anthony Bernardis and the chairman of the Zoning Board of Appeals for the Town of Islip.

Plaintiffs oppose the Town's motion, arguing that there is no governmental immunity as to the claims based on negligent maintenance and repair. In opposition, plaintiffs submit, among other things, affidavits of plaintiff Anthony Bernardis and Peter Dermody, a hydrogeologist, copies of the construction contract for the subject house, the final building plan for such house approved by the Town of Islip, the certificate of occupancy inspection report, the Town of Islip's dwelling construction field card, the deed for the subject property, transcripts of the parties' deposition testimony, soil bore test report, an invoice from Lee's Dock Building for installation of piles for the subject property, photographs of the subject property before and after fill was added, and the Town of Islip's plans relating to drainage around the subject premises.

Bernardis v Town of Islip

Index No. 08-9250

Page 4

The Testamentary Trust defendants also oppose the Town of Islip's motion, arguing that the Town has admitted its failure to maintain the bulkhead, and that it is not immune from liability as to its design of the drainage system. In opposition, the Testamentary Trust defendants submit a copy of an All Hazard Mitigation Plan, and an excerpt of the deposition testimony of David Janover, an engineer employed by the Town.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any 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]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

A municipality is immune from liability arising out of claims that it negligently designed a sewerage system or storm drainage system (*see Bilotta v Town of Harrison*, 106 AD3d 848, 965 NYS2d 174 [2d Dept 2013]; *Carbonaro v Town of N. Hempstead*, 97 AD3d 624, 948 NYS2d 645 [2d Dept 2012]). However, a municipality is not entitled to governmental immunity arising out of claims that it negligently maintained the sewerage system, as these claims challenge conduct that is ministerial in nature (*see DeWitt Properties, Inc. v New York*, 44 NY2d 417, 406 NYS2d 16 [1978]; *Bilotta v Town of Harrison, supra*). For a plaintiff to recover under a theory of negligent inspection or maintenance of a storm drainage system, the plaintiff must demonstrate that the municipality had "notice of a dangerous condition or has reason to believe that the pipes have shifted or deteriorated and are likely to cause injury," that the municipality failed to "make reasonable efforts to inspect and repair the defect," and that such failure caused the plaintiff's injuries (*Holmes v Incorporated Vil. of Piermont*, 54 AD3d 809, 811, 863 NYS2d 774 [2d Dept 2008], quoting *DeWitt Properties, Inc. v New York*, 44 NY2d 417, 406 NYS2d 16 [1978]; *see Holy Temple First Church of God in Christ v City of Hudson*, 17 AD3d 947, 794 NYS2d 465 [3d Dept 2005]).

The Town has failed to establish a prima facie case that it made reasonable efforts to maintain the storm drainage system for the Terry Street and River Road area in Sayville (*see Nachamie v County of Nassau*, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]; *Carbonaro v Town of N. Hempstead*, 97 AD3d 624, 948 NYS2d 645 [2d Dept 2012]; *Zeltmann v Town of Islip*, 265 AD2d 407, 696 NYS2d 231 [2d Dept 1999]). Significantly, the Town has failed to submit any evidence that it properly maintained and repaired the storm drainage system. Instead, it merely points to the deposition testimony of plaintiff Anthony Bernadis that on occasion he has observed a town employee cleaning storm drains. Moreover, while an All Hazard Mitigation Plan prepared by the Town in 1997 recommended that bulkheads owned by the Town should be inspected and replaced if necessary, testimony from its own representatives revealed that the bulkhead on Terry Street near the subject premises was in disrepair and that the Town

failed to replace it. Thus, the Town's motion for summary judgment dismissing the complaint against it is denied.

With regard to the motions by defendant Judith Stein and the Testamentary Trust defendants seeking summary judgment, it is settled law that a landowner may improve his or her property, "regardless of what becomes of the surface water," provided that "the improvements are made in good faith to fit the property to some rational use . . . , and that the water is not drained into the other property by means of pipes or ditches" (*Kossoff v Rathgeb-Walsh, Inc.*, 3 NY2d 583, 589-590, 170 NYS2d [1958]; see *6 Harbor Park Drive, LLC v Town of N. Hempstead*, 159 AD3d 777, 72 NYS3d 175 [2d Dept 2018]; *Condello v Town of Irondequoit*, 262 AD2d 940, 941, 693 NYS2d 775 [4th Dept 1999]). Although "[i]t is the plaintiff[s] burden to establish that the improvements on the defendants' land caused the surface water to be diverted, . . . 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 defendants' property" (*Moone v Walsh*, 72 AD3d 764, 764, 898 NYS2d 472, 473 [2d Dept 2010]), the defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case (see *Jiann Hwa Fang v Metropolitan Transp. Auth.*, 148 AD3d 791, 792, 48 NYS3d 758, 759 [2d Dept 2017]). "The diversion of water by artificial means, [] is not strictly limited to the use of pipes, drains and ditches and may otherwise be established where it is demonstrated that the net effect of defendants' improvements so changed, channeled or increased the flow of surface water onto the plaintiff[s] land as to proximately cause damage to the property" (*517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC*, 156 AD3d 1187, 1189, 68 NYS3d 173, 175 [3d Dept 2017] [internal quotation marks and alterations omitted]; see *Biaglow v Elite Prop. Holdings, LLC*, 140 AD3d 814, 815, 34 NYS3d 461, 462 [2d Dept 2016]).

Here, both defendant Judith Stein and the Testamentary Trust defendants have failed to conclusively establish that the water diversion onto plaintiffs' property was not made through artificial means or that it was made in good faith (*Tatzel v Kaplan*, 292 AD2d 440, 441, 738 NYS2d 863, 864 [2d Dept 2002]). Defendants, as here, may not satisfy their burden on a summary judgment motion by demonstrating the perceived insufficiency of the plaintiff's proof (*George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 585 NYS2d 894 [1992]). Both defendant Judith Stein and the Testamentary Trust defendants contend that plaintiffs' damages are caused by the improper construction of the subject property; however, they failed to submit sufficient evidence showing that any improvements on defendants' properties did not change, channel or increase the flow of surface water onto plaintiffs' land. In support of both motions, defendants submit the affidavit of Judith Stein, who states that the properties are all leased to third parties, who are solely responsible for maintaining and repairing said properties and that defendants did not cause fill to be placed on such properties. Moreover, defendants' assertion that they are not liable for damages to plaintiffs' property, as they are out-of-possession landlords, is without merit.

Furthermore, the parties have submitted conflicting expert evidence as to the cause of the water diversion onto plaintiffs' property; thus, there exists a question of fact as to the cause of the plaintiffs' property damage (see *Creagan v Sachs*, 65 AD3d 101, 879 NYS2d 440 [1st Dept 2009]; *Gleeson-Casey v Otis Elevator Co.*, 268 AD2d 406, 702 NYS2d 321 [2d Dept 2000]). Terchunian, defendants' expert geologist, states that the properties owned by the Testamentary Trust defendants are located between 735

feet and 1600 feet from plaintiffs' property, and that even if fill was placed on the properties, it would not cause surface water to flow onto plaintiffs' properties. He explains that River Road contains a drainage and pumping system, which was installed and maintained by the Town, and serves as a mechanical barrier against water flow over the road. He states that the system is designed to collect water from the roadway and direct it south, away from plaintiffs' property, via pipes running underneath River Road, and to "artificially pump the water via a force main into the southern portion of Brown's River." He also states that River Road acts as a topographic barrier to water flow originating from the Testamentary Trust's properties and that the roadway "crests in the middle at a higher elevation," so that water could not physically cross the road unless during extreme weather events. However, plaintiffs' expert, Peter Dermody, a hydrogeologist, states that the fill material added annually to the parking lot surface and edges has been running off during storms and leads to clogging of the outflow drainage pipes, which results in water diversion onto plaintiffs' property. He also points to correspondence from the Federal Emergency Management Agency to the Town of Islip Supervisor, which includes concerns that the placement of fill in the parking lot may have added significant elevation to the land and potentially increasing the risk of flooding to adjacent properties. He further states that while a pumping station was installed along the west side of River Road sometime after the commencement of this action, which was designed to collect storm water from catch basins and "convey the water by culvert to Brown's River," it is not presently in operation.

Finally, plaintiff states in his affidavit that prior to the work on the parking area, while water would pool in defendants' parking lot after rainfall, the water would quickly drain off. However, after work was done in the parking lot, that area would become covered with water after a rain event and the water would drain very slowly, which resulted in water diversion onto his property (*see generally Biaglow v Elite Prop. Holdings, LLC*, 140 AD3d 814, 815, 34 NYS3d 461, 462 [2d Dept 2016]; *Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781, 783, 777 NYS2d 517, 519 [2d Dept 2004]). Thus, on the record before the court, there remains an issue of fact whether "improvements so changed, channeled or increased the flow of surface water onto the plaintiff[s] land as to proximately cause damage to the property" (*517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC*, 156 AD3d 1187, 1189, 68 NYS3d 173, 175 [3d Dept 2017]). Accordingly, the motions by defendant Judith Stein and by the Testamentary Trust defendants for summary judgment are denied.

Finally, as to the LoDuca defendants' application for summary judgment, the elements of a cause of action for fraud are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (*see Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; *see also Ozelkan v Tyree Bros. Env'tl. Servs.*, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]). In the third-party complaint, the Town of Islip alleges that the LoDuca defendants made false representations and did not construct the subject home in accordance with the plans and specifications provided. Specifically, it states that there was no detailed piling schedule submitted, that test borings were not performed, and that no engineer certified the property could withstand the construction as proposed.

Here, the LoDuca defendants have established their prima facie entitlement to summary judgment as to the cause of action for fraud. The LoDuca defendants submit a Soil Mechanic Report,

Bernardis v Town of Islip
Index No. 08-9250
Page 7

dated September 26, 1984, showing that a test boring at the subject location was performed prior to the construction of the house. They also submit an invoice from Lee Dockbuilding to demonstrate that pilings were installed at the house and an engineering inspection report which reveals that an inspection was completed and approved. Plaintiffs and Richard LoDuca further testified that pilings were installed at the location after the test boring was performed. Furthermore, they submit an engineering inspection report and a certificate of occupancy inspection report which reveal that the subject property was inspected and approved as constructed. In opposition, the Town failed to submit sufficient evidence to raise a triable issue of fact.

The LoDuca defendants' application to dismiss the cause of action for contribution, however, is denied. The LoDuca defendants contend that the affidavit of their expert, Theodore Von Rosenvinge, an engineer, states that they appropriately installed foundation pilings for the site conditions and properly identified the subsurface conditions from test borings performed prior to the construction. However, the expert affidavit of Michael Simon, an engineer, states that there is no evidence that the foundation of the subject house has sunk. Instead, Simon avers the various conditions which plaintiffs identify as evidence of foundation issues was due to the construction by the LoDuca defendants, which departed from standard industry practice.

Further, as to the LoDuca defendants' contention that they had no relationship with defendants which would give rise to a common obligation or duty to support contribution claims, this Court has already stated in its prior decision dated December 20, 2010 (Whelan, J), that contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories and the remedy may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors (*see Raquet v Braun*, 90 NY2d 177, 681 NYS2d 404 [1997]). Accordingly, the LoDuca defendants' application to dismiss the claim for fraud is granted, but their application to dismiss the claim for contribution is denied.

Dated: 7/30/18



THOMAS F. WHELAN, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION