

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY

Trial/IAS: Part 42
Index No.: 4530/95

Present: Honorable Jerald S. Carter

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**JOSEPH SCHWARTZ and ROSALIE
SCHWARTZ,**

DECISION AFTER TRIAL

Plaintiffs,

-against-

**TAUSCHER CRONACHER ENGINEERS,
P.E., P.C. and NEIL SCHMELKIN, P.E.,**

Defendants.

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On April 3, 4 and 5, 2000, this Court conducted a bench trial wherein all parties were represented by counsel. The case involved an alleged breach of contract and warranty in which it is alleged that the Defendants, TAUSCHER CRONACHER ENGINEERS, P.E., P.C. and NEIL SCHMELKIN, P.E., failed to detect termite infestation during a pre-purchase inspection of residential premises located at 3022 Bellmore Avenue, South Bellmore, New York.

JOSEPH and ROSALIE SCHWARTZ commenced this action by service of a Summons and Complaint upon the Defendants on or about February 10, 1995. A Verified Answer was served upon Plaintiffs on or about March 3, 1995.

Subsequent to the commencement of this action, MR. SCHWARTZ passed away and ROSALIE SCHWARTZ, by operation of law, became fee owner of the premises.

After trial, the Court makes the following finding of facts and conclusions of law:

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FACTS

Defendant, TAUSCHER CRONACHER, is a professional corporation comprised of professional engineers and registered architects which is engaged in the business of, *inter alia*, pre-purchase inspections of residential premises and rendering written reports with respect thereto. In conducting the pre-purchase inspections of residential premises, the Defendants represented that they adhere to the standards of practice of the National Academy of Building Inspection Engineers ("NABIE").

On or about December 1993, Plaintiffs retained the office of the Defendant, TAUSCHER CRONACHER, to perform a pre-purchase inspection of residential premises located at 3022 Bellmore Avenue, South Bellmore, New York. Plaintiffs had utilized TAUSCHER CRONACHER on two (2) prior occasions to inspect houses that they were considering for purchase. The Plaintiff did not purchase the two (2) prior houses after they received the reports of TAUSCHER CRONACHER.

Defendant, SCHMELKIN, was assigned by TAUSCHER CRONACHER to conduct the inspection of the subject premises and such inspection was conducted on December 24, 1993. Present at the inspection were Plaintiffs, ROSALIE SCHWARTZ, her late husband, JOSEPH SCHWARTZ, Elliot Zahalsky, a Florida attorney and brother-in-law of the Plaintiff; the realtor and the sister of Mrs. SCHWARTZ. Elliot Zahalsky, accompanied Defendant, SCHMELKIN, during part of the inspection.

Mr. Zahalsky testified and told the Plaintiff, ROSALIE SCHWARTZ, that while he and Defendant, SCHMELKIN, were standing on the sun deck or flat roof over the den portion of the

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subject premises, MR. SCHMELKIN'S heel broke through the surface of the deck and MR. SCHMELKIN asked him to leave the roof for safety reasons.

Defendant, SCHMELKIN, denies the incident described by Mr. Zahalsky concerning his foot penetrating the surface of the flat roof. However, he testified that the flat roof was soft as he walked across it, which he attributed to deteriorated roofing material. In his written report, Defendant, SCHMELKIN, recommended that the roof was in poor condition and would have to be repaired or replaced.

Defendant, SCHMELKIN, conducted the inspection by visual observation of accessible areas without removing surface materials; without moving furniture or other obstructions which may have prevented him from observing certain areas; and with any probings. The Defendant, SCHMELKIN, did not inform the Plaintiffs of any obstructions that prevented him from properly inspecting the premises during his inspection on December 24, 1993, nor did the Defendant seek permission to remove the obstructions from the owners of the premises.

On December 27, 1993, Defendant, TAUSCHER CRONACHER, rendered a written report to Plaintiffs prepared and signed by Defendant, SCHMELKIN, setting forth the results of the inspection conducted by MR. SCHMELKIN on December 24, 1993.

Plaintiff, ROSALIE SCHWARTZ, received and read the report rendered by TAUSCHER & CRONACHER, as well as the Termite Inspection Certification attached at the end of the report. The report included a Termite Inspection Certification that indicated that there was no evidence of termites in the premises. The report made no mention of the incident alleged by Mr. Zahalsky wherein the Defendant, SCHMELKIN's, heel went through the flat roof of the premises.

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The TAUSCHER CRONACHER report indicated, among other things, that based upon visual *observation* of accessible areas, no termites or termite action was apparent at the time of the inspection, but there were areas in and around the subject premises which could permit easy termite entry and it was recommended that Plaintiff consider a fiber optic search of the walls for evidence of structural damage and termite activity. The Plaintiff did not order the fiber optic search. Subsequent to the report, the Plaintiffs entered into a contract to purchase the premises and eventually purchased the premises.

After moving into the subject premises, Plaintiff engaged Precision Home Improvement Corp. ("PRECISION") to do the work on the roof that had been recommended by TAUSCHER CRONACHER and after removing the decking of the flat roof, PRECISION discovered termite damage in the roof rafters under the decking. Thereafter, after removing paneling from the den walls, PRECISION discovered termite infestation and damage behind the walls of the den. The Plaintiff discovered two openings or holes on the exterior wall of the subject premises behind the den. These areas had been covered by a pile of bricks at the time of the inspection and were not discovered until the bricks were removed.

Plaintiff entered receipts and cancelled checks into evidence totaling the amount of \$14,829.73 for replacement of the walls in the premises and for the extermination of the termite infestation. Plaintiff testified to having out of pocket expenses in the amount of approximately \$18,000.00

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LEGAL CONCLUSION

It is clear to the Court that the Plaintiff reasonably relied upon the Defendant's December 24, 1993 report wherein it was represented that Mr. Schmelkin's sight inspection revealed no evidence of termite infestation.

The Court determines that the inspection was deficient insofar as the Defendant's representative, Mr. Schmelkin, failed to conduct a complete inspection by not removing loose bricks which were piled against the exterior den walls. This area was accessible to the inspector by the simple removal of the loose bricks. The failure to do so constitutes negligence and a departure from acceptable practices within the industry.

The Defendant asserts that holes hidden behind the bricks could not have been discovered unless a fiber optic search was ordered by the Plaintiff. However, the fact that such a search was not ordered by Plaintiff is not dispositive. The credible evidence reveals that the two holes on the den exterior walls were readily apparent upon visual inspection.

Accordingly, judgment is entered in favor of the Plaintiff. The credible evidence establishes that the Plaintiff paid \$14,829.73 to correct the condition. Plaintiff is awarded same with interest.

Settle judgment on notice.

Dated: Mineola, NY
August 8, 2000

ENTER,



A.J.S.C.