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INDEX
NO. 14204-03

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 11-9-04
Submission Date: 11-9-04
Motion Sequence No.: 001/MOT D

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ANTHONY PEPE and MARGUERITE PEPE,
Plaintiffs,

- against -

E & M BASEMENT WATERPROOFING CO., INC. and EDWARD McHELICK,
Defendants.

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COUNSEL FOR PLAINTIFF
McCabe, Collins, McGeough & Fowler, LLP
114 Old Country Road
P.O. Box 855
Mineola, New York 11501

COUNSEL FOR DEFENDANT
Law Office of Frederick Eisenbud
6165 Jericho Turnpike
Commack, New York 11725

ORDER

The following papers were read on Defendants' motion for summary judgment dismissing the complaint:

Notice of Motion dated October 5, 2004;
Affirmation of Frederick Eisenbud, Esq. dated October 5, 2004;
Affidavit of Edward Mchelic sworn to on October 4, 2004;
Affidavit of Victor Zelaya sworn to on September 30, 2004;
Defendant's Memorandum of Law;
Affirmation of Thomas J. Nogan, Esq. dated October 26, 2004;
Affidavit of Anthony Pepe sworn to on October 26, 2004;
Affidavit of Marguerite Pepe sworn to on October 26, 2004;
Affidavit of Samantha Pepe sworn to on October 26, 2004;
Affidavit of Larry Bardavid sworn to on October 7, 2004;
Affidavit of Lori Lebowitz sworn to on October 18, 2004;
Affidavit of Michael Geller sworn to on October _, 2004;
Affidavit of Anthony B. Barrone sworn to on October 27, 2004;
Defendant's Memorandum of Law;

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Affirmation of Frederick Eisenbud, Esq. dated November 9, 2004;
Affidavit of Edward Mchelic sworn to on November 8, 2004;
Defendant's Reply Memorandum of Law;
Affidavit of James M. DeMartinis & Keith W. Butler sworn to on November 9, 2004;
Affidavit of Harry Johnson sworn to on November 9, 2004.

Defendants E & M Basement Waterproofing Co., Inc. ("E & M") and Edward Mchelic sued herein as Edward McHelick ("McHelick") move for summary judgment dismissing Plaintiffs' complaint pursuant to CPLR 3212.

BACKGROUND

On or about March 22, 2003, Plaintiffs contracted with E & M to install a French drain system at their home located at 720 Franklin Boulevard, Long Beach, New York to prevent the infiltration of water into their basement.

The house, built in 1930, was heated by oil from an underground storage tank buried on the north side of the house. Plaintiff, Anthony Pepe, testified at his deposition that "whenever there was heavy rains, there was always water in the basement" which seeped in "all around the edges." According to the Plaintiffs' contract with E & M:

> 1) the basement flooring in specified areas was to be broken out approximately one foot in width from the foundation;
>
> 2) the newly formed trench would be graded to one designated point where a two-foot well would be excavated and an automatic submergible pump installed; and
>
> 3) a bed of 3/4 inch washed gravel would be leveled and a four-inch perforated pipe installed inside the pre-dug trench. Gravel would then be leveled over the perforated pipes after which the basement floor would be re-cemented and all areas left clean and in order.

Plaintiffs allege that in the course of installing the French drain system, which they do not claim was improperly installed, Defendants negligently perforated Plaintiffs' submerged oil tank causing the release/discharge of petroleum into the soil at and around Plaintiffs' premises. After the oil leak was discovered, the underground tank was removed, under the inspection of New York State Department of Environmental Conservation ("DEC"). On or about June 7, 2003, a report was filed indicating soil contamination due to an oil spill and a spill number [03-02391] was assigned to Plaintiffs' premises which, according to the complaint, resulted in a decrease in the value of the premises of approximately $50,000-$60,000.

Plaintiffs seek damages against Defendants predicated on theories of negligence, breach of contract and strict liability under Navigation Law § 181(5). While they originally sought to hold McHelick, the president of E & M, personally liable for all damages, Plaintiffs have agreed to waive such claim. The complaint against him, on consent, will be dismissed.

While Plaintiffs testified, at their respective depositions, that the French drain system and sump pump installed by E & M functioned properly, Anthony Pepe testified that approximately three days after the installation, and on six or eight other occasions between April 26 and early June, 2003, he observed the presence of oil in the water discharged by the pump. According to McHelick's testimony, he received a telephone call from Plaintiff Marguerite Pepe on June 2, 2003 in which she informed him that oil and water were being discharged on the side of her house. He immediately went to the

residence. After observing approximately eight inches of oil in the sump pump cannister, he unplugged the pump.

E & M seeks summary judgment dismissing Plaintiffs' complaint based on the sworn reports of two senior hydrologists from J.R. Holzmacher, P.E., LLC; to wit: the president of Oilheat Associates, Inc. and the president of Programmatic Solutions, Inc. E & M's experts establish that E & M did nothing to cause damage to Plaintiffs' underground storage tank or in any way disturb the fill and return lines running from the tank to the boiler. Plaintiffs do not deny, as the DEC inspector testified, that, when removed from the ground, the tank exhibited heavy corrosion and pitting as well as two to four holes on the bottom of the tank.

Plaintiffs have offered no evidence to show that E & M breached its contract with Plaintiffs or "negligently perforated Plaintiffs' submerged oil tank" causing the release of petroleum or to refute the evidence presented by E & M that the subject tank – – which was corroded, pitted and contained holes – – was leaking prior to E & M's installation of the French drain system.

DISCUSSION

Generally, in order to establish negligence, a Plaintiff must identify a duty of care on the part of the Defendant, a failure to exercise that duty in a reasonable manner and injury proximately caused by Defendant's failure to perform that duty. Elliot v. Long Island Home, Ltd., 12 A.D. 3d 481 (2nd Dept. 2004). See also, Curley v. AMR Corp., 153 F.3d 5, 13 (2nd Cir. 1998). The record is devoid of any showing that E & M failed to

perform its contractual duty with due care or was negligent. The affidavit of Plaintiffs' expert, licensed by the Nassau County Fire Marshall to remove and install combustible storage tanks and president and CEO of Gasoline Installations, Inc., contains only the speculative conclusion that

> "the vibration caused by drilling of the home's foundation wall and around the trenching performed by Defendant to install the PVC discharge pipe caused a disturbance of the soil which surrounded the submerged tank thereby creating void/pockets of air which previously did not exist. * * * When the pump was activated in April, 2003 and May, 2003 during heavy rains a vacuum effect occurred pulling fuel from the tank and water from the ground into the home and then out through the PVC discharge."

It is axiomatic that where there are no genuine issues of material fact, summary judgment must be granted. Herrin v. Airborne Freight Corp., 301 A.D. 2d 500 (2nd Dept. 2003). Once the proponent of a summary judgment motion makes a *prima facie* showing of entitlement to judgment as a matter of law by setting forth sufficient evidence to demonstrate the absence of any material issues of fact, the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for the failure to do so. Kosson v. Algaze, 84 N.Y. 2d 1019, 1021 (1995). Summary judgment will not be defeated by conclusory or irrelevant allegations. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y. 2d 223, 231 (1978).

Defendants' submission in support of their motion for summary judgment satisfy the *prima facie* showing required to warrant judgment as a matter of law. The affidavit

submitted by Plaintiffs' expert, however, is deficient in that it fails to provide the data on which the opinion is based. It is, therefore, speculative and conclusory and, thus, insufficient to raise a factual issue requiring a trial. The opinion of an expert that is conclusory or unsupported by the record is insufficient to raise a triable issue of fact. Davenport v. County of Nassau, 279 A.D. 2d 497 (2nd Dept. 2001). Moreover, the conclusory assertions of Plaintiff's counsel, who has neither personal knowledge of the facts at bar nor expertise on which to ground such assertions, that vibrations from a rotary hammering drill in close proximity to the oil supply and return lines to the tank "caused vibrations, pockets and voids resulting in the tank ultimately leaking" and that "the mud (packing) which was keeping the tank from leaking was * * * disturbed due to the close proximity of the sump pump and its discharge pipe to the submerged tank" lack probative value and are insufficient to defeat E & M's entitlement to summary judgment. While an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment, an opposition attorney's assertions, unsupported by factual proof, are of no probative value and, therefore, fail to raise a factual issue. Lewis v Safety Disposal System of Pennsylvania, Inc., 12 A.D. 3d 324, 325 (1st Dept. 2004). See also, Zuckerman v. City of New York, 49 N.Y. 2d 557 (1980). The record is devoid of any evidence to establish that, prior to installation of the French drain, mud actually kept the tank from leaking or that anything done by E & M during the installation process caused the mud to dislodge thereby exposing the holes in the tank.

Pursuant to Navigation Law § 181(1), "[a]ny person who has discharged petroleum" is strictly liable "without regard to fault, for all cleanup and removal costs and all direct and indirect damages no matter by whom sustained." In addition, Navigation Law § 181(5) provides that "[a]ny claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on strict liability imposed by this section may be brought directly against the person who has discharged the petroleum." A claim, however, may only be maintained by a person "who is not responsible for the discharge." Navigation Law § 172(3). "Discharge" is defined under § 172(8) as an "action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum." While an owner of the property on which petroleum has been released may have a claim under the Navigation Law, a property owner who caused or contributed to the spill is precluded from seeking indemnification from another discharger. White v. Long, 85 N.Y. 2d 564, 568-9 (1995); and Hjerpe v. Globerman, 280 A.D. 2d 646, 647 (2nd Dept. 2001).

Inasmuch as the record contains no evidence that any action on E & M's part caused the contamination herein, Plaintiffs' Navigation Law claim cannot be sustained.

Given the failure of proof on Plaintiffs' part in establishing either any manner in which E & M breached the contract herein or was negligent in the performance thereof, and the lack of viability of Plaintiffs' Navigation Law § 181 claim, Defendants are entitled to summary judgment dismissing the complaint pursuant to CPLR 3212.

Accordingly, it is,

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ORDERED, that Defendants' motion for summary judgment dismissing this action is **granted**. The complaint is hereby dismissed.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
February 22, 2005

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED XXX

FEB 28 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE