# DECISION AFTER TRIAL

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 33

MARVIN BUCKBINDER and LAURA BUCKBINDER,

Plaintiffs,

-against-

WOODS AT SMITHTOWN HOMEOWNERS ASSOCIATION, INC.,

Defendant.

BY: WHELAN, J.S.C.
DATED: January 17, 2013

INDEX No. 15801-04

Non-Jury Trial: 12/6/12,1/17/13
CDISP

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The above entitled action was tried before the Court as a non-jury trial on December 6, 2012 and January 17, 2013. At the conclusion of plaintiff's case, the defendant made a motion to dismiss the case pursuant to CPLR 4401. The Court decided to render a written decision, in keeping with CPLR 4213, in order to more fully set forth its findings of fact and conclusions of law.

Trial court's function on a directed verdict motion pursuant to CPLR 4401 is not to engage in a weighing of the evidence. In order to take the case from the plaintiff, the motion may be granted only when the trial court determines that, upon viewing the evidence in a light most favorable to the nonmoving party and affording such party the benefit of every inference, there is no rational process by which a court could find in favor of the nonmovant (***Szczerbiak v Pilat***, 90 NY2d 553, 556, 664 NYS2d 252 [1997]; ***Doland v Stephenson***, 89 AD3d 789, 932 NYS2d 369 [2d Dept 2011]).

What follows is a summary of the testimony that influenced the Court in deciding the motion. A prior summary judgment decision by the Hon. Peter Fox Cohalan, dated September 28, 2010, dismissed the seventh, eighth, ninth, and part of the second causes of action. What remains are various requests for declaratory relief and damages for breach of contract, malicious prosecution, slander of title and abuse of process.

The first cause of action seeks a declaration that defendant is ob ligated to perform maintenance and repairs on plaintiffs' gutters, leaders, and driveway. Upon reviewing the documentation submitted as Pl. Ex. 1, the Court finds that plaintiff cannot prevail on this claim. The Introduction to the Offering Plan (*see* p. 1) limits the Common Areas to just, in part, the "internal roadways and parking spaces." The Declaration of Covenants, Restrictions, Easements, Charges and Liens, describes common areas and lot as set forth on the subdivision map (*see* p. 2 of same). Title to the Common Properties, as set forth on page three of the Declaration notes that defendant takes same subject to "... exterior home and building maintenance to all homes *which consist of staining or painting the exterior of the Homes and roof repairs"* (emphasis added). The same limited responsibility of the defendant for exterior maintenance is set forth under Article IX, Section 1 (*see* p. 9), including snow removal from the driveways. Maintenance of same is not set forth as including the driveways. In addition, maintenance includes "pipes, wires or conduits located outside of any Home including common sewer lines located outside the Home." The By-Laws restricts the Common Areas to land "other than individual lots as shown on the filed subdivision map and intended to be devoted to the common use and enjoyment of the owners of the Properties (*see* p. 2 thereof). Finally, attached as exhibit F to the Offering Plan is a reduced copy of the subdivision map. While it is not clearly legible, the Court can ascertain that the individual lots all appear to be of a flag lot design with the driveway apparently within the individual lot of each home owner.

In light of the above and in keeping with the testimony of defendant's current Treasurer, Mario Castellano, the Court finds that the plaintiff can not prevail on the first cause of action. Defendant's only responsibility with regard to the individual driveways is to plow snow. Furthermore, under plaintiffs' notion that the driveways are common areas, then anyone could park their vehicle in any available driveway as part of the common use of the common areas. Moreover, without any proof to the contrary, the reduced subdivision map appears to place each driveway under the control of the lot owner. Additionally, plaintiffs' Deed (*see* Def. Ex. A), sets forth a property description with a beginning and ending on Jeremy Circle, the internal roadway of the development. Plaintiff's testimony that he made the driveway wider and put in belgian blocks appears to confirm his control over same. The discussion of a ten foot buffer to the front and rear of each home for each lot owner appears to confuse the written right to change landscaping ten feet from the rear exterior wall as set forth under page 13 of the Use of Property Declarations (*see* Article XI [l]).

As for the gutters, the maintenance obligation is clearly set forth as simply *"staining or painting the exterior of the Homes and roof repairs."* Maintenance of "pipes, wires or conduits located outside of any Home including common sewer lines located outside the Home," references the utilities required from outside sources, such as sewer lines, facie water, sprinkler system, and electrical utilities. This Court will not read into a written agreement that which is not explicitly set forth therein. This Court will not hold that the term "Home" is subsumed in the term "Building," unless expressly included therein within the Declaration. In reading the entire Offering Plan, Building, is set forth as the pool cabana and the gate house. Homes are separate structures and are treated differently throughout the Offering Plan. Moreover, no proof was offered that such an obligation was assumed by the defendant prior to the decision of then Justice Cohalan. In any event, the defendant, in response to that decision, has undertaken to replace all gutters in the complex and therefore this controversy is moot.

As for the second cause of action, which reads a malicious prosecution claim, no evidence was offered of malice in the actions of the defendant and no proof of damages was provided to the Court. Plaintiffs offered no photographs, bills, invoices, checks paid to support any claim of damages. No proof was offered as to how the plaintiffs were singled out , as compared to the other 55 homeowners in this development. Just because the defendant's foreclosure action was dismissed by Justice Elizabeth Emerson, by order dated November 17, 2004, that does not prove that defendant's action of filing a Notice of Lien was malicious, in light of the fact that plaintiffs had prior thereto pursued a frivolous claim in the District Court. In any event, Justice Emerson found that plaintiffs were 1/56th responsible for the legal fee incurred in opposing that dismissed District Court action, which is hardly evidence of wrongful conduct. With no proof offered of malice or damages, the second cause of action must be dismissed.

As for the third cause of action for breach of contract, as set forth above no such breach of obligations under the Offering Plan has been set on a prima facie basis and no proof of damages has been offered. Therefore, the third cause of action is dismissed.

The fourth cause of action is duplicative of the first and second claims and for the reasons set forth above, it is dismissed. In any event, the relief demanded to vacate the previously filed notice of lien occurred by Certificate of Satisfaction of Lien, dated May 29, 2007. Plaintiff could not demonstrate any damages that resulted from the filing of same or from the delay in vacating the lien.

The fifth cause of action sounding in slander of title must be dismissed for failing to offer evidence of special damages, that is, resulting from the filing and the above described failure to set forth proof of malice. For the same reasons, the sixth cause of action claiming an abuse of process must be dismissed, absence proof of malice. The Court declines plaintiffs' invitation to infer malice from defendant's course of conduct. Defending oneself from two separate litigations, one of which seeks substantial damages, does not equate to inferred malice.

Based on the review of the limited documentation supplied, the Court must hold that even viewing the evidence in a light most favorable to the plaintiffs and affording them the benefit of every inference, there is no rational process by which this Court could find in favor of the plaintiffs. Pursuant to CPLR 4401, the action is dismissed, with prejudice. As set forth on the record, in light of this ruling, defendant withdraws the counterclaims set forth in the Answer. Accordingly, this action is dismissed in its entirety, without costs to any party.

THOMAS F. WHELAN, JSC