Analysis
As of: May 23, 2013

[**1] **THOMAS SOJA et al., Appellants, v KEYSTONE TROZZE, LLC, et al., Respondents, et al., Defendant.**

515422

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2013 N.Y. App. Div. LEXIS 3086*; *2013 NY Slip Op 3147

May 2, 2013, Decided
May 2, 2013, Entered

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PRIOR HISTORY: *Soja v. Keystone Trozze, LLC, 2012 N.Y. Misc. LEXIS 1178 (N.Y. Sup. Ct., Mar. 1, 2012)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff owners appealed orders by the Delaware County Supreme Court (New York) that, upon reargument, granted a motion by defendant architect for partial summary judgment limiting the scope of their liability, and thereafter denied their cross-motion for reargument of their negligence and breach of contract action.

OVERVIEW: The owners hired the architect to design their new residence. The owners claimed that, as a result of the architect's allegedly faulty design plans, the first floor of their home was built almost two feet lower than applicable regulations allowed, leading to increased flood insurance premiums, among other things. The owners claimed that the architect's conduct constituted gross negligence, abrogating the limitation of liability clause in their contract. The appellate court found, inter alia, that even assuming that the letter relied upon by the owners might ultimately be used to prove a breach of contract or professional malpractice by the architect, it did not raise a question of fact as to whether the architect was grossly negligent. In other words, the conduct alleged did not evince the necessary reckless indifference to the rights of others that would render the limitation of liability clause unenforceable. Accordingly, the trial court properly granted partial summary judgment in the architect's favor.

OUTCOME: The first order was affirmed, and the appeal from the supplemental order was dismissed.

COUNSEL: [*1] Thomas Soja and Syble Young-Soja, Hancock, appellants, Pro se.

Lewis, Brisbois, Bisgaard & Smith, LLP, New York City (David M. Pollack of counsel), for Keystone Trozze, LLC and another, respondents.

JUDGES: Before: Mercure, J.P., Lahtinen, McCarthy and Garry, JJ. Lahtinen, McCarthy and Garry, JJ., concur.

OPINION BY: Mercure

OPINION

MEMORANDUM AND ORDER

Mercure, J.P.

Appeals (1) from an order of the Supreme Court (Becker, J.), entered March 14, 2012 in Delaware County, which, upon reargument, granted a motion by defendants Keystone Trozze, LLC and Keystone Associates, LLC for partial summary judgment limiting the scope of their liability, and (2) from a supplemental order of said court, entered March 20, 2012 in Delaware County, which denied plaintiffs' cross motion for reargument.

Plaintiffs commenced this negligence and breach of contract action against defendants Keystone Trozze, LLC and Keystone Associates, LLC (hereinafter collectively referred to as Keystone), which they had hired to design their residence, and the general contractor that built the residence. Keystone moved for partial summary judgment enforcing the limitation of liability clause contained in its contract with plaintiffs, which provides in relevant [*2] part that plaintiffs "agree[d], to the fullest extent permitted by law, to limit the liability of [Keystone] . . . to [plaintiffs] . . . for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [Keystone] . . . shall not exceed [its] total fee for services rendered on this project." Supreme Court, upon reargument, granted partial summary judgment to Keystone, holding that, in the event of a judgment in favor of plaintiffs, Keystone's liability is limited to the amount of fees paid by plaintiffs to Keystone, plus interest and costs. In a separate order, the court denied plaintiffs' cross motion for [**2] reargument. Plaintiffs appeal from both orders, and we now affirm the grant of partial summary judgment to Keystone.

"As a general rule, parties are free to enter into contracts that absolve a party from its own negligence or that limit liability to a nominal sum" (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., 18 NY3d 675, 682-683, 967 N.E.2d 666, 944 N.Y.S.2d 443 [2012]* [citations omitted]). As a matter of public policy, however, exculpatory or limitation of liability clauses are not enforceable in the face of grossly negligent [*3] conduct (*see id. at 683*; *Sommer v Federal Signal Corp., 79 NY2d 540, 554, 593 N.E.2d 1365, 583 N.Y.S.2d 957 [1992]*; *Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, 384-385, 448 N.E.2d 413, 461 N.Y.S.2d 746 [1983])*. "This applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum" (*Sommer v Federal Signal Corp., 79 NY2d at 554*).

Here, plaintiffs allege that a letter they received from Keystone in 2001 proves that Keystone failed to use the flood elevation report provided by plaintiffs' surveyor or to consult with the local Federal Emergency Management Agency coordinator when designing the home, as Keystone was contractually obligated to do[1]. Plaintiffs claim that, as a result of Keystone's allegedly faulty design plans, the first floor of their home was built almost two feet lower than applicable regulations allow, leading to increased flood insurance premiums, among other things. Plaintiffs contend that Keystone's conduct constitutes gross negligence, abrogating the limitation of liability clause.

> 1 In the letter, Keystone stated: "[Y]our Foundation/Building Contractor should have transferred th[e] information [regarding flood data] to the building site and established the finished [*4] first floor elevation. Keystone . . . was not retained to perform or coordinate any of this work. We are also not responsible for means or methods of construction."

We disagree. The parties do not dispute the legal standard to be applied in determining whether conduct amounts to "gross negligence." In this context, it is settled that "gross negligence differs in kind, not only in degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*Finsel v Wachala, 79 AD3d 1402, 1404, 915 N.Y.S.2d 323 [2010]* [internal

quotation marks and citations omitted]; *see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., 18 NY3d at 683*).

In our view, even assuming that the letter relied upon by plaintiffs may ultimately be used to prove a breach of contract or professional malpractice by Keystone, it does not raise a question of fact as to whether Keystone was grossly negligent. That is, while plaintiffs may have stated causes of action based upon breach of contract and common-law negligence, the conduct alleged does not evince the necessary reckless indifference to the rights of others that would render the limitation of liability [*5] clause unenforceable (*see Colnaghi, U.S.A. v Jewelers Protection Servs., 81 NY2d 821, 824, 611 N.E.2d 282, 595 N.Y.S.2d 381 [1993]*; *David Gutter Furs v Jewelers Protection Servs., 79 NY2d 1027, 1029, 594 N.E.2d 924, 584 N.Y.S.2d 430 [1992]*; *Rector v Calamus Group, Inc., 17 AD3d 960, 961-962, 794 N.Y.S.2d 470 [2005]*; *compare Abacus Fed. Sav. Bank v ADT Sec. Servs., 18 NY3d at 683-684*; *Kalisch-Jarcho, Inc. v City of New York, 58 NY2d at 385*). Accordingly, Supreme Court properly granted partial summary judgment in Keystone's favor.

Finally, plaintiffs' appeal from the denial of their motion to reargue must be dismissed, [**3] inasmuch as no appeal lies therefrom (*see Putney v People, 94 AD3d 1193, 1195, 942 N.Y.S.2d 252 [2012]*, *appeal dismissed 19 NY3d 1020, 976 N.E.2d 244, 951 N.Y.S.2d 716 [2012]*; *Cheney v Cheney, 86 AD3d 833, 838, 927 N.Y.S.2d 696 [2011])*. Plaintiffs' remaining argument is not preserved for our review.

Lahtinen, McCarthy and Garry, JJ., concur.

ORDERED that the order entered March 14, 2012 is affirmed, without costs.

ORDERED that the appeal from the supplemental order entered March 20, 2012 is dismissed, without costs.