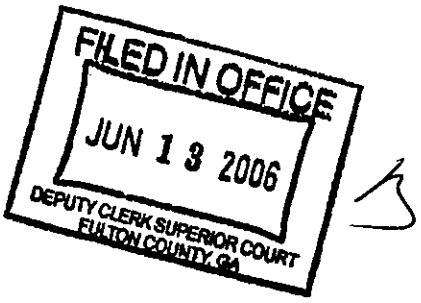
6-13-2006

Order (BONNIE LAMB)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY



BONNIE LAMB, BRIAN K. KING, JOSEPH P. D'ANDREA, JR., ROBERT BRYAN DAVIS, MARK BETTIS, REBECCA HOELTING, GARY JACKSON, MARY CULLEN, JOHN DOUGLAS, ROBERT MICHAEL ORENSTEIN, STEVEN E. MARCUS, PETER BALLARD, STACEY ANDERSON, JOSEPH REARDON, SCOTT BLACK, KEITH ANDERSON, GOFFREDO DANIELE GONZALEZ, ARITURO GIANCARLO PIRRONE, DUANE S. HORNAN, EDWARD MASHEK, JR., CAROL MASHEK, JOHN C. WOODS, MARIA SURPRISE, TIMOTHY MCENTEE, LOFTS @ THE PARK II CONDOMINIUM ASSOCIATION, and MARTHA ROACH, M.D.,

Plaintiffs,

v.

SPRINGBOK, LLC, BROCK GREEN ARCHITECTS AND PLANNERS, LLC, GREENHORNE & O'MARA, INC., JUNEAU CONSTRUCTION COMPANY, LLC, PEACH STATE GRADING, INC., ALTAMIRA DESIGN AND COMMON SENSE, INCORPORATED, THE LOFTS @ THE PARK II, LLC, JONATHAN BERZACK, RMS ENGINEERING, INC., CLIFFORD PRICE, SAM SAITOWITZ, ATLAS PROJECTS AMERICA, LLC, PRICE FAMILY CORPORATION, and BERLOFT, INC.,

Defendants.

Civil Action File No. 2003-CV-73694

ORDER

The motion for judgment notwithstanding the verdict and new trial filed by Defendant Greenhorne & O'Mara, Inc. (hereinafter "G&O") is before this Court for consideration. The parties

waived oral argument on the motion, preferring that the Court rule based upon their written submissions. The Court has carefully reviewed the briefs submitted by the parties and the evidence submitted during trial.

The Plaintiffs own condominium units in a building known as the Lofts @ The Park II. At the trial which began on January 23, 2006, the Plaintiffs introduced evidence that their building experienced repeated instances of flooding in the lower level of the parking garage following heavy rains and maintained that the storm drainage and sewer systems for the building overflowed because they were improperly designed and constructed by the Defendants.[1] Plaintiffs also presented testimony that repair to the property was an absurd undertaking. The Plaintiffs' witnesses included two experts, several named Plaintiffs, a real estate appraiser, a G&O representative, and an employee of the City of Atlanta. G&O did not present any witnesses or evidence.

On January 31, 2006, the jury returned a $5.58 million verdict in favor of the Plaintiffs, finding G&O liable for professional negligence. The judgment was entered on February 21, 2006 and G&O filed its motion for judgment notwithstanding the verdict and new trial on March 3, 2006.

G&O asserts the following arguments in the motion for judgment notwithstanding the verdict and new trial: (1) Plaintiffs failed to prove that the cost of repair of the flooding problem was an absurd undertaking; (2) Plaintiffs failed to lay a proper foundation for their real estate appraiser's opinion that the Plaintiffs' units had zero value; (3) Plaintiffs failed to show any decrease in the value of the property; (4) Plaintiffs failed to lay a proper foundation for their expert witnesses' opinions regarding standard of care and causation; and (5) the Court erred in giving and refusing to give particular jury charges.

In Georgia, the proper measure of damages in negligence cases for injury to real property is

1 Although there were other Defendants in the case when the trial began, all of the Defendants except for G&O were dismissed by the Court or the Plaintiffs during the course of the trial.

the cost to repair, unless the restoration or repair costs would be "an absurd undertaking," in which case the measure of damages is the diminution of the fair market value. Ray v. Strawsma, 183 Ga. App. 622 (1987); Atlanta Recycled Fiber Co. v. Tri-Cities Steel Co., 152 Ga. App. 259 (1979). In general, the issue of whether repair would be an absurd undertaking is for the jury's determination. American Pest Control, Inc. v. Pritchett, 201 Ga. App. 808 (1991).

In the instant case, the Court concluded as a matter of law that repair to the property would be an absurd undertaking. G&O argues that the Court should have submitted this issue to the jury. Plaintiffs' expert testified that the only theoretical repairs he could envision were to make the parking decks into a large septic tank, to tear the building down and make a lake on the property, or to move the building out of the floodplain. The expert concluded, of course, that all three "proposals" were unreasonable and without merit. G&O failed to offer a viable repair solution and failed to introduce any evidence whatsoever to contradict Plaintiffs' expert opinion or to suggest that any of his suggestions were feasible. Additionally, the Plaintiffs owned most, but not all of the units at the Lofts. Therefore, the Court necessarily concluded that repair would be an absurd undertaking and so instructed the jury, concluding that it would be error to allow the jury to decide that the property could be repaired, given the complete absence of evidence to support such a finding.

Thus, the proper measure of damages in this case was diminution in value of Plaintiffs' property. Plaintiffs' expert appraiser testified at trial that he had evaluated the units and determined that their fair market value at the time of the trial was zero. To establish the fair market value of the property at the time of the injury, Plaintiffs then submitted a stipulation establishing the purchase price of each Plaintiff's unit.

G&O argues that Plaintiffs' real estate appraiser's opinion that the Lofts had no value lacked a proper foundation. Specifically, G&O maintains that the expert improperly relied upon Plaintiffs'

counsel's representation that the property could not be repaired. This argument is without merit. Before the real estate appraiser testified, one of Plaintiffs' causation experts testified that repairing the property would be an absurd undertaking. Accordingly, because there was sufficient evidence of such in the record, the real estate appraiser's opinion was supported by the evidence and, therefore, admissible.

G&O also complains that Plaintiffs failed to adequately prove the value of their units before they sustained their injury. To prove dimunition in value, a party must show the difference in value before and after the injury. Southeast Consultants, Inc. v. O'Pry, 199 Ga. App. 125 (1991). In this case, Plaintiffs clearly established at trial that floods occurred during construction and prior to the closing of the units; the flooding was not disclosed to Plaintiffs before they closed on their units. Accordingly, the injuries to Plaintiffs occurred around the time of closing. Moreover, G&O did not offer any evidence whatsoever to controvert Plaintiffs' appraiser's opinions. The Court concludes, therefore, that the purchase price paid by Plaintiffs was proper evidence of their damages.

Next, G&O argues that Plaintiffs' experts were allowed to testify about standard of care and causation issues without establishing an appropriate foundation and without complying with the requirements set forth in O.C.G.A. § 24-9-67.1, Georgia's Daubert statute. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). At trial, Plaintiffs' experts testified regarding their observations of the property and of the civil designs and explained how they reached their causation conclusions. G&O failed to make Daubert objections during the trial regarding Plaintiffs' experts' qualifications. In fact, G&O declined to substantively cross-examine the experts regarding their qualification and failed to present any evidence to contradict their methodology. Therefore, G&O's post-trial Daubert objections regarding Plaintiffs' causation experts fail as a matter of law.

Finally, G&O asserts that the Court erred in its charges to the jury. Specifically, G&O argues

that the Court erroneously charged the jury on concurrent negligence and joint and several liability. At trial, the jury heard evidence and the arguments of counsel suggesting that third parties (including the City of Atlanta and other Defendants that were ultimately dismissed prior to deliberations) caused and/or contributed to Plaintiffs' injuries. As a result, the jury charges regarding joint and several liability and concurrent negligence were proper.

Moreover, G&O complains that the Court erred in failing to charge the jury on assumption of risk, a plaintiff's duty to mitigate damages, and a plaintiff's duty to avoid the consequences of a defendant's negligence. There was absolutely no evidence introduced a trial to support such charges and the Court's failure to give them was proper.

For the foregoing reasons, Defendant G&O's motion for judgment notwithstanding the verdict and new trial is hereby **DENIED**.

SO ORDERED this 13th day of June, 2006.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Michael J. Bowers, Esq.
David J. Marmins, Esq.
Matthew B. Ames, Esq.
James L. Hollis, Esq.
Balch & Bingham LLP
Fourteen Piedmont Center, Suite 1100
3535 Piedmont Road, NE
Atlanta, Georgia 30305

Kent T. Stair, Esq.
Gregory H. Wheeler, Esq.
Sharese L. Shields, Esq.
Carlock, Copeland, Semler & Stair, LLP
2600 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303