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THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

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PUTNAM CO. CIRCUIT COURT

DAVID W. DICKENS and DEBORAH A. DICKENS,

Plaintiffs,

v. **CIVIL ACTION NO.: 11-C-221-S**

SAHLEY REALTY COMPANY, INC., a West Virginia corporation; PATRICK L. STERNER, MELINDA R. STERNER, and WHR GROUP, INC., a foreign corporation doing business in West Virginia,

Defendants,

And

SAHLEY REALTY COMPANY, INC., a West Virginia Corporation,

Defendant/Third-Party Plaintiff,

v.

TERLIN ENTERPRISES, LLC, a West Virginia Limited Liability Company; and ROSEHILL ACRES – SECTION THREE HOMEOWNERS ASSOCIATION, INC., a West Virginia corporation,

Third-Party Defendants.

FINAL ORDER OF DISMISSAL BASED ON SUMMARY JUDGMENT

On October 26, 2012, came the parties hereto by counsel, pursuant to Motions for Summary Judgment filed by Defendant Sahley Realty Company, Inc. ("Sahley") and renewed Motions for Summary Judgment previously-filed by Defendants WHR Group, Inc. ("WHR") and Patrick and Melinda Sterner ("Sterners"). Third-Party Defendant Rosehill Acres – Section Three Homeowners Association, Inc. ("Rosehill") joins in the Motion for Summary Judgment of

Sahley. The only party which did not participate and has not herein appeared is Third-Party Defendant Terlin Enterprises, LLC ("Terlin"), against which the Court ordered Default Judgment in favor of Sahley, by Order entered June 11, 2012. No monetary award for damages was set forth in this Order.

The Court has carefully and thoroughly considered the Motions, Plaintiffs' response thereto, Plaintiffs' response to written discovery requests, supplemental pleadings and affidavits filed by all parties, and the transcript of the oral arguments, and hereby sets forth the following Findings of Fact and Conclusions of Law on the issues asserted in Plaintiffs' Complaint and upon the defenses raised by Defendants:

Findings of Fact

1. In 1999, during development of Rosehill Acres – Section Three, Sahley caused a retention pond to be constructed, according to the Subdivision Regulations of Putnam County, for the purpose of catching, collecting and carrying-away water run-off.

2. By Deed, dated August 25, 2005 (DB 459/378), Sahley conveyed Lot No. 329 to Terlin Enterprises, LLC, which lot shares its west property line with the pond.

3. On September 13, 2005, Third-Party Defendant Terlin Enterprises ("Terlin") was issued a building permit to begin construction of a residential single-family structure thereon. During construction, Terlin buried pipes across the common property line from the downspouts of the house, carving into and altering the contour of the east vertical side of the pond, contrary to the Regulations of Putnam County and the restrictive covenants of Rosehill Acres.

4. Following construction of the house, Terlin sold the real property to the Sterners by Deed, dated May 19, 2006 (DB 465/680).

5. Eventually, the Sterners were transferred by Mr. Sterner's employer, and WHR, a relocation company, was enlisted to handle the sale of the subject property. By Deed, dated Sept. 28, 2007, the Sterners, through WHR, conveyed the real estate to Plaintiffs.

6. Prior to the purchase of the property from the Sterners, Plaintiffs had the property inspected.

7. The inspection revealed several items to be repaired as a condition to the sale of the house. The inspection did not indicate any issues with the retention pond.

8. The necessary repairs were completed by Davis Building and Remodeling for the sum of $4,320.00.

9. At the completion of the repair work, on or about June, 2008, Plaintiffs executed a Release in favor of, *inter alia*, the Sterners and WHR. The Release relieved the Releasees from "all claims, demands and causes of action that Releasor may have or might subsequently accrue to Releasor arising out of or connected with, directly or indirectly the purchase of the [property]."

10. Plaintiffs now claim that, in 2010, they learned a "slip" had occurred in the east side of the retention pond at some time before their purchase, having occurred along the common boundary of Lot 329, and they assert that the "slip" allowed the side of the pond to expand, encroaching across the common property line into what is now their property.

11. Plaintiffs claim that the purported "slip" and encroachment occurred because the pond was negligently constructed, maintained and/or repaired by Sahley, and that this condition was of the nature which could not have otherwise existed without the negligence of Sahley – that is, the doctrine of *res ipsa loquitur*. In their Pre-Trial Conference Memorandum, Plaintiffs state that application of this doctrine is the only contested negligence issue remaining in this case.

12. Plaintiffs are specifically unaware of when the alleged "slip" occurred, except they report having been told by neighbors that it was during the ownership of the property by the Sterners. Accordingly, they assert that the Sterners and WHR fraudulently conveyed the property to them with knowledge of what they contend amounted to a defect. The Sterners and WHR deny any knowledge of the alleged "slip".

13. Plaintiffs claim that they have suffered "loss of property" and damages to the stability and integrity of their property. However, Plaintiffs, in discovery, presented no evidence of current instability in the pond. The pond remains today as it was at the time of the conveyance to Plaintiffs. Plaintiffs have also not set forth any evidence of damages.

14. Sahley denied that it was negligent in how the retention pond was constructed or maintained. It further denied that a "slip" of the nature and extent alleged by Plaintiffs occurred to change the contour of the east side of the retention pond or to encroach into Plaintiffs' property. Sahley also denied that there is any ongoing issue which endangers Plaintiffs' property.

15. As to the doctrine of *res ipsa loquitur*, Sahley asserts that, if an "encroachment" exists, other reasonable causes exist to explain same: 1) Terlin damaged the side of the retention pond by illegally burying drainage pipes to carry water from the downspouts of the house; 2) by very nature of the retention pond as a receptacle for surface-water runoff, the constant passage of water from the eastern (uphill) part of Section Three of Rosehill Acres across and over the east edge of the pond would naturally and expectedly lead to a change in its contour; and 3) any failure in maintenance and/or preservation of the retention pond was initially assumed by the Homeowners Association with its inception in 1999, and fully and finally by conveyance of the common areas to it in 2010.

16. Plaintiffs alleged, as against WHR Group and the Sterners, actual fraud, constructive fraud, breach of contract and negligence. The Court finds that the evidence is clear and uncontested that these Defendants never did anything to the pond by way of construction or repair. At the time Plaintiffs purchased the property, the location of the pond was known to Plaintiffs or would have been known to a purchaser as a result of diligent attention. Plaintiffs made no actual inquiry to the Sterners or WHR about the pond. None of the employees of WHR Group ever viewed the property or had it brought to the company's attention, by any party, that there was a pond adjacent to the property being sold. When it was agreed that some repairs would be made to the property, which included no repairs regarding the pond, Plaintiffs signed a written release as to "liability, responsibility, negligence, or wrong doing of any kind whatsoever in conjunction with sale of property in question", releasing the Sterners, WHR Group, the realtors and others.

17. Counterclaims and Cross-claims, seeking contribution and indemnification, had been asserted by and between each Defendant and each appearing Third-Party Defendant.

Conclusions of Law

1. In *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997), the West Virginia Supreme Court of Appeals established a three-part test for application of the doctrine of *res ipsa loquitur*:

> Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (1) the event is of a kind which ordinarily does not occur in the absence of negligence; (2) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Syl. Pt. 3, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997).

2. The Court concludes the doctrine of *res ipsa loquitur* is not applicable because Plaintiffs have not provided evidence that the retention pond has in fact moved or circumstantial eveidence of Defendants' negligence. Hence, Plaintiffs have failed to meet the first part of the *Foster* test: the event resulting in damages is of a kind which does not occur in the absence of negligence.

3. Plaintiffs also argue that Defendants breached an implied contract for the purchase of land and violated the covenant of good faith and fair dealing. They also claim that ownership of any part of the retention pond was not included in the purchase contract.

4. The Court concludes that Defendants did not breach an implied contract with Plaintiffs because Plaintiffs received the benefit of their bargain. Plaintiffs purchased the property at issue and lived there for several years before having a survey undertaken to determine the location of the retention pond's boundary line. At the same time Plaintiffs' purchased the property, the location of the pond was known to Plaintiffs or would have been known to a purchaser exercising diligent attention. *See Thacker v. Tyree*, 171 W.Va. 110, 297 S.E.2d 885 (1982). Without a breach of contract claim, the Court concludes that Plaintiffs' claim for violation of the covenant of good faith and fair dealing also fails.

5. Plaintiffs finally argue that Defendants knew the retention pond had encroached upon the property, and they committed fraud by inducing Plaintiffs to purchase the property without disclosing this fact. Defendants have denied any knowledge of any encroachment by the pond, and Plaintiffs have offered no evidence to contradict this. The Court concludes that Plaintiffs have failed to produce any genuine issue of material fact with regard to this claim. The Court further concludes that Plaintiffs set forth no evidence to support their claim of fraud,

constructive fraud, breach of contract, and negligence against WHR Group and the Sterners. In reviewing the facts, in a light most favorable to Plaintiffs, they do no put forth any set of facts in discovery, by affidavit, or otherwise which would support a finding in their favor under *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E.2d 885 (1982); *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); or *Teter v. Old Colony Co.,*, 190 W.Va. 711, 441 S.E.2d 728 (1994).

6. Pursuant to *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 320 (1995), the Court finds that there is no geniune issue of material fact with regard to any of Plaintiffs' claims. Therefore, the Court **ADJUDGES, ORDERS and DECREES** that the Motions for Summary Judgment of Defendants Sahley, WHR and the Sterners are **GRANTED,** and this Court **DISMISSES** this civil action with prejudice as to all counts, counterclaims, cross-claims, and third-party claims, and **DISMISSES** all defendants, including specifically Sahley, the Sterners, WHR and Rosehill, as there is no triable issue remaining.

The objections and reservations of Plaintiffs are hereby excepted and preserved.

ENTERED on this the 7th day of January, 2012.

PHILLIP M. STOWERS, CHIEF JUDGE
Circuit Court of Putnam County, W.Va.

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STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:
I, Ronnie W. Matthews, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and the seal of said Court.
this 9 day of Jan, 20 13
Ronnie W. Matthews, Clerk
Circuit Court
Putnam County, W.Va.

Approved for Entry by:

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cpy to Judge Reeder