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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ROBERT FRIEDMAN and LOUISE FRIEDMAN,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 601622/09

- against -

MOTION SEQUENCE
NO. 1 & 2

VILLAGE OF EAST HILLS, WARD ASSOCIATES, P.C.,
GALVIN BROTHERS, INC., SCHNEIDER ENGINEER,
P.L.L.C LEISURE SOLUTIONS, INC. and RICHARD
ARENELLA,

MOTION SUBMISSION
DATE: August 13, 2010

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Notice of Cross Motion	X
Affirmation in Opposition	X
Affirmation in Partial Opposition	X
Reply Affirmation	X

Upon the foregoing papers the motion by the plaintiffs for an Order granting plaintiffs a preliminary injunctive directing that defendant Village of East Hills "Defendant") be enjoined from allowing any water to escape from the Park property and/or drain onto the Premises and the cross motion by the defendant Ward Associates, P.C., for an Order pursuant to CPLR 3212 granting summary judgment and dismissing the Verified Complaint in its entirety, or, in the alternative, pursuant to CPLR 3212 granting summary judgment and dismissing the Verified Complaint as against Ward Associates P.C., are both determined as hereinafter provided:

The plaintiffs are the owners of property located at 60 Walnut Drive, East Hills, New York. The property is adjacent to certain land that had been an air national guard facility which was subsequently developed into a public park. The plaintiffs contend that subsequent to the development of the park rain water was diverted onto the plaintiff's property resulting in multiple instances of water and mud damage to the plaintiffs' property and home.

In examining the issue of a preliminary injunction, the Court in **Aetna Insurance Company v Capasso**, 75 NY2d 860, 552 NYS2d 918, 552 NE2d 166 set forth:

"The trial court properly noted that in order to be entitled to a preliminary injunction, plaintiffs had to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (see, *Grant Co. v Srogi*, 52 NY2d 496, 517, 438 NYS2d 761, 420 NE2d 953). Weighing these factors, the trial court denied the requested relief."

Aetna Insurance Company v Capasso, supra at 919

The Court observes that the plaintiffs' submit an affidavit of Frederick W. Glaser, PE and the defendant Village of East Hills an affidavit of Vincent A. Ettari, PE. A review of the respective affidavits sets forth an issue of fact as to the cause and nature of the water runoff at the plaintiffs' premises. In light of such issue of fact, the plaintiffs cannot show a probability of success (see, **Aetna Insurance Company v Capasso, supra**). As such, the plaintiffs application for an Order granting plaintiffs a preliminary injunctive directing that defendant Village of East Hills "Defendant") be enjoined from allowing any water to escape from the Park property and/or drain onto the Premises, is **denied**.

Based upon the fact that discovery in this action has not been undertaken, the defendant Ward Associates PC's application for an Order pursuant to CPLR 3212 granting summary judgment and dismissing the Verified Complaint in its entirety, or, in the alternative, pursuant to CPLR 3212 granting summary judgment and dismissing the Verified Complaint as against Ward Associates P.C., is **denied without prejudice to renew** after the completion of discovery.

SO ORDERED.

DATED:

10/29/2010

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Ray S. Mellon
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J.S.C.