

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

Michael L. Sensor, Esquire
Perry & Sensor
One Customs House, Suite 560
P.O.Box 1568
Wilmington, DE 19899

Kimberly Anne Meany, Esquire
Marshall Dennehey Warner
Coleman & Goggin
1220 N. Market St., Fifth Floor
P.O. Box 8888
Wilmington, DE 19899

Marie-Louise Caravatti
1405 35th Street, NW
Washington, DC 20007

Brian Thomas McNelis, Esquire
Young & McNelis
300 South State St.
Dover, DE 19903

Joseph S. Naylor, Esquire
Swartz Campbell, LLC
P.O. Box 330
300 Delaware Avenue
Suite 1130
Wilmington, DE 19899

Douglas A. Shachtman, Esquire
The Shachtman Law Firm
1200 Pennsylvania Avenue, Suite 302
Wilmington, DE 19806

RE: *Frederick S. Freibott and Elaine Freibott v. David Miller, et al; Marie-Louise Caravatti v. Indian Harbor, Inc., et al.*
C.A. No. S08C-11-025 RFS **~AMENDED~**

*Defendants Indian Harbor Villas Condominium Association, Inc.
and Randall Snowling's Motion for Summary Judgment. Granted.*

Submitted: October 2, 2012.
Decided: November 2, 2012.

Dear Counsel and Ms. Caravatti:

This is my decision on a summary judgment motion filed by Defendants Indian Harbor Villas Condominium Association, Inc. ("IHV") and Randall Snowling ("Snowling"), president of IHV. The motion addresses issues of negligence raised in two cases that were consolidated in June 2009.

Because Plaintiffs Frederick Freibott and Elaine Freibott (“the Freibotts”) settled their claims with all Defendants in October 2012, the summary judgment issue is moot as to the Freibotts. The motion as to Plaintiff Marie-Louise Carvatti (“Caravatti”) is granted. Facts pertaining to the Freibotts and Defendant David Miller and Defendant Lynn Miller are included herein as necessary.

Facts. A sprinkler system malfunction in one unit damaged the two adjacent units in February 2007 when none of the affected owners was in residence. The burst pipe occurred in the sprinkler system in Unit 3, owned by Defendants David Miller and Lynn Miller, who are not implicated in this motion. Caravatti owns Unit 4, adjacent to the Millers’ unit. The units are located in the community of Indian Harbor Villas Condominiums (“Indian Harbor”) in Bethany Beach, Delaware.

During a drive-through inspection, water and ice were observed outside Caravatti’s unit, and she was notified of the problem. Caravatti called the Millers and Snowling, all of whom lived in or around Washington, D.C. Snowling told Caravatti to contact the property manager, First Choice Property Management (“First Choice”). Caravatti and a First Choice representative discovered that the source of the leak was Unit 3, owned by the Millers. The property manager shut off the water in Unit 3 and contacted Mrs. Freibott, owner of Unit 2, who arrived later the same day. The property manager hired a contractor who was already on-site to start water remediation, using 14 commercial fans, 4 dehumidifiers and multiple vacuum cleaners and dryers.

Mrs. Freibott contacted Cogent Building Diagnostics (“Cogent”) to inspect her unit on February 12, 2007. At Cogent’s suggestion, the Freibotts replaced the contractor with Defendant Diamond Restoration (“Diamond”) to perform water remediation in their unit, starting the next day. The Millers also contracted with Diamond. Diamond worked for approximately one month, when

Cogent gradually took over the drying out process and mold removal. Diamond's motion for summary judgment as to Caravatti was granted in October 2012.

IHV made a formal claim for damages to its carrier, Scottsdale Insurance Company ("Scottsdale") March 6, 2007. Scottsdale paid \$50,000 to the Freibotts and put \$100,000 in escrow pending agreement as to its disbursement.

Caravatti alleges damages resulting from the burst sprinkler pipe but has not pled a sum certain.

Governing documents. The statutory duties of IHV and the unit owners are established by 25 *Del.C.* ch. 22, §2201–§2246 (" the Unit Property Act"). The Indian Harbor documents, dated August 1985, include the Declaration and the Code of Regulations, both of which incorporate Attachment "A." These documents form an ordinary contract among the unit owners created under the framework of the Unit Properties Act.

Standard of review. Summary judgment is granted only when, after viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact.¹ If the moving party makes this showing, the burden shifts to the non-moving party to show the existence of such facts.² If the non-moving party cannot show the existence of an essential element of his case, summary judgment is appropriate.³

Negligence. The elements of negligence are duty, breach, proximate cause and damages.⁴

¹*Dumbro v. Meyer*, 974 A.2d 121, 138 (Del.2009).

²*Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del.1979).

³*Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991).

⁴*Culver v. Bennett*, 588 A.2d 1094, 1097 (Del.1991).

Discussion. IHV argues that there is no evidence to support Caravatti's claims of negligence against IHV and Snowling. Caravatti alleges first that IHV was negligent in failing to adequately inspect and maintain the common elements, thereby causing or contributing to the burst pipe. Caravatti failed to name expert witnesses to support her claims by December 22, 2010, pursuant to the Court's scheduling order. On June 6, 2012, Caravatti filed a motion to identify experts and obtain reports in preparation for trial. Following oral argument, the motion was denied. The result is that Caravatti cannot make out a *prima facie* case of negligence against IHV.

Caravatti also alleges that IHV was negligent in allowing Defendant Diamond and/or Defendant Kristin to enter or perform demolition work in Caravatti's unit. On this assertion, Caravatti alleges that IHV is liable for any damages caused by Kristin or Diamond.

Kristin's summary judgment motion against Caravatti was granted in May 2012 in part because Caravatti abandoned her assertions of negligent demolition against both Kristin and Diamond. Caravatti testified that "I don't believe that I'm saying in there that they both [Kristin and Diamond] performed demolition and caused damage and/or performed negligently."⁵ Further, Caravatti presented no evidence of damages.

Diamond's summary judgment motion was granted in October 2012 because Caravatti cannot show proximate cause or damages without benefit of expert testimony. Thus, the argument that Kristin and Diamond were negligent is moot.

Caravatti raises three issues for the first time in her answering brief. She argues that IHV was negligent in failing to repair damage to her unit from a leak in Unit 3 in December 2004. She hired a contractor herself and paid for the repairs to her own unit in 2005. She argues that her unit was

⁵Caravatti Deposition at 149.

damaged more severely in 2007 because of IHV's previous failure to repair Unit 3. Although Caravatti was aware of the 2004 leak since it occurred and fact discovery concluded in December 2011, Caravatti first raised this question in her May 2012 answering brief. She has not presented expert reports to support her allegations, and judgment on this issue will be entered for IHV on this issue.

Caravatti also argues that IHV was negligent in submitting only Albert Stavola's (president of Kristin Konstruction) estimate of damages to Scottsdale because Art. VII, § 2 of the Regulations refers to "estimates" in the plural. She asserts that her then-attorney questioned the accuracy of the estimate, but no action has taken place until now. Caravatti previously obtained four professional estimates of her own. Although she and her attorney wanted to take up the matter with Council, they failed to name individuals as expert witnesses for trial pursuant to the scheduling order. As it is, the information from these individuals is inadmissible hearsay, and there is no evidence to support Caravatti's contentions. Assuming without deciding that IHV breached its duty by relying on only one estimate, Caravatti cannot show causation or damages. Judgment will be entered for IHV on this issue.

Finally, Caravatti argues that IHV breached its fiduciary duty to her by failing to give her more than two days' notice of a meeting scheduled to resolve the insurance claims. Caravatti requested a second meeting to explain the results of the first meeting. A second meeting did not take place and the Scottsdale disbursement has not been changed. Caravatti argues that Scottsdale allocated \$17,683.60, as estimated by Stavola, for Caravatti's unit. However, the record indicates that Scottsdale disbursed \$50,000 to the Freibotts and placed \$100,000 in an escrow account awaiting further resolution. Caravatti has not shown breach of a fiduciary duty, nor established

damages.

Viewing the facts in the light most favorable to Caravatti, there is no genuine issue of material fact. Summary judgment will be entered for IHV as to Caravatti.

In sum:

The Freibotts settled their claims with all Defendants in October 2012.

Diamond's motion for summary judgment against Caravatti was granted October 2012.

Kristin's motion for summary judgment against Caravatti was granted in May 2012.

IHV's motion for summary judgment against Caravatti is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary