

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAVIER QUEREGUAN, )  
JOANNE A. QUEREGUAN, and )  
AUREA E. QUEREGUAN, )  
 )  
Plaintiffs, )  
 )  
v. ) C.A. No. 20298-MG  
 )  
NEW CASTLE COUNTY, a political )  
subdivision of the State of Delaware, )  
 )  
Defendant/Third-Party )  
Plaintiff, )  
 )  
STATE OF DELAWARE, )  
 )  
Third-Party Defendant. )

MASTER’S REPORT  
(State’s Motion for Summary Judgment)

Date Submitted: April 3, 2008  
Final Report: May 2, 2008

Javier Quereguan, Joanne A. Quereguan, and Aurea E. Quereguan, Pro Se, Plaintiffs.

Eric L. Episcopo, Esquire and James A. Robb, Esquire, of New Castle County Law Department, Attorneys for New Castle County.

Laura L. Gerard, Esquire, of Department of Justice, Attorney for State of Delaware.

GLASSCOCK, Master

This is my final report with respect to the State of Delaware’s motion for summary judgment. For the reasons that follow, the motion is denied in part and continued in part.

This matter involves a claim by the plaintiffs for property damage against defendant New Castle County (the “County”). The basis of the complaint is that plaintiffs’ lot is next to a former school, the Absalom Jones School Property (the “School Property”), that a retaining wall seven feet high exists on the line between the properties, and that ground water pours through a crack in the wall, resulting in a nuisance or trespass which has lead to property damage to the plaintiffs.<sup>1</sup> The owner of the School Property leased by the County is the State of Delaware (the “State”). Plaintiffs’ direct claim against the State was dismissed by this Court on grounds of sovereign immunity. The County has brought a third-party action against the State for indemnification or contractual damages resulting from the State’s alleged failure to maintain the retaining wall under the terms of its lease with the County. The State has moved for summary judgment against the County. This is my decision on that motion.

### Standard

Summary judgment will be entered where no genuine issue of material fact exists and the record demonstrates that the moving party is entitled to judgment as a matter of law. Chancery Court Rules, Rule 56; Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59

---

<sup>1</sup> I entered summary judgment in favor of the County on the plaintiffs’ additional claims for personal injury in my report of April 22, 2008.

(1991). In considering a motion for summary judgment, I must view the facts in the light most favorable to the non-moving party. Acro Extrusion Corp. v. Cunningham, Del. Supr. 810 A.2d 345, 347 (2002).

The Law of the Case Doctrine/Plaintiffs' Failure to Support Their Claims.

The State points out that a former owner of the property, Red Clay Consolidated School District (the "School District") was dismissed from this action because this Court found that the plaintiffs had failed to state a claim against the School District; specifically, that the plaintiffs had failed to allege an unnatural condition or unreasonable use of the School Property resulting in water intruding onto plaintiffs' land, and consequent property damage. Because the plaintiffs' complaint also fails to make these allegations against the County or the State, the State argues that under the law of the case doctrine it should be entitled to summary judgment as well. In my April 22, 2008 report, however, I rejected a similar motion on behalf of the County, finding that, through the complaint and the pleadings, including the submission of an engineer's report, the plaintiffs have alleged facts that may result in liability on the part of the County. The plaintiffs' engineer opines that the maintenance of artificial fill and a retaining wall on the School Property causes ground water (which would otherwise percolate down-slope through various properties below the School Property) to be held above the natural grade, and that the resulting hydrostatic pressure causes discharge of water in an unnatural

manner onto the Quereguans' property. According to plaintiffs' expert, the retaining wall should have been constructed and maintained so as to drain naturally on to all the properties down-grade from the School Property. *See Quereguan v. New Castle County*, Del. Ch. No. 20298, Glasscock, M. (April 22, 2008)(Master's Report) at 3-5. I deemed the pleadings amended to conform to the record, including the engineer's report. *Id.* A finding of liability on the part of the County may lead, theoretically, to potential contractual liability to the County from the State. For the reasons stated fully in my April 22, 2008 report, the State's motion for summary judgment on this ground must be denied. For the same reasons, viewing the facts in the manner most favorable to the non-moving parties, the State's request that summary judgment be entered because the plaintiffs have failed to show evidentiary support for their underlying nuisance/trespass claims must be denied.

#### The Allegations of Breach of the Lease.

The State maintains that I should find that there has been no breach of its lease with the County, as a matter of law. According to the State, the law of this case is that "if the County could prove that after the date of transfer [of the School Property,] the State maintained [that] property in a manner that resulted in increased drainage problems on the Quereguan property and a breach of the lease, the County conceivably could overcome the State's sovereign immunity defense to such a claim." State's Opening Brief at 12,

*citing Quereguan v. New Castle County*, Del Ch., No. 20298, Parsons, V.C. April 24, 2006 (Mem. Op.). In other words, if plaintiffs prevail against the County then (according to the law of this case) the County may attempt to demonstrate that a breach of a provision of the lease has occurred, allowing it to seek indemnification or contribution from the State. Because my decision on primary liability must proceed any meaningful analysis of the County's rights under the lease, it is premature to consider the State's summary judgment motion with respect to breach of the lease. As a matter of judicial and litigants' economy, it is preferable to have before me the precise cause of liability on the part of the County (if any) before evaluating whether that liability arose from breach of the lease. *See Kidder, Peabody & Co. v. Maxus Energy Corp.*, Del. Ch., No. 9424, Allen, Ch. (December 27, 1998)(Mem. Op.) at 2 (noting that the Court has discretion to defer consideration of motion for reasons of efficiency and economy). I will continue consideration of this issue pending the outcome of the trial on liability.

#### Issues Arising under the Bond Bill

The State argues that proper construction of the bond bill which resulted in the purchase of the School Property from Red Clay by the State should result in a finding that it is immune from liability for any damage alleged here as a matter of law. This argument is logically a part of the motions concerning sovereign immunity currently before the

presiding Vice Chancellor. These issues were specifically retained by the Vice Chancellor, and thus the issues raised here should be placed before him.

Conclusion

For the foregoing reasons, the State's motion for summary judgment is denied in part and continued in part. The period for taking exceptions to this report will not begin to run until resolution of the liability issues at trial, and all exceptions are preserved until that time.

/s/ Sam Glasscock, III  
Master in Chancery