IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

NOONING TREE HOMEOWNERS ASSOCIATION, INC., et al.,	)	
Plaintiffs,	)	
	)	Cause No. 08SL-CC00505
v.	)	
	)	Div. 17
McBRIDE & SON HOMES, INC., et al.,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause came before the court for hearing on Defendants' Summary Judgment on November 15, 2011. The court took the matter under submission.

BACKGROUND

A landslide occurred in the Nooning Tree Subdivision in 2004 (the "First Landslide"). A second landslide occurred in the subdivision (the "South Landslide") in February 2005. The South Landslide went from the common ground through and onto the backyards of five individual lot owners. Both landslides caused severe damage to the lots of adjacent landowners and to the common ground controlled by the HOA. Accordingly, both the individual plaintiffs and the Nooning Tree Homeowners Association ("HOA") are plaintiffs.

The HOA and Defendants reached a settlement agreement that required Defendants to correct the damage caused by the First Landslide at their expense. While the release agreement (the "Release") was being negotiated, the South Landslide occurred and Defendants hired an engineering company to review both landslides. Plaintiffs contend that no formal claim was ever asserted against the Defendants for the South

Landslide during the resolution of the damages caused by the First Landslide. Defendants, on the other hand, claim that the Release entered into with respect to the First Landslide included a release of the Defendants for any and all damages caused by the South Landslide.

STANDARD OF REVIEW

Missouri Courts have repeatedly cautioned that summary judgment is an extreme and drastic remedy that should be exercised with great care. ***Robinson v. Ahmad Cardiology, Inc.,*** 33 S.W.3d 194 (Mo.App.E.D. 2000). Summary judgment is only appropriate in those cases where no genuine issues of material fact exists. ***Bueneman v. Zykan,*** 52 S.W.3d (Mo.App.E.D. 2001). A genuine issue of facts exists, precluding summary judgment, when there is competent evidence of two plausible, but contradictory, accounts of essential facts. ***Armoneit v. Ezell***, 59 S.W.3d 628 (Mo.App.E.D. 2001).

When faced with a motion for summary judgment, a court must view all facts and make all reasonable inferences in a light most favorable to the non-moving party. ***J.M. v. Shell Oil Co.***, 922 S.W.2d 759 (Mo. 1996). Courts have been extremely skeptical when considering summary judgment due to the suspicion that denial of a party's day in court borders on a denial of due process. ***Hammonds v. Jewish Hosp. Of St. Louis***, 899 S.W.2d 527 (Mo.App.E.D.1995).

LEGAL ANALYSIS

1. There is a question of fact as to whether the release agreement encompasses a release for both landslides

The Release specifically defines the area of the First Landslide and included a drawing of the First Landslide area which is attached to the Release as Exhibit A. It

depicts only Lots 90, 91 and 92 and makes no mention of Lots 83 through 87 which were damaged in the South Landslide. It also included a proposed work plan to address the damage caused by the First Landslide.

The Release states as follows:

> D. A slope failure ("Slope Failure") has occurred on a portion of the HOA Property and the property of one or more adjoining homeowners. The area of the slope failure (the "Subject Property") is depicted on Exhibit A, attached hereto.
>
> HOA...hereby fully, finally and unconditionally release, remise, acquit and forever discharge West Star, McBride... from all claims, liabilities, damages, losses costs and expenses, including without limitation all claims made, to be made or which might have been made (whether past, present, future, accrued, unaccrued, known or unknown) of any nature or kind in connection with the **Slope Failure, the Work, or the surface or subsurface condition of the HOA Property and the Subject Property** (whether existing or arising before, during or after completion of the Work)" (emphasis added).

It is undisputed that the South Landslide occurred on lots to the south of the First Landslide, and involved a different area of the common ground. The failure to include a drawing of the area affected by the South Landslide or depict or even refer to lots 83 through 87 damaged in the South Landslide creates an ambiguity that precludes summary judgment in this issue. As a consequence, parole evidence is admissible to discern the intentions of the parties to the release. Chuck Gunn testified in his deposition that the Release was limited to the First Landslide and was not intended to encompass the damage caused by the Second Landslide. The jury must weigh the evidence with respect to the intentions of the parties in order to resolve this question of fact.

Missouri holds that when a release contains "both general and specific language, the general language will be presumed to have been used in subordination to the specific, and will be construed and limited accordingly." ***Comm. Title. Co. v. Safeco Ins. Co.,***

795 S.W.2d 453, 457 (Mo. App. 1990). The defendants are free to present evidence to overcome this presumption but, ultimately, the jury must decide the issue.

2. Defendants are not entitled to summary judgment on Count 1 of their counterclaim

Defendants argue that the HOA breached the covenant not to sue that is contained in the Release by filing the case at bar. Again, the jury must determine whether or not the parties intended to generally include the South Landslide into the Release. If so, then it would appear that the Plaintiffs were in violation of the covenant not to sue. If not, then the covenant has no applicability to the Plaintiffs as it pertains to their claims for damages caused by the South Landslide.

3. The Individual Homeowner Plaintiffs provided notice to McBride before suit was filed

McBride argues that a notice provision in the sales contracts with the individual homeowners required the individual homeowners to give notice to McBride prior to filing suit. Plaintiffs contend that a letter dated May 11, 2007 from the HOA to McBride provides sufficient notice. This letter was sent some 8 months before the instant cause of action was filed and describes the South Landslide, specifies the lots damaged and indicates that legal action would be initiated if the Defendants did pay for the anticipated repair costs. See Exhibit S attached to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment. The court is of the opinion that this letter substantially complies with the notice provision and, at the very least, raises a question of fact sufficient to preclude summary judgment in favor of McBride. West Star was not a party to the sales contract and, therefore, cannot assert the notice provision in defense of the present cause of action.

4. The Waiver Provision in the Sales Contract is Void as Against Public Policy

The Missouri Supreme Court in ***Huch v. Charter Communications***, 290 S.W.3d 721, 725 (Mo. 2009) recognized that:

> The Missouri statutes … relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless. ***High Life Sales Co. v. Brown–Forman Corp.***, 823 S.W.2d 493, 498 (Mo. banc 1992) quoting ***Electrical and Magneto Service Co. v. AMBAC International Corp.***, 941 F.2d 660, 664 (8th Cir.1991).

Accordingly, the waiver provision is not enforceable against the individual purchasers. Again, West Star was not a party to the sales contract and, therefore, cannot assert the waiver provision in defense of the present cause of action.

5. There is a question of fact as to whether McBride knew or should have known that the area where Plaintiffs' homes were built was located in an area prone to landslides and that the lake would evolve into a wetland thereby precluding summary judgment

The evidence most favorable to plaintiffs is that McBride was the managing member of West Star LLC, the developer of the subdivision, and McBride served as the construction manager of the development of the subdivision. In these roles, McBride received numerous soil reports from SCI, a geotechnical company, who reviewed the soils conditions of the subdivision and issued several reports to McBride to assist them in developing the subdivision.

Importantly, McBride itself was concerned about the subsurface conditions as early as July 15, 1999, prior to the development taking place. In a memorandum concerning the same, McBride noted that it had concerns with shale and fill in the soil.

Exhibit Q. The presence of shale and fill increases the risk of landslides, and the Second Landslide was located on top of shale. The development also placed additional fill in the Second Landslide area, another activity that increases the risk of a landslide. Like McBride, the soil engineer SCI was also aware that shale was present in the area because their boring logs in their Soil Exploration report indicated the presence of shale.

In addition, the Nooning Tree Subdivision is located in an area where soil conditions are "susceptible to rapid erosion, landslide, settlement and/or creep." McBride's soil engineer was either aware of this designation, or should have been aware of this designation, as the geologic map that contains this information is readily available to St. Louis engineers. Finally, Volz, the engineering company who prepared the development plans for McBride, prepared a development plan document used by McBride that showed that, in the very area of the second landslide, an historic landslide had taken place. Thus, there is evidence from which a jury could reasonably conclude that McBride knew or should have known of the propensity of a landslide where the South Landslide occurred. Consequently, the court is bound to deny summary judgment in this respect.

Knowledge of Wetlands

The evidence most favorable to Plaintiffs establishes that, prior to development, McBride received a copy of a report called "Wetland Delineation," that discussed in detail the issues involving wetlands in the subdivision. McBride also received a copy of the 404 permit to the U.S. Army Corps of Engineers that specifically mentions the lake area promoting the emergence of wetland vegetation. Finally, McBride specifically raised the issue in a construction meeting in July 1999. In that meeting, McBride was concerned about whether the HOA knew about the wetlands and whether McBride's sales

and marketing knew about the wetlands. Exhibit Q. Again, there is evidence from which a jury could reasonably conclude that McBride knew or should have known of the wetland issue such that summary judgment must be denied in this respect.

6. Because McBride's employees served on the HOA Board it served as a trustee and consequently had a fiduciary duty to both the HOA and the homeowners

In ***Twin Chimneys Homeowners Association v. J.E. Jones Construction Co.,*** 168 S.W.3d 488 (Mo. App. 2005), the court held that, as a matter of law, an employee of a developer that serves as a trustee of a subdivision gives rise to fiduciary duty on the part of the developer to the homeowners association.[1] The court in *Twin Chimneys* affirmed a jury verdict finding that the developer breached this duty for failure to maintain and repair siltation of a lake; monument lighting and an irrigation system. Because McBride's employees were serving on the HOA board until June 27, 2002, well after all of the homes had been sold to Plaintiffs in this case, they had a fiduciary duty to the homeowners for that period of time.

It is well established that a fiduciary is not allowed to remain silent, and has a duty to speak and divulge material facts. ***Centerre Bank of Independant v. Bliss***, 765 S.W.2d 276 (Mo. App. 1988). The jury must decide whether McBride, while serving on the Board of Directors, knew or should have known that these homes were built on unstable shale soil and were built in an area prone to landslides. And, if so, whether McBride breached its fiduciary duty by failing to disclose this information to the Plaintiffs when their homes were being purchased and/or failing to remedy the problems after the purchase and before its employees resigned from the HOA Board..

[1] In *Twin Chimneys* the areas of concern were on common ground so the court held that the Association was a real party in interest. In the case at bar, both common ground and private lots were damaged and, therefore, both the HOA and the individual homeowners are real parties in interest and McBride has a fiduciary duty to both.

7. West Star had a duty to properly construct the slopes on which the homes were built

West Star argues that it owed no duty to the individual homeowners to properly build their lots, and, therefore, it could not have been negligent to them. West Star previously made this exact argument to the Court in its Motion to Dismiss. This Court (through Judge Kendrick) ruled against West Star on this point, holding that:

> Defendant West Star asserts that while there may have been a duty that ran to the Homeowners Association, there is no such duty to future individual homeowners. Defendant's argument is, essentially, that there is no privity between Defendant West Star and future homeowners. While this may be germane if Plaintiffs were asserting breach of contract claims, it is not relevant in a tort action, because the question is not one of privity, but one of forseeability. In this matter, it is reasonably foreseeable that future homeowners may have to pay for repairs to their property if West Star negligently developed the subdivision and it damages their property.

Accordingly, West Star owed the Plaintiffs a duty as a matter of law. The only issue remaining is whether a jury believes West Star breached its duty and caused Plaintiffs to suffer damages.

8. Counts 3, 4 and 5 are only based on claims by the individual homeowner Plaintiffs

McBride argues that it is entitled to judgment against the HOA on Counts 1, 3, 4, and 5 because it didn't sell or transfer property to the HOA. Counts 3, 4 and 5 against McBride are claims brought solely by the individual homeowner plaintiffs against McBride, so summary judgment against the HOA on this point is moot. Count 1, however, is a fiduciary duty claim brought by all Plaintiffs, and, summary judgment is improper for the reasons previously stated in §6 *supra*.

9. The individual homeowners are the real party in interest to their claims

Defendants argue that the individual homeowners are not the real party in interest because they have "assigned any recovery they might obtain from this lawsuit to the HOA." Plaintiffs assert that they did not assign their entire claims to the HOA – the only thing agreed to by the individual homeowners was to pay over a portion of the recovery to the HOA, for reimbursement for fronting the costs of the repairs to their property. Obviously, the homeowners cannot recover twice, however, that is between the HOA and the homeowners. Additionally, the homeowners can pursue damages beyond just the cost of repairs. Under the Missouri Merchandising Practices Act the homeowners are entitled to seek punitive damages and attorney's fees over and above their actual damages. Accordingly, summary judgment is denied in this respect.

For the foregoing reasons, the court denies the Motion for Summary Judgment filed by the Defendants in all respects.

SO ORDERED

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Judge Joseph L. Walsh, III Dated
Division 17

Cc: All Attorneys of Record