

IN THE COURT OF CLAIMS OF OHIO

GRACE B. EDWARDS :
Plaintiff : CASE NO. 2002-01233
v. : Judge J. Warren Bettis
OHIO DEPARTMENT OF : DECISION
TRANSPORTATION :
Defendant :

: : : : : : : : : : : : : : : :

{¶1} Plaintiff brought this action against defendant, Ohio Department of Transportation ("ODOT"), alleging that defendant negligently performed highway construction activities that resulted in damage to her home and property. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff filed this claim on January 9, 2002, alleging that defendant's negligent repair work on Interstate 280 ("I-280") during 2001 caused significant property damage. Defendant maintains that much of the damage plaintiff complains of has existed for decades, since at least 1958, and that plaintiff's claims are barred by the statute of limitations as well as by the doctrines of settlement and release, laches, and sovereign immunity.

{¶3} Plaintiff testified at trial that her home was built in 1946 and that she and her late husband purchased the home in 1952. Some time in the mid-1950s, ODOT began construction on a highway directly west of plaintiff's property. Plaintiff acknowledged that in 1956 she entered into a settlement agreement with ODOT for acquisition of part of her land for \$4,800 and that the release she signed included all future claims for compensation as a result of construction and improvement of State Route 24-A, Section 4.04 (herein

referred to as I-280). However, plaintiff claims that the damages she now seeks arise out of construction negligently performed by defendant on improvements to I-280 including the expressway exit ramp directly adjacent to her property.

{¶4} Plaintiff explained that due to the widening of I-280, the exit ramp was relocated closer to her property line. To accomplish this move, defendant excavated soil from below the surface of land at the bottom of the slope between the exit ramp and the western edge of her property and then placed concrete retaining walls at the base of the slope, which were approximately three feet high. Plaintiff argues that defendant negligently reconfigured the slope and caused significant disruption of the soil and that the disturbance of the soil combined with the vibrations from pile-driving operations created myriad problems in her home and the surrounding property. Plaintiff also argues that soil was moving toward the slope and away from the house as a consequence of ODOT's construction activity. According to plaintiff, soil has eroded and receded from the foundation, and cracks and heaves have appeared in the basement floor, the walls of the foundation, and the interior walls of her home, and visible damage has been caused to the fencing, sidewalks, porches, garage, and driveway. Plaintiff also has alleged that ODOT failed to perform regular maintenance on the vegetation growing on the slope and that such neglect allowed both noxious weeds to encroach upon her property and tree limbs to overhang her roof with resultant damage to the shingles. Plaintiff related that she has filed at least two prior complaints against defendant regarding property damage, with the most recent occurring in 1994.

{¶5} On cross-examination, plaintiff admitted that she has had ongoing problems with cracks in the plaster since at least the 1970s; that she was "always" patching cracks in the plaster; that in 1975 she and her late husband had an addition built onto the rear of the house and that invoices from 1983 through 1994 list repairs needed for the basement floor, the garage, sidewalks and front steps, and that one invoice mentions that the addition needed to be resealed. Plaintiff testified that in 1997 or 1998, she contracted to have the foundation under the addition removed and replaced, the kitchen cabinets raised, and the concrete front stairs repaired.

{¶6} Plaintiff further testified that she noticed an increase in the amount of damage during the spring and summer of 2001 while highway construction was ongoing. She related that she had an inspection of her home completed in the fall of 2001. She asserted that the cost to repair the foundation totaled approximately \$42,000. Plaintiff alleges that damage such as cracks in the walls, sloping of the floors, and separation of kitchen cabinets from both the wall and the ceiling is ongoing and that there is a continuing separation at the roof line between the house and the addition. She explained that over the years she has complained to ODOT and numerous state and local elected officials about her concerns but that she has not successfully pursued litigation prior to filing this complaint because she had not been able to obtain an expert opinion.

{¶7} Plaintiff stated that the limbs of the trees overhanging her roof have caused openings to develop such that rainwater leaks in, and wild creatures such as racoons and squirrels now enter her home. Plaintiff admitted that although she has hired laborers to patch the roof on occasion, the original roof has never been replaced. Plaintiff testified that due to the ongoing nature of the damage, repair estimates now exceed \$70,000. At trial, plaintiff submitted numerous photographs depicting the claimed damage.

{¶8} Although, defendant argued, inter alia, that plaintiff's cause of action was barred by the statute of limitations, this court does not agree. R.C. 2743.16(A) states, in part:

{¶9} "****, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of the accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." The Tenth District Court of Appeals has discussed the application of R.C. 2743.16 (A) as follows: "[f]or cases involving property damage resulting from negligent construction, unless damage is immediate, the cause of action does not accrue until actual injury occurs or damage ensues." *Thompson v. Ohio Dept. of Transp.* (Nov. 26, 1996), Franklin App. No. 96API04-497. In this instance, plaintiff claims she noticed the appearance of new damage while the 2001 highway improvement project was in progress.

Under R.C. 2743.16(A), plaintiff has timely filed this action. However, the court concludes that any claims predicated upon defendant's alleged acts or omissions prior to January 9, 2000, are barred pursuant to R.C. 2743.16(A).

{¶10} Turning to the merits of plaintiff's claim, defendant maintains that the damage plaintiff complains of has been in existence for many years, that there is no evidence that the highway construction was a proximate cause of the damage, and that the damage in all probability resulted from improper home maintenance or unskilled repair efforts. In addition, defendant argues that the entire subdivision where plaintiff's property is situated was built on very poor soil and that the land was at one time described as a swamp. Thus, defendant contends that some of the cracks may be due to the house settling over time or because of changes in the primarily clay-like soil which can shrink during a particularly dry season. Defendant also asserts that some of the damage to the foundation resulted from soil disruption during the initial excavation when the addition was built and again when the foundation was changed in 1997. Defendant's alternate theory is that the foundation was damaged by water seeping into the soil around the foundation from malfunctioning or misplaced gutters and spouts.

{¶11} Defendant produced a copy of the claim plaintiff filed with the Sundry Claims Board in 1970. Plaintiff acknowledged that the document referenced a crack in the basement wall, plaster that had cracked throughout the house and the garage floor that had sunk. Defendant also presented plaintiff with a letter that she drafted dated March 21, 1991, which lists damage to doors, walls, porches, steps, and the garage.

{¶12} Plaintiff hired Andrew Heydinger, Ph.D., a civil and geo-technical engineer who is a soil specialist, to inspect her property and formulate his opinion regarding structural damage and slope stability. He testified that plaintiff's house sits atop a steep incline next to the exit ramp from I-280, that there is a fence at the top of the slope, and that the western side of plaintiff's house is approximately five feet from the fence. He stated that he looked near the fence for signs of "escarpment," which he explained as a difference in soil heights. He testified that he did not find any evidence of this occurring;

that there was no extrinsic evidence of soil movement toward the slope either large or small; and that there was no evidence of slope failure at the top of the slope. However, he testified that the marked increase in the appearance of damage described to him by plaintiff indicated some outside factor was causing the deterioration. On cross-examination, he acknowledged that his opinion was based on information supplied to him by plaintiff and that he could not state that the damage was caused by construction activity performed by defendant.

{¶13} Mark Mondora, ODOT's manager for the I-280 widening project, testified that highway traffic is now traveling approximately five feet closer to plaintiff's property. He confirmed that construction activity at times had been conducted 24 hours per day and that the noise and lights were disruptive to the community. However, he explained that the scope of the project required lanes of traffic to be either closed or rerouted and that in order to provide the greatest safety to the motoring public as well as to the construction workers, it was necessary to complete portions of the work at night, despite the inconvenience to the surrounding property owners. In addition, he maintained that on those occasions when plaintiff complained about the vegetation overgrowth on the slope, either he or someone from his district responded in a timely manner and trimmed tree branches or engaged a contractor to apply herbicide to weeds and vines as needed.

{¶14} Eugene Geiger, an ODOT engineer for over 20 years, testified that he inspected the slope on November 14, 2002. He stated that the slope was a 2:1 ratio; that this ratio complied with the original ODOT construction plans; that he saw no signs of slope instability; and that the fence at the top of the slope was not out of plumb nor had it moved laterally. He related that he examined the exterior and the interior of plaintiff's home and then he described for the court the extent of the damage that he had witnessed, which was similar to damage claimed by plaintiff. Geiger observed that the floor of the addition was not level with the adjoining kitchen floor and that, as he walked across the floor of the addition toward the back of the house, it sloped downward approximately 4-6 inches. He opined that such degree of settling was unlikely to be caused by slope movement. He further opined that if slope movement was responsible for the severe difference in the floor

height he would expect to see bulges and cracks in the yard between the house and the top of the slope. Moreover, he stated that he would expect to see movement of the fence first. Geiger emphasized that the sidewalk on the west side of the house was broken and tilted in all different directions and that if there had been slope movement he would expect the sidewalk to move uniformly in the direction of the slope. Geiger testified that the house showed evidence of poor construction and that he believed it was not built according to code specifications. Geiger also testified that he did not attribute the claimed damage to defendant's pile-driving operations because those vibrations had been monitored at a distance of 15 feet and were noted to have been within acceptable limits.

{¶15} Allen Kundtz, a consultant on issues of structural engineering, testified that he reviewed both the original and the more recent construction plans for the highway project. He opined that he believed there had been no slope movement since the interstate was built in 1956. He also inspected plaintiff's home and property and stated that he found most of the damage to be confined to the addition. He testified that there was no causal relationship between the construction activity taking place on I-280 and the damage occurring to plaintiff's home. In addition, he stated that damage from pile-driving vibrations usually causes a widespread similar pattern of cracking but that there was no discernible pattern to the cracks present in plaintiff's home. He further explained that if slope failure was responsible for the damage, he would expect to see lines or ridges in the soil between the house and the fence; however, he stated that he saw no evidence of soil disruption.

{¶16} J. Scott Heisey, a geo-technical engineer, also testified for the defendant at trial. He stated that he too had visited plaintiff's property and had not observed any indication of slope movement. He described the fence as being generally in good condition for its age. He noted that the soil around plaintiff's home was free from bulges or tension cracks. He further testified that the outside wall at the northwest corner of the addition was plumb, signifying that movement occurred as a result of vertical settlement and that it was not due to slope movement. Heisey reasoned that since the addition to plaintiff's home

sloped more toward the back of the property than it did toward the fence and because the northwest corner was vertically plumb, downward settling had occurred, not slope rotation.

{¶17} Plaintiff presented her cause of action under a theory of negligence. In order for plaintiff to prevail upon such claim, she must prove by a preponderance of the evidence that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶18} Upon review of all the testimony and evidence presented, the court finds that plaintiff has failed to prove, by a preponderance of the evidence, that defendant committed any negligent act during the 2001 highway improvement project that proximately caused damage to her property. Plaintiff did not prove that the soil excavation at the base of the slope caused the damage to her home nor did she prove that any slope movement occurred. The court is convinced that if movement of soil significant enough to damage the foundation were occurring, then evidence of slope movement would necessarily have to be apparent in the yard between the house and the fence. The court notes that none of the persons who viewed plaintiff's property saw any bulges, ridges or evidence of soil delineations. In addition, the court finds that the photographs of the sidewalk on the west side of plaintiff's property show that the concrete was broken and tilted in a haphazard manner such that it did not appear to be rotated or pulled only toward the fence. The court also finds the testimony of Mr. Heisey was particularly persuasive, especially with respect to the observations and measurements that he recorded in reference to the northwest corner of the addition. The fact that the addition sank straight down and that the northwest corner did not lean toward the slope signifies to the court either that the house and the addition either were poorly constructed or that the soil under the house or the addition was not adequate to provide the proper support to the foundation.

{¶19} In addition, the court finds that plaintiff failed to prove that defendant acted negligently with respect to the maintenance of the vegetation growing on the slope area. The court finds that defendant responded in a timely manner to plaintiff's complaints

regarding the encroachment of noxious weeds. Plaintiff specifically failed to prove that any act or omission of defendant with respect to maintenance of the vegetation on the slope caused damage to her roof. Although plaintiff testified that she had repairs to the roof performed by both skilled and unskilled laborers over the years, upon plaintiff's own admission, the roof had never been replaced since the home was built more than 50 years ago.

{¶20} For the foregoing reasons, the court finds plaintiff has failed to prove any of her claims and accordingly, judgment shall be rendered in favor of defendant.

{¶21} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

Entry cc:

Katryna Johnson
1445 Worthington Woods Blvd.
Suite C
Worthington, Ohio 43085

Attorney for Plaintiff

Velda K. Hofacker Carr
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Assistant Attorney General

SJM/cmd
Filed April 1, 2004
To S.C. reporter April 16, 2004