

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED

2003 AUG 29 P 1:44

JAMES W. MARBLE and)
M. MARTHA MARBLE,)
Plaintiffs,)

v.)

FIRST AMERICAN FLOOD DATA)
SERVICES, INC. and)
BANKNORTH GROUP, INC.,)
Defendants.)

SUPERIOR COURT
WASHINGTON COUNTY
Washington Superior Court
Docket No. 87-2-01 Wncv

Plaintiffs' Motion to Alter or Amend Judgment Pursuant to V.R.C.P. 59 (e)

Plaintiffs cite to many facts "in the record" in support of their claim that there are facts from which a jury could infer that they relied on the Determination in deciding not to purchase flood insurance. Many of these citations are improper, as they are allegations in the complaint (¶6a), discovery statements made prior to deposition (¶6b), statements contained in statements of undisputed material fact that are not fully supported by the record to which citation is made (¶6c and d), and documents (¶6f and g). One of the challenges of this case was that the Motions for Summary Judgment were not filed after discovery was complete. Rather, discovery continued throughout the period of such filings, and "new" citations to the record, containing actual deposition testimony rather than initial claims made in the complaint or interrogatory answers, were continually being filed, thereby changing the state of the record evidence.

In a summary judgment motion, the court should be able to decide the legal issues based on the statements of undisputed and disputed material facts, that is, assuming that the portions of the record cited actually support the assertions in the statements of undisputed and disputed material facts. That was impossible in this case, partly due to discrepancies between the assertions in the statements and the record evidence cited, which did not always support the statements, and more significantly due to the constantly evolving state of the evidence due to ongoing discovery. Nonetheless, the court read thoroughly all of the material submitted, and used as the basis for its decision the most developed evidence on any point (e.g., Mr. Marble's actual deposition testimony, as opposed to earlier statements). After identifying that evidence, the court viewed all of the updated evidence in the light most favorable to the Plaintiffs, with the Plaintiffs receiving the benefit of all reasonable doubts and inferences.

Even using this standard, the court was unable to infer from the Plaintiffs evidence that the Plaintiffs' decision to not purchase flood insurance was in reliance on the Determination.


There is sufficient evidence to support the conclusion that it was made in reliance on the factor of whether the lender required it to be purchased or not, but no evidence that the decision was made in reliance on a representation that an expert opined that their property was not in a flood zone. As Dobbs notes in the passage quoted on page 7, reliance requires a choice of conduct *because of the representation*.

Plaintiffs have the obligation to offer evidence in support of each element of a cause of action. Because the court's review of the evidence shows that there was insufficient evidentiary support for reliance at all, the element of justifiable reliance, one element in the cause of action which the court determined must be the basis for the case, could not be met. It is worth noting that because of a lack of evidence on that element, the Defendants motions were granted, and the court did not examine whether there was sufficient evidence to support each of the other elements identified on page 5 of the Decision. Defendants' motions would not be denied unless Plaintiff had provided sufficient evidence on which to go to the jury on each of the elements. Plaintiffs do not address this point in their Motion to Alter or Amend.

Order

For the foregoing reasons, Plaintiffs' Motion to Alter or Amend is *denied*.

Dated at Montpelier, Vermont this 26th day of August, 2003.



Mary Miles Teachout
Superior Court Judge