

SUPERIOR COURT OF NEW JERSEY

SOMERSET, HUNTERDON AND WARREN COUNTIES

VICINAGE 13

EDWARD M. COLEMAN
PRESIDING JUDGE-CIVIL



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September 15, 2011

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Re: Nevins v. Toll Brothers, Inc., et al.
Docket #Som-L-1102-01

Dear Counsel:

As you are aware, Toll Brothers, Inc. has requested an Evidence Rule 104 hearing as to Plaintiff's expert, Anthony Dowling's, testimony. This is an issue we discussed on September 2, 2011 at the case management conference. Arguments were raised then on behalf of Toll Brothers, Inc. regarding the need for an Evidence Rule 104 hearing prior to trial. Toll Brothers, Inc. argues that the expert report and conclusions by Mr. Dowling do not set forth the methodology and actual basis for the opinions. Citing Ripa v. Owens-Corning Fiberglass Corp., 282 N.J. Super. 373 (App. Div. 1995) that an Evidence Rule 104 hearing should be held when the expert's foundation and/or methodology is called into question. Defense argues that Mr. Dowling has essentially lifted word-for-word a prior barred expert report, the Roop/Hunt report. The details of that report has already been precluded by a prior court order.

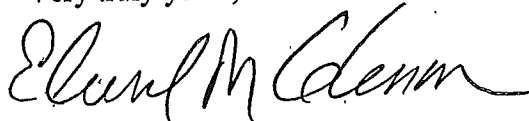
I have reviewed his deposition taken on December 10, 2009. At times Mr. Dowling agrees with the Defense that he was relying on the expertise, testing, analysis and conclusions reached by other experts in forming his opinion basically agreeing with what they had written. He did not conduct an independent testing regarding the problems at the residence and the recommended solutions. He agrees that he did not conduct any engineering calculations or any analysis to confirm whether or not the foundation walls, for example, were appropriate.

I have also reviewed Mr. Dowling's supplemental certification dated July 10, 2010 wherein he states that he did not accept anything as true in the Roop/Hunt report unless he personally viewed the area and also determined that a construction defect existed. He claims that he examined each and every wall, floor, ceiling, tile, nook and cranny in the Nevins home to determine if what he saw in his professional opinion was a construction defect and the cure for the defect.

I understand that the Roop/Hunt report has been stricken for consideration in this case. The Appellate Division, in their review of this court's decision, pointed out that the expert testimony should not be used as a vehicle for wholesale introduction of an otherwise inadmissible evidence, citing to Agha v. Feiner, 198 N.J. 50 (2009). I anticipate that Plaintiff will follow the Agha decision and not attempt to use the Roop/Hunt report as a basis for Mr. Dowling's opinion.

Given those perimeters for Mr. Dowling's testimony, I do not find that there is any need for a separate Evidence Rule 104 hearing for his testimony prior to trial. Therefore, the request for that hearing is denied.

Very truly yours,



Edward M. Coleman, P.J.Cv.

EMC:ttv