

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1337

CA 11-00444

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

VERIZON NEW YORK, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BARLAM CONSTRUCTION CORP., DEFENDANT,
AND ECSM UTILITY CONTRACTORS, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DOBSHINSKY & PRIYA, LLC, NEW YORK CITY (NEAL S. DOBSHINSKY OF
COUNSEL), FOR DEFENDANT-APPELLANT.

SOLOMON AND SOLOMON, P.C., ALBANY (TODD M. SARDELLA OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), dated November 9, 2010. The judgment
awarded plaintiff the sum of \$47,124.87 against defendant ECSM Utility
Contractors, Inc.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs and the complaint is
dismissed.

Memorandum: Plaintiff, the owner of underground cables and
facilities on a construction site in Camillus, New York, commenced
this action seeking money damages arising from the damage caused to
its cables. Defendant Barlam Construction Corp. (Barlam) was a
subcontractor preparing the property for residential housing, and
defendant ECSM Utility Contractors, Inc. (ECSM) was a utility locator
for plaintiff. In accordance with General Business Law §§ 760 - 767
and 16 NYCRR part 753, Barlam telephoned the one-call notification
system to request a mark-out of all underground facilities in the area
that it planned to excavate. ECSM was then electronically notified to
conduct the mark-out of plaintiff's underground facilities. An ECSM
employee marked out plaintiff's facilities on December 1, 2005 using
orange paint and flags, but almost two weeks later Barlam dug up some
of plaintiff's cables while excavating the property. Following a
bench trial, Supreme Court entered judgment in favor of plaintiff
against ECSM. We reverse.

We note at the outset that New York does not recognize tort
claims arising out of the negligent performance of a contract (see
Sommer v Federal Signal Corp., 79 NY2d 540, 551; *Gallup v Summerset*

Homes, LLC, 82 AD3d 1658, 1660), and plaintiff failed to prove that ECSM owed it a duty independent of any contractual obligations. We further conclude that plaintiff failed to prove that ECSM breached the contract between the parties inasmuch as plaintiff failed to introduce into evidence the original agreement between the parties, and the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it (see *Paz v Singer Co.*, 151 AD2d 234, 235). Here, plaintiff failed to establish that the original contract came within an exception to the best evidence rule by sufficiently explaining the unavailability of the original contract (see generally *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644), and the court erred in permitting plaintiff to establish the terms of the contract through secondary evidence in the absence of any proof that the original contract was lost or destroyed (see *id.* at 644; *Chamberlain v Amato*, 259 AD2d 1048, 1048-1049).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court