

**Village of Palmyra v Hub Langie Paving, Inc.**

2009 NY Slip Op 32384(U)

October 16, 2009

Supreme Court, Wayne County

Docket Number: 58637/2007

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

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VILLAGE OF PALMYRA,

Plaintiff,

-vs-

HUB LANGIE PAVING, INC., HARLEYSVILLE  
WORCHESTER INSURANCE COMPANY and  
TURNER UNDERGROUND,

Defendants.

DECISION

Index No. 58637

2007

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HUB LANGIE PAVING, INC.

Third Party Plaintiff,

-vs-

SNIEDZE ASSOCIATES,

Third Party Defendant,

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TURNER UNDERGROUND,

Third Party Plaintiff,

-vs-

SNIEDZE ASSOCIATES,

Third Party Defendant

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The Plaintiff Village of Palmyra (“Village”) has moved for partial summary judgment on the issue of liability against both Co-Defendants Hub Langie Paving, Inc. (“Hub Langie”) and Turner Underground (“Turner”). Each Co-Defendant has opposed the Village’s motion, and has also cross-moved for an order dismissing the Village’s Complaint. There are also two third-party actions. The Third Party Defendant Sniedze Associates in each action (“Sniedze”) has moved for an order dismissing the Third Party Complaints of Hub Langie and Turner, respectively. Both Third-Party Plaintiffs have opposed the Sniedze motion. Third-Party Plaintiff Hub Langie has also moved for an order declaring that it is entitled to both common law indemnification and contribution from Sniedze and

Turner, respectively. (The Court notes that Defendant Harleysville Worcester Insurance Co. Is no longer a party to this action.)

On July 2, 2003 the Village entered into a contract with Hub-Langie to perform work relative to its Sanitary Sewer System Improvement Project, Phase II. The scope of the project, which was designed by Sniedze as the Village Engineer, was to improve, repair and renovate two sewage pump stations owned by and located in the Village, and to install a new force main beneath Main Street and Hyde Parkway.

As a condition of the contract, Hub Langie certified in substance that it had reviewed all documents provided by the Village and its Engineers, and represented that it assumed responsibility for the accuracy of the drawings and specifications, and that any and all conflicts, errors or discrepancies had been resolved with the Engineer prior to the commencement of operations. Defendant Hub Langie subsequently contracted with Defendant Turner to perform the directional drilling, a lateral drilling process designed to install the underground force main without damage to the road.

In October 2003, as work was progressing on the project, the Village maintains that Hub Langie and Turner allegedly caused serious damage to the Village's existing sanitary sewer main as a result of the drilling process.

(The scope of the damage and the necessary repair work was set out in a letter from Sniedze to Hub Langie, dated December 1, 2004, which is before the Court as an exhibit attached to the Village's Second Amended Complaint.) Turner subsequently left the project, maintaining that the Sniedze plans and specifications were defective, and that Sniedze unjustifiably refused to agree to any field changes, which were allegedly necessitated by unforeseen soil conditions. Turner was replaced by non-party Underground Technologies, which continued the directional drilling process.

In response to Sniedze's letter, Hub Langie responded with a repair estimate, indicating that the repairs to the system and the road would cost approximately \$283,000.00. Other estimates were subsequently obtained. Hub Langie and Turner, however, refused to pay for the repairs, and as of the date of these motions, there have been no repair efforts undertaken by any of the parties.

Pursuant to the terms of the Agreement with the Village, Hub Langie gave its assent to certain representations and responsibilities, including the following:

7.3 CONTRACTOR has obtained and carefully studied (or

assumes responsibility for obtaining and carefully studying) all such examinations, investigations, explorations, tests, reports and studies (in addition to or to supplement those referred to in paragraph 7.2 above) which pertain to the subsurface or physical conditions at or contiguous to the site or otherwise may affect the cost, progress, performance or furnishings of the Work as CONTRACTOR considers necessary for the performance or furnishing of the Work at the contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents, including specifically the provisions of paragraph 4.2 of the General Conditions; and no additional examinations, investigations, explorations, tests, reports, studies or similar information or data are or will be required by CONTRACTOR for such purpose. (emphasis added)

- 7.4 CONTRACTOR has reviewed and checked all information and data shown or indicated on the Contract Documents with respect to existing Underground Facilities at or contiguous to the site and assumes responsibility for the accurate location of said Underground Facilities. No additional examinations, investigations, explorations, tests, reports, studies or similar information or data in respect of said Underground Facilities are or will be required by CONTRACTOR in

order to perform and furnish the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents, including specifically the provisions of paragraph 4.3 of the General Conditions. (emphasis added)

Hub Langie also agreed to certain conditions and responsibilities set forth in documents incorporated in the agreement, including the following:

#### SPECIFICATIONS SECTION 1.1.6

Information on underground utilities and structures are shown according to available information, and are presented for the convenience of the Contractor.

It is the Contractor's responsibility to locate and protect all existing utilities, underground structures and piping before, during and after excavation. (emphasis added)

All utilities, underground structures and piping shall be protected in a manner acceptable to the Engineer and to the Owner of the underground facility. **If any damage is done, it shall be repaired at the Contractor's expense in a manner acceptable to the Engineer and to the Owner of the underground facility.** (emphasis added)

#### GENERAL CONDITIONS 6.1

Contractor shall supervise, inspect and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the work in accordance with the Contract Documents.

#### GENERAL CONDITIONS 6.9.1

Contractor shall be fully responsible to Owner and Engineer for all acts and omissions of the Subcontractors, Suppliers and other persons and organizations performing or furnishing any of the Work under a direct or indirect contract with Contractor just as Contractor is responsible for Contractor's own acts and omissions. (emphasis added)

The above provisions constitute the primary basis for the Village's contractual claims against Hub Langie. The Complaint also sets forth claims sounding in tort against Hub Langie, together with one cause of action against Turner based on allegations of negligence. Turner and Hub Langie have each filed Cross-Claims against the other in their respective Answers, seeking indemnification and/or contribution.

The moving papers submitted by the respective parties are voluminous, and any attempt by the Court to summarize their factual and legal arguments would be likewise lengthy. Therefore, having considered those arguments and in the interests of judicial economy and clarity, the

Court finds as follows:

1) The Defendant Hub Langie's cross-motion to dismiss the Plaintiff's Complaint on procedural grounds is denied. The Court finds that the allegations set forth in the Complaint are sufficient to state a valid cause of action, in that it sets forth Hub Langie's contractual obligations, the breach of those obligations and the resulting damage to the Village.

2) Having found that the Village's Second Amended Complaint states a cause of action against Hub Langie, the Court further holds that the Village's motion for partial summary judgment against Hub Langie on the issue of liability is granted as to the Village's claims based on breach of contract. The Court has previously set forth certain contractual provisions, pursuant to which Hub Langie agreed to assume responsibility for the accuracy of any data regarding existing underground facilities including the accuracy of their location; to protect such structures during the course of the project; to assume responsibility for the actions of its subcontractor; and to assume responsibility for the repair of such structures if damaged during the course of the project.

In response to the Village's motion, Hub Langie has argued that the Village's moving papers are defective, in that they do not include an expert's report or other affidavits based up on personal knowledge, and

that there is no admissible proof as to damages presented.

The Court finds that Hub Langie's arguments offered in opposition to the motion are insufficient to create a valid issue of fact. Nowhere in any of the papers is it disputed that there was damage to the existing sewer lines and roadway incurred during the course of the project. Nor is there any basis for the Defendant's allegation that the Village breached the contract, thereby rendering it void. As the Village argues, it is essentially irrelevant whether the damage was the result of inaccurate information or incompetent drilling. In either case, a fair reading of the contract imposes responsibility on Hub Langie for the protection of the facilities during the drilling process and for any repair in the event of resulting damage.

3) The Defendant Turner's cross-motion for summary judgment dismissing the Plaintiff's Complaint is denied. While Turner has correctly stated the traditional rule that contractors not in privity with the damaged party are generally not liable in tort if the contractor breaches its contract and the breach causes injury, (see, e.g. Styver v Good & Fair Carting & Moving, Inc., 32 AD3d 1209 (4<sup>th</sup> Dept, 2006)), Turner has also conceded that there are recognized decisional exceptions to this rule. The Court finds that there are factual issues as to whether any of these exceptions apply and whether the Village is an intended third-party beneficiary of the

contract between Turner and Hub Langie.

4. As to the issue of Hub Langie's right to common law indemnification from Turner, as well as the respective rights of Hub Langie and Turner to implied indemnification from Sniedze, all motions and cross-motions are hereby denied. To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Correia v Professional Data Mgt., 259 AD2d 60, 65, 693 NYS2d 596 (1991)) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557, 757 NYS2d 65 (2003)).

Sniedze maintains in its moving papers, that the Third-Party Plaintiffs claims for implied indemnity are barred by the absence of vicarious liability and by the active participation of both Hub Langie and Turner in the activity resulting in the alleged damages. In turn, Hub Langie argues that, not only should Sniedze's motion to dismiss be denied, but also that its motion for summary judgment against Sniedze should be granted, maintaining that the record establishes that Sniedze was solely responsible for the design

and supervision of the project.

Turner, without cross-moving for summary judgment, maintains that both Sniedze's motion and Hub Langie's motion should be denied because of the existence of numerous issues of fact which must await determination at trial. The Court agrees with this position. Conditional common law indemnification is based on the equitable principle that permits the shifting of loss to the responsible party, and it is not available from more than one party. Given the circumstances of this action, any decision regarding the availability of indemnification must await the determination of a jury as to the degree of fault, if any, attributable to the various Defendants. Although vigorous in its assertion that the Third-Party Complaints should be dismissed as a matter of law even Sniedze concedes that, in the alternative, there are "strongly disputed" factual issues raised by the respective moving papers which require resolution at trial.

5. As to the various claims for contribution by the parties, while it has been argued that the Village's claim is one for economic loss only, which would preclude contribution by statute, the Village also sets forth claims which sound in tort. Moreover, "the determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought ..." (*Westbak Contracting v Roundout*,

46 AD3d 1187, 1190 (3<sup>rd</sup> Dept, 2007)). Here, the damages are alleged to include the cost to repair the existing sewer line and the roadway, which occurred as a result of the directional drilling. Therefore, it cannot be said that the damages sought by the Plaintiff are purely for economic loss (see, e.g. *Livingston v Klein*, 256 AD2d 1214 (4<sup>th</sup> Dept, 1998) (emphasis added)). Accordingly, all motions as to the issue of contribution are also denied.

In summary, the Village's motion for partial summary judgment against Hub Langie on the issue of liability is granted as to its claims based on breach of contract. All other motions and cross-motions are denied. The issue of the rights of the parties to indemnification and/or contribution shall be revisited at the time of trial.

This Decision constitutes the Order of the Court.

Dated:       October 16, 2009  
               Lyons, New York



Honorable Dennis M. Kehoe  
 Acting Supreme Court Justice

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SUPREME AND COUNTY COURT  
 WAYNE COUNTY