

Long Is. Lighting Co. v Granite Bldg. 2, LLC

2011 NY Slip Op 31290(U)

May 2, 2011

Sup Ct, Nassau County

Docket Number: 006274/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

LONG ISLAND LIGHTING COMPANY d/b/a LIPA,

Plaintiff,

-against-

Index No.: 006274/08
Motion Sequence...05
Motion Date...03/02/11

GRANITE BUILDING 2, LLC, LALEZARIAN
DEVELOPERS INC., LALEZARIAN PROPERTIES,
LLC, KULKA CONTRACTING, LLC, KULKA LLC,
KULKA CONSTRUCTION CORP., G.I.C.
CONSTRUCTION COMPANY, INC.,

Defendants.

G.I.C. CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

EASTERN LOCATING SERVICES, INC.,

Third-Party Defendant,

EASTERN LOCATING SERVICES, INC. and
KULKA CONTRACTING, LLC,

Second Third-Party Plaintiffs,

-against-

ONE CALL CONCEPTS, INC. and

DIGNET OF NYC AND LONG ISLAND, INC.,

Second Third-Party Defendants.

X

Papers Submitted:

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the Second Third-Party Defendants, DIGNET OF NYC AND LONG ISLAND, INC.'s and ONE CALL CONCEPTS, INC.'s (collectively referred to as "DIGNET") motion, pursuant to CPLR § 3211 (a) (7), seeking an order dismissing the Second Third-Party Plaintiffs, EASTERN LOCATING SERVICES, INC. ("ELS") and KULKA CONTRACTING, LLC's ("KULKA") Second Third Party Complaint and Amended Second Third-Party Complaint, is decided as hereinafter provided.

The Plaintiff, LONG ISLAND LIGHTING COMPANY d/b/a LIPA ("LIPA") commenced this action for damage caused to its facilities due to an excavation and/or digging project. According to the complaint, LIPA alleges that on April 23, 2007, it owned an underground transmission cable which was caused to be struck by equipment used for excavation, digging, movement and/or removal of earth rock, pavement or other materials. The damage to the transmission cable caused the release of cable insulating oil. LIPA originally commenced this action on or about April 4, 2008, to recover the cost for property damage and related cleanup of the oil spill as well as any other damages resulting from the destruction of the transmission cable.

In its original complaint, LIPA sued the Defendants, GRANITE BUILDING 2, LLC (“GRANITE BUILDING”), LALEZARIAN DEVELOPERS INC., LALEZARIAN PROPERTIES LLC, (“LALEZARIAN”), KULKA CONTRACTING, LLC, KULKA LLC, KULKA CONSTRUCTION CORP. (“KULKA”), G.I.C. CONSTRUCTION COMPANY, INC. (“G.I.C.”) and EASTERN LOCATING SERVICES, INC. (“ELS”), claiming that the foregoing Defendants were made aware or should have been made aware of the presence of LIPA’s underground electric transmission facilities located at or near the land adjacent to Union Turnpike, west of New Hyde Park Road in Lake Success, Town of North Hempstead, County of Nassau, State of New York, the location where the excavation took place.

Thereafter, on or about May 21, 2010, the Defendant/Third-Party Plaintiff, G.I.C. filed a Third-Party Complaint against ELS. According to the Third-Party Complaint, G.I.C. was hired by the Defendant, GRANITE BUILDING to perform excavation work in connection with certain buildings and structures being erected in and around the property and land adjacent to Union Turnpike, west of New Hyde Park Road, Lake Success. The Defendant/Third-Party Defendant, ELS, provides services which include locating and marking out of underground utilities, including the facilities in the area where the excavation work was to be performed. G.I.C. maintains that ELS failed to provide accurate information with respect to the location of any underground facilities owned and operated by the Plaintiff, LIPA, including the location of the transmission cable that was struck during the excavation. G.I.C. claims that any damages sustained by the Plaintiff was caused by the negligent and reckless conduct of ELS. Further, G.I.C. alleges in the Third-Party Complaint that to the

extent the Plaintiff, LIPA, recovers any sum for property damage and related costs from G.I.C., ELS will be liable to G.I.C.

On or about September 28, 2010, ELS filed a Second Third-Party Complaint against the Second Third-Party Defendant and movant herein, DIGNET. According to the Second Third-Party Complaint, DIGNET acts as a communications link between its member utility companies, including LIPA, and individuals planning any digging activity in the five boroughs of New York City and Nassau and Suffolk Counties on Long Island. DIGNET provides information regarding upcoming excavation and/or digging activity and ELS performs a mark-out of the utility lines or underground facilities. The Second Third-Party Complaint states that DIGNET was contacted by a representative of the Defendant, KULKA, with regard to the excavation project described above. DIGNET obtained certain requested information from KULKA regarding the exact location and nature of the excavation project. A ticket was generated by DIGNET, bearing ticket number 62510032 ("Ticket"), which described the exact location of the excavation project. ELS claims that it relied on the information contained in the Ticket to properly perform the physical mark-out of the utility lines and underground facilities.

The Plaintiff, LIPA, commenced an action against ELS for breach of contract due to ELS's failure to mark out an underground transmission cable located on the property adjacent to Union Turnpike, west of New Hyde Park Road, Lake Success, New York. However, ELS claims that it was not retained to mark out the property "west of New Hyde Park Road", but rather, it was retained to mark out the underground facilities "east of New

Hyde Park Road". G.I.C. also commenced a third party action against ELS for common law contribution and indemnification. ELS denied all of the material allegations in LIPA's Verified Amended Complaint and in G.I.C.'s Third-Party Complaint. ELS further claims that if it is found liable to LIPA and/or G.I.C., then such liability shall derive from the acts or affirmative wrongdoing on the part of DIGNET.

On or about September 29, 2010, the Defendant and Second Third-Party Plaintiff, KULKA, filed a Second Third-Party Complaint against DIGNET. According to its Second Third-Party Complaint, KULKA was hired by the Defendant, GRANITE BUILDING, to act as the construction manager for the excavation work to be performed with respect to certain buildings and structures being erected in and around the property adjacent to Union Turnpike, west of New Hyde Park Road, Lake Success, New York. KULKA alleges that a request was made of DIGNET to arrange having a mark-out performed in the vicinity where the construction was scheduled to take place. KULKA alleges that DIGNET failed to make a telephone call it had agreed to make and, as a result, the mark-out was not placed within the construction site. As a result of the foregoing, the mark-out failed to include LIPA's high voltage transmission cable which caused the excavator to strike said cable. KULKA claims that if it is found liable to the Plaintiff, LIPA, for damages, that said damages were caused wholly and solely by the negligence, recklessness, carelessness and/or breach of contract by Second Third-Party Defendant, DIGNET.

The Second Third-Party Defendant, DIGNET, filed the instant motion to dismiss the Second Third-Party Complaint and Amended Second Third-Party Complaint,

claiming that the complaint fails to state a cause of action. Specifically, DIGNET alleges that ELS and KULKA failed to state a cause of action because the excavator did not contact DIGNET between two (2) and ten (10) business days prior to the commencement of the excavation work as required by 16 NYCRR § 753-3.1 (a)(2). The Second Third-Party Defendant claims that they were not negligent as a matter of law due to the excavator's failure to comply with the foregoing rule. 16 NYCRR § 753-3.1 (a) (2), provides, in pertinent part:

(a) Before commencing or engaging in any nonemergency excavation or demolition, each excavator shall provide notice of the location and date of the planned excavation or demolition to the one-call notification system serving the vicinity in which the excavation or demolition is to take place.

(2) Such notice shall be served at least two but not more than 10 working days, not including the date of the call, before the commencement date of the excavation or demolition.

It is not disputed that DIGNET was contacted on Friday, September 8, 2006 regarding the excavation work that was to be performed as aforementioned described. It is also not in dispute that ELS completed the mark-out for the location as described in the Ticket on October 2, 2006. The Second Third-Party Defendants allege that the excavation work did not commence until April 23, 2007, well beyond the statutory time frame provided for notice relating to upcoming excavation projects.

In opposition, counsel for ELS claims that it is not an excavator, and as such, 16 NYCRR § 753-301 (a) is not applicable to it. This issue warrants little discussion. The Court agrees with counsel for ELS in that the statute does not mandate that a mark-out

company, such as ELS, contact the call center to notify it of upcoming excavation activities. Further, the Second Third-Party Complaint properly states a cause of action against DIGNET in that it is alleged that the wrong location information was provided to ELS for marking out the underground facilities in preparation for the excavation project. Specifically, the Second Third-Party Complaint alleges that DIGNET had a duty to accurately and correctly obtain the exact location and nature of the planned excavation; that DIGNET knew or should have known that ELS would rely upon the information provided in the Ticket; that ELS did in fact rely upon said information; and as a result, it may be liable to the Plaintiff, LIPA for damages. *See* Second Third-Party Complaint, dated September 28, 2010, attached to ELS's Opposition as Exhibit "A". The four corners of the Second Third-Party Complaint squarely states a cause of action against DIGNET.

According to the Amended Second Third-Party Complaint by KULKA, it was hired by the Defendants, GRANITE BUILDING and/or LALEZARIAN PROPERTIES to act as the construction manager for work to be performed at the excavation project site. *See* Amended Second Third-Party Complaint, ¶ 26, attached to KULKA's Affirmation in Opposition as Exhibit "A". Further, it is stated therein that the Defendant, G.I.C. was hired to actually perform the excavation work in connection with the excavation project. *Id.* at ¶27.

A plain reading of the Amended Second Third-Party Complaint indicates that KULKA was not an "excavator" as defined in 16 NYCRR 753-3.1 (a) (2). Notably, in DIGNET's reply papers, it is conceded that G.I.C. was the "excavator" pursuant to the aforementioned statute. *See* Reply Affirmation, February 28, 2011, ¶ 5. The Court finds it

puzzling that, given the admission that G.I.C. is the excavator pursuant to the statute, it seeks dismissal of KULKA's and ELS's claims against it based upon the same statute that applies only to "excavators". Counsel for DIGNET acknowledged ELS's argument that the statute is not applicable to a mark-out company, yet argues that this fact does not change that no liability can attach for excavation that is done in violation of a clear statutory mandate. *Id.* at ¶ 7. DIGNET's argument is misplaced. It can still be liable to parties for negligently providing information regarding the location where the mark-out of underground facilities needs to be performed, which is precisely what is being plead by KULKA and ELS. DIGNET is attempting to use a statute, admittedly not applicable to KULKA and ELS, to evade liability. The Court will not condone such conduct.

In any event, a review of the applicable law reveals that a violation of 16 NYCRR § 753-3.1 (a) (2) constitutes some evidence of negligence. *Schumer v. Caplin*, 241 N.Y. 346, 351 (1925). Thus, if it were found after completion of discovery in this case that the excavator failed to comply with 16 NYCRR § 753.31 (a) (2), then it may be indicative of some evidence of negligence which a trier of fact may consider on the question of the Defendant(s) negligence. The case relied upon by DIGNET to support its contention that the "existence and scope of [a] duty is a question of law to be determined by the court" is inapplicable here. *See Church v. Callahan Indus., Inc.*, 99 N.Y.2d 104 (2002). That case is distinguishable as the court primarily focused on whether a duty was owed to a third-party infant due to the alleged negligence of a construction company contracted to perform construction work at the site where the plaintiff's accident occurred.


Accordingly, it is hereby

ORDERED, that the Second Third-Party Defendants, DIGNET OF NYC AND LONG ISLAND, INC.'s and ONE CALL CONCEPTS, INC.'s motion, pursuant to CPLR § 3211 (a) (7), seeking an order dismissing the Second Third-Party Plaintiffs, EASTERN LOCATING SERVICES, INC. and KULKA CONTRACTING, LLC's Second Third Party Complaint and Amended Second Third-Party Complaint, is **DENIED**.

The Second Third-Party Defendants' remaining contentions are without merit.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
May 2, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
MAY 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE