

Long Is. Lighting Co. v Town of N. Hempstead

2011 NY Slip Op 31468(U)

May 19, 2011

Supreme Court, New York County

Docket Number: 11042-07

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

LONG ISLAND LIGHTING COMPANY d/b/a
LIPA,

Plaintiffs,

-against-

TOWN OF NORTH HEMPSTEAD and
EASTERN LOCATING SERVICES, INC.,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 11042-07

MOTION SUBMISSION
DATE: 3-24-11

MOTION SEQUENCE
NOS. 2 and 3

Defendant, Eastern Locating Services, Inc. ("ELS") moves, pursuant to CPLR 3212, for an Order granting it summary judgment dismissal of plaintiff, Long Island Lighting Company d/b/a LIPA ("LIPA")'s complaint in its entirety together with any cross claims asserted against ELS. The motion is denied.

Defendant, Town of North Hempstead ("Town") also moves, pursuant to CPLR 3212, for an Order granting it summary judgment dismissal of plaintiff's complaint in its entirety. The motion is denied.

This action arises out of a May 10, 2006 incident in which an employee of the Town operating a payloader struck an underground utility line located at Bar Beach in Port Washington, New York (hereinafter referred to as the "Site"). LIPA brings this action against the Town of North Hempstead claiming, *inter alia*, that in the course of performing excavations preparatory to building a boat house at Bar Beach, the Town's

employee struck an underground cable owned by LIPA, causing extensive damage to same. As against ELS, LIPA claims, *inter alia*, that despite having a contract with LIPA to properly perform its work of locating and marking out underground LIPA cables upon the request of a third party such as the Town, ELS failed to properly locate and mark out all three underground LIPA cables at the Site, resulting in one cable being damaged by the Town employees.

As best as can be determined from the papers submitted herein, the undisputed facts are as follows:

In 1987, plaintiff Long Island Lighting Company, known as LILCO at the time, entered into an Easement Agreement with the Town of North Hempstead which stated, in pertinent part, as follows:

***[I]t is understood and agreed that in the event that the Town shall determine to build or construct any improvement or structure in, on, over, under, through or along the surface of the easement areas, the Town agrees that its plans and specifications shall first be submitted and approved by LILCO, as to the sufficiency of the proposed construction in order to prevent any damage to LILCO's electric and gas facilities and equipment. LILCO agrees that its consent to the Town's plans and specifications shall not be withheld or delayed unreasonably.

This agreement shall hereinafter be referred to as the "Easement Agreement."

Subsequently, on April 1, 2004, defendant ELS, an underground utility locating and markout service provider, entered into an agreement with nonparty Keyspan Corporate Services, Inc. ("Keyspan") to perform locating and mark out services for Keyspan's Long Island and New York territory, which included plaintiff LIPA's underground utilities. This agreement shall hereinafter be referred to as the "Markout Agreement." As explained by ELS Vice President, Richard Peragallo, in his sworn

affidavit, locating and mark out services involve the identification and surface detection of underground utilities through the interpretation of topographical maps and the use of sophisticated machines (*Peragallo Aff.*, ¶3).

According to Peragallo, the specifications in the Markout Agreement referring to the locating and marking out of buried electric facilities "are ELS' Daily Reference Manual in order to perform under the contract...they detail the respective obligations of ELS and LIPA under the contract." In pertinent part, the Markout Agreement, at page 17, Section 3 entitled "LMC [Locate and Markout Contractor]/Field Operations Field Crew Responsibilities," Subsection "I" sets forth, as follows:

The LMC crew (or Field Operations) must perform the field markout of KeySpan facilities by "Conductive Markout or Conductive Methods" for any of the following type of pipelines:

- Transmission Lines (operating at 125 psig or greater).
- Supply Mains (designated with an "SM" symbol on the 50' gas quads).
- Underground Electric Transmission Cables (fluid filled, gas filled or solid electric).
- NYPA Oil Static Lines.

According to Peragallo, prior to the commencement of any excavation project in the State of New York, the excavation contractor is required to notify the One-Call System in order to determine whether there are any underground utilities in the area of the planned excavation. When One-Call is alerted to a planned excavation in the area that falls within KeySpan's Long Island and New York territory, an electronic notification, referred to by ELS as a "One-Call Ticket" is forwarded to ELS which provides general information concerning the planned excavation, including the location of the excavation. Upon receipt of a One-Call Ticket, ELS accesses the electronic maps provided to it by

LIPA in order to accurately identify any potential underground utilities in the area of the planned excavation.

Kevin O'Brien, a locator for the defendant ELS, the individual tasked with locating the underground facilities in this matter, testified at his sworn examination before trial that pursuant to the Markout Agreement, the maps of the facilities, which are provided on their laptop computers and are updated by download approximately every three months, are provided by LIPA and Keyspan. He stated that the utilities provide the maps and that ELS thus has the most current maps available. After ELS "locates" or identifies one of LIPA's underground utilities in the planned excavation area, ELS travels out to the site to perform the surface mark out of the underground utilities.

In 2005, the Town of North Hempstead entered into an agreement with the Manhasset High School Booster Club to construct a boat house on the Site.

With respect to the excavation project at issue in this case, Gilbert Anderson, the Commissioner of the Suffolk County Department of Public Works and the former Commissioner for Public Works for the Town of North Hempstead, testified at his sworn deposition that he notified the One-Call Center in order to have a mark out performed on the Site and also contacted LIPA directly to alert it to the planned excavation. Anderson testified that he was well aware that LIPA held an easement on the Site. He stated that in preparing his plans for the construction of the boat house, he worked off a set of site plans that were prepared in the 1970s which showed *proposed* utility transmission lines traversing the Site. With respect to whether he was aware of any requirement that LIPA be provided with plans regarding any excavation prior to the excavation commencing, Anderson stated:

Yeah. Well I sent them whatever plans I had. Whoever I spoke with, again, because of my concerns with the layout, I sent over – would have been a sketch, not really formal but it should show where I wanted to place the building, where I thought their right of way was and the park (*Anderson Tr.*, pp. 25-26).

The locator assigned to this project for ELS, Kevin O'Brien testified that he received a notification on his computer requesting a mark out at Bar Beach. O'Brien stated that the One-Call Ticket generally identified the location of the work as "Bar Beach Park located on the E side of the t-intersection off of W. Shore Dr. ... work is taking place in the parking area near the SW corner of the location – callers concern is the high voltage lines in this area..." He testified that on the map of the facilities provided to him by Keyspan/LIPA, that there were three utility lines on the Site.

O'Brien testified that he performed the markout at the Site on May 3, 2006. Also present at the Site were Kevin Heubish, who was employed with Keyspan for 37 years and was directed to attend the meeting by Keyspan and/or LIPA in order to provide O'Brien with "whatever help [he] could" in order to accurately complete the markout and Gil Anderson.

According to O'Brien and Anderson, Heubish brought a large printed map with him that identified the lines on the Site. Heubish was aware that there were three utility lines on the Site, i.e., one 345 KV line and two 138 KV lines, which could be accessed by the manholes at the Site. At his sworn deposition, Anderson testified that on the day of the markout, he had his 1970s plan and his site plan with him. Anderson testified that after Heubish compared their respective plans, Heubish indicated that Anderson's plans were "wrong" because they showed utilities which had not been installed on the Site. Anderson testified that Heubish indicated to him that the plan which Heubish had

showed all the utilities in the area and that if it was not on his plans, it did not exist. Anderson testified that Heubish's map did not show a line or a cable going through the easement (*Anderson Tr.*, pp. 43-45). He stated that when they started the work, they believed that they were outside the LIPA right of way. Specifically, he testified that he was "relatively confident we were outside of that easement but not by much. Whatever was required, we were outside of the right of way" (*Anderson Tr.*, pp. 22-23).

Together with the LIPA representative, O'Brien searched for the utilities. O'Brien testified that the manholes associated with the pipe type cables were the only way to mark them out. He stated that since there was no way of hooking up to the lines directly because they did not have an anode or cath station, they had to conductively drop the box on the ground and pick up the cable going up. He explained that at a manhole, you stay 2-3 feet away and place the box on the ground which in turn sends a penetrating signal down to the ground. O'Brien explained that they have a wand known as Metrotech that picks up signals as you walk away from the box. If the box picks up a signal, a tone, it means that there is a pipe underground. Together with Heubish, O'Brien went to each of the manholes.

As O'Brien began to detect the tones, he started marking out the area of the underground cables and pipes periodically marking them with paint. He stopped the mark out approximately 900 feet away from the location where the excavation was going to be done. O'Brien stated that while it was his equipment that was used to do the mark out, the LIPA representative accompanying him during the markout, namely Heubish, also had his own equipment which he used to verify that he was getting a tone

at the same spots. Heubish admitted that he believed that the markout conducted by O'Brien was accurate and correct.

O'Brien stated that after the markout, he and the LIPA representative Heubish ran tests of the test stations located along the road to check for signals corresponding to the lines they marked out. He testified that while he picked up a signal on the first test station, he would lose the tone on the second test station which indicated to him that there was no cable beyond a 25 foot radius. Heubish told him that this second test box "doesn't work anymore" and was not even shown on the map that Heubish brought with him to the Site. As a result, O'Brien testified that he and the LIPA representative went back and looked at the print. At that point, Heubish indicated that the second pipe was not a pipe that was located where the work was going to be done. O'Brien testified that the LIPA representative dismissed the notion that the second line was connected to the second test station. When Heubish left the Site that day, he was satisfied that the two 138 KV lines had been properly marked out by ELS.

Patrick Noonan, then a Manager of the Electrical Design and Construction Department with Keyspan, testified at his EBT that on May 10, 2006, one week after the markout, no such representative was present when James McCormack, an employee with the Town, struck the underground utility line with a payload. McCormack was working upon direct instruction from Gil Anderson. He was excavating the footing for the boat house at the Site. In late April 2006, McCormack and Peter Nielson, another "equipment operator" employed by the Town, delivered the necessary construction equipment to the Site including a dozer, loader, and a dump trailer, to perform the

excavation. They also met Gil Anderson at the Site and proceeded to stake out the footprint of the boathouse.

On May 10, 2006, McCormack and Nielson arrived on the Site to complete the excavation and McCormack proceeded to operate a payloader and load dirt into Nielson's trailer. Nielson was hauling the dirt off of the Site when the incident took place. There were no other Town employees on the Site. McCormack testified that while moving the payloader forward, he felt what he believed to be a "rock." Rather than dismounting the payloader to observe what he had struck or waiting for Nielson to return to the Site to investigate the issue, McCormack backed the machine up slightly and proceeded to take "another bite" with the payloader bucket. The bucket pierced the underground utility line causing fluid to spring out of the electric cable.

Noonan was called to the Site after the Incident. When he arrived, he observed the payloader in an excavation ditch surrounded by dielectric fluid. He also saw in the dirt removed from the excavation area that there was yellow caution tape, which he explained is routinely buried a few feet above underground pipe lines as a precaution to alert anyone digging that there is a utility line present. McCormack conceded that if he observed the yellow caution tape while excavating, he should stop and proceed to dig "very carefully" by hand. Nonetheless, McCormack denied that he ever saw the yellow tape on the Site.

Noonan testified that he spoke with Heubish, who was also told to return to the Site, about the events during the markout one week earlier. At that time, Heubish used the same equipment he used to assist O'Brien during the markout to demonstrate to Noonan the precise markout that he and O'Brien had previously performed. Heubish

again did not detect the cable that was struck by the Town. Although Heubish could not explain why he did not detect the underground utility lines on two separate occasions, Heubish believed that the mark out was "accurate." O'Brien, on the other hand, testified that after the accident, the struck cable gave a very weak signal.

Upon the instant motions, defendants, ELS and the Town separately move, pursuant to CPLR 3212, for an Order granting them each summary judgment dismissal of LIPA's complaint in its entirety.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt. Inc. v. Gincherman*, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In seeking summary judgment, the Town asserts three bases for its motion. First, given that the Town contacted the One Call Center concerning the excavation at issue, it complied with the prior notification requirement and thus plaintiff's claims under the General Business Law and 16 NYCRR Part 753 should be dismissed. Second, any alleged breach in notification pursuant to the Easement Agreement is not the proximate

cause of the accident as LIPA was clearly on notice of the work at issue and sent a representative there to assist with the markout of the facilities. Finally, the proximate cause of the accident at issue was the failure of the LIPA representative and/or the ELS representative to properly mark out the second line; the failure to locate that line is not attributable to the Town and but for their failure to locate the line, the accident would not have occurred. These arguments all fail to demonstrate the absence of any material issues of fact.

With respect to the Town's argument that it relied upon measurements provided by defendant ELS and/or LIPA in an attempt to avoid the underground cable, in light of the fact that there remain genuine issues of material fact, CPLR 3212(b) requires the Town's motion be denied without regard to the opposing proof (*Stone v. Continental Ins. Co.*, 234 AD2d 282, 284 [2nd Dept. 1996]). Specifically, this Court notes that the Town's own witness, Gil Anderson, testified under oath that he was aware of an easement at the Site but was "relatively confident" that the work being performed was outside the easement. Anderson also admitted that in drawing up his "plans" to construct the boat house, he relied upon 30 year old plans and failed to properly denote the proposed work in relation to the easement. He also claimed to have sent "a sketch, not really formal" to LIPA of the proposed work which when read together with the testimony of Patrick Noonan (witness for LIPA), resulted in the markout (requested by the Town) to cover a portion of the facilities in question. Noonan stated that since the Town did not provide the metes and bounds, the markout was incomplete – covering only a portion of the facilities in question. Further, at his sworn deposition, Anderson admitted that there was yellow caution tape plainly visible warning of the presence of the cable but that despite its

existence the Town nevertheless proceeded to excavate at the Site striking the unmarked cable.

Thus, the facts are clear that the Town never provided either ELS or LIPA with any plans (at best, the Town provided a "sketch") regarding the location of the proposed work. Further, consistent with Anderson's testimony (on behalf of the Town), McCormack (also on behalf of the Town) also testified that the yellow caution tape plainly visible in the photographs of the Site at issue warned of the presence of the cable and that despite the knowledge that the proper procedure to follow upon observing the tape would have been to dig by hand, at no point did he or any of his crew stop the use of their heavy equipment diggers. Further, in light of McCormack's testimony that while moving the payloader forward, he felt what he believed to be a "rock" but he did not dismount the payloader to observe what he had struck or wait for Nielson to return to the Site to investigate the issue, he backed the machine up slightly and proceeded to take "another bite" with the payloader bucket, this Court is not persuaded that the Town has established its defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212[b]).

Further, with respect to the Easement Agreement, it is plain to this Court that the Town failed to properly notify LIPA of the planned construction and similarly failed to provide plans for approval prior to commencement of the work. The Easement Agreement plainly stated that "[i]t is further understood and agreed that ***in the event that the Town shall determine to build or construct any improvement or structure*** in, on, over, under, through or ***along the surface of the easement areas, the Town agrees that its plans and specifications shall first be submitted to and approved by LILCO,***

as to the sufficiency of the proposed construction in order to prevent any damage to LILCO's electric and gas facilities and equipment" (emphasis supplied). It is undisputed that the Town failed to submit "plans and specifications." It is also undisputed that LIPA never approved any said "plans" (as required by the Easement Agreement as a prerequisite to the commencement of the work) or even the purported "sketch" Anderson claims to have submitted to LIPA. The Town did not wait for LIPA's approval of its "sketches" which it claims herein were the plans that satisfied its obligations under Easement Agreement. Read together with the Town Commissioner Gil Anderson's testimony that he was aware of the easement in the area but was "relatively confident" that the work would take place outside of the easement, this Court finds that the Town has not demonstrated its entitlement to judgment as a matter of law on the basis of its compliance with the Easement Agreement or that its breach of the Easement Agreement was not a proximate cause of the incident.

Therefore, the Town failed to demonstrate that it provided accurate information including the precise location of the planned excavation to LIPA and ELS regarding the work to be performed on the Site. Further, despite the Town's knowledge that the planned excavation was to proceed at or near LIPA's easement, it failed to verify the location of the intended excavation with respect to the easement. In addition, it appears that the Town's employees including McCormack and Nielson who performed the excavation failed to take proper precautions and/or observe the caution tape which was unearthed at the time of the excavation.

In light of the foregoing, this Court finds that the defendant, Town, has failed to establish its entitlement to judgment as a matter of law. Accordingly, its motion for

summary judgment is herewith denied, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

Similarly, defendant ELS's motion for summary judgment is also denied. In seeking summary judgment, ELS asserts four bases for its motion. First, LIPA cannot prove a prima face case for breach of contract claim because there is no evidence ELS failed to perform under its obligations under its contract, i.e., the Markout Agreement, with LIPA. Second, LIPA's negligence cause of action should be dismissed because it is duplicative of LIPA's breach of contract claim. Third, LIPA's failure to secure an expert to prove its breach of contract or negligence claims is fatal to its case. Lastly, LIPA's indemnification claim should be dismissed because that provision has not been triggered by a third party claim against LIPA.

As with the Town's motion, based upon the facts presented herein, this Court is not convinced that ELS has a tenable position so as to entitle it to judgment as a matter of law.

Initially it is noted that ELS relies upon a report by an expert electrical engineer, Richard Daken, who reiterates ELS' claim that it was the fault of LIPA and/or the Town that ELS failed to locate the underground facilities in question. Daken opines that the Town and LIPA "failed to provide accurate information" and that the Town and LIPA "failed to verify the specific excavation location." He concludes that "ELS exceeded any reasonable requirements" attendant upon it and was in no manner at fault in any fashion. However, in light of Daken's failure to mention that he inspected O'Brien's laptop or the Metrotech machine and in light of Daken's failure to even visit the Site in order to inspect the area, take measurements or readings or otherwise attempt detection of the cables,

his opinions herein cannot be considered and regarded by this Court (*Haberman v. Cheesecake Factory Rests., Inc.*, 43 AD3d 392 [2nd Dept. 2007]; *Reyes v. City of New York*, 29 AD3d 667 [2nd Dept. 2006]).

Further, the facts are clear that ELS's own witness, Kevin O'Brien testified that ELS, which was hired for its expertise in locating underground facilities, received maps from LIPA which delineated the cables in question and that he had the most updated maps at his disposal as the maps were regularly updated every three months. The maps were downloaded to his laptop computer and that based upon these updated maps, and in conjunction with the LIPA employee (Heubish) and the Town's supervisor (Anderson), he attempted to properly locate the facilities using a Metrotech machine to detect the underground lines, marking 600 to 800 feet of the location and relying upon the test stations in making his final determinations. Despite the most updated information and its expertise, defendant ELS, via the testimony of its witness O'Brien admitted that he failed to locate the cable which was later struck by the Town's construction workers. When questioned as to why, O'Brien simply stated that he "never got a tone coming up [on the Metrotech]." This Court finds that defendant ELS has failed to demonstrate its entitlement to judgment as a matter of law. It appears ELS failed to mark out the line that was ultimately struck. Thus, there remains an issue of fact as to whether, by failing to detect and markout the underground facilities particularly because it had the most updated resources (maps) given by LIPA, ELS failed to fulfill its obligations under its contract with LIPA.

Pursuant to the Markout Agreement, ELS was obligated to locate certain underground facilities and in this instance the evidence submitted shows that it failed to

do so. The documentary evidence herein including the markout agreement, specifically at page 17, section 3 entitled "LMC [Locate and Markout Contractor]/Field Operations Field Crew Responsibilities" confirms that there remain issues of fact as to whether ELS breached the contract. Specifically in light of LIPA's contention supported by the testimony of Patrick Noonan that the 138 KV cable which was struck in this incident was not located by a conductive test and that had proper conductive tests been performed the 138 KV cable in question would have been located (*Noonan Tr.*, pp. 66-67), there remain issues of fact as to whether ELS fulfilled its contractual obligations.

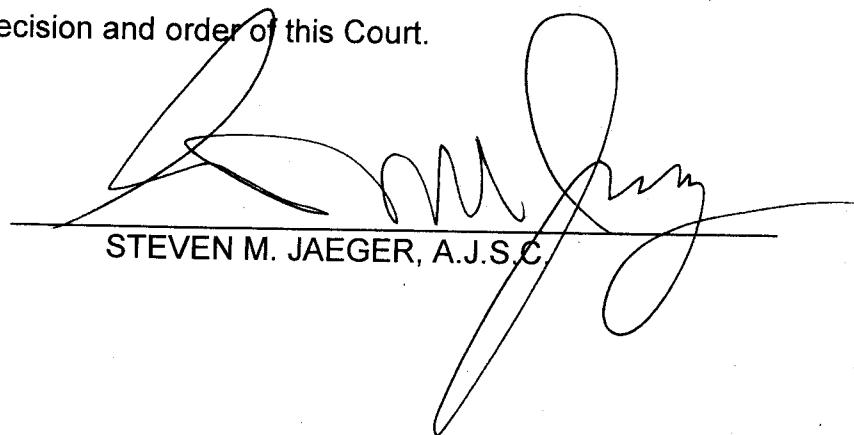
Defendant ELS's second argument that there is no legal duty independent of the contract itself to support LIPA's negligence claim also fails. In light of O'Brien's testimony that the reason he did not pick out the cable in the mark out was because he never "got a tone coming up" on his Metrotech machine, this Court finds there is a sufficient predicate for ELS's separate duty, independent of the contract itself, which may have been violated – i.e., whether ELS was negligent insofar as failing to properly maintain, repair, and operate equipment which, if properly maintained and operated, would have detected the facilities. It is well established that "a contracting party may be charged with a separate tort liability arising from a breach of duty distinct from, or in addition to, the breach of contract" (*Meyers v. Waverly Fabrics*, 65 NY2d 75, 80 [1985] quoting *North Shore Bottling Co. v. Schmidt & Sons*, 22 NY2d 171, 179 [1968]).

Therefore, this Court finds that in light of ELS' failure to make a prima facie showing of entitlement to judgment as a matter of law, its motion for summary judgment dismissal of plaintiff's complaint must be denied, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, supra at 853).

The parties remaining contentions have been considered by this Court and do not warrant discussion.

This shall constitute the decision and order of this Court.

Dated: May 19, 2011



STEVEN M. JAEGER, A.J.S.C.

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