

Cablevision of Rockland v HSP Constructors, LTD

2011 NY Slip Op 33567(U)

November 30, 2011

Supreme Court, Nassau County

Docket Number: 18309/09

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

Justice

**CABLEVISION OF ROCKLAND AND/RAMAPO,
LLC, d/b/a CABLEVISION,**

**TRIAL/JAS, PART 4
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 9/1/11**

HSP CONSTRUCTORS, LTD.,

INDEX NO.: 18309/09

Defendant.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....	1
Affirmation in Opposition.....	2
Memorandum of Law.....	3
Reply Affirmation.....	4

Motion by defendant HSP Constructors, Ltd. (HSP) pursuant to CPLR §3212 for summary judgment dismissing the complaint is determined as follows.

BACKGROUND

In this action, plaintiff Cablevision seeks to recover damages arising from excavation of a driveway at 6 Green Hedges Lane, Blauvelt, New York, on September 12, 2006 during which an underground cable wire, located at the base of the driveway apron, was crushed. Plaintiff alleges that defendant HSP was hired by the homeowner, who is not a party to this lawsuit, to perform certain home improvements and renovation services at the premises. Defendant HSP avers that it was not hired to do any digging or work on the subsurface in the area of plaintiff's utilities and did not, in fact, perform such work. As plaintiff points out, however, the one page contract between defendant HSP and the homeowner does not specify the scope of work and the respective responsibilities of the parties.

Contending that it never did any excavation work in the front of the premises, or in any area in or around the driveway, defendant HSP seeks summary judgment dismissing the complaint.

In this regard, moving defendant argues that, pursuant to its contract with the homeowner, it was not obligated to perform any excavation work on the driveway nor was it obligated to control/supervise the work of any other contractors hired to perform such work. The movant asserts that its crew was not working anywhere near the driveway of the premises on the date of plaintiff's alleged loss or at any other time. Since it had no duty to perform excavation work, or provide supervisory service *vis-a-vis* other contractors on the job, defendant HSP maintains it cannot be held liable for the alleged negligent excavation by independent contractor, Perfection Paving, Inc. which it hired to excavate and replace the driveway using Perfection's own labor and materials. In short, defendant HSP asserts that it was hired to perform exterior work to the rear of the premises and did not perform the digging and excavation activity plaintiff alleges caused the damage.

Moreover, defendant HSP further asserts that, prior to beginning work at the premises, in compliance with the "Call Before You Dig Program, it contacted the One Call Center to request a markout of all underground utilities in and around the premises in order to obtain authorization to begin work. According to defendant HSP, markouts of water, cable television, gas and electrical utilities were completed by a company provided by One Call Center and locating reports in the area of the excavation were produced. Defendant HSP's president attests that he had no knowledge of any cable wire running through the driveway area.

ANALYSIS

Excavation work is governed by statutes and regulations designed to protect underground facilities. They set forth various procedures to be followed when engaging in such work. The regulations provide that an excavator must contact the One Call notification system serving the vicinity prior to commencing or engaging in a non-emergency excavation. 16 NYCRR 753-3.1(b).

General Business Law Article 36 and 16 NYCRR 753 are statutes designed to protect underground facilities by setting forth procedures with which all excavators must comply prior to and during excavation. See *Verizon New York v Village of Athens*, 43 AD3d 526, 527 [3rd Dept 2007]. These laws do not contain any procedure or requirements for parties who are not performing the excavation.

General Business Law §§ 763 - 765 outline the duties of excavators in preparing and conducting excavations. These sections mandate that an excavator shall not

commence/engage in any excavation until notice is given of the location and date the proposed excavation is to take place. These statutory sections apply only to “operators” (utilities) and “excavators.” The statutory definition of “excavators” is set forth in 16 NYCRR 753-1.2(i), and does not include property owners or lessees. *See, Level 3 Communications, LLC v Petrillo Contr., Inc.*, 73 AD3d 865, 866-78 [2nd Dept 2010].

16NYCRR 753-1.2(i) provides that an “excavator” is:

“Any person who is engaged in a trade or business which includes the carrying out of excavation or demolition; provided, however, that an individual employed by an excavator and having no supervisory authority other than the routine direction of employees over an excavation or demolition, shall be deemed an excavator for the purpose of this part. The act of any employee or agent of any excavator acting within the scope of his or her official duties or employment shall be deemed to be the act of such excavator.”

Violation of the statute’s implementing rules and regulations constitutes some evidence of negligence. *Verizon, New York, Inc. v Village of Athens, supra*, at p. 527.

Generally, a party who hires an independent contractor is not liable for the acts of said contractor because the hiring party does not control the manner in which the independent contractor performs its work. The general rule is subject to various exceptions, not here present, including where premises are open to the public and the owner has a non-delegable duty to provide the public with a reasonably safe premises or where the general contractor supervises or controls the method or manner in which an independent contractor performs its duties. *Posa v Copiague Pub. School Dist.*, 84 AD3d 770, 772 [2nd Dept 2011]. Control of the method and means by which the work is performed is, therefore, a critical factor in determining whether a party is an independent contractor. Typically, such a determination involves a question of fact. Summary judgment is appropriate, however, in those instances where the evidence on the issue of control presents no conflict. *Goodwin v Comcast Corp.*, 42 AD3d 322 [1st Dept 2007] (citations and quotation marks omitted).

Here, the contractual arrangement between defendant HSP and non-party Perfection is unclear as is the exact scope of the “additional construction” to the premises referenced in defendant HSP’s one page contract (March 6, 2006) with the homeowner.

The court notes that it was defendant HSP that contacted the One Call Center to request a markout of the underground utilities. The locating reports that were provided to defendant HSP list it as the contractor on the project and Pete Hillebrand, the president of HSP, as the contact person.

On a motion for summary judgment, the movant has the burden of making a *prima facie* showing of entitlement so summary judgment as a matter of law and of tendering sufficient evidence to show the absence of material issues of fact. *Weingrad v New York University Medical Center*, 64 NY2d 851 [1985]. If the moving party fails in meeting this burden, the motion must be denied. If, however, the burden is satisfied, then the burden shifts to the opposing party, regardless of the sufficiency of the opposing papers, to establish the existence of material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 [1980].

While the mere fact that discovery has not been conducted does not necessarily preclude the grant of summary judgment (*Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of movant, summary judgment may be denied. This is particularly so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006].

Under the circumstances extant, the existence of a factual issue as to whether and the extent to which defendant HSP had control of, or was involved in, the excavation work at the premises, and given the fact that no discovery has been conducted, summary dismissal is precluded.

Accordingly, motion by defendant HSP for summary judgment dismissing the complaint is **denied**.

This constitutes the Order of the Court.

Dated: *November 30, 2011*

[Handwritten Signature]
J.S.C.

ENTERED
JAN 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE