CIBELLIS CONTR., INC. v. HAMILTON GARDENS OWNERS, INC.

2012 NY Slip Op 50215(U)

CIBELLIS CONTRACTING, INC., Plaintiff(s),

v.

HAMILTON GARDENS OWNERS, INC., Defendant(s),

6185/09.

Supreme Court, Nassau County.

Decided February 14, 2012.

ANGELA G. IANNACCI, J.
The motion by the plaintiff, Cibellis Contracting, Inc. (Cibellis) for summary judgment on liability and dismissing the counterclaims, and the cross motion by the defendant, Hamilton Gardens Owners, Inc. (Hamilton), for summary judgment in its counterclaims, are determined as follows:

On February 13, 2008, the parties entered into a contract in which Cibellis was to perform certain excavation and construction work on the premises owned by Hamilton. The contract provided for over $110,000.00 in work and included the following provision: "Not responsible for anything underground such as electric, cable, phone ect [sic]." While Cibellis was performing excavation work, it struck an underground electrical wire, severed it and caused a complete loss of power to Hamilton's building and property. Hamilton alleges that it had to incur costs of $37,657.55 to repair the electrical damage caused by Cibellis. Cibellis asserts that it is owed $36,881.67 as the amount due on the contract and an additional $8,421.11 for extra excavation work it performed so an electrician could repair the electrical supply to Hamilton's property. It is undisputed that Cibellis finished the work required under the contract.

On its motion, Cibellis contends that the clear provision in the contract quoted above absolves it of liability for the electrical damage. General Obligations Law § 5-322.1(1) states as follows:

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance

contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

The law is settled that a party seeking contractual indemnification must prove itself free of negligence in order to enforce the indemnity clause (*see Fernandez v Abalene Oil Co., Inc.,* ___ AD3d ___ [2d Dept. Jan. 31, 2012]; *Cava Const. Co., Inc. v Gealtec Remodeling Corp.,* 58 A.D.3d 660 [2d Dept. 2009]). Here, there is no reasonable argument that Cibellis was free from negligence. In fact, it is undisputed that Cibellis failed to comply with General Business Law § 764, which requires excavators to verify the precise locations of underground facilities by contacting the "one-call" notification system. The violation of the statute in and of itself is at least some evidence of negligence (*see Level 3 Communications, LLC v Petrillo Contracting, Inc.,* 73 A.D.3d 865 [2d Dept. 2010]).

Cibellis, nevertheless, asserts that General Obligations Law § 5-322.1(1) does not apply here because it was excavating a concrete driveway when it severed the electrical wires and therefore was not involved in construction of a building as required by the statute. A plain reading of the statute dictates that this contention is meritless. General Obligations Law § 5-322.1(1) clearly applies to contracts for "construction, **alteration,** repair or maintenance of a building, structure, **appurtenances** and appliances including moving, demolition and **excavating** connected therewith [emphasis added]." Here, even assuming that Cibellis is correct in its assertion, the contract as a whole was obviously for the construction of appurtenances on Hamilton's property. That the incident happened while excavating a driveway does alter the nature of the contract between the parties. Cibellis's reliance upon *Appliance Assocs. Inc. v Dyce-Lymen Sprinkler Co., Inc.* (123 A.D.2d 512 [2d Dept. 1986]), is misplaced. In *Appliance,* the underlying contract was for alarm services which is clearly not construction, alteration, repair or maintenance of a building. Therefore, the indemnity clause in the contract is unenforceable.