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Re: ***Donegal Companies, as subrogee of Donald W. and Shirley H. Wilson v. Horizon Home Svcs, Inc. f/k/a Geiger Services, Inc.***
Case No. 2002-02-099

LETTER OPINION
Date Submitted: March 26, 2004
Date Decided: April 1, 2004

Dear Counsel:

Trial in the above captioned matter took place on Friday, March 26, 2004. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's final Decision and Order.

Donegal Companies, as subrogee of Donald W. and Shirley H. Wilson ("plaintiffs") filed the instant complaint in negligence against Horizon Home Services, Inc. f/k/a Geiger Services, Inc. ("defendant"). Prior to trial, the Court granted Plaintiff's Motion in Limine and struck the contract clause on the face of the parties' contract that disclaimed any responsibility for any damage to Plaintiff's property during excavation or backfill.

Additionally, since plaintiff presented no argument or evidence to substantiate claims of breach of implied warranty of good quality and workmanship as alleged in Count II of its complaint in the trial record, the Court dismisses *sua sponte* Count II of the Complaint for failure

to prosecute and/or meet the preponderance of evidence standard. The Court proceeded to trial on Count I, Negligence, which alleged Defendants, through its agents, servants or employees failed to take reasonable and customary precautions to avoid collateral damage to Wilson's property in the amount of $21,339.58. The term "collateral damage" was not defined in plaintiff's complaint.

For the reasons set forth below, the Court enters judgment in favor of Defendants, each party shall bear their own costs.

THE FACTS

At trial, William D. Detrich ("Detrich") presented testimony as follows. He works for Geiger and is still so employed and was called to the Wilson's residence. Upon contacting them he was advised that a sewer line backed up.[1]

At trial, Detrich explained the red line on Plaintiff's Exhibit 7 which depicted the sewage line across the property. Detrich spoke to Mrs. Wilson and first explained that they could perhaps water pressure the line and open it, which was later unsuccessful. He advised Mrs. Wilson prior to the work that the job involve major restoration and a concrete section of the driveway had to be removed. He filled out the instant contract and read it and explained it to Mrs. Wilson. The cost of the scope of the work was $4,405.00 and took approximately two (2) days. Detrich presented testimony he had to dig a wide trench beginning four feet wide from the house and eleven feet wide at the street. There was one tree in the middle of the yard that had to be removed. He removed shrubbery in the garden. His company set three (3) large rocks aside

[1] At trial, plaintiff entered seven (7) joint exhibits into evidence by stipulation with the Defendant. Exhibit 1 was a copy of the party's contract; Exhibit 2 was eight (8) photographs of the front, back and driveway of the instant residence; Exhibit 3 was a repair estimate by G.W. Booth, Contractor, Inc.; Exhibit 4 was a Proof of Loss statement by G.W. Booth, Inc.; Exhibit 5 was an estimate; Exhibit 6 was payment and invoice copies for the work done at Wilson's residence; Exhibit 7 was three (3) photographs, which were also received into evidence depicting the property.

and moved some shrubbery and worked around "larger trees". Geiger saw-cut the joints in the concrete to open a section of the driveway in order to install the new sewage line and dug portions of the line cut eleven feet deep. Detrich indicated he, for safety reasons, as OSHA qualified, put the wet soil removed from the trench on the driveway. Detrich presented testimony at trial there was no other safe place in the yard to take the fill dirt out of the trench.

On cross-examination, Detrich presented testimony that he is a licensed plumber for five years and has fourteen years experience in the industry, including a four year apprenticeship. He has installed "a hundred different pipes during his career".

Detrich pointed out that there was hand drafted language in the contract that provided, "we will have to cut driveway to replace sewer, price includes remove of concrete, but does not include replacement of concrete."

There is also language in the contract Detrich explained to Shirley Wilson that provided the following language;

> The process of replacing underground water or sewer lines is a disruptive procedure. There will be extensive excavation to the yard and landscaping. Ditches will be backfilled and tamped to rough grade only. There will be setting of the ditch and it is understood that any further restoration of the yard is to be done at the owner's expense and is not included.

Again, the proposal was for $4,405.00 and was signed by Shirley Wilson and Mr. Detrich. The contract indicated it was for an underground utility proposal for sewer replacement. There was also language that provided, *inter alia,* "it is recommended that property owner contact his/her landscape service upon Geiger Services, Inc.'s completion to return the yard/property to original condition at homeowner's expense."

Detrich indicated the old sewer pipe was forty-seven (47) years old and was the original sewer pipe installed in the house. He explained the three steps required to complete the contract; Step one was to excavate the trench; Step two was to install PVC pipe and Step three was to backfill the dirt to a rough grade only.

Shirley Wilson ("Wilson") presented testimony at trial. She resided at 819 Woodside Road in Wilmington, Delaware since 1955. Wilson owns the subject property. She believes that she was not been informed of what the actual cause of the sewer back-up was. She presented testimony that her twenty year old driveway was an "aggregate" type driveway. She believes the flagstone and damages were caused through cracking by Geiger running machinery over her driveway and does not believe that Geiger took the necessary precautions to stop or control the damage to her driveway. Wilson presented testimony that her insurance company paid to restore the driveway, flagstone and shrubbery. She is now a subrogee witness for Plaintiff insurance company.

On cross-examination, Wilson presented testimony that the toilets and sewer line was backed up and it was original tar paper sewer line from 1934 and is now 47 years old. Mrs. Wilson also explained the different clauses and that she fully read and was explained to the terms of the contract by Geiger.

Gerald S. Booth ("Booth") presented testimony. He is a general contractor and did the replacement/reconstructive work at the Wilson property. Booth was not qualified as an expert witness, but was qualified at trial as a general contractor and performed the subsequent work to repair the driveway and other matters at the Wilson's residence. In Step one, he stabilized the trench, which had apparently sunk approximately two (2) feet and then put new fill dirt back into the property. In Step two, he replaced the driveway and tore out the existing aggregate driveway

and put in a new driveway, as well as replace the flagstones. (See plaintiff's Exhibit's 3). He submitted an invoice for $22,172.83 and was paid $19,256.84, largely for the driveway for his work at the Wilson residence.

Booth presented testimony that there were cracks in the driveway and he believed that because there was dirt and no weeds that they were fresh cracks caused by Geiger Service's installation of the pipe by using small machinery over the driveway.

Richard W. Dechert ("Dechert") presented testimony. He works for Crawford & Company, a general property adjuster for nine (9) years and had thirty (30) years as an adjuster. He is an expert in the industry. In February 2001 he was called to the Wilson residence and recommended Booth be the contractor. He found cracks in the main driveway and Mrs. Wilson informed him that they occurred during excavation work and the running of equipment on the driveway. He determined the cause of loss and submitted the claim to his carrier. Because the cracks in the driveway were caused in time with close proximity to the subject work by Geiger, he believed it was a "covered claim."

On cross-examination Dechert indicated he was not present during any time of the subject work; has no idea of the condition of the driveway before work began; and is not a contractor and was unaware of whether the ditch was actually eleven feet deep. He issued his report on May 9, 2001 indicating that he believed damages to be approximately $11,000.00, although he issued a Supplemental Report on September 14, 2001. He employed Booth as the subject contractor.

The Defense presented its case in chief. Mr. James Edwards ("Edwards") testified. It was stipulated by the parties that he is an expert in the area of sewage installation. He is familiar with the subject job, although not personally involved and has worked for Geiger over the years

and has performed approximately 1,000 jobs. Edwards visited the Wilson job site and indicated he believed all the subject work done by Geiger was done in a workmanlike manner. He agreed that the fill dirt should have been placed on the driveway because of safety reasons. He issued an expert opinion that based upon his professional judgment the work was done by Geiger was performed in workmanlike manner and the Geiger "did all they could do to control the job site" from being disruptive or injured in any way. He understands the job was only to have the subject property backfilled to "rough grade" not replaced with new fill dirt.

On cross-examination, Edwards presented testimony that the excavator machine used to remove the dirt at the Wilson property weighed approximately 3,500 pounds with the rubber tracks and was used specifically by Geiger so that no damage would occur to the subject property.

David Geiger ("Mr. Geiger") presented testimony at trial. He was also qualified as an expert. He is a Master Plumber in Pennsylvania, Delaware and Maryland for the past seventeen or eighteen years and owns Geiger. He believes the subject work was done in a workmanlike manner and specifically the use of the small mechanical machine weighing 3,500 pounds with the rubber tracks was a good choice to control damage to the Wilson property. He testified the instant contract was a "tough job" and he explained to his employees, including Mr. William Detrich, who was OSHA certified, to handle the job in a "very safe manner". He believes Geiger "went beyond what it was required to do" in the terms and scope of its contract to restore the property to original conditions agreed to between the parties and that Geiger did not cause any of the subject damage was negligent in any manner. Geiger testified that people have "died" because of collapses with eleven foot ditches and for safety reasons, as well as there was lack of

room otherwise, his employees placed the fill dirt removed from the sewer trench on the Wilson driveway.

THE LAW

"In an action based upon negligence, for a plaintiff to recover, it must be shown by a preponderance of the evidence that the defendants' negligent act or omission violated a duty which was owed to the plaintiff. "*Elliott v. Camper*, Del. Super., 194 A.130, 132 (1937). The plaintiff must also prove, *inter alia*, that there is a reasonable connection between the negligent act or omission of the defendant and the injury which the plaintiff has suffered. This connection is usually called 'proximate' or 'legal cause.' W. Keeton, Prosser and Keeton on The Law of Torts 263 (5th ed. 1984)." *See, Catherine and Glenn Colve v. Mary V. Mahon, et al.*, Del. Supr., 588 A.2d 1094 (March 21, 1991).

"Superior Court Civil Rule 9(b) requires that averments of negligence be stated with particularity." *Myer v. Dyer*, Del. Super., 542 A.2d 802 (1982) ". . . [i]n order to sufficiently plead negligence, a defendant must be apprised of (1) what duty, if any, was breached, (2) who breached it, (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed." *Gunzl v. Osteopathic Hospital Assoc. of Delaware*, Del. Super., C.A. No. 81 C-FE-6, Martin, J. (January 19, 1983).

OPINION AND ORDER

It is clear that Plaintiff's presented no testimony to substantiate Count II of the Complaint and as indicated above, the Court dismisses the same. It is also clear, from the evidence presented at trial that all the subject work done at the Wilson's residence was done in a competent and workmanlike manner as safety was a material issue. The Court finds credible the testimony that the wet large fill dirt take from an eleven feet deep trench by Geiger was placed

on Wilson's driveway because of safety reasons. Detrich is an OSHA certified employee of Geiger and performed his duties under the job competently. At trial, Plaintiffs presented no testimony as to what the standard of care for in the installation of a sewer pipe and excavation work. Nor did Plaintiff explain the specific duty Geiger allegedly breached in its complaint, or at trial. Nor was the cause in fact, and proximate cause of any damages suffered by the Wilsons as subrogors of the insurance carrier wherein the Court could award damages by a preponderance of evidence. Plaintiff never clearly defined the term "collateral damage" at trial or in its complaint, and other than a claim of negligence to replace a 20 year old driveway, plaintiff did not define the duty or breach by defendants. The contract terms as outlined above were clearly explained to Mrs. Wilson. At trial she testified she read, reviewed and understood these terms contained in the instant contract.

The subject driveway was twenty (20) years old and clearly there were some existing cracks in the driveway. Special equipment was used with rubber tracks to avoid damages in removing the soil by Geiger. Clearly Plaintiff failed to prove by a preponderance of the evidence a negligence claim against Defendants which this Court could award monies to plaintiffs for the work subsequently done by Booth. *See e.g., Asset Recovery Systems, Inc. v. Process Systems*, C.A. No. 1999-10-124, Court of Common Pleas, 2002 Del. C.P. LEXIS 55, (February 6, 2002) (Welch, J.); *Wirt v. Matthews*, C.A. No.: 199-12-271, Court of Common Pleas, 2002 Del. C.P. LEXIS 17, (February 7, 2002) (Welch, J.). Geiger was careful to remove existing shrubbery and for safety reasons, the fill dirt was placed on the driveway. Finally, the contract language which Wilson testified at trial she read and understood at trial, clearly placed Wilson on notice of the necessary digging under the driveway and remedial action necessary by the Wilsons to restore the property to its original addition at the homeowner's expense.

It is therefore the Order of the Court that judgment be entered in favor of the defendants. Each party to bear their own costs.

IT IS SO ORDERED this 1st day of April, 2004.

Honorable John K. Welch
Associate Judge