

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 7, 2002

89975

MANFRED LEGER et al.,
Respondents,

v

MEMORANDUM AND ORDER

CENTRAL HUDSON GAS & ELECTRIC
CORPORATION,
Appellant.

Calendar Date: December 18, 2001

Before: Mercure, J.P., Crew III, Spain, Carpinello and Rose, JJ.

Cook, Tucker, Netter & Cloonan (Robert E. Netter of
counsel), Kingston, for appellant.

Law Offices of Oleh N. Dekajlo (Oleh N. Dekajlo of
counsel), East Meadow, for respondents.

Crew III, J.

Appeal from a judgment of the Supreme Court (Meddaugh, J.),
entered October 17, 2000 in Sullivan County, upon a verdict
rendered in favor of plaintiffs.

On April 9, 1992, plaintiffs purchased property in the Town
of Neversink, Sullivan County, which was subject to an easement
in favor of defendant. The easement granted defendant the right
to, inter alia, enter plaintiffs' property to construct and
maintain electrical transmission lines, as well as the right to
trim and remove trees in order to provide a 10-foot clearance for
such transmission lines.

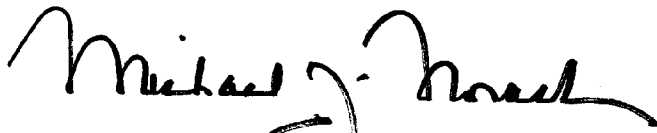
In August 1993, defendant contracted with Asplundh Tree Expert Company to trim and remove trees in accordance with the underlying easement. In performing that contract, Asplundh cleared a 40-foot swath along defendant's right-of-way and removed numerous mature trees. As a consequence, plaintiffs commenced the instant action against defendant asserting causes of action in trespass and negligence. Following a jury trial, plaintiffs were awarded \$62,415 as damages for trespass and, based upon a finding that the trespass was not casual and involuntary, plaintiffs were awarded treble damages (see, RPAPL 861 [2] [a]).

While it is true, as contended by defendant, that a party who retains an independent contractor has no liability for the negligent acts of such contractor (see, e.g., Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668), the record here amply justifies a finding that defendant was negligent in the manner in which it instructed Asplundh to perform the work which, in turn, constitutes a well-recognized exception to the rule against the imposition of liability for the acts of an independent contractor (see, Kleeman v Rheingold, 81 NY2d 270, 274). We further find no merit in defendant's contention that Supreme Court erred in failing to charge the jury as to the affirmative defense of probable cause (see, RPAPL 861 [2] [a]). It is axiomatic that defendant was entitled to such charge only if there was evidence in the record tending to establish the elements of that defense (see, e.g., People v Harris, 95 NY2d 316, 319), and the record reveals that defendant provided no evidence that it had probable cause to believe that it owned the property in question.

Mercure, J.P., Spain, Carpinello and Rose, JJ., concur.

ORDERED that the judgment is affirmed, with costs.

ENTER:

A handwritten signature in black ink, appearing to read "Michael J. Novack". The signature is written in a cursive style with a large, looping initial "M".

Michael J. Novack
Clerk of the Court