STATE OF VERMONT

SUPERIOR COURT Addison Unit	CIVIL DIVISION Docket No. 83-5-16 Ancv
Jeffrey and Leilani Schnoor, Plaintiffs, v. Don Weston Excavating, Inc., and Town of Middlebury, Defendants. Don Weston Excavating, Inc., Third Party Plaintiff, v. Phelps Engineering, Inc., Third Party Defendant. Town of Middlebury, Cross-Claimant, v. Don Weston Excavating, Inc. and Phelps Engineering, Inc., Defendants.	DECISION ON MOTION

This matter comes before the court on a motion for summary judgment. Plaintiffs have sued the Town and its contractor, Don Weston Engineering, Inc., for damages arising out of a sewage intrusion into their home. Plaintiffs allege negligence on the part of Weston, in crushing a sewer line. Weston in turn sued Third Party Defendant Phelps Engineering, Inc., based on Phelps's alleged negligence in creating plans that failed properly to locate the line. Phelps seeks summary judgment on this claim. For the reasons below, the court concludes that Phelps owes Weston no duty of indemnification, and so grants the motion.

Background

In support of its Motion, Phelps submitted a properly supported Statement of Undisputed Material Facts. In response, while Weston did submit its own statement of disputed facts, its submission failed properly to address Phelps's assertions. *See* n. 2 below. Thus, the court considers the following facts to be undisputed for purposes of this motion. *See* V.R.C.P. 56(e)(2).

Weston is a contractor, hired by the Town to work on storm and sanitary sewage infrastructure ("the project"). Phelps provided engineering services for the project, and Weston alleges that it relied on Phelps's plans. It alleges further that the plans were inaccurate in failing properly to depict the location of underground structures. Allegedly, in its work, Weston negligently crushed one such underground facility—a sewer line—resulting in damage to Plaintiffs' home—evidently a structure adjacent to the site.[1]

Weston had no contractual relationship with Phelps. The General Conditions for the project expressly state that Phelps was not responsible for the "accuracy or completeness" of data shown on the plans with respect to underground facilities. *See* Exhibit C to SUMF, at G-9 (Article 4.3.1.1). Rather, Weston had "full responsibility" for confirming all information on Phelps's plans and for locating all underground facilities. *Id.* (Article 4.3.1.2).[2] Finally, Weston had "full responsibility" for the "safety and protection" of underground facilities, *id.*; it undertook further to "provide the necessary protection to prevent damage, injury, or loss to: . . . other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities and Underground Facilities not designated for removal," *id.*, at G-15 (Article 6.20.3).

Notwithstanding these provisions, Weston alleges that Phelps owes it a duty of indemnification. Weston's third-party complaint alleges that Phelps had an engineer on site during the project and created the construction plans. Weston claims these plans failed properly to describe and depict the location of the underground structures. Thus, it argues, any damage to Plaintiffs' home resulted not from Weston's active fault, but from Phelps's negligence.

ANALYSIS

Weston's arguments fundamentally misapprehend Vermont law on indemnity. "Indemnity is available where (1) an express agreement or undertaking by one party to

[1] Weston disputes this allegation; it suggests that Phelps, in doing some exploratory digging, may have caused the damage. *See* Affidavit of Jeffrey Weston, ¶ 6. To the extent this is true, of course, Weston has a complete defense, and any claim for indemnity is moot.

[2] Weston disputes this assertion; it suggests that "Weston was only responsible for locating Underground Facilities depicted on Phelps'[s] plans and Weston did not have an independent obligation to find Underground Facilities that Phelps failed to include in its plans." Statement of Disputed Facts, ¶ 7, citing Article 4.3.1.2. Weston's crabbed and tortured reading of this provision gives sophistry a bad name; it does not properly create a genuine dispute on this point. Rather, this is a question of contract interpretation. The court concludes as a matter of law that Phelps's interpretation, as reflected in the text above, is the correct one. *See John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 16 (1999) (determination that contract is unambiguous, and interpretation of unambiguous provisions, are matters of law for the court).

indemnify the other exists or (2) circumstances require the law to imply such an undertaking." *City of Burlington v. Arthur J. Gallagher & Co.*, 173 Vt. 484, 486 (2001). There being no contract between Weston and Phelps, any duty of indemnification here must be implied.

Implied indemnity is "a right accruing to a party who, without active fault, has been compelled by some legal obligation, such as a finding of vicarious liability, to pay damages occasioned by the negligence of another." *Morris v. American Motors Corp.*, 142 Vt. 566, 576 (1982). "Because of the rule against contribution among joint tortfeasors and the fact that indemnification shifts the entire loss from one party to another, [citation omitted], one who has taken an active part in negligently injuring another is not entitled to indemnification from a second tortfeasor who also negligently caused the injury." *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 29 (1992). "We have acknowledged the difficulty of articulating a general rule on implied indemnity, but have explained that usually it will apply only when the party seeking indemnity is vicariously or secondarily liable to the third person because of a legal relationship with the third person or because of the party's failure to discover a dangerous condition caused by the indemnifying party, 'who is primarily responsible for the condition.' " *Hemond v. Frontier Communications of America, Inc.*, 2015 VT 66, ¶ 9, 199 Vt. 263 (citing *White*). "The obligation of indemnity, however, is only imposed where there is a legal relationship between indemnitor and indemnitee." *Peters v. Mindell*, 159 Vt. 424, 428 (1992).

Here, the claim for implied indemnity fails on all points. Any liability on the part of Weston arises out of Weston's active fault: its failure to fulfill its contractual obligation to locate all underground facilities and to "prevent damage, injury, or loss" to either those facilities or adjacent structures. Weston has not even alleged that it is only "vicariously or secondarily liable" to Plaintiffs, or suggested that it had any legal relationship with them that could give rise to such liability. Nor has it produced any competent evidence to show that any "dangerous condition" was "caused by the act of" Phelps; rather, it agreed contractually that Phelps undertook no responsibility with respect to any such condition. Finally, it has neither alleged nor shown that there was any "legal relationship" between it and Phelps. In short, at best, Weston is the prototypical joint tortfeasor, whom the law of implied indemnity does not protect.

ORDER

Phelps's Motion for Summary Judgment is **granted**. Weston's third-party complaint is **dismissed, with prejudice**.

Electronically signed on February 23, 2017 at 12:05 PM pursuant to V.R.E.F. 7(d).

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Samuel Hoar, Jr.
Superior Court Judge