Pompeii Estates, Inc. v. Consolidated Edison Co. of N. Y., Inc.

Civil Court of the City of New York, Trial Term, Queens County

397 N.Y.S.2d 577

August 16, 1977

Posner, J.:

The "Dawn of the Age of Aquarius" has also ushered in the "Age of the Computer".

There is no question that the modern computer is as indispensable to big business as the washing machine is to the American household. To ask the American housewife to go back to washing clothes by hand is as unthinkable as asking Consolidated Edison to send out its monthly bills by any other method than the computer.

This is an action in negligence by a builder against a public utility for damages sustained as a result of the alleged "wrongful" termination of electricity at an unoccupied one-family house (that had recently been constructed by the plaintiff) at 200-15 Pompeii Rd., Holliswood. Sometime in October, 1975, the defendant had installed electric services to the plaintiff's property. On or about January 20, 1976, the defendant terminated such service because of two unpaid bills amounting to $ 25.11. Since the premises were unoccupied, the lack of electricity caused the motor which operated the heating unit to go off, which resulted in frozen water pipes, which burst and caused $ 1,030 of proven damages to the premises. . . .

Defendant through the use of five witnesses, made out a good case proving that the notice to disconnect was probably mailed even though no witness had actual knowledge of mailing this specific notice. Obviously, it would be overly burdensome, if not impossible, to expect a utility mailing out thousands of disconnect notices a day to be able to prove that each one was individually mailed. . . .

Accordingly, this court finds that the defendant did comply with the statutory requirement of mailing even though we are also convinced that the plaintiff had never received the notice because an expert witness from the U. S. Postal Department testified that the postal service does not leave mail at an unoccupied address. Unless a statute or the contract between the parties calls for *actual notice* proof of mailing is sufficient to prove notice, even though the notice was never received.

While the parties, at the trial and in their memoranda of law devoted considerable time to the issue of "notice", the court finds that this is not the main issue in this case. Let us say that this was a "procedural" hurdle which Consolidated Edison cleared successfully. However, the court has serious doubts as to whether the defendant has cleared the "substantive" hurdle—did it act reasonably or negligently in discontinuing plaintiff's electric service?

. . . The defendant's witnesses stated that a customer's file is opened when a new account is established and that all correspondence and other documents involving the customer are included in this file. Defendant's attorney admitted that he had found in such file the original letter from plaintiff requesting the opening of electrical current. This letter is reproduced in its entirety because of its significance to the case:

POMPEII ESTATES INC.
34-34 Bell Blvd.
Bayside, N.Y. 11361
212-631-4466

June 12, 1975

Con Edison
40-55 College Pt. Blvd.
Flushing, N.Y. 11354
Att: Mr. A. Vebeliunas—670-6152

To Whom It May Concern:

Please be advised that there have been no changes in the original Building Plans for the 2 Houses located at the following addresses:
House #1-200-15 Pompeii Rd., Holliswood, N.Y.—Lot #163
House #2—200-19 Pompeii Rd., Holliswood, N.Y.—Lot #160
Be further advised that the electrical load within the house will be:—6KW Lighting and 3 1/2 Horse Power Air-Conditioning
1/4 Horse Power Blowers
1.2 KW Dishwashers

There will be 1-150 AMP—3 wire socket type electric meter for each house.

Sincerely yours,
POMPEII ESTATES
AT: SWR
ALBINO TESTANI—PRESIDENT

Between the date of this letter (June 12, 1975) and the time service was installed (Oct. 24, 1975) four months elapsed. There was no other correspondence; but the plaintiff's witness (Testani) testified that he had numerous conversations with Mr. Vebeliunas on the phone and at the job site. Mr. Vebeliunas, defendant's employee never appeared in court, even though the case was tried on three separate occasions over a period of two weeks. Though Vebeliunas was defendant's field representative and the only contact plaintiff had with defendant, he was never consulted when the decision was made to discontinue service for the nonpayment of the first two months rent. The testimony of defendant's witnesses bore out the fact that said decision was a routine procedure activated by the computer and ordered by a Mr. Chris Hagan. Did defendant produce Mr. Hagan to testify what human input there was to the computer's order? No, like Mr.

Vebeliunas, he never graced the courtroom scene. Failure to produce two key witnesses under the defendant's control can only lead to the inference that they would not contradict the plaintiff's contention that defendant acted unreasonably.

Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under such circumstances. The statute only requires the notice of discontinuance to be sent to the premises where the service is provided; though, by regulation, the Public Service Commission has said that the customer may direct another address for mailing purposes. While the plaintiff's letter *(supra)* does not specifically direct that the mail be sent to 34-34 Bell Boulevard, any reasonably prudent person examining the letter would realize that this is a builder building new homes and that it is not customary for a builder to occupy the homes he builds. Certainly, any reasonably prudent person, if in doubt, would contact Mr. Vebeliunas to ascertain the facts. This is especially so when the termination of service is in the middle of winter and the foreseeable consequences to the heating system and the water pipes are apparent. Where there is a foreseeability of damage to another that may occur from one's acts, there arises a duty to use care. In this instance, a one-minute cursory glance at plaintiff's letter *(supra)* would have alerted Mr. Hagan to the fact that there was something unusual in this situation. To the contrary, the computer said, "terminate", and Mr. Hagan gave the order to terminate.

This court finds the defendant liable to the plaintiff for damages in the amount of $ 1,030, with interest and costs. While the computer is a useful instrument, it cannot serve as a shield to relieve Consolidated Edison of its obligation to exercise reasonable care when terminating service. The statute gives it the discretionary power to do so, and this discretion must be exercised by a human brain. Computers can only issue mandatory instructions—they are not programmed to exercise discretion.