Broeker v The State of New York
2000 NY Slip Op 30009(U)
September 11, 2000
Court of Claims
Docket Number: 90956
Judge: Philip J. Patti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[*1]

BROEKER v. THE STATE OF NEW YORK, #2000-013-508, Claim No. 90956

Case Information

UID: 2000-013-508

Claimant(s): MICHELLE BROEKER

Claimant short name: BROEKER

Footnote (claimant name) :

Defendant(s): THE STATE OF NEW YORK

Footnote (defendant name) : The Court has sua sponte amended the caption to reflect the only properly named defendant.

Third-party claimant(s):

Third-party defendant(s):

Claim number(s): 90956

Motion number(s):

Cross-motion number(s):

Judge: PHILIP J. PATTI

Claimant's attorney: AMDURSKY, PELKY, FENNELL & WALLEN, P.C.BY: GREGORY R. GILBERT, ESQ.

Defendant's attorney: ELIOT SPITZER

Attorney General of the State of New York

BY: ED J. THOMPSON, ESQ. Assistant Attorney General

Third-party defendant's attorney:

Signature date: September 11, 2000

[*2]

City: Rochester

Decision

This timely filed claim arises from what Claimant describes as "atypical roommate problems" she encountered when she enrolled as a first-year student at SUNY Oswego. It involves a series of incidents, including criminal mischief, threatening telephone calls, larceny and an assault, that led Claimant to leave college less than two months into her first year. Claimant alleges in this case that Defendant is legally responsible for these incidents because it failed to take reasonable steps to protect her.

A trial on the issue of liability took place on November 22, 1999. Claimant testified on her own behalf and called her mother, Carolyn Scheftic, as a witness. She also relied upon her own deposition and upon the depositions of four SUNY Oswego employees: Lawrence Jarrett, a lieutenant in the Oswego Department of Public Safety; Charlie Weeks, Director of Residence, Life and Housing; Kathleen Evans, Assistant Dean of Students; and, James Wassenaar, Vice President for Student Services. Defendant relied primarily upon the trial testimony of Thomas Ryan, the Chief of the University Police Force at SUNY Oswego.

CLAIMANT'S PROOF

"Atypical Roommate Problems"

In the fall of 1994, Ms. Broeker, the Claimant, was an on-campus resident assigned to a double room on the third floor of Seneca Hall. Her first roommate left school two days after enrollment due to a common malady among first-year students known as "homesickness." Claimant was the sole occupant of the room until the third week of September, when she was approached by another resident of the dorm, Dana Williams, who said that she had also lost her roommate. After a brief meeting, Claimant agreed to let Dana Williams move into her room. Her Resident Assistant, James Hogan, approved the move.

The two women lived together amicably at first, but it soon became apparent that they were not compatible.[1] They had different study and sleeping habits. They also had differences over their personal property. Initially, Claimant was more than willing to share her belongings with her new

[*3]

roommate, but it soon began to bother her that Williams was not returning her property to its place after she used it.

These differences led to tensions between the two roommates. Claimant described one incident when she and Williams argued over Claimant's electric hot pot. Williams reportedly threw the hot pot to the floor in anger and broke it. Another time, Ms. Williams became upset when she was awakened by an early morning call from Claimant's mother. According to Claimant, Williams slammed the phone back into its cradle with such force that she broke the receiver.

In an effort to improve the atmosphere in the room, Claimant sought out the advice of her Residence Assistant, James Hogan. He suggested that she talk with Williams about their differences. Claimant explained at trial that she found it difficult to follow Hogan's advice because Williams would not acknowledge that the two were having problems. During one talk with her roommate, Claimant said she learned that Williams and her original roommate had parted company after the two had had a physical confrontation.

After several unsuccessful attempts to resolve the situation with Williams and a few more visits to Hogan, Claimant said she told Williams that she would no longer be welcome to use her property. Williams became angry and left the room.

The Ransacking

The situation came to a head during the first weekend in October. Claimant's mother picked her up and drove her to Albany to visit her brother. According to mother and daughter, Claimant's portion of the room was neat and orderly when they left the campus. When Claimant returned from Albany on Sunday, she found that her side of the room was in complete disarray. It had been ransacked and some of her books, notebooks, lab materials, and about $20.00 in cash were missing.

[*4]

Claimant concluded that Williams was responsible for the damage since she was the only other person who had a key to the room. She reported the incident to Mr. Hogan, who said he would notify the Dorm Director, Matt Poole. At Hogan's request, she also contacted campus Public Safety and filed an incident report.

Within the next 24 hours, Claimant met with a representative from the Department of Public Safety named Kelly Byrne and told her she blamed Williams for the ransacking. Upon Ms. Byrne's advice, Claimant removed her remaining valuables from her room and relocated to a friend's room pending a hearing with the Dorm Director. Ms. Williams gave a sworn statement to Byrne on October 4th which offered two seemingly inconsistent explanations for the ransacking: (1) that Claimant did it herself before she left on Friday; or (2) that third parties did it after Ms. Williams had returned to the room and then left it without relocking it. Photographs of the room taken by campus security were received into evidence as Exhibit 5.

A few days after this incident, the Dorm Director convened an informal hearing. According to Claimant, each roommate wanted the other to move out. Mr. Poole decided that Ms. Williams should relocate. As soon as Ms. Williams moved out, Claimant returned to the room and lived there alone. She made clear in her testimony that she did not, at the time of the hearing, fear any reprisals from Williams and that she did not ask for or receive any assurances that she would be provided with any special protection after the ransacking.

Threatening Phone Calls

Claimant said she soon began to receive telephone calls from an unidentified person who would ask to speak to Ms. Williams. When Claimant would inform the caller that Ms. Williams no longer lived in the room, the caller responded that he or she was aware that Ms. Williams had moved and that Claimant either had "better watch out" or had "better watch her back."[2] Claimant testified that she brought these calls to the attention of Resident Adviser Hogan after she had received several of them. He told her not to overact and asked her to let him know if the calls continued. He also promised to notify the Dorm Director of these occurrences. When the calls continued over the next few days, Claimant went back to Hogan and told him that the calls were frightening her. Hogan assured her again that he would report the matter to the Director.

[*5]

The Assault

Claimant left campus on the weekend of October 15-16, 1994 to visit her brother in Albany. She returned early in the evening on the 16th. At about 8:30 or 9:00 p.m., she left her dorm to get some materials from the library.

The walk to the library took Claimant over a paved pathway through a somewhat wooded area located near the center of the University's academic quadrangle. The wooded area was not well illuminated, according to Claimant. She testified that as she was passing through that area, she heard voices and felt someone push her violently from behind. She fell to the ground, striking her face on the pavement. The assailants jumped on her and kicked her repeatedly and then fled the scene. They left Claimant sprawled on the pathway, bruised and bleeding.

Claimant did not see her assailants. She testified at trial that she felt that they were males because their voices were "deep." In a deposition statement that she signed several days after the attack, however, she said her assailants were "two girls... because it most [definitely] sounded like female voices" (Exhibit A).

Once Claimant was certain that her assailants had left the area, she proceeded to a friend's room where she described what had happened. The Residence Assistant and the Dorm Director were immediately advised, as was the Public Safety Department. After giving Public Safety a statement, Claimant was taken to the Oswego Hospital for treatment. Her mother picked Claimant up at the hospital and transported her home.

Claimant prepared a second written statement for campus police about the incident on October 19th, but otherwise remained at home for the balance of the week. On the day that she gave her statement, Claimant met with Lieutenant Gauthier of the Public Safety Department, who was involved in the investigation of this incident. According to Claimant, Lieutenant Gauthier assured her that his department would do all that it could to apprehend those involved in the assault. Claimant also recalled

[*5]

Lieutenant Gauthier telling her that the University's "normal patrol cars... that just drive around the campus all day anyway... would patrol around the area" of her dorm and that Public Safety would place a wiretap on her campus phone. Lieutenant Gauthier asked Claimant to promise not to walk anywhere on the campus grounds alone. He also asked her to call campus security if she found herself returning at night from any place on campus. He said that security would dispatch a car to drive her back to her dorm.

As one would expect, Claimant's mother also called the University to find out what it would do to protect Claimant from further incidents. Ms. Scheftic testified that she spoke to a number of University officials, including Dean Evans, Lieutenant Jarrett and Chief Ryan. According to Ms. Scheftic, Lieutenant Jarrett told her that he had strong suspicions about who had attacked Claimant and believed that there would be additional incidents. He reportedly promised to put extra patrols around Claimant's dorm and told Claimant's mother that Claimant should never walk anywhere on campus by herself. He also said he wanted to put a wiretap on Claimant's telephone.

According to Ms. Scheftic, Chief Ryan, whom she spoke to separately, agreed with Lieutenants Jarrett and Gauthier that Claimant should not be walking around campus by herself and promised that there would be extra patrols of Claimant's dorm when Claimant returned to campus.

The Motor Oil Incident

Claimant returned to campus the Sunday following the assault. At the request of the Department of Public Safety, her mother called Dorm Director Matt Poole to notify him of the exact time that Claimant would be arriving. Upon her arrival, Claimant visited with friends and then retired to her room at about 3:00 a.m. Monday morning. She did not notice anything unusual about the condition of her room when she entered it and immediately went to bed. She awoke early the next morning for class and saw a goldish liquid on the floor near the door to her room. She immediately contacted her Residence Advisor and the Department of Public Safety. It turned out that the liquid on Claimant's floor was motor oil.

Claimant was very upset and frightened. That evening, after the oil had been cleaned up, she packed her belongings and left. She never again returned to SUNY Oswego as a student.

[*6]

DEFENDANT'S PROOF

Defendant called Thomas Ryan, who was the chief of the campus police department, both at the time in question and on the day of trial. He had only a vague memory of the incidents. He appeared to be drawing his recollections primarily from his review of the incident file maintained by his office, a file that contained notes made by his staff. As a result, I have given little weight to his testimony as it related to the actual events, but find that it is probative to the extent that it relates to the type of protection that he and his department allegedly offered to Claimant after the ransacking and assault.

Chief Ryan could not recall speaking with Claimant's mother about the assault or discussing security measures that would be taken to protect Claimant. He said he would never have promised Claimant's mother that there would be personal security provided to Claimant, and he saw no indication in the file that his staff had given such assurances. He testified that it would be impracticable for the University to provide personal protection to any individual student because of the large number of students who attended SUNY Oswego and the limited number of officers available to police the campus.

Chief Ryan also testified that, since there was never a positive identification of the assailants or any direct proof as to who might have committed the assault, he would have never told Claimant's mother that the Department had narrowed its investigation to a particular group of suspects. It was Chief Ryan's opinion that the three incidents were separate and unrelated and that there was nothing in the record of sufficient probative value to connect them to any particular individual.

He said that the part of the campus where Claimant had been assaulted had never posed a security problem and that there had not been, prior to October 1, 1994, problems with women being attacked on campus or with burglaries in campus dorms.

First semester students like Claimant and their parents attend a one-hour orientation program when they arrive on campus. In the program, Chief Ryan tells students not to walk alone at night. He also tells

[*7]

parents and students that they can call him at any time if they become fearful on campus. He said he never received a call from Claimant.

Chief Ryan was in the dispatch area when the Department received the call from Claimant about the motor oil incident. He sent Lieutenant Taylor to investigate but had no direct involvement with this incident.

Lieutenant Jarrett, whose deposition Claimant submitted in support of her claim, was not specifically asked about any conversations that he had with Claimant's mother. He testified that the Public Safety Department did not learn about the threatening phone calls until after Claimant was assaulted. He also said that he did not know whether anyone from his Department had checked on Claimant or promised to check on Claimant when she returned to campus on the Sunday evening after the assault. He recalled looking into installing a tap on Claimant's phone and said he believed that one had been installed.

LEGAL ANALYSIS

National campus crime statistics are seemingly at odds with the tranquil settings in which many of America's 3,400 public and private institutions of higher learning are located. By one estimate, more than 21,000 college students each year are victims of campus crimes ranging from robbery and assault to rape and murder (see, Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization, 43 Case Western Reserve Law Review, 525, 526 [1993]). A survey of 774 colleges, which appeared in the Chronicle of Higher Education six months before the incidents at issue in this case, revealed that there were 1,353 robberies, 3,224 aggravated assaults, 21,478 burglaries, 466 rapes and 17 murders on those campuses in a single academic year (D. Lederman, Crime on the Campuses, The Chronicle of Higher Education, Feb. 2, 1994).

College students are particularly vulnerable to crime. Though legally treated as adults they lack the knowledge and experience they will gain in later years to protect themselves from crime. They often have no choice where to live on campus or whom to live with, particularly when they are freshmen. They do not have the ability to design and implement a security system, to hire or supervise security guards, to install proper locks or take other precautions that apartment dwellers, for example, would be

[*8]

able to take for their own personal safety (see, Mullins v Pine Manor College, 389 Mass 47, 449 NE2d 331, 335). Consequently, some states have recognized a duty on the part of a university to protect students from foreseeable risks of third-party criminal activity (see, Mullins v Pine Manor College, supra) [duty to provide adequate security]; Nero v Kansas State University, 253 Kan 567, 861 P2d 768 [duty to protect a student against sexual assault by a dorm mate who was facing rape charges stemming from a prior incident]; Petersen v San Francisco Community College District, 36 Cal 3d 799; 685 P2d 1193, 205 Cal Rptr 842 [duty to apprise students of past assaults on campus, to trim foliage and take other protective measures to reduce the risk of crime]).

New York has followed a different path than these jurisdictions. The doctrine of in loco parentis no longer applies in our State, and the duty of care owed by a university to its students is narrowly drawn (Eiseman v State of New York, 70 NY2d 175, 190; Rothbard v Colgate Univ., 235 AD2d 675, 676; Lloyd v Alpha Phi Alpha Fraternity, _____ F Supp 2d _____, 1999 US Dist LEXIS 906; Talbot v New York Institute of Technology, 225 AD2d 611, 612-613; McNeil v Wagner College, 246 AD2d 516, 517; Wells v Bard College, 184 AD2d 304, lv dismissed 80 NY2d 971). A college does not have a duty to supervise its students' activities outside the classroom (Eiseman v State of New York, supra at 189-190; Talbot v New York Institute of Technology, supra). Nor is it required to protect them from the dangerous activities of their classmates or to monitor students who are antisocial, criminal or even violent (Eiseman v State of New York, supra; McEnaney v State of New York, 267 AD2d 748; Rothbard v Colgate Univ., supra; Lloyd v Alpha Phi Alpha Fraternity, supra; Weitz v State of New York, 182 Misc 2d 320, 327).

In apparent recognition of these limitations, Claimant has founded her breach of duty argument not upon her relationship to Defendant as a university student, but rather upon her status as a tenant in one of Defendant's dormitories.

With the waiver of its sovereign immunity, Defendant is subject to the same rules of liability as a private citizen and must take reasonable steps to keep its property in a safe condition in view of all of the circumstances (Preston v State of New York, 59 NY2d 997, 998; Basso v Miller, 40 NY2d 233, 241; Miller v State of New York, 62 NY2d 506, 513). When it owns and operates dormitories, it acts as a landlord and has a duty to provide basic security devices such as functioning locks and adequate illumination to ward off reasonably foreseeable criminal intrusion (Miller v State of New York, supra, 62 NY2d, at 513; Weitz v State of New York, supra, 182 Misc 2d, at 327).

[*9]

The fact that the State is acting in a proprietary capacity does not mean, however, that it may be held liable in every circumstance in which liability could be imposed upon a private landowner (see, Weiner v Metropolitan Transportation Auth., 55 NY2d 175, 182). Claims against the State which are alleged to arise out of its ownership of land must be carefully scrutinized to determine whether the alleged act or omission implicates a proprietary responsibility or a governmental one (Miller v State of New York, supra, 62 NY2d, at 513; McEnaney v State of New York, supra, 267 AD2d, at 750). This is important because Defendant is "immune from negligence claims arising out of the performance of its governmental functions, including police protection, unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect the individual, and the individual relied upon the performance of that duty" (Miller v State of New York, supra, 62 NY2d at 510; McEnaney v State of New York, supra, 267 AD2d 748). It is the specific act or omission out of which the injury is claimed to have arisen, not whether the entity is engaged generally in a proprietary activity that is controlling (Weiner v Metropolitan Transportation Auth., supra, 55 NY2d at 182; Miller v State of New York, supra, 62 NY2d, at 513; McEnaney v State of New York, supra, 267 AD2d, at 750).

I now apply these principles to the claim before me.

To the extent that Claimant seeks damages for the theft of her personal property and the ransacking of her room, she has not demonstrated a breach of any proprietary duty by Defendant. She has not shown, for example, that inadequate locks played a role in the incident. To the contrary, her theory was that Ms. Williams vandalized Claimant's property after gaining access to the room with her own key. The fact that Claimant was having "atypical roommate problems" with Ms. Williams before the incident and that these problems related to personal property use arguably made this incident foreseeable, but "foreseeability of injury does not determine the existence of duty" (Eiseman v State of New York, supra, 70 NY2d, at 187).

In essence, this part of Claimant's case is similar to Weitz v State of New York (182 Misc 2d 320, supra). There, Judge Collins dismissed a claim brought by a SUNY Albany student who was assaulted in his dorm hall by other students. Judge Collins concluded that there was no breach of a proprietary duty where one of the assailants had been issued a key to the dormitory to access his own room, and there was no proof that a malfunctioning lock or a propped open door made it possible for the other aggressors to enter the hallway.

[*10]

I also conclude that Defendant may not be held liable for the injuries Claimant suffered when she was assaulted on campus grounds. Although Claimant testified that the illumination on the path was less than ideal, she does not argue that Defendant breached a duty of care by providing inadequate lighting. Nor does she assert that a deficiency in the lighting facilitated the attack. Instead, Claimant argues that the "atypical roommate problems" she was experiencing, the ransacking of her room and the threatening phone calls made it "evident" that her former roommate, Ms Williams, or someone affiliated with Ms. Williams intended to harm her. Once again, Claimant is attempting to infer the existence of a duty to protect her from facts that, in her view, made the assault foreseeable. In the absence of a legal duty, however, foreseeability is immaterial (see, Eiseman v State of New York, supra, 70 NY2d, at 187).

The allegations that Defendant failed to provide adequate security on campus grounds and failed to investigate or follow up on the ransacking and threatening phone call incidents, constitute a challenge to the adequacy of the police protection Defendant provided on campus, a traditional government function (McEnaney v State of New York, supra, 267 AD2d, at 750-751; Ruchalski v Schenectady Community College, 239 AD2d 687, 688). Claimant has not demonstrated that she had a "special relationship" with Defendant at the time of the assault (see, Miller v State of New York, supra, 62 NY2d, at 510). To the contrary, she did not ask for or receive any promises of special protection after the ransacking, and the Resident Assistant promised only to pass her report of threatening phone calls on to the Dorm Director. Therefore, Defendant had no specific duty to protect her and cannot be held liable for the injuries she sustained in the assault (see, Miller v State of New York, supra, 62 NY2d, at 510; see also, McEnaney v State of New York, supra, 267 AD2d, at 752).

I credit the testimony offered by Claimant and her mother about the promises made to them by Lieutenant Gauthier, Lieutenant Jarrett and Chief Ryan after the assault. Those promises were not, in my view, sufficient to create a specific duty of protection running from Defendant to Claimant. Even if I were to assume that a specific duty arose from them, Defendant may not be held liable for damages, if any, that arose from the motor oil incident. At most, the assurances that Claimant and her mother received obliged Defendant to provide extra patrols in the vicinity of Claimant's dorm. Defendant clearly did not agree to post a guard at the door of Claimant's room or to provide around- the-clock surveillance on her hall. In the absence of any proof that Defendant failed to fulfill the promises that it made, or that a failure to fulfill those promises made it possible for the motor oil incident to occur, I cannot hold Defendant liable for that incident.

While I am constrained to find for Defendant, I was touched and saddened by the difficulties that Claimant faced during her brief stay on the Oswego campus. No young person embarking upon the

[*11]

adventure and challenge of a college education should have to endure such a painful and unfortunate series of events. As Defendant points out, however, compassion alone does not justify an award.

For the reasons stated above, Claim No. 90956 is dismissed. All motions not heretofore ruled upon are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

September 11, 2000

Rochester, New York

HON. PHILIP J. PATTI

Judge of the Court of Claims

----

[1]

Neither side elected to call Dana Williams as a witness. In fairness to her, I note that I am describing Claimant's account of their difficulties. Ms. Williams might have a very different recollection of what transpired.

[2]

All quotations are from the trial transcript unless otherwise noted.