

**Grover v Fuchs**

2011 NY Slip Op 33249(U)

August 8, 2011

Supreme Court, Queens County

Docket Number: 4036/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

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Robert M. Grover, Jr. and Melissa Grover,  
Plaintiffs,  
- against -

Index  
Number: 4036/09  
Motion  
Date: 7/26/11

Robert Fuchs and The City of New York,

Motion  
Cal. Number: 17

Defendants.

Motion Seq. No.: 1

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The following papers numbered 1 to 9 read on this motion by defendant, The City of New York, for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibits.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the cross-claim against it by co-defendant Fuchs is granted.

As a preliminary matter, contrary to the contention of Fuchs' counsel, the instant motion is timely. Pursuant to the stipulation of the parties dated March 11, 2011 and so-ordered by this Court on March 18, 2011, the time of the parties to move for summary judgment was extended to June 1, 2011. Since the instant motion was served on May 12, 2011 and the initial return date thereof was May 31, 2011, it is timely.

Plaintiff has not opposed the instant motion. The City represents that plaintiff wishes to discontinue his action against the City and has entered into a stipulation with the City discontinuing the action against the City with prejudice, but that Fuchs has refused to agree to the discontinuance.

Plaintiff, a New York City firefighter, sustained burns to his hands while fighting a fire at Fuchs' home at 87-35 114<sup>th</sup> Street in Queens County on February 26, 2008. Plaintiff alleges that he was unable to press the emergency alert button (EAB) on his radio with his gloves on and sustained burns to his hands when he removed his gloves to press the emergency button. Fuchs cross-claimed against the City for contribution alleging generally that plaintiff's injuries were caused by the City's negligence.

In his bill of particulars in response to the City's demand therefor, plaintiff alleged that there was no mayday button on his remote microphone and was thus required to reach under his bunker gear coat to access his radio to press the mayday button that was located on the radio. Moreover, the button on the radio was recessed and difficult to depress with his gloves on and he had to remove his gloves to press the button, causing his hands to be exposed to the heat. In the process, he dropped his gloves and lost them amid the debris. He then lay down on the floor with his hand under him to protect them, but he still sustained serious burns. His complaint also contended that he was not provided with proper gloves that would have enabled him to depress the radio's emergency button without removing them. Plaintiff alleged that the City was negligent in failing to provide him with proper equipment.

The radio that plaintiff was equipped with was a Motorola Model 3500 unit that had a push-to-talk button on it as well as the EAB button and a remote microphone with only a push-to-talk button on it that was attached near the firefighter's head, usually on the shoulder.

FDNY Captain Anthony Catalanotto and Commissioner Salvatore Cassano, who was Chief of Department on the date of the accident, presented the history of the development of the radios in use by the FDNY in their depositions.

The original "walkie-talkies" used by the FDNY only had a push-to-talk button, volume, squelch and channel selector knobs. The radio was worn in a leather holster slung over the shoulder under the bunker coat. A remote microphone was connected to the radio via a cord and clipped onto the outside of the coat at a point near the firefighter's head. The remote microphone only had a push-to-talk button. In March 2001, the FDNY procured new radios from Motorola, the Model 3500. These radios delivered by Motorola included an EAB button, a new design feature that hitherto did not exist. Neither Catalanotto nor Cassano knew whether anyone from the FDNY had requested this new design feature, but only knew that these devices came from Motorola with this new feature, which the FDNY decided to utilize. The EAB was located on the radio itself

next to the antenna and the other knobs. The remote microphone that was delivered with the new radios, however, did not have an EAB on it but was the traditional remote microphone equipped only with a push-to-talk button.

Catalanotto and Cassano explained that when a firefighter was in trouble, he would issue a mayday on his radio by pushing the talk button on his remote microphone and exclaiming, "Mayday, mayday, mayday!" All other firefighters who heard this on their radios were then supposed to immediately cease whatever communications they were engaged in and allow only the firefighter in distress to transmit. The EAB on the new radios, when pressed, generated an audible beacon from the radio's speaker as well as an automated distress signal that transmitted the firefighter's location to other radios equipped with LCD screens. It also automatically boosted the power output of the radio from 2 watts to 5 watts to overpower all other transmission chatter so that the distress signal would not be drowned out by other communications. They testified that firefighters could also, and indeed were still trained and instructed, to issue a mayday in the traditional manner of depressing the regular push-to-talk button and speaking.

Catalanotto and Cassano testified that from the outset, they recognized that the location of the EAB on the radio was not optimal, since it would be awkward for firefighters to reach under their coats to find the EAB, and that a second EAB should be located on the remote microphone. A "radio committee" was assembled to identify and implement the necessary design changes. The committee included representatives from Motorola, the FDNY Tactical Training Team and the FDNY's Bureau of Technology and Development, as well as Catalanotto and Cassano.

The original 3500s that were delivered in March 2001 were tested in a month-long trial, found to be flawed in certain other respects, and were never put into service. In the interim, the FDNY continued using its old radios. In 2003, Motorola delivered new 3500s to the FDNY that corrected the problems found with the first ones. They also included remote microphones that were equipped with an EAB, as per the committee's specification. Unfortunately, Motorola also took it upon itself to add volume and channel selector knobs to the remote microphone, which were neither requested nor wanted by the FDNY.

During initial evaluation, the committee found that the push-to-talk button was too small and should protrude more prominently to make it easier for a gloved hand to press. That microphone was, therefore, rejected and the committee instructed Motorola to make the required design change. The original remote microphones that

only had the push-to-talk button were retained for use in the interim. Motorola delivered a remote microphone with the improved push-to-talk button six to 12 months later in 2004. However, after testing this prototype in the field, it was found that the channel selector knob on the microphone was prone to being switched accidentally to another frequency and being clogged with dust. Firefighters did not need to switch channels on their radios and this feature was an unnecessary complication and hindrance. The committee recommended to Motorola that the channel selector knob be removed from the remote microphone. The remote microphone also failed the submersibility test.

Therefore, this third design was rejected and a fourth design was presented by Motorola in 2006, in which the channel-selector knob had been eliminated and the submersibility issue had been corrected. After a period of testing this latest design, the committee found that the EAB ripped off from the microphone because it protruded and was made of an eraser-like material. The committee also found other design flaws including a poorly-designed honeycomb face piece.

The fifth and final design of the remote microphone was delivered in the early part of 2007. It corrected all of the design flaws found by the committee in the prior prototypes and only had a push-to-talk button and EAB on it. There were no channel or volume knobs. In testing, however, it was found to have an issue with feedback, which had to be corrected. This delayed its rollout, i.e., its introduction into general service. The FDNY was in the middle of the final rollout of the remote microphone in February 2008. Plaintiff had not yet been issued this new microphone on the date of the accident but was still using the original remote microphone with only the push-to-talk button and no EAB.

Fuchs' counsel contends, in his affirmation in opposition, that Commissioner Cassano's testimony that they knew from the time they first received the new radios with the EAB that an EAB would have to be located on the remote microphone instead of only on the radio is a "tacit admission of some culpability in the matter." Counsel's argument, especially in light of the undisputed history of the development and introduction of the FDNY radios, is without merit.

In the first instance, the EAB is not a required safety device, the absence of which or the misplacement of which on radios issued to firefighters might, arguendo, constitute negligence on the part of the City. Pharreaux Nelson, Director of the Occupational Safety and Health Administrative Unit of the Bureau of Facilities of the FDNY, and Stephen Raynis, Deputy Assistant Chief

of the FDNY serving as Chief of the Safety and Inspection Services Command of the FDNY, aver in their affidavits annexed to the moving papers that there are no OSHA or National Fire Protection Association (NFPA) regulations or standards requiring hand-held radios used by firefighters to be equipped with an EAB. The radios that had been used by the FDNY prior to their replacement with the Model 3500s did not have an EAB. Rather, the EAB was a new feature added by Motorola to its new radios that were delivered to the FDNY. Indeed, when Commissioner Cassano was asked, "Over your long career, was this the first time that there was an EAB button on any radio?" he responded, "Yes." When asked, "Had you ever seen any other department using a remote mic with an EAB access button right on the microphone?" he responded, "No."

It is well-established that an employer is only required to furnish its employees with equipment that is "reasonably safe, in good repair and suitable for its intended use" (see McCormack v City of New York, 80 NY 2d 808, 810 [1992]). The City does not have the duty to provide its firefighters with the best-known equipment to protect them and, therefore, does not breach its duty of care to them merely because the equipment it provided them was not state of the art and there may have existed other devices that may have been safer (see id.).

Therefore, Fuchs' contention that the City may be found negligent for not providing plaintiff with a radio equipped with an EAB on the remote microphone, which amounts to an argument that the City should have provided him with a radio that was designed better, is without merit. Indeed, not only was the City not required to equip plaintiff with the latest and safest state of the art design, but the radio set-up used by plaintiff on the date of the accident was, in fact, state of the art at the time and no competing products existed which had the EAB feature at all, either on the radio itself or the remote microphone. In fact, the EAB feature on the remote microphone, which Fuchs argues the City was negligent in not providing to plaintiff, was a design developed by the FDNY radio committee and ordered by it from the Motorola company, and which the City was in the process of testing, evaluating and finally rolling out on the date of the accident. The City, through its presentation of the undisputed history of the development and testing of the various prototypes of this new product design, has reasonably explained the delay in equipping plaintiff with it and has demonstrated undisputably that the FDNY was in fact concerned with the safety of its firefighters and that it demanded the best product possible for them, even going to the length of having Motorola change its state of the art radios to conform to the better design specifications developed by the FDNY radio committee.

While the new design was being developed by Motorola, the FDNY used the new radios with the EAB and retained their existing remote mics that only had the push-to-talk button. There is no evidence that this radio set-up was unsafe or unsuited for its intended use. On the contrary, the old remote microphone was the standard, tried and true, design used by the FDNY for many years. Said Catalanotto in his deposition, "That is the microphone that we've used for almost twenty years in the fire services. It's - I believe it's the Jedi microphone, and that's the microphone that we held as a standard of what microphones should - this is the one that we were accustomed to using for over 20 years." It is undisputed that this microphone functioned properly and as intended and was reasonably safe.

With respect to the radio itself, the Model 3500 with the EAB on it, the evidence on this record is that it functioned properly and that there were no other known incidents prior to plaintiff's accident where a firefighter had to take off his gloves to depress the EAB and was injured in the process. When asked, "Before February of 2008, had you personally ever learned that firefighters were removing their gloves to depress that EAB button?", Catalanotto replied, "It was not known by me." When asked, "Do you know if there were any records kept of firefighters who were burned because they removed their gloves trying to reach the EAB button?", he also responded in the negative. And when asked, "Were you ever made aware through the safety division that members were burning their hands because they were taking their gloves off?", he responded, "No." Commissioner Cassano also testified that during the study phase, he did not see any difficulty in pressing the EAB with fire gloves on. He also explained that the issue the committee had with wanting the EAB to be on the microphone rather than only on the radio was one of convenience and easier access, not that it would make the radio safer. In other words, the committee did not find, and the record on this motion does not suggest, that the placement of an EAB on the radio was a dangerous design feature.

With respect to the allegation of plaintiff's complaint that he was not provided with proper gloves that would have enabled him to depress the EAB on the radio without removing them, Commissioner Cassano stated that the gloves issued to firefighters were indeed bulky, but the very reason for them was to protect the hands of firefighters from being burned. And although these gloves made access to the EAB on the radio more difficult, explained Cassano, any glove would, since the wearing of gloves reduces the wearer's dexterity. The Court trusts that no authority need be cited for the obvious fact, within the knowledge and experience of every common layperson, that gloves - any gloves - reduce the wearer's manual dexterity and tactile sense. Therefore, that plaintiff's fire

gloves made it more difficult for him to feel and press the EAB on the radio, an obvious fact, does not mean that the gloves were in any way defective or dangerous. They performed the function they were designed to perform, namely, to protect a firefighter's hands from being burned. There is no issue that they performed as designed and protected plaintiff's hands against the heat and flames while they were worn. Indeed, Fuchs does not argue in his opposition that there is any issue of fact regarding plaintiff's gloves.

Finally, even if, *arguendo*, there were a question of fact as to whether the City selected appropriate equipment for its firefighters, it is well-established that a discretionary act of a governmental entity, as opposed to a ministerial act, may not form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). "The function of selecting firefighting equipment is clearly a discretionary governmental function" (Amodio v City of New York, 33 AD 3d 456, 457 [1<sup>st</sup> Dept 2006]).

Accordingly, the motion is granted and Fuchs' cross-claim against the City is dismissed.

Dated: August 8, 2011

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KEVIN J. KERRIGAN, J.S.C.