

**Bellomo v New York State Univ. Constr. Fund**

2011 NY Slip Op 33354(U)

December 8, 2011

Supreme Court, Nassau County

Docket Number: 9940/09

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY  
Justice

MD

DANIEL BELLOMO and GRACE BELLOMO,  
Plaintiffs,

Motion Sequence #1  
Submitted September 26, 2011

-against-

INDEX NO: 9940/09

THE NEW YORK STATE UNIVERSITY  
CONSTRUCTION FUND,  
Defendant.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-4
Affs in Opposition.....	5&6
Memoranda of Law.....	7-8a

Upon the foregoing, it is ordered that this motion by defendant, New York State University Construction Fund ("Fund"), for an Order pursuant to CPLR 3212 granting Summary Judgment dismissing the plaintiffs' Complaint, is denied.

This is an action brought by the plaintiffs seeking to recover money damages for personal injuries allegedly sustained by plaintiff Daniel Bellomo as the result of the negligence of the defendant in that it created a dangerous and/or hazardous condition, that

it had constructive and actual notice of the condition, and that it failed to take reasonable care in remedying the condition. Plaintiff, Grace Bellomo, the wife of the injured plaintiff, Daniel Bellomo, has a derivative cause of action claiming a deprivation of services and loss of consortium as a result of her husband's injuries.

It is noted that the plaintiff filed a Court of Claims action against the State of New York, who in turn impleaded the insurer for TR Pipe, Arch Speciality Insurance Company, seeking indemnification. The State moved for a declaratory judgment against the insurance company and that matter is and was pending at time the instant motion was filed.

The defendant is a public benefit corporation created by the State of New York to fund construction projects for the State University of New York's Stonybrook campus ("SUNY"). In March, 2007, TR Pipe, Inc., ("TR Pipe") as per its agreement with defendant, was hired to perform construction work where it was responsible for the removal of 30-year-old high temperature water piping and installing newer piping throughout the SUNY campus. The project is referred to as SUCF Project #13B61.

According to the defendant, on March 31, 2008, TR Pipe notified the defendant and SUNY that there was a steam leak coming through the grounds of the campus, and that steam was coming out of a hole in a specific area, located on the grounds on the campus' Greely College Building #93, about 30 feet from the southwest corner of Roosevelt Drive and West drive, and about 50 feet from a bus stop, known as "Bus Stop". SUNY, on that day, cordoned off the area with yellow tape and barricades.

On April 8, 2008 at 8:30 a.m., Daniel Bellomo, TR's employee, while performing work in the barricaded area for purposes of repair and/or replacement of the piping, sustained burning injuries when he fell into the hole causing his leg to make contact with

scalding hot water. According to the defendant, the plaintiff opened up the temporary fencing surrounding the work area where TR Pipe had dug a trench to facilitate its construction work, and walked backwards into the hole causing the ground area around the steam hole to give way under his weight. However, plaintiff maintains that he walked sideways about the hole area and the ground around the hole collapsed underneath him.

According to plaintiff, the hole was allegedly formed as result of leaks in and/or bursting of the underground steam piping, and the size of the hole progressed in size over a period of time. There is a dispute as to how the subject condition was created.

Defendant argues that although it contracts for the construction work and oversees the projects, it does not own, manage or control the actual campus on which the work is performed and that its role was limited to that of general supervision of the subject project. As such, it cannot be held liable for damages. Additionally, there is no duty to warn of dangers that are foreseeable, and that are open and obvious. Finally, it did not create the subject condition.

The defendant submits, as evidence, copies of the pleadings, pictures of the subject condition, Supervisor's Incident Investigation Report and Employee Incident Report, Agreement between Fund and TR Pipe, transcripts of testimony provided at Examinations Before Trial of: plaintiff, Daniel Bellomo; non party witness and TR Pipe Supervisor, Jeffrey Bellomo; non party witness and independent contractor for the Fund, William Dodd; and Director of Facilities Design and Construction of SUNY, Louis Rispoli, and the sworn affidavit of Louis Rispoli.

The plaintiffs argue that once the defendant became aware of the steam leaks, the hot water system should have been shut down, and that it failed to perform immediate

repairs when notified of the condition. Consequently, the hole grew in size and created the danger that caused the plaintiff's injuries. In addition, the construction project was a project of the defendant and it had responsibility for monitoring and maintaining the construction site. The defendant was also negligent in its construction, design, maintenance and repair of the piping system and as a result, the leakage occurred giving rise to the hazardous and dangerous condition.

Further, plaintiff claims that defendant set forth a contradictory argument in the Court of Claims action where it is contended that the plaintiff's accident occurred in furtherance of TR Pipe's work in the vicinity of the actual construction zone pursuant to the work agreement between the parties; however, the defendant argues in the instant motion that SUNY was responsible for the condition and its repair.

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v Prospect Hospital, supra*; *Miceli v Purex*, 84

AD2d 562).

Once the initial burden has been met by the movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562) even if alleged by an expert (*Alvarez v Prospect Hospital, supra*; *Aghabi v Serbo*, 256 AD2d 287).

The prevailing issue is whether the defendant controlled, supervised or directed construction work on the project. Any liability must be predicated upon the duty to repair the condition upon notice, or to place sufficient barriers around the area where the hole was located. Without control over the construction project, defendant would then have no duty with respect to the condition that resulted in plaintiff's accident. In sum, in the absence of duty, there can be no liability (*Miano v State University Const. Fund*, 291 AD2d 830; *Giordano v Seeyle, Stevenson & Knight, Inc.*, 216 AD2d 439).

Note the specific language as set forth by the defendant in its own memorandum of law : "...The fund does not own, manage or control the **campuses** (emphasis added) on which the projects are performed.." It then cites the case of *Old Oaks Country Club v. State University Construction Fund*, 66 AD2d 815 and uses that court's holding as support; "the Fund can only be forced to answer damages through a showing that it actually controlled, supervised or directed the **construction work** on the project [that resulted in injury)". The two terms are distinguishable. The crux of the argument is whether the defendant controlled the *project*, not the actual *campus*.

Notwithstanding what term the defendant uses, for purposes of the instant motion, its argument is unavailing. In light of the foregoing, control of the project is presumed to be controlled by contractor, TR Pipe, but the presumption can be overcome by evidence demonstrating a surrender of control of the project by TR Pipe to the Fund, and an assumption of such control by the Fund or any other entity. Categorization of such a relationship is generally a question of fact (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553).

Additionally, the question of fact regarding the foregoing seminal issue is underscored by the Fund's daily on-site presence and whether such presence creates a presumption of management and control. In addition, the defendant's evidence, by way of testimony from Rispoli, describes the Fund's role as "the arm of the State University system that does construction projects for all the campuses that belong to the [SUNY] system".

As to the plaintiff's conduct, it is well settled that, **absent inherently dangerous activity** (emphasis added), the responsibility of an owner or general contractor does not include responsibility for injuries which arise as a result of the negligent performance of the work by its employees and/or subcontractors (*Old Oaks Country Club v State University Const. Fund*, 66 AD2d 815). It is undisputed that the construction project required some interaction with high temperature water piping, which is arguably a dangerous activity and consequently, the contractor and/or Fund may not be relieved from liability. It is beyond cavil that this is a question for a jury to determine.

This Court has reviewed the cases cited by the defendant in support of the foregoing argument and finds them to be distinguishable from the case at bar. In *McGrath v Oyster Bay Visiting Nurse Assn., Inc.*, 84 AD3d 894, the case involved a repaving project and the plaintiff in that case was not an employee assigned to work in that area. There, the contractor erected a yellow tape barrier around the area and the plaintiff lifted up the tape, entered the area and fell. That court held that there is no duty to protect or warn against an open and obvious condition that is not inherently dangerous. The plaintiff in *Kartychak v Consolidated Edison of N.Y.*, 304 AD2d 487 purposely entered a properly erected barrier of a construction site and fell into a transformer vault. The other cited cases set forth a similar fact pattern where the plaintiffs' actions were willful or purposeful and the conditions that gave rise to their injury were known to them.

There is no evidence that plaintiff was aware that his actions were purposeful or would cause injury. Although the hole had increased in size and the plaintiff was aware of it, it was not obvious that the ground would have collapsed around him. Even if plaintiff recognized that such danger may exist, the nature of the work may be deemed as a dangerous activity.

Implicit in the defendant's argument, is that the plaintiff brought about his own peril by his actions by averring that plaintiff deliberately entered the area and walked backwards into the hole. However, plaintiff maintains that he walked *about* the area of the hole and the ground gave way underneath him. As there is a dispute as to these facts, the non movant shall be given a favorable presumption as to his account of the facts. In deciding a summary judgment motion, the evidence must be construed in a light most favorable to

the party opposing the motion (*Matter of Benincasa v Garrubbo*, 141 AD2d 636).

Therefore, the defendants have not established a *prima facie* case establishing its entitlement to summary judgment and accordingly, the defendant's motion for an order dismissing plaintiffs' complaint is denied.

Dated: **DEC 08 2011**

  
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UTE WOLFF LALLY, J.S.C.

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**ENTERED**  
DEC 12 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE