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When Does Tort Liability Extend Beyond Contractual Parties?

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This article will explore recent case law and trends involving when tort liability attaches for injuries or damages sustained by non-parties to a contract.

In assessing whether a duty should be extended to a non-party to a contract, the Court of Appeals in *Palka v. Servicemaster Mgt. Servs. Corp.*[1] advised that "[c]ourts traditionally and as part of the common law process fix the duty point by balancing factors, including the reasonable expectation of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability."

New York's high court in *Palka* was concerned that by allowing a non-party to a contract to recover in tort from another whose duty arises from its performance of that contract would result in limitless exposure. Consequently, the court held, "to limit an open-ended range of tort duty arising out of contractual breaches, injured non-contracting parties must show that 'the performance of contractual obligations [between others] has induced detrimental reliance [by them] on continued performance and inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury.'"[2] The court further held that the nexus for a tort relationship between the defendant's contractual obligation and the injured non-contracting plaintiff's reliance and injury must be "direct and demonstrable," not "incidental or merely collateral."[3]

> The Court of Appeals has noted that "under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party."

The Court of Appeals further considered in *Espinal v. Melville Snow Constrs.*[4] whether a contractual obligation with one party can give rise to a tort duty to another outside the contract. In *Espinal*, the plaintiff commenced an action for injuries incurred from a slip and fall against the defendant, a company that entered into a snow removal contract with a property owner. The court examined whether the defendant snow removal company owed a duty to the plaintiff given that its snow removal contract was with the property owner.

Initially, the court noted that "under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." Citing Judge Benjamin Cardozo again in *Moch v. Rensselaer Water Company*, (note 2), the court noted that "imposing liability under such circumstances could render the parties liable in tort to an indefinite number of potential beneficiaries."

However, the Espinal court recognized three distinct situations in which a party who enters into a contract to render services may be found to have assumed a duty of

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care—and thus be potentially liable in tort to third parties. These exceptions were enumerated as follows:

(1) Where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm";[5]

(2) Where the plaintiff detrimentally relies on the continued performance of the contracting parties' duties;[6] and

(3) Where the contracting party has entirely displaced the other party's duty to maintain the premises safely.[7]

The court ultimately upheld dismissal in *Espinal* finding that none of the three exceptions were met.

The "detrimental reliance" exception was first recognized in *Eaves Brooks Costume Company v. Y.B.H Realty* (note 2) supra. *Eaves Brooks* involved an action to recover property damage incurred by a commercial tenant when a fire sprinkler system malfunctioned and flooded its leased premises.[8] While the court ultimately determined that the alleged negligence of the defendant in performing its contractual obligations did not breach any duty of care to the plaintiff, the Court of Appeals established that a duty would arise where a third party detrimentally relies on the continued performance of the contracting party's duties.

Specifically, the court held that "even an action may give rise to tort liability where no duty to act would otherwise exist if, for example, performance of contractual obligations has induced detrimental reliance on continued performance and inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury.' In such a case, the defendant is undertaken not just by his promises but by his legal duty to act with due care."

Security Companies

There are numerous instances in which courts have refused to grant dismissal or summary judgment to by way of example, security companies sued by non-contracting plaintiffs. In *Johnson v. George A. Fuller Company*, 266 A.D.2d 158, 699 N.Y.S.2d 348 (1st Dept. 1999), a police detective sued a general contractor, a subcontractor and a security guard company to recover for injuries he sustained at a construction site when he attempted to rescue two homeless men from a fire which was allegedly started with construction debris. The court denied the motions to dismiss by all of the parties, including the security guard company, based on questions of facts but also noting that a security company may owe the plaintiff a duty under the circumstances presented.

In *Gilmartin v. Helmsley-Speer*,[9] a tenant in a housing complex brought a negligence action against both her landlord and a security service in connection with injuries suffered when she was forcibly robbed by an unknown intruder in the lobby of the building. The First Department affirmed the trial court's denial of summary judgment, finding that material issues of fact concerning shift change procedures and other factors that led to the apartment complex being unguarded for at least 15 minutes precluded summary judgment. As such, it was clear that it could not be determined, as a matter of law, that the security company did not owe a tort duty to the plaintiff.

In *Lewis v. McDonalds Corporation*,[10] the court denied summary judgment for a security company contracted by a fast food restaurant in a claim by one of its patrons who was assaulted in the restaurant's parking lot. In *Lewis*, plaintiffs produced evidence that the security guard failed to immediately summon police after being advised that one of the individuals harassing the restaurant's staff was carrying a gun and the guard assured plaintiff that he would "take care of it." The Second Department held that "under these circumstances, a question of fact was presented for resolution by the jury with respect to the negligence of [the security guard] which would preclude summary judgment against his employer, Russo Security Services, Inc.

In *Kotchina v. Luna Park Housing Corp.*,[11] the Second Department upheld the denial of summary judgment in favor of a security company in a case brought by a tenant in an apartment building that the guard was contracted to secure. The security service argued that it did not owe a duty of care to the plaintiff, but rather to the landlord with whom it entered into a contract to

provide security services. Relying on *Espinal*, the court denied summary judgment finding the security guard's duty was not "limited to protecting property, and…one of the duties of the security guards was to provide security for the tenants of the premises."

The cases holding that a security company may owe a duty to non-contracting parties have not been limited to personal injury actions. In *Atlantic Mutual Insurance Company v. United Security*,[12] the court allowed a building owner and its subrogated insurer to assert a claim against a security company that contracted with the building owner's tenant and not the owner. *Atlantic Mutual* only involved property damage.

Citing *Palka*, supra, the First Department in *Atlantic Mutual* stated that "based upon defendant security company's reasonable expectations and the non-contracting building owner's detrimental reliance on its tenants' agreement with the security company, the owner is within the intended ambit of contractual beneficiaries entitled to seek recovery in tort for breach of the agreement."[13] The court in *Atlantic Mutual* agreed with the lower court's "determination that the criminal conduct was not, as a matter of law, an intervening cause of the fire and resulting insurance losses."

Provisions of the Contract

In *Pagan v. Hampton Houses*,[14] resident Georgina Bone was found murdered in her apartment, which was owned and managed by defendant, Hampton Houses. Before the crime was committed, defendant had entered into a contract with defendant, KBI, to provide security services for the building. Similar to the standard agreement referenced in *Bernal v. Pinkerton's*,[15] the security services agreement with KBI made no mention of the tenants and states that KBI agreed to perform such duties as specified by the landlord 'that will assist in the protection of ifs property, assets and personnel."

The First Department held it is settled that "[b]efore an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him [or her] from physical injury."[16] Without such a showing, the security company is entitled to summary judgment. The First Department continued in its reasoning that "given the fact that there were no signs of forced entry into the decedent's apartment, plaintiff simply cannot prove that it is more likely than not that decedent's injuries and death were caused by an unauthorized intruder. It is just as likely that the crime was committed by someone known to decedent whose presence in the building was not due to any negligence on the landlord's part."

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The First Department in *Pagan* continued by explaining that plaintiff failed to present evidence that negligence, if any, on the part of the landlord or KBI was the proximate cause of the decedent's injuries and death notwithstanding allegations of prior criminal acts of violence against persons in or near the building, claims that the security guard was frequently not at the lobby desk, and two rear doors that had either no lock or a broken lock.

In *Dabbs v. Aron Security*,[17] the injured plaintiffs sustained physical injuries when they were attacked by a fellow student in the courtyard of their school. Aron Security, Inc. and Arrow Security Patrols had a contract with the defendant Middle Country Central School District to provide unarmed security service. The contract terms specified that the security company agreed to "protect the physical facilities and the welfare of the students."

The Second Department held that the defendant security company "demonstrated that it did not owe a contractual or a common-law duty to protect the injured plaintiffs from physical injury or attack."[18] The Second Department held

"[t]he defendant security company also demonstrated that the injured plaintiffs were not third-party beneficiaries of its contract to provide unarmed security service, as the contract did not contain any express provision that it would protect students from physical injury or attack."[19] Consequently, the defendant security company established that it was entitled to summary judgment.

Plaintiffs Not Named

This month, the Supreme Court in New York County denied a motion to dismiss in *American Casualty Company of Reading, Pennsylvania, as subrogee of SBF Construction, Inc. and SBF Construction, Inc. individually, v. Motivated Security Services, Inc.*[20] In *SBF*, plaintiffs commenced a negligence action against the defendant security company alleging a crane leased by SBF, which plaintiff insured, was destroyed by fire even though plaintiff was not a party to the contract with the security company.

The defendant entered into two contracts with Gilbane Building Company-McKissack & McKissack to provide security-guard services on the construction site where the crane was located. Plaintiffs were not named in those contracts. Defendant argued it therefore owed no duty of care to plaintiffs and was therefore not liable for damages to the crane.

In *SBF*, plaintiffs did not dispute the documentary evidence, but rather argued that they detrimentally relied on the contracts between Gilbane and defendant. The record established that various contractors, including SBF, reported incidents of vandalism and threats on the project.

Plaintiffs therefore argued that they expected defendant would keep the construction site and enclosed property secure. Plaintiff SBF further argued that it refrained from hiring its own security personnel because defendant was already providing security services at the site.

The court held that "Plaintiffs were within the group of beneficiaries that were intended to benefit directly from the off-hour security." Additionally, the documentary evidence defendant relied upon did not conclusively establish a defense to the tort claim. The documentary evidence neither resolves all factual issues as a matter of law, nor does it conclusively dispose of plaintiffs' claim." Defendant's motion was therefore denied.

Even though a party is not named in a contract does not necessarily preclude them from seeking recovery if one of the exceptions enumerated in *Espinal v. Melville Snow Constrs* are met.[21]

1. 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994).

2. *Palka*, 83 N.Y.2d at 587 (citing *Eaves Brooks Costume Company v. Y.B.H. Realty Group*, 76 N.Y.2d 220, 226 (1990), citing *Moch Company v. Rensselaer Water Company*, 247 N.Y. 160, 167 (1928)).

3. *Palka*, 83 N.Y.2d at 587 (citing *Strauss v. Belle Realty Company*, 65 N.Y.2d 399 (1985); *White v. Guarente*, 43 N.Y.2d 356 (1977), and *Ultramares Corp. v. Touche*, 255 N.Y. 170 (1931)).

4. 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002).

5. Citing *Moch*, 247 N.Y. at 168.

6. Citing *Eaves Brooks*, 76 N.Y.2d at 226.

7. See *Espinal*, 98 N.Y.2d at 140, citing *Palka*, 83 N.Y.2d at 589.

8. *Eaves Brooks Costume Company*, 76 N.Y.2d at 222.

9. 162 A.D.2d 275, 556 N.Y.S.2d 632 (1st Dept. 1990).

10. 245 A.D.2d 270, 664 N.Y.S.2d 477 (2d Dept. 1997).

11. 27 A.D.3d 696 (2d Dept. 2006).

12. 236 A.D.2d 338, 654 N.Y.S.2d 739, 740 (1st Dept. 1991).

13. *Atlantic Mutual Insurance Co. v. United Security Group,* 236 A.D.2d at 339 (citing *Palka v. Service Master Mgt. Servs. Corp.*, supra) ; cf., *Hagan v. Comstat Sec.*, 214 A.D.2d 435, 625 N.Y.S.2d 196 (1st Dept. 1995).

14. 187 A.D.2d 325 (1st Dept. 1992).

15. 52 A.D.2d 760, affd 41 N.Y.2d 938.

16. *Pagan v. Hampton Houses*, 187 A.D.2d 325 (1992), citing to *Bernal v. Pinkerton's*, 52 A.D.2d 760, 760, affd 41 N.Y.2d 938, 382 N.Y.S.2d 769 (1st Dept. 1976).

17. 12 A.D.3d 396, 397, 784 N.Y.S.2d 601 (2d Dept. 2004).

18. Id. Citing to *Durham v. Beaufort*, 300 A.D.2d 435, 752 N.Y.S.2d 88 (2002); *Haston v. East Gate Sec. Consultants*, 259 A.D.2d 665, 687 N.Y.S.2d 657 (1999); *Buckley v. IBI Sec. Serv.*, 157 A.D.2d 645. 549 N.Y.S.2d 744 (1990).

19. Id. Citing to *Haston v. East Gate Sec. Consultants*, 259 A.D.2d 665, 687 N.Y.S.2d 657 (1999).

20. See *American Casualty Company of Reading, Pennsylvania, as subrogee of SBF Construction, Inc. and SBF Construction, Inc. individually, v. Motivated Security Services, Inc.*, Decision/Order dated Aug. 15, 2016, Index No. 157562/2014; Lebovits, J.

21. See *Espinal v. Melville Snow Constrs*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002).