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Recent Cases

Recreational Use Statute Immunized Landowners From Liability for Personal Injuries

In *Larini v. Biomass Industries, Inc.*, 918 F.2d 1046 (2d Cir. 1990), the United States Court of Appeals for the Second Circuit held that New York's recreational use statute, N.Y. Gen. Oblig. Law § 9-103 (McKinney 1988), immunized a landowner from liability to an injured snowmobiler.

Background

On February 19, 1980, Biomass Industries, Inc. ("Biomass") purchased approximately nine hundred acres of undeveloped wilderness in Windham, New York. Two years later, Biomass subdivided the property and improved the access road. As part of the road improvements, Biomass placed a drainage pipe under the road to channel water from an adjacent pond. This drainage pipe created a stream bed seven to nine feet below the road level.

Upon completion of the subdivision and the road improvements, Biomass offered some of the lots for public sale. Prior to March 1, 1986, an authorized real estate agent provided Keith Larini ("Larini") with a site plan, price quotations, and a viewing of the available lots.

In the early evening of March 1, 1986, without the permission of the real estate agent or a Biomass representative, Larini rode a snowmobile along the access road to view the specific lot which he was interested in purchasing. Biomass had blocked the access road entrance with a metal gate and a wall of snow. Biomass also had posted "No Trespassing" signs along the unplowed road. Nevertheless, Larini entered the subdivision.

As Larini travelled along the access road, he decided to drive off the roadway toward the stream

bed. As he drove into the stream bed, Larini was thrown from his snowmobile and landed against the embankment. Larini suffered serious personal injuries from the accident.

Subsequently, Larini and his wife, Sally (the "Larinis"), sued Biomass in the United States District Court for the Northern District of New York to recover damages for Larini's injuries.

District Court Proceedings

In the district court, Biomass moved for summary judgment. Biomass claimed that it was immune from liability under the New York recreational use statute, N.Y. Gen. Oblig. Law § 9-103 (McKinney 1988). On March 16, 1990, the district court held that the statute applied and granted Biomass's motion for summary judgment. The Larinis appealed the dismissal to the United States Court of Appeals for the Second Circuit.

Second Circuit Opinion

Recreational Use Statute

The New York legislature originally enacted § 9-103 to encourage landowners to make their property available for specified recreational activities such as fishing, hunting, and trapping. Through amendments, the legislature expanded the specified activities to include hiking, horseback riding, and snowmobiling. The statute provided in part that an owner of certain recreational property was immune from liability to others for personal injuries occurring on the recreational property unless: (1) for consideration, the landowner granted a party permission to take part in a specified recreational activity on his land; or (2) the landowner willfully or maliciously failed to guard or warn against a dangerous condition on his land. N.Y. § 9-103(2)(a), (b) (McKinney 1988).

First, the Larinis argued that the statute should not apply. Alternatively, they argued that if the statute did apply, Biomass was liable

under either the consideration exception or the willful or malicious conduct exception. Finally, the Larinis argued that the common law duty of reasonable care applied in this case.

Applicability of Statutory Immunity

The Larinis argued that the statute was inapplicable to immunize Biomass, as Biomass violated the purpose of the statute. The statute's purpose was to encourage access to recreational lands by limiting liability to landowners. The Larinis argued that Biomass tried to prevent public access to the property when it posted "No Trespassing" signs and placed blockades at the front entrance of the subdivision. Because Biomass acted inconsistently with the purpose of the statute, the Larinis contended that Biomass should not be immunized from liability.

The court rejected the Larinis' argument. The court found that although Biomass sealed off the access road, the property was still accessible and remained useable for several of the statute's enumerated activities.

The Larinis next argued that the property did not fall within the scope of the recreational use statute; the property was not physically conducive to snowmobiling because it contained numerous obstacles such as trees, stone walls, and a pond.

The court rejected the Larinis' argument. The court found that the property was very appealing to snowmobilers and that the obstacles only added to the attractiveness of the undeveloped woodlands. Thus, the court concluded that the property was conducive to snowmobiling and was of a type generally appropriate for recreational snowmobiling by the public. The court held that the property fell within the scope of the statute.

Consideration Exception

The Larinis also argued that Biomass was liable under the stat-

ute's consideration exception, N.Y. Gen. Oblig. Law 9-103(2)(b) (McKinney 1988). Under the consideration exception, if Biomass gave Larini permission to ride a snowmobile along the access road in exchange for some form of consideration, Biomass would be liable to Larini for his injuries. The Larinis urged the court to accept an "indirect consideration" theory as a basis for applying the exception. Under such a theory, the Larinis argued that since Larini was a potential purchaser of a lot in the subdivision, Biomass anticipated receiving consideration from him.

The court refused to apply the consideration exception to the Larinis, noting that no New York court had ever found any form of indirect consideration sufficient to satisfy the exception. In addition to consideration, the exception expressly required the injured party to demonstrate that he had permission to use the landowner's recreational property. Larini admitted that he did not have express or even implied permission to enter the property without a real estate agent or a Biomass representative or to ride a snowmobile on the property. Therefore, the court noted that even if it adopted the "indirect consideration" theory, the Larinis' argument would fail.

Willful Or Malicious Conduct Exception

The Larinis then alleged that Biomass was liable under the willful or malicious conduct exception, N.Y. Gen. Oblig. Law § 9-103(2)(a) (McKinney 1988), due to its failure to erect guardrails and warnings around the drop-off leading to the drainage ditch and stream bed. The exception imposed liability upon the landowner for willful or malicious failure to guard or warn against a dangerous condition. The court rejected this argument as well. The Larinis failed to prove that Biomass intentionally and unreasonably failed to issue warnings regarding an obvious risk. The court noted that the road on which Larini travelled posed no danger to those who used it for its usual and ordinary purpose; Biomass could not reasonably be required to mark off-road obstacles.

Common Law Liability

Finally, the Larinis argued that the common law liability of a landlord applied in this case. The Larinis argued that Biomass was liable under the reasonable care standard because Biomass could have reasonably expected the public to enter the property and to sustain injury because of the nature of the hidden drop-off.

The court rejected the Larinis' application of the common law duty of reasonable care. The court noted that in situations covered by the recreational use statute, the statute's standard of willful or malicious conduct constituted the single standard applicable.

Finding no genuine issue of material fact with respect to the Larinis' claim, the court affirmed the district court's grant of summary judgment in favor of Biomass.

Rosemary G. Milew

Evidence of Side Agreement Between Lender and Borrower Not Admissible To Show Modification of Loan Agreement

In *Hall v. Federal Deposit Ins. Corp.*, 920 F.2d 334 (6th Cir. 1990), the Sixth Circuit Court of Appeals held that the *D'Oench* doctrine barred an action by a borrower against a failed savings and loan association for breach of a loan agreement. The *D'Oench* doctrine protected the Federal Deposit Insurance Corporation (the "FDIC") by excluding evidence of secret agreements modifying loan agreements made between the failed lending institution and its former customers.

Background

R. Vance Burkey and M.D. Kelly ("Burkey and Kelly") owned B & K Enterprises, Inc. ("B & K"), a corporation which constructed a motel in Knoxville, Tennessee. In order to finance the motel's construction, Burkey and Kelly obtained a \$1,000,000 loan from United American Bank of Knox-

ville ("UAB"); UAB took a first priority lien in the motel units. B & K subsequently defaulted on the UAB loan and advertised the units for sale. Lillian H. Hall ("the Halls") and William L. Hall ("the Halls") and Brenda C. Gibson and Wallace G. Gibson ("the Gibsons") answered the advertisement. Burkey and Kelly, the Halls, and the Gibsons formed the Jackson, Tennessee Motel Partnership ("the partnership") and agreed to obtain another loan to pay off the UAB debt and move the motel to Jackson, Tennessee.

In January 1983, the Halls and the Gibsons entered into a loan agreement with Commerce Federal Savings and Loan Association, Inc. ("Commerce") which provided that Commerce would lend them \$1.85 million in exchange for a first priority security interest in the motel units. Burkey and Kelly served as guarantors on the loan.

The partnership allegedly believed UAB would also be involved in the new loan with Commerce. Commerce and UAB had agreed that UAB would participate in the Commerce loan, a fact confirmed in a letter signed by the two lenders. However, the two lenders had not entered a formal participation agreement at the time the partnership closed the loan with Commerce. The loan agreement between the partnership and Commerce stated that Commerce would not be obligated to fund more than \$750,000 if UAB failed to participate in the loan agreement. At the closing with Commerce, the partnership signed a security agreement which gave Commerce a security interest in all personal property and gave Commerce an interest in the motel land through execution of a deed of trust in favor of Commerce. Commerce then disbursed \$200,000.00 to the partnership as a first draw on the loan.

In February 1983, Commerce refused to fund the loan further because the partnership had failed to give Commerce a first priority lien on the units, in accordance with the loan agreement. The partnership stopped construction on the motel. Unpaid subcontractors

(continued on page 102)