BALSAM v. DELMA ENG'G CORP.

234 A.D.2d 118 (1996)
650 N.Y.S.2d 707
Rachel Balsam et al., Respondents, v. Delma Engineering Corp. et al., Defendants, and City of New York, Appellant
Appellate Division of the Supreme Court of the State of New York, First Department.
December 12, 1996

Concur — Milonas, J. P., Wallach, Kupferman, Ross and Williams, JJ.

Contrary to plaintiffs' assertion, at the time and place in question, the police were engaged in the regulation of traffic, a police function, and were therefore acting in a governmental, as opposed to proprietary, capacity (*see*, *Parsons v City of New York*, 248 App Div 825, *affd* 273 N.Y. 547; *see also*, *Kamnitzer v City of New York*, 265 App Div 636). Indeed, it is the plaintiffs' argument that the police were negligent in not re-routing traffic in some manner to avoid the icy condition that was the cause of plaintiffs' injuries.

Consequently, in order to impose liability on the City acting in its governmental capacity, it is necessary for plaintiffs to demonstrate that a special relationship existed between them and the City (*Cuffy v City of New York*, 69 N.Y.2d 255, 260; *see also*, *Riss v City of New York*, 22 N.Y.2d 579, 583).

The record reveals that plaintiff failed in that regard. Of the four requirements necessary to establish a special duty ([1] an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party injured; [2] knowledge on the part of the municipality's agents that inaction **[234 A.D.2d 119]** could lead to harm; [3] direct contact between the municipality's agents and the injured party; and [4] the injured party's justifiable reliance on the municipality's affirmative undertaking [*Cuffy v City of New York*, *supra*, at 260]), the plaintiffs' evidence only sustained the second requirement. Furthermore, to the extent that the police exercised their professional discretion in determining how to handle this emergency situation, the City cannot be held liable for negligence in the exercise of a governmental function despite the fact that in retrospect they may have shown poor judgment (*Kenavan v City of New York*, 70 N.Y.2d 558, 569).

The circumstances here are distinguishable from those in cases cited by plaintiffs, such as *Kamnitzer v City of New York* (*supra*) and *Cleary v City of New York* (47 N.Y.S.2d 456), where the governmental entity bore a measure of responsibility for the creation of the hazardous condition; here the hazard was apparently caused by a third party and had nothing to do with the City's maintenance or other proprietary responsibilities relative to the street. Also, plaintiffs' citation of *Coco v State of New York* (123 Misc.2d 653) in support of their claim is not persuasive to the extent that it suggests that police work is not a governmental function, but a *proprietary* one (*see*, *Miller v State of New York*, 62 N.Y.2d 506, 510-512; *Riss v City of New York*, 22 N.Y.2d 579, 581, *supra; Bass v City of New York*, 38 A.D.2d 407, 411, *affd* 32 N.Y.2d 894).

In view of our holding on the question of the capacity in which the City was functioning, it is unnecessary for us to address the remaining issues raised on this appeal.