[*1] **Edward Beazer, Plaintiff-Respondent, v New York City Health and Hospitals Corporation, et al., Defendants, Beys Contracting, Inc., Defendant-Appellant.**

2076, 117030/04

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2010 NY Slip Op 6284*; *76 A.D.3d 405*; *906 N.Y.S.2d 218*; *2010 N.Y. App. Div. LEXIS 6384

August 3, 2010, Decided
August 3, 2010, Entered

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PRIOR HISTORY: *Beazer v. New York City Health and Hospitals Corp., 2009 N.Y. Misc. LEXIS 5839 (N.Y. Sup. Ct., June 11, 2009)*

COUNSEL: Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Mark D. Levi of counsel), for appellant.

David Horowitz, P.C., New York (Steven J. Horowitz of counsel), for respondent.

JUDGES: Friedman, J.P., Catterson, Acosta, DeGrasse, Abdus-Salaam, JJ. All concur except Catterson and Acosta, JJ. who dissent in a memorandum by Catterson, J.

OPINION

[**405] [***218] Order, Supreme Court, New York County (Eileen A. Rakower J.), entered June 15, 2009, which, inter alia, denied defendant Beys Contracting Inc.'s (Beys) motion for summary judgment dismissing the common-law negligence cause of action as against it, affirmed, without costs.

Plaintiff was an employee of the construction manager for a project at Bellevue Hospital. He was injured while using an unguarded power grinder, which was owned by Beys, to cut exposed steel from a concrete floor. Conflicting testimony as to whether plaintiff selected the grinder from his employer's gang box or was given it by Beys presents an issue of fact whether there was a bailment of the grinder. If there was a bailment, a further triable issue arises as to whether the bailment was one for the mutual benefit of Beys and plaintiff's employer, which would [***219] render Beys liable to plaintiff for injuries caused by its negligence in providing him with dangerous equipment, notwithstanding that the defect was patent (*see Fili v Matson Motors, 183 AD2d 324, 328-329, 590 N.Y.S.2d 961 [1992]*; *Dufur v Lavin, 101 AD2d 319, 324, 476 N.Y.S.2d 389 [1984], affd 65 NY2d 830, 482 N.E.2d 919, 493 N.Y.S.2d 123 [1985]*; *see also Ruggiero v Braun & Sons, 141 AD2d 528, 529 N.Y.S.2d 144 [1988], lv denied 73 NY2d 707, 537 N.E.2d 623, 540 N.Y.S.2d 238 [1989]*). *Vargas v New York City Tr. Auth. (60 AD3d 438, 874 N.Y.S.2d 446 [2009])* is inapposite, as the ladder lent to the plaintiff by the

contractor (Atlantic) dismissed from that case was not alleged to be defective, unlike the grinder at issue here. In addition, Atlantic had no interest in the task the *Vargas* plaintiff was performing. Furthermore, we do not "conflate[]" differing duties of care [**406] because the issue is whether, to the extent there was a bailment and to the extent that bailment was one for mutual benefit as opposed to being gratuitous, Beys discharged the higher duty of care it owed to plaintiff.

While we are in basic agreement with the principles enunciated by the dissent, we reach a different conclusion because, in our view, there is an issue of fact whether the bailment (assuming there was one) was gratuitous or for mutual benefit. Significantly, it is [*2] undisputed that Beys was a contractor on the project for which plaintiff's employer served as construction manager. Plaintiff, pursuant to an assignment from his foreman, was using the grinder to perform a task in furtherance of that project, which Beys and plaintiff's employer arguably had a common interest in seeing to completion. In this regard, the record indicates that plaintiff was using the grinder lent by Beys to finish a cement floor, and Beys was the contractor responsible for tiling the floors. Thus, inapposite are cases in which the record established as a matter of law that the bailment was gratuitous in that the bailee was not using the item to accomplish a purpose of mutual benefit to both bailor and bailee (*see Acampora v Acampora, 194 AD2d 757, 599 N.Y.S.2d 614 [1993], lv denied 82 NY2d 664, 632 N.E.2d 461, 610 N.Y.S.2d 151 [1994]* [shotgun lent for hunting excursion]); *Ruggiero v Braun & Sons, 141 AD2d at 529* [meat grinder lent by one provisions dealer to another]).

In fact, comparative analysis of the situation at bar with *Acampora* and *Ruggiero*, the two Second Department cases upon which the dissent relies, provides support for the conclusion we reach. In *Acampora*, the plaintiff borrowed a shotgun from the defendant, his father, to go hunting with a friend in November 1985; the defendant had purchased the shotgun in the early 1960s. During the hunt, the plaintiff was injured when the shotgun malfunctioned. In concluding that the trial court had charged the jury on the appropriate standard of care, the Second Department stated: "Under these circumstances, it is clear that the loan of the shotgun was a gratuitous bailment" (*194 AD2d at 758*). The borrowing of a shotgun to go hunting is in no way akin to the present plaintiff's use of a grinder borrowed from Beys to work on the building that both Beys and plaintiff were in the midst of building. Similarly, in *Ruggiero*, the plaintiff, an employee of Meatland, sued Braun for injuries she sustained from a meat grinding machine that Braun had lent to Meatland while the latter's grinder was being repaired. The Second Department held that the evidence was insufficient to support a conclusion that the lending of the meat grinder was a bailment for mutual benefit. Again, and unlike the instant case, Meatland [**407] and [***220] Braun were not engaged in a common task or seeking to accomplish a common purpose.

The court properly permitted plaintiff to submit a surreply in response to Beys's reply papers, which advanced a certain argument for the first time through a supplemental affidavit by its expert (*see CPLR 2214[c]*; *Matter of Kushaqua Estates v Bonded Concrete, 215 AD2d 993, 994, 627 N.Y.S.2d 140 [1995])*.

We have considered Beys's remaining contentions and find them unavailing.

All concur except Catterson and Acosta, JJ. who dissent in a memorandum by Catterson, J. as follows:

DISSENT BY: CATTERSON

DISSENT

CATTERSON, J. (dissenting)

Because I believe that there is no material issue of fact on the issue of bailment, I respectfully dissent and would grant summary judgment to defendant Beys.

A brief review of the law of bailments is necessary to a resolution of this case because the [*3] majority has not set forth any principles of bailments that would control the outcome of this dispute.

> "As this Court stated in *Martin v. Briggs (235 AD2d 192, 197, 663 N.Y.S.2d 184 [1997])*: A [b]ailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.' (*Foulke v. New*

> *York Consolidated R.R. Co., 228 N.Y. 269, 275, 127 N.E. 237 [1920])*. A bailment may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner.' (*Phelps v. People, 72 N.Y. 334, 358, 2 Cow. Cr. 383 [1878])*. A bailment may be created by operation of law. It is the element of lawful possession, and the duty to account for the thing as the property of another, that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained. It makes no difference whether the thing be intrusted to a person by the owner or by another. Taking lawful possession without present intent to appropriate creates a bailment'."

Pivar v. Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212, 212-213, 735 N.Y.S.2d 522, 524 (1st Dept. 2002).

It is beyond dispute that "[a] gratuitous bailment is, by definition, the transfer of possession or use of property without compensation." *Fili v. Matson Motors, 183 AD2d 324, 328, 590 N.Y.S.2d 961, 963 (4th Dept. 1992)*; *see also Leventritt v. Sotheby's, Inc., 5 AD3d 225, 773 N.Y.S.2d 60 (1st Dept. 2004)*.

A bailment for hire for the mutual benefit of both parties, on the other hand, requires the same transfer of possession or use [**408] of property, but either payment by the bailor to the bailee or a tangible benefit conferred upon both parties by nature of the bailment itself. *Fili, 183 AD2d at 328-329, 590 N.Y.S.2d at 963-964*; *see e.g. Mack v. Davidson, 55 AD2d 1027, 391 N.Y.S.2d 497 (4th Dept. 1977)*; *Jays Creations v. Hertz Corp.., 42 AD2d 534, 344 N.Y.S.2d 784 (1st Dept. 1973)*.

In the instant case, plaintiff contends, and the majority accepts the premise, that the defendant Beys, as bailor, may be liable to plaintiff, as bailee, for an injury sustained by plaintiff while using the very article that was the subject of the bailment. [***221] In my view, this theory conflates the duty of care imposed on the bailee with respect to the chattel bailed, with that of the duty of the bailor to third parties to create a theory of liability on the bailor for personal injury to the bailee.

In a gratuitous bailment, the bailee is only liable to the bailor for the bailee's "gross or wanton negligence." *Linares v. Edison Parking, 97 Misc 2d 831, 832, 414 N.Y.S.2d 661, 662 (Civ. Ct., N.Y. County 1979)*. This is normally applied to the bailee's conduct concerning the bailed chattel itself. I could find no authority for the proposition that the bailor owes a bailee any concomitant duty in a gratuitous bailment, but for a duty to warn of known defects that were not readily discernable. *Acampora v. Acampora, 194 AD2d 757, 599 N.Y.S.2d 614 (2d Dept. 1993), lv. denied, 82 NY2d 664, 610 N.Y.S.2d 151, 632 N.E.2d 461 (1994)*.

In a bailment for hire for the mutual benefit of both bailor and bailee, the Third Department has held that the bailor "who supplied the chattel for his own business purpose, owes [*4] a duty to exercise reasonable care to make the chattel safe for the intended use." *Snyder v. Kramer, 94 AD2d 860, 861, 463 N.Y.S.2d 591, 593 (3d Dept. 1983)*; *see Dufur v. Lavin, 101 AD2d 319, 476 N.Y.S.2d 389 (3d Dept. 1984), aff'd, 65 NY2d 830, 493 N.Y.S.2d 123, 482 N.E.2d 919 (1985)*. Initially, it should be noted that no other Department has articulated this standard vis-a-vis the bailor's duty to the bailee. The standard of reasonable care running from bailor to bailee articulated in *Snyder* and *Dufur* seems to be derived from the line of cases imposing such a duty on a bailor *with respect to third parties*, or a commercial lessor "in the business of placing products into the stream of commerce." *Winckel v. Atlantic Rentals & Sales, 159 AD2d 124, 129, 557 N.Y.S.2d 951, 954 (2d Dept. 1990)*. Neither scenario is presented here.

In my view, Beys at best was either a gratuitous bailor or a casual lessor of the grinder. As such, while Beys could only be "liable for ordinary negligence on a theory of failure to warn, [a]t most, the duty of a casual or occasional seller [or lessor] would be to warn the person to whom the product is supplied of known defects that are not obvious or readily discernable.'" *Burns v. Haines Equip., 284 AD2d 922, 923, 726 N.Y.S.2d 516, 519 (4th Dept. 2001), quoting Sukljian v. Ross & Son Co., 69 NY2d 89, 97, 511 N.Y.S.2d 821, 825, 503 N.E.2d 1358, 1362 (1986)* (no [**409] liability where safety guard obviously removed from loading machine); *see also Ruggiero v. Braun & Sons, 141 AD2d 528, 529 N.Y.S.2d 144 (2d Dept. 1988), lv. denied, 73 NY2d 707, 540 N.Y.S.2d 238, 537 N.E.2d 623 (1989)* (no liability where

safety guard removed from meat grinder, danger was patent); *Sofia v. Carlucci, 122 AD2d 263, 505 N.Y.S.2d 178 (2d Dept. 1986)* (no liability where absence of safety railings was patent).

Consistent with the above precedent is the principle that there is no duty to warn where "the injured party is already aware of the specific hazard." *Yong Hwan Chae v. Lee Natl. Corp., 261 AD2d 240, 240, 690 N.Y.S.2d 238, 239 (1st Dept. 1999)* (internal quotation marks and citation omitted).

Plaintiff testified that he was fully aware that the grinder was missing its original safety guard at the time he received it from Beys. Indeed, this case is factually indistinguishable from *Ruggiero*, and *Sofia*, where the Second Department found no liability on behalf of the bailor. Thus, whether it is a gratuitous bailment or a casual lease of the grinder, Beys had no duty to warn plaintiff of the missing guard.

[***222] The majority's contention that "plaintiff . . . was using the grinder to perform a task in furtherance of [the] project, which Beys and plaintiff's employer arguably had a common interest in seeing to completion," simply has no support in the record but for plaintiff's counsel's argument. An examination of the record citation behind plaintiff's position that Beys would suffer adverse financial consequences if plaintiff did not perform his own work using Beys's grinder discloses only that the construction manager was responsible to coordinate the trades and "take the necessary measures to eliminate the circumstances which may lead to a delay." Indeed, the record contains the contract between the owner and the construction manager, but no complete contract for Beys. Similarly, no one, including the majority, cites to any Beys contract provision which supports the novel proposition that Beys, as a subcontractor, was in some way united with all of the other subcontractors and the construction manager, in "common interest."

Finally, in attempting to distinguish *Acampora* and *Ruggiero*, because they did not involve a mutual benefit, the majority draws the wrong lesson from both cases. Both cases, as well as the remaining precedent cited above, stand for the proposition that without proof of record of a tangible financial benefit to the bailor [*5] from the bailment itself, the bailor's duty is limited to the above described duty to warn.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 3, 2010