

Oil Contamination/Remediation: New York Court Considers Potential Liability of Insurance Company/Environmental Consultant



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The New York Supreme Court – Appellate Division (Second Department) (“Court”) addressed in an October 20th Decision & Order (“Decision”) alleged damages associated with the remediation of oil contamination. See *Bennett v. State Farm Fire and Casualty Company*, 2021 WL 4888734.

Certain insureds’ whose properties was affected by the oil contamination alleged that their insurance company (“insurer”) and the environmental consultant were liable for additional damage allegedly caused by the remediation process.

The Decision indicates that property owned by Richard Bennett and Mary Wendell Bennett (“Plaintiffs”) suffered an oil contamination incident on their property in 2011. They had an insurance policy with State Farm Fire and Casualty Company (“State Farm”).

State Farm provided coverage pursuant to a third-party liability provision. This provided coverage to the extent of remediating the property as required by the New York State Department of Environmental Conservation (“DEC”).

State Farm engaged Holzmacher, McLendon and Murrell, P.C. (“HMM”) as an environmental consultant. HMM was tasked to oversee the work of Milro Associates, Inc. (“Milro”). Milro was undertaking remediation after being retained by the Plaintiffs. State Farm was paying for Milro’s services.

Plaintiffs filed an action in 2014 against State Farm and HMM to recover alleged damages associated with the remediation process. They alleged that State Farm, HMM and Milro caused additional damage to the property beyond what had occurred in the initial oil contamination incident.

The lower court denied separate motions of State Farm and HMM for summary judgment. They appealed the decision.

The Court first outlined the elements necessary to hold a defendant liable in common-law negligence, which include:

1. a duty owed by the defendant to the plaintiff,
2. a breach of that duty, and
3. that the breach constituted a proximate cause of the injury

Gross negligence is noted to include intentional wrongdoing or reckless indifference to the rights of others.

The Court also states that liability in negligence is generally premised on the defendant's own fault as opposed to someone else's wrongdoing. Nevertheless, it states that under the doctrine of vicarious liability, another person's wrongdoing can be imputed to a defendant.

The Court also notes that a party who retains an independent contractor is not in most cases liable for the independent contractor's negligent actions. However, three exceptions to this general rule are referenced:

1. Negligence of the employer in selecting, instructing or supervising the contractor;
2. Employment for work that is especially or 'inherently' dangerous; and,
3. Instances in which the employer is under a specific nondelegable duty

An example of a nondelegable duty is stated to include:

. . . when services, though in reality rendered by an independent contractor, were accepted by a third party after assurance that they were being supplied by its employer.

State Farm argued that it was not vicariously liable for the alleged negligence of Milro because it did not:

. . . supervise, direct, or control Milro's work, and that it was not vicariously liable for the alleged negligence of H2M, since H2M was an independent contractor and the plaintiffs failed to establish an exception to the general rule that a party is not responsible for the negligent acts of its independent contractors.

State Farm also argued that regardless of vicarious liability for HMM's alleged negligence, HMM was not vicariously liable for Milro's alleged negligence since it did not supervise, direct, or control Milro.

The Court concludes that State Farm failed to eliminate triable issues of fact. The triable issues of fact are stated to include:

. . . whether State Farm, through H2M, improperly sought to limit the scope of the investigation and remediation of the plaintiffs' property, whether State Farm retained final approval with regard to any "recommendation" made by H2M, and whether H2M supervised, directed, and controlled the remediation and the work of Milro.

In addition, the Court stated that regardless of whether State Farm demonstrated that HMM was an independent contractor, there was a failure to prove that there was no negligence in selecting, instructing, or supervising HMM, and/or that the services rendered by the environmental consultant were not accepted by the Plaintiffs after assurance they were being supplied by State Farm.

As a result, the Court upholds the denial of a motion for summary judgment for State Farm.

HMM argued that it submitted evidence indicating it did not breach any duty owed to the Plaintiffs. The environmental consultant contended it was not the proximate cause of the exacerbation of the residual oil contamination. This argument was premised on the idea that its underlying role was limited to ensuring that the remediation work paid for by State Farm satisfied the requirements of the New York DEC. HMM further asserted it did not direct, control, or supervise Milro in the performance of the remediation.

The consulting services provided were also argued to be appropriate and performed in accordance with generally accepted environmental standards and practices as well as regulations promulgated by DEC.

The Court holds that even if such duties were limited and performed in accordance with DEC's requirements, etc., that HMM did not establish prima facie that its duties were so limited and that it did not, in fact, direct, control, and supervise the investigation or remediation.

HMM was held to have also failed to demonstrate, prima facie, that its environmental consulting services were appropriate and performed in accordance with generally accepted environmental consulting standards. It is also stated to have failed to demonstrate that its actions were not a proximate cause of the Plaintiffs' damages. An affidavit submitted from Paul W. Grosser, engineer, geologist, and groundwater professional, was considered to be a conclusory opinion that the company's work was appropriate and did not cause or contribute to exacerbation of the contamination.

As a result, the Court stated that HMM failed to demonstrate it was entitled to judgment as a matter of law.

A copy of the Decision can be downloaded [here](#).