



## **Question of the Month: Are municipal ordinances with state law roots entitled to statutory treatment?**

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When construction on a neighboring building begins, a building owner and the building's tenants are often left in a bad situation, at least temporarily, until the construction is complete. Neighboring buildings, and tenants, often had to deal with noise, dirt, scaffolding, the general unpleasantness of construction happening right next door and of course the danger that something may happen to their building. In the event that something did happen to the building, the owner and affected tenants had a long battle ahead of them if they wanted compensation. However, a recent ruling by the Court of Appeals, makes obtaining compensation, in one type of case, both easier and more difficult for affected parties.

In *Yenem Corp. v 281 Broadway Holdings, et al*, (2012 NY Slip Op 1096) Decided Feb 14, 2012 the Court of Appeals held that a violation of former Administrative Code of the City of NY Â§ 27-1031(b)(1) "imposes absolute liability upon defendants whose excavation work caused damage to adjoining property."

The facts in *Yenem* are fairly straightforward. A commercial building, 281 Broadway, is sold, the new owners begin development of the building that they just bought. As part of the renovation, the new owner excavated the site to a depth of 18 feet below curb level. As the renovation continued, the neighboring building, 287 Broadway, "shifted out of plumb, tilting out of verticality." In other words, the neighbor's building, 287 Broadway, was no longer standing straight-it was now leaning. The Department of Buildings determined that the neighbor's building was leaning to the south by approximately nine inches, deemed the building to be unsafe for occupancy and issued a vacate order for the entire building.

*Yenem*, a commercial tenant operating a pizzeria in 287 Broadway, brought an action against the owner of 281 Broadway, and the contractor who had done the excavation. The owner of 287 Broadway brought a separate action against the owner of 281 Broadway and the contractor brought cross claims against its codefendants and third party claims against several subcontractors and engineering companies.

The trial court in *Yenem's* case denied *Yenem's* motion for summary judgment, with leave to renew at the close of discovery. The trial court found that a violation of Â§ 27-1031(b)(1) does not impose strict liability but is evidence of negligence. In the case brought by the owners of 287 Broadway the court granted the owners motion for summary judgment and determined that there is strict liability under Â§ 27-1031(b)(1). In a consolidated appeal of all cases the Appellate Division upheld the decision in the *Yenem* case and reversed the decision in the 287 Broadway case. The Appellate Division determined that a violation of Â§ 27-1031(b)(1) is only evidence of negligence.

The Appellate Division did allow the plaintiffs to appeal its decision to the Court of Appeals. After examining the legislative history of Â§ 27-1031(b)(1) the Court of Appeals determined that there is

strict liability imposed upon a defendant for violating Â§ 27-1031(b)(1).

On its face, the Yenem decision would seem to make recovery more easily obtainable for a building owner and tenant whose building is damaged by imposing a standard of strict liability upon owners of buildings undergoing construction and the contractors they hire. However, a closer reading of the case reveals that the Court believes Â§ 27-1031(b)(1) to be "unique" and embodies "the specific legislative policy that in New York City those who undertake excavation work, rather than those whose interest in neighboring land is harmed by it should bear its costs."

This decision may well lead to more actions, by supposed aggrieved neighbors of buildings undergoing construction, using local ordinances as a sword against unwanted construction. What is yet to be determined is whether this case will ultimately be "unique" or a harbinger of future decisions by the courts. The court did make clear that "not every municipal ordinance with state law roots is entitled to statutory treatment." However, they did provide a clue as to what they would look for in determining which ordinances may provide to statutory treatment. The ordinances must reflect the "policy of the state." How to determine the policy of the state though is not as clear. What is clear is that owners of buildings undergoing construction have more to worry about.

Note: This case was filed in 2007. Effective on July 1, 2008 Â§ 27-1031(b)(1) was amended. Its equivalent is now contained in the New York City Construction Code. The Court of Appeals did not rule upon the provision in its current form at Title 28, Chapter 33, Â§ 3309.4. The court did not determine if a violation of Â§ 27-1031(b)(1) as currently codified in the New York City Construction Code would lead to the same conclusion.

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