



Be Careful How You Dig: Court Held Excavators Responsible for Damage to Neighboring Property

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In the past, when a neighboring property in New York City was damaged during excavation of a new construction project, the search for the responsible party or parties was often the subject of lengthy litigation. A recent decision by New York's Court of Appeals accelerates this process by imposing strict liability on certain parties, at least for damages caused by construction that preceded the enactment of the New York City 2008 Building Code. In the recent decision of *Yenem Corp. v. 281 Broadway Holdings, et al.* (and other related actions)¹, the Court of Appeals held that a former provision of the New York City Building Code, found under former Administrative Code of the City of New York § 27-1031(b)(1), imposed absolute liability on defendants whose excavation work caused damage to adjoining property.

Technically, this ruling only impacts lawsuits involving excavation damage that occurred to adjoining properties prior to the enactment of the 2008 Building Code. In such instances, developers, owners, and contractors performing excavation, which exceeded ten feet below the curb level, are now

deemed absolutely liable for damage to adjoining property. This ruling empowers courts to grant summary judgment relief on liability against the developer/owner and the excavator/contractors upon the proffer of evidence of excavation and resulting property damage. The remaining issue for the trier of fact will be the determination of the amount of damages attributable to the excavation activities.

To determine whether the violation of former Administrative Code § 27-1031(b)(1) constituted negligence per se (i.e., strict liability) or merely some evidence of negligence, the Court of Appeals traced the history of the subject code provision and found that it was a municipal ordinance rooted in state law. The Court then held that although "not every municipal ordinance with state law roots is entitled to statutory treatment," this particular code is unique because "[i]ts language and purpose are virtually identical, in all relevant aspects, to those of its state law predecessors" and "neither the wording nor the import of that statute was materially or substantively altered." Accordingly, the Court of Appeals held that the violation of former Administrative Code § 27-1031(b)(1) imposes absolute liability on those who undertake excavation work.

Since the Yenem ruling was based on a Code provision that was subsequently superseded in 2008, it ostensibly has limited application due to the three-year statute of limitations for negligence actions in New York. Nonetheless, the decision may be a harbinger for a similar judicial determination on the equivalent provision now found in the 2008 Building Code, under Administrative Code, Title 28, Chapter 33, Section 3309.4 (effective on July 1, 2008). It is important to note that the 2008 Code provision eliminates the ten-foot requirement of both the former Code section and the 1855 special law². The Court of Appeals, however, specifically declined to make any determination on the new Code provision since it was not an issue in the Yenem lawsuit. Whether the elimination of the ten-foot requirement materially alters the law and, thus, renders the new Code provision a municipal ordinance, violation of which merely constitutes evidence of negligence, remains an open issue for future judicial determination.

In its analysis, the Yenem Court noted that the specific wording of the law is only one of the factors that led to the holding that the former Code provision was rooted in a state statute. Indeed, the Court of Appeals emphasized the substance and intent of the original state law as compared with the former Code provision. Specifically, the Court stated "[e]ven more important, its original purpose of shifting the risk of injury from the injured landowner to the excavator of adjoining land has remained constant over the years" and "[t]o hold that a violation of the provision is only 'evidence of negligence' would thus defeat the legislation's basic goal." Additionally, the Court found that the former Code provision "continues to embody 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."

Imposing the same factors identified in *Yenem* on the equivalent provision of the 2008 Code also reveals a valid basis for the imposition of strict liability. No one can credibly argue that the purpose embodied in the 2008 Code provision is different from that of its predecessor Code provisions. The 2008 Code is clearly seeking to shift "the risk of injury from the injured landowner to the excavator of adjoining land." Nothing has changed in the dynamics of construction or public policy to deviate from the identified legislative intent that if you undertake excavation work in New York City, you bear the burden and risk of any damage incurred.

It can additionally be argued that the 2008 Code's elimination of the ten-foot requirement is more than just semantics and that it actually reinforces the policy of protecting adjoining property. Compare the 2008 Code to the former Administrative Code § 27-1031(b)(2) which required the owner of the adjoining property to protect his own structure if the excavation depth is ten feet or less. Under the 2008 Code, as long as the excavator is granted a license to enter and inspect the adjoining buildings and property, and to perform the necessary work, the excavator has the responsibility to "preserve and protect from damage any adjoining structures."

The 2008 Code imposes the additional requirement that the excavating party document the existing conditions of all adjacent buildings in a preconstruction survey prior to commencement of the work. As such, the 2008 Code imposes increased burdens on the excavator to protect the adjoining property. At the same time, the original legislative intent of the special law of 1855 protecting adjoining properties remains intact. Thus, it would appear that the stage is set for a subsequent judicial determination holding that the 2008 Code imposes strict liability for damage to adjoining property caused by excavation.

The above article is an overview only, and should not be considered legal advice, which is dependent upon specific facts and circumstances. For more information, please contact {attorney_link(calvin-t-mellon, right)} or Calvin Lee at 212.682.6800.

1 *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, 841 N.Y.S.2d 20 (February 14, 2012)

2 The statute enacted by the state legislature in 1855 created a duty, when none had previously existed, to protect neighboring landowners in "the city and county of New York" from harm due to excavation work. The statute effectively shifted the burden of protecting against harm from the landowner to the excavator.

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