**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF RICHMOND**

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**ALYCE IAVARONE and BRUCE BROCK,** **Part C-2**

**Plaintiffs,** **Present:**

**HON. THOMAS P. ALIOTTA**

**-against-**

**DECISION AND ORDER**

**THE CITY OF NEW YORK and SCALA CONTRACTING CO., INC.,** **Index No. 103693/05**

**Defendants.** **Motion Nos. 2033-014**
**2034-015**

**----------X**

The following papers numbered 1 to 6 were fully submitted on the 19th day of December, 2012.

| | Papers Numbered |
|---|---|
| Notice of Motion for Summary Judgment by Defendant City of New York with, Supporting Papers, Exhibits and Memorandum of Law (dated June 29, 2012) | 1 |
| Notice of Motion for Summary Judgment by Defendants Scala Contracting Co. Inc, with Exhibits (dated June 29, 2012) | 2 |
| Affirmation in Opposition by Plaintiffs Iavarone and Brock, with Exhibits (dated October 10,2009) | 3 |
| Affirmation in Support by Defendant Scala Contracting Co., Inc. (dated October 10, 2012) | 4 |
| Reply Affirmation by Defendant City of New York (dated December 13, 2012) | 5 |
| Reply Affirmation in Support by Defendant Scala Contracting Co. Inc. (dated December 14, 2012) | 6 |

Upon the foregoing papers, the motion for summary judgment (No. 2033) by defendant Scala Contracting Co. (hereinafter "Scala"), and the (cross) motion (No. 2034) for like relief by defendant the City

of New York (hereinafter, the "City") are granted to the extent indicated and are otherwise denied.

This litigation arises out of the alleged illegal demolition of plaintiffs' home, located at 116 Holland Avenue, Staten Island, New York, on June 13, 2005. Plaintiffs commenced this action by the filing of a summons and complaint on or about December 16, 2005. Issue was joined by the service of answers by (1) the City, on February 16, 2006 and (2) co-defendant Scala, on June 2, 2006.

As is relevant, on May 25, 2005, at the request of the New York City Fire Department, the New York City Department of Buildings (hereinafter "DOB") was called upon to inspect plaintiffs' premises. On May 26, 2005, the DOB advised plaintiff Bruce Brock that the dwelling had been declared unsafe and in "imminent peril" of collapse, and that it had to be repaired immediately or it would be demolished. Said notice also provided that in the absence of immediate repairs begun on behalf of the owner, the City would have the necessary demolition work completed at plaintiffs' expense. When repairs were not initiated by plaintiffs, the City requested bids on the emergency demolition work, and subsequently entered into a contract with co-defendant Scala to demolish the dwelling within 20 working days. On June 13, 2005, Scala commenced demolition, which was competed on or before July 1, 2005. The complaint alleges, in pertinent part, that the demolition was performed without regard to the preservation of the contents of the dwelling,

and that the City lacked the legal authority to order the demolition. The City and Scala now move separately for summary judgment dismissing the complaint.

Despite extensive and protracted discovery which is now complete, plaintiffs have wholly failed to demonstrate the presence of any facts supportive of their claim that the City's decision to demolish the premises was unreasonable or in violation of section 643 of the New York City Charter or sections 26-127,26-235, 26-243,27-127 and 27-110 of the Administrative Code of the City of New York, all of which invest the DOB with the discretion to determine whether a structure poses a threat to life and/or an imminent danger, *i.e.*, an "immediate emergency", warranting its immediate demolition. Likewise plaintiffs have failed to demonstrate that their procedural or substantive due process rights have been violated by the City (*see* Catanzaro v. Weiden, 188 F3d 56, 62 [2d Cir 1999]). Moreover, even if plaintiffs had been successful in their efforts to establish that the City's action in demolishing their home was ill-advised or incorrect, they further failed to adduce any evidence that the City's conduct was outrageously arbitrary or shocking to one's conscience. As for plaintiffs' further claims of intentional and/or negligent infliction of emotional distress, it is the opinion of this Court that plaintiffs have not only failed to satisfy or raise a triable issue as to the essential elements of either cause of action, but that public policy

bars the assertion of any claim for the intentional infliction of emotional distress against a governmental entity (*see* Lauer v City of New York, 95 NY2d 95, 99-101, 102, *revg* 258 AD2d 92; Wyllie v District Attorney of County of Kings, 2 AD3d 714, 720).

Finally, plaintiffs' claim that the City negligently and wrongfully used plaintiffs' personal property and demolition debris as backfill for the area below grade level must fail.

On February 16, 2010, plaintiffs sought leave to file an amended bill of particulars asserting this particular claim as against both defendants. Although leave was granted, a careful review of the entire Court record reveals that the notice of claim, which was not annexed as an exhibit to any of the papers then before the Court, does not contain any claim against the City for negligently or wrongfully backfilling the area below grade level. Neither was this omission brought to the Court's attention by any of the parties.

Nevertheless, it is axiomatic that timely and proper service of a notice of claim which, among other things, sufficiently identifies the claimant, states the nature of the claim and describes "the time when and the manner in which the claim arose," is a necessary condition precedent to the maintenance of a common-law tort action against a municipality (General Municipal Law § 50-e[1]; *see* Santoro v Town of Smithtown, 40 AD3d 736, 737). "The test of the notice's sufficiency is whether it includes information

sufficient to enable the city to investigate the claim" (O'Brien v City of Syracuse, 54 NY2d 353, 358). In addition, while General Municipal Law § 50-e(6) permits the correction of "good faith, non-prejudicial, technical mistakes, defects or omissions" in a notice of claim, it does not authorize "substantive changes in the theory of liability" (Mahase v Manhattan & Bronx Surface Tr. Operating Auth., 3 AD3d 410, 411). In any event, the new claim asserted for the first time in the amended bill of particulars in this case post-dated by more five years the event to which it relates, *i.e.*, a period well in excess of the one year and ninety day statute of limitation applicable to tort claims against a municipality (*id.*; *see* General Municipal Law §§ 50-e[5], 50-i[1]).

This is the position adopted and demonstrated prima facie by the City in support of its motion for summary judgment on plaintiffs' "negligent backfill" claim (*see* O'Brien v City of Syracuse, 54 NY2d at 358; Gabriel v City of New York, 89 AD3d 982, 983). In opposition, plaintiffs, who never sought leave to amend their notice of claim to assert this contention (*see* General Municipal Law § 50-e[5]), have failed to raise a triable issue of fact (*see generally* Alvarez v Prospect Hosp., 68 NY2d 320, 324).

The circumstances are different, however, with regard to plaintiffs' "negligent backfill" claim as against Scala, which this Court held on April 14, 2009, presented a triable issue of fact. The Court stands by this decision. Nevertheless, plaintiffs' claim

for punitive damages against Scala must be dismissed. Such a recovery can only be made upon a showing that defendants' conduct demonstrated a "high degree of moral culpability, or willful or wanton negligence or recklessness" indicating a conscious disregard for the rights of others" (Murray v 600 East 21st Street, LLC, 55 AD3d 805; *see also* Stein v Doukas, 98 AD3d 1024, 1026). Here, plaintiffs have failed to rebut Scala's prima facie showing that its conduct did not rise to this level.

Accordingly, it is

**ORDERED**, the motion for summary judgment of defendant the City of New York is granted; and it is further

**ORDERED**, that the complaint against said defendant is severed and dismissed; and it is further

**ORDERED**, that the counterclaim interposed by said defendant shall continue; and it is further

**ORDERED**, that the motion for summary judgment of defendant Scala Contracting Co., Inc. is granted to the extent of severing and dismissing plaintiffs' claim for punitive damages; and it is further

**ORDERED**, that the balance of its motion is denied; and it is further

**ORDERED** that the Clerk enter judgment accordingly.

E N T E R,

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**IAVARONE, et ano v THE CITY OF NEW YORK, et ano**

Hon. Thomas P. Aliotta
J.S.C.

Dated: March 19, 2013