SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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BRIAN HARRIS and FUKUKO YAHAGI-HARRIS
and EVEREST NATIONAL INSURANCE COMPANY
a/s/o BRIAN HARRIS and FUKUKO YAHAGI-HARRIS,

Plaintiffs,

Index No. 151291/2012

-against-

DECISION/ORDER

ARANI BOSE, SHUMITA BOSE and THINK
CONSTRUCTION LLC,

Defendants.

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THINK CONSTRUCTION LLC,

Third-Party Plaintiff,

-against-

AVALANCHE RESTORATION CORP., et al.,

Third-Party Defendant.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Reply Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action for property damages allegedly caused by defendants during excavation work on an adjoining property. Plaintiffs now move for an order pursuant to CPLR § 3212 granting partial summary judgment against defendants on the issue of liability pursuant to New York City Administrative Code § 3309.4, which requires anyone

performing excavation work to protect adjoining property from damage. For the reasons set forth below, plaintiffs' motion is granted.

The relevant facts are as follows. Plaintiffs are the owners of a four-story townhouse located at 320 East 18th Street in Manhattan. Defendants Arani and Shumita Bose (the "Bose Defendants") own the adjoining townhouse directly east of plaintiffs' home. Sometime in 2010, the Bose Defendants hired defendant Think Construction LLC ("Think Construction") as the general contractor to perform renovation work at their home, which included demolition, excavation and underpinning (the "Project"). In or around October 2012, the excavation and underpinning process began. As the excavation work progressed, plaintiffs' home sustained severe damage as a result of the work. Specifically, during this time floors became un-level, the walls became separated from the floors and numerous cracks appeared along the interior and exterior walls and facade. Defendants do not dispute these facts.

On or about March 28, 2012, plaintiffs commenced the instant action against defendants seeking to recover for the damages caused to their home. On this motion, plaintiffs seek an order granting partial summary judgment against defendants as to liability on the ground that defendants violated Section 3309.4 of the New York City Administrative Code, which states: "the person who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures." In opposition, defendants do not dispute that they did excavation work, which caused damage to plaintiffs' home in violation of Section 3309.4. They, however, contend that summary judgment should be denied as such violation is only evidence of negligence and does not constitute negligence per se. Thus, the only issue for this court to decide is whether violation of Section 3309.4 constitutes evidence

of negligence or constitutes negligence per se creating absolute liability.

As to that issue, this court finds that based the Court of Appeals recent holding in *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481 (2012), a violation of Section 3309.4 constitutes negligence per se imposing absolute liability. In *Yenem*, the Court of Appeals was presented with the exact issue this court faces but in respect to Section 3309.4's predecessor, former New York City Administrative Code Section 27-103(b)(1). Former Section 27-103(b)(1) provided:

> When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property.

Since violation of an Administrative Code is usually only evidence of negligence unless it has its origins in state law, the Court of Appeals started their analysis by examining the history of New York laws imposing liability for excavation work. *Id.* at 489-90. In so doing, the Court of Appeals noted that former Section 27-103(b)(1) originated from a 1855 state special law that created a duty to protect neighboring landowners in "the city and county of New York" and the "city of Brooklyn" from harm arising from excavation work where none had existed at common law. As the Court of Appeals recognized, "the statute, as enacted, shifted the burden of protecting against harm from the landowner to the excavator." *Yenem*, 95 N.Y.2d at 489 (citing N.Y. Const., art. IX, § 39[d][4]). Since Section 27-103(b) continued to promote this original purpose and otherwise remained virtually identical to its state law predecessor in language and purpose, the Court of Appeals concluded that strict liability should apply. Specifically, the Court of Appeals stated:

> Certainly not every municipal ordinance with state law roots is entitled to statutory treatment, but section 27-103(b)(1) is unique. Its language and purpose are virtually identical, in all relevant aspects, to those of its state law predecessors. Indeed, as noted by the dissent below, 'neither the wording nor the import of the statute was materially or substantively altered" either upon its remodification as a local law or in the century thereafter. Even more import, 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. To hold that a violation of a provision is only 'evidence' of negligence would thus defeat the legislation's basic goal. Though formerly a state law and now a local ordinance, section 27-103(b)(1) 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. *Id.*

Here, the court finds no reason to depart from the holding in *Yemen* as Section 3309.4's language and purpose are virtually identical to former Section 27-103(b)(1). Section 3309.4 states, in pertinent part, as follows:

> Regardless of the excavation or fill depth, the person who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property and to perform such work thereon as may be necessary for such purpose.

The only changes from former Section 27-103(b)(1) as quoted above are that the ten-foot depth requirement has been removed and it now applies to a "fill" as well as an excavation. Clearly, neither of these changes fundamentally alter the original purpose of shifting the risk of injury from the injured landowner to the excavator of adjoining land. Thus, as Section 3309.4 continues to promote the original purpose of its state law predecessor, violation of it continues to constitute negligence per se.

Accordingly, plaintiffs are entitled to partial summary judgment against defendants on the issue of liability as it is undisputed that defendants violated Section 3309.4 by performing an excavation on an adjoining property that caused damage to plaintiffs' home. To the extent that defendants argue that plaintiffs' motion should be denied as premature as no party depositions

have yet been held, such contention is without merit. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, defendants have offered no evidentiary basis as to why depositions would lead to relevant evidence. Indeed, no evidence could change the essential facts that defendants did excavation work that caused damage to plaintiffs' property.

Based on the foregoing, plaintiffs' motion for partial summary judgment as to liability is granted. This constitutes the decision and order of the court.

Dated: 6/23/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.