Yenem Corp. v. 281 Broadway Holdings

2012 | Cited 0 times | New York Court of Appeals | February 14, 2012

18 N.Y.3d 481 (2012) 964 N.E.2d 391 941 N.Y.S.2d 20 2012 NY Slip Op 1096 YENEM CORP., Appellant, v. 281 BROADWAY HOLDINGS et al., Respondents. (And Other Actions.) RANDALL CO., LLC, Appellant, v. 281 BROADWAY HOLDINGS et al., Respondents, et al., Defendants. 281 BROADWAY HOLDINGS LLC et al., Third-Party Plaintiffs, v. HUNTER-ATLANTIC, INC., Third-Party Defendant-Respondent, et al., Third-Party Defendants. No. 1.

Court of Appeals of New York.

Argued January 3, 2012. Decided February 14, 2012.

Jaroslawicz & Jaros LLC, New York City (David Jaroslawicz and David Tolchin of counsel), for Yenem Corp., appellant.

Weg and Myers, P.C., New York City (Dennis T. D'Antonio, Joshua L. Mallin, William H. Parash and Jonathan C. Corbett of counsel), for Randall Co. LLC, appellant.

Shafer Glazer, LLP, New York City (David A. Glazer and Mika M. Mooney of counsel), for respondents.

Molod Spitz & DeSantis, P.C., New York City (Marcy Sonneborn and Alice Spitz of counsel), for third-party respondent.

Michael A. Cardozo, Corporation Counsel, New York City (Margaret G. King and Spencer Fisher of counsel), for City of New York, amicus curiae.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT and JONES concur.

OPINION OF THE COURT

CIPARICK, J.

On this appeal, we consider whether former Administrative Code of the City of New York § 27-1031 (b) (1) imposes absolute liability on defendants whose excavation work caused damage to adjoining property. We hold that it does, and that plaintiffs are entitled to summary judgment.

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Plaintiff Randall Co. (Randall) is the owner of a landmark cast iron and masonry building located at 287 Broadway in Manhattan. Plaintiff Yenem Corp. (Yenem) was a commercial tenant operating a pizzeria in the building. In 2006, defendant The John Buck Company (JBC) through its subsidiary, defendant 281 Broadway Holdings LLC (281 Broadway Holdings), purchased the lot adjacent to the south and west sides of 287 Broadway and began developing an L-shaped commercial and condominium complex. JBC and 281 Broadway Holdings hired defendant Hunter-Atlantic, Inc. (Hunter-Atlantic) to excavate the site. The excavation occurred at a depth of 18 feet below curb level. As the excavation progressed, 287 Broadway shifted out of plumb, tilting out of verticality. On November 28, 2007, the Department of Buildings (DOB) found that the building leaned to the south by approximately nine inches. The following day, DOB issued a vacate order deeming the building unsafe for occupancy. As a result, Yenem was forced to close its business, and Randall's building remains vacant.

Yenem commenced an action against JBC, 281 Broadway Holdings and Hunter-Atlantic claiming that defendants were negligent and strictly liable under Administrative Code of the City of New York § 27-1031 (b) (1) for causing damage to 287 Broadway, resulting in the loss of Yenem's business. Randall commenced a separate action against JBC and 281 Broadway Holdings [1] asserting similar claims. Hunter-Atlantic cross-claimed against its codefendants and asserted third-party claims against various subcontractors and engineering companies.

Randall moved for partial summary judgment against JBC and 281 Broadway Holdings seeking lost rent and other damages, and Yenem moved for summary judgment against all defendants. JBC and 281 Broadway Holdings opposed plaintiffs' motions and cross-moved for summary judgment against Hunter-Atlantic. In support of their respective summary judgment motions, plaintiffs submitted, among other things, a letter and affidavit of managing agents of 281 Broadway Holdings and a report by defendants' structural engineers, all of which stated that 287 Broadway shifted increasingly out of plumb during the course of defendants' excavation work despite defendants' various remedial efforts. Specifically, one of defendants' engineers stated that "[t]he movement of the building during excavation was caused by settlement due to undermining of the existing footings and a loss of soil under the footing."

In the Yenem action, Supreme Court denied Yenem's motion for summary judgment with leave to renew at the close of discovery. The court found that violation of Administrative Code of the City of New York § 27-1031 (b) (1) did not result in strict liability but constituted some evidence of negligence. The court also found potential factual issues regarding the proximate cause of the building's movement. In the Randall action, however, a different Supreme Court justice granted Randall's motion for partial summary judgment and denied defendants' cross motion in its entirety. The court held that defendants were strictly liable under section 27-1031 (b) (1).

In consolidated appeals, a divided Appellate Division upheld the order denying plaintiff's motion for summary judgment in the Yenem action and reversed the order granting plaintiff summary judgment

in the Randall action (see Yenem Corp. v 281 Broadway Holdings, 76 AD3d 225, 231 [1st Dept 2010]). The court rejected plaintiffs' argument that because section 27-1031 (b) (1) was originally enacted as a state law imposing absolute liability, it should continue to be so construed (see id. at 228-229). Citing Elliott v City of New York (95 NY2d 730 [2001]), the Appellate Division found that as a municipal ordinance, the code provision was an "unsuitable candidate for elevation to the status of a state statute imposing per se negligence or absolute liability" (Yenem Corp., 76 AD3d at 230). The court further held that plaintiffs failed to demonstrate that "defendants' actions were the proximate cause of the damage to the building or that the precautions taken by defendants in connection with the excavation were inadequate" (id. at 231).

Two justices dissented on the ground that section 27-1031 (b) (1), having its origins in state law, imposes strict liability where a plaintiff demonstrates that a violation of the provision proximately caused injuries to the plaintiff's property (see id. at 233). The dissent opined that Elliott expressly recognized that a local law with state law origins could invoke statutory treatment and, providing a thorough review of the provision's legislative history, concluded that section 27-1031 (b) (1) fit that rule "to the proverbial tee" (id. at 237). The dissent further concluded that defendants violated the code provision; that the building's prior condition was irrelevant to the issue of proximate cause; and that, as a strict liability provision, section 27-1031 (b) (1) did not permit an affirmative defense of reasonable precautions (see id. at 242-245).

The Appellate Division granted plaintiffs leave to appeal, certifying the following question to us: "Was the corrected decision and order of this Court, which affirmed the order of the Supreme Court entered September 18, 2008, and reversed an order of said Court entered January 29, 2009, properly made?" We now reverse and answer the certified question in the negative.

"As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance constitutes only evidence of negligence" (Elliott, 95 NY2d at 734 [citations omitted]). We have "however, acknowledge[d] that certain sections of the Administrative Code have their origin in State law and, as such, they might be entitled to statutory treatment in tort cases" (id. at 736 [citation omitted]). Thus, "[i]n analyzing whether a violation of [an] Administrative Code section should be viewed as negligence per se or as some evidence of negligence, we consider the origin of [the] provision" (id. at 733).

Former Administrative Code of the City of New York § 27-1031 (b) (1) [2] provides:

"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."

The provision originated from an 1855 special law (see NY Const, art IX, § 3 [d] [4]) 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 (L 1855, ch 6, § 1). In effect, the statute, as enacted, shifted the burden of protecting against harm from the landowner to the excavator. In Dorrity v Rapp (72 NY 307 [1878]), we characterized the statute as imposing absolute liability, stating:

"[t]he primary object of the statute[ ] was to cast upon the party making an excavation on his land, exceeding ten feet in depth, the risk of injury resulting therefrom to the wall of an adjoining owner, and the burden of protecting it. The liability imposed is not made to depend upon the degree of care exercised by the person making the excavation. When the facts bring the case within the statute, the duty and liability which the statute imposes is absolute and unqualified" (id. at 311 [emphasis added]).

The original statute was subsequently reenacted under the Consolidation Act of 1882 (see L 1882, ch 410, § 474). In 1899, the law was recodified as a municipal ordinance in section 22 of the New York City Building Code, which, in turn, was later incorporated into the Administrative Code as section C26-385.0 (a). In 1968, section C26-385.0 (a) was recodified as section C26-1903.1 (b) (1), and in 1985, that section became section 27-1031 (b) (1). Even after its recodification as a local law, however, New York courts continued to treat the provision as a strict liability statute (see Hart v City Theatres Co., 215 NY 322, 325-326 [1915]; Racine v Morris, 201 NY 240, 244 [1911]; Post v Kerwin, 133 App Div 404, 405-406 [2d Dept 1909]; Victor A. Harder Realty & Const. Co. v City of New York, 64 NYS2d 310, 317-318 [Sup Ct, NY County 1946]).

We see no reason to depart from that interpretation in our review of section 27-1031 (b) (1). Certainly not every municipal ordinance with state law roots is entitled to statutory treatment, but section 27-1031 (b) (1) is unique. Its language and purpose are virtually identical, in all relevant aspects, to those of its state law predecessors. [3] Indeed, as noted by the dissent below, "neither the wording nor the import of the statute was materially or substantively altered" either upon its recodification as a local law or in the century thereafter (see Yenem Corp., 76 AD3d at 239). Even 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. To hold that a violation of the 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 27-1031 (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. [4]

Finally, we agree with the dissent below that plaintiffs are entitled to summary judgment. Defendants' affidavits and the report of defendants' engineers expressly state that the excavation, carried to a depth exceeding the regulatory threshold, undermined the foundation of 287 Broadway and caused it to lean southward. The majority below erred in finding that the building's allegedly poor condition raised an issue of fact as to causation; though certainly relevant to any measure of

damages, consideration of the building's prior condition does not factor into a proximate cause analysis under section 27-1031 (b) (1).

Accordingly, the order of the Appellate Division should be reversed, with costs, in Yenem Corp. v 281 Broadway Holdings, plaintiff's motion for summary judgment on the issue of liability granted, in Randall Co., LLC v 281 Broadway Holdings, the order of Supreme Court reinstated, and the certified question answered in the negative.

Order reversed, with costs, in Yenem Corp. v 281 Broadway Holdings, plaintiff's motion for summary judgment on the issue of liability granted, in Randall Co., LLC v 281 Broadway Holdings, order of Supreme Court, New York County, reinstated, and certified question answered in the negative.

1. The complaint also named "John Doe," "Jane Doe," and "XYZ Corporation" as the contractors hired by defendants to perform the excavation work.

2. Section 27-1031 (b) (1) was repealed effective July 1, 2008 and its equivalent provision is now contained in the New York City Construction Code (Administrative Code, tit 28, ch 33, § 3309.4). We do not pass on that provision, as it is not before us on this appeal.

3. In 1882, the law provided:

"Whenever excavations, for building or other purposes, on any lot or piece of land in the city and county of New York, shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall, wholly or partly on adjoining land and standing upon or near the boundary lines of such lot, the person causing such excavations to be made. . . shall at all times from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before the excavations were commenced" (L 1882, ch 410, § 474).

4. We note that we have previously given elevated treatment to local ordinances derived from special laws, finding that they reflect the "policy of the state" and, in some circumstances, may even override a conflicting state law embodying a countervailing public policy (see Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 6 NY3d 563, 576 2006. holding that the state policy embodied in Administrative Code § 14-115 (a), which reserves authority over police disciplinary matters to the New York City Police Commissioner, is "so important that the policy favoring collective bargaining (implemented by the Taylor Law) should give way".).