Yenem Corp. v. 281 Broadway Holdings

Court of Appeals of New York

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

No. 1

Reporter

18 N.Y.3d 481 *; 964 N.E.2d 391 **; 941 N.Y.S.2d 20 ***; 2012 N.Y. LEXIS 214 ****; 2012 NY Slip Op 1096; 2012 WL 443945

[1] 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.

Subsequent History: Motion granted by, Summary judgment denied by *Yenem Corp. v. 281 Broadway Holdings, LLC, 2012 N.Y. Misc. LEXIS 6403 (N.Y. Sup. Ct., May 9, 2012)*

Motion granted by, in part, Motion denied by, in part, Request denied by *Yenem v. 281 Broadway Holdings, 2012 N.Y. Misc. LEXIS 6351 (N.Y. Sup. Ct., May 11, 2012)*

Decision reached on appeal by *Randall Co. LLC v. 281 Broadway Holdings LLC, 2015 N.Y. App. Div. LEXIS 7489 (N.Y. App. Div. 1st Dep't, Oct. 13, 2015)*

Prior History: Appeals, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from a corrected order of that Court, entered August 3, 2010. The Appellate Division (1) affirmed so much of an order of the Supreme Court, New York County (Carol R. Edmead, J.), as had denied plaintiff Yenem Corp.'s motion for summary judgment on the issue of liability, and (2) (a) reversed, on the law, so much of an order of that court (Charles E. Ramos, J.), as had granted plaintiff Randall Co., LLC's motion for summary judgment on the issue of liability, and denied the cross motion of defendants and third-party plaintiffs 281 Broadway Holdings LLC and the John Buck Co. for, among other things, leave to amend their answer, (b) denied plaintiff's motion, and (c) granted the cross motion for leave to amend. The following question was certified by the Appellate Division: "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?"

Yenem Corp. v 281 Broadway Holdings, 76 AD3d 225, 904 NYS2d 392, reversed.

Yenem Corp. v. 281 Broadway Holdings, 76 A.D.3d 225, 904 N.Y.S.2d 392, 2010 N.Y. App. Div. LEXIS 5558 (N.Y. App. Div. 1st Dep't, 2010)

Disposition: [**1]** 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.

Counsel: *Jaroslawicz & Jaros LLC*, New York City (David Jaroslawicz and David Tolchin of counsel), for Yenem Corp., appellant. I. Plaintiff was entitled to summary judgment as to liability on common-law grounds. (*Klein v*

Beta I LLC, 10 AD3d 509, 782 NYS2d 54; Hixon v Congregation Beit Yaakov, 57 AD3d 328, 869 NYS2d 443; 11 Essex St. Corp. v Tower Ins. Co. of N.Y., 81 AD3d 516, 917 NYS2d 164; Andre v Pomeroy, 35 NY2d 361, 320 NE2d 853, 362 NYS2d 131; Nallan v Helmsley-Spear, Inc., 50 NY2d 507, 407 NE2d 451, 429 NYS2d 606; Silberman v Surrey Cadillac Limousine Serv., 109 AD2d 833, 486 NYS2d 357; Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444.) II. Under Administrative Code of the City of New York § 27-1031 (b), plaintiff was entitled to summary judgment and there was absolute liability as against defendants. (Cohen v Lesbian & Gay Community Servs. Ctr., Inc., 20 AD3d 309, 799 NYS2d 190; Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292; Post v Kerwin, 133 App Div 404, 117 NYS 761; Levine v City of New York, 249 App Div 625, 290 NYS 953; Elliott v City of New York, 95 NY2d 730, 747 NE2d 760, 724 NYS2d 397; Bloomingdale v Duffy, 71 Misc 136, 127 NYS 1080; Gordon v Automobile Club of Am., 101 Misc 724, 167 NYS 585; *180 App Div 927, 167 NYS 585*; Klein v Beta I LLC, 10 AD3d 509, 782 NYS2d 54; Hixon v Congregation Beit Yaakov, 57 AD3d 328, 869 NYS2d 443.) III. The finding of the majority below that absolute liability should not apply is directly contrary to the law in this state. (Spano v Perini Corp., 25 NY2d 11, 250 NE2d 31, 302 NYS2d 527; Gordon v Eastern Ry. Supply, 82 NY2d 555, 626 NE2d 912, 606 NYS2d 127; Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444; Levine v City of New York, 249 App Div 625, 290 NYS 953; Palermo v Bridge Duffield Corp., 3 AD2d 863, 161 NYS2d 755.) IV. The conclusion of the majority in the Appellate Division that the Elliott v City of New York (95 NY2d 730, 747 NE2d 760, 724 NYS2d 397 [2001]) case precludes summary judgment for plaintiff is erroneous. (Derdiarian v Felix Contr. Corp., 51 NY2d 308, 414 NE2d 666, 434 NYS2d 166.) V. The Appellate Division majority's statement that Coronet Props. Co. v L/M Second Ave. (166 AD2d 242, 243, 560 NYS2d 444 [1st Dept 1990]) is dispositive is erroneous. (Levine v City of New York, 249 App Div 625, 290 NYS 953; Palermo v Bridge Duffield Corp., 3 AD2d 863, 161 NYS2d 755.) VI. The majority in the Appellate Division ignored the distinction between summary judgment on liability and the amount of damages a plaintiff can recover. (Andre v Pomeroy, 35 NY2d 361, 320 NE2d 853, 362 NYS2d 131.)

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. I. Owners and general contractors have historically been held absolutely liable for the damages that their construction causes to adjoining landowners. (Cohen v Lesbian & Gay Community Servs. Ctr., Inc., 20 AD3d 309, 799 NYS2d 190; Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292; Post v Kerwin, 133 App Div 404, 117 NYS 761; Levine v City of New York, 249 App Div 625, 290 NYS 953; Elliott v City of New York, 95 NY2d 730, 747 NE2d 760, 724 NYS2d 397; Bloomingdale v Duffy, 71 Misc 136, 127 NYS 1080; Gordon v Automobile Club of Am., 101 Misc 724, 167 NYS 585; Klein v Beta I LLC, 10 AD3d 509, 782 NYS2d 54; Hixon v Congregation Beit Yaakov, 57 AD3d 328, 869 NYS2d 443; Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444.) II. The Appellate Division majority's reliance on Elliott v City of New York (95 NY2d 730, 747 NE2d 760, 724 NYS2d 397 [2001]) is misguided. (Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444; Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 509 NE2d 51, 516 NYS2d 451; Huerta v New York City Tr. Auth., 290 AD2d 33, 735 NYS2d 5.) III. Appellant is entitled to partial summary judgment on the issue of liability because respondents violated section 27-1031 (b) of

the Building Code (Administrative Code of City of NY). (Gandley v Prestige Roofing & Siding Co., 148 AD2d 666, 539 NYS2d 416; Trbaci v AJS Constr. Project Mgt., Inc., 22 Misc 3d 1116[A], 880 NYS2d 227, 2009 NY Slip Op 50153[U]; Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292; Post v Kerwin, 133 App Div 404, 117 NYS 761; Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444; Bloomingdale v Duffy, 71 Misc 136, 127 NYS 1080; Van Nostrand v Froehlich, 44 AD3d 54, 844 NYS2d 293; Doyle v American Home Prods. Corp., 286 AD2d 412, 729 NYS2d 194; Gramigna v Morse Diesel, 210 AD2d 115, 620 NYS2d 58.) IV. The Appellate Division erred in granting respondents' motion to amend. (Lettieri v Allen, 59 AD3d 202, 873 NYS2d 39; Sharon Ava & Co. v Olympic Tower Assoc., 259 AD2d 315, 686 NYS2d 422; Daniels v Empire-Orr, Inc., 151 AD2d 370, 542 NYS2d 614; Matter of Cromwell Towers Redevelopment Co. v City of Yonkers, 41 NY2d 1, 359 NE2d 333, 390 NYS2d 822; Elmsmere Assoc. v Gladstone, 153 AD2d 501, 545 NYS2d 136.)

Shafer Glazer, LLP, New York City (David A. Glazer and Mika M. Mooney of counsel), for respondents. I. The Appellate Division correctly determined that absolute liability can only be imposed under a state statute. (Elliott v City of New York, 95 NY2d 730, 747 NE2d 760, 724 NYS2d 397; Smulczeski v City Ctr. of Music & Drama, 3 NY2d 498, 146 NE2d 769, 169 NYS2d 1; Huerta v New York City Tr. Auth., 290 AD2d 33, 735 NYS2d 5; Schumer v Caplin, 241 NY 346, 150 NE 139; Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292; City of New York v Wineburgh Adv. Co., 122 App Div 748, 107 NYS 478; Kobbe Co. v City of New York, 122 App Div 755, 107 NYS 489; Pajak v Pajak, 56 NY2d 394, 437 NE2d 1138, 452 NYS2d 381; Post v Kerwin, 133 App Div 404, 117 NYS 761.) II. Excavation and protection of adjacent structures does not fall into the category of statutes that typically give rise to absolute liability, and there is no evidence demonstrating an intent to impose absolute liability upon owners that undertook measures to preserve and protect adjoining structures. (Van Gaasbeck v Webatuck Cent. School Dist. No. 1, 21 NY2d 239, 234 NE2d 243, 287 NYS2d 77; Koenig v Patrick Constr. Corp., 298 NY 313, 83 NE2d 133; City of New York v Stringfellow's of N.Y., 253 AD2d 110, 684 NYS2d 544; Matter of City of New York v State of New York, 282 AD2d 134, 725 NYS2d 10; Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292.) III. The Appellate Division correctly determined that a violation of Administrative Code of the City of New York § 27-1031 and a determination on proximate cause must be made prior to an imposition of liability. (Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444; Cohen v Lesbian & Gay Community Servs. Ctr., Inc., 20 AD3d 309, 799 NYS2d 190; Quattrocchi v F.J. Sciame Constr. Corp., 44 AD3d 377, 843 NYS2d 564; Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292; McGlynn v Palace Co., 262 AD2d 116, 691 NYS2d 514; Johnson v Phillips, 261 AD2d 269, 690 NYS2d 545; Kiernan v Edwards, 97 AD2d 750, 468 NYS2d 381.) IV. Yenem Corp. cannot seek liability under common-law negligence for the first time on appeal, nor can it establish a prima facie case of negligence. (Sean M. v City of New York, 20 AD3d 146, 795 NYS2d 539; Recovery Consultants v Shih-Hsieh, 141 AD2d 272, 534 NYS2d 374; Quain v Buzzetta Constr. Corp., 69 NY2d 376, 507 NE2d 294, 514 NYS2d 701; Kenney v City of New York, 30 AD3d 261, 817 NYS2d 264; Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444; Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC, 71 AD3d 537, 895 NYS2d 825; Horwitz v Camelot Assoc. Corp., 66 AD3d 1299, 888 NYS2d 241.) V. Neither the former statutes pertaining to excavation and adjoining

properties nor Administrative Code of the City of New York § 27-1031 were intended to provide a cause of action for tenants. VI. Leave to amend respondents' answer was properly awarded by the Appellate Division since such leave is freely given and the claims have merit. (*Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc., 4 AD3d 290, 772 NYS2d 313*; *Matter of Salon Ignazia, Inc., 34 AD3d 821, 826 NYS2d 129*; *McFarland v Michel, 2 AD3d 1297, 770 NYS2d 544*; *St. Paul Fire & Mar. Ins. Co. v Town of Hempstead, 291 AD2d 488, 738 NYS2d 226*; *Lettieri v Allen, 59 AD3d 202, 873 NYS2d 39*.) VII. Randall Co., LLC's request for $250,000 for lost rents should not be awarded as it is an unsubstantiated amount. (*SRM Card Shop v 1740 Broadway Assoc., 2 AD3d 136, 769 NYS2d 483*.)

Molod Spitz & DeSantis, P.C., New York City (Marcy Sonneborn and Alice Spitz of counsel), for third-party respondent. I. Summary judgment is premature before discovery has been conducted. (*Venables v Sagona, 46 AD3d 672, 848 NYS2d 238*; *Amico v Melville Volunteer Fire Co., Inc., 39 AD3d 784, 832 NYS2d 813*; *Valdivia v Consolidated Resistance Co. of Am., Inc., 54 AD3d 753, 863 NYS2d 720*; *Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 476 NE2d 642, 487 NYS2d 316*; *Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 390 NE2d 298, 416 NYS2d 790*; *Alvarez v Prospect Hosp., 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923*; *Zuckerman v City of New York, 49 NY2d 557, 404 NE2d 718, 427 NYS2d 595*; *Lewis v Safety Disposal Sys. of Pa., Inc., 12 AD3d 324, 786 NYS2d 146*; *Global Mins. & Metals Corp. v Holme, 35 AD3d 93, 824 NYS2d 210*; *Fazio v Brandywine Realty Trust, 29 AD3d 939, 815 NYS2d 470*.) II. The Legislature has not expressed its intent to treat an alleged violation of the Building Code of New York City as a state statute. (*Staples v Town of Amherst, 146 AD2d 292, 540 NYS2d 926*; *Fox v Jenny Eng'g Corp., 122 AD2d 532, 505 NYS2d 270*; *70 NY2d 761, 514 NE2d 1374, 520 NYS2d 750*; *Allen v Cloutier Constr. Corp., 44 NY2d 290, 376 NE2d 1276, 405 NYS2d 630*; *Conte v Large Scale Dev. Corp., 10 NY2d 20, 176 NE2d 53, 217 NYS2d 25*; *De Milio v New York State Thruway Auth., 15 AD2d 27, 222 NYS2d 471*; *Utica Mut. Ins. Co. v Mancini & Sons, 9 AD2d 116, 192 NYS2d 87*; *People v Pulizzi, 199 Misc 405, 106 NYS2d 680*; *Cohen v Crimenti, 24 AD2d 587, 262 NYS2d 364*; *Schaeffer v Caldwell, 273 App Div 263, 78 NYS2d 652*; *Martin v Herzog, 228 NY 164, 126 NE 814*.) III. Plaintiffs have not made out a prima facie case under the Administrative Code of the City of New York. (*Dorrity v Rapp, 72 NY 307, 4 Abb N Cas 292*; *Coronet Props. Co. v L/M Second Ave., 166 AD2d 242, 560 NYS2d 444*; *Eastern Consol. Props. v Adelaide Realty Corp., 95 NY2d 785, 732 NE2d 948, 710 NYS2d 840*; *Holy Props. v Cole Prods., 87 NY2d 130, 661 NE2d 694, 637 NYS2d 964*; *Cenven, Inc. v Bethlehem Steel Corp., 41 NY2d 842, 362 NE2d 251, 393 NYS2d 700*; *Elliott v City of New York, 95 NY2d 730, 747 NE2d 760, 724 NYS2d 397*; *Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 509 NE2d 51, 516 NYS2d 451*; *Major v Waverly & Ogden, 7 NY2d 332, 165 NE2d 181, 197 NYS2d 165*; *Tkach v Montefiore Hosp., 289 NY 387, 46 NE2d 333*; *Worth Distribs. v Latham, 59 NY2d 231, 451 NE2d 193, 464 NYS2d 435*.) IV. Hunter-Atlantic, Inc. is not in privity of contract with Yenem Corp. (*Espinal v Melville Snow Contrs., 98 NY2d 136, 773 NE2d 485, 746 NYS2d 120*; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 556 NE2d 1093, 557 NYS2d 286*; *Raffa v Stilloe Roofing & Siding, 182 AD2d 901, 581 NYS2d 888*; *Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 451 NE2d 459, 464 NYS2d 712*; *Strauss v Belle Realty Co., 98 AD2d 424, 469 NYS2d 948*; *65 NY2d 399, 482 NE2d 34, 492*

NYS2d 555.)

Michael A. Cardozo, Corporation Counsel, New York City (Margaret G. King and Spencer Fisher of counsel), for City of New York, amicus curiae. Certain language in the Appellate Division majority decision risks creating confusion about the legal status of many New York City Charter and Administrative Code of the City of New York provisions originally adopted as state laws, including provisions applicable outside the tort context. This Court should ensure the continued status of those provisions in accordance with long-standing judicial precedent. (*Elliott v City of New York, 95 NY2d 730, 747 NE2d 760, 724 NYS2d 397*; *Grimmer v Tenement House Dept. of City of N.Y., 204 NY 370, 97 NE 884*; *Racine v Morris, 201 NY 240, 94 NE 864*; *People ex rel. Savory, Inc. v Plunkett, 295 NY 180, 66 NE2d 46*; *Board of Educ. v Rogers, 278 NY 66, 15 NE2d 401*; *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 6 NY3d 563, 848 NE2d 448, 815 NYS2d 1*; *Matter of City of New York v Patrolmen's Benevolent Assn. of the City of N.Y., Inc., 14 NY3d 46, 924 NE2d 336, 897 NYS2d 382*; *Matter of Finegan v Cohen, 275 NY 432, 10 NE2d 795*; *Walter v City of N.Y. Police Dept., 244 AD2d 205, 664 NYS2d 21*; *Old Dutch Lands v City of New York, 55 Misc 2d 384, 286 NYS2d 86*; *32 AD2d 649, 301 NYS2d 437*; *26 NY2d 984, 259 NE2d 492, 311 NYS2d 25*.)

Judges: Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Opinion by: CIPARICK

Opinion

[*486] [392] [***21]** Ciparick, J.

On this appeal, we consider whether former Administrative Code of the City of New York § 27-1031 (b) (1) **[**393] [***22]** 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.

Plaintiff Randall Co. (Randall) is the owner of a landmark cast iron and masonry building located at 287 Broadway in **[*487]** 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 **[****2]** 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 **[****3]** 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 **[3]** 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."

[*488] In the *Yenem* action, Supreme Court denied Yenem's motion for **[****4]** 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 **[**394]** **[***23]** 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, 904 NYS2d 392 [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, 747 NE2d 760, 724 NYS2d 397 [2001])*, the Appellate Division found that as a municipal **[****5]** 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

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

proximate cause; and that, as a strict liability provision, section 27-1031 (b) (1) did not **[****6]** permit an affirmative defense of reasonable precautions (*see* *id. at 242-245*).

[*489] 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.

[1] "As a rule, violation of a State statute that imposes a specific duty constitutes **[4]** 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] **[****7]** provides:

> **[**395] [***24]** "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* ***[*490]*** *Rapp (72 NY 307, 4 Abb N Cas 292 [1878])*, **[****8]** 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]). **[5]**

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).

[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.

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, 109 NE 497 [1915]*; *Racine v Morris, 201 NY 240, 244, 94 NE 864 [1911]*; *Post v Kerwin, 133 App Div 404, 405-406, 117 NYS 761 [2d Dept 1909]*; **[****9]** *Victor A. Harder Realty & Constr. 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 **[**396]** **[***25]** import of the statute was **[*491]** materially or substantively altered" either upon its recodification as a local law or in the century thereafter (*see* *Yenem, 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 **[****10]** in neighboring land is harmed by it, should **[6]** bear its costs. [4]

[2] 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

---

[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, 848 NE2d 448, 815 NYS2d 1 [2006]* [holding that the state policy embodied in **[****11]** *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"]).

answered **[****12]** in the negative.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Order reversed, with costs, in *Yenem Corp. v 281 Broadway Holdings*, plaintiff's motion for summary judgment on the issue **[*492]** 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.

End of Document