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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN PART 5

Justice

131 + Madison Realty Group

-v-

City of New York and Gateway Demolition Corp.

INDEX NO. 107637/99

MOTION DATE 6/7/02

MOTION SEQ. NO. 005

MOTION CAL. NO. 4

The following papers, numbered 1 to 3 were read on this motion to/for S.J.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Notice of X.M	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

SCANNED DEC 09 2002

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

"is determined in accordance with the annexed memorandum decision and order."

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/25/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

HON. MICHAEL D. STALLMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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131 & Madison Realty Corp.,

Index No. 107637/99

Plaintiff,

Decision and Order

-against-

City of New York, and Gateway Demolition Corp.,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this plenary action, plaintiff seeks damages for the City's allegedly unlawful demolition of its building. Plaintiff moves for summary judgment pursuant to CPLR 3212. Defendant City of New York cross-moves for leave to amend its answer to assert a defense of governmental immunity, and for summary judgment dismissing the complaint. These motions address a novel issue: Is the City's decision to summarily demolish plaintiffs building, without notice or prior judicial approval, immune from post-demolition judicial review?

FACTS

Plaintiff owned a building at 41 East 131st Street, also known as 2081 Madison Avenue, in Manhattan. Plaintiffs building shared a common party wall with an adjoining City owned building, 2083 Madison Avenue.

On August 19, 1998, the Department of Buildings (DOB) responded to an emergency condition at 2081 and 2083 Madison Avenue. At his deposition, DOB inspector George Gabourel testified that upon his arrival at the site, he saw that several floors of 2083 had collapsed, and bricks had fallen from the common wall. Gabourel recommended that 2083 be demolished, and concluded if 2083 were demolished, then 2081 could not stand alone. Gabourel therefore recommended that 2081 be demolished too. The City then issued an Emergency Declaration, which directed that 2081

be demolished "to protect the public safety." On the same day, August 19, 1998, the City contracted with defendant Gateway Demolition, which actually carried out the demolition. Plaintiff states that it did not learn of the demolition until it received a letter from the City, dated August 21, 1998, after the building had already been demolished.

I

Plaintiffs complaint pleads two theories of recovery against the City of New York. The first cause of action asserts that the City was negligent and reckless in the decision to demolish, and in the process of demolishing, plaintiff's building. The second cause of action asserts that the demolition was an unlawful taking of plaintiffs property under color of law in violation of 42 USC § 1983.

By decision and order dated October 31, 2001, this Court granted Gateway's motion for summary judgment dismissing the complaint as against it and denied plaintiffs motion to amend its complaint to assert a claim that the City negligently maintained 2083.

The Court denied the proposed amendment of the complaint because the notice of claim neither mentioned 2083 Madison Avenue, the City's building, nor alleged a negligence cause of action. The notice of claim simply alleged the "unlawful and reckless destruction, demolition and taking of plaintiffs building, 2081 Madison Avenue . . . . .by the City." In denying that motion to amend, the Court determined that the proposed amendment of the complaint would have added a different theory of liability and altered the nature of the standard of conduct alleged to have been wrongful. Because the notice of claim contained no reference to negligence and no reference to negligent maintenance of the City's building, and because the time to seek leave to file a late notice of claim (or to amend the notice of claim to assert a different theory of liability; see Gen. Municipal Law § 50-e[5]) had expired, the Court lacked the power to grant the amendment.

For the same reason, to the extent that the first cause of action against the City pleads negligence and carelessness, it is beyond the scope of the notice of of claim and is not properly part of this case'. To the extent that summary judgment searches the record, the Court deems the first cause of action against the City limited to the claim of reckless demolition of plaintiff's building, and otherwise dismissed.

The second cause of action against the City is within the scope of the notice of claim to the extent that it pleads a wrongful taking of plaintiff's property without due process of law in violation of the federal and state Constitutions (U.S. Const. 14th Amend; N.Y. Const. Art I, $6) and 42 US.. § 1983.

II

Plaintiff claims entitlement to judgment as a matter of law because the City never sought a precept order from the Supreme Court and did not otherwise notify plaintiff of its intention to demolish 2081. Plaintiff asserts that the City lacked authority to order the demolition of plaintiffs building. The City contends that it has the authority to demolish a building without a precept order in emergency situations where, as here, plaintiffs building was in imminent danger of collapse.

The federal and state due process clauses each provide that no person may be deprived of property by state action without due process of law. U.S. Const. Amend. 14; N.Y. Const. Art. I § 6. Under its inherent police power and common law nuisance theory, government may act to

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[1] To the extent that the complaint alleges claims based on theories in conflict with those set forth in the notice of claim, the complaint lacks validity. Negligence and carelessness are a conceptually different, lesser standard of culpability than recklessness. Where, as here, in the absence of a timely motion to amend the notice of claim equivalent to a motion for leave to serve a late notice (made within 1 year and 90 days of accrual), a pleading may not extend the claim beyond that set forth in the notice of claim.

protect members of the public from danger. to life and health posed by private property. See gen. McQuillan, Municipal Corporations § 24.561. Due process generally requires that government give an owner notice, an opportunity to be heard and a chance to remove the hazard before proceeding to abate or demolish, unless the condition poses an imminent emergency. See Catanzaro v. Weiden, 140 F3d 91 (2d Cir. 1998); Matter of City of New York v. Unsafe Building, 77 Misc.2d 562 (Sup. Ct. N.Y. City., M. Evans, J., 1973); Moses v., City Council of Long Beach, 71 Misc.2d 925 (Sup. Ct., Nassau Cty. 1971). Thus, the City's police power must be exercised in a manner consistent with due process.

The City of New York has adopted procedures for abating hazards posed by unsafe structures and codified them in the City Charter and Administrative Code. N.Y.C. Charter § 643; N.Y.C. Admin. Code §§ 26-235 through 26-243.

The New York City Charter empowers the Department of Buildings to perform the City's functions relating to unsafe buildings and structures, including the power to take necessary legal action to remove unsafe conditions including the sealing or demolition of such buildings.

Charter § 643 states:

> The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law and other laws, rules and regulations as may govern the construction, alteration, maintenance, use, conditions, mechanical equipment and inspection of buildings or structures in the city, and shall perform the functions of the City of New York relating to
>
> > (1) the designation of buildings and structures as unsafe and the necessary legal action in relation thereto prior to the removal of the unsafe condition through demolition or sealing except as provided in section eighteen hundred two of this charter.
> >
> > (2) the shoring of hazardous and unsafe buildings and structures.

Article 8 of Chapter 1 of Title 26 of the Administrative Code (§§ 26-235 through 26-243), entitled "Unsafe Buildings and Property," governs the procedures by which the DOB removes unsafe conditions by demolition or sealing.

Section 26-235 provides, in pertinent part:

> Any structure or part of a structure or premises that from any cause may at any time become dangerous or unsafe, structurally or as a fire hazard..., shall be taken down and removed or made safe and secure...

The quoted language states the general objective – to make the affected building safe, if possible, or to demolish the building if that is not possible. Article 8 then describes the specific procedures to be followed in cases involving unsafe buildings. Administrative Code § 26-236 provides that immediately upon receipt of an inspection report that shows the building to be unsafe, DOB enters the report on a docket of unsafe buildings. The owner must be served with a written notice containing a description of the condition, and an order either to make the building safe or to remove the building. The owner is expected to contact the DOB immediately and either accept or reject the order. If the owner agrees to the order, then it has 24 hours to commence the abatement of the unsafe or dangerous condition (Admin. Code § 26-237).

Administrative Code § 26-238 provides for appointment of a three-person survey team, which includes an architect and engineer. The surveyors issue a report concerning the alleged unsafe condition. Administrative Code § 26-239 provides for judicial review of the survey. Whenever the report recites that the building is unsafe, the Corporation Counsel, at such time specified in the notice to the owner, places the notice and report before a justice of the Supreme Court, presumably by commencement of a special proceeding. Because of the exigency of the situation, the proceeding has preference over all other matters [§ 23-239(b)]. A trial of the issue shall be held without delay[1]. If the judge, jury or court-appointed referee finds the building to be unsafe, the court issues a

"precept," directing the DOB to vacate and repair and secure the building, or to repair and secure, or to take down or remove the building [§ 26-239(d)]. Section 26-243 permits the City to perform work to render the building "temporarily safe" until the proper proceedings for unsafe structures are instituted.

The cited notice provisions of the Administrative Code not only afford due process to the property owner; they protect the City from post-demolition claims that the City acted illegally. When the City obtains expedited judicial review of its administrative determination before demolition, it immunizes itself from post-demolition litigation like the instant case.

Irrespective of the Administrative Code's procedure for removing hazardous structures with notice, the police power, compatible with constitutional requirements, permits the City to remove imminently dangerous structures without prior notice. Common sense requires the law to recognize that, when immediate action is required to protect lives and health, due process does not require time-consuming impracticable procedure or prior judicial review that would hobble the City's attempt to safeguard the public.

If the City does act immediately without seeking prior court approval, due process requires that the property owner have an opportunity to seek judicial review of the City's act. Thus, the City may summarily demolish a building if it finds exigent circumstances which require immediate demolition to protect the public from imminent danger. Starik v. City of New York, 68 AD2d 936; see Calamusa v. Town of Brookhaven, 272 AD2d 426. However, if immediate demolition was not required, and that the condition of plaintiffs building would have permitted the City adequate time to afford plaintiff notice and an opportunity to be heard, the failure to provide notice is a due process violation for which liability will attach. See Calamusa v. Town of Brookhaven, supra.

Whether plaintiff's structure presented an imminent emergency so as to have permitted the City to bypass its Administrative Code procedure, is a triable factual question. See e.g., Fellman v. Town of Babylon, 194 AD2d 517. Whether the City acted unlawfully depends on resolution of this question at trial. Plaintiff's motion for summary judgment, and that branch of the City's cross-motion seeking summary judgment, are therefore denied.

Moreover, should it be determined at trial that the City wrongfully bypassed legal process, plaintiff would have the burden of proving that the City's act caused the damages plaintiff alleges. If it is determined at trial that, had the City followed the Administrative Code procedure, the City would have been granted a precept to demolish the building, then plaintiff may well be entitled only to nominal damages.

The City's cross-motion to amend its answer to add the defense of governmental immunity, is denied. In the sole cause of action against the City, plaintiff alleges that the City's demolition of plaintiff's building constituted an unlawful taking without due process of law. The crux of the illegality alleged here is that the City did not follow lawful procedure—procedure set forth by its own Administrative Code. Consequently, this case does not involve the City's common law tort immunity for its employees' discretionary acts. See, e.g., Lauer v. City, 95 NY2d 95.

This case must be distinguished from Rampart Tennis Corp. v. City of New York, 212 AD2d 481 (1st Dept., 1995) where the plaintiff alleged that that the City's chosen method of demolition of a hazardous, partially collapsed structure caused bricks to fall on and damage plaintiffs building. Rampart held that the City had discretion to select the appropriate means of doing the work and was immune from tort liability for resulting property damage. Here, the method of demolition is not in issue. Rather, it is the City's decision to demolish without prior notice that plaintiff challenges. Were this Court to hold, as the City requests, that the City's unilateral choice is immune from liability,

property owners would be deprived of any judicial review or recourse whatsoever, even if the City's demolition was arbitrary or baseless. Such a result would be incompatible with due process.

This opinion constitutes the decision and order of the Court.

Dated: November 5, 2002 **ENTER:**

MICHAEL D. STALLMAN, J.S.C.

HON. MICHAEL D. STALLMAN