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

PRESENT: HON. JUDITH J. GISCHE ~~J.S.C.~~ *Justice* PART 10

Index Number : 101157/2004
CANNON POINT NORTH
VS.
CITY OF NY
SEQUENCE NUMBER : 010
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

JUL 01 2010

Dated: 7/1/10

HON. JUDITH J. GISCHE *J.S.C.*
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

Supreme Court of the State of New York
County of New York: Part 10

Canon Point North, Inc.,

Plaintiff,

-against-

The City of New York, The City of New York Department of Transportation, The City of New York Department of Buildings, The City of New York Department of Housing Preservation and Development, The State of New York and The State of New York Department of Transportation,

Defendants.

Decision/Order

Index No.: 101157/04
Seq. No.: 010

Present:
Hon. Judith J. Gische, JSC

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

PAPERS	NUMBERED
Notice of Motion, BB affirm dated 6/17/09, exhibits 1 through15	1
Exhibits 16 through 44	2
Notice of Cross-Motion, RBG affirm., exhibits	3
CPN Volume II exhibits	4
BB Reply affirm dated 10/2/09., HDP affirm dated 9/15/09; MWD affirm dated 10/2/09; exhibits 38 through 53	5

Upon the foregoing papers the decision and order of the court is as follows:

Remaining defendants, The City of New York, The City of New York Department of Transportation ("DOT"), The City of New York Department of Buildings ("DOB"), The City of New York Department of Housing Preservation and Development ("DHPD"), and (collectively "City") move for partial summary judgment dismissing plaintiff, Cannon Point North's ("CPN") first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, nineteenth and twentieth causes of

action asserted in its Second Amended Complaint. [1] CPN opposes the motion in all respects, "except the discrete noted instances where Notice of Claim bars the causes of action." In its brief, CPN acknowledges that the Appellate Division, in this very case, already rejected the arguments raised in the twentieth cause of action, but it has included the claim to preserve its right on appeal (46 AD3d 143 [1st dept. 2007]). CPN cross-moves for partial summary judgment on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth (in part), twelfth, thirteenth, fourteenth, sixteenth, seventeenth, eighteenth and nineteenth causes of causes of action. It also seeks judgment on the Second and Third Counterclaims in the City's answer. The City opposes the cross-motion in its entirety.

Issue has been joined on all claims and counterclaims interposed in this case. The Note of Issue was filed on May 1, 2009 and the motion and cross-motion were each served before the expiration of the 120 day period. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]. The motion and cross-motion are, therefore, properly before the court and will be decided on their relative merits.

The Pleadings

CPN asserts the following causes of action in its Second Amended Complaint that are relevant to this motion:

first cause of action ("1st COA") seeking a declaration that it is excused from any obligation to repair or maintain the FDR roof structure due to impossibility of

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[1]The City's decision to organize its arguments in a manner that does not follow the causes of action as asserted in the complaint has made what is an extremely complicated motion even more prolix. The court urges the city in the future to consider a more organized method of presenting its legal positions.

performance;

second cause of action (2nd COA") seeking a declaration that under the 1941 and 1957 agreements CPN is entitled to repair or maintain the roof structure during regular business hours and that to the extent that CPN must reimburse the City for such work, the amount will not exceed that which any contractor would have been paid had the contractor been permitted to do such work during regular business hours;

third cause of action ("3rd COA") claiming breach of contract based upon the City's failure to permit CPN to repair and maintain the FDR roof structures during regular business hours;

fourth cause of action ("4th COA") seeking a declaration that the City's emergency procedures violate due process and are unconstitutional on their face;

fifth cause of action ("5th COA") seeking a declaration that the 2003 and 2005 Emergency declarations in this case violated CPN's procedural due process and are unconstitutional;

sixth cause of action ("6th COA") seeking a declaration that the 2003 and 2005 Emergency declarations in this case violated CPN's substantive due process;

seventh cause of action ("7th COA") seeking a declaration that the City is responsible for the FDR roof structure by reason of inverse condemnation;

elghth cause of action ("8th COA") claiming a *de facto* taking without just compensation;

ninth cause of action ("9th COA") claiming breach of contract based upon alleged interference by the City with the FDR roof structure;

tenth cause of action ("10th COA") claiming trespass;

eleventh cause of action ("11th COA") claiming negligence in connection with the use of salting and de-icing materials that caused damage to the FDR roof structure;

twelfth cause of action ("12th COA") claiming wrongful demolition of the The FDR roof structure;

thirteenth cause of action ("13th COA") seeking ejectment of the City from the FDR roof structure based upon the City's wrongful outster of CPN therefrom in salting, de-icing, placing signage and placing lighting;

fourteenth cause of action ("14th COA") seeking money damages based on unjust enrichment in connection with a tax payment made by CPN (sometimes "tax payment");

fifteenth cause of action ("15th COA") seeking money damages for conversion in connection with the tax payment;

sixteenth cause of action ("16th COA") claiming that CPN's tax payment was diverted without due process of law;

seventeenth cause of action ("17th COA") claiming that CPN's tax payment was diverted in violation of substantive due process;

eighteenth cause of action ("18th COA") claiming that there was an unconstitutional taking of CPN's tax payment;

nineteenth cause of action ("19th COA") seeking a declaration that the contracts awarded by the City under the authority of the 2005 Emergency Declaration is illegal; and

twentieth cause of action ("20th COA") seeking a declaration that the City easement extends and includes the FDR roof structure.

The City has interposed an Answer to the Second Amended Complaint which

contains counterclaims. The second ("2nd CC") and third counterclaim ("3rd CC"), which are implicated in this motion, are respectively for: a declaration that CPN is responsible for the repair and maintenance of the FDR roof structure and recoupment of approximately $40,000,000 spent by the City to repair the FDR roof structure.

Underlying Facts

CPN is a cooperative apartment corporation that owns the building located at 25 Sutton Place South, New York, NY (sometimes "building"). It is next to a building owned by Cannon Point Nouth, Inc. ("CPN"), which is located at 45 Sutton Place South, New York, N.Y. Both buildings are canterlevered over the FDR Drive and under each, extending to the highway, are columns, a curtain wall and a lower slab ("structures" or, as above, "FDR roof structures"). These structures support the buildings above them.[2]

In or about 1938 the City took action to condemn a permanent easement over property belonging to CPN's and CPS's predecessor in interest, the Henry Phipps Estate ("HPE"), in order to open and extend a highway on the East Side of Manhattan, which is now known as the FDR Drive ("FDR Drive"). An order granting condemnation to the City was made on or about March 29, 1939. HPE then filed a claim seeking compensation for the City's condemnation. During the compensation claim trial, HPE and the City entered into agreements modifying the easement granted. Orders awarding compensation for the easement were made by the Court on March 14, 1940

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[2] As this court has observed in other contexts, "One man's ceiling is another man's floor." (Paul Simon, see Garza v. 508 West 112th Street, 869 NYS2d 756 [NY Sup. 2008][nor] affd. __ AD3d __ [1st dept. 2010], 2010 WL 1068053). In this regard, although the structures at issue form a "roof" for the FDR, they likewise form a support for the building above.

and April 30, 1940. The agreements and condemnation orders were memorialized in an indenture dated July 25, 1941 ("1941 indenture").

Insofar as pertinent to the instant motions the 1941 indenture made between HPE and the City provides:

> "Whereas the City, Through its Board of Estimate, did by resolutions adopted July 28, 1938..and June 29, 1938... authorize the acquisition of a permanent easement for street purposes between certain elevations, in lands between East 54th and East 55th Streets and between East 55th and East 56th Streets in the Borough of Manhattan, for the East River Drive and
>
> Whereas title to said easement vested in the City on the 29th day of March, 1939, excluding therefrom, however, column rights of not more than 18 inches in width, to be at intervals of not less than 15 feet apart, in the centrally located mall, located within the lines of said easement; and.....
>
> Whereas, it was intended by the parties hereto the [HPE], in addition to the column rights reserved to it in the centrally located mall, **should have the right to utilize parts of such easement on the east and on the west and additional parts in the said centrally located mall, for the purpose of erecting and maintaining columns and foundations in connection with the erection and maintenance of buildings and over and across the easement**, but the resolutions heretofore adopted by the Board of Estimate did not reserve to [HPE] the right to do so; and
>
> Whereas, upon the trial in the proceedings instituted by the City to acquire title to the said easement, it was stipulated by the parties hereto that proof of damages to the property of [HPE] be submitted by both parties upon the assumption that the rights referred to in the last preceding paragraph would be secured to [HPE] by appropriate action of the City authorities ..." (*emphasis added*)

The parties then go on to grant each other certain rights and waive certain rights to collect damages. The 1941 indenture further provides:

> "The foregoing covenants and agreement are made by [HPE] and accepted by the City with the distinct understanding and condition that...(b) [HPE] **shall be permitted to perform the work of erecting its columns and foundations and any and all work it is permitted to do under the terms of this instrument**, during the ususal business hours of the day, that is, during the hours when no overtime would be charged, as provided

in the terms of the of a stipulation made in open court and spread on the record in the proceeding entitled as aforesaid...."
(emphasis added)

In 1957 the City and HPE's tenants ("tenants") entered into a further agreement ("1957 agreement") providing that in exchange for certain map changes to be made by the City, the tenants agreed to certain conditions by which they would perform the work necessary to construct buildings over the FDR Drive. The 1957 agreement provided in pertinent part:

> "Whereas the City and [HPE] entered into an Agreement. Dated July 25, 1941, and approved by the Board of Estimate August 14, 1941... agreeing to more definitively describing the areas to be closed and discontinued within the limits of the City's easement for column foundation and support rights for any future building which might be erected by [HPE] or their assigns, and further granting to [HPE] the right to erect such columns and foundations 'during the ususal business hours of the day, that is, during the hours when no overtime would be charged, as provided in the terms of a stipulation made in open court and spread upon the record" in the condemnation proceeding aforesaid; .... IT IS HEREBY AGREED BY THE [TENANTS] THAT: 1. If the City shall adopt the two map changes...THEN, and in that event, the [tenants] hereby agree as follows: (a) to perform their work of borings, installing foundations, erecting columns and beams, and erecting their buildings as not to endanger the stability of the roadways of the Franklin D. Roosevelt Drive and its appurtenant structures.....(b) **to limit the time and scope of all operations so as to abide by the any joint decisions of the Borough President of Manhattan, the commissioner of Traffic and the Police commissioner, designating the hours and time when the Franklin D. Roosevelt Drive roadways, or any of its traffic lanes, will be closed for any construction or maintenance operations.** It is understood that these closings will be restricted to off-peak traffic hours . Generally work will be performed on Mondays through Fridays in no more than one lane of the southbound roadway between the hours of 10:00 A.M. and 4:00 P.M. and in no more than one lane of the northbound roadway between the hours of 7:00 A.M. and 3:00 P.M. " (emphasis added)

Construction of the two buildings, now respectively located at 25 and 45 Sutton

Place South in Manhattan, was commenced thereafter and the buildings were completed in 1959. Subsequent thereto, the City installed lights and roadway traffic signs to the structures.

Following an inspection, on or about June 18, 2002 the DOB served a Notice of Unsafe Building and Structure and Summons and issued Emergency Declarations related to the structures that had been erected in accordance with the earlier agreements, thereby instituting an Unsafe Building Proceeding. A survey and report of the structures was made by HAKS Engineers, P.C. (NYAC §26-235). An Order and Precept issued by the Hon. William Davis of the Supreme Court, New York County (index #s 402764/02, 402766/02), directed that action be taken to correct the conditions and make the building safe. A contractor was retained by DHPD and certain work was done on or about January 16, 2003. CPN claims that some, but not all, of the conditions were repaired, and that the DOB subsequently rescinded the Emergency Declaration.

On or about August 22, 2003 the DOB issued a new Emergency Declaration, again claiming that CPN had failed to maintain the structures. The conditions declared unsafe were then repaired by the City between January 22, 2004 and February 5, 2004 by a contractor retained by the City, through he auspices of DHPD.

After this action had already been commenced, on or about April 1, 2005 the DOT issued a Declaration of Emergency related to the structures and requested that DHPD retain contractors to repair the condition. In connection with the conditions, the City retained the services of a professional engineer, Daniel Frankfort, P.C. ("Frankfort") to inspect and determine the scope of necessary work. Frankfort was paid for its services

by the City.

On or about February 21, 2006 DHPD issued a Notice to Proceed to Slattery, Skanska, Inc. ("Slattery") to remove spalling concrete on the lower slab above the Northbound FDR. The work was completed on or about February 24, 2006 at a cost of $35,376.

In or about February of March 2006, pursuant to a contract entitled Emergency Shield Installation and procured under emergency procurement policies, Slattery installed a platform over the Southbound FDR to serve as a work platform for work related to slab repair. The cost of the contract for the Shield was $3,473,272.

In or about April or May 2006 a further contract was awarded to Slattery, entitled Replacement of Lower building Slabs, Column Repairs, Asbestos Abatement and Related Work, in the amount of $32,287,000.00. On August 26, 2006 the contract was registered with the New York City Comptroller.

By September 2007 Slattery had completed the work indicated in the contracts. The City claims that the cost to do the work, consisting of fees paid to Frankfort and Slattery was $39,526,753.00.

This action was commenced by filing on January 23, 2004. The Second Amended Complaint was interposed on or about January 18, 2008.

Discussion

Law applicable to Summary Judgment

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

eliminate any material issues of fact from the case. (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). In this case each party bears the initial burden on their relative motions for summary judgment. Where the issues raised concern only issues of law, such as contract interpretation, the court can and should resolve them on a dispositive motion. (American Express Bank Ltd. v. Uniroyal, Inc. 154 AD2d 275 [1st dept. 1990]).

The 1st COA; 2nd COA and 3rd COA

CPN claims that under the 1941 indenture and the 1957 agreement (sometimes collectively "instruments") it had the right to perform maintenance work on the structures it was permitted to erect over the easement (ie: columns, lower slab and curtain wall) during business hours, so as to avoid the increased payment of overtime for workers. CPN then argues that because laws have since been passed that prohibit closing the FDR Drive during business hours, CPN's obligations under the parties' agreements to maintain the structures are now impossible to meet and CPN should be excused from the responsibility.

The City argues that neither the 1941 indenture nor the 1957 agreement gave CPN a right, in perpetuity, to perform maintenance work on the structures during business hours. It further argues that any time restrictions about when the maintenance work can be performed, do not render the maintenance work impossible, only perhaps,

more expensive. The City argues that there is no basis for construing the instruments in a way that would relieve CPN of its obligation to maintain the structures.

Both sides agree that the issue of the interpretation of the instruments is one of law, to be decided by the Court.

These arguments bear upon the1st COA, 2nd COA and the 3rd COA, on which both parties seek summary judgment.

a. Interpretation of the instruments

It is black letter law that agreements are to be construed in accordance with what the parties intend. The best evidence of what the parties intend is what they say in their writing. (Greenfield v. Phillies Records, Inc., 98 NY2d 562 [2002]). An agreement set forth in a document that is clear and complete should be enforced according to its terms and without any reference to extrinsic evidence. (W.W.W. Associates Inc. v. Gianconteri, 77 NY2d 157 [1990]).

It is clear that both the 1941 indenture and the 1957 agreement provided CPN's predecessor in interest with the right to initially build the structures during the day, when there was no need to pay overtime charges. There is no doubt that these rights were conferred by the City and considered by Court in fixing just compensation for the permanent easement condemned by the City. The Court calculated compensation, in part, by determining the increased costs of erecting a foundation over the FDR Drive over and above the cost a conventional foundation, had the easement not been condemned. The Court rejects, at the outset, the City's argument that the 1941 indenture conferred no rights or obligations of future access to maintenance the structures because those rights were not included in the eminent domain decree.

Regardless of whether the language was part of the Court's decree or even whether the court was willing to address the issue one way or the other, if the obligation was otherwise part of the agreement between the City and HPE, as manifested in the instruments, then it is an enforceable obligation. (See: Christian v. Christian, 52 NY2d 63 [1977]).

The Court finds that both the 1941 indenture and the 1957 agreement gave CPN a right of access for maintenance work on the structures during the day time hours of operation of the FDR Drive. The 1941 indenture gave a right of daytime access to HPE for "erecting its columns and foundations and any and all work it is permitted to do under the terms of this instrument." The work permitted under the terms of the 1941 indenture expressly included not only building the structures, but also maintenance of them. The 1957 agreement also expressly refers to not only the time of access to first erect the structures that will ultimately support the buildings, but also for "maintenance operations."

The City's argument that maintenance is not a "permitted work", but a retained obligation of ownership is unpersuasive in this context. The parties' agreement recognized that the structures could neither be built nor maintained without access to and over the permanent easement that had been condemned by the City. Thus, the parties themselves, in their agreements referred to permitted work as that work for which they would provide access. The applicable instruments expressly include erection and maintenance of the structures. Certainly the City is correct in claiming that CPN's obligation to maintain the structures is an obligation attendant to ownership, however, that is not inconsistent with the parties considering it "permitted work" in the context of

their agreements and/or the City's obligations to provide access.

b. doctrine of impossibility

Notwithstanding that the instruments provide CPN with the right to perform maintenance work to its structures that are situated within the easement within certain hours of the business day, the Court otherwise finds that the doctrine of impossibility has no application to facts presented.

Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even where unforseen circumstances make performance burdensome. Impossibility of performance is a recognized common law defense, but it is applied narrowly and only in extreme circumstances. (Kel Kim Corporation v. Central Markets, Inc., 70 NY2d 900 [1987]). Impossibility excuses a party's performance only when the subject matter of the of the contract has been destroyed or when the means of performance makes performance objectively impossible. (Kel Kim Corporation v. Central Markets, Inc., *supra*, Warner v. Kaplan, 71 AD3d 1 [3rd dept. 2009]). Performance that is possible, albeit at a greater financial cost to the obligor, cannot be excused by the defense of impossibility. (407 E. 61st Garage v. Savoy Fifth Ave., Corp., 23 NY2d 275 [1968]). Nor is performance excused merely because it has become more difficult. (Monroe Piping & Sheet Metal, Inc. v. Edward Joy Company, 138 AD2d 941 [4th dept. 1988]).

CPN claims and the City does not dispute that present applicable laws and regulations prevent closing any portion of the FDR Drive during the day. However, CPN's obligation to maintain its structures situated within the easement is not impossible to perform. The only "impossibility" is the time of day that the maintenance

work can be performed, with the consequence of increased cost. In this regard CPN's reliance on International Paper Company v. Rockefeller, (161 AD 180 [3rd dept. 1914]) is inapposite, where a fire had destroyed the very lumber that was a requirement of the contract. At bar, the subject of the contract (the structures) still exist and the means (access) is still available, albeit at additional cost.

Moreover, the paradigm of impossibility of performance ill suits the situation at bar because the burden of providing daytime access falls on the City, not CPN. The City must provide access, because the structures cannot otherwise be maintained without access over the permanent easement that was condemned by the City. CPN's obligation to maintain the structures is not a consequence of the parties' agreements, but an incident of its retained ownership in that which was not part of and/or inconsistent with the easement. (See: Bakeman v. Talbot, 31 NY 366 [1865]: Columbia Gas Transmission Corp. v. Bishop, 809 F. Supp. 220 [WDNY 1002]). Any consequent failure by the City to perform its obligation of access, can be answered by the City in money damages.

The Court is also not persuaded by CPN's argument that such damages are "impossible" to calculate. Increased costs attendant to overtime charges can be calculated with reasonable certainty based upon reliable factors. (See: Greasy Spoon, Inc. V. Jefferson Towers, Inc., 75 NY2d 792 [1990]; Kenford Co., Inc. v. County of Erie, 67 NY2d 395 [1986]). Even if money damages were impossible to calculate, that is not the type of "impossibility" that forgives performance of contractual obligations since it does not involve the destruction of the subject matter or means of contractual performance.

Consequently, the Court: grants summary judgment in favor of the City and against CPN dismissing the 1st COA.

While the Court has determined that the instruments require the City to provide CPN daytime access to the FDR to maintain the structures, whether and to what extent that right permits an offset to the City's claim for reimbursement of expenses to repair the structures, is not subject to a declaration of rights on this motion and must await trial. No summary judgment for breach of contract is warranted because there are at least factual disputes about whether and to what extent CPN asked for, but was denied, access to do repairs. The reasonableness of the amount of the expenses sought by the City may also be affected by their failure to do them during daytime hours (see: decision *infra*; 2nd CC and 3rd CC).

Consequently the Court denies both the motion and cross-motion seeking summary judgment on the 2nd COA and the 3rd COA.

The 4th COA

The 4th COA Challenges the City's emergency procedures relating to unsafe structures as violative of the due process guarantees of the 14th Amendment to the Unites States Constitution. CPN seeks summary judgment in its favor on this cause of action. The City does not raise any arguments in opposition to this item of relief.[3]

The New York City Charter empowers the DOB to perform governmental

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[3]While the City does not raise any arguments specifically in opposition to CPN's cross-motion on the 4th COA, it opposes CPN's request for relief on the related 5th COA, which opposition is only relevant if CPN does not prevail on the 4th COA. Consequently the Court considers the *bona fides* of CPN's motion on the 4th COA though not substantively opposed.

functions that relate to unsafe buildings and structures within the City of New York. NYCAC §§26-235 et. Seq. If the superintendent of the DOB determines that there is actual an imminent danger that any structure or part thereof will fall, so as to endanger life or property, s/he shall have the necessary work done to make the structure temporarily safe, until the proper proceedings for unsafe structures are instituted. NYCAC §26-243. In implementing its responsibilities, the DOB follows the procedures set forth in its Operations Policy and Procedure Notice # 16/93 ("OPPN 16/93"). CPN does not challenge the procedures dealing with an "immediate emergency" as defined in OPPN 16/93. CPN acknowledges that no pre-deprivation hearing is required to satisfy due process where there are exigent circumstances. (Kshel Realty Corp. v. City of New York, 2006 WL 2506389 [SDNY 2006]). CPN argues, however, that to the extent OPPN 16/93 has a second-tier emergency procedure, when danger is anticipated in the very near future but the City will not commence work for another 30 to 60 days, due process requires a pre-deprivation hearing.

The Court does not find that the policy for second tier emergencies provided for in OPPN 16/93 violates procedural due process.

OPPN 16/93 requires that in the event there is an "emergency," as opposed to an "immediate emergency," an unsafe building violation must be written and a letter must be sent to the owner. An emergency is defined as a building "with serious structural damage and/or a deteriorating condition when a collapse or failure is expected in the very near future." Work is expected to begin within 30 to 60 days of the declaration of emergency.

Generally, the demolition or repair of a building by a municipality without providing

the owner with notice and an opportunity to be heard constitutes a violation of due process. (Calamusa v. Town of Brookhaven, 272 AD2d 426 [2nd dept. 2000]). A municipality may, however, demolish a building without providing notice and an opportunity to be heard if there are exigent circumstances which require an immediate demolition of the building to protect the public from imminent danger. (Rapps v. City of New York, 54 AD3d 923 [2nd dept. 2008]). In determining whether due process has been satisfied the Court must examine: [1] the private interest affected by the municipality action; [2] the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional safeguards and [3] a consideration of the municipality interest. Due process does not always require a hearing on the merits in every civil case. (Swartz v. City of Corning, 46 AD3d 1364 [4th dept. 2007]).

At bar OPPN 16/93 provides Notice to the owner in the event of an emergency. Although an emergency, as that term is defined by the DOB, is not as exigent as an "immediate emergency," it nonetheless may still be a situation requiring action without delay to prevent harm to the public. While the DOB policy does not provide for a pre-deprivation hearing, it does give the owner advance notice of action sought to be taken by the City. In addition there are meaningful post deprivation remedies available. (See: Jackson v. Burke, 256 F.3d 93 [CA 2nd Cir.]). The Court, therefore, does not find that the DOB policy is *per se* unconstitutional. While a party may still raise issues about whether a pre-deprivation hearing is required in any particular case, OPPN 19/93 as written, does not violate due process.

Consequently, CPN's cross-motion for summary judgment on the 4th COA is denied. In addition, because the issue of whether the procedures instituted violate due

process is one of law, the Court searches the record and grants the City summary judgment dismissing this cause of action. (Ortega v. City of New York, 35 AD2d 422 [2nd dept. 2006]).

5th COA

CPN's 5th COA alleges that both the 2003 and 2005 issuance of Emergency Declarations in this particular case violated its right to procedural due process. 42 USC § 1983.[4] The City moves for summary judgment on the fifth cause of action, initially claiming that it is barred by a three year statute of limitations. The City also claims that the claims are "legally deficient." CPN cross-moves for summary judgment claiming that as a matter of law the 2003 and 2005 Emergency Declarations violated the procedural due process guarantees of the fourteenth amendment of the United States Constitution.

The 2003 Emergency Declaration was issued on August 18, 2003. CPN acknowledges in its Second Amended Complaint that the conditions identified in such 2003 Emergency Declaration were repaired prior to February 5, 2004.

The applicable statute of limitations to this claim is three years. CPLR §214; Owens v. Okure, 488 U.S. 235 (1989). The statutory period begins to run upon the accrual of the claim. The City argues that latest date any claim regarding the 2003 Emergency Declaration could have accrued is February 4, 2004. Since this due process claim first appeared in the Second Amended Complaint interposed January 18, 2008;

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[4]Although the complaint also asserts violations of the New York State Constitution, those issues are not raised in this motion by the parties. The Court assumes from the silence that the rights under the New York State Constitution are no greater than those under the Federal Constitution and that the arguments raised and outcome thereunder will be the same.

the City argues it was brought over three years after the accrual of the claim and is, therefore, time barred.

CPN argues that the claims are timely because they relate back to the time the original complaint was interposed in January 2004. CPLR §203 (f). Under the relation back doctrine, a claim in an amended pleading is deemed to have been interposed at the same time as the claims contained in the original pleading, "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR § 203 [f]; Buran v. Coupal, 87 NY2d 173 [1995]). "The burden is on the plaintiff to establish the applicability of the doctrine once a defendant has demonstrated that the Statute of Limitations has expired." (Spaulding v. Mt. Vernon Hosp., 283 AD2d 634 [2d Dept 2001]). While the original pleading in this case included allegations about the 2003 Emergency Declaration, it contained no claims about the repairs done by the City. In fact, those repairs were not commenced nor completed until after the original complaint had been interposed. Since the basis for this due process claim is that the repairs deprived CPN of its property, there is no basis for the Court to find that the relation back doctrine applies to this cause of action.

Consequently, to the extent that the 5th COA makes any claims regarding the constitutionality of the 2003 Emergency Declaration, those claims are time barred.

The remainder of the 5th COA is that the 2005 Emergency Declaration as applied in this particular case violated CPN's due process. Thus, even though the underlying statute and procedure may be constitutional (see: decision, *supra*, 4th COA), CPN argues that the City's actions in this case were unconstitutional for the reasons that

follow reasons. CPN alleges that the City Improperly issued the Emergency Declaration through the DOT, rather than through the DOB. CPN further alleges that the DOT issued the 2005 Emergency Declaration to DHPD when it should have been issued to the property owner. Finally, CPN claims that because there was no emergency no emergency Declaration should have been issued in this case.

The City's argument that the 5th COA should be dismissed because CPN had no property interest at stake is denied. The underlying gravamen of the City's primary position in this case is that CPN owned the concrete slabs and columns under its building and, therefore, is required to reimburse the City for the emergency work done. The City cannot, consistent with its position, also claim that as a matter of law, CPN has no property interest in the structures when it comes to CPN's claims against the City. Moreover, the Appellate Division has already ruled in favor of the City on its 1st counterclaim that CPN is the owner of the structures. (46 AD3d 146 [1st dept. 2007]). There is simply no basis to conclude that CPN has no property interest in that which it owns. The Court also does not believe it can, as the City suggests, presume that the concrete demolished and removed by the City had little or no value. Even were that true, it would only be relevant to damages.

The parties dispute whether there was really an emergency necessitating that work be done by the City. The issue of whether there actually were circumstances that would have permitted the City to utilize its emergency procedures for repairing a building is a disputed question of fact. (See: decision, infra, 2nd CC and 3rd CC). The further question of what process was due CPN at the time the City did those repairs, necessarily turns on whether there was an emergency condition or not. It cannot be

summarily adjudicated at this time.

Consequently both the motion and cross-motion for summary judgment on the 5th COA are denied to the extent they concern the 2005 Emergency Declaration.

6th COA

To the extent that the 6th COA alleges that the corrective action taken in 2003 violates CPN's substantive due process, it is barred by the applicable statute of limitations (see decision, *supra*, 5th COA).

In the 6th COA, CPN otherwise alleges that the City's actions violated CPN's substantive due process when it undertook corrective action in 2005. The complaint claims that the City invoked its emergency procedures without adequate justification of an emergency, did not follow its own procedures and then exceeded the emergency powers by doing work to the lower slab that was not required and was well beyond what was necessary to abate the claimed emergency.

A valid claim based on denial of substantive due process must be based upon a [1] cognizable property interest and [2] governmental action that was wholly without legal justification. (Bower Associates v. Town of Pleasant Valley, 2 NY3d 617 [2004]). Only the most egregious official conduct can be said to be arbitrary in the constitutional sense. It is an outer limit on the legitimacy of governmental action and is violated only by conduct that constitutes a gross abuse of governmental authority. (Bonded Concrete, Inc. v. Town of Saugerties, 50 Fed. Appx. 491 [CA 2nd 2002]; Natale v. Town of Ridgefield, 170 F3d 258 [CA 2nd 1999]). Where a municipality acts in accordance with a legitimate concern, it cannot be said to have acted in an outrageously arbitrary manner that would constitute a violation of substantive due process rights. (Lisa's Party City v.

Town of Henrietta, 185 F.3d 12 [2nd Cir. 1999]).

While CPN has an identifiable property interest in the structures, no facts establish that the government action was wholly without legal justification. Regardless of whether the structures were failing and constituted an emergency condition, there is no dispute that they were deteriorating and that the City's actions were motivated by a desire to keep users of the FDR drive safe. The conduct CPN complains about does not rise the to level of governmental action that would constitute a denial of CPN's substantive due process rights.

Consequently, the City's motion for summary judgment dismissing the 6th COA is granted and CPN's cross-motion for summary judgment is denied.

7th COA and 8th COA

CPN alleges the following circumstances constitute a *de facto* taking and/or inverse condemnation of its property by the City, entitling it to various relief: [1] placing lighting and signage on the lower slab without the consent of CPN; [2] use of salt and de-icing materials causing damage to the structures, and [3] the City's invocation of its emergency powers in 2003 and 2005. Both the City and CPN seek summary judgment on the 7th COA and the 8th COA.

Both the United States and the New York State Constitutions prohibit the taking of private property for public use without just compensation. City of Buffalo v. JW Clement Co. 28 NY2d 214 (1971). The Courts have recognized that a taking of property without just compensation may occur without an actual physical taking. In the recent United States Supreme Court case of Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, (__ U.S. ___ [decided June 17, 2010]) the

Court recognized that when the government uses its own property in such a way that it destroys private property, it has taken the property within the meaning of the Constitution (Opn. p8). The seminal case in New York on *de facto* taking remains the Court of Appeals decision in City of Buffalo v. JW Clement Co., supra. The Court of Appeals stated therein:

> " .. [I]t has long been recognized by the Courts of this State that he constitutional provision against the taking of property without just compensation may be violated without a physical taking. Indeed, injuries which in effect deprive individuals of full and unimpaired use of their property may constitute a taking in the constitutional sense. ...[W]henever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, it deprives him of his property within the meaning of the Constitution. And it is not necessary, in order to render a statute obnoxious tot he retrains of the Constitution, that it must in terms or in effect authorize the actual physical taking of the property, so long as it affects its or the power of disposition at will of the owner. ... However, the concept of de facto taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use....It is our view that only the most obvious injustice compels such a result. "

A *de facto* taking is limited to situations in which there has been a direct invasion by the condemning authority upon the property of the condemnee or some direct legal restraint upon the use of such property. (Beaux Arts Properties, Inc. v. United Nations Development Corp., 68 Misc2d 785 ([Sup. Ct. NY Co. 1972]). It must also be a permanent interference. (Carr v. Flemming, 122 AD2d 540 [4th dept. 1986]).

[1]The Placement of Signage and Lighting

There is no dispute that at some point, the City placed permanent lighting and

signage on the structures.[5] The City claims, however, that such actions were taken with CPN's consent. It relies upon that part of the 1957 agreement which provides that the City will adopt toe map changes and in exchange CPN's predecessor in interest agreed to:

> "(e) to provide in their construction work, at their own cost and expense, all necessary anchor bolts, electrical conduits, electrical pull boxes, wall and ceiling chases and niches, required by the City for the future installation of the permanent roadway lighting and ventilation systems and the necessary anchorages in the walls for the future installation of panels or tile, all such work to be done in accordance with plans, and specifications to be furnished by th Borough President of Manhattan to the Coronations.
>
> (f) to furnish and install at their own cost and expense a temporary lighting system in accordance with the requirements of the Borough President of Manhattan, to remain until such time as said permanent lighting system is installed."

CPN argues that the 1957 indenture does not address signage at all and that, while it anticipated that permanent lighting would be attached to the structures at some future point, the issue of who is entitled to and responsible for the installation of permanent lighting is left open. The Court agrees with CPN. The language relied upon by the City to prove "consent" as a matter of law is not such consent. It certainly contains no references to signs. To the extent there are references to permanent lighting, the language is limited to making the structures ready for the installation of same at some indefinite point in the future.

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[5] At another point in the arguments the Claims that there is no proof that after making the repairs it restored either the signs or the permanent lighting. (See: decision, *infra*, 13th COA). While the Court believes that this should be an objective verifiable fact by both parties, the record on these motion is devoid of information concerning the current status of these items.

Nothing expressly gives the City the right at that time to undertake permanent installations.

Consequently, the Court finds that CPN is entitled to summary judgment on the 7th COA and 8th COA to the extent they alleges that the City's placement of lighting and signage on the structures constitutes a *de facto* taking without just compensation. The issue of the amount of damages is referred to trial. The damages trial should include a determination of what signs and lighting were maintained by the City on CPN's structures and for what period of time they were maintained.

[2]The De-icing and Salting

The Statute of Limitations

The City argues that the claims related to salting and de-icing by the City are barred by the applicable statute of limitations. These claims, based upon a *de facto* taking, are subject to a three year statute of limitations. (Owens v. Okure, 488 US 235 [1989]; South Salina Street, Inc. v. Syracuse, 68 NY2d 474 [1986]). The statute of limitations begins to run upon the accrual of the claim. A claim accrues upon the occurrence of all events essential to the claim, such that the plaintiff would be entitled to judicial relief. (CPLR §203; Vigilant Ins. Co. of America v. Housing Authority of City of EL Paso, Tex. 87 NY2d 35 [1995]; Aetna Life and Casualty Co. v. Nelson, 67 NY2d 169 [1986]; Utica Mutual Ins. v. Avery, 261 AD2d 802 [3rd dept. 1999]).

The City argues that CPN had ' "reason to know" as early as 1993, that its lower slab and columns were damaged, and that the City's de-icing salts might be

the cause." (City Memorandum of Law pp.27). It further claims that "CPN had reason to know the scope and cause of the injury in June 1997." (City Memorandum of Law pp.28). It argues further that CPN had actual notice no later than July 2001 and September 2004. It then claims that the 7th COA and 8th COA were brought more than three years after all of these dates, so that the 7th COA and 8th COA should be dismissed.

With respect to these causes of action, CPN correctly argues that the doctrine of relation back applies. (CPLR §203(f); Buran v. Coupal, 87 NY2d 173, 181 [1995]). Under this doctrine, a claim in an amended pleading is deemed to have been interposed at the same time as the claims contained in the original pleading, "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR § 203 [f]).

It is clear that in the original complaint CPN made allegations and gave the City ample notice of its claim that the use of salt and other chemicals to de-ice the FDR drive caused substantial damage to its structures. These claims, although now cast in the constitutional doctrine of taking, are based upon the identical factual allegations in the original complaint. (Jacobson v. McNeil Consumer & Specialty Pharmaceuticals, 68 AD3d 652 [1st dept. 2009]). The original complaint was brought within the time period that the City concedes CPN had actual notice of the accrual of the injury.

As to whether CPN had reason to know of the injury before 1997, the evidence presented by the City is not definitive and does not establish, as a

matter of law, the right to summary judgment. This issue is for the trier of fact to determine.[6]

The Court, however, rejects CPN's claim that this was a continuous wrong that tolls the statue of limitations. Boland v. State, 30 NY2d 337 (1972).

Consequently, the City's motion for summary judgment on the 7th COA and the 8th COA to the extent they rely on allegations of de-icing is denied.

The Substantive Claims

CPN argues that it is entitled to summary judgment on the 7th COA and the 8th COA because there is no dispute that the City's de-icing activities caused damage to its property. The City's argument in opposition that CPN had no property interest in the structures has already been rejected (see decision, *supra,* 5th COA).

There are, however, multiple disputed issues that require the denial of summary judgment on the merits of the claim. As previously stated, there is a disputed issue regarding the application of the statute of limitations and from what date the claim should be allowed (see: decision, *supra*, 7th COA and 8th COA [2]). There are further issues about whether the level of the claimed interference by de-icing caused the deterioration, and/or whether other factors, such as roadway

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[6]In denying summary judgment on this issue, the Court recognizes that CPS acknowledged knowing about the damage caused by the de-icing in an October 2000 letter. The Court relied upon such letter in granting the city summary judgment on identical claims made by CPS in a companion case. While CPS's letter may be presented to the trier of fact at trial in connection with arguments that CPN could have, with reasonable diligence, discovered the injury before 2001, it cannot serve as basis for summary judgment against CPN.

exhaust, age, use etc, contributed to the deterioration of the lower slab.

Consequently CPN's cross-motion for summary judgment on the 7th COA and 8th COA to the extent they are based on allegations of de-icing is denied.

[3] The 2003 and 2005 Emergency Declarations

The City claims that any taking claim based on the emergency declarations is legally deficient.[7] The gravamen of the City's claim is that it properly exercised its authority pursuant to its emergency powers to address an emergency condition. CPN claims that it is entitled to summary judgment based on the emergency declarations because no emergency existed. The issues regarding whether an emergency existed are disputed and not subject to summary adjudication (see: decision, *infra*, 2nd CC and 3rd CC).

Consequently the motion and cross motion for summary judgment on the 7th COA and the 8th COA to the extent they are based upon the City's exercise of authority to make emergency repairs is denied.

9th COA

In the 9th COA, CPN alleges that City interfered with and damaged the structures and that the City's actions constituted a breach of the parties' 1941 indenture. CPN claims that the City "covenanted not to damage the FDR Roof Structure while maintaining the FDR Drive." (CPN Memorandum of Law p.64). The City argues that there is no contractual obligation in the 1941 indenture not to damage the structures. At

[7]No argument is made by the City that the claims made with respect to the 2003 Emergency Declaration in this cause of action is barred by the applicable statute of limitations.

most, the City argues the language of the 1941 indenture prohibits it from damaging the FDR roof structure while maintaining the parapets, walls and foundations of the FDR drive. CPN claims that the language of the indenture is more inclusive. In any event, CPN claims that the obligation derives from the duty of good faith and fair dealing and that by having the benefit of the residual permanent easement, the City is not permitted to damage the servient estate.

The Court agrees with the City that the actual language of the 1941 indenture does not include any express general obligation undertaken by the City not to damage the structures. While holding an easement carries with it an obligation not to damage the servient estate, (Mandia v. King Lumber & Plywood Co., 179 AD2d 150 [2nd dept. 1954]), that obligation gives rise to a duty to sue in tort, not for breach of a contract. (See: Lopez v. Adams, 69 AD3d 1162 [3rd dept. 2010]). Nor is CPN aided by basing the claim on the implied duty of good faith and fair dealing implicit in every contract. The implied duty of good faith and fair dealing is not sufficient to support an otherwise non-viable breach of contract claim. (Jacobs Private Equity, LLC v. 450 Park, LLC, 22 AD3d, 347 [1st dept. 2005]; Triton Partners, LLC v. Prudential Sec. Inc., 301 AD2d 411 [1st dept. 2003]).

Consequently, the City's motion for summary judgment dismissing the 9th COA is granted and CPN's cross-motion for summary judgment is denied.

10th COA

CPN alleges that the City trespassed on its property by engaging in the following activities: [1] de-icing the FDR Drive; [2] installation of signage and permanent lighting and [3] demolishing and removing concrete from the lower slab.

The City seeks summary judgment. It claims that trespass based upon de-icing is barred by the applicable statute of limitations and CPN's failure to file a Notice of Claim. It claims that the trespass based upon the placement of signage and lighting is "legally deficient." Finally it claims that to the extent the claims is based upon demolition and the removal of concrete, it is barred by CPN's failure to file a Notice of Claim and it is also legally deficient.

CPN has cross-moved for a determination of liability only to the extent that the 10th COA is based upon the City's placement of permanent lighting and signage on its property and the demolition and removal of concrete.

Trespass is an intentional tort. It is the intentional entry onto the land of another without justification or permission. (Phillips v. Sun Oil Co., 307 NY 328 [1954]; Long Island Gynecological Services, PC v. Murphy, 298 Ad2d 504 [2nd dept. 2002]). A proper exercise of the City's police power to repair an emergency condition does not constitute a trespass. (Westchester Joint Water Works v. City of Yonkers, 155 AD2d 534 [2nd dept. 1989]; Idelwild 94-100 Clark LLC v. City of New York, 898 NYS2d 808 [Sup. Ct. Kings Co. 2101]).

Trespass is governed by a three year statute of imitations. (CPLR §214(4); Alamio v. Rockland, 302 AD2d 842 [3rd dept. 2003]). Where there is a continuous trespass, based upon latent effects of exposure to any combination of substances and the primary relief sought is pecuniary, the statute of limitations begins to run from the date of discovery of the injury or from the date when, through the exercise of reasonable diligence, the injury should have been discovered. (CPLR 214-c[2]; Jensen v. General Electric Co., 82 NY2d 77 [1993]). Where, however, the claim is a continuous wrong,

and it is not based upon exposure to toxic substances, a separate cause of action accrue for each day that the trespass continues. (509 Sixth Avenue Corp. v. NYCTA, 15 NY2d 48 [1964]).

Actions seeking damages to real property caused by the wrongful act of the City require that a Notice of Claim be served within 90 days after the claim arises. (GML §§ 50-e; 50-i. See also: CPLR 214-c[3]). A late Notice of Claim may be permitted by the Court when requested within the time permitted to otherwise commence the underlying action. (GML § 50-e.5.; Small v. NYCTA, 14 AD3d 690 [2nd dept. 2005]). Failure to comply with the Notice of Claim requirement requires dismissal of the underlying claim. (Pierson v. City of New York, 56 NY2d 950 [1982]).

[1] The Placement of Signage and Lighting

The City's arguments with respect to trespass due to the placement of signage and lighting are largely that they had permission from CPN's predecessor in interest to place the signs and permanent lighting on CPN's property, based upon the 1957 agreement. As discussed previously in this decision, the 1957 agreement contains no such permission (see: decision, *supra*, 7th COA and 8th COA).

There are only oblique references to whether the trespass claim for signage and lighting should be dismissed for failure to file a Notice of Claim. The City does not directly ask for this relief and it is not considered by the Court.

CPN, makes a *prima facie* showing that the City affixed lighting and signs to its property without its consent. As to the Notice of Claim, it was filed on June 29, 2007. Since this was a continuing trespass and not based upon exposure to a toxic substance,

the Notice of Claim was timely as to the trespass occurring 90 days before its filing and to date.

Consequently, the Court denies the City's motion for summary judgment and grants CPN's cross-motion on the 10th COA for liability only, to the extent it is based upon claims pertaining to lighting and signage. The issue of damages is referred to trial. The damages part of the trial will also address what signs and lighting were maintained by the City on CPN's structures and for what period of time they were maintained.

[2] The De-icing and Salting

CPN's claims of trespass related to de-icing and the placement of chemicals falls within the rubric of CPLR 214-c. Although there are factual disputes about whether CPN should have discovered the injury prior to 2001, there is no dispute that by 2001 CPN had actually discovered the injury. The only Notice of Claim filed by CPN was on June 29, 2007. The Notice of Claim was more than 90 days after CPN knew about the claim. CPN was never given Court permission to file a late Notice of Claim.

Failure to file a timely Notice of Claim requires dismissal of that claim. (McGarity v. City of New York, 44 AD3d 447 [1st dept. 2007]). Service of a late notice without leave of Court is a nullity. (Pierre v. City of New York, 22 AD3d 733 [2nd dept. 2005]).

Consequently, the Court grants the City's motion for summary judgment dismissing the 10th COA for trespass to the extent it is based upon allegations related to de-icing the FDR Drive.

[3] The Demolition and Removal of Concrete

The City claims that CPN's Notice of Claim for trespass due to demolition and removal of concrete was late and warrants dismissal of the action. The demolition work

that forms the basis fo this claim of trespass began no earlier than September 16, 2006. In October 2006, CPN's counsel visited the worksite and observed the ongoing demolition. The work continued, however, through October 31, 2007. The Court rejects, at the outset, the City's contention that in the Second Amended complaint, CPN "admitted" that the work was completed in January 2007. CPN's allegations, are contrary to the actual facts as to when the emergency work was actually completed, which facts are known to the City since it actually did the work.

The City argues that CPN's claim accrued no later than October 20, 2006 and that failure to file the Notice of Claim within 90 days of that date warrants dismissal of the claim. CPN argues that because the demolition work was ongoing and continuous, the wrong was not referable exclusively to the day when the original tort was committed. Consequently, when the Notice of Claim was filed on June 29, 2007, it was timely.

The Court agrees with CPN that the demolition work, done over the course of many months, constituted a continuous wrong. (Bloomingdales, Inc. v. NY City Transit Authority, 52 AD3d 120 [1st dept. 2008]). The Notice of Claim was, therefore, timely.

The City also argues that a July 20, 2006 stipulation giving it access to CPN's property warrants summary judgment dismissing CPN's trespass claim. The wording of the stipulation, however, does not provide a defense, as a matter of law, to the allegations made in this action.

CPN, however, is not entitled to summary judgment either. The underpinning of this claim revolves around whether the City was properly exercising its police power to repair an emergency. There are issue of fact regarding whether there was an emergency condition (see: decision, *infra*, 2nd CC and 3rd CC).

Consequently, the Court denies the City's motion for summary judgment and CPN's cross-motion for summary judgment to the extent that the 10th COA is based upon demolition the structures.

11th COA

The 11th COA is based upon claim of negligence with respect to the City's de-icing of the FDR Drive. The City moves for summary judgment dismissing such cause of action based upon CPN's failure to file a timely Notice of Claim. CPN concedes that this cause of action should be dismissed for failure to file a Notice of Claim.

Consequently, the Court grants the City's motion for summary judgment dismissing the 11th COA.

12th COA

The 12th COA seeks money damages based upon a claim that the City wrongfully demolished its structures. The wrongful demolition occurred in connection with the City's claim that it was exercising its emergency power to make repairs to the structures. The City seeks summary judgment dismissing this claim upon the ground that it is barred by a 4 month statute of limitations (CPLR §217). Alternatively, The City claims that if a 3 year tort statute of limitations applies, the claim is barred by CPN's failure to file a timely Notice of Claim. CPN seeks summary judgment in its favor.

The Court finds that the action seeking monetary damages for the wrongful demolition of a structure is a tort subject to a three year statute of limitations and not a challenge to an administrative decision which is limited to a 4 month statute of limitations. (See e.g.: Rapps v. City of New York, 54 AD3d 923 [2nd dept. 2008]; Home Doc Corp. v. City of New York, 297 AD2d 277 [2nd dept 2002]).

As a tort, a Notice of Claim is required. As for the arguments on the "late" Notice of Claim, the Court rejects the City's position that CPN is bound to the completion date of demolition alleged in the Second Amended complaint. The date alleged, as the City knows, was not the actual date that its emergency work on the structures was completed. A claim for wrongful demolition cannot be asserted until demolition actually occurs. Deposition testimony, by Dr. Bojidar Yanev, that a portion of the demolition had been completed by December 28, 2006 is not sufficient for the Court to find that the Notice of Claim filed in this action was late. There is evidence that the work on CPN's structures was not completed by the City until late 2007.

Under these circumstances the June 27, 2007 Notice of Claim for wrongful demolition was timely.

CPN's cross-motion for summary judgment must be denied. There are issues of fact concerning whether the action taken to CPN's structures was part of the City's legitimate police power to repair emergencies, which warrant a denial of summary judgment. (Rapps v. City of New York, 54 AD3d 923 [2nd dept. 2008]) (see: decision, *infra*, 2nd CC and #rd CC).

13th COA

CPN's 13th COA is for ejectment. It alleges that based upon the placement of signage and permanent lighting and the application of de-icing materials, CPN has been ousted from its property. The City seeks summary judgment dismissing the 13th COA. To the extent that it is based on the placement of lighting and signage, the City claims that the 13th COA is legally deficient. To the extent the claim is based upon de-icing, the City argues it is legally deficient and also "partially" barred by the Notice of Claim

requirements. CPN argues that it is entitled to summary judgment in its favor.

Ejectment is a remedy available to recover real property, when a party with an immediate or present right to possession has been unlawfully or wrongfully ousted or disseized. (See: PJI § 6:3). The remedy is available for a partial ouster. (Butler v. Frontier, 186 NY 486 [1906]).

With respect to the lighting and signage, the City repeats its argument that under the 1957 agreement it had permission to erect signs and place lights on CPN's property. The Court has already rejected this position (see: decision, *supra*, 7th COA and 8th COA [1]). Consequently, the position will not support the City's motion for summary judgment on this cause of action either.

The City also argues since there is no evidence that the signs and lighting are still there after it repaired the structures, the remedy of ejectment is improper. The City does not affirmatively state that there currently are no signs and lighting on the structures. At another point in this motion, the City argued that lights and signs are essential for the safety of motorists using the FDR Drive.

There is no evidence whatsoever about whether the City presently has signs or permanent lighting placed on CPN's structures at this time. The remedy of ejectment allows process of law to remove a party from real property. If no party in improperly in possession, then there is no right to ejectment. The lack of evidence one way or the other about whether there are currently signs and lighting on the structures, however, warrants a denial of summary judgment to both parties on the 13th COA to the extent it is based upon the placement of lighting and signage.

With respect to CPN's arguments that the City's de-icing activities are a basis for

its ejectment claims, the City seeks partial summary judgment due to the failure to file a Notice of claim. To the extent that CPN seeks money damages, in addition to the remedy of possession, for the City's de-icing of the FDR Drive, that claim is barred based upon CPN's failure to file a timely Notice of Claim. Damages for the withholding of property require a Notice of Claim to be filed. Crawford v. Town of Hamburg, 19 AD2d 100 (4th dept. 1963). Where, as here, the money damages are predicated on exposure to toxic materials, the cause of action accrues either upon the discovery of the injury or when with reasonable diligence the injury could have been discovered. (CPLR 214-c[3]; see: Jensen v. General Electric Co., 82 NY2d 77 [1993]). The Notice of Claim must be filed within 90 days of accrual. Contrary to CPN's argument, ejectment is an action at law, not equity ,and a Notice of Claim is required. (Lattin v. McCarty, 41 NY 107 [1869]). Here the claim for de-icing accrued no later than 2001 but the Notice of Claim was filed in 2007.

Thus, money damages attendant to ejectment based on de-icing of the FDR Drive are barred by CPN's failure to file a timely Notice of Claim. It may still seek the remedy of possession.

CPN's cross-motion for summary judgment on what remains of the ejectment action, however, must also be denied. The nature and extent that any de-icing might have played in depriving CPN of possession is a disputed question of fact. (See decision, supra, 7th COA and 8th COA).

14th COA

The 14th COA, 15th COA, 16th COA, 17th COA and 18th COA are based upon the same set of alleged facts. CPN claims that in or around April 8, 2005 CPN made a

quarterly real estate tax payment for the period ending June 2005 and in the amount of $568,534.68 ("tax payment"). Rather than apply the monies to the taxes, CPN alleges that $243,598.71 of the tax payment was applied to satisfy an emergency repair lien that the City had placed against the building as a consequence of the 2003 emergency repairs. On June 9, 2005 CPN paid an additional amount of $243,598.71 toward its real estate taxes "under protest and with the reservation of all rights." CPN claims that the lien was imposed, even though there was ongoing litigation over the City's right to collect the payment in the first instance.

The 14th COA alleges that the City's actions in applying the tax payment to an emergency repair lien constituted unjust enrichment. The City seeks summary judgment on the 14th COA, claiming that it was brought beyond the applicable statute of limitations. The City argues that although styled as an unjust enrichment claim, the claim is really equivalent to an Article 78 proceeding challenging a tax, to which a four month statute of limitation applies. CPN argues that it is a claim independent of an Article 78 challenge and, therefore, a six year statute of limitations applies. (CPLR § 213[1]).

At bar, the tax payment was diverted to pay off a tax lien imposed based upon cost incurred by the DHPD pursuant to its emergency Repair Program. (NYCAC §27-2144). The New York Court of Appeals held that only when taxes are collected without jurisdiction or in violation of constitutional authority may they be recovered by a taxpayer in a plenary action for money had and received. (Trizec Western, Inc. v. City of New York ,66 NY2d 807 [1985]). The distinction to be made is whether the tax was assessed in error (in which case an article 78 proceeding is the proper method of challenge) or in

violation of law (in which case a plenary proceeding may be maintained for moneys had an received). (Niagra Mohawk Power Corp. v. City School District of City of Troy, 59 NY2d 262 [1983]).

The Court holds that the 14th COA is governed by the a four month statute of limitation and is, therefore, time barred. The City had statutory authority to impose the lien pursuant to the Administrative Code. To the extent that CPN argues that the authority was imperfectly exercised, that is merely an error in the assessment, which only can be remedied in an Article 78 proceeding. Although CPN claims it is attacking the tax as having been imposed in violation of law, because it is also disputing the underlying the *bona fides* of the 2003 emergency repairs, the time to contest the efficacy of these repairs has passed. (See: decision, *supra*, 5th COA).

Consequently, the Court grants the City's motion dismissing the 14th COA and denies CPN's cross-motion for summary judgment.

15th COA

The City claims that the 15th COA for conversion must be dismissed for failure to comply with the Notice of Claim provisions of the General Municipal Law. CPN concedes that the 15th COA of action must be dismissed for failure to comply with the GML § 50-e and 50-l.

Consequently, the Court grants the City's motion for summary judgment dismissing the 15th COA.

16th COA

The 16th COA asserts that by diverting the tax payment without first affording CPN

notice and an opportunity to be heard, CPN's due process rights have been violated. The City has not directly opposed this relief. Notwithstanding the City's failure to oppose the relief sought, the Court does not believe that CPN has asserted a *prima facie* case on this cause of action. Its claim is largely piggy backed on its underlying claim that 2003 Emergency Declarations were unconstitutional and improper. As already indicated, the time to contest the underlying constitutionality and efficacy of the 2003 emergency declarations and repairs has passed (see: decision, *supra*, 5th COA). CPN does not put forth arguments that the laws permitting the imposition of an emergency repair lien are unconstitutional. To the extent that it claims the City made errors in following the statutory procedure, those claims should have been timely raised in an article 78 proceeding.

Consequently, the cross-motion for summary judgment on the 16th cause of action is denied.

Notwithstanding that the City does not substantively address the 16th COA, the Court recognizes that the issues raised are purely ones of law. The Court, therefore, searches the record and grants the City summary judgment dismissing the 16th COA. (Ortega v. City of New York, 35 AD3d 422 [2nd dept. 2006]).

17th COA

The City's actions in enforcing an emergency repair lien on CPN's tax payment does not rise to the level of violating CPN's substantive due process rights. (Bower Associates v. Town of Pleasant Valley, 2 NY3d 617 [2004]). Whether the lien was properly asserted or not, there is no basis to conclude that the lien was enforced for any

other reason but to collect a debt from CPN that the City believed it was owed.

Consequently, CPN's cross-motion for summary judgment dismissing the 17th COA is denied.

The City did not move for summary judgment on this cause of action. It is, however, without merit as a matter of law. The Court, therefore ,searches the record and dismisses this cause of action. (Ortega v. City of New York, 35 AD3d 422 [2nd dept. 2006]).

18th COA

CPN cross-moves for summary judgment on the 18th cause of action, claiming that by diverting the tax payment, the City took CPN's funds without just compensation. The City does not address this request for relief. Nonetheless the Court denies the relief requested by CPN. The monies were credited to a debt that CPN owed the City. The time to contest that debt has passed (see: decision, *supra*, 5th COA). It is hard to reconcile what was a dollar for dollar credit of the tax monies against a outstanding debt owed by CPN with CPN's claim that it did not receive "just compensation" for the monies applied to the lien.

Consequently, CPN's cross-motion for summary judgment on the 18th COA is denied.

The City did not move for summary judgment on this cause of action. The claim is, however, without merit as a matter of law. The Court, therefore, searches the record and dismisses this cause of action. (Ortega v. City of New York, 35 AD3d 422 [2nd dept. 2006]).

19th COA

In the 19th COA, CPN claims that the contract(s) made by the City with Skanska to demolish and repair the structures were illegal because no emergency actually existed. The claim is styled as a declaratory judgment. The City moves for summary judgment dismissing the 19th COA, claiming that it is barred by the four month statute of limitations. CPLR §217. CPN cross-moves for summary judgment, claiming that the City's emergency procurement in this case was improper as a matter of law.

The Statute of Limitations

In the seminal case of Solnick v. Whalen (49 NY2d 224 [1990]) the Court of Appeals set of the basis for the analysis of what it the correct statute of limitations to apply in any particular declaratory judgment action. The Court stated:

> " In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought factors we have previously identified as pertinent to the selection of the applicable Statute of Limitations. If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action. In that event there is a limitation specifically prescribed by law and the catch-all provision of CPLR 213(subd. 1) is not applicable."

When the declaratory action seeks to challenge actions by governmental agencies, especially when they concern administrative rather than legislative actions, the four month statute of limitations is applicable, because the challenge could have been made in an Article 78 proceeding. (See: Press v. Monroe County, 50 NY2d 695 [1980]; Rosenthal v. City of New York, 283 AD2d 156 [1st dept. 2001]).

At bar, the underlying claim relates to administrative action in declaring that the

claimed repairs constituted an emergency which otherwise authorized the City to enter into contracts in derogation of the usual bidding procedures. These are administrative decisions by the DOB that should be reviewed in an Article 78 proceeding. (Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 AD3d 144 [1st dept. 2006]; 300 West 154th St. Realty Co. v. Department of Buildings, 30 AD2d 351 [1st dept. 1968] mod. 26 NY2d 538 [1970]). Consequently, the Court finds that a four month state of limitations applies to this declaratory action.

The Court rejects CPN's arguments that the 19th COA relates back to the time of the original complaint, because the events which form the basis of the 19th COA had not yet occurred when the original complaint was interposed.

Consequently, the 19th COA is barred because it was not brought within the applicable statute of limitations. The Court grants the City's motion for summary judgment dismissing the 19th COA and denies CPN's cross-motion for summary judgment.

20th COA

CPN concedes that the 20th COA was previously resolved against it by the Appellate Division (46 AD3d 146 [1st dep't 2007]). The claim is. therefore, barred by the application fo the doctrine of law of the case. (People v. Evans, 94 NY2d 499 [2000]).

Consequently, the Court grants the City's motion for summary judgment dismissing the 20th COA.

2nd CC and 3rd CC

In its 2nd CC, the City seeks a declaration that CPN is responsible for the repair of

the structures. In its 3rd CC, the City seeks a declaration that CPN is responsible to reimburse it for the approximate $40,000,000 in emergency repairs it undertook. CPN has cross-moved for summary judgment on these causes of action, claiming that because there was no emergency, they are not required to reimburse the City for the expenses incurred in connection with the repair of the structures.

Preliminarily, the Court holds that even though CPN's affirmative claims that the underlying contracts were procured illegally are barred by the applicable four year statute of limitations, they may still be interposed in a defensive posture. (CPLR §203(d); Bloomfield v. Bloomfield 97 NY2d 188 [2001]). CPLR §203(d) allows a defendant to assert an otherwise untimely claim that arises out of the same transactions as the claim asserted in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief. (Bloomfield v. Bloomfield, *supra* ; Carlson v. Zimmerman, 63 AD3d 772 [2nd dept. 2009]).

At bar, CPN stands in the shoes of a defendant relative to the City's 2nd CC and 3rd CC. The 3rd CC seeks recoupment of costs paid to effect emergency repairs. The claims that the repairs were not an emergency and the amounts paid were excessive, clearly arise out of the same transactions underlying the City's counterclaims.

CPN argues that, as a matter of law, the repairs made by the City to its structures were not unforseen and, therefore, the contracts made without bids are void and unenforceable. It also argues that even if emergency repairs were required, the repairs done by the City far exceeded what could be considered an emergency. Under Administrative Code §§ 27-127 and 27-128, an owner is required to maintain its building in a safe condition. If DHPD determines that a condition is dangerous to human life and

safety, the DHPD may correct the conditions and seek reimbursement for the costs of repairs from the owner. (AC §27-2125).

General Municipal Law ("GML") §103(1) requires that most public contracts be procured through open advertisement for sealed competitive bids. GML § 103(4) provides an exception from competitive bidding for emergency contracts "in the case of a public emergency arising out of an accident or other unforseen occurrence or condition whereby circumstances affecting .... the life, health, safety or property of the inhabitants of a political subdivision or district therein, require immediate action which cannot await competitive bidding..." An emergency is an unforseen combination of circumstances which calls for the immediate action. (Lutzken v. City of Rochester, 7 AD2d 498 [4th dept. 1959]). An occurrence or condition is unforseen when it is not anticipated; when it creates a situation which cannot be remedied by the exercise of reasonable care. (Civil Service Employees Association, Inc. v. O'Rourke, 173 Misc2d 460 [Sup. Ct. West. Co. 1997]; Rodin v. Director of Purchasing of the Town of Hempstead, 38 Misc2d 362 [Sup. Ct. Nass. Co. 1963]). RCNY 3-06 was enacted in consonance with GML §103(4) and it provides in pertinent part that an emergency procurement shall be limited to the procurement of those items necessary to avoid or mitigate serious danger to life, safety, property or a necessary service.

If a municipality enters into a contract in contravention of these rules, it would be an illegal contract. (Gerzof v. Sweeney, 16 NY2d 206 [1965]).

In support of its position that no real emergency existed, CPN relies upon a course of dealings between the parties which reveals that as early as 2002 the City was claiming that the structures required substantial work. CPN claims that in 2003 the City

wanted the work to be done at a certain time, not because there was truly an emergency, but because the State was doing certain work on the FDR Drive and it would be advantageous for the buildings structures to be repaired at that time to prevent additional closures of the FDR Drive. The City relies primarily on the deposition testimony of DOT employees Russell Holcomb and Henry Perahia to establish their position.

The City argues that the structures continued to deteriorate over time and when it issued its emergency declaration, the City was legitimately concerned that if the work did not proceed in an expedited fashion, concrete could fall from the structures onto passing motorists below. The City argues that as part of its emergency action, it first undertook a full inspection by a mechanical engineer to determine the full extent of the deterioration and obtain suggestions for remediation.

Consequently, there are issues of fact regarding whether there was an emergency condition justifying the no bid contracts which preclude summary judgment in favor of CPN. Even assuming that the contracts were illegal, there is an issue about whether a complete forfeiture or the right to collect against CPN is the correct remedy. (Compare D'Angelo v. Cole, 67NY2d 65 [1986] with Gerzoff v. Sweeny, *supra*).

There are also an issue of fact about whether the scope of the work exceeded what was necessary to remediate the emergency and/or whether the "cost" of repairs is affected by the fact that the City did the work outside of ususal business hours (see: decision, *supra*, 1st COA, 2nd COA and #rd COA).

Consequently, the Court denies CPN's cross-motion for summary judgment on

the 2nd CC and 3rd CC.

Conclusion

In accordance herewith it is hereby:

ORDERED that the City's motion for summary judgment dismissing the 1st COA is granted, and it is further

ORDERED that the CPN's cross-motion for summary judgment on the 1st COA is denied, and it is further

ORDERED that the City's motion for summary judgment and CPN's cross-motion for summary judgment on the 2nd COA is denied, and it is further

ORDERED that the City's motion for summary judgment and CPN's cross-motion for summary judgment on the 3rd COA is denied and it is further

ORDERED that CPN's motion for summary judgment on the 4th COA is denied and that the Court searches the record and grants the City summary judgment dismissing the 4th COA, and it is further

ORDERED that the City's motion for summary judgment dismissing the 5th COA is granted only to the extent that it concerns the 2003 Emergency Declaration and it is otherwise denied, and it is further

ORDERED that CPN's cross-motion for summary judgment dismissing the 5th COA is denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 6th COA is granted, and CPN's cross-motion for summary judgment on the 6th COA is denied and it is further

ORDERED that CPN is entitled to summary judgment on the 7th COA to the extent it alleges that the City's placement of permanent lighting and signage on the structures constitutes a de facto taking without just compensation. The issue of the amount of damages is referred to trial, and it is further

ORDERED that the motion and the cross motion for summary judgment on the 7th COA is otherwise denied, and it is further

ORDERED that CPN is entitled to summary judgment on the 8th COA to the extent it alleges that the City's placement of permanent lighting and signage on the structures constitutes a de facto taking without just compensation. The issue of the amount of damages is referred to trial, and it is further

ORDERED that the motion and the cross motion for summary judgment on the 8th COA is otherwise denied, and it is further,

ORDERED that the City's motion for summary judgment dismissing the 9th COA is granted and CPN's cross-motion for summary judgment is denied, and it is further

ORDERED that the City's motion for summary judgment on the 10th cause of action is granted only to the extent it seeks dismissal of the claims related to de-icing and it is otherwise denied, and it is further

ORDERED that CPN's cross-motion for summary judgment on the 10th COA is granted to the extent of finding the City is liable to CPN for trespass based upon placing signage and permanent lighting on CPN's property, the issue of damages is reserved for trial, the remainder of the cross-motion for summary judgment on the 10th COA is denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 11th COA is granted, and it is further

ORDERED that the City's motion for summary judgment dismissing the 12th COA is denied and CPN's motion for summary judgment is also denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 13th COA is granted only to the extent it seeks money damages for de-icing and it is otherwise denied, and it is further

ORDERED that CPN's cross-motion for summary judgment on the 13th COA is denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 14th COA is granted and CPN's cross-motion is denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 15th COA is granted, and it is further

ORDERED that CPN's cross-motion for summary judgment on the 16th COA is denied and the Court searches the record and grants the City summary judgment dismissing this cause of action, and it is further

ORDERED that CPN's cross-motion for summary judgment on the 17th COA is denied and the Court searches the record and grants the City summary judgment dismissing this cause of action, and it is further

ORDERED that CPN's cross-motion for summary judgment on the 18th COA is denied and the Court searches the record and grants the City summary judgment dismissing this cause of action, and it is further

ORDERED that the City's motion for summary judgment dismissing the 19th COA is granted and CPN's cross-motion for summary judgment is denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 20th COA is granted, and it is further

ORDERED that CPN's cross-motion for summary judgment in its favor on the City's 3rd CC and its 2nd CC is denied, and it is further

ORDERED that the parties shall proceed to trial on the remaining causes of action and counterclaims, and it further

ORDERED that any requested relief not expressly addressed herein is denied and that this constitutes the decision and order of the Court.

Dated: New York, NY
July 1, 2010

SO ORDERED:

J.G. J.S.C.

FILED

JUL 02 2010

COUNTY CLERK'S OFFICE
NEW YORK