[* 1]

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

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

Index Number : 120652/2003
CANNON POINT SOUTH
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 009
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

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.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

Canon Point South, 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.: 120652/03
Seq. No.: 009

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	3
RJM affirm dated 8/27/09, exhibits	4
BB Reply affirm dated 10/2/09., HDP affirm dated 9/15/09; MWD affirm dated 10/2/09; exhibits 45 through 58	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") (collectively "City") move for partial summary judgment dismissing plaintiff, Cannon Point South's ("CPS") first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action in its Fourth

Amended Complaint. CPS opposes the motion, except as to the first, sixth, seventh and fourteenth causes of action, which it concedes should be dismissed (see: CPS memorandum of law p.8, fn 1). CPS cross-moves for partial summary judgment on the second, third and thirteenth causes of action. It also seeks judgment on its second affirmative defense (made in reply) and dismissing the City's third counterclaim. 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 9, 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

CPS' Fourth Amended Complaint sets forth sixteen separate causes of action, only ten of which are implicated in these motions. The twelve causes of action considered on this motion are the:

second cause of action ("2nd COA")seeking a declaration the CPS is excused from repairing and maintaining the columns, the curtain wall and the lower slab located on the underside of its building canter levered over the FDR Drive;

third cause of action ("3rd COA") seeking a declaration of rights under the 1941 Indenture and 1957 Agreement;

fifth cause of action ("5th COA") seeking money damages for a de facto taking of the columns, the curtain wall and the lower slab located on the underside of its building canter levered over the FDR Drive;

eighth cause of action ("8th COA") seeking money damages for breach of contract based on the 1941 Indenture and 1957 Agreement;

ninth cause of action ("9th COA") seeking money damages for violating CPS' procedural due process in the 2003 and 2005 declarations of emergency relative to the columns, the curtain wall and the lower slab located on the underside of its building

canter levered over the FDR Drive;

tenth cause of action ("10th COA") seeking money damages for violating CPS' substantive due process in the 2003 and 2005 declarations of emergency relative to the columns, the curtain wall and the lower slab located on the underside of its building canter levered over the FDR Drive;

eleventh cause of action ("11th COA") seeking monetary damages for trespass on the columns, the curtain wall and the lower slab located on the underside of its building canter levered over the FDR Drive;

twelfth cause of action ("12th COA") seeking monetary damages for the unconstitutional taking of the columns, the curtain wall and lower slab of its building cater levered over the FDR Drive without just compensation,

thirteenth cause of action ("13th COA")seeking a determination that contracts made based on the 2003 and 2005 Emergency declarations by the City were illegal and void and that the City may not recover as damages from CPS payments made on such contract(s),

fourteenth cause of action ("14th COA") seeking monetary damages for unjust enrichment, and

fifteenth cause of action ("15th COA") seeking monetary damages for conversion of a tax payment made by CPS.

The City interposed an answer to the Fourth Amended Complaint which contains eight affirmative defenses and three counterclaims. Insofar as pertinent to this motion: the second affirmative defense ("2nd AD") claims that contracts made by the City with third parties to repair CPS' property in 2005 and 2006 are *ultra vires*, illegal, null and void. The City's third counterclaim ("3rd CC") seeks approximately $40,000,000.00 in damages as and for reimbursement for expenditures made by the City to effect allegedly emergency repairs of the columns, the curtain wall and the lower slab located on the underside of its building canterlevered over the FDR Drive.

Underlying Facts

CPS is a cooperative apartment corporation that owns the building located at 45 Sutton Place South, New York, NY (sometimes "building"). It is next to a building owned by Cannon Point North, Inc. ("CPN"), which is located at 25 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"). These structures support the buildings above them.

In or about 1938 the City took action to condemn a permanent easement over property belonging to CPS' and CPN'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 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 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.

Following an inspection, on or about June 18, 2002 the DOB served a Notice of Unsafe Structure and Summons related to the structures that had been erected in accordance with the earlier agreements. A survey and report of the structures was made by HAKS Engineers, P.C. (NYAC §36-235). An Order and Precept issued by the Hon,. William Davis of the Supreme Court, New York County (index # 402764/02), directed that action be taken to correct the conditions.

On or about August 22, 2003 The DOB issued a Revised Emergency Declaration again claiming that CPS had failed to maintain the structures. The conditions declared unsafe were then repaired by the City between January 29, 2004 and February 3, 2004

by a contractor retained by the City, through the auspices of DHPD.

After this action had already been commenced, on or about April 1, 2005, DOT issued a Declaration of Emergency 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 the filing of a summons and complaint on December 2, 2003. The fourth amended complaint was interposed on or about January

16, 2008.

Discussion

Companion Case

CPS' neighbor, CPN has brought a companion case based upon the same facts (index # 101157/04). Some of the causes of action asserted by CPN are identical to those made by CPS. The City, moved simultaneously for summary judgment in each case. Although the motions were separately opposed, they were argued and submitted to the court at the same time. Both motions were considered by the court at the same time. Many, but not all, of the arguments made by the City are the same in each case. Many, but not all, of the arguments made by CPS and CPN in their respective motions are the same. To the extent there are identical arguments raised in each case the court will cross-reference the reasoning in the decision made on the summary judgment motion submitted and decided this day in the CPN case ("CPN companion decision" or "CPN companion case"). 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.Y2d 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])

1st COA

CPS does not oppose the City's motion to dismiss this cause of action. The motion for summary judgment dismissing the first cause of action is, therefore, granted.

2nd COA and 3rd COA

CPS' 2nd COA seeks a declaration that it be excused from repairing and maintaining the structures based on the doctrine of impossibility. The 3rd COA seeks a declaration that under the 1941indenture and 1957 agreement CPS is entitled to perform repair and maintenance work to the structures during business hours and that it is not responsible for any increased costs due to the City having performed work outside of those business hours.

CPS' 2nd COA is identical to CPN's 1st COA. CPS' 3rd COA is identical to CPN's 2nd COA.

The court's interpretation of the 1941 indenture and the 1957 agreement is fully discussed in the CPN companion decision. The doctrine of impossibility, as it pertains to the parties rights and obligations in the context of repairing and maintaining the structures is also fully discussed. That reasoning is relied upon the court in reaching a conclusion on this motion.

Consequently, the court grants the City's motion for summary judgment dismissing the 2nd COA and denies CPS' cross-motion for summary judgment on the 2nd

COA. The court denies both the City's motion and CPS' cross-motion for summary judgment on the 3rd COA.

5th COA

CPS' 5th COA alleges that the following actions by the City constituted a taking of its property without just compensation: [1] de-icing of the FDR drive; [2] issuance of an unsafe building notice in 2002; [3] issuance of the 2003 Emergency Declaration; [4] refusal of unrestricted access to do inspection and repair of the structures and [5] issuance of the 2005 Emergency Declaration. The City argues that the de-icing claims are time barred. The City argues that the 2002 Unsafe Buildings notice claims are barred by *res judicata*. The City argues that the 2003 Emergency Declaration claims are legally deficient and are time barred. The City argues that the claims of refusal of access are legally deficient and are time barred. The City argues that the 2005 Emergency Declaration claim is legally deficient.

Although CPS argues that its claim is based upon the cumulative governmental interference which ultimately resulted in a *de facto* taking of its property, it does not articulate at what point in time the taking actually occurred. The court, therefore, analyzes the different aspects of CPS' claims separately.

[1] de-icing the FDR Drive

Whether CPS' claim is asserted under the Federal or the State constitutions, the applicable state of limitations is three years. (42 USC §1983, CPLR 214; Legal Aid Society v. City of New York, 242 AD2d 423 [1st dept. 1997]; Sarnelli v. City of New York, 256 AD2d 399 [2nd dept. 1988] app den. 93 NY2d 804 [1999]). 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]).

Following the reasoning in the CPN companion decision, the de-icing claims, for statue of limitations purposes, the claims relate back to the Amended Complaint interposed March 29, 2004. By October 20, 2000 CPS had already asserted its position to the City that de-icing of the FDR Drive had caused physical damage to its structures. Since the Amended Complaint was not interposed until over three years later, it is barred by the applicable statute of limitations.

Consequently the City's motion to dismiss the taking claim based on allegations of de-icing is granted.

[2] issuance of an unsafe building notice in 2002;

Any claim of de facto taking related to the issuance of a 2002 Notice of Unsafe building would have to be brought within three years of its issuance. The Fourth Amended complaint interposed in January 2008 was the first time any claim was made that the actual issuance of the unsafe building notice caused any harm to CPS. It is barred by the application of the statute of limitations. In any event, since there was a substantive ruling by the Hon. William Davis finding that an unsafe condition did exist, CPS is barred by principles of res judicata from arguing that the Notice was improper. Ryan v. New York Telephone Co., 62 NY2d 494 (1984).

Consequently, the court grants the City's motion for summary judgment dismissing the 5th COA to the extent it is based upon allegations regarding the 2002

Notice of Unsafe Building.

[3] issuance of the 2003 Emergency Declaration;

Any repairs done pursuant to the 2003 Emergency Declaration were made prior to February 5, 2004. The claim first appeared in the January 2008 Fourth Amended Complaint. These claims are therefore barred by the applicable statute of limitations. The relation back doctrine does not save this claim because there are no allegations that the 2003 Emergency Declaration caused harm to CPS in the Amended Complaint.

Consequently, the court grants the City's motion for summary judgment dismissing the 5th COA to the extent it is based on allegations regarding the 2003 Emergency Declaration.

[4] refusal of unrestricted access to do inspection and repair of the structures

The City claims that it notified CPS in August 2001 that it would only provide CPS with access to repair and maintain the structures if certain conditions were met. It argues that since this claim was not interposed until January 18, 2008, it is time barred. The court agrees. The court has reviewed the Amended complaint and finds that CPS' claim is not helped by the relation back doctrine because there are no allegations giving the City notice that CPS had any claims predicated on allegations of lack of access.

Consequently the court grants the City's motion dismissing the 5th COA to the extent it is based on allegation of lack of unrestricted access.

[5] issuance of the 2005 Emergency Declaration.

CPS' 5th COA to the extent it is based upon the issuance of the 2005 Emergency Declaration duplicates the claims made in CPN's 8th COA.

For the reasons stated in the CPN companion case, the court denies the City's

motion for summary judgment to the extent the 5th COA is based upon the 2005 Emergency Declaration.

6th COA and 7th COA

CPS does not oppose the City's motion to dismiss the 6th COA and the 7th COA. The motions to dismiss such causes of action is therefore granted.

8th COA

The 8th COA is for breach of contract based upon the 1941 indenture and the 1957 Agreement. It is largely identical to CPN's 9th COA for breach of contract. The court agrees with the City that neither the 1941 indenture not the 1957 agreement contain any express language that obligates the City not to damage the structures based upon the reasoning set forth in the CPN companion decision.

CPS' collateral argument that the Appellate Division decision (46 AD3d 146 [1st dept. 2007]) in the CPN companion case constitutes law of the case, is rejected. Firstly, CPS was not a party to the appeal and cannot rely on the doctrine of law of the case. (People v. Evans, 94 NY2d 499 [2000]). The decision does have precedential value, because the material facts and circumstances of this case and the CPN companion case are identical. The Appellate Division, however, did not interpret the 1941 indenture. In *obiter dicta* it held that: "whether viewed as tortious or a violation of the 1941 agreement not to damage plaintiff's structures, those deicing actions, and any other debilitative causes attributable to the City defendants, would warrant the imposition of liability on the City defendants for repairs.." The issue of the interpretation of the 1941 indenture and the 1957 are now squarely before the court. Upon review of the instruments themselves, this court holds that there is no express obligation under

the instruments not to damage the structures that would support a claim for breach of contract.

Consequently, the court finds that the City is entitled to summary judgment dismissing the 8th COA.

9th COA

CPS' 9th COA for denial of due process based upon the 2003 and 2005 emergency declarations is identical to CPN's 5th COA. The City argues that the claims related to the 2003 emergency declaration are barred by the applicable statute of limitations. It argues that the substance of the claim is otherwise "legally deficient."

For the reasons stated by the court in the CPN companion decision, the court holds that the claims regarding the 2003 Emergency Declaration are time barred, but that, substantively, the remainder of the claim can go forward to trial.

Consequently, the court grants the City's motion only to the extent that it is based upon the 2003 Emergency Declaration. The City's motion for summary judgment is otherwise denied.

10th COA

CPS' 10th COA claims that the City's issuance of the 2003 and 2005 Emergency Declarations constituted a denial of CPS' substantive due process. The claim is identical to CPN's 6th COA. Based upon the reasoning in the CPN companion decision, the court grants the City's motion for summary judgment dismissing this cause of action.

11th COA

CPS' 11th COA is for trespass based upon: [1] the City's de-icing activities, [2] demolition and/or removal and replacement of the structures and [3] placement of signs and permanent lighting on the structures. This claim is identical to CPN's 10th COA.

[1] De-icing of the FDR Drive

The City claims that the de-icing allegations are barred by the applicable statute of limitations and the failure to file a timely Notice of Claim. The de-icing claims are barred by the applicable statute of limitations in this case (see: decision, *supra*, 5th COA). They also barred by CPS' failure to file a timely Notice of Claim. The Notice of Claim was filed on December 2, 2002. By October 20, 2000 CPS had written a letter affirmatively stating its position that chemicals from de-icing of the FDR Drive has damaged its structures. The Notice of Claim was filed more than 90 days after the October 20, 2000 letter and is therefore untimely. Failure to file a timely Notice of Claim requires dismissal. (McGarity v. City of New York, 44 AD3d 447 [1st dept. 2007]).

Consequently the court grants the City's motion for summary judgment dismissing the 11th COA to the extent it is based upon de-icing of the FDR Drive.

[2] Demolition, Removal and Replacement of the Structures

For the reasons stated in the CPN companion decision, the court denies the City's motion to dismiss the 11th COA to the extent it is based upon allegations related to the demolition, removal and replacement of the structures.

[3] Signage and Permanent Lighting

For the reasons stated in the CPN companion decision, the court denies the City's motion for summary judgment to dismiss the 11th COA to the extent it is based on

allegation related to the placement of signage and permanent lighting.

12th COA

CPS' 12th COA claims an unconstitutional taking without just compensation. It is a blunderbuss claim that references all allegations in the complaint. It is a duplication of the *de facto* taking claim in the 5th COA. The City, likewise, in a blunderbuss manner seeks to dismiss the 12th COA as either being time barred, legally deficient or both.

The court, ruling consistently with its ruling on the 5th COA, grants the City's motion for summary judgment only insofar as it is based on the de-icing, 2002 Notice of Unsafe Building, 2003 Emergency Declaration, restrictions on access. The City's motion is otherwise denied.

13th COA

CPS' 13th COA seeks a determination that the contracts made by the City to repair the structures were illegal and void. This claim is identical to CPN's 19th COA. The City seeks to dismiss this claim as barred by the applicable statute of limitations. For the reasons set forth in the CPN companion decision, the court grants the City's motion for summary judgment dismissing this cause of action and denies CPS' cross-motion for summary judgment on this cause of action.

14th COA

CPS does not oppose the City's motion to dismiss the 14th COA . The motion to dismiss such causes of action is, therefore, granted

15th COA

CPS' 15th COA is for conversion based upon the City placing an emergency repair lien on a real estate tax payment of $98,720.80. The claim accrued on June 25, 2004, when CPS was notified that about that the City was placing a tax lien against the property. The Notice of Claim for conversion was not filed until December 18, 2007. This tort claim is therefore barred by CPS' failure to file a timely Notice of Claim.

Consequently, the City's motion for summary judgment dismissing the 15th COA is granted.

3rd CC and 2nd AD

The 3rd CC interposed by the City seeks reimbursement of the almost $40,000,000 the City claims to have spent in making emergency repairs to the structures. CPS' 2nd AD claims that the no bid contracts by which such expenditures were made are illegal and unenforceable primarily because there was no emergency. These claims are identical to the 3rd CC made by the City in the CPN companion case.

Based upon the reasoning on the CPN companion decision, the court denies CPS' cross-motion for summary on the 3rd CC and 2nd AD.

Conclusion

In accordance herewith, it s hereby:

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

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

ORDERED that City's motion for summary judgment dismissing the 3rd COA is denied and CPS' cross-motion dismissing the 3rd COA is also denied, and it is further

ORDERED that City's motion for summary judgment dismissing the 5th COA is granted only to the extent that it is based upon allegation relating to de-icing, the 2002 issuance of a Notice of Unsafe Building; the 2003 Emergency Declaration and restriction on access; the City's motion for summary judgment dismissing the 5th COA is otherwise denied, and it is further

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

ORDERED that the City's motion for summary judgment dismissing the 7th COA is granted, and it is further

ORDERED that the City's motion for summary judgment dismissing the 8th COA is granted, and it is further

ORDERED that the City's motion for summary judgment dismissing the 9th COA is granted only to the extent it is based on the 2003 Emergency Declaration and it is otherwise denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 10th COA is granted, and it is further

ORDERED that the City's motion for summary judgment dismissing the 11th COA is granted only to the extent that it is based on allegations of de-icing and it is otherwise denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 12th COA

is granted only to the extent it is based on de-icing, the 2002 Notice of Unsafe Building, the 2003 Emergency Declaration and restricted access and it is otherwise denied, and it is further

ORDERED that the City's motion for summary judgment dismissing the 13th COA is granted and CPS' 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 it is further

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

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

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