

**432 E. 11th St. Corp. v City of New York**

2011 NY Slip Op 31186(U)

April 29, 2011

Sup Ct, NY County

Docket Number: 109308/05

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C. *Justice*

PART 52

Index Number : 109308/2005  
432 EAST 11TH STREET  
VS.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. 109308/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 02  
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 *is decided in accordance*  
*with the annexed decision.*

**FILED**

MAY 03 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/29/11

CK  
CYNTHIA S. KERN J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
432 EAST 11<sup>TH</sup> STREET CORP., and ROBERT J.  
GIURDANELLA,

Plaintiffs,

Index No. 109308/05

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK and "JOHN DOE 1" through  
"JOHN DOE XX", intended to be individuals who were  
involved in the acts complained of herein but their identity  
and/or the extent of their involvement is not yet fully  
known to the Plaintiffs,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>      </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action to recover damages sustained when the City of New York (the "City") ordered the demolition of a portion of plaintiffs' building located at 638 East 12<sup>th</sup> Street (the "Subject Premises") in New York, New York. The City moves for summary judgment dismissing the complaint on the grounds that plaintiffs cannot meet their burden of proof to succeed on their claims and that the City is entitled to immunity from plaintiffs' claims . The City also moves for summary judgment on its counterclaims for costs and expenses incurred in demolishing the portion of the Subject Premises at issue in this action. The court grants the

City's motion in its entirety for the reasons set forth below.

The relevant facts are as follows. The New York City Department of Buildings (the "DOB") is the City's agency charged with the authority and responsibility to oversee the maintenance of buildings or structures in New York City. Section 643 of the New York City Charter ("Charter") and sections 26-127, 26-235, 26-243, 27-127 and 27-110 of the New York City Administrative Code contain the provisions guiding the DOB in determining whether an emergency exists and the procedures for acting upon such a determination. DOB Operations Policy and Procedure # 16/93 ("OPPN #16/93") sets forth the criteria for determining whether an emergency situation should be classified as an "Emergency" or an "Immediate Emergency" and the procedures for responding to the emergencies. In this regard, OPPN #16/93 provides that an "Immediate Emergency" will be declared on a building with life threatening structural damage and/or in imminent danger of collapse" and that the expectation is that work on such a structure will begin by the day after the declaration. An "Emergency" will be declared on a building with serious structural damage and/or a deteriorating condition when a collapse or failure is expected in the very near future and work on such a building is expected to begin within 30 to 60 days of the declaration. OPPN #16/93 also states that the City must notify the owner of the building of the declaration.

On Thursday April 1, 2004, DOB inspector Calvin Warner inspected the Subject Premises in response to a complaint. Inspector Warner found a hazardous condition at the Subject Premises and issued a violation. Specifically, Inspector Warner found that there was a failure to maintain the building's exterior walls – that the west exterior at roof level was bulging out of plumb approximately two feet from front to rear at two story building. He also found that

bricks were cracked due to the wall leaning out of plumb and that the west exterior bearing wall was leaning inward creating danger of collapsing onto the playground of the school next door. Inspector Warner informed his supervisors of the suspected emergency conditions at the Subject Premises. As a result, Max S. Lee, a plan examiner at DOB and Paul Harkin, a Supervising Inspector at DOB inspected the Subject Premises on that same date and wrote a Special Report of their findings. Lee and Harkin found that “[t]he front portion of the building at 638 East 12<sup>th</sup> Street experienced an excessive lateral movement along its west wall” and that “the west elevation of this wall is approximately 2 foot out of plumb bulging out over the driveway (see photos 1 & 2), while the east wall is being dragged, concave inward to the building.” Lee and Harkin concluded that the “hazardous condition render[ed] the building unsafe to be occupied” and that “the instability of this structure may also endanger the occupants, the school children, at the adjacent property should the west wall collapse.” The report recommended that the front portion of the building should be demolished immediately and that the owner of the building should appoint an engineer to investigate the structural integrity of the remaining three-story structure in the rear portion of the building. As a result of the finding made in this report, on April 2, 2004, Laura V. Osorio, acting in her capacity as the Borough Commissioner (“Commissioner Osorio”) issued an Immediate Emergency Declaration for the Subject Premises. The Immediate Emergency Declaration stated that the “West exterior masonry wall at the second story window [was] bulging approximately 2' out of plumb to the west and in imminent danger of collapse into school yard of Public School 61” and that the “East masonry wall [was] leaning inwards to West.” As a result of these conditions, Commissioner Osorio ordered the owner of the Subject Premises to demolish the structure at the front of the lot. A copy of this declaration

was mailed to the owner of the Subject Premises and a telephone call was made conveying this information. Between April 8 and April 11, 2004, an architect acting on behalf of the owner of the Subject Premises filed a work permit application and supporting documents to repair a portion of the building subject to demolition. In accordance with the plan, the first story of the front building at the subject premises could be (and ultimately was) saved from demolition. Permits to repair that portion of the building were issued on April 12, 2004 and the Emergency Declaration was amended to preserve the portion now planned for repair. The City's Housing Preservation Development undertook the demolition of the unpreserved portion at a cost of \$32,000. On August 21, 2005, plaintiff filed the instant action seeking damages for the demolition and destruction of the Subject Premises without due process of the law.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1<sup>st</sup> Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"[A] municipality may demolish a building without providing notice and an opportunity to be heard if there are exigent circumstances which require immediate demolition of the building to protect the public from imminent danger ... Although notice and a predeprivation hearing are generally required, in certain circumstances, the lack of such predeprivation process

will not offend the constitutional guarantee of due process, provided there is sufficient postdeprivation process. Either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Kshel Realty Corp. v The City of New York*, 2006 WL 2506389 at \*3,7 (S.D.N.Y.) (internal citations omitted). In determining whether such a circumstance existed, deference is given to the decision to invoke the emergency procedure and there is not a hind-sight analysis of whether the damage to the building actually created an immediate danger. *See id.* "Procedures that give inspectors discretion to determine whether or not there is an emergency, even with the inherent possibility of their misapplication, do not offend due process....The due process guarantee is only offended when the decision to invoke the emergency procedure amounts to an abuse of discretion. The crux of the question is whether the emergency procedure was invoked in an abusive and arbitrary manner and whether there were adequate postdeprivation remedies available" *Id.* The legal analysis in the instant action is limited to whether the emergency procedure was invoked in an abusive and arbitrary manner as it is settled that New York provides adequate postdeprivation remedies. *See Catanzaro v Weiden*, 188 F.3d 56, 60 (2d Cir 1999) (finding that "New York provide(s) an adequate post-deprivation legal remedy" after invoking emergency demolition procedures); *see also Idlewild 94-100 Clark, LLC v City of New York*, 27 Misc. 3d 1006, 1022 (Sup. Ct. Kings Co. 2010) ("plaintiff's opportunity to contest the propriety of the agency determination and seek money damages through a common-law state court action...constitute[s] meaningful post-deprivation process. The availability of state court actions as fair forums where plaintiffs can

protect their rights has been upheld as providing adequate post-deprivation remedies.”)

In the instant action, the court finds the City has met its burden of demonstrating that plaintiff's procedural due process rights were not violated as it has provided sufficient evidence to demonstrate that the demolition was not invoked in an abusive and arbitrary manner. According to Commissioner Osorio, who ordered the demolition of the Subject Premises, she based her decision on the inspection report of DOB inspectors who recommended that the front portion of the building should immediately be demolished for fear of imminent collapse into the neighboring school yard. As Commissioner Osorio's decision was made based on the recommendations made in a report prepared by DOB inspectors, the court finds that the City met its burden of demonstrating that Commissioner Osorio did not abuse her discretion in declaring the Subject Premises in a state of Immediate Emergency.

Plaintiffs, on the other hand, have failed to meet their burden of presenting evidentiary proof in admissible form sufficient to require a trial of material questions of fact. Plaintiffs present two arguments in opposition. Plaintiffs' main argument is that the bulge in the structure at issue had been present since 1979 and that plaintiff had made improvements on the structure to address any safety issues. In support of their argument, plaintiffs submit an affidavit of a Liviu Schwartz, a structural engineer, who opined that the Subject Premises was structurally sound and that there was no reason to demolish the building. Even when taking plaintiffs' assertions as fact, plaintiffs' argument is not persuasive because the applicable analysis is not whether the building, in hindsight, was actually in immediate danger of collapsing. Rather, it is whether the City abused its discretion in coming to that determination. Plaintiffs also argue that Commissioner Osorio abused her discretion by failing to look into the prior history of the violations issued and

structural improvements made on the Subject Premises before issuing her declaration.

Commissioner Osorio stated in her affidavit that she based her decision to declare an Immediate Emergency on the inspection report reporting on the condition of the building at the time the declaration was made, not on any earlier conditions. Commissioner Osorio's decision to issue an Immediate Emergency declaration based on the most current inspection report prepared regarding the Subject Premises which recommended demolition of a portion of the building because of a concern that portions of the building could collapse into the neighboring school playground is not arbitrary or capricious or an abuse of discretion. As plaintiffs have failed to provide any evidence demonstrating an abuse of discretion on the part of the City in declaring a state of Immediate Emergency, the court grants the City's motion for summary judgment to dismiss plaintiff's procedural due process claim.

The court also finds the City has met its burden of demonstrating that plaintiffs' substantive due process rights were not violated. In order to succeed on a substantive due process claim, plaintiff must show that the City's action was "arbitrary, conscience-shocking, or oppressive in a constitutional sense and not merely incorrect or ill-advised." *See Kshel Realty Corp*, 2006 WL 2506389 at \*8 (internal citations omitted). For all of the reasons discussed more fully above, the court finds that the City has met its burden of demonstrating that its decision to demolish a portion of the Subject Premises was not arbitrary, conscience-shocking or oppressive in a constitutional sense. Plaintiff, on the other hand, has failed to meet its shifting burden. Accordingly, the court grants the City's motion for summary judgment to dismiss plaintiff's substantive due process claim.

Moreover, the court also finds that the City has met its burden of demonstrating that it is

immune from plaintiffs' claims. "Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach...When official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant generally is not answerable in damages for the injurious consequences of that action." See *Mon v City of New York*, 78 N.Y.2d 309, 313 (1991). In *Idlewild 94-100 Clark, LLC v City of New York*, 27 Misc. 3d 1006, 1022 (Sup. Ct. Kings Co. 2010), the court, in dismissing plaintiff's claim for damages arising from the City's demolition of one of its buildings found that the City was entitled to immunity from liability and not liable for damages because "DOB's determination that an Immediate Emergency existed, warranting demolition of the Building, was a discretionary act entitling the City Defendants to full immunity from liability." The *Idlewild* court further reasoned that "although DOB follows a prescribed set of procedures in executing the act, the determination of emergency itself relies on the judgment of professionals such as ... engineers, and is not improper merely because others would have reached a different conclusion as to the structural soundness of the Building." *Id.*

In the instant action, the City's decision, as in *Idlewild*, to declare the Subject Premises in a state of "Immediate Emergency" relied on the discretionary judgment of professionals such as engineers and Commissioner Osorio, a licensed architect. Accordingly, the court grants the City's motion for summary judgment to dismiss plaintiffs' claim on the ground that the City is immune from plaintiffs' claims.

Finally, the City's motion for summary judgment on its counterclaims for costs and expenses incurred by the City in partially demolishing the Subject Premises is granted in light of the determinations made above. Moreover, plaintiffs have not opposed the City's motion for summary judgment on its counterclaims.

Accordingly, the City's motion for summary judgment to dismiss plaintiffs' claims is granted in its entirety and the City's motion for summary judgment on its counterclaims for costs and expenses is granted. The Clerk is directed to enter judgment in favor of the City and against plaintiffs in the sum of \$32,000 plus interest, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. This constitutes the decision, order and judgment of the court.

Dated: 4/29/11

Enter: CK  
J.S.C.

**FILED**

**CYNTHIA S. KERN**  
J.S.C.

**MAY 03 2011**

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