NEW YORK CONSTRUCTION LAW UPDATE

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Is the Liability Landscape in New York City Changing? Understanding Yenem v. 281 Broadway Holdings

In February of 2012 the New York Court of Appeals pushed the legal world, and in particular construction litigators, into frenzy. With their decision in Yenem v. 281 Broadway Holdings, 18 N.Y.3d 481, 941 N.Y.S.2d 20 (2012) the Court signaled a monumental shift in property damage litigation that involved improper excavation. Or so the legal community thought. Now that the dust has settled and we have had time to more fully understand Yenem, and its real world application, my recommendation to construction litigators is this: calm down. Maybe nothing has changed after all.

The facts of Yenem actually are not all that important. It is no different than most property damage causes brought on by excavation work on an adjacent lot. So instead of looking at the facts, let's look at the law. Yenem was decided under former §27-1031(b)(1) of the NYC Administrative Code. As most people in the construction world know, the NYC construction code was wholly overhauled in 2008. The 2008 code does not contain §27-1031(b)(1). In its place, we have its successor, §3309.4. But all statutes are not created equally and §27-1031(b)(1) is not identical to §3309.4. It is in this distinction that the potential irrelevance of Yenem comes in.

§27-1031(b)(1) provided:

> **When an excavation is carried to a depth of more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures…**

On the other hand, §3309.4 provides:

> **Regardless of the excavation or fill depth, the person who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures….**

The two statutes sound similar but upon close examination they are, potentially, very different.

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To understand the distinction we first need to take a step back and look at what the Court of Appeals said about §27-1031(b)(1) in Yenem:

> **"The primary object of the statute was to case upon the party making an excavation on his land, exceeding ten feet in depth, the risk of injury resulting therefrom to the wall of an adjoining owner, and the burden of protecting it. The liability imposed s not made to depend upon the degree of care exercised by the person making the excavation."**

The transfer of risk is present in both §27-1031(b)(1) and §3309.4. Both the old statute and the new statute require those performing excavation, or more precisely, "those who cause an excavation to be performed" to protect adjoining landowners. Neither statute looks to the degree of care exercised by the person making the excavation.

So will courts treat §27-1031(b)(1) the same as §3309.4? Maybe. Let's look at the arguments for and against.

Arguments For	***Arguments Against***
➢ §3309.4 is simply the latest reincarnation of a 150 year old principle in the State of New York that those who cause an excavation to be made will be held responsible for resulting damages. ➢ The Court of Appeals acknowledged that the key to the statute, and its application of strict liability, was the "shifting of the risk of the injury from the injured landowner to the excavator." §3309.4 does this just as well as §27-1031(b)(1).	➢ §3309.4 is more broad than §27-1031(b)(1) ➢ §3309.4 removes the ten foot (10') threshold that was present in §27-1031(b)(1) ➢ The Court of Appeals specifically noted that they were not passing upon the strict liability nature of §3309.4

The arguments can cut both ways and both are valid. Ultimately, the Courts will likely once again have to resolve the strict liability nature of §3309.4. In fact, it would not be shocking if the Court of Appeals takes on a §3309.4 case in the near future to clarify whether it is a strict liability statute like §27-1031(b)(1) or not. Until then, all we have is our interpretation and our "best guess."

If Courts decide that §3309.4 is, indeed, entitled to the same strict liability status as §27-1031(b)(1) then, as the great Bob Dylan once said, times they are a-changin'. If §3309.4 is treated the same as §27-1031(b)(1) then everyone that "causes an excavation to be performed" will be strictly and absolutely liable for damage caused to adjacent properties. Arguably, owners, general contractors, excavators (subcontractors), architects and engineers could all be in the category of those that "cause an excavation to be performed." This would mean that vis-á-vis the injured adjacent landowner, everyone is strictly liable. There will be no more establishing who is responsible or what degree of care they took. The bar for plaintiffs will be low, very low. Plaintiffs will have to establish that an excavation took place and that damage resulted.

Now there is one very important thing to remember, even if Yenem is applied to §3309.4, everyone can still defend on the issue of damages. In other words, those who cause an excavation to be performed will have to write a check, but they can still fight over the size of the check. The Court noted in its decision that the condition of the damaged adjacent property does not factor into the proximate cause analysis but is still very relevant on the issue of damages. Also, the defendants (those that caused the excavation to be performed) can still fight amongst themselves and ask for the check that they wrote to the plaintiff, or at least a part of it, to be reimbursed.

One interesting note for design teams is that under certain conditions you can choose to proceed under the prior building code on your application. Arguably, and I think it is a very strong argument, if you do so, you are subjecting yourself to §27-1031(b)(1) notwithstanding the fact that it no longer officially is the statute. That means you could, by election, be subjecting yourself to a strict liability statute. Food for thought in the cost analysis.

For now, we will have to wait for the new §3309.4 cases to wind their way through the Court. You can be certain that in 2013 we will see Appellate Division cases applying §3309.4 and we will see whether it is, in fact, a strict liability statute like its predecessor §27-1031(b)(1).

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