

NEW YORK CONSTRUCTION LAW UPDATE

This article is written by Vincent T. Pallaci, Esq. Mr. Pallaci is a partner with the New York law firm of Kushnick Pallaci, PLLC. His practice focuses on construction law.

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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