

OWNERS: DO NOT RELY UPON MUNICIPAL BUILDING CODE INSPECTORS TO GUARANTY THAT PROJECTS ARE BUILT PROPERLY

Many building owners do not hire an architect or engineer to design or supervise construction projects because they believe that the municipal building code inspectors will ensure that the project is built properly; and they further believe that if the inspectors do not do their job correctly that the municipality for whom they work will be liable for any defects.

Similarly, many builders believe that if the code enforcement officer issues a certificate of occupancy the builder is relieved of any liability, and the municipality will be liable for defective construction. Both are wrong except in rare instances.

On several occasions New York courts have addressed the issue of the liability of municipalities for the failure of their employees to properly enforce building and safety codes. In those cases it has been uniformly held that a municipality will not be held liable for damages sustained as a result of the failure of its code enforcement employees to enforce building codes or regulations, unless a "special relationship" exists between the municipality and the party who has sustained damages.

In most of these cases, the municipality was held not liable based on a lack of a specific duty to the victims, despite the obvious defects in construction and the attendant risk. The rationale behind such decisions lies in the public policy that creating liability, except in extraordinary circumstances would hinder municipalities from promoting the general safety and welfare of the community-at-large because of the fear of potential liability. In effect, the courts have reasoned that imperfectly enforced building and safety codes are preferable to no building and safety codes at all.

For example, municipalities have been found not liable: where residents perished in a fire in a building that clearly lacked basic safety precautions; where a city building inspector allowed occupation of an apartment building with numerous known structural defects that ultimately collapsed; and where a municipal building inspector allowed resumption of gas services where pipes were clearly not properly sealed resulting in an explosion causing multiple fatalities. See, *Estate of Sanchez v. Village of Liberty*, 42 N.Y.2d 876 (1977); *Worth Distributors, Inc. v. Latham*, 59 N.Y.2d 231 (1983); *O'Connor v. City of New York*, 58 N.Y.2d 184 (1983).

The same rule is true for damage caused to neighboring structures, such as where the failure to enforce building codes results in the flooding of a neighboring property. It has even been held that where a city has taken steps to alleviate an obvious fire hazard and a city fire fighter was killed by a chimney collapse, the city was held to owe no specific duty to the firefighter under either the Labor Law of the relevant fire codes. *Quinn v. Nadler Bros., Inc.*, 92 A.D.2d 1013 (3rd Dept. 1983).

In the few cases where the necessary special relationship could be found, it was based upon the particular facts of that case and satisfying a number of complicated legal

requirements. For example, in *Smullen v. City of New York*, 28 N.Y.2d 66 (1971) the City was held to owe a special duty to a worker who died in a trench collapse. The Court pointed to three facts in its decision 1) the obviousness of the violation, 2) the inspector's statements regarding the safety of the trench were more than mere consent or acquiescence, and 3) the inspector's representations of the safety of the trench amounted to "an exercise of control by the only person in authority then present" on the job site.

Similarly, a federal court found a special relationship in *Valencia ex rel. Franco v. Lee*, 55 F.Supp. 2d 122 (E.D.N.Y. 1999). The Court held that the party seeking an award of damages must establish either 1) a violation of a duty commanded by a statute enacted for the special benefit of particular persons, 2) the assumption of positive direction and control under circumstances in which a known, blatant and dangerous safety violation exists (such as in *Smullen*), or 3) a voluntarily assumed duty, the proper exercise of which was justifiably relied upon by persons benefited thereby.

In *Valencia* also stated that to prove justifiable reliance four additional factors had to be satisfied.

What is to be learned from these cases? It is very difficult and rare for a municipality to be held liable for the mistakes or errors of its code enforcement personnel. Owners should never assume that a municipality is an available deep pocket which they can look to in the event that the builder does not construct a project properly.

The role of code enforcement employees is to protect the general safety of the community, and not to act as the owner's private construction consultant. Unless owners are experienced in construction they should be advised to seek the services of a construction professional to monitor the progress of the job, and not rely on code enforcement to ensure that their project is built properly. Mistaken reliance on code enforcement can very likely result in a defectively built project with no one pay for expensive corrective work.

Incidentally, the contractor's liability insurance does not cover the cost to repair defective construction; but that is the subject for a future column.