1992 Third Realty LLC v. Third Ave NY Realty LLC

Supreme Court of New York, Appellate Division, First Department

June 18, 2026, Decided; June 18, 2026, Entered

Index No. 161382/23, Appeal No. 5482, Case No. 2025-01656

Reporter
2026 N.Y. App. Div. LEXIS 4070 *; 2026 NY Slip Op 03871 **; 2026 LX 374784

1992 Third Realty LLC, Plaintiff-Appellant, v. Third Ave NY Realty LLC, Defendant-Respondent, City Builders NYC LLC, Defendant.

Prior History: *1992 Third Realty LLC v. Third Ave NY Realty LLC, 86 Misc. 3d 1271(A), 239 N.Y.S.3d 764, 2025 N.Y. Misc. LEXIS 7119 (Feb. 10, 2025)*

Core Terms

owner of land, counterclaim, excavate, owed, property damage, adjoin, stop work, common-law, economic loss, building code, soil, duty of care, neighbor's, proximate, adjacent, cause bodily injury, adjoining building, insurer-like, compliance

Case Summary

Overview
Key Legal Holdings

- Third Avenue NY Realty LLC's negligence counterclaim against 1992 Third Realty LLC was dismissed because the adjacent building owner owed no duty to protect the developer's excavation work from construction delays, where only the developer was conducting excavation activities when DOB issued the December 2023 stop work order, Building Code §3309.4 placed the duty on the excavator to protect adjoining structures, and the building owner lacked control over the developer's construction or remediation measures.
- Even if a duty existed, Third Avenue NY Realty LLC could not recover its alleged $16 million in construction delay damages because these were purely economic losses without accompanying bodily injury or property damage to persons or property, falling outside the scope of any landowner duty under 532 Madison Ave. Gourmet Foods.

Material Facts

- Developer began excavation at adjacent 1990 Third Avenue property in March 2023.
- Plaintiff owned building at 1992 Third Avenue built years before developer's project.
- DOB issued stop work order December 13, 2023 citing building movement.
- Stop work order required developer provide remedial stabilization measures for plaintiff's building.
- Developer alleged over $16 million damages from construction delays only.
- Developer alleged no bodily injury or property damage to persons or property.

Controlling Law

- NYC Building Code §BC 3309.4.
- *532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 NY2d 280 (2001)*.
- *Yenem Corp. v. 281 Broadway Holdings, 18 NY3d 481 (2012)*.
- *Hamilton v. Beretta U.S.A. Corp., 96 NY2d 222 (2001)*.

• *Butler v. Rafferty, 100 NY2d 265 (2003)*.

Court Rationale

Only developer engaged in excavation activities when stop work order issued. Building Code §3309.4 places duty on excavator to protect adjoining structures. Plaintiff lacked control over developer's construction, protection process, or remediation. Imposing duty would create insurer-like liability for unpredictable future projects. Costs and burdens of prophylactic duty outweigh any social benefit. Pure economic losses historically excluded from landowner duty scope absent property damage.

Outcome
Procedural Outcome

Appellate Division reversed Supreme Court's February 10, 2025 order and granted plaintiff's motion to dismiss developer's negligence counterclaim.

LexisNexis® Headnotes

Torts > Negligence > Elements > Breach of Duty

Torts > ... > Elements > Causation > Proximate Cause

Torts > Negligence > Elements > Duty

HN1 **Elements, Breach of Duty**

To establish common-law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury proximately resulting therefrom.

Torts > Premises & Property Liability > General Premises Liability > Duties of Care

Torts > Negligence > Elements > Duty

HN2 **General Premises Liability, Duties of Care**

The existence and scope of a tortfeasor's duty is a legal question for the courts. Courts have historically proceeded carefully and with reluctance to expand an existing duty of care. Whether a duty exists is determined by common concepts of morality, logic and consideration of social consequences of imposing a duty. A key consideration is whether the defendant's relationship with the plaintiff places the defendant in the best position to protect against the risk of harm. The judicial recognition of a landowner's duty also considers an assessment of its efficacy in promoting a social benefit as against its costs and burdens. In determining the existence of a duty, courts balance various factors, including the likelihood of unlimited or insurer-like liability.

Torts > ... > General Premises Liability > Duties of Care > Duty On Premises

HN3 **Duties of Care, Duty On Premises**

It is well settled that landowners generally owe a common-law duty to people outside of their land for conditions on their property that result in bodily injury or property damages.

Torts > ... > General Premises Liability > Duties of Care > Duty Off Premises

HN4 **Duties of Care, Duty Off Premises**

In addition to conditions on the land, landowners generally owe a common-law duty to persons outside of their land for injuries that result from activities that the landowners conduct on their land that cause bodily injury or property damages.

Torts > ... > General Premises Liability > Duties of Care > Duty Off Premises

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Premise Owners

Torts > ... > General Premises Liability > Duties of Care > Duty On Premises

HN5 **Duties of Care, Duty Off Premises**

Critically, the common thread regarding a landowner's duty of care to persons outside of their land, as well as to persons on their land, is the principle that the person in possession and control of property is best able to identify and prevent any harm to others. Indeed, it has

been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property. Consequently, no duty exists where the landowner lacks control.

Business & Corporate Compliance > Real Property > Zoning > Building & Housing Codes
Real Property Law > Zoning > Building & Housing Codes

HN6 **Zoning, Building & Housing Codes**

NY City Bldg Code § BC 3309.4 provides that where a license to perform the work has been given, and whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations. NY City Bldg Code § BC 3309.4, and its predecessor, *Administrative Code of the City of New York Section 27-1031(b)(1)*, embody the specific legislative policy that in New York City those who undertake excavation work, rather than those whose interest in neighboring land is harmed by it, should bear its costs. The worse the condition of a building, the greater the burden on the excavator to protect it.

Business & Corporate Compliance > Real Property > Zoning > Building & Housing Codes
Real Property Law > Zoning > Building & Housing Codes

Torts > ... > General Premises Liability > Duties of Care > Duty Off Premises

HN7 **Zoning, Building & Housing Codes**

The Building Code squarely places a duty of care on a person performing soil or foundation work to preserve and protect the adjoining structures from damage during any excavation/foundation work regardless of the condition of the adjoining building. NY City Bldg Code § BC 3309.4. Consequently, placing a duty on an adjoining landowner to design, construct, and maintain its building essentially to protect the developer's excavation/foundation work is antithetical to the duty imposed by NY City Bldg Code § BC 3309.4. It is the developer, not the adjoining landowner, that is in the best position to protect against the risk of harm in this context.

Torts > Premises & Property Liability > General Premises Liability > Duties of Care

HN8 **General Premises Liability, Duties of Care**

Control is the test which measures generally the responsibility in tort of the owner of real property.

Torts > ... > General Premises Liability > Duties of Care > Duty Off Premises

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN9 **Duties of Care, Duty Off Premises**

The mere proximity of two properties, by itself, is insufficient to create a duty when a defendant's construction-related activities result in purely economic losses to a plaintiff.

Counsel: **[*1]** Saliann Scarpulla Llinét M. Rosado Kelly O'neill Levy Margaret A. Chan, Greenspoon Marder LLP, New York (Joshua M. Deal, Carol A. Sigmond and Christopher T. Leuhs of counsel), for appellant.

Rukab Brash PLLC, New York (Jack Rukab, Lynn E. Judell and Jay Cohen of counsel), for respondent.

Plaintiff appeals from that portion of an order of the Supreme Court, New York County (Judy H. Kim, J.), entered February 10, 2025, which denied plaintiff's motion to dismiss defendant Third Avenue NY Realty LLC's second counterclaim for negligence.

Judges: Peter H. Moulton, Judge. Moulton, J.P, Scarpulla, Rosado, O'Neill Levy, Chan, JJ.

Opinion by: Peter H. Moulton

Opinion

[1]** Plaintiff is the owner of a nine-story building located at 1992 Third Avenue in Manhattan. Defendant Third Avenue NY Realty LLC (the developer) is a developer and the owner of the adjacent property, located at 1990 Third Avenue in Manhattan, also known as 185 East 109th Street. In March 2023, the developer began excavation/foundation work in connection with

the construction of a new building on its property (the Project).

In November 2023, plaintiff commenced this action against the developer and its general contractor. The complaint asserts causes of action against **[*2]** both defendants for strict liability under *New York City Building Code (Administrative Code of City of NY, title 28, ch 7) § BC 3309.4*, negligence, trespass (for soil removal), and private nuisance, and against the developer only for breach of contract and garden variety trespass.

The causes of action are premised on plaintiff's allegations that the excavation/foundation work on the Project, particularly the pile driving, led to ground water permeating the construction site. The water was subsequently removed by a process known as "dewatering," which, according to plaintiff, undermined its building, causing it to settle and lean into the Project site.[1] According to the complaint, the Department of Buildings stopped work on the Project from approximately April 2023 to October 2023. The complaint alleges that the work resumed in November 2023, but it caused more water to permeate through the Project site and further damaged plaintiff's building.

A few weeks after plaintiff filed the complaint, the DOB issued a stop work order to the developer. On its face, the stop work order indicates that it was issued to the developer as the result of a "potential hazard/soil or foundation work, affecting adjoining property." The stop work order alleges the "approx[imate] movement of 2.8 [inches] **[*3]** lateral and 1.2 [inches] vertical settlement" of plaintiff's building. It also directs the developer to "provide engineering remedial measures to stabilize [the] adjoining . . . building." The developer filed an amended answer with affirmative defenses and counterclaims. The counterclaims assert causes of action against plaintiff for trespass, negligence, and private nuisance; however, only the negligence counterclaim is relevant to this appeal.

[2]** The negligence counterclaim asserts that plaintiff "had a duty to construct and maintain the 1992 Building in compliance with the [Building] Code" and "a duty to maintain the 1992 Building in a reasonable and safe condition." It contends that, as evidenced by three structural engineering reports, the building was "not constructed in compliance with the Code," "remains in violation of the Code" and "was constructed and remains in an unsafe condition."[2] The counterclaim further asserts that, on December 13, 2023, as a result of these conditions, "the DOB issued a partial Stop Work Order for the Project Site, forcing [the developer] to stop construction on its own property because of structural instability of the 1992 Building that was caused by **[*4]** the 1992 Building's non-compliance with the Code and [plaintiff's] failure to maintain the 1992 Building in a reasonable condition." According to the developer, it was "harmed by the delay in construction . . . due to this stoppage" in an amount not less than $16 million. The developer does not allege that plaintiff's negligent design, construction, and maintenance of its building caused any bodily injury or property damage.

This appeal raises two novel issues: 1) whether Supreme Court correctly held that plaintiff owes the developer a common-law duty as an adjacent landowner to protect the developer's excavation/foundation work from construction delays arising out of the stop work order and, 2) assuming the existence of a duty based on plaintiff's status as an adjacent landowner, whether the court correctly held that the developer could recover purely economic damages.

We now answer both questions in the negative and reverse.

Procedural History

Plaintiff moved to dismiss the developer's counterclaims and affirmative defenses. Plaintiff argued that the developer failed to allege a viable negligence counterclaim because the developer did not allege a legally cognizable duty. Plaintiff also **[*5]** argued that the developer failed to allege facts sufficient to establish a causal connection between the design, construction, and maintenance of plaintiff's building and the stop work order. Citing *532 Madison Ave. Gourmet Foods v. Finlandia Ctr. (96 NY2d 280, 750 N.E.2d 1097, 727 N.Y.S.2d 49 [2001]*), plaintiff further argues that the negligence counterclaim should be dismissed because

[1] The "dewatering" involved the removal of ground water from the Project site. Plaintiff alleges that the dewatering caused large quantities of fine soils to be flushed from under its building into the street, causing cracks and damage to the building's structure, undermining it and causing it to lean. The developer denies these allegations.

[2] The alleged deficiencies relate to 1) the building's lateral force resistance system, which is intended to resist code-prescribed seismic and wind loads, and 2) deficiencies in certain members of the gravity load resisting system.

purely economic damages are outside the scope of any duty it may otherwise have owed to the developer.

[3]** In opposing plaintiff's motion, the developer argued that the negligence counterclaim was viable because plaintiff owed it a duty as an adjacent property owner to design, construct, and maintain its building in a non-negligent manner, citing paragraphs 215-221 of the negligence counterclaim, which alleges "a duty to maintain [plaintiff's building] in a reasonably safe condition" (i.e., a common-law duty). In addition to a common-law duty of care, paragraph 214 of the negligence counterclaim alleges that plaintiff "had a duty to construct and maintain [its building] in compliance with the [building] Code" without specifying any Code provision. However, in opposing plaintiff's motion, the developer did not mention or discuss paragraph 214, thereby abandoning its position in the counterclaim that plaintiff **[*6]** "had a duty to construct and maintain [its building] in compliance with the Code."

In concluding that the negligence counterclaim stated a claim, the court reasoned that plaintiff owed the developer a duty, citing the language in *532 Madison Ave. Gourmet Foods* that states, "a landowner who engages in activities that may cause injury to persons on adjoining premises owes those persons a duty to take reasonable precautions to avoid injuring them" (*532 Madison Ave. Gourmet Foods, 96 NY2d at 290*). The court also found that "[the developer] has also sufficiently alleged that plaintiff's negligent design and construction caused [plaintiff's building] to be unstable . . . from [the developer's] construction." Addressing the fact that the developer's answer states, "both that the stop work order was precipitated by the inherent structural instability of [plaintiff's] Building and issued due to plaintiff's allegations that the foundation and soil work . . . had caused the Building to move," the court reasoned that dismissal was not warranted because "any contradiction must be resolved in favor of the non-movant of the motion." Citing *Yenem Corp. v. 281 Broadway Holdings (18 NY3d 481, 491, 964 N.E.2d 391, 941 N.Y.S.2d 20 [2012])*, the court rejected plaintiff's economic loss argument, stating that "[s]ubsequent Court of Appeals' jurisprudence indicates that this **[*7]** limitation does not apply to claims, such as this one, under *Administrative Code § 27-1031(b)(1)* (the predecessor to *Building Code § 3309.4*)."[3] The court reasoned that the developer sufficiently "alleged that it has been damaged by the decrease in its property's value caused by its inability to continue the Project."

Discussion

[4]** Accepting the facts as alleged by the developer as true and affording the developer the benefit of every possible inference, as required on a *CPLR 3211* motion, the negligence counterclaim fails to state a cause of action (*see Leon v. Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]*). ***HN1*** To establish common-law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury proximately resulting therefrom (*see Ferreira v. Binghamton, 38 NY3d 298, 308, 173 N.Y.S.3d 484, 194 N.E.3d 239 [2022]*). Here, the lack of a legally cognizable duty is fatal to the developer's negligence counterclaim.

HN2 "The existence and scope of a tortfeasor's duty . . . is a legal question for the courts" (*532 Madison Ave. Gourmet Foods, 96 NY2d at 288*). Courts have "historically proceeded carefully and with reluctance to expand an existing duty of care" (*Davis v. South Nassau Communities Hosp., 26 NY3d 563, 572, 26 N.Y.S.3d 231, 46 N.E.3d 614 [2015]*). Whether a duty exists is determined by "common concepts of morality, logic and consideration of social consequences of imposing a duty" (*id.*). A key consideration is whether "the defendant's relationship **[*8]** with. . . the plaintiff places the defendant in the best position to protect against the risk of harm" (*Hamilton v. Beretta U.S.A. Corp., 96 NY2d 222, 233, 750 N.E.2d 1055, 727 N.Y.S.2d 7 [2001]*). The judicial recognition of a landowner's duty also considers "an assessment of its efficacy in promoting a social benefit as against its costs and burdens" (*Peralta v. Henriquez, 100 NY2d 139, 145, 790 N.E.2d 1170, 760 N.Y.S.2d 741 [2003]*; *see also 532 Madison Ave. Gourmet Foods, 96 NY2d at 288-289*,quoting *Palka v. Servicemaster Mgt. Servs. Corp., 83 NY2d 579, 586, 634 N.E.2d 189, 611 N.Y.S.2d 817 [1994]* [in determining the existence of a duty, courts balance various factors, including "the likelihood of unlimited or insurer-like liability"]). Thus, for example, the Court of Appeals has reasoned that "[w]ere we to impose a general duty of care requiring landowners to

[3] Contrary to Supreme Court's reasoning, the negligence counterclaim did not involve *Administrative Code § 27-1031(b)(1)*, the predecessor to *§ 3309.4 of the Building Code*. That provision was the basis for *plaintiff's* first cause of action for strict liability. It was not the basis for the *defendant's* negligence counterclaim.

illuminate their property during all hours of darkness, the financial and environmental costs would surely outweigh any social benefit" (*Peralta, 100 NY2d at 145*).

[5]** ***HN3*** It is well settled that landowners generally owe a common-law duty to people outside of their land for conditions on their property that result in bodily injury or property damages (*see e.g. Mullen v. St. John, 57 NY 567, 569[1874]* [collapse of a portion of building wall causing bodily injury to a pedestrian on the street]; *Ivancic v. Olmstead, 66 NY2d 349, 350-351, 488 N.E.2d 72, 497 N.Y.S.2d 326 [1985]*, *cert denied 476 U.S. 1117, 106 S. Ct. 1975, 90 L. Ed. 2d 658 [1986]* [decayed tree falling on a neighbor's property causing bodily injury to the neighbor]; *Roark v. Hunting, 24 NY2d 470, 475, 248 N.E.2d 896, 301 N.Y.S.2d 59 [1969]* [landowner's transfer, by artificial means, of snow and ice to a public sidewalk causing bodily injury to a pedestrian **[*9]** on the street]; *Associated Mut. Ins. Coop. v. 198, LLC, 78 AD3d 597, 597, 914 N.Y.S.2d 7 [1st Dept 2010]* [fire in a vacant building causing property damages to the adjoining premises]; *Gellman v. Seawane Golf & Country Club, Inc., 24 AD3d 415, 417-418, 805 N.Y.S.2d 411 [2d Dept 2005]* [golf balls from a driving range causing property damage to a neighbor's property]; *A. L. Russell, Inc. v. City of New York, 4 AD2d 943, 943, 167 N.Y.S.2d 1003, 168 N.Y.S.2d 159 [1st Dept 1957]*, *affd 5 N.Y.2d 794, 154 N.E.2d 575, 180 N.Y.S.2d 323 [1958]* [water drained from the subsoil of an adjoining building causing property damage to the adjoining building]). None of these circumstances is alleged here.

HN4 In addition to conditions on the land, landowners generally owe a common-law duty to persons outside of their land for injuries that result from "activities" that the landowners conduct on their land that cause bodily injury or property damages (*see e.g. 532 Madison Ave. Gourmet Foods, 96 NY2d at 290* ["A landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them"]; *see also Weitzmann v. Barber Asphalt Co., 190 NY 452, 457, 83 N.E. 477 [1908]* ["If an owner or occupier of land uses upon it appliances, devices or methods that may cause injury to persons upon adjoining premises, or in public places, such owner or occupier owes to such persons the duty to take reasonable precautions to avoid injuring them"]).

HN5 Critically, the common thread regarding a landowner's duty of care to persons outside of their land (as well as to persons on their land) **[*10]** is the principle "that the person in possession and control of property is best able to identify and prevent any harm to others [citing Prosser and Keeton, Torts § 57, at 386 [5th ed]]" (*Butler v. Rafferty, 100 NY2d 265, 270, 792 N.E.2d 1055, 762 N.Y.S.2d 567 [2003]*). Indeed, "[i]t has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v. Goldberg, 27 NY2d 887, 889, 265 N.E.2d 772, 317 N.Y.S.2d 361 [1970]*). Consequently, no duty exists where the landowner lacks control (*see e.g. Tagle v. Jakob, 97 NY2d 165, 168-169, 763 N.E.2d 107, 737 N.Y.S.2d 331 [2001]* [no duty to maintain utility poles and overhead electric wires running above a tree on the landowner's property because the landowner "was neither equipped nor empowered to undertake such efforts"]).

[6]** Here, Supreme Court erred in holding that plaintiff owed the developer a duty to design and construct its building to prophylactically protect the developer's excavation/foundation work. The court concluded that plaintiff owed the developer a duty because plaintiff engaged in "activities" on its land during the developer's excavation/foundation work which allegedly resulted in economic injury. However, when the DOB issued the stop work order, only the developer was engaged in "activities" on its land, namely excavation/foundation work (*see 532 Madison Ave. Gourmet Foods, 96 NY2d at 286* [activity of construction]; *Weitzmann,190 NY at 453* [activity **[*11]** of operating a hoist]; *Doundoulakis v. Town of Hempstead, 42 NY2d 440, 445, 368 N.E.2d 24, 398 N.Y.S.2d 401 [1977]* [activity of hydraulically pumping water and sand]; *Wright v. Tudor City Twelfth Unit, 276 NY 303, 305, 12 N.E.2d 307 [1938]* [activity of cleaning mats on a sidewalk]; *Rohlfs v. Weil, 271 NY 444, 447, 3 N.E.2d 588 [1936]* [activity of using a scaffold to paint billboards on a building]; *Althorf v. Wolfe, 22 NY 355, 359 [1860]* [activity of removing snow and ice from the roof of a house]; *Simmons v. Radio Print. Corp., 254 AD 521, 521, 5 N.Y.S.2d 345 [1st Dept 1938]*, *affd 279 NY 783, 18 N.E.2d 866 [1939]* [activity of hoisting machinery up to a floor of a building]).

Plaintiff brought this action alleging, among other things, that the developer violated *New York City Building Code (Administrative Code of City of NY, title 28, ch 7) § BC 3309.4*, a strict liability provision. ***HN6*** That section provides that where a license to perform the work has been given, as it was here, and "[w]henever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any

adjoining structures, including but not limited to footings and foundations" (NY City Bldg Code § BC 3309.4).

Section 3309.4, and its predecessor, Administrative Code of the City of New York Section 27-1031 (b) (1), embody "the specific legislative policy that in New York City those who undertake excavation work, rather than those whose interest in neighboring land is harmed by it, should bear its costs" (Yenem Corp., 18 NY3d at 491; K.K. Mach. Co., Inc. v. Grillo, 242 AD3d 720, 723, 240 N.Y.S.3d 218 [2d Dept 2025]). As aptly noted by the Appellate Division dissent in *Yenem Corp.*, "the worse the condition of a building, the greater the burden **[*12]** on the excavator to protect it" (Yenem Corp. v. 281 Broadway Holdings, 76 AD3d 225, 244, 904 N.Y.S.2d 392 [1st Dept 2010] [Catterson, J. dissenting], *revd* 18 NY3d 481, 964 N.E.2d 391, 941 N.Y.S.2d 20 [2012]). The Court of Appeals in *Yenem Corp.* agreed with the dissent and held that "[t]he majority below erred in finding that the building's allegedly poor condition raised an issue of fact as to causation; though certainly relevant to any measure of damages, consideration of the building's prior condition does not factor into a proximate cause analysis under section 27-1031(b) (1)" (Yenem Corp., 18 NY3d at 491).

[7]** ***HN7*** Although it has not yet been determined whether the developer has violated section 3309.4, the Building Code squarely places a duty of care on a person performing soil or foundation work to "preserve and protect" the adjoining structures from damage during any excavation/foundation work regardless of the condition of the adjoining building (NY City Bldg Code § BC 3309.4). Consequently, placing a duty on plaintiff to design, construct, and maintain its building essentially to protect the developer's excavation/foundation work is antithetical to the duty imposed by section 3309.4.

It is the developer, not the adjoining landowner, that is in the best position to protect against the risk of harm in this context (*see* Hamilton, 96 NY2d at 233). The stop work order reflected that the delays were the result of the lateral and vertical movement of plaintiff's **[*13]** building during the developer's excavation/foundation work. The stop work order required that the developer take remedial measures to stabilize plaintiff's building. ***HN8*** As previously explained, "control is the test which measures generally the responsibility in tort of the owner of real property" (Ritto, 27 NY2d at 889). Here, plaintiff did not control the construction, did not control the process by which the developer preserved and protected the adjoining structures from damage, and did not control the developer's remedial measures. Thus, notwithstanding plaintiff's status as an adjoining landowner, no duty existed because plaintiff was "neither equipped nor empowered to undertake such efforts" (Tagle, 97 NY2d at 168-169).

Moreover, the costs and burdens of imposing a duty of care on a landowner to design, construct, and maintain its own building to prophylactically protect a neighbor's excavation/foundation work from construction delays would outweigh any social benefit (*see* Peralta, 100 NY2d at 145). Indeed, because plaintiff's building was built years before the developer started the excavation/foundation work on the Project, the costs and burdens related to construction delays on unknown, future projects would have essentially been impossible to predict **[*14]** and, depending on the size of such future projects, could have subjected it to "insurer-like liability" and "crushing exposure" (532 Madison Ave. Gourmet Foods, 96 NY2d at 288-289).

The negligence counterclaim fails for another reason. The developer's negligence counterclaim alleged that plaintiff owed the developer a "duty to construct and maintain [its building] in compliance with the [Building] Code." Plaintiff persuasively rebuts the argument on appeal. In response, the developer abandons the counterclaim's allegation that the Building Code imposes a duty under these facts.[4]

[8]** Even assuming the existence of a common-law duty based on plaintiff's status as a landowner, purely economic damages would fall outside the scope of the duty (*see* Caronia v. Philip Morris USA, Inc., 22 NY3d 439, 452, 982 N.Y.S.2d 40, 5 N.E.3d 11 [2013] ["Allowance of [a medical monitoring] claim absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence"]).

HN9 The mere proximity of the two properties, by itself, is insufficient to create a duty (*see* 532 Madison Ave. Gourmet Foods, 96 NY2d at 288, 291-292 ["no satisfactory way geographically to distinguish among those who have suffered purely economic losses" as the result of defendants' construction-related activities]; Roundabout Theatre Co. v. Tishman Realty & Constr.

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[4] Significantly, as plaintiff points out, the developer fails to cite to a Building Code provision that imposes a duty on plaintiff in favor of the developer. As discussed above, only plaintiff cites to a specific Building Code provision (NY City Bldg Code § BC 3309.4) and that provision imposes a duty of care on the developer, not vice versa.

Co., 302 AD2d 272, 272-273, 756 N.Y.S.2d 12 [1st Dept 2003] ["[i]t does not avail plaintiff that its property is so **[*15]** proximate to defendants' property as to be within a zone of danger" because "defendants' duty of care extended only to those who, as a result of this construction disaster, suffered personal injury or property damage, and not to those who, like [the plaintiff], suffered only economic loss"] [internal quotation marks omitted]).

532 Madison Ave. Gourmet Foods is instructive. There, the Court of Appeals was concerned with finding a "principled basis" for apportioning liability where two construction accidents resulted, among other things, in street closures that affected an unknown number of people in a large urban neighborhood (532 Madison Ave. Gourmet Foods, 96 NY2d at 291-292). The Court expressed the need "to avoid exposing defendants to unlimited liability," "crushing exposure," and "the likelihood of unlimited or insurer-like liability," albeit in the context of "an indeterminate class of persons" (id. at 288-289). Because there was "no satisfactory way geographically to distinguish among those who have suffered purely economic losses" the Court found that "limiting the scope of defendants' duty to those who have, as a result of these events, suffered personal injury or property damage—as historically courts have done—affords a principled basis for reasonably apportioning **[*16]** liability" (id. at 291-292; *see also* KSW Mech. Servs., Inc. v. DiFama Concrete, Inc., 104 AD3d 818, 819, 961 N.Y.S.2d 495 [2d Dept 2013] ["in the absence of a contractual relationship, the plaintiff cannot recover solely for economic losses arising out of the two subject construction accidents . . . allegedly caused by the negligence of the defendant . . . unless [the defendant's] negligence caused the plaintiff both property damage and economic loss"]; Cedar & Wash. Assoc., LLC v. Bovis Lend Lease LMB, Inc., 95 AD3d 448, 449, 944 N.Y.S.2d 47 [Plaintiff's tort claims . . . also fail since plaintiff merely alleges economic loss, not personal injury or property damages"]).

[9]** To be sure, the economic damages allegedly sustained by the developer here did not affect "an indeterminate class of persons" (532 Madison Ave. Gourmet Foods, 96 NY2d at 289) but rather, a single developer. Nevertheless, assuming the existence of a duty, limiting the scope of the duty to adjacent landowners who suffer personal injury or property damage, as courts have historically done, is appropriate because it avoids imposing on a landowner "insurer-like liability" and "crushing exposure" which were the driving concerns in 532 Madison Ave. Gourmet Foods (id. at 288-289).

Yenem Corp. (18 NY3d 481)is not to the contrary. In that case, the plaintiff leased commercial space in a building that was damaged by excavation work conducted by the adjacent property owner, which caused the building to shift and tilt (id. at 487). After the DOB deemed **[*17]** the building unsafe and issued a vacate order, the plaintiff's business was destroyed (*id.*). Thus, unlike here, the plaintiff's economic losses were tied to property damage in a building in which the company leased space.

Accordingly, the order of the Supreme Court, New York County (Judy H. Kim, J.), entered February 10, 2025, which, insofar as appealed from, denied plaintiff's motion to dismiss defendant Third Avenue NY Realty LLC's second counterclaim for negligence, should be reversed, on the law, without costs, and the motion granted.

Order, Supreme Court, New York County (Judy H. Kim, J.), entered February 10, 2025, reversed, on the law, without costs, and the motion granted.

Opinion by Moulton, J.P. All concur

Moulton, J.P, Scarpulla, Rosado, O'Neill Levy, Chan, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 18, 2026

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