

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN DEPIETRO;

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY, VINCENT
INGIZIO, LOUIS TOBACCO, VITO MUSTACIUOLO,
IRA GLUCKMAN, WILLIAM DELUCA, ROBERT
RUVOLO, STEPHEN COYLE, A. RUSSO WRECKING,
INC., ALBERT GIRIMONTE, RICHARD GUTCH,
LIEUTENANT FALCONE, JEFFREY WALTER, TRACY
LAVELLE, EUGENE McARDLE, and JOHN DOE
NUMBERS 1 THROUGH 25,

Defendants.

**CITY DEFENDANTS
EUGENE MCARDLE
AND LIEUTENANT
FALCONE'S ANSWER
TO AMENDED
VERIFIED
COMPLAINT WITH
COUNTER-CLAIM**

09 Civ. 932 (SLT)(JMA)
(ECF Case)

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Defendants, Eugene McArdle and Lieutenant Falcone,¹ ("City defendants"), by
their attorney, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, for
their Answer to the Amended Verified Complaint ("complaint"), respectfully allege upon
information and belief as follows:

¹ Defendants Richard Gutch, Jeffrey Walter, and Tracy Lavelle are all current or former employees of the City of New York, but have not been served with the Amended Complaint. Thus, an answer is not submitted on their behalves at this time. An answer to the amended complaint has already been filed on behalf of Defendants the City of New York, Vincent Ignizio, Vito Mustaciulo, Ira Gluckman, William Deluca, Robert Ruvolo, Stephen Coyle, and Albert Girimonte.

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the complaint.

2. Deny the allegations set forth in paragraph "2" of the complaint, except admit that records of the City of New York reflect that plaintiff was the owner of the property located at 527 Page Avenue, Staten Island, New York 10307 (the "subject property"), during the relevant time periods at issue herein.

3. Admit the allegations set forth in paragraphs "3," "4," "5," "6," "7," "8," "9," "10" "11," "12," "13," "14," "15," and "16" of the complaint.

4. Deny the allegations set forth in paragraph "17" of the complaint, except admit that defendant Ignizio is the New York City Council Member for the 51st District in Staten Island, New York and aver that his District Office is located at 3944 Richmond Avenue, Staten Island, New York 10312.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "18" of the complaint.

6. Deny the allegations set forth in paragraph "19" of the complaint, except admit that defendant Mustaciulo's principal place of business is located at 100 Gold Street, New York, New York 10038, and aver that defendant Mustaciulo is a Deputy Commissioner of the New York City Department of Housing Preservation and Development ("HPD").

7. Admit the allegations set forth in paragraph "20" of the complaint.

8. Deny the allegations set forth in paragraph "21" of the complaint, and aver that defendant William Deluca is an employee of the New York City Department of Buildings ("DOB") with a principal place of business located at 280 Broadway, New York, New York 10007.

9. Admit the allegations set forth in paragraph "22" of the complaint.

10. Deny the allegations set forth in paragraph "23" of the complaint, and aver that defendant Stephen Coyle is an employee of DOB with a principal place of business located at 280 Broadway, New York, New York 10007.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "24" of the complaint.

12. Deny the allegations set forth in paragraph "25" of the complaint, and aver that defendant Girimonte was an Assistant Chief with the Staten Island 123rd Precinct of the New York City Police Department ("NYPD") and is now retired.

13. Admit the allegations set forth in paragraphs "26," "27," "28," and "29" of the complaint.

14. Deny the allegations set forth in paragraph "30" of the complaint, and aver that defendant Eugene McArdle was formerly the Director of Demolition of HPD and is currently an employee at HPD, with a principal place of business located at 100 Gold Street, New York, New York 10038.

15. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "31" of the complaint.

16. Deny the allegations set forth in paragraph "32" and "33" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

17. Deny the allegations set forth in paragraph "34" of the complaint, except admit that venue properly lies in this judicial district.

18. Deny the allegations set forth in paragraph "35" of the complaint, except admit that plaintiff served a Notice of Claim upon the City of New York, dated March 3, 2008,

and aver that some of the causes of action alleged herein occurred well before the 90- day period alleged in the complaint.

19. Deny the allegations set forth in paragraph "36" of the complaint, except admit that as of the present date, the City of New York has not offered a settlement in response to the Notice of Claim.

20. Deny the allegations set forth in paragraph "37" of the complaint, except admit that an examination of plaintiff's claim pursuant to New York General Municipal Law § 50-h has not been conducted.

21. Deny the allegations set forth in paragraphs "38" and "39" of the complaint.

22. Deny the allegations set forth in paragraph "40" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

23. Deny the allegations set forth in paragraph "41" of the complaint, except admit that plaintiff became the record owner of the subject property in 1995.

24. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "42," "43," and "44" of the complaint.

25. Deny the allegations set forth in paragraph "45" of the complaint.

26. Deny the allegations set forth in paragraph "46" of the complaint, except admit that Staten Island Public School 6 is located at 555 Page Avenue, Staten Island, New York.

27. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "47" and "48" of the complaint.

28. Deny the allegations set forth in paragraph "49" of the complaint.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “50” of the complaint.

30. Deny the allegations set forth in paragraph “51” of the complaint.

31. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs “52,” “53,” “54,” and “55” of the complaint.

32. Deny the allegations set forth in paragraph “56” of the complaint.

33. Deny the allegations set forth in paragraph “57” of the complaint, and aver that in 2004, the New York State Supreme Court, Richmond County, issued a precept against the subject property upon the request of DOB, ordering the plaintiff to perform certain repairs of the subject property.

34. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “58” of the complaint.

35. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “59” of the complaint, except admit that at some point in time, plaintiff met with the then-Staten Island Borough Commissioner for the New York City Department of Transportation (“DOT”).

36. Deny the allegations set forth in paragraph “60” of the complaint.

37. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “61” of the complaint.

38. Deny the allegations set forth in paragraphs “62,” “63,” and “64” of the complaint.

39. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs “65,” “66,” “67,” “68,” and “69” of the complaint.

40. Deny the allegations set forth in paragraph “70” of the complaint, and aver that on December 5, 2007, New York State Supreme Court Justice Maltese signed an Order to Show Cause in the case of DePietro v. City of New York, et al., New York State Supreme Court, Richmond County, Index No. 80389/07, directing defendants to show cause on December 21, 2007, why an order should not be issued restraining defendants from demolishing the subject property.

41. Deny the allegations set forth in paragraph “71” of the complaint.

42. Deny the allegations set forth in paragraph “72” of the complaint, except admit that someone brought a copy of the signed Order to Show Cause to the subject property on December 6, 2007.

43. Deny the allegations set forth in paragraphs “74,”² “75,” and “76” of the complaint.

44. Deny the allegations set forth in paragraphs “77,” “78,” and “79” of the complaint, and aver that the provisions of law cited therein are inapplicable herein and further deny so much of said allegations as alleges or purports to allege that the demolition of plaintiff’s property was unlawful or unconstitutional.

45. Deny the allegations set forth in paragraphs “80” and “81” of the complaint.

46. Deny the allegations set forth in paragraph “82” of the complaint, and aver that the provisions of law cited therein are inapplicable herein and further deny so much of said allegations as alleges or purports to allege that the demolition of plaintiff’s property was unlawful or unconstitutional.

² Paragraph “73” of the complaint is blank and contains no allegations, therefore, City defendants have no response to this paragraph; in the event the Court requires a response, City defendants deny the allegations.

47. Deny the allegations set forth in paragraph "83" of the complaint.

48. Deny the allegations set forth in paragraph "84" of the complaint, except admit that HPD prepared an HPD Field Survey on November 28, 2007, and aver that the provisions of law cited therein are inapplicable herein and further deny so much of said allegations as alleges or purports to allege that the demolition of plaintiff's property was unlawful or unconstitutional.

49. Deny the allegations set forth in paragraphs "85," "86," "87," and "88" of the complaint, and aver that the provisions of law cited therein are inapplicable herein and further deny so much of said allegations as alleges or purports to allege that the demolition of plaintiff's property was unlawful or unconstitutional.

50. Deny the allegations set forth in paragraph "89" of the complaint, except admit that DOB ordered that the structures on the subject property be demolished in two Declarations of Immediate Emergency, dated November 26, 2007 and December 6, 2007, and that there was no precept issued against the subject property in 2007.

51. Deny the allegations set forth in paragraph "90" of the complaint, except admit that DOB ordered that the structures on the subject property be demolished in two Declarations of Immediate Emergency, dated November 26, 2007 and December 6, 2007, and aver that the provisions of law cited therein are inapplicable herein and further deny so much of said allegations as alleges or purports to allege that the demolition of plaintiff's property was unlawful or unconstitutional.

52. Deny the allegations set forth in paragraph "91," "92," and "93" of the complaint.

53. Deny the allegations set forth in paragraph "94" of the complaint, except admit that defendant Coyle prepared an "Immediate Emergency Declaration" form, dated November 26, 2007, which recommended that the house at the subject property be demolished, that the recommendation was approved by the Administrative Chief Inspector and Borough Commissioner on that date, and that DOB Deputy Commissioner Amer sent a Memorandum to defendant Mustaciuolo of HPD.

54. Deny the allegations set forth in paragraph "95" of the complaint, except admit that on December 6, 2007, DOB Inspector DeLuca conducted another inspection of the subject property and issued a second "Immediate Emergency Declaration" with respect to the garage on the subject property, and that DOB Deputy Commissioner Amer sent a Memorandum to Defendant Mustaciuolo on December 7, 2007.

55. Deny the allegations set forth in paragraph "96" of the complaint.

56. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "97" of the complaint.

57. Deny the allegations set forth in paragraph "98" of the complaint.

58. Deny the allegations set forth in paragraphs "99," "100," "101," "102," "103," and "104" of the complaint, except admit that someone brought a copy of the signed Order to Show Cause to the subject property at the time of the demolition.

59. Deny the allegations set forth in paragraphs "105," "106," "107," "108," "109," and "110" of the complaint.

60. Deny the allegations set forth in paragraph "111" of the complaint, except admit that HPD forwarded a notice, dated November 27, 2007 to plaintiff, and respectfully refer the Court to a copy of the notice for its complete text and true content.

61. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "112" of the complaint.

62. Deny the allegations set forth in paragraph "113" of the complaint, and aver that the demolition of the subject proper was lawful and authorized by City defendants.

63. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "114" of the complaint, and aver that there was no Stop Work Order contained in the Order to Show Cause to enforce.

64. Deny the allegations set forth in paragraph "115" and respectfully refer the Court to Chapter 18 of the New York City Charter for a full description of the powers and duties of the NYPD and its force.

65. Deny the allegations set forth in paragraphs "116," "117," "118," "119," and "120" of the complaint.

66. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "121" of the complaint.

67. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "122" of the complaint, except admit that NYPD Lt. Falcone spoke to plaintiff at some point in time and that the NYPD did not issue a police report for the December 2007 demolition complained of by plaintiff.

68. Deny the allegations set forth in paragraph "123" of the complaint, except admit that the NYPD did not issue a police report for the December 2007 demolition complained of by plaintiff.

69. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "124" and "125" of the complaint.

70. Deny the allegations set forth in paragraph "126" of the complaint, except admit that plaintiff sent a letter, dated December 17, 2007, to NYPD Police Commissioner Raymond W. Kelly complaining about the events surrounding the November 2007 demolition of the subject property.

71. Deny the allegations set forth in paragraph "127" of the complaint.

72. Deny the allegations set forth in paragraph "128" of the complaint, and aver that the NYPD responded to plaintiff's complaint, in a letter, dated January 8, 2008.

73. Deny the allegations set forth in paragraphs "129" and "130" of the complaint.

74. Deny the allegations set forth in paragraph "131" of the complaint, and aver that the NYPD issued a Complaint Report based on a complaint made by plaintiff in April 2008 for a stolen mailbox from the subject premises.

75. In response to paragraph "132" of the complaint, defendants repeat the responses to the cited paragraphs by reference herein.

76. Neither admit nor deny the allegations set forth in paragraphs "133" and "134" of the complaint insofar as they set forth legal argument for which no response is required; in the event that a response is required, deny said allegations; and aver that City defendants did not violate any of plaintiff's constitutionally-protected rights.

77. Deny the allegations set forth in paragraphs "135," "136," "137," "138," "139," "140," "141," "142," "143," "144," "145," "146," and "147" of the complaint.³

³ To the extent that plaintiff is now attempting to plead a violation of his substantive due process rights in the Complaint (see Complaint, ¶¶ 132-147), such claims were expressly dismissed by this Court in the decision of the Honorable Sandra L. Townes, dated January 29, 2010, at 20-22, and 26, and cannot be asserted again herein.

78. In response to paragraph "148" of the complaint, defendants repeat the responses to the cited paragraphs incorporated by reference herein.

79. Neither admit nor deny the allegations set forth in paragraph "149" of the complaint insofar as it sets forth legal argument for which no response is required; in the event that a response is required, deny said allegations; and aver that City defendants did not violate any of plaintiff's constitutionally-protected rights.

80. Deny the allegations set forth in paragraphs "150," "151," "152," "153," and "154" of the complaint.

81. In response to paragraph "155" of the complaint, defendants repeat the responses to the cited paragraphs by reference herein.

82. Deny the allegations set forth in paragraph "156" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

83. Deny the allegations set forth in paragraph "157" of the complaint, and respectfully refer the Court to Article 1, Section 6 of the New York State Constitution for its complete text and true meaning.

84. Deny the allegations set forth in paragraphs "158," "159," and "160" of the complaint.

85. In response to paragraph "161" of the complaint, defendants repeat the responses to the cited paragraphs by reference herein.

86. Deny the allegations set forth in paragraph "162" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

87. Deny the allegations set forth in paragraph "163" of the complaint, except admit that plaintiff is the record owner of the subject property.

88. Deny the allegations set forth in paragraph "164," "165," and "166" of the complaint.

89. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "167" of the complaint.

90. Deny the allegations set forth in paragraphs "168," "169," and "170" of the complaint.

91. In response to paragraph "171" of the complaint, defendants repeat the responses to the cited paragraphs by reference herein.

92. Deny the allegations set forth in paragraph "172" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

93. Deny the allegations set forth in paragraphs "173," "174," "175," "176," and "177" of the complaint.

94. In response to paragraph "178" of the complaint, defendants repeat the responses to the cited paragraphs by reference herein.

95. Deny the allegations set forth in paragraph "179" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

96. Deny the allegations set forth in paragraphs "180," "181," "182," and "183" of the complaint.

97. In response to paragraph "184" of the complaint, defendants repeat the responses to the paragraphs incorporated by reference therein.

98. Deny the allegations set forth in paragraph "185" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

99. Deny the allegations set forth in paragraphs "186," "187," "188," "189," and "190" of the complaint.

AS AND FOR A FIRST DEFENSE:

100. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND DEFENSE:

101. Some or all of plaintiff's claims and causes of actions are barred by the applicable statute of limitations.

AS AND FOR A THIRD DEFENSE:

102. City defendants have not violated any rights, privileges or immunities reserved to the plaintiff by the constitutions or laws of the United States or the State of New York, nor have they violated any act of Congress providing for the protection of civil rights.

103. The demolition of the subject property pursuant to a Department of Building's Declaration of Immediate Emergency Police Department's did not violate the Due Process or Equal Protection clauses of the United States or New York State Constitution, nor constitutes an unlawful seizure under the Fourth Amendment.

AS AND FOR A FOURTH DEFENSE:

104. Any injury alleged to have been sustained resulted from the plaintiff's own culpable or negligent conduct or the culpable or negligent conduct of parties other than the City defendants.

AS AND FOR A FIFTH DEFENSE:

105. At all times relevant herein, the individually-named City defendants, (defendants Ignizio, Mustaciuolo, Gluckman, Deluca, Ruvolo, Coyle, Girimonte, McArdle, and Falcone) acted within the scope of their employment and in a good faith belief that their actions

were lawful, proper and constitutional, and did not violate any clearly established rights of which a reasonable person would have known at the time.

106. Consequently, the individually-named defendants are immune from liability under the doctrine of qualified immunity.

AS AND FOR A SIXTH DEFENSE:

107. Punitive damages are not obtainable against a municipality, such as the City of New York.

AS AND FOR A SEVENTH DEFENSE:

108. To the extent that plaintiff is seeking the reversal of charges assessed by City defendants against the subject property, those claims are either jurisdictionally barred because plaintiff has failed to exhaust his administrative remedies, not ripe for judicial review, or time-barred by the four month statute of limitations available for claims pursuant to Article 78 of the New York Civil Practice Law and Rules.

COUNTER-CLAIM AGAINST PLAINTIFF

109. Any damages sustained by the plaintiff was caused in whole or in part by the acts or omissions of plaintiff or his agents, who is or may be liable to defendant City of New York for contribution on the basis of his equitable shares of responsibility.

110. Plaintiff's failure to demolish and/or make safe the subject premises, wrongfully created a serious hazard to the public health, safety, and welfare.

111. In view of the public emergency resulting from this threat of imminent collapse, defendant City of New York expended funds on an emergency basis to demolish and make safe the subject premises pursuant to New York City Administrative Code § 26-243(b).⁴

112. In expending such funds, defendant City of New York has borne a duty to the public that in law, equity, and fairness, ought to have been borne by the plaintiff. Plaintiff, who was the actual wrongdoer, had a duty which included its obligations as prescribed by New York City Administrative Code §§ 26-235 and 27-127 to maintain its property and safeguard the public and public property.

113. Plaintiff must therefore make restitution to defendant City of New York for the cost of demolition of the subject premises.

114. In addition, plaintiff must indemnify defendant City of New York for the cost of demolishing the building at the subject premises.

115. Plaintiff has failed to pay the cost and expense incurred by defendant City of New York in demolishing and making safe the subject premises. As a result of City of New York's efforts, plaintiff has been unjustly enriched in that it did not expend its own funds to secure and make safe the property that received the benefits of such action bestowed upon them.

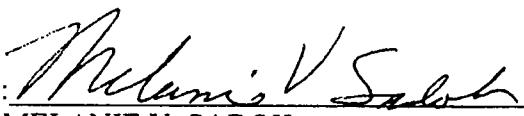
116. Under principles of equity, plaintiff is liable to defendant City of New York for benefits received in the amounts expended by defendant.

⁴ Reference herein is to the New York City Building Code in effect at the time of the demolition.

WHEREFORE, City defendants demand judgment dismissing the complaint against them, along with costs and disbursements in this action; in addition, City defendants demand judgment on their counter-claim and awarding the costs of this action, together with such other and further relief as to the court may seem just and proper.

Dated: New York, New York
March 25, 2010

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