07-2537(cv)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative administrator of the estate of OLIVER ST. CLAIR STEWART and in his individual capacity, THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL, INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, YESENIA GONZALEZ, JACKIE GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, JOSEPH PASTORE, PETER WILLIAMS, PETER WILLIAMS ENTERPRISES, INC., HENRY WEINSTEIN, 535 CARLETON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., AARON PILLER and ROCKWELL PROPERTY MANAGEMENT, LLC,

Plaintiffs-Appellants,

\- against -

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE

(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MUNICIPAL APPELLEES' BRIEF

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August 31, 2007

DEVELOPMENT CORPORATION, BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANY, RATNER GROUP, INC., BR FCRC, LLC, BR LAND, LLC, FCR LAND, LLC, BROOKLYN ARENA, LLC, ATLANTIC YARDS DEVELOPMENT COMPANY, LLC, MICHAEL BLOOMBERG, DANIEL DOCTOROFF, ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF NEW YORK and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellees.

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MUNICIPAL APPELLEES' BRIEF

PRELIMINARY STATEMENT

Plaintiffs-appellants ("plaintiffs") are property owners and tenants within the "footprint" of the Atlantic Yards Land Use Improvement and Civic Project ("Atlantic Yards"), a 22-

acre redevelopment project in Brooklyn (JA25-27; SPA44).[1] In two separate actions that were consolidated in March 2007 (JA1361-1364), plaintiffs challenge the use of eminent domain to acquire certain property needed to assemble the Atlantic Yards site. They appeal from a decision and order, dated June 6, 2007, of the United States District Court for the Eastern District of New York (Hon. Nicholas G. Garaufis, D.J.)(SPA43-108), embodied in a judgment entered on June 8, 2007 (SPA109-110).

In its decision and order, the District Court determined that Atlantic Yards satisfied the Fifth Amendment's Public Use Clause, that the claims in plaintiffs' complaints to the contrary were "baseless," and that those complaints failed to state any federal Constitutional claim as a matter of law (SPA99). As the District Court correctly recognized (SPA85), plaintiffs' factual assertions, accepted as true for the purposes of a motion to dismiss, fail to plausibly allege that the proposed exercise of eminent domain violated the Fifth Amendment's "public use" requirement. That is because the project undeniably constitutes a public use under well-established law (SPA92-93).

[1] Unless otherwise indicated, parenthetical references preceded by "JA" refer to pages in the Joint Appendix, and references preceded by "SPA" refer to pages in the Special Appendix.

For those reasons, as well as those presented below, and in the briefs submitted by the other defendants-appellees, the order appealed from should be affirmed.[2]

QUESTION PRESENTED

Inasmuch as Atlantic Yards will provide multiple public benefits, in that it will dramatically transform central Brooklyn by redeveloping a large swath of blighted and underutilized land that is dominated by sunken rail yards and dilapidated, vacant, and underutilized properties, and will include a sports arena, affordable housing, public space, and greatly improved public transportation facilities, did the District Court correctly find that the allegations in the complaint failed to allege a Fifth Amendment "public use" issue as a matter of law?

STATEMENT OF FACTS

The Atlantic Yards project site sits at a Brooklyn crossroads that has historically been home to residential,

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[2] There are three sets of defendants in this action. The State defendants include New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"); George E. Pataki, the former Governor of New York; and Charles A. Gargano, the former Chief Executive Officer of the ESDC. The Forest City Ratner defendants include Bruce C. Ratner; James P. Stuckey; Forest City Enterprises; Ratner Group, Inc.; FCRC, LLC; Brooklyn Arena, LLC; Atlantic Yard Development Co. LLC; BR Land, LLC; and FCR Land, LLC. The municipal defendants include Mayor Michael Bloomberg; Deputy Mayor Daniel L. Doctoroff; the New York City Economic Development Corporation ("EDC"); and two of EDC's former presidents, Andrew M. Alper and Joshua Sirefman.

industrial, and commercial uses (JA160). Following the opening of the Brooklyn Bridge in 1883, the Long Island Rail Road, in 1892, built its Flatbush Terminal, now called Atlantic Yards, at the northeast corner of Flatbush and Atlantic Avenues (Id.). The nearby Carlton Freight Yard, on the south side of Atlantic Avenue between Carlton and Sixth Avenues, had served Brooklyn, and by 1904, it was extended and renamed the Vanderbilt Yard (Id.). A larger LIRR Atlantic Terminal for commuters opened in 1907 (Id.).[3]

The following year, the IRT subway was extended to the intersection of Flatbush and Atlantic Avenues, and that, in turn, led to the construction of the Brooklyn Academy of Music in 1908 and the Williamsburgh Savings Bank Building in 1927 (JA160). The Great Depression intervened in this nascent Brooklyn boom, however, and the area became home to the meat packing industry, located just east of Atlantic Terminal (Id.). The area never recovered.

Brooklyn suffered from two trends following World War II: the relocation of industry outside the borough, and middle

[3] The Metropolitan Transportation Authority ("MTA") now uses the eight acres of Vanderbilt Yards to store buses and railroad cars (JA941). The open air property is several feet below the grade of the surrounding streets and creates what one judge described as "a massive trench that acts as a barrier isolating the neighborhoods to the south of the site from other nearby neighborhoods" (JA907).

class exodus to the suburbs (JA160). Neighborhoods near Atlantic Yards experienced disinvestment, abandonment, and arson (Id.). On the project site, many active industrial and commercial uses became auto-repair shops, gas stations, parking lots, or vacant lots (JA161). By the late 1960s, the Fort Greene Meat Market had closed, leaving many abandoned buildings behind (Id.).

Atlantic Yards straddles several Brooklyn neighborhoods, including Fort Greene and Boerum Hill (JA187). While surrounding neighborhoods have since experienced a boost from the City's long-range urban renewal plans that began in the late 1970s, the project site has not enjoyed similar redevelopment, largely because of the remaining below-grade and open air rail yards, but also because many properties remain vacant, in poor repair and underutilized (JA161-162; 228-229; 237; 1044).

Five of the project's eight blocks, comprising approximately 63 percent of the site's total square footage, are located within the Atlantic Terminal Urban Renewal Area ("ATURA"), which was created in 1968 and which earmarked the area for comprehensive redevelopment (JA215-216). The Plan has been repeatedly amended over the years, and in 2004, the City again amended it, and extended the Plan for another 40 years (JA215).

In July 2006, defendant-appellee Empire State Development Corporation ("ESDC") issued a blight study for the area that concluded that the area surrounding the below-grade Vanderbilt Yard has never benefited from renewal efforts and has, instead, had a blighting effect, increasing crime rates, and vacant and underutilized properties (JA216).

Prior to 2003, 76 different parties owned the parcels within the redevelopment site (JA218). Forest City Ratner, the project sponsor, has since gained control of 80 percent of the site's tax lots, though 27 separate tax lots remain wholly or partially under the control of parties other than the sponsor, the City, or the MTA (Id.).

Atlantic Yards is a master plan to transform these 22 acres of blighted and under-utilized property in Brooklyn into a mixed-use community (JA106; 108-109; 115; 145). Situated at an intersection where 10 subway lines, 11 bus routes, and a railroad terminal converge, the project includes a state-of-the art arena for the New Jersey Nets, market-rate and affordable housing, office and retail space, public spaces, a 180-room hotel, a new subway entrance, and rail yard (JA106; 169). Rail yards for the Long Island Rail Road and New York City Transit's

lot for retired buses, make up nine of those acres (JA106-107).[4]

The arena would be home to the Nets, once the team relocates to Brooklyn, and would also serve as a 20,000-seat concert and event venue (JA107).[5] The project includes at least seven acres of publicly accessible open space, community facility uses, a bicycle path, and approximately 3,800 parking spaces (JA107; 110-111; 125-126; 175-176). A new subway entrance is planned at the corner of Atlantic and Flatbush Avenues (JA107). The sports arena will have a 10,000-square-foot atrium, open to the public, as a pedestrian pass, access point to the subways, and sitting area (JA175).

At least 50 percent of the project's proposed 4,500 rental units will be administered under an affordable housing program, meaning they would be reserved households earning between 30 and 160 percent of citywide Area Media Income, or AMI, and rents will be set at 30 percent of household income

[4] The project's Draft Environmental Impact Statement, dated July 18, 2006, described two variations of the project: a residential mixed-use variation, and a commercial mixed-use variation (JA107; 146-147; 188-189). Unless otherwise indicated, the facts cited in this brief relate to both variations.

[5] The Nets would be the first major league sports team to be based in the borough since Brooklyn's tragic loss of its beloved Dodgers in 1957 (JA165-166). The City has been planning for a sports complex in Brooklyn since the early 1970s (Id.). In 2001, the Brooklyn Cyclones, a Mets farm team, took up residence at Keyspan Park in Coney Island (Id.).

(JA109). Ten percent of the total rental units will be designated for seniors (JA110).

The project would displace 171 residential housing units with approximately 410 residents, many of whom have received financial incentives to leave (JA121). The project would also displace 27 businesses, two institutions, a privately-operated facility housing homeless families, and a New York City Fire Department Special Operations facility (JA121).

Atlantic Yards is expected to generate substantial tax revenues and employment opportunities (JA122). Aside from significant jobs and tax revenues generated during the construction period (JA122-123), Atlantic Yards is expected to create, on the low end, 8,400 permanent jobs in New York City alone (JA123).

The project will not just remove long-standing blighted conditions in the area, it will also remove physical and visual barriers to adjacent neighborhoods that have existed because of the rail yards, modernize a major transportation hub for the borough, and bring affordable and market-rent housing, community facilities, a hotel, a sports arena, open space, and much-needed commercial space to this area of the borough (JA169; 490-495). The project has the support of Senator Charles Schumer and Representative Ed Towns, Former Governor George Pataki, Mayor Michael Bloomberg, Brooklyn Borough President

Marty Markowitz, City Comptroller William C. Thompson, Public Advocate Betsy Gotbaum, and numerous State and City legislators, local leaders, and union officials (JA605-623).

The project is undertaken under ESDC's authority, and that agency will exercise the eminent domain powers at issue in these actions (JA653). The project is subject to environmental review under the State Environmental Quality Review Act (Id.; 942-843). The Final Environmental Impact Statement was certified as complete on November 27, 2006 (SPA12).

The takings needed for Atlantic Yards are also subject to the comprehensive provisions of New York's Eminent Domain Procedure Law ("EDPL")(SPA47-51). The law sets forth a requirement for a public hearing upon notice, the publication of a Determination and Findings, and provides for appellate court review of those findings (Id.). It also sets out the method of making compensation offers (Id.).

In accordance with the EDPL, on August 23, 2006, ESDC held a duly-noticed public hearing concerning Atlantic Yards (A58.20, ¶¶83-84). In addition, in September 2006, ESDC conducted community forums and accepted written comments (JA58.21, ¶¶85-86). ESDC published its Determination and Findings on December 8, 2006 (JA1204-1227). In January 2007, a separate group of plaintiffs filed a petition in the New York Appellate Division, Second Department, pursuant to section 207

of the EDPL, challenging ESDC's Determination and Findings with respect to two properties within the project site (SA1330). That matter is sub judice.

On December 20, 2006, the Public Authorities Control Board, which has the power and duty to "receive applications for approval of the financing and construction" project proposed by state public benefit corporations, approved the Project (JA1310-1318), an action that signaled the support for the project of State Senators Sheldon Silver and Joseph L. Bruno. However, no public takings have actually occurred (Id.; SPA51).

This action.

In their amended complaint (JA58.1-5841), the Goldstein plaintiffs allege that the exercise of eminent domain for Atlantic Yards is both unconstitutional and unnecessary (JA58.2, ¶3).[6] They contend that Atlantic Yards was "conceived" by Forest City Ratner "and is being driven by his needs," rather than those of the public (JA86.3, ¶4), and that the public benefits that will result are "either wildly exaggerated or simply false" (JA58.21-58.22, ¶89). They challenge the use of eminent domain under 42 U.S.C. § 1983, asserting claims under

[6] Plaintiffs amended their complaint in January 2007 to add some of the named plaintiffs and eliminate a claim against former Governor Pataki in his official capacity. They also added as a fourth cause of action a supplemental state law claim against the ESDC pursuant to EDPL section 207.

the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection and Procedural Due Process Clause. They also assert a supplemental state law claim under New York Eminent Domain Procedure Law ("EDPL") §207 (JA58.29-58.37). In their January 2007 complaint, the Piller plaintiffs raise similar allegations against the same defendants (JA59-94), though only the EDSC and Forest City Ratner defendants were served with it.

The Defendants' Motions to Dismiss.

In December 2006, all the defendants moved to dismiss the original Goldstein complaint, arguing that the complaint fails to state a claim upon which relief can be granted; ESDC also argued that plaintiffs' claims were not ripe, and that the Court should abstain from exercising federal jurisdiction under Younger v. Harris, 401 U.S. 37 (1971), or Burford v. Sun Oil Co., 319 U.S. 315 (1943), arguments in which the remaining defendants joined (JA96.1-99-1233).

In January 2007, the Goldstein plaintiffs responded to the motions to dismiss. The defendants then filed reply papers in support of their motions to dismiss the Goldstein case (JA1278-1280). ESDC also filed a motion to dismiss Goldstein's EDPL claim (JA1281-1318).

Magistrate Levy's February 2007 Report and Recommendation.

After reviewing the foregoing facts (SPA1-12), Magistrate Judge Levy concluded that the Court should abstain on Burford abstention grounds (SPA41-42). After extensively analyzing the ripeness issue and concluding that plaintiffs' claims became ripe once ESDC published its Determination and Finding of public use (SPA14-29), Magistrate Levy found that two Burford factors -- "the degree of specificity of the state regulatory scheme" and "whether the subject matter of the litigation is traditionally one of state concern" -- "weigh in favor of abstention" (SPA33-42). In light of his recommendation that the Court dismiss plaintiffs' federal claims on Burford abstention grounds, Magistrate Levy stated that their supplemental state law claim may be dismissed under 28 U.S.C. §1367(c)(3)(SPA40-41).

The parties then collectively challenged all of Judge Levy's recommendations.

The District Court's Memorandum and Order.

As an initial matter, the District Court declined to abstain on Burford abstention grounds (SPA53). That was because, the Court reasoned, "federal-court review of the questions presented in this and similar cases will not disrupt New York's effort to establish a coherent eminent-domain policy" (SPA54). The Court also adopted the Magistrate Judge's recommendations that the issues are ripe for review but not

subject to abstention under Younger v. Harris, 401 U.S. 37 (1971) (SPA53; 84).

In then finding that plaintiffs "have not sufficiently alleged that the takings at issue violate the public use requirement, the District Court, citing Berman v. Parker, 348 U.S. 26 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); and Kelo v. City of New London, 545 U.S. 469 (2005); stated that "a taking fails the public use requirement if and only if the uses offered to justify it are 'palpably without reasonable foundation,' such as if (1) the 'sole purpose' of the taking is to transfer property to a private party or (2) the asserted purpose of the taking is a 'mere pretext" for an actual purpose to bestow a private benefit" (SPA98)(internal citations omitted).

Analyzing plaintiffs' complaints under the standard that they must allege "enough facts to state a claim to relief that is plausible on its face," Bell Atlantic Corp. v. Twombly, ___U.S.___, 127 S.Ct. 1955, 1974 (2007), the Court found they did not meet that standard.

As for plaintiffs' claim that there is no public benefit to Atlantic Yards because it supposedly will generate no or minimal economic benefits, will not create jobs, will not materially increase affordable housing, and that the area is not blighted, the Court found those claims are "baseless and may be

rejected even at this early stage of the litigation" (SPA99). That was because the Court found those claims concern only "the measure of a public benefit -- as opposed to its existence" (Id.).

The District Court noted that, although plaintiffs allege that the net gain in tax revenues and job creation has been inflated, they do not allege that there will be no net gain or no jobs created (JA1421). And although plaintiffs claim that the Takings Area is not blighted, the Court noted that "the majority of the Project Area -- which encompasses the Takings Area -- is blighted, and in fact they seem to concede that it is" (SPA99-100).

Indeed, the Court pointed out, ESDC's Blight Study, which is incorporated by reference into the complaint, shows how the Takings Area is blighted (SPA100). The Court found that Atlantic Yards nevertheless is "permissible even if Plaintiffs' own properties are not blighted, because, under Berman, property that is not blighted may be taken by eminent domain "if the redevelopment is intended to cure and prevent reversion to blight in some larger area that includes the property." (Id.). The Court noted that "the ATURA area, which comprises a significant portion of the Project Area, has been designated blighted ten times, first in 1968 and most recently in 2004" (Id., at n.11).

As for plaintiffs' allegation that Atlantic Yards might yield fewer affordable housing units than defendants maintain, the Court found that plaintiffs still do not "allege that the Project will fail to achieve a significant net increase in housing units in the area, and it is clear that it is intended to do so (SPA100). The Court noted that whether those units are "sufficiently affordable may be an important political question . . . the Constitution does not enshrine Plaintiffs' value judgment that a taking lacks a public purpose if it results in "luxury" as opposed to "affordable" housing, and the constitutionality of this taking does not depend on the relative numbers of planned housing units priced at, above, or below market rate (Id.).

Indeed, the Court reasoned, whether Atlantic Yards "will in fact achieve this or any other objective is not a matter that this court may consider" (SPA100, n.12). That is because, in Kelo, the Supreme Court rejected the argument that courts should require a "reasonable certainty" that expected public benefits will accrue (Id.). Creating a "constitutional rule" conditioning judicial approval to an assurance of the likelihood of success of the plan, the Kelo Court ruled, "would unquestionably impose a significant impediment to the successful consummation of many such plans" (Id.).

At any rate, the District Court reasoned, plaintiffs "do not allege that the Project's non-quantifiable public benefits are false" (SPA101). The Court noted that, while plaintiffs allege that the planned sports arena will generate less than $1 million in annual tax revenue, "they do not allege that having a professional team in Brooklyn is not in itself a benefit to the public" (Id.). Indeed, the Court noted, plaintiffs don't even allege that the various uses planned for the Vanderbilt Rail Yard "will fail to benefit the public by their very effectuation, and not merely by their power to generate revenue" (Id.).

The District Court then addressed plaintiffs' claim that any public benefits are "mere pretexts" for bestowing a private benefit on Forest City Ratner (SPA101). In doing so, the Court adopted Justice Kennedy's description of "mere pretext" from his Kelo concurrence (545 US, at 491):

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Under that standard, the District Court found that plaintiffs have not set forth facts supporting a plausible claim of an unconstitutional taking (SPA102). Rather, the Court found, plaintiffs "attempt to satisfy the 'mere pretext' test solely by alleging that the purported purposes of the Project are dubious, but Kelo requires them to allege that the 'actual purpose' of the Project is 'to bestow a private benefit'" on Forest City Ratner (SPA102-103). The Court found the complaints devoid of "any facts suggesting that any Defendant had any reason to bestow a benefit on any private party" (SPA103). Thus, the Court concluded, "even if Plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project are 'mere pretexts' within the meaning of Kelo, i.e., mere pretexts for an actual purpose to bestow a private benefit" (Id.).

The Court recognized that plaintiffs allege that, "[b]y taking plaintiffs' property and giving it to FCRC, defendants intend to benefit FCRC," and also that "Defendants' desire to confer a private benefit to FCRC was a substantial, motivating factor, in defendants' decision to seize plaintiffs' property and transfer it to FCRC," but the Court found that those conclusory allegations are not sufficient to withstand a motion to dismiss (SPA103).

Thus, the District Court found, plaintiffs' allegations "are not plausible grounds to infer that the asserted public uses of the Project are 'palpably without reasonable foundation'" (SPA106). Rather, inasmuch as plaintiffs concede that Atlantic Yards will "create large quantities of housing and office space, as well as a sports arena, in an area that is mostly blighted," their allegations, if proven, "would not permit a reasonable juror to conclude that the 'sole purpose' of the Project is to confer a private benefit or that the proffered purposes for Atlantic Yards are 'mere pretexts' for an actual purpose to confer a private benefit on Forest City Ratner (Id.).

As for plaintiffs' equal protection and due process claims, the District Court found that, since the takings at issue "are rationally related to a legitimate governmental purpose," they do not offend the Equal Protection Clause (JA1429). Moreover, inasmuch as the Second Circuit has already determined that the EDPL's procedures are constitutional, plaintiffs' due process claim must also be dismissed (SPA106-108).

Finally, the District Court declined to exercise supplemental jurisdiction over plaintiffs' EDPL section 207 claim and dismissed that claim without prejudice to being re-filed in state court (SPA108).

SUMMARY OF ARGUMENT

The Determination and Findings for the Atlantic Yards project, the Blight Findings, and the Draft EIS, all explain and substantiate the numerous ways the project would provide diverse public uses and public benefits. They provide an ample basis for this Court to find, as the District Court found, that the proposed takings are for a public use in accordance with the requirements of the Takings Clause, and that the allegations in the complaints fail to state a cause of action as a matter of law.

Indeed, a taking fails the public use requirement only if the uses offered to justify it are "palpably without reasonable foundation." Hawaii Housing Authority v. Midkiff, 467 U.S. at 241. The allegations in the complaints fail even to allege "enough facts to state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 127 S. Ct., at 1974, and the District Court properly dismissed them on that basis.

Accordingly, for the reasons that follow, as well as for the reasons presented in the briefs of the other appellees-defendants, this Court should affirm the judgment from which plaintiffs appeal.

ARGUMENT

EVEN UNDER LIBERAL PLEADING RULES, THE COMPLAINTS STILL FAIL TO STATE LEGALLY SUFFICIENT, PLAUSIBLE ASSERTIONS OF A MISUSE OF THE POWER OF EMINENT DOMAIN, AND ON THAT BASIS THE DISTRICT COURT CORRECTLY DISMISSED THEM.

While it is beyond dispute that a complaint not need include detailed factual allegations, a plaintiff nevertheless has an "obligation" to provide the grounds of his entitlement to relief, and that must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 127 S. Ct., at 1964-1965. Indeed, on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986).

Thus, as the Court instructed in Twombly, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 127 S. Ct., at 1965. The need at the pleading stage for allegations that plausibly suggest the claim "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.' Bell Atl. Corp. v. Twombly, 127 S. Ct., at 1966. Where the complaint "in toto" fails to render plaintiffs' entitlement to relief "plausible," and where plaintiffs "have not nudged their claims

across the line from conceivable to plausible," dismissal is warranted. Bell Atl. Corp. v. Twombly, 127 S. Ct., at 1973-1974.

In short, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d. Cir. 2002) A plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." ATSI Comms., Inc. v. Shaar Fund, Ltd., ___ F.3d.___, 2007 U.S. App. Lexis 16382 at *17 (2d Cir. July 11, 2007).[7]

Finally, this Court reviews *de novo* the grant of a motion to dismiss under Rule 12(b)(6), accepting as true the factual allegations in the complaint and drawing all inferences in the plaintiff's favor. Roth v. Jennings, 489 F.3d 499, 509-510 (2d Cir. 2007); Allaire Corp. v. Okumus, 433 F.3d 248, 249-

[7] Although Twombly addressed the sufficiency of a pleading in an antitrust case, this Court has declined to read the case's "plausibility standard" as relating only to antitrust cases. ATSI Communs., Inc. v. Shaar Fund, Ltd., 2007 U.S. App. Lexis 16382(securities fraud); Iqbal v. Hasty, ___ F.3d ___, 2007 U.S. App. Lexis 13911, (2d Cir. 2007)(qualified immunity); Kassner v. 2nd Ave. Delicatessen, Inc., 2007 U.S. App. Lexis 17523 (2d Cir. 2007)(employment discrimination). Thus, plaintiffs' claim that Twombly is limited to antitrust pleadings and may never be applied in a civil rights context (App. Br., at 30-32) is just plain wrong.

50 (2d Cir. 2006); Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002).[8]

Applying the foregoing standards to a thorough and fair reading of plaintiffs' allegations, the District Court correctly dismissed plaintiffs' complaints.

As the District Court correctly pointed out (SPA98-99), the Supreme Court has held that a taking fails the public use requirement "if and only if the uses offered to justify it are 'palpably without reasonable foundation,'" citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. at 241. Examples cited by the District Court include if the "sole purpose" of the taking is to transfer property to a private party (citing Kelo v. City of New London, 545 U.S. 469, 477 [2005] and Midkiff, 467 U.S., at 245); or the asserted purpose of the taking is a "mere pretext" for an actual purpose to bestow a private benefit (Kelo, at 478)(SPA98).

Thus, in first addressing plaintiffs' contention that the uses offered to justify the project are pretextural -- supposedly because Atlantic Yards will in fact yield no or

[8] The District Court may permissibly consider documents other than the complaint in ruling on a motion under Rule 12(b)(6). Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered. Roth v. Jennings, 489 F.3d, at 509. Even if a document is not attached or incorporated by reference, it may nevertheless still be considered where it is "integral" to the complaint. Id.

minimal economic benefits, will not create jobs, the area is not blighted, and the project will not materially increase available affordable housing (JA58.31-58.32, ¶140) -- the District Court correctly determined that, in effect, plaintiffs are seeking to prove that there is no public benefit whatsoever (JA58.30, ¶135), and that those allegations are "baseless and may be rejected even at this early stage of the litigation" (SPA99).

First, the Draft EIS, Blight Study, and the Determination and Findings (JA105-593; 1204-1227), all of which are incorporated by reference into the complaints, undeniably demonstrated that each of plaintiffs' claims in this regard are entirely implausible.

While plaintiffs allege that the net economic benefit to the City and State "rests upon a faulty premise," was improperly calculated, and is "untenable" (JA58.22-58.23), and that the projected creations of jobs are "grossly distorted and demonstrably untrue" (JA58.27-58.28), they do not claim there will be no benefit at all, as the District Court correctly pointed out (SPA99).

At any rate, even assuming the truth of those allegations, there is no Constitutional requirement that there be a guarantee that expected public benefits will actually accrue. Kelo, 545 U.S., at 487-488. Not only would such a rule represent a substantial departure from Supreme Court

precedent but it "would empower -- and might often require -- courts to substitute their predictive judgments for those of elected legislatures and expert agencies." Id., *quoting* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005). The Kelo Court described the disadvantages of such a "heightened form of review" as "especially pronounced" in a Takings Clause case (Id., at 488):

> Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

See also Midkiff, 467 U.S., at 242 (recognizing that the measure at issue "like any other, may not be successful in achieving its intended goals" but that the Constitution only requires that the legislature "rationally could have believed" it would promote its objective); Brody v. Vill. of Port Chester, 434 F.3d 121, 136 (2d Cir. 2005)("Legislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns. . . . The wisdom or advisability of a public project is not reasonably subject to the adversarial adjudicative process").

And although plaintiffs also assert either that the Takings Area is not blighted or that whatever blight may exist was caused by Forest City Ratner itself (JA58.15-58.17; 58.24-58.25), the District Court correctly pointed out that plaintiffs "do not dispute that the majority of the footprint -- which encompasses the Takings Area -- is blighted, and in fact they seem to concede that it is (SPA99-100). This record also includes comprehensive documentation, on a block-by-block basis, of significant and longstanding blight (JA213-593). See also Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 A.D.3d 144 (1st Dept. 2006), lv. to app. denied, 8 N.Y.3d 802 (2007).

Nevertheless, there is no Constitutional requirement that the entire footprint be blighted where, as here, local government and its authorized agencies "attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis." Berman v. Parker, 348 U.S., at 34-35; See also Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986)(this Court holding that "structurally sound and fully utilized" property may nevertheless be taken as part of Times Square Redevelopment because under Berman redevelopment

need not "by force of the Constitution" be on a "lot by lot, building by building" basis).

Thus, even though the comprehensive Blight Study details how the Takings Area is blighted (JA310-478), and that much of the footprint has been designated for urban renewal since 1968 (JA215-216), the exercise of eminent domain powers is permissible even if plaintiffs' own properties are not blighted, because, as the District Court correctly noted (SPA100), "innocuous and unoffending" property may be taken for redevelopment if the redevelopment is intended to cure and prevent reversion to blight in some larger area that includes the property. Berman, 348 U.S., at 35.

Plaintiffs also contend that Atlantic Yards might result in fewer units of affordable housing than Defendants predict because only a portion are slated to be built during Phase 1 and that the proposed affordable units "will not remotely offset the impact of the luxury housing" that the Project will provide (JA58.25-58.26), an absolute guarantee that defendants' plan will meet every anticipated target is not required by the Constitution. Kelo, 545 U.S., at 487-488. Significantly, however, this record amply demonstrates the municipal and State defendants' good faith commitment to creating affordable housing in New York City (JA964-996), initiated well before Atlantic Yards ever took shape, and

achieving that goal is a proper use of the power of eminent domain. Cf., Midkiff, 467 U.S., at 242 (land oligopoly has "created artificial deterrents to the normal functioning of the State's residential land market" and regulating the evils associated with oligopoly "is a classic exercise of a State's police powers); Yonkers Racing Corp. v. Yonkers, 858 F.2d 855, 867 (2d Cir. 1988)(construction of low-income housing in Yonkers serves a valid public purpose).

Nevertheless, passing on the kind and quantity of affordable housing units planned for Atlantic Yards is simply not the kind of judicial inquiry the Takings Clause contemplates. That is because once a public purpose is established, the means of executing the project are not subject to judicial review. Kelo, 545 U.S., at 489-490 ("This Court's authority . . . extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution"); Berman, 348 U.S., at 33; Midkiff,467 U.S., at 240.

Thus, as the District Court correctly reasoned (SPA100-101), "the Constitution does not enshrine Plaintiffs' value judgment that a taking lacks a public purpose if it results in 'luxury' as opposed to 'affordable' housing, and the constitutionality of this taking does not depend on the relative

numbers of planned housing units priced at, above, or below market rate."

At bottom, plaintiffs cannot and do not genuinely take issue with the considerable public benefits that are integral parts of Atlantic Yards, including the improvements to various mass transit facilities and the new sports arena, which will bring a professional basketball team to Brooklyn. That is true even though plaintiffs allege that the arena will generate less than $1 million in annual tax revenue (JA58.23, ¶96), because, as the District Court pointed out (SPA101), they do not allege that having a professional team in Brooklyn "is not in itself a benefit to the public." The public benefit of those parts of the project are independent of their ability to generate revenue, as the District Court correctly recognized (SPA101).[9]

As a back-up, plaintiffs also contend that any public benefits are "secondary and incidental to the benefit that inures to" Forest City Ratner and that "Defendants' desire to confer a private benefit to FCRC was a substantial, motivating factor in Defendants' decision to seize Plaintiffs' property and

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[9] Significantly, even the Kelo dissent recognized that the power of eminent domain to transfer private property to a private party in order to build a stadium is a public use under the Takings Clause. Kelo, 545 U.S., at 498 (O'Connor, J., dissenting).

transfer it to FCRC" (JA58.30). In other words, they claim that the real purpose is "to bestow a private benefit."

Once again, however, the amended complaint does not even genuinely allege that the "actual purpose" of Atlantic Yards is to bestow a private benefit or that any of the defendants had any reason to bestow a benefit on any private party, as the District Court found (SPA102). There are none of the requisite facts that, if taken as true, even suggest that such an agreement was made. There are not enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Twombly, 127 S.Ct., at 1965.

Finally, the District Court also correctly dismissed plaintiffs' claim that the proposed taking of their property violates their equal protection and due process rights, claims that are based on the same facts as their Takings Clause claim (JA58.33-58.36). That is because, inasmuch as the takings are rationally related to a legitimate governmental purpose, they do not offend the Equal Protection Clause.

Plaintiffs also allege in their complaints that defendants deprived them of their property without due process of law by "providing an empty, meaningless process with a pre-determined outcome" (JA58.35), but this Court has found that the procedures in the EDPL are "appropriate given the narrow role that the courts play in ensuring that [a] condemnation is for a

public use." Brody v. Vill. of Port Chester, 434 F.3d, at 134. Those procedures therefore satisfy the constitutional requirement of due process. Id. at 136.

Plaintiffs nevertheless hope to prevail on this appeal, first, by improperly attempting, in effect, to have this Court grant them leave to amend their amended complaint with additional factual allegations never raised below (App. Br., at 15-21). Those matters, however, are *de hors* the record and are not properly before this Court.[10]

Plaintiffs also contend that the District Court overlooked their "critical" allegations that the idea for Atlantic Yards originated with Forest City Ratner, that the City and State were "convinced . . . to support his vision," and that, from that point, the project was a "*fait accompli*" (App. Br., at 35-37). Even assuming the truth of those allegations, however, "the government's pursuit of a public purpose will often benefit individual private parties," and there is nothing inherently unconstitutional about that. Kelo, 545 U.S., at 485. Moreover, the "mere fact that property taken outright by eminent

[10] It is well-settled that "'a federal appellate court does not consider an issue not passed upon below.'" In re Ishihara Chemical Co. Ltd., 251 F.3d 120, 127 (2d Cir. 2001), quoting Singleton v. Wulff, 428 U.S. 106, 120,(1976) (declining to consider "facts and issues" not raised in the district court). As to the substance of those allegations, the municipal defendants rely on the arguments made by the ESDC and Forest City Ratner in their briefs.

domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." Midkiff, 467 U.S., at 243-244.

Plaintiffs evidently hope those claims will establish that the takings are for a private purpose, but given the unquestionable public uses here -- including a sports arena, upgraded public transportation facilities, public spaces, affordable housing, and removal of blight -- there can be no set of facts plaintiffs can present to a jury that would prove an improper use of eminent domain for the purpose of conferring a private benefit on a particular party, as the District Court correctly found. Midkiff, 467 U.S., at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases").[11]

[11] As the Kelo Court pointed out (545 U.S., at 485, n.14), "[a]ny number of cases illustrate that the achievement of a public good often coincides with the immediate benefiting of private parties. See, *e.g., National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 422, 118 L. Ed. 2d 52, 112 S. Ct. 1394 (1992)(public purpose of facilitating Amtrak's rail service served by taking rail track from one private company and transferring it to another private company); *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 155 L. Ed. 2d 376, 123 S. Ct. 1406 (2003) (provision of legal services to the poor is a valid public purpose)."

Thus, plaintiffs may indeed wish to put defendants' motives on trial (App. Br., at 41-44), but given the uncontroverted and demonstrated public benefits and uses of Atlantic Yards, judicial review can go no further. Kelo, 545 U.S., at 489-490 ("This Court's authority . . . extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution"). See also Brody v. Vill. of Port Chester, 434 F.3d, at 136 ("Legislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns. If Brody seeks a more detailed examination of the thought processes of those exercising the legislative prerogative, he asks us to endorse a judicial invasion into an area exclusively reserved for the legislature. The wisdom or advisability of a public project is not reasonably subject to the adversarial adjudicative process").[12]

Nor is there anything inherently sinister in involving a private developer before a redevelopment plan takes final shape and has completed the review process, as plaintiffs seem

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[12] As EDSC aptly explains in Point II of its brief to this Court, if this case entails an examination of the political process involved in the public use determination, "a federal court's adjudication of the claim would be tantamount to engaging in the intensely local inquiries at issue in Burford and Alabama Public Rail Commission, as the District Court recognized (SPA77). The District Court's rationale for declining to abstain would therefore need to be reexamined.

to suggest (App. Br., at 44-49). As an initial matter, the redevelopment of this area has been contemplated since at least 1968, when the ATURA was created (JA215), and a stadium has been planned since the 1970s (JA165-166), well before Forest City Ratner's involvement. At any rate, the individuals who would benefit from the legislation at issue in Midkiff were certainly known to the Legislature before they acted, and yet, the Court nevertheless found that the legislation was enacted "not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii -- a legitimate public purpose." Midkiff, 467 U.S., at 245. See also Brody v. Vill. of Port Chester, 434 F.3d at 124 (indicating that agreement with a private development company to coordinate the land acquisition and construction contracting aspects of renewal project occurred before "plans for the Project took shape"). Indeed, this fact is even less sinister given that Forest City Ratner undeniably has a demonstrated track record of successfully spearheading large-scale, complex redevelopment projects of this nature in New York (JA597).

In a claim they improperly attempt to raise for the first time in their brief to this Court, plaintiffs also contend that the District Court misconstrued their equal protection claim, because they contend that they were targeted for adverse

treatment for no rational purpose (App. Br., at 51). Not only is that unpreserved, it is also simply an attempt to achieve through a back door what plaintiffs may not attain through the front, that is, judicial second-guessing of which parcels of land are needed for the project. As the Kelo Court, *citing* Berman, noted (545 U.S., at 488-489):

> Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

In a purely perfunctory fashion, plaintiffs contend the District Court also misconstrued their due process claim, because they really claim that there was "an empty, meaningless process with a pre-determined outcome" (App. Br., at 55). Any complaint about the process is foreclosed by this Court's decision in Brody v. Village of Port Chester, 434 F.3d 121, as the District Court correctly found (SPA107). Moreover, there is no factual basis in the complaint for plaintiffs' claim that the review process was pre-determined, and that claim was therefore properly dismissed as facially insufficient as a matter of law.

As the Supreme Court cautioned in Midkiff, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." 467 U.S., at 243-244. And yet, having failed as a matter of law to advance any plausible ground in the amended complaint that Atlantic Yards fails the "public use" test, plaintiffs instead seek to engage the federal courts in an exercise of second-guessing the methods defendants will use to accomplish this public use, which the courts simply cannot and should not do. The District Court wisely understood that, and its order should therefore be affirmed.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL GOLDSTEIN, et al.,

Plaintiffs-Appellants,

- against -

GEORGE E. PATAKI, et al.,

Defendants-Appellees.

ANTI-VIRUS CERTIFICATION

I, Jane L. Gordon, certify that I have scanned for viruses the PDF version of the Municipal Appellees' Brief that will be submitted in this case as an email attachment to briefs@ca2.uscourts.gov and that no viruses were detected. The anti-virus detector used was VirusScan Enterprise Version 8.5i.

Dated: New York, New York
August 31, 2007

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,521 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: August 31, 2007

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