

07-2537 CV

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IN THE  
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, GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL, INC., doing business as Freddy's Bar and Backroom, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., AARON PILLER and ROCKWELL PROPERTY MANAGEMENT, LLC,

Plaintiffs-Appellants,

v.

GOVERNOR GEORGE E. PATAKI, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, doing business as Empire State 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, BROOKLYN ARENA, LLC, MICHAEL BLOOMBERG, DANIEL DOCTOROFF, ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF NEW YORK and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellees.

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

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BRIEF FOR STATE DEFENDANTS-APPELLEES

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## **PRELIMINARY STATEMENT**

This brief is submitted on behalf of defendant-appellee George E. Pataki, the former Governor of the State of New York, who is sued in his individual capacity for money damages. Plaintiffs-appellants challenge the use of eminent domain in connection with the Atlantic Yards Arena and Development Project by defendant-appellee New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"), an independent public authority. The United States District Court for the Eastern District of New York (Garaufis, J.) dismissed plaintiffs' claims for failure to state a claim under the Takings, Due Process, or Equal Protection Clauses.

ESDC is separately defending its decision to exercise eminent domain here, and this brief therefore does not address that issue. We file this brief to point out that whether or not the decision was proper, plaintiffs have stated no claim for damages against Mr. Pataki personally. Their vague, conclusory allegations that Mr. Pataki "controlled" and "conspired" with ESDC do not sufficiently suggest that he was personally involved in the particular actions they challenge as unconstitutional. In any event, Mr. Pataki is entitled to qualified immunity because plaintiffs' allegations do not suggest that he violated any of their clearly established constitutional rights. The district court's judgment therefore should be affirmed.

## ISSUE PRESENTED FOR REVIEW

Have plaintiffs failed to state a claim for money damages against former Governor Pataki individually where they have alleged no specific facts suggesting either that he was personally involved in the challenged acts by ESDC or that he violated clearly established constitutional law?

Mr. Pataki does not address any other issue involved in this appeal.

## STATEMENT OF THE CASE

### A. Background

The Atlantic Yards Project is a twenty-two-acre planned urban development project in Brooklyn, which is to be carried out by defendants-appellees Forest City Ratner Company and its officers and affiliated companies (collectively, "FCRC"). About half of the Project's proposed location is made up of the Atlantic Terminal Urban Renewal Area, which largely consists of a publicly owned rail yard and has been officially designated a blighted area since 1968. (Joint Appendix ["J.A."] 58.13 ¶ 46; 58.15 ¶¶ 55-57) Plaintiffs own or rent real estate within the rest of the Atlantic Yards Project's potential area (J.A. 58.4-58.7 ¶¶ 6-21).

At the end of 2003, FCRC publicized its plan to develop the Atlantic Yards Project after it had acquired the New Jersey Nets basketball franchise, which it intended to house in a sports arena

as part of the Project (J.A. 58.14 ¶ 53). Around the same time, New York City Mayor Michael Bloomberg announced that FCRC would develop the Atlantic Yards Project with the assistance of ESDC, a public-benefit corporation created by the New York State Legislature in 1973 to combat urban blight and encourage development (J.A. 58.17 ¶ 68). ESDC is authorized to acquire real property by eminent domain. See N.Y. Unconsolidated Laws ch. 252, §§ 2, 33 (LEXIS). Two memoranda of understanding among ESDC, FCRC, and the City of New York laid out the plan for development of the Atlantic Yards Project (J.A. 58.17-18 ¶¶ 70-71). In addition, in September of 2005, the Metropolitan Transit Authority ("MTA") agreed to sell FCRC development rights to the rail yard it owned within the Project area for \$100 million (J.A. 58.20 ¶ 80).

Following a public hearing and community forums on the proposed Atlantic Yards Project, ESDC issued findings and a determination that the Project would serve public purposes and that ESDC would use its condemnation power to acquire property to implement the project, including the property owned or leased by plaintiffs (J.A. 58.20-21 ¶¶ 83-87).

## **B. The Complaint and Amended Complaint**

Although New York law provides streamlined procedures for resolving eminent-domain disputes in state courts, see Eminent Domain Procedure Law § 207, plaintiffs chose to bypass this option

and filed a federal lawsuit instead. Plaintiffs asserted that the defendants violated the "public use" requirement of the Takings Clause, the Equal Protection Clause, and the Due Process Clause (J.A. 58.38), and they asked the district court to exercise supplemental jurisdiction over their state-law claims under the Eminent Domain Procedure Law (J.A. 58.36-37 ¶¶ 171-180). They sought injunctive relief and monetary damages from numerous entities and individuals – not only the development companies and their officers and ESDC and its chair, but also several New York City officials (including Mayor Michael Bloomberg) and George Pataki, who was Governor of New York State when the original complaint was filed in October of 2006 (J.A. 27-31 ¶¶ 18-39).

Plaintiffs filed an Amended Complaint in January 2007 (J.A. 58.1-58.40). By then, Governor Pataki's term of office had ended and he had returned to private life. Unlike the original complaint, the Amended Complaint named Mr. Pataki as a defendant only in his individual capacity (J.A. 58.7-8 ¶ 22).

Of the Amended Complaint's one hundred sixty-five paragraphs, only six mentioned Mr. Pataki:

- "At the behest of defendant developer Bruce Ratner, defendants Governor Pataki and Mayor Bloomberg have agreed to allow Ratner and his companies to build the single largest multi-use real estate development in the history of the City of New York in the heart of central Brooklyn." (J.A. 58.2 ¶ 2).



- "Far from an open process, the 'review' and approval for this mammoth Project has been largely, if not solely, the province of the Empire State Development Corporation, an entity wholly controlled by Pataki." (J.A. 58.3 ¶ 4).
- "Defendant George E. Pataki [] is the former Governor of the State of New York. The Governor acted as an employee, agent, and servant of the State, within the scope of his employment, and as a policy-maker with respect to state agencies, State development corporations and public authorities under his control, including without limitation [ESDC and the MTA]." (J.A. 58.7-8 ¶ 22).
- "ESDC is wholly controlled by defendants Pataki and [its chairman Charles] Gargano. It consists of nine directors. The Superintendent of Banks serves as a director as does the Chairman of the New York State Science and Technology Foundation. The remaining seven directors are appointed by defendant Pataki, as is the Chairman, defendant Gargano....Defendants Pataki, Gargano and ESDC are collectively referred to as the 'State Defendants.'" (J.A. 58.8 ¶¶ 24-25).
- "On December 11, 2003, with both Governor Pataki and Mayor Bloomberg already lined up behind it, FCRC announced the Project...." (J.A. 58.14 ¶ 53).

Thus, apart from generalities about the former Governor's role as a "policy-maker" for state agencies and his control over ESDC, only one allegation purports to connect Mr. Pataki to the Atlantic Yards Project: that when FCRC announced its intention to develop the Project in December, 2003, the Governor (along with the Mayor) was "already lined up behind it."

### C. The District Court's Decision

The district court dismissed the Amended Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted (Special Appendix ["S.P. A."] 43-109). The court held that plaintiffs had not stated a claim that the Atlantic Yards Project violated the "public use" provision of the Takings Clause, because the Project indisputably serves public purposes such as eliminating blight. ( See S.P.A. 85-108). Although plaintiffs dispute the degree to which the Project will achieve anticipated benefits such as increasing affordable housing (S.P.A. 99-101), raising tax revenues, and creating jobs, the measure – rather than the existence – of the public benefit is not open to challenge under the Takings Clause.

The district court noted that the plurality in Kelo v. City of New London, 545 U.S. 469, 478 (2005), had observed that an exercise of eminent domain might violate the Takings Clause if its "actual purpose" were to benefit a private party and the public purpose were a "mere pretext" (S.P.A. 101-102). But the court found that plaintiffs' conclusory statement that the Atlantic Yards Project's actual purpose was to benefit FCRC did not make out a "plausible" claim that the public purposes of the Project were pretextual (see S.P.A. 102-106). The plausibility standard came both from Justice Kennedy's concurring opinion in Kelo, 545 U.S. at 491, and from Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007), which

held that a complaint must contain "enough factual matter" to provide "plausible grounds to infer" the basis of the claim. Because plaintiffs relied entirely on their contentions that the claimed public benefits for the Atlantic Yards Project were unrealistic but suggested no reason why any of the defendants would have wanted to benefit FCRC, the court determined that plaintiffs' bald assertion of pretext was not plausible (S.P.A. 102-103).

Because the district court dismissed the entire complaint for insufficiency on this ground, it had no need to rule on former Governor Pataki's distinct individual arguments for dismissal under Rule 12(b)(6).

#### **SUMMARY OF ARGUMENT**

The other defendants, including ESDC, have explained why ESDC's decision to exercise eminent domain in connection with the Atlantic Yards Project is constitutional. But in any event plaintiffs have no basis for seeking money damages from former Governor Pataki personally. Mr. Pataki has – and had – no legal authority over ESDC, and plaintiffs' conclusory allegation that he conspired with ESDC to violate their constitutional rights does not plausibly suggest that he was personally involved in any of the challenged actions.

Mr. Pataki also is entitled to qualified immunity, because nothing that plaintiffs allege he did violated clearly established constitutional law.

#### STANDARD OF REVIEW

This Court reviews dismissal of a complaint for failure to state a claim de novo. Joblove v. Barr Labs., Inc., 466 F.3d 187, 200 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007). The Court accepts as true all material factual allegations in the complaint and the reasonable inferences that would follow from those facts. Id. Dismissal is proper when those facts and inferences fail to show that it is plausible – as opposed to merely speculative – that the plaintiff will be able to prove his entitlement to relief. See Bell Atl. Corp., 127 S. Ct. at 1965-66; Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007) (reading Twombly as “requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.”). Furthermore, the Court may affirm “on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.” Gmurzynska v. Hutton, 355 F.3d 206, 210 (2d Cir. 2004) (internal quotation marks omitted).

## ARGUMENT

### PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR DAMAGES AGAINST FORMER GOVERNOR PATAKI IN HIS INDIVIDUAL CAPACITY

ESDC's brief fully explains why the district court properly dismissed plaintiffs' Amended Complaint for failure to state a claim. In particular, plaintiffs do not dispute that the Atlantic Yards Project serves public purposes, and they have not alleged any facts plausibly suggesting that ESDC's true motivation for exercising its power of eminent domain was to confer a purely private benefit on FCRC.

But wholly apart from the merits of the underlying constitutional issues, the claims for damages from Mr. Pataki personally were properly dismissed because plaintiffs have not adequately alleged his personal involvement in ESDC's exercise of eminent domain here. Furthermore, Mr. Pataki is entitled to qualified immunity. Thus, no matter how this Court rules on plaintiffs' claims against ESDC and the other defendants, it should affirm the dismissal of their claims against Mr. Pataki. See Gmurzynska, 355 F.3d at 210 (the Court may affirm on any grounds supported by the record).

**A. Plaintiffs' Conclusory Allegations Do Not Sufficiently Suggest That Mr. Pataki Was Personally Involved in the Challenged Conduct by ESDC.**

When seeking monetary damages under 42 U.S.C. § 1983 from a state officer in his individual capacity, the plaintiff must show "personal involvement" by the defendant in the allegedly unconstitutional conduct. Ayers v. Coughlin, 780 F.2d 205, 210 (2d Cir. 1985). When the defendant is a supervisory official, the plaintiff must show that he (1) directly participated in the challenged conduct; (2) failed to remedy the conduct after learning of it; (3) created the policy under which the conduct occurred; (4) was grossly negligent in supervising the subordinates who themselves acted; or (5) showed deliberate indifference to the plaintiff's rights by failing to act after learning of the conduct. Iqbal, 490 F.3d at 152. On a motion to dismiss, the question is whether the complaint's factual allegations and the reasonable inferences drawn from those facts plausibly suggest the defendant's personal involvement. See id. at 166 (concluding that the complaint's factual allegations were sufficient because they plausibly suggested defendants' personal involvement in the challenged conduct).

Plaintiffs have not adequately alleged that former Governor Pataki was personally involved in ESDC's decision to exercise its statutory power of condemnation. The Amended Complaint contains no allegations whatsoever that he was directly involved in the

decision. The only allegations that even arguably touch on his involvement are the broad assertions that former Governor Pataki was a "policy-maker" for state agencies and that he "wholly controlled" ESDC. These conclusory statements – whatever they mean – are insufficient to allege that Mr. Pataki was personally involved in the condemnation at issue here.

If by stating that Mr. Pataki "wholly controlled" ESDC plaintiffs meant to suggest that he actually dictated its decisions, that contention is wrong as a matter of law. ESDC is a "corporate governmental agency of the state, constituting a political subdivision and public benefit corporation." N.Y. Unconsolidated Laws ch. 252, § 4 (LEXIS). Like other New York public authorities, ESDC exercises "governmental authority, although it does so independently of the State" and is not "identical with the State itself." Cine 42nd Street Theater Corp. v. The Nederlander Org., Inc., 790 F.2d 1032, 1036, 1044 (2d Cir. 1986) (citations and quotation marks omitted); cf. Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 292-97 (2d Cir. 1996) (holding that the Thruway Authority is not entitled to Eleventh Amendment immunity as an "arm of the State" because it is "independent of the state" and has "an existence quite independent from the state," and the State "exercises the most minimal control" over it); Schulz v. State, 84 N.Y.2d 231, 246 (1994) (public authorities are independent of the State). It is thus irrelevant that the

Governor, subject to the Senate's advice and consent, appoints seven of the nine ESDC members – only three of whom serve at his pleasure, N.Y. Unconsolidated Laws ch. 252, § 4(1) – because once he appoints them he has no further legal authority over their day-to-day decisions. See Matter of Antonetty v. Cuomo, 131 Misc. 2d 1041, 1044-46 (Sup. Ct. Bronx County) (dismissing the Governor as an improper party from a proceeding challenging an action by the Urban Development Corporation), aff'd, 125 A.D.2d 1010 (1st Dep't 1986).

If, on the other hand, plaintiffs merely meant that as Governor of New York, Mr. Pataki's policy preferences influenced others, the allegation fall far short of establishing the type of personal involvement required for § 1983 liability. Because he had no supervisory authority over ESDC and no power to approve or veto its decisions, Mr. Pataki cannot be held liable under any of the traditional tests for personal involvement.<sup>1</sup> See Iqbal, 490 F.3d at 152. Plaintiffs have not alleged – and, given ESDC's statutory independence, could not allege – that Mr. Pataki created the specific policy under which the alleged constitutional violation

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<sup>1</sup>That distinguishes this case from Iqbal, where this Court found it plausible that senior officials from the Department of Justice were personally aware of and condoned the detention of those arrested by federal officers in the New York City area in the aftermath of September 11, 2001. 490 F.3d at 166. While in Iqbal the high-level officials had direct supervisory authority over the detaining officers or involvement in post-September 11th detention decisionmaking, here Mr. Pataki does not have authority over the ESDC.



occurred, failed to remedy it after it was brought to his attention, or was grossly negligent in managing the subordinates who caused the violation. See id. Even if Mr. Pataki "lined up behind" the Atlantic Yards Project, as plaintiffs allege, that does not make him responsible for ESDC's condemnation decision. And even if an inference could be drawn that advocacy of the Atlantic Yards Project by Mr. Pataki indirectly influenced the decision, such advocacy by public officials is protected by the First Amendment unless accompanied by threats, coercion, or intimidation, none of which are alleged here. See X-Men Security, Inc. v. Pataki, 196 F.3d 56, 70-71 (2d Cir. 1999).

Nor do plaintiffs' vague suggestions of a conspiracy between Mr. Pataki and the other defendants suffice. Even before Twombly, it was well established that "to state a claim of conspiracy under § 1983 the complaint must contain more than mere conclusory allegations," and that "diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Dwares v. City of N.Y., 985 F.2d 94, 99-100 (2d Cir. 1993) (citations and quotation marks omitted); see also, e.g., Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002); San Filippo v. U.S. Trust Co. of N.Y., 737 F.2d 246, 256 (2d Cir. 1984); Zemsky v. City of N. Y., 821 F.2d 148, 151 (2d Cir. 1987); Ellentuck v. Klein, 570 F.2d 414, 426 (2d Cir. 1978); Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977). The specific

allegations must plausibly suggest all elements of a § 1983 conspiracy claim: an agreement to act in concert to inflict an unconstitutional injury and an overt act in furtherance of that goal that caused injury. See Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). As this Court has long recognized, permitting a conspiracy claim to proceed in the absence of concrete factual allegations supporting it would be an open invitation to persons dissatisfied with the outcome of government decisions to file baseless federal complaints. Powell v. Workman's Comp. Bd., 327 F.2d 131, 137 (2d Cir. 1964).

Here, although plaintiffs assert generally that the "defendants conspired among themselves . . . and took numerous overt steps in furtherance of such conspiracy" (e.g., J.A. 58.32), they have not alleged any specific overt act on Mr. Pataki's part. The Amended Complaint fails to offer any "details of time and place," let alone enough factual content to permit Mr. Pataki "intelligently to prepare [his] defense" to the conspiracy accusation. Ciambriello, 292 F.3d at 325. The vague conspiracy claims against Mr. Pataki are precisely the kind of effort to trump up a federal claim against which this Court warned in Powell. They thus were properly dismissed by the district court.

**B. Mr. Pataki Is Entitled to Qualified Immunity Because He Violated No Clearly Established Right.**

State officials sued in their individual capacity are immune from liability for money damages if either (1) the actions they are alleged to have committed did not violate clearly established law or (2) it was objectively reasonable of them to think that their conduct was lawful. See, e.g., Iqbal, 490 F.3d at 152. When a defendant asserts qualified immunity, the Court ordinarily should first determine whether the defendant violated a constitutional right and, if so, decide whether that right was clearly established at the time of the challenged action. Id.

As explained above, here plaintiffs' allegations fail to state any constitutional claim against Mr. Pataki. But even if the allegation that Mr. Pataki "lined up behind" the Atlantic Yards Project somehow sufficed at this stage, it still would not show that he violated a clearly established right. At the time of the events discussed in the Amended Complaint – and as it remains today – a takings need only be "rationally related to a conceivable public purpose." Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (emphasis added). Plaintiffs' theory – and the district court's analysis (S.P.A. 101-102) – that an otherwise valid condemnation can fail if it is a pretext is based largely on Justice Kennedy's lone concurrence in Kelo. Pl. Br. at 39-41. Whether or not that theory is correct as a matter of constitutional

interpretation, it cannot be said to have been clearly established.  
Mr. Pataki therefore is entitled to qualified immunity.

### CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York  
August 31, 2007

Respectfully submitted,

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