UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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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, HUDA MUFLEH-ODEH, JAN AKHTAR, and DAVID SHEETS,

Plaintiffs,

v.

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANY, RATNER GROUP, INC., BR FCRF, 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.

CV 06 5827 (NGG) (RML)

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MEMORANDUM OF LAW OF DEFENDANT GEORGE E. PATAKI IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT

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Defendant George E. Pataki, sued in his official capacity as Governor of the State of New York, and also individually, submits this memorandum of law in support of his motion, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the complaint because (1) this Court lacks jurisdiction over the claims against the Governor officially, (2) plaintiffs lack standing to assert those claims, and (3) the Governor is entitled to qualified immunity. In addition, the claims against the Governor should be dismissed for the reasons stated in the motion to dismiss by defendants Charles A. Gargano and the New York State Urban Development Corporation d/b/a Empire State Development Corporation (together ESDC).

PRELIMINARY STATEMENT

Hoping to block the Atlantic Yards Project—ESDC's plan for development of the Atlantic Terminal area of Brooklyn—plaintiffs have sued in federal court to enjoin condemnation proceedings that have yet to be commenced in state court. If state-court condemnation proceedings *are* commenced, it will not be until after Governor Pataki leaves office. Moreover, those state-court condemnation proceedings will be filed not by the Governor, but by ESDC, the public benefit corporation sponsoring the Atlantic Yards Project. ESDC exercises governmental authority (including the Legislature's power of eminent domain), but does so independently of the State of New York and the Governor. Under applicable law, ESDC is the public entity endowed by the Legislature with the power to condemn

properties as part of a land use development and civic project such as the Atlantic Yards Project. Should this Court determine not to dismiss plaintiffs' claims for lack of jurisdiction, on abstention grounds, or because they fail to state a claim—as ESDC urges—and if it were of the view that injunctive relief is warranted, it could enjoin ESDC from commencing condemnation proceedings. Enjoining the Governor would neither be appropriate nor needed. *See Alabama v. Pugh,* 438 U.S. 781 (1978). The Governor therefore is both an improper and unnecessary party.

The complaint make no specific factual allegations against the Governor to support its claims that he will soon unlawfully condemn plaintiffs' properties. Of its one hundred sixty-six paragraphs, just six refer to the Governor. (Cplt. ¶¶ 2, 4, 18, 20, 21, 49.) These assert merely that the Governor is a "policy-maker" for the development corporations and public authorities that allegedly are "under his control," including ESDC, (Cplt. ¶ 18), and that ESDC is "wholly controlled" by Governor Pataki because he appoints seven of ESDC's nine directors, including its Chairman, defendant Gargano. (Cplt. ¶¶ 4, 20.)[1]

Apart from these generalities, only one allegation purports to connect the Governor to the Atlantic Yards Project. According to the complaint, when the Mayor

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[1]This Court should not presume true that ESDC is "wholly controlled" by Governor Pataki for that is not a specific factual allegation but a "bald assertion[] and conclusion[] of law," *Amron v. Morgan Stanley Inv. Advisors*, 464 F.3d 338, 344 (2d Cir. 2006), or a "legal conclusion[], deduction[] or opinion[] couched as [a] factual allegation[]." *Mason v. American Tobacco Co.*, 346 F.3d 36, 39 (2d Cir. 2003), *cert. denied,* 541 U.S. 1057 (2004). Moreover, as we show below in Point I(A), this bald assertion and legal conclusion is inaccurate.

of New York in December 2003 announced that Forest City Ratner Company would be developing the Atlantic Yards Project with ESDC, (Cplt. ¶ 64), the Governor was "already lined up behind" it. (Cplt. ¶ 49.)

These few scattered and cursory references are insufficient to sustain any legally cognizable claims against the Governor.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE CLAIMS ASSERTED AGAINST GOVERNOR PATAKI IN HIS OFFICIAL CAPACITY

A. Plaintiffs Have Failed to Allege Governor Pataki Has Any "Direct Connection to or Responsibility For" the Taking of Their Properties

This Court lacks jurisdiction over plaintiffs' claims against Governor Pataki officially because the complaint's factual allegations do not establish his "direct connection to or responsibility for" the allegedly unlawful taking of their properties. Suits against State officials in their official capacity in federal court, such as this, are suits against the State and thus barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). The Eleventh Amendment bars suits against State officials, such as Governor Pataki, when they are sued for money damages in their official capacities for alleged violations of federal law because such claims really are claims against the State. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999).

An exception permits actions to be brought against state officers who allegedly are violating federal law, though only for prospective injunctive relief. *Ex*

Parte Young, 209 U.S. 123 (1908). But *Ex Parte Young* carved a "limited exception" to the Eleventh Amendment. *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 371 (2d Cir. 2005). Under *Ex Parte Young*, a plaintiff may sue state officials but (1) only for prospective injunctive relief, and (2) only if they have a "direct connection to, or responsibility for, the alleged illegal action." *Reynolds v. Blumenthal*, 2006 U.S. Dist. LEXIS 68970, at *25-26 (D. Conn. Sept. 26, 2006); *see also Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984); *Marshall v. Switzer*, 900 F. Supp. 604, 615 (N.D.N.Y. 1995).

The converse is also true: the Eleventh Amendment forbids an action seeking to enjoin a state official who does *not* have a direct connection to, or responsibility for the challenged activity, for such an action really seeks to enjoin the State. *Confederated Tribes & Bands of the Yakama Indian Nation v. Locke*, 176 F.3d 467, 469-70 (9th Cir. 1999); *Cincotta v. New York City Human Res. Admin.*, 2001 U.S. Dist. LEXIS 11457, at *28 & n.7 (S.D.N.Y. July 31, 2001).

In *Yakama Indian Nation*, an Indian tribe seeking to exclude a state lottery from its reservation where it operated a casino sued Washington State's governor. Invoking *Ex Parte Young*, the tribe contended that the Eleventh Amendment was no bar because it sought prospective injunctive relief against the governor. 176 F.3d at 469. The Ninth Circuit disagreed. The tribe's action, it held, was "clearly barred from federal court" because the tribe did not allege (and could not under

Washington law) that the governor had the "requisite connection" to the state lottery. *Id.* at 470 & n.6. The state lottery was a "separate state agency" operated by "an independent Commission" whose members are appointed by the governor. *Id.* at 469. The governor thus did not have the "responsibility of operating the state lottery or determining where its tickets will be sold." *Id.* at 470. "Because the governor lacks the requisite connection to the activity to be enjoined," the court held, the tribe was impermissibly attempting to "make the state a party." *Id.* at 470 (quoting *Ex Parte Young*, 209 U.S. at 157).

Similarly, in *Cincotta v. New York City Human Res. Admin.*, plaintiff was not allowed to seek injunctive relief against New York's Attorney General under *Ex Parte Young* because plaintiff "made no allegations of wrongdoing"on the Attorney General's part, and thus failed to show his "direct connection to, or responsibility for, the alleged illegal action." 2001 U.S. Dist. LEXIS 11457, at *28 & n.7.

Like the complaints in *Yakama Indian Nation* and *Cincotta*, the complaint here is insufficient. It contains no allegations that the Governor in his official capacity has had any "direct connection to, or responsibility for" the activity sought to be enjoined. It fails to allege his "direct connection to, or responsibility for" the Atlantic Yards Project generally, much less the allegedly illegal taking of plaintiffs' properties. For that reason, though plaintiffs purport to sue the Governor, they really are seeking to enjoin the State of New York. But the Eleventh Amendment bars all federal suits seeking any form of relief against the State. *Pennhurst State*

Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-100 (1984); *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 604-605 (2d Cir. 1988).

The conclusory allegation that ESDC is "wholly controlled" by Governor Pataki because of his statutorily defined appointment powers falls far short. ESDC is a "corporate governmental agency of the State constituting a political subdivision and public benefit corporation." N.Y. Unconsol. L., c. 252, § 4. Like other New York public authorities, ESDC exercises "governmental authority, but 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); *cf. Mancuso v. New York 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).

That the Governor, subject to the Senate's advice and consent, appoints ESDC members (only three of whom serve at his pleasure, Unconsol. L., c. 252, § 4), is no basis for holding him liable for ESDC's allegedly improper acts. *See Antonetty v. Cuomo*, 131 Misc. 2d 1041, 1044-46 (Sup. Ct. Bronx Co.), *aff'd*, 125 A.D.2d 1010 (1st Dep't 1986), *app. denied*, 70 N.Y.2d 602 (1987) (dismissing the Governor as an unnecessary and improper party from proceeding challenging UDC

action because UDC exists "separate and apart from the Governor" and his alleged "influence" over the UDC's chair was "insufficient to state a claim against the Governor who had no "legal authority" to control the UDC). *See Mancuso,* 86 F.3d at 295 (noting that although Governor appoints members of Thruway Authority, their actions are "essentially unreviewable" by the Governor and he does not have "a veto power" over their actions); *Raymond Int'l, Inc. v. The M/T Dalzelleagle*, 336 F. Supp. 679, 682 (S.D.N.Y. 1971) (holding that the Triborough Bridge and Tunnel Authority is an "independent corporate entity, standing on its own feet," even though its chair and members are appointed by the Governor); *TM Park Ave. Assoc. v. Pataki*, 986 F. Supp. 96, 104-106 (N.D.N.Y. 1997), *vacated on other grounds*, 214 F.3d 344 (2d Cir. 2000) (holding that the Dormitory Authority is not an "arm of the state" entitled to sovereign immunity even though the Governor appoints its members because its acts are not "reviewable either by the governor or other state officers"). *See also Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978) (noting that New York's Governor has "no general control or powers of supervision or operation" over "so-called independent agencies, such as public authorities").

The complaint's scanty allegations fall well short of what would be needed to sufficiently allege the Governor's direct connection to the as-yet-to-occur taking by ESDC of plaintiffs' properties. Nor can this failure be cured by repleading. ESDC's statutory framework as well as applicable case law about New York's public authorities plainly dictate that claims do not lie against the Governor for the matters under consideration here.

B. Plaintiffs Do Not Have Standing to Assert These Claims Against the Governor

For similar reasons, this Court lacks jurisdiction under Article III of the Constitution over plaintiffs' claims against the Governor officially because plaintiffs lack standing to assert them. They should therefore be dismissed.

To establish standing to seek prospective injunctive relief against the Governor—the only relief they can obtain against him in his official capacity—plaintiffs must show (1) that they are about to suffer an injury in fact, (2) that there is a "causal connection between the injury and the conduct complained of," and (3) that it is "likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Baur v. Veneman*, 352 F.3d 625, 631-32 (2d Cir. 2003). Because standing is "both plaintiff-specific and claim-specific," *Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006), plaintiffs must satisfy each of these three requirements for each defendant, including the Governor. *See Back v. Bayh*, 933 F. Supp. 738, 752 (N.D. Ind. 1996); *Project Basic Tenants Union v. Rhode Island Hous.& Mortgage Fin. Corp.*, 636 F. Supp. 1453, 1461-62 (D.R.I. 1986).

Here, even assuming that plaintiffs have alleged a sufficient injury—the prospective taking of their properties—they have not satisfied either of the two other standing requirements. They have alleged neither how the *Governor* has caused or will cause that injury, nor what this Court could lawfully order the

Governor to do that would redress their threatened injury. *See Okpalobi v. Foster*, 244 F.3d 405, 426-28 (5th Cir. 2001) (en banc).

In *Okpalobi*, plaintiffs sued the Governor and Attorney General of Louisiana to challenge a statute that created a private civil right of action allowing women to sue doctors who had performed their abortions. The district court enjoined the statute's implementation, but the en banc Fifth Circuit reversed. It held that plaintiffs could not satisfy two essential requirements for standing—the causal-connection requirement and the redressability requirement. *Id.* at 426.

Both the Governor and the Attorney General were "powerless" to enforce the statute or to prevent any threatened injury from its enforcement. *Id.* Plaintiffs therefore lacked standing because they did not and could not allege how the state officials "play a causal role" in their injury. *Id.* Similarly, because the Governor and the Attorney General had no "ability or duty" to stop a private litigant from suing a doctor under the statute, they had "no power to redress" plaintiffs' asserted injuries. *Id.* at 426-27. The district court had enjoined implementation of the statute, but the Fifth Circuit called its injunction "utterly meaningless." *Id.* And it noted that it could not think of any practicable injunction against the Governor or the Attorney General that would "bar private plaintiffs from suing doctors or courts from hearing such suits." *Id.* at 427 n.34.

Here, as in *Okpalobi*, plaintiffs have failed to show how the Governor has played a role in causing their alleged threatened injuries. And here, as there, there

is no reasonable and practicable order for this Court to issue and enforce against the Governor that would redress plaintiffs' alleged threatened injuries.

II. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST GOVERNOR PATAKI IN HIS INDIVIDUAL CAPACITY

A. The Complaint Does Not Allege the Governor's Personal Involvement in the Taking of Their Properties

Plaintiffs' claims that the Governor as an individual is about to unlawfully exercise the power of eminent domain to seize their properties (Cplt. ¶ 1), and so personally should pay them compensatory and punitive damages, are equally unavailing, and also should be dismissed.

As we show above, the complaint fails to allege, as it must, that the Governor has been "personally involved" in the as-yet-to-occur taking of their properties. To state a claim against the Governor in his individual capacity, plaintiffs must allege his "personal involvement" in the alleged constitutional deprivation. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065 (2d Cir. 1989). They must set forth "specific and detailed factual allegations" not "bald assertion[s]" and "conclusory terms." *Tricoles v. Bumpus*, 2006 U.S. Dist. LEXIS 17457, at *11-12 (E.D.N.Y. Mar. 23, 2006).

But plaintiffs' complaint does not do so. References in it to the Governor, as we have already shown, are sparse and conclusory. Nowhere does the complaint specifically allege how the Governor has been personally involved as an individual acting under color of state law in the taking plaintiffs' properties for the Atlantic Yards Project.

B. The Governor is Entitled to Qualified Immunity Because He Has Neither Violated Nor is About to Violate Clearly Established Constitutional Rights of Which A Reasonable Person Would Have Known

But even were this Court to determine that the complaint somehow states claims against the Governor individually for money damages, it should still dismiss them. The Governor is entitled to qualified immunity from such claims. Whatever it is that plaintiffs allege he has done or is about to do, they have not alleged, nor can they, that the Governor has or is about to violate clearly established constitutional rights of which a reasonable person would have known. *Demoret v. Zegarelli*, 451 F.3d 140, 149 (2d Cir. 2006). The Governor's immunity from these claims against him individually is especially significant here because plaintiffs' conceded purpose in filing this action is to obtain expedited discovery. As the Supreme Court recognizes, qualified immunity shields government officials not only from liability for damages but from discovery and other "burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Because qualified immunity protects government officials—most especially highly placed executive branch officials such as the Governor—from "distraction from official duties, inhibition of discretionary action, and deterrence of able people from public service," *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), immunity questions should be resolved at the "earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

This Court should decide, first, if plaintiffs' complaint alleges that the Governor has deprived them of a recognized constitutional right. *Skehan v. Vill. of Mamaroneck,* 465 F.3d 96, 107 (2d Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006). If not, this Court need not reach the qualified-immunity question. *Saucier*, 533 U.S. at 201. For the reasons set forth by the ESDC defendants and the Forest City Ratner defendants in their motions to dismiss, neither the Governor nor any of the other defendants has violated or is about to violate these plaintiffs' rights under the Public Use Clause of the Fifth Amendment. Because it is undisputed that there has not yet been any takings, and because injunctive relief is not available against the Governor individually, the court need not proceed beyond the first prong of the qualified-immunity analysis on the individual claim against the Governor, and the claim should be dismissed.

But should this Court determine that plaintiffs have sufficiently alleged Governor Pataki's personal involvement in a violation of the Public Use Clause,[2] and assuming (for now) that those rights were clearly established, it should nevertheless grant him qualified immunity if it was "objectively reasonable" for the Governor to believe that he has not violated plaintiffs' rights under the Public Use Clause. *Pabon*, 459 F.3d at 248.

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[2]Because plaintiffs have acknowledged that their case is "basically limited" to a claim brought under the Public Use Clause (Tr. of Proc. at 5:18-21), we address here only the question whether it was objectively reasonable for the Governor to believe that he was not violating plaintiffs' rights under the Public Use Clause.

Plaintiffs have failed to allege specifically what the Governor personally, as opposed to officially, has done or is about to do to violate their rights under the Public Use Clause. Other than generalities, plaintiffs' only specific allegation relating to the Governor is that when the Mayor of New York in December 2003 announced that Forest City Ratner Company would be developing the proposed Atlantic Yards Project with ESDC (Cplt. ¶ 64), the Governor was "already lined up behind" it. (Cplt. ¶ 49.) Without more, plaintiffs cannot establish that it was objectively unreasonable for the Governor to support a project developed by ESDC, the entity created by the State Legislature to "promot[e] large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas" throughout New York State. *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 31 A.D.3d 144, 146 (1st Dep't 2006).

C. The Claims Against the Outgoing Governor as an Individual Will Soon Be Moot

Plaintiffs conclusorily allege that defendant George E. Pataki is about to unlawfully use his powers as Governor to take their properties and give them to a private developer. (Cplt. §§ 129, 140, 147, 153, 160, 162.) They demand that, when this happens, Governor Pataki will irreparably harm them and so should have to pay them money damages to both compensate them and punish him. (Cplt. §§ 5, 144, 157, 166.) Yet plaintiffs concede that: (1) no taking of their properties has yet happened; (2) such a taking of their properties would be done by ESDC and ESDC can do so only by commencing condemnation proceedings under Article 4 of the

Eminent Domain Procedure Law (Tr. of Proc. at 14:15 to 15:8); and (3) ESDC is unlikely to file such condemnation proceedings under Article 4 until *after* the Appellate Division has considered and finally decided any challenges to the proposed takings under section 207 of the Eminent Domain Procedure Law. (Tr. of Proc. at 14:15-21.)[3]

Two weeks from now, at midnight on December 31, 2006, defendant George E. Pataki will no longer be the Governor of New York State. Equally certain is that when Governor Pataki leaves office, plaintiffs' properties will not yet have been taken from them. He will therefore not have caused them to suffer any harm, let alone irreparable harm, while he was Governor. Governor Pataki's departure will moot plaintiffs' claims that, acting under color of state law, he is about to unlawfully take their properties and irreparably harm them. Accordingly, plaintiffs' claims against him as an individual should be dismissed as moot.

CONCLUSION

For the foregoing reasons, defendant George E. Pataki's motion to dismiss the complaint should be granted.

Dated: New York, New York
December 15, 2006

[3]As ESDC notes in its brief, ESDC published its final determination and findings under EDPL § 204 on December 11 and 12, 2006, and prospective condemnees have 30 days from then (which is nearly two weeks *after* Governor Pataki leaves office) to file a petition for review in the Appellate Division. (ESDC Br. at 8-10.)

Respectfully submitted,

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