UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- x

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

CV-06-5827 (NGG) (RML)

Plaintiffs,

-against–

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BRUCE C. RATNER, JAMES B. 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.

---------- x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CITY DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for the City Defendants
100 Church Street
New York, New York 10007
(212) 788-1578

Susan E. Amron
Michael Burger
Of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Cases (cont.) **Page**

Federal Statutes

Federal Rules

State Statutes

PRELIMINARY STATEMENT

Defendants City of New York, New York City Economic Development Corporation, Michael Bloomberg, Daniel Doctoroff, Andrew Alper, and Joshua Sirefman (collectively, "City defendants"), submit this Reply Memorandum of Law in further support of their motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) to dismiss the complaint and, now, the amended complaint. The City defendants also join the reply memorandum of law submitted separately by Charles A. Gargano and the New York State Urban Development Corporation d/b/a/ the New York State Empire State Development Corp. (collectively "ESDC"), and incorporate the arguments set forth therein.

In Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl. Memo. of Law"), plaintiffs repeat the fundamental error of the complaint, namely, they attempt to save their facially deficient claims of constitutional deprivation with nonspecific and conclusory allegations of "conspiracy." Plaintiffs' attempt fails. As elucidated by ESDC, plaintiffs' federal claims amount to little more than strategic puffery, devoid of any substantive merit: their claims are not ripe, their claims warrant abstention in favor of the ongoing state proceedings, and, in any event, plaintiffs fail to state a cause of action for violations of the Takings, Due Process or Equal Protection clauses of the U.S. Constitution.

Moreover, plaintiffs' own opposition memorandum makes abundantly clear that there is absolutely no legal basis for plaintiffs' claims against the City defendants. Plaintiffs fail to cite to a single case, from any jurisdiction, that supports their claim that City defendants could possibly be held liable for the allegedly "unconstitutional" taking of their property. Similarly, their insistence that they are entitled to discovery regardless of their failure to state a claim—purportedly because they provided City defendants with notice of their insufficient claims—is

nonsense, and only confirms the transparent purpose of their inappropriate filing of a challenge to a state agency's eminent domain proceeding in federal court.

STATEMENT OF FACTS

For a complete statement of the relevant facts, City defendants respectfully refer the Court to the statement of facts set forth in the Memorandum of Law in Support of City Defendants' Motion to Dismiss the Complaint ("City Memo. of Law") and in the Memorandum of Law of ESDC Defendants in Support of Their Motion to Dismiss the Complaint ("ESDC Memo. of Law"). Here, City defendants note only that on January 5, 2007, plaintiffs filed an amended complaint, which included no changes with respect to plaintiffs' claims against the City defendants. City defendants' motion should therefore be considered a motion to dismiss the amended complaint

ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION AGAINST THE CITY DEFENDANTS[1]

Despite plaintiffs' insistence that their case against the City defendants must proceed toward summary judgment, dismissal for failure to state a claim is entirely proper at this stage because "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir. 1999). Indeed, as argued more fully in the City Memo. of Law, the complaint fails to state a cause of action against any of the City defendants either in their individual capacity or in their official capacity. Plaintiffs' conclusory allegations of conspiracy are simply not sufficient to preclude dismissal.

[1] City defendants limit this reply to the issues specific to them, and respectfully defer to the arguments contained in the ESDC reply memorandum on the issues regarding the lack of ripeness, abstention, and failure to state a cause of action for illegal takings and violations of plaintiffs' due process and equal protection rights.

A. Dismissal is Appropriate Because Plaintiffs Fail to State a Valid Cause of Action

To withstand the motion to dismiss their claims against a City defendant in his personal capacity, plaintiffs must allege specific facts showing that defendant's "personal involvement" in the deprivation of plaintiffs' constitutional rights. *Obilo v. City Univ. of N.Y.*, 2003 U.S. Dist. LEXIS 2886, *66 (E.D.N.Y. 2003); *see also Brown v. O'Shea-Schell*, 2006 U.S. Dist. LEXIS 80857, *6 (E.D.N.Y. 2006); *Dove v. Fordham University*, 56 F. Supp. 2d 330, 335-36 (S.D.N.Y. 1999), *aff'd without opinion*, 210 F.3d 354 (2d Cir. 2000) (table). To survive the motion to dismiss their claims against any of the City defendants in their official capacity, plaintiffs must allege specific facts showing that that defendant was "the moving force" behind the alleged constitutional deprivation. *See, e.g.*, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978); *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 200 (1997). Plaintiffs do neither. Rather, plaintiffs attempt to confuse the straightforward issue before the Court by arguing that it is not incumbent upon them to actually state a cause of action, but only to "afford[] defendants adequate notice of the nature of the claims against them." Pl. Memo. of Law at 54 (emphasis added). Regardless of the sufficiency of the notice of the kind of claim they would like to prove, however, "[i]n order to survive dismissal, a plaintiff must assert a cognizable claim and allege facts that, if true, would support such a claim." *Boddie v. Schnieder*, 105 F.3d 857, 860 (2d Cir. 1997).[2]

[2] In support of their "notice" theory, Plaintiffs rely on *Philips v. Girdich*, 408 F.3d 124 (2d Cir. 2005). *See* Pl. Memo. of Law at 50. In that case, the Second Circuit primarily addressed the technical sufficiency of a *pro se* complaint under Rules 8 and 10. Notably, the Court there reiterated the "bedrock tenet of civil procedure," Pl. Memo. of Law at 56, that a complaint may be dismissed where "it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations." *Philips*, 408 F.3d at 127 (internal quotes and citations omitted). None of the other cases cited by plaintiffs are to the contrary. *See James v. Aidala*, 389 F. Supp.2d 451 (W.D.N.Y. 2005) (complaint deemed sufficient where facts alleged could support claim of Section 1983 liability); *Shariff v. Goord*, 2005 U.S. Dist. LEXIS 224 (W.D.N.Y. Aug. 4, 2005) (same); *Evans LLC v. Pataki*, 89 F. Supp.2d 250 (N.D.N.Y. 2000) (same).

Here, the facts alleged, even if true, do not support a claim for personal or municipal liability against any of the City defendants. Plaintiffs' entire case revolves around their claim that their property will be taken for an allegedly private use in violation of the Fifth Amendment. None of the City defendants are parties to the condemnation being undertaken by ESDC pursuant to the Eminent Domain Procedures Law. *See, e.g.,* Amended Complaint, Fourth Cause of Action. Tellingly, plaintiffs offer no support whatsoever for the proposition that a non-condemning entity can, or should, be held liable for an allegedly improper condemnation.[3]

In order to fluff up their claims against City defendants, plaintiffs conflate the condemnation of their property with the entirety of the Atlantic Yards project, arguing that the City's commitment of $100 million to the Atlantic Yards project, the agreement by the City to convey its own property to ESDC for the project, and its acknowledgement of ESDC as lead agency for the project, as well as EDC's agreement to coordinate City agency activity in support of the project, somehow all add up to the City defendants' being either "personally involved" in, or, alternatively, the "moving force" behind, the condemnation of plaintiffs' property. Pl. Memo. of Law at 54 – 55.[4] Plaintiffs are off-base. The proposed condemnation of plaintiffs' property is only one small part of the Atlantic Yards project, and, although the City supports the

[3] A diligent search undertaken by this office failed to unearth any instance where the issue was addressed, indicating that plaintiffs are treading new ground in seeking to expand the potential targets of takings lawsuits to any and all entities that play a role in developing large-scale projects of which an individual taking may be a small part. Past cases, however, provide some guidance. The U.S. Supreme Court has stated that "ordinary principles of proximate cause govern the causation inquiry for takings claims." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 344 (2002). Moreover, in *Pointer v. Villane*, a complaint which included, among other things, "vague references to the NAACP [a non-condemning entity] as the moving force" behind a condemnation, was held insufficient to satisfy Rule 8 requirements. 1991 U.S. Dist. LEXIS 4701 at *8-9 (S.D.N.Y. April 10, 1991).

[4] The complaint itself contains no allegations whatsoever concerning defendants Andrew M. Alper, Joshua Sirefman or EDC. Although plaintiffs try to remedy that deficiency in their memorandum, a "claim for relief may not be amended by the briefs in opposition to a motion to dismiss." *Disabled in Action of Metro. N.Y. v. Trump Int'l Hotel & Tower*, 2003 U.S. Dist. LEXIS 5145 at *44 (S.D.N.Y. 2003), quoting *Telectronics Proprietary Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 836 (S.D.N.Y. 1988). *See also, Auguste v. Dep't of Corr.*, 424 F. Supp. 2d 363 , 368 (D.Conn. 2006) (memorandum of law cannot amend complaint); *Daury v. Smith*, 842 F.2d 9 (1st Cir. 1988) (same).

project in its entirety, the City's support does not make it liable for any condemnation. Indeed, the City's role in the Atlantic Yards project is spelled out in the two MOUs annexed to ESDC's moving papers.

Moreover, even if plaintiffs have stated a claim against the City defendants in their individual capacity, any defendants subject to such a claim are entitled to qualified immunity from any claim for money damages under Section 1983, and the complaint should be dismissed. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004) (qualified immunity defense may be raised on 12(b)(6) motion if defense appears on face of complaint).

B. Plaintiffs' Conspiracy Claims Do Not Save the Complaint

Plaintiffs attempt to sustain their claims against the City defendants with their repeated references to a purported "conspiracy." However, while plaintiffs argue that the case should continue because "[a]t the summary judgment stage, the City defendants will be free to submit all the evidence they want that the taking of plaintiffs' property is, as they claim, 'being undertaken solely by ESDC,'" Pl. Memo. of Law at 56, plaintiffs themselves have already acknowledged as much by filing their EDPL § 207 challenge against ESDC alone. Amended Complaint, ¶¶ 171-180.

Ultimately, plaintiffs' conclusory, nonspecific allegations regarding the City defendants' purported role in the alleged conspiracy are insufficient to sustain a cause of action. As stated by the Second Circuit, such "diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." *Ciambriello v. County of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002). Thus, it is critical that plaintiffs identify some misconduct on the part of the City defendants. Plaintiffs have not done so.[5] Nor can they.

[5] Plaintiffs' vain insistence that all of the defendants have misconstrued their tortured due process claim is unconvincing. *See* Pl. Memo. of Law at 46-47, and 57 at fn. 16. The Complaint plainly claims that the City

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the accompanying reply papers submitted by the Empire State Development Corporation, the complaint should be dismissed.

Dated: January 19, 2007
New York, New York

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for the City Defendants
100 Church Street
New York, New York 10007
(212) 788-1578

By: Susan E. Amron
Digitally signed by Susan E. Amron
DN: cn=Susan E. Amron, c=US, o=New York City Law Department, ou=Environmental Law Division, email=samron@law.nyc.gov
Date: 2007.01.19 14:23:45 -05'00'

Susan E. Amron (SA 0355)
Michael Burger (MB 5714)
Assistant Corporation Counsel

defendants were part of a "conspiracy" to "circumvent[] local and community review and local zoning regulations." Complaint at ¶ 160. The process undertaken by ESDC, however, is entirely sufficient. *New York State Nat'l Org. for Women v. Pataki*, 261 F.3d 156, (2d Cir. 2001); *BAM Historic District Assoc. v. Koch*, 723 F.2d 233, 236-237 (2d Cir. 1983) (plaintiffs did not possess liberty interest in ULURP review); *see also Floyd v New York State Urban Dev. Corp.*, 41 A.D.2d 395, 343 N.Y.S.2d 493 (1st Dep't), *aff'd*, 33 N.Y.2d 1, 300 N.E.2d 704 (1973).