UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL GOLDSTEIN, et al.,	:	
Plaintiffs,	:	
v.	:	CV 06 5827 (NGG) (RML)
GEORGE E. PATAKI, et al,	:	
Defendants.	:	

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

ANDREW CUOMO
Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8568

Attorney for Defendant George E. Pataki

PETER SISTROM
Assistant Attorney General
Of counsel

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Former Governor George E. Pataki submits this reply memorandum of law in support of his motion to dismiss the (now-amended) complaint because it fails to state cognizable claims against him in his individual capacity and he is entitled to qualified immunity. In addition, he joins in the Empire State Development Corporation defendants' arguments in reply to plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (filed January 5, 2007) (Opp. Br.), which opposed dismissal of the first three counts of the amended complaint.

PRELIMINARY STATEMENT

Plaintiffs began this lawsuit by suing the Governor in his official capacity—calling him a "policy-makers" who wholly controlled ESDC because of the Governor's statutory duty to appoint its members—and then demanding broad, intrusive, and expedited discovery into his motives for supporting the Atlantic Yards Project and seeking to enjoin his unspecified actions. Now, they have abandoned those claims for injunctive relief. Instead, plaintiffs in their recently amended complaint assert claims only against now-former Governor George Pataki in his individual capacity and only for money damages.[1]

As we showed in our opening brief (Br. at 13-14), plaintiffs' remaining claims should be dismissed as moot because when Governor Pataki left office their properties had not yet been taken. Their claims also should be dismissed because plaintiffs' fail adequately to allege that he was personally involved in the taking of plaintiffs' properties, and because Governor Pataki has qualified immunity. Plaintiffs try to avoid these arguments by alluding to, albeit without pleading, a supposed conspiracy to violate plaintiffs' civil rights, one "instigated" by the former

[1]Plaintiffs' amended complaint asserts no claims against New York's incumbent Governor, Eliot Spitzer, either in his official capacity or his individual capacity.

Governor, and of which he is the "main architect." (Opp. Br. at 51.) But accusations of conspiracy in plaintiffs' memorandum of law cannot rescue from dismissal a pleading that is factually and legally deficient. Indeed, the amended complaint adds no new factual allegations to their initial complaint's sparse, conclusory, and legally insufficient allegations. As with the original complaint, the amended complaint barely mentions former Governor Pataki (Am. Cplt. ¶¶ 2, 22, 24-25, 53), and in those few instances, the amended complaint fails to plead facts sufficient to avoid dismissal of plaintiffs' claims that he was personally involved in an unconstitutional taking of their properties and in a conspiracy to deprive them of their civil rights. Accordingly, this Court should dismiss it.

ARGUMENT

I. PLAINTIFFS' REMAINING CLAIMS AGAINST FORMER GOVERNOR PATAKI IN HIS INDIVIDUAL CAPACITY ARE MOOT

As we showed in our opening brief (Br. at 13-14), Governor Pataki's departure from office mooted plaintiffs' § 1983 claims against him individually for money damages because their properties had then not yet been taken (and still have not been taken) and plaintiffs had therefore suffered no harm while he was acting under color of state law. And *if* plaintiffs' properties *are* taken sometime in the future, former Governor Pataki would not be personally liable to them because that taking as a matter of law would be constitutional.

Under New York's Eminent Domain Procedure Law, ESDC may act only through condemnation proceedings under Article 4 of the EDPL to obtain title to plaintiffs' properties. And ESDC will not commence those proceedings until after judicial review of the ESDC's determination and findings under EDPL § 207---including the constitutionality (under both the

state and federal constitutions) of the proposed condemnations and whether they serve a public purpose. That judicial review, under EDPL § 207, is already underway in the Appellate Division, despite plaintiffs' efforts to simultaneously bring it before this Court in their amended complaint.

Because the ESDC's determination and findings now are subject to judicial review, which will necessarily determine the very claims plaintiffs seek to pursue here, there is no basis for plaintiffs' assertion in this Court that they have been subjected to an unconstitutional taking by ESDC, much less by former Governor Pataki. If these plaintiffs (or other plaintiffs) persuade a court to reject ESDC's determination and findings because the Atlantic Yards Project does not serve a public use, benefit, or purpose (or for another reason under EDPL § 207(C)), then ESDC cannot take plaintiffs' properties, and they will suffer no constitutional injury. If, on the other hand, the court confirms ESDC's determination and findings, then ESDC may lawfully take plaintiffs' properties, and plaintiffs cannot maintain their constitutional challenge in this Court.

Plaintiffs assert in their memorandum (Opp. Br. at 51) that former Governor Pataki in his individual capacity took part in a "conspiracy" that has not yet been "completed," and so their claims against him are not moot, disregarding that their amended complaint contains no such claim. Moreover, the only judicial authorities plaintiffs rely on do not support this theory of an unmooted conspiracy.

Beyah v. Coughlin, 789 F.2d 986, 988 (2d Cir. 1986), involved an inmate's suit against prison officials who forced him when he was at Attica to use soap made with pork products. The court held that his transfer from Attica did not moot his claim for money damages because, unlike here, he alleged an actual injury at Attica for which he sought damages.

Plaintiffs' second case, *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282 (S.D.N.Y. 2002), involved a political candidate's First Amendment challenge to local sign ordinances. Although her claims reached the court only after she had lost the election, they were not moot because, unlike plaintiffs here, she alleged that an actual injury had already taken place for which she sought damages.

In both cases plaintiffs had suffered an actual injury and not, as here, only a speculative future injury. Moreover, neither one involved an alleged conspiracy among public officials that was not "completed" until after they left office.

II. PLAINTIFFS HAVE FAILED TO ALLEGE THAT FORMER GOVERNOR PATAKI WAS PERSONALLY INVOLVED IN TAKING THEIR PROPERTIES

As we noted in our opening brief (Br. at 6-7, 10), the complaint contains no allegations that Governor Pataki was personally involved in the ESDC's proposed use of eminent domain to take these plaintiffs' properties for the Atlantic Yards Project. Although plaintiffs have since amended their complaint to add new plaintiffs and a new claim under state law, they have added no new factual allegations of personal involvement by former Governor Pataki while in office.

Plaintiffs merely reassert their conclusion that former Governor Pataki "wholly control[ed] the ESDC," and say that is enough to survive a motion to dismiss. (Opp. Br. at 48-49.) Plaintiffs are wrong. It does not state a cognizable claim for them to allege that the Governor "wholly controls" the ESDC, and hope that "extensive discovery [might] flesh out" their claims, (Opp. Br. at 50), for not only is that a "bare conclusory statement," not "a specific and detailed factual allegation," as we showed in our opening brief (Br. at 2 n.1), but it is wrong—former Governor Pataki did not "wholly control" the ESDC while he was Governor.

Plaintiffs ignore the numerous state and federal cases we cited in our brief (Br. at 6-7), which hold that ESDC and New York's other public benefit corporations operate independently of the State and are not controlled by the Governor (despite the Governor's appointment power). Implicitly conceding thereby that the Governor's appointment powers cannot support their conclusory claim of control (which is all that their complaint alleged), plaintiffs now assert in their memorandum (but do not allege in their amended complaint) that Governor Pataki had an "absolute veto power" over ESDC (and thus "wholly control[ed]" it) because, they argue, the Public Authorities Control Board (PACB) must act by unanimous vote of its three voting members, and the Governor appoints a voting member. (Opp. Br. at 48-49.) This argument just rehashes the claim that the Governor's exercise of his appointment power for ESDC establishes his control of ESDC. It fails here for the same reason it fails there.

Plaintiffs misconstrue the purpose of the PACB. The Legislature in 1976 created the PACB in response to concern that the amount of debt issued by New York's public benefit corporations had "grown dramatically and without effective or comprehensive monitoring." L. 1976, c. 39 § 1. The PACB's primary role is to review, along with the State Comptroller, the financing and construction of projects sponsored by certain public authorities (including ESDC) to ensure that there are "commitments of funds sufficient to finance" their acquisition and construction. Pub. Auth. Law § 51(3). *See, e.g., Wurmfeld Assoc., P.C. v. Harlem Interfaith Counseling Serv., Inc.*, 179 A.D.2d 502, 503 (lst Dep't 1992) (noting that PACB had "approved public financing" for a UDC project); *In re N.Y. State Urban Dev. Corp. [TOH Realty Corp.]*, 165 A.D.2d 733 (1st Dep't 1990) (noting that PACB had authorized UDC to enter into "necessary financial arrangements" for a project).

Here, ESDC asked the PACB for permission to issue up to $100 million of State personal income tax revenue bonds to help in financing the development of the Atlantic Yards Project, and the PACB approved.[2] Contrary to plaintiffs' assertion, the PACB's power to review the financing and construction of projects proposed by ESDC or other public benefit corporations, or their issuance of bonds, does not give the Governor "absolute veto power" over them. It is not sufficient to warrant plaintiffs' allegation that Governor Pataki was personally involved in—indeed was "one of the main architects" of—an illegal conspiracy with ESDC and the Ratner defendants to take their properties. (Opp. Br. at 49.)

Far from helping plaintiffs, the cases they cite as examples of § 1983 claims against government officials that sufficiently alleged their personal involvement (Opp. Br. at 49), highlight how inadequate are their allegations that Governor Pataki was personally involved in the allegedly unlawful taking of their properties.

In *Gronowski v. Spencer*, 424 F.3d 285, 293-95 (2d Cir. 2005), for example, the Second Circuit affirmed a jury verdict against the Mayor of Yonkers because as the "hiring authority" for the city he laid off the plaintiff, one of four Chief Clerks, who had actively campaigned for one of the Mayor's opponent in the last election despite repeated warnings from her boss, a friend of the Mayor's. Although the Mayor also laid off the other Chief Clerks, he reversed their layoffs, and none of them ever left the city payroll, only the plaintiff. *Id.* at 290.

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[2]A copy of the PACB's resolution approving ESDC's participation in the Atlantic Yards Project, dated December 20, 2006, is annexed as Exhibit C to the Declaration of Douglas M. Kraus, which accompanies the Memorandum of Law of ESDC Defendants in Support of Their Motion to Dismiss the Amended Complaint, filed January 19, 2007.

And in *Hous. Works, Inc. v. Giuliani*, 179 F. Supp. 2d 177 (S.D.N.Y. 2001), the court did not dismiss the complaint filed by Housing Works—a "vocal and militant critic" of former New York City Mayor Rudolph Giuliani's AIDS policies—alleging that the Mayor and other city officials had punished it for its activism (which included protestors chaining themselves to desks at the Mayor's campaign headquarters) by refusing to renew Housing Works contracts with the city. But unlike plaintiffs' complaint here, Housing Works' complaint made specific factual allegations that supported the inference that the Mayor was personally involved in retaliating against Housing Works. It "explicitly alleg[ed," for example, that the Mayor had "expressed his outrage" at Housing Work's criticisms and demonstrations, and it alleged that the Mayor had refused to consider its administrative appeals. *Id.* at 203-204.

Plaintiffs apparently recognize the weakness of their allegations of his personal involvement, for they suggest that, even if the Governor had no "*direct* personal involvement" in taking their properties, he had "supervisory authority over [ESDC's] exercising of the power of eminent domain" and "created a policy or custom under which" ESDC unconstitutionally pursued the taking of plaintiffs' properties. (Opp. Br. at 51 n.12.) But this supervisory liability theory suffers from the same defect as their direct personal-involvement theory: Both rely on the same incorrect premise that former Governor Pataki had "undeniable control of the ESDC" (Opp. Br. at 51 n.12), a premise that applicable case law, which we cited (Br. at 6-7) but plaintiffs ignore, explicitly and consistently refutes.

Moreover, plaintiffs' effort to meet their burden to allege former Governor Pataki's personal involvement with the "conclusory statement" that the allegedly unconstitutional taking of their properties by ESDC resulted from a policy created by former Governor Pataki (which

plaintiffs do not bother describing), is unavailing. *See Tricoles v. Bumpus*, 206 U.S. Dist. LEXIS 17457, at *11-12 (E.D.N.Y. Mar. 23, 2006). If that were all plaintiffs had to do, the *Tricoles* court warned, they could "engage in fishing expeditions into the affairs of high-level government officials every time a member of their department is accused of committing a violation under § 1983." *Id.*

Nor can plaintiffs satisfy their burden to allege specific facts showing former Governor Pataki's personal involvement in the allegedly unlawful taking of their properties by making the vague accusation that he was "one of the main architects of a conspiracy to deprive" them of their civil rights. (Opp. Br. at 49.) In the Second Circuit, complaints containing only nebulous allegations of conspiracy to violate civil rights (even complaints drawn by pro se plaintiffs) do not survive dismissal motions. "[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff[s] of [their] constitutional rights are properly dismissed." *Ciambriello v. County of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002). *See e.g., McNeill v. People*, 2006 U.S. Dist. LEXIS 77085, at *12-13 (E.D.N.Y. Oct. 26, 2006) (Garaufis, J.) (dismissing pro se complaint for failing adequately to allege a civil rights conspiracy); *Collins v. City of New York*, 2005 U.S. Dist. LEXIS 38395, at *4-5 (E.D.N.Y. Dec. 21, 2005) (Garaufis, J.) (same). Other than former Governor Pataki's support for the Atlantic Yards Project, plaintiffs assert only a single "fact" to substantiate their illegal conspiracy theory: that he and defendant Bruce Ratner were law school classmates. (Opp. Br. at 49.) Even had plaintiffs alleged this in one of their complaints—rather than in a parenthetical aside in their brief—it is irrelevant. That the two were in the same law school class does not give rise to any inference of an unlawful agreement between the two, nearly forty years

later, to deprive plaintiffs of their constitutional rights. *See Kramer v. City of New York*, 2004 U.S. Dist. LEXIS 21914, at *20-21 (S.D.N.Y. Nov. 1, 2004) (dismissing § 1983 conspiracy claim because, even if the alleged co-conspirators were active friends, "friendship alone is insufficient to support the existence" of a "specific agreement to violate" plaintiffs' civil rights). Yet, here, friendship is the most that plaintiffs have alleged.

Plaintiffs cite just one civil rights conspiracy case (Opp. Br. at 50 n.11), Judge Garaufis's decision in *Pizzuto v. County of Nassau*, 239 F. Supp. 2d 301 (E.D.N.Y. 2003). But comparing what happened there to plaintiffs' allegations here just illustrates the emptiness of their own conspiracy theory. In *Pizzuto*, several corrections officers who beat a prisoner so badly that they ruptured his spleen and killed him, pleaded guilty to federal crimes—conspiring to violate their victim's civil rights. His widow, relying on their guilty pleas and criminal convictions, sued them for money damages under § 1983 alleging a civil conspiracy. Judge Garaufis granted her summary judgment, holding that the defendants' criminal conspiracy convictions estopped them from denying their personal involvement in a civil conspiracy under § 1983. *Pizzuto*, 239 F. Supp. 2d at 308-309.

III. FORMER GOVERNOR PATAKI IS ENTITLED TO QUALIFIED IMMUNITY

Because plaintiffs have not alleged that former Governor Pataki was personally involved in violating their civil rights and because it was objectively reasonable for him to support the Atlantic Yards Project, a land use development and civic project sponsored by ESDC in accordance with all applicable laws, he is entitled to qualified immunity from all of plaintiffs' constitutional claims, as we showed in our opening brief. (Br. at 11-13.)

Unable to disagree, plaintiffs assert merely that former Governor Pataki may not assert qualified immunity *now* before they have had a chance to pursue discovery. (Opp. Br. at 52.) Alleging that Governor Pataki has committed a "motive-based constitutional tort" and so his "personal liability hinges on his motives and intent" (Opp. Br. at 53), plaintiffs contend that this Court cannot decide whether he is entitled to qualified immunity until after they have had discovery. But as the Governor and the other defendants showed in successfully resisting plaintiffs efforts to begin discovery before this Court ruled on our motions to dismiss the complaint, this case does not involve a "motive-based constitutional tort" and plaintiffs are not entitled to discovery of the Governor's purportedly illegal "motives" for supporting the Atlantic Yards Project.

In a true "motive-based constitutional tort" case—as in the three First Amendment retaliation cases cited by plaintiffs (Opp. Br. at 53)—the official's conduct is objectively reasonable, but the officials' subjective intent—racial animus, say, or punishing employees for speaking their minds—is the essence of the wrong. By contrast, in this case, the *only* appropriate inquiry is an objective one: whether the "exercise of the eminent domain power is rationally related to a *conceivable* public purpose." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

As a matter of law, Governor Pataki's allegedly illegal subjective motive for supporting the Atlantic Yards Project is irrelevant. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 136 (2d Cir. 2005). Accordingly, this Court should affirm Governor Pataki's qualified immunity now, at the "earliest possible stage in [this] litigation, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), to

shield him not only from liability for damages but from discovery and other "burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

CONCLUSION

For the foregoing reasons and those set forth in his moving papers (and for the additional reasons urged by ESDC), plaintiffs' claims under 42 U.S.C. 1983 for money damages against former Governor Pataki in his individual capacity should be dismissed.

Dated: New York, New York
January 19, 2007

Respectfully submitted,

ANDREW CUOMO
Attorney General of the State of New York
Attorney for Defendant George E. Pataki

By: _____

Peter Sistrom (PS 3109)
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8568