

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
In the Matter of

DEVELOP DON'T DESTROY BROOKLYN,
et al,

Petitioners - Respondents

For a Judgment Pursuant to Article 78 of the CPLR and
Declaratory Judgement

- against-

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES

Respondents - Defendants
-----X

:
Index No. 100686/06
:
: NOTICE OF MOTION
IN
SUPPORT OF
: MOTION FOR
PRELIMINARY
: INJUNCTION

PLEASE TAKE NOTICE that, upon the annexed affirmation of JEFFREY S. BAKER, dated the 21st day of February, 2006, the accompanying Memorandum of Law, and the exhibits annexed hereto, and upon all the papers and proceedings had herein, the Petitioners-Cross-Appellants by their counsel will move this court at a Motion Term of the Supreme Court, Appellate Division, First Department, to be held at the courthouse, located at 27 Madison Avenue, New York, New York, on the th day of February, 2006, at 10:00 a.m. o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order of this Court pursuant to CPLR Section 5518 issuing a preliminary injunction staying the demolition of buildings known as 608-620 Atlantic Avenue, 461 Dean Street, 463 Dean Street, 585-601 Dean Street, and 620 Pacific Street, all in Brooklyn, New York, until the within cross-appeal can be determined, for the reasons set forth in the annexed affirmation and

Memorandum, and for such

other and further relief as to this Court seems just and proper.

Dated: New York, New York
February 20, 2006

RITZENBERG,

**YOUNG, SOMMER, WARD,
BAKER & MOORE, LLC**

By: _____
Jeffrey S. Baker
Attorneys for Petitioners/Plaintiffs
5 Palisades Drive
Albany, New York, 12205
(518) 438-9907

TO: DOUGLAS M. KRAUS, ESQ.
SKADDEN, ARPS, SLATE,
MEAGHER AND FLOM, LLP
Attorneys for Respondent
Empire State Development Corp.
Four Times Square
New York, NY 10036

JEFFREY BRAUN, ESQ.
KRAMER, LEVIN, NAFTALIS
& FRANKEL, LLP
Attorneys for Respondent
Forest City Ratner Companies
1177 Avenue of the Americas
New York, NY 10036

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION; FIRST DEPARTMENT

-----X

In the Matter of

DEVELOP DON'T DESTROY BROOKLYN,
et al,

:
Index No. 100686/06
:

Petitioners - Respondents

: AFFIRMATION IN
SUPPORT OF
: MOTION FOR
PRELIMINARY
: INJUNCTION

For a Judgment Pursuant to Article 78 of the CPLR and
Declaratory Judgement

- against-

EMPIRE STATE DEVELOPMENT CORPORATION and
FOREST CITY RATNER COMPANIES

:
:

Respondents - Defendants

:

-----X

JEFFREY S. BAKER, an attorney duly admitted to practice before the Courts of the
State of New York hereby affirms under the penalty of perjury and states:

1. I am a member of the law firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for Petitioners-Plaintiffs in the above referenced action. I make this affirmation in support of the Motion for a Preliminary Injunction pursuant to CPLR §5518, pending the resolution of the appeals filed in this action. I am fully familiar with the facts and circumstances set forth in this Affirmation.
2. Petitioners appeal from that part of an order of Supreme Court (Hon. Carol Edmead, J.) dated February 14, 2006 and filed February 15, 2006 which granted in part Respondents Motion to Dismiss the Petition and denied petitioners' motion for a preliminary injunction to block the demolition of certain buildings.

PROCEDURAL HISTORY

3. This proceeding was commenced on January 18, 2006 by Order to Show Cause seeking to block the planned demolition of buildings located on five properties in Brooklyn: 608-620 Atlantic Avenue; 461 Dean Street; 463 Dean Street; 585-601 Dean Street and 620 Pacific Street. All of the buildings are owned or controlled by Respondent Forest City Ratner Companies (FCRC) and all are part of what is known as the Atlantic Yards Project (“Atlantic Yards” or “Project”). The proceeding seeks to overturn an “Emergency Declaration” issued by Responded Empire State Development Corporation (“ESDC”) on December 15, 2006 which purported to determine that an emergency existed with respect to the subject buildings because they presented an imminent threat to public health and safety and thus could be demolished notwithstanding that they were part of a larger project for which the environmental review under the State Environmental Quality Review Act (SEQRA) N.Y. Environmental Conservation Law § 8-0101 et. seq. was still on-going. A copy of the Emergency Declaration is attached as Exhibit A.
4. At the filing of the Order to Show Cause, Petitioners requested a Temporary Restraining Order. Based in part upon the representations of counsel for FCRC that demolition of the buildings was not imminent, the Court denied the request for the TRO and directed respondents to reply to the motion and petition on February 9, 2006 and scheduled oral argument on the motion for the preliminary injunction on February 14, 2006.
5. On February 9, 2006, Respondents filed motions with supporting affidavits and

memorandum of law opposing the request for a preliminary injunction and moving to dismiss the petition for failing to state a cause of action. Respondents did not file an answer and did not file a record of the decision challenged as otherwise required by CPLR § 7804.

6. Supreme Court heard argument on February 14, 2006 for almost three hours wherein the Court heard the argument of counsel and questioned counsel extensively. The Court then issued its decision which had largely been prepared beforehand. The Court denied the request for a preliminary injunction and granted respondents' motions to the extent they dismissed those causes of action of the petition that sought to reverse the emergency declaration issued by ESDC and enjoin FCRC from demolishing the buildings. The Court did grant petition to the extent that it found that David Paget, Esq. and the law firm of Sive, Paget & Riesel, P.C. had a conflict of interest representing ESDC for the environmental review of the Project when it had previously represented FCRC on the same project.
7. On February 17, 2006, ESDC filed a Notice of Appeal on the disqualification of Mr. Paget and was granted a preference, without objection from petitioners, for an expedited appeal. Petitioners are now cross-appealing on the dismissal of that portion of the petition that challenged ESDC's determination and make this motion for a preliminary injunction pending the resolution of that appeal..

THE ATLANTIC YARDS PROJECT

8. The Atlantic Yards Project was announced by FCRC in December 2003, and is anchored by a proposed new arena for the NBA New Jersey Nets team which has been

purchased by a group headed by FCRC principal Bruce Ratner. In addition to the basketball arena, the project includes approximately 9 million square feet of residential, office and commercial space located in approximately 16 high-rise towers. Included therein is the approximately 850, 000 gross square foot arena accommodating up to 20,500 persons, 7,300 residential units, 4,000 parking spaces and a 180 room hotel. The project site encompasses 22 acres of Brooklyn only 8 of which are included within the Metropolitan Transportation Authority's Vanderbilt Yards. The balance consists of city streets and existing buildings, only some of which are owned or controlled by FCRC. Through the powers of ESDC, FCRC plans to use the power of eminent domain to acquire the balance of the project site.

ESDC EMERGENCY DECLARATION

9. Justice Edmead upheld ESDC's declaration that an emergency existed solely upon the February 8, 2006 affidavit of Rachel Shatz, Director of Planning and Environmental Review for ESDC and the report of LZA Technology, FCRC's paid consultant who concluded that the buildings should be demolished. A copy of Ms. Shatz' affidavit is attached as Exhibit B. Justice Edmead concluded that ESDC's determination was rational despite the lack of a certified record, the lack of any affidavit or sworn statement from an LZA engineer and without questioning the obvious inconsistencies in the affidavits and documents presented to the court by FCRC and ESDC.
10. The premise for ESDC's emergency declaration was that the buildings were an imminent threat to public health and safety and must be demolished, however as set forth below, the evidence belied the emergency finding and in fact, FCRC had long

planned to demolish the buildings and only argued for the emergency upon learning that under SEQRA it could not start changing the environment unless it could demonstrate that an emergency existed. And as further shown below, with the collusion of Mr. Paget who has a demonstrated conflict of interest, ESDC collaborated with FCRC in making that finding by not questioning the underlying facts leading to the claimed emergency and did not undertake even the most rudimentary investigation.

**THE EVIDENCE THAT THE BUILDINGS
DO NOT POSE AN IMMINENT THREAT**

11. FCRC began acquiring buildings in the footprint in 2004 and knew that some of the buildings it was acquiring and “would require either substantial maintenance, extensive repairs or renovation, or demolition”. (Affidavit of Andrew Zlotnick, dated February 8, 2006, ¶ 2; attached hereto as Exhibit C). Mr. Zlotnick is a Senior Vice President for Commercial Development for FCRC.
12. According to Mr. Zlotnick in January or February of 2005, he put together a list of buildings that “appeared to me to be so dilapidated as to be potentially dangerous, and therefore to require demolition rather than maintenance”. (Zlotnick Aff. ¶ 3). At or around that time FCRC retained LZA Technology. (Id.).
13. LZA prepared separate reports on each of the buildings it investigated. (Zlotnick Aff. ¶5) While Mr. Zlotnick had identified some buildings as being so potentially hazardous as to require demolition, LZA did not agree on some of those buildings. (Id.) LZA did provide reports to FCRC recommending that “six or seven buildings that FCRC had acquired or was in contract to acquire were so unsafe and structurally unsound that

they should be demolished”. (Zlotnick Aff. ¶ 6). Those reports prepared by LZA have not been provided to the Court.

14. Although the reports prepared by LZA in the Spring of 2005 were not provided to the Court, they were provided to Sive Paget & Riesel who were apparently advising both FCRC and ESDC at the time. Melanie Meyers, Esq. an attorney with Fried Frank Harris Shriver & Jacobson, LLP, attorneys for FCRC states in her affidavit sworn to February 8, 2006, that Daniel Chorost, Esq. an attorney at Sive Paget, reviewed the reports and “took issue with the conclusion for one of the buildings (465 Dean Street) and expressed the view that further documentation was required for another”. (Meyers Aff. ¶ 10, attached hereto as Exhibit D).

15. While Mr. Zlotnick claimed that the decision to demolish the buildings was not made until after reports were received by LZA in the Spring of 2005, in fact fully completed demolition plans had been prepared by LZA’s parent company for most of the buildings before those reports were prepared. The dates of the final plans are:

- 608 - 620 Atlantic Avenue 2/15/05
- 461 and 463 Dean Street3/7/05
- 585 - 601 Dean Street 3/4/05
- 620 Pacific Street 6/30/05

The dates for these plans are included as Exhibit B to the December 16, 2005 demolition contract between FCRC and Gateway Demolition Corp. That contract is referred to in ¶ 17 of Mr. Zlotnick’s Affidavit and is Exhibit Q to the FCRC Exhibits submitted to the Court below. The relevant pages are attached hereto as Exhibit E.

16. While FCRC wanted to begin demolition of the buildings in the Spring of 2005, they were advised by Mr. Paget that the SEQRA regulations prohibited physical alteration of the area related to the action until SEQRA was completed. 6 NYCRR § 617.3(a). (Meyers Aff. ¶ 8). Mr. Paget told Ms. Meyers that the buildings could be demolished if there was a basis for determining the buildings presented an emergency and demolition was necessary to preserve life, health, property or natural resources. FCRC decided to submit materials to ESDC for its determination that there was an emergency warranting demolition. (Meyers Aff. ¶ 9).
17. Despite the asserted desire to demolish the buildings and the claimed imminent threat posed by the buildings, FCRC took no action in furtherance of the demolition from at least the end of May 2005 until November 2005. FCRC claims that a significant part of that hiatus was due to the MTA requesting proposals for the disposition of the Vanderbilt Yards (part of the project site) and that a moratorium existed during that process that precluded discussions with the MTA. (Meyers Aff. ¶ 11; Zlotnick Aff. ¶ 6).
18. Neither FCRC nor ESDC has provided any proof of such a moratorium other than the self-serving statements in the affidavits. Nor have they explained how a moratorium on a public bidding process for the disposition of real property rights is a bar to moving forward with the demolition of buildings which supposedly presented an imminent threat to public health and safety.
19. On November 2, 2005, LZA made a power-point presentation to Ms. Shatz; ESDC's environmental impact statement consultant AKRF; Mr. Paget and counsel to MTA.

(Shatz Aff. ¶ 11). While Ms. Shatz claims that there was a question and answer period, and “explanations by LZA engineers as to why they believe that the buildings posed an imminent danger” (Id.), she does not provide any information regarding what kind of questions were raised or whom was present with the technical knowledge to ask relevant questions.

20. Ms. Shatz states that at that meeting “an LZA engineer stated that he believed that no responsible engineer could conclude that the buildings in question should not be taken down”. (Shatz Aff. ¶ 12). That statement is pure hearsay. Not only does Ms. Shatz fail to identify the engineer who supposedly made the statement, but as noted above, neither ESDC nor FCRC has submitted a single affidavit from anyone at LZA attesting to having that opinion or any opinion that the buildings are in imminent danger of collapse.
21. Thereafter, on November 8, 2005, Ms. Shatz received a written report from LZA and sent to ESDC through FCRC. (Shatz Aff. ¶ 13) (A copy of the LZA report is attached to Ms. Shatz’ Affidavit which is Exhibit B of my affirmation). Ms. Shatz then issued the December 15 Emergency Declaration after consulting with various ESDC staff whom were either attorneys, planners or executives and Mr. Paget. (Shatz Aff. ¶¶ 14 and 18).
22. Ms. Shatz attempts to justify her determination in part on an earlier tour she took of the project area where she became aware that the project site contained “ a number of vacant, boarded-up, and deteriorated buildings that did not have landmark designation or other historical significance”. (Shatz Aff. ¶ 15) Ms. Shatz never states that she

actually viewed the buildings in question or was otherwise aware of them as distinct buildings of concern during her tour of the project site. Nor does Ms. Shatz or any other person associated with ESDC represent that they inspected the interior of the buildings.

23. Ms. Shatz also referenced the May 2005 collapse of a wall of a building in the Fort Greene section of Brooklyn that killed a woman and injured others as a reason for her belief that the buildings posed an imminent danger. (Shatz Aff. ¶ 15). Such a self-serving statement is little more than fear-mongering as Ms. Shatz did not investigate the circumstances of that collapse to determine its relevance to the instant buildings.
24. Ms. Shatz affidavit also makes clear that she did not inquire or consider whether less drastic measures could have been undertaken to stabilize the buildings and protect the public short of demolition. She unilaterally determined that any such measures would be “pointless and wasteful”. She determined that the buildings would be demolished if the project is approved and even if not approved she states that “Forest City has clearly expressed its desire to demolish these buildings”. (Shatz Aff. ¶ 20). It must be noted that in all of the affidavits submitted in this proceeding by FCRC and its attorneys, there are no statements that FCRC would demolish the buildings even if the project was not approved.
25. It is uncontroverted that neither ESDC nor its agents ever inspected the buildings in question. ESDC did not seek the advice of any qualified technical person to review the LZA report. ESDC did not inquire as to other means short of demolition that could preserve the buildings. While ESDC’s lawyers, who also worked for FCRC saw the

earlier LZA reports, it does not appear that ESDC was ever informed about those reports or given an opportunity to review them.

26. After the demolition of the buildings was announced by FCRC in a press release, City Councilwoman Letitia James, who represents that area of Brooklyn, requested permission from FCRC to inspect the buildings with an engineer. After initially agreeing to the request, FCRC later cancelled the planned inspection and informed Councilwoman James that she could inspect the buildings but could not be accompanied by an engineer. Lacking the training to determine if the buildings were really in danger of collapse, Councilwoman James declined the invitation.
27. Petitioners retained an engineer, Jay Butler to do an external visual inspection of the buildings and to review the LZA report. He prepared an affidavit that was submitted to the court below, a copy is attached hereto as Exhibit F. While Mr. Butler could not enter the buildings and thus could not offer a definitive opinion, he was of the opinion that the buildings were no different than countless other buildings in New York City and did not appear in imminent danger of collapse. Mr. Butler's affidavit was and remains the only sworn statement from a qualified individual concerning the physical conditions of the buildings. Recent pictures of the buildings do not present an image of serious deterioration or imminent collapse. Those pictures are attached as Exhibit G.
28. Despite the claimed imminent threat posed by the buildings, as of this date all of the buildings are still standing and FCRC has not begun any demolition. The only steps undertaken have been asbestos abatement on some of the buildings.
29. Despite the claimed imminent threat posed by the buildings, the only building with any

measures to protect the public from falling masonry are the buildings at 608 -620 Atlantic Avenue which has a scaffolding shed protecting the sidewalk. It is my understanding from my clients that the sidewalk shed has been in place for at least several years and pre-dates the announcement of the Atlantic Yards Project. Moreover until yesterday morning, February 20, 2006 there were no warning signs or barriers placed on any of the other buildings. On that day, a single sign was posted for the first time on 461 and 463 Dean Street stating: "DANGER - NO TRESPASSING".

CONCLUSION

30. Justice Edmead accepted the rationale presented by ESDC, particularly that of Ms. Shatz on face value without a complete record and without any inquiry as to whether Ms. Shatz' determination was made on a rational basis. As shown above, analysis of the November LZA report must be considered in the context of the past efforts toward demolition, the lack of inquiry regarding the previous reports, the lack of inquiry regarding other options and the reliance on the advice of counsel whose representation of ESDC, Justice Edmead said "has such a severe crippling appearance of impropriety". Taken as a whole, it cannot be said that ESDC's determination was rational when so many facts were conveniently ignored or omitted from the record.

Dated: February 21, 2006

Jeffrey S. Baker