

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DEVELOP DON'T DESTROY BROOKLYN, et al., : Index No. 100686/06
 : IAS Part 35
 Petitioners, : Justice Edmead

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

EMPIRE STATE DEVELOPMENT CORPORATION :
and FOREST CITY RATNER COMPANIES, :

Respondents. : **AFFIDAVIT**

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STATE OF NEW YORK)
 : ss.:
COUNTY OF KINGS)

ANDREW ZLOTNICK, being sworn, states:

1. I am a Senior Vice President for Commercial Development for respondent Forest City Ratner Companies ("FCRC"). I am also an attorney admitted to the practice of law in New York. I practiced real estate law for three years with the law firm of Baer, Marks & Upham LLP, and then practiced for six years with the New York office of Arnold & Porter. In 1996, I joined FCRC's Legal Department as Associate General Counsel. In 2002, I moved to the business side of the organization into my current position. While I no longer practice law at FCRC, since 1999 I have been an Adjunct Professor of Law at Brooklyn Law School, where I teach a course in real estate practice. I make this affidavit in opposition to petitioners' motion for a preliminary injunction, and in support of FCRC's cross-motion to dismiss.

2. My responsibilities at FCRC include over-all responsibility for the acquisition, assemblage and maintenance of the 73 properties that are located on the site of the proposed Atlantic Yards Arena and Redevelopment Project (the “Project”). Through affiliates, FCRC began to negotiate and enter into contracts for the acquisition of properties on the site of the Project in 2004. As we began to negotiate for the acquisition of properties, our own physical examinations of the properties raised concerns that some of the buildings that we would be acquiring were in derelict condition and would require either substantial maintenance, extensive repairs or renovation, or demolition, in the absence of which FCRC could be determined by City agencies to be in violation of its legal obligations, and also could be exposed to liability to third parties for personal injuries or property damage. As an affiliate of a publicly traded New York Stock Exchange company – Forest City Enterprises, Inc. – FCRC takes very seriously the condition of the property it owns. Needless to say, the unsafe buildings that are subject of this lawsuit are not the kind of assets that our company permits us to retain in its portfolio.

3. In January or February 2005, based on my own examination of the properties that we were contracting to acquire, and in consultation with environmental consultants at the firm of AKRF, Inc., I put together a list of buildings that were vacant – or that were to be delivered to FCRC vacant – and that appeared to me to be so dilapidated as to be potentially dangerous, and therefore to require demolition rather than maintenance. In making this determination I consulted with Robert P. Sanna, our head of construction whose affidavit accompanies my affidavit, Terence M. Whalen, the head of our property management division, and their respective staffs. FCRC also retained LZA Technology (“LZA”), a well-known Manhattan based firm of consulting structural engineers, which is one of the very best in its field. As one testament to its forensic engineering expertise, LZA was retained to study the collapse of the World Trade Center.

4. We asked LZA to visit the buildings that we were acquiring, inspect them and make recommendations as to which of them, if any, should be demolished. LZA's work for FCRC was headed up by James W. Feuerborn, Jr., P.E., a licensed Professional Engineer whose résumé is being submitted to the Court as FCRC Exhibit I.

5. LZA made periodic visits to the Project's site to examine different properties as they became available to FCRC for acquisition. After visiting these properties, LZA would advise me and our construction team as to whether the building or buildings on the site could be stabilized at a reasonable cost or should be demolished. As of the spring of 2005, FCRC had received separate reports from LZA on each of the buildings that it had examined for the purpose of determining whether demolition was necessary. As to some of the buildings that I had identified as potentially so hazardous as to require demolition, LZA advised me that, in its opinion, the buildings were not structurally unsound and need not be demolished. As to those buildings, FCRC deferred to LZA's professional judgment and decided not to proceed with demolition.

6. Nevertheless, in the spring of 2005, FCRC had received reports from LZA 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.* However, some of these structures were situated in close proximity to Subway tunnels and therefore could not be demolished without an inspection of the tunnels and written confirmation by the MTA that it had no objection to the buildings' demolition. At the same time, in the spring of 2005, the MTA decided to open to competitive bidding the right to build purchase its Vanderbilt Yards, which is

* The contracts for the purchase of these buildings whose demolition is necessary but which purchases have not closed specifically grant us the right to demolish the buildings. Copies of relevant portions of the contracts for 608-620 Atlantic Avenue and 620 Pacific Street are FCRC Exhibits J and K, respectively.

an essential component of the Project. In response, another substantial developer, Extell Corporation, announced a rival plan for development of the site. Therefore, commencing in the spring of 2005, and continuing until September 14, 2005, FCRC was in a competitive bidding contest for the right to purchase the Vanderbilt Yards property, and there was a moratorium on contact between FCRC and ESDC and the MTA pending the MTA's selection of a developer and development plan. While the moratorium was in effect, work toward demolition of buildings on the Project's site came to a halt due to the need to inspect the nearby MTA Subway tunnels and obtain confirmation from the MTA that it had no objection to demolition of some of the buildings.

7. In the meantime, there were discussions between FCRC's attorneys for the Project at the law firm of Fried Frank Harris Shriver & Jacobson LLP and David Paget of Sive, Paget & Riesel, P.C., the senior environmental counsel for the Project, about the legal principles applicable to demolition of these buildings. Melanie Meyers, a partner at the Fried Frank firm and a former counsel to the New York City Department of City Planning, took the position that demolition of buildings that FCRC owned or had a contractual right to demolish was not subject to the State Environmental Quality Review Act ("SEQRA"), and that such buildings could be demolished upon compliance with New York City demolition requirements, without any review or approval by the Empire State Development Corporation ("ESDC"). On the other hand, Mr. Paget took the position that the State's regulations under SEQRA required FCRC to obtain ESDC's approval of the proposed demolition. Eventually, FCRC decided to seek ESDC approval in accordance with Mr. Paget's advice.

8. On September 14, 2005, the MTA's Board of Directors determined to proceed with FCRC's proposal rather than the Extell proposal. Later in September, ESDC's Board of Directors approved two Memoranda of Understanding ("MOU's") for the Project

among ESDC, FCRC, the City of New York and the City's Economic Development Corporation ("EDC"), and ESDC declared itself lead agency for the Project.

9. In October 2005, FCRC instructed LZA to visit the sites again and update its information regarding demolition of those buildings that, in LZA's opinion, were dangerous, so that a presentation could be made to ESDC. By this time, FCRC was concerned about the coming winter, and fearful that, if winter brought substantial snow, the extra load that snow and ice would place on some of these buildings could cause the buildings to collapse. Sleet and freezing rain, driven by high winter winds, also could jeopardize parts of the shoring and facades of many of these structures. And with buildings of this nature, there also is a danger of vandalism, of fires that are started as pranks or to provide warmth for homeless people seeking shelter in the buildings, and of a sudden floor or roof collapse under the weight of a trespasser.

10. In mid-October 2005, in anticipation of a public "scoping" meeting that was to be conducted by ESDC pursuant to SEQRA on October 18, I accompanied several representatives of ESDC, including Mr. Paget, on a tour of the Project's site. Although they were not the sole focus of the tour, the buildings that FCRC wanted to demolish were pointed out to the ESDC personnel during the course of the tour.

11. On November 2, 2005, at a meeting held at the Sive Paget firm's offices in Manhattan, the LZA engineer, Mr. Feuerborn, made an extensive presentation to representatives of ESDC and the MTA regarding the buildings that LZA believed were so dangerous that they should be demolished. I was not present at that meeting, but I understand that several lawyers and other representatives of FCRC, the MTA and ESDC were present, and that the ESDC representatives in attendance included Rachel Shatz, who is ESDC's director of Planning and Environmental Review, and Mr. Paget and one of Mr. Paget's associates. I also understand that Mr. Feuerborn's presentation and the questions and answers that followed it consumed more than

one hour. One of the representatives of FCRC who attended this presentation was Melanie Meyers of the Fried Frank firm, and I understand that she describes this presentation in further detail in an affidavit that FCRC is submitting to this Court.

12. Mr. Feuerborn's presentation included Power Point materials with extensive photographs. LZA provided FCRC with a copy of Mr. Feuerborn's presentation, which is being submitted to this Court as FCRC Exhibit L.

13. I was advised after this meeting that at the conclusion of the meeting ESDC asked that FCRC submit a written report of LZA's conclusions. FCRC asked LZA to prepare such a report, and LZA's comprehensive written report, which is dated November 7, 2005, is FCRC Exhibit M. By letter dated November 8, 2005, Robert P. Sanna, FCRC's Executive Vice President and Director of Construction and Design Development, transmitted the LZA report to Ms. Shatz at ESDC. A copy of Mr. Sanna's letter to Ms. Shatz is FCRC Exhibit N.

14. Mr. Feuerborn's presentation and the final LZA written report recommended the immediate demolition of the following buildings: 608-620 Atlantic Avenue (which is functionally a single building although it is several buildings joined together which occupy multiple tax lots), 461 Dean Street, 463 Dean Street, 585-601 Dean Street (which also is several buildings functionally joined as a single building although it occupies multiple tax lots), and 620 Pacific Street.

15. I had hoped to include a sixth building, 622 Pacific Street which is also in an advanced state of disrepair and clearly unsafe, in the presentation to ESDC, and in mid-October I directed one of our construction personnel to visit the building and examine the exterior. The inspection of this building was later than the inspections of the other buildings, because negotiations with the building's owner had been protracted and difficult and, although

those negotiations were concluded in mid-September 2005, due to the moratorium and preparation for the scoping meeting, we did not focus on 622 Pacific Street until that time. We are scheduled to close on the acquisition of this property this month, and FCRC intends to request ESDC's consent to the demolition of the building, and submit supporting materials, as soon as feasible after we acquire ownership of the property.

16. In a memorandum dated December 15, 2005, Ms. Shatz set forth ESDC's determination that demolition of the five buildings now at issue was appropriate. A copy of this memorandum is FCRC Exhibit O. By letter dated December 16, 2005, Ms. Shatz transmitted the ESDC determination to Jane Marshall of FCRC, cautioning FCRC that "FCRC must cause the least change or disturbance to the environment that is practicable under the circumstances," and that, "[a]lthough [the] emergency demolition is exempt from SEQR review, any additional physical activities at the Project site are fully subject to SEQR and its implementing regulations." A copy of Ms. Shatz's letter to Ms. Marshall is FCRC Exhibit P. We believe FCRC has complied with Ms. Shatz's request during the course of our preparation of these sites for demolition, and we will continue to do so in the future.

17. Once FCRC had received ESDC's determination, the two FCRC affiliates that are the Project's sponsors, Brooklyn Arena, LLC and Atlantic Yards Development Co., LLC, entered into a demolition contract with Gateway Demolition Corp. A copy of this contract is FCRC Exhibit Q. In accordance with this contract, Gateway has subcontracted with a licensed asbestos abatement contractor, Top Line, to perform asbestos abatement, and with an environmental monitoring firm, Safety Environmental Co. of New York, Inc., to monitor air quality during asbestos abatement. The abatement work has commenced at 608-620 Atlantic Avenue and is expected to be concluded there shortly. Upon completion of asbestos abatement at this building, FCRC expects to apply for and hopefully obtain a demolition permit from the

New York City Department of Buildings and commence demolition of the structure itself as soon as possible. This structure is so unstable that it has been supported by a sidewalk bridge for several years, and this condition is extremely dangerous due to the fact that there is a public bus stop on Atlantic Avenue immediately adjacent to the property. After demolition of this property, I and others at FCRC will sleep better at night, knowing that this structure is no longer a threat to the pedestrians who walk under that sidewalk bridge every day.

18. Once asbestos abatement has been completed at 608-620 Atlantic Avenue, we anticipate that asbestos abatement will immediately commence at one of the other buildings that is slated for demolition, and that the application for a demolition permit for the building will follow shortly thereafter.

19. The fourth cause of action in the combined petition and complaint in this litigation purports to seek enforcement of a restrictive covenant in favor of petitioner Pacific Carlton Development Corporation. Copies of the instruments that create this covenant are being submitted as FCRC Exhibit R.



Andrew Zlotnick

Sworn to before me this
8th day of February, 2006.



JEANNE MUCCI
Notary Public, State of New York
No. 30-4834577
Qualified in Nassau County
Commission Expires March 30, 2007