

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, 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.

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

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PRELIMINARY STATEMENT

Defendants City of New York, New York City Economic Development Corporation, Michael Bloomberg, sued in his official capacity as Mayor of the City of New York and in his individual capacity, Daniel Doctoroff, sued in his official capacity as Deputy Mayor of the City of New York and in his individual capacity, Andrew Alper, sued in his official capacity as former President of the New York City Economic Development Corporation and in his individual capacity, and Joshua Sirefman, sued in his official capacity as Acting President of the New York City Economic Development Corporation and in his individual capacity (collectively, “City defendants”), submit this Memorandum of Law in support of their motion pursuant to Federal Rules of Civil Procedure. 12(b)(1) and (6) to dismiss the complaint.

The City defendants join the motion to dismiss 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”). In addition, to the extent any of plaintiffs’ claims survive ESDC’s motion, the complaint as against the City defendants, in their individual capacity and in their official capacity, should nonetheless be dismissed. Indeed, plaintiffs fail to plead any facts whatsoever concerning several of the City defendants. In addition, City defendants sued in their individual capacity are entitled to qualified immunity.

STATEMENT OF FACTS

The complaint makes only four assertions regarding the City defendants: (1) that in December 2003 Mayor Bloomberg agreed that ESDC should appropriately act as lead agency with respect to the proposed development; (2) that on February 18, 2005 the City entered into a Memorandum of Understanding (“MOU”) with ESDC and Forest City Ratner Companies (“FCRC”) that, among other things, designated ESDC as the project sponsor and lead agency (the “Brooklyn Arena/Mixed Use Development Project MOU”), and another MOU that, among

other things, designated ESDC as lead agency for development in the Atlantic Terminal Urban Renewal Area (“the ATURA Development Project MOU”); (3) that the City is providing some financial support to the Atlantic Yards project; and (4) that the City did not offer financial support to an alternative development preferred by plaintiffs. Complaint at ¶¶ 61-68, 77. A copy of the Brooklyn Arena/Mixed Use Development Project MOU incorporated by reference in the complaint, and a copy of the ATURA Development Project MOU, also incorporated by reference in the complaint, are annexed to ESDC’s motion.

For a complete statement of the remaining facts, the City defendants respectfully refer the Court to the statement of facts set forth by ESDC.

ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED

Dismissal for failure to state a claim is proper where “it appears beyond doubt that the 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) (internal citation and quotation marks omitted). All factual allegations in the complaint are, therefore, presumed to be true. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990); *Charles W. v. Maul*, 214 F.3d 350, 356 (2d Cir. 2000). All reasonable inferences are drawn in favor of the plaintiff. *See Fed. R. Civ. P.* 12(b)(6); *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000). However, “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Gebhardt v. Allspect, Inc.*, 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) (internal citation and quotation marks omitted).

Here, for all of the reasons set forth by ESDC, plaintiffs’ complaint should be dismissed. First, plaintiffs’ taking claim is not ripe for adjudication because ESDC has not yet commenced a proceeding pursuant to Article 4 of the New York State Eminent Domain

Procedure Law (“EDPL”). Moreover, even if the complaint were justiciable, the comprehensive administrative and judicial procedures provided for in the EDPL warrant this Court’s abstention under the doctrines established in *Younger v. Harris*, 401 U.S. 37 (1971) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Finally, the complaint fails to state a claim for an unconstitutional taking, a violation of plaintiffs’ due process rights, or a violation of plaintiffs’ right to equal protection. The City defendants hereby incorporate hereto all of the arguments and explanations set forth by ESDC in support of its motion to dismiss.

The complaint should be dismissed as against the City defendants for the additional reason that 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. Should the Court find that the complaint states a cause of action against any of the City defendants in their individual capacity, the complaint should nonetheless be dismissed because any such City defendants are entitled to qualified immunity.

A. The Complaint Fails to State a Cause of Action Under Section 1983 Against The City Defendants Acting In Their Individual Capacity

Section 1983 imposes liability only upon a defendant who personally “subjects, or causes to be subjected” any person to the deprivation of any federal right. *See* 42 U.S.C. § 1983 (2006). Again, as argued more fully by ESDC, plaintiffs have not been deprived of any federal right; accordingly, Section 1983 does not impose any liability on defendants.

Moreover, plaintiffs have failed to state a cause of action against the City defendants in regards to their takings claim because Section 1983 does not impose liability upon officials in their individual capacity where they are not personally involved in the alleged constitutional deprivation. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977); *see also Martinez v. California*, 444 U.S. 277, 285

(1980) (no Section 1983 liability where the causal connection between defendants' conduct and the constitutional injury is remote rather than direct); *Taylor v. Brentwood Union Free School Dist.*, 143 F.3d 679 (2d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999). To withstand a motion to dismiss, a complaint must allege specific facts showing each defendant's "personal involvement" in the deprivation of plaintiffs' constitutional rights. *See Obilo v. City Univ. of N.Y.*, 2003 U.S. Dist. LEXIS 2886, *66 (E.D.N.Y. 2003). Indeed, "a complaint that does not allege the direct, personal involvement and responsibility of a defendant is 'fatally defective on its face.'" *Brown v. O'Shea-Schell*, 2006 U.S. Dist. LEXIS 80857, *6 (E.D.N.Y. 2006), citing to *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987); *see also 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) (dismissing Section 1983 claims as legally deficient because complaint was devoid of allegations of wrongdoing or personal involvement by particular defendants).

Here, the crux of plaintiffs' complaint is that their property is going to be condemned, allegedly for private use in violation of the Fifth Amendment. However, even assuming, *arguendo*, that plaintiffs have asserted ripe and legally sufficient claims that the condemnation of plaintiffs' property does not satisfy the public use requirements of the Fifth Amendment, plaintiffs do not allege, nor can they, that any of the City defendants are or have been personally involved in the condemnation proceeding, which is being undertaken solely by ESDC pursuant to the EDPL. *See, e.g.*, Brooklyn Arena/Mixed Use Development Project MOU at ¶ 7. Indeed, the complaint alleges only that certain City defendants were signatories to the two MOUs, and that the City is providing financial support for the project; the complaint contains no allegation that any City defendant was, is or will be involved in the condemnation proceeding.

Moreover, the complaint contains no allegations whatsoever concerning defendants Andrew M. Alper, Joshua Sirefman or the New York City Economic Development Corporation.

Thus, none of the City defendants can appropriately be subject to plaintiffs' Section 1983 takings claim. For these same reasons, plaintiffs' equal protection claim must fail as against the City defendants. *See* Complaint at ¶ 147 (“By selecting plaintiffs’ properties to be taken for the purpose of conferring a benefit...defendants have targeted plaintiffs for adverse treatment for no rational purpose”). The City defendants have not selected plaintiffs’ properties for condemnation.

Plaintiffs also claim that certain City defendants’ role in the purported “conspiracy” to “circumvent[] local and community review and local zoning regulations” violates their Fourteenth Amendment right to procedural due process. Complaint at ¶ 160. However, the establishment of ESDC as project sponsor and lead agency, the substitution of public review procedures required under the New York Urban Development Corporation Act (codified at Chapter 174, Section 1, Laws of 1968, N.Y. Unconsol Laws § 6251, *et seq.*) (“UDC Act”) for the public review procedures required pursuant to the Uniform Land Use Review Procedures (“ULURP”), and ESDC’s decision to exercise its authority to override local zoning do not violate plaintiffs’ procedural due process rights. *See, e.g., 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). Similarly, the City defendants’ agreement to consult with ESDC in regard to ESDC’s decision-making on local zoning and other local regulations, *see* Brooklyn Arena/Mixed Use Development Project MOU at ¶ 5(ii), does not violate plaintiffs’ rights as the ability to override local zoning and other local regulations is fully within ESDC’s power. *See Floyd v New York*

State Urban Dev. Corp., 41 A.D.2d 395, 343 N.Y.S.2d 493 (1st Dep't 1973), *aff'd* 33 N.Y.2d 1, 300 N.E.2d 704 (1973).

B. City Defendants in Their Individual Capacity Are Entitled to Qualified Immunity

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 Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *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).

“A government official is entitled to qualified immunity under Section 1983 if it was objectively reasonable for him to believe his conduct did not violate the law.” *Gottlieb and Riggs v. Village of Irvington*, 69 F. Supp. 2d 553, 561 (S.D.N.Y. 1999), citing to *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Holeman v. City of London*, 425 F.3d 184, 189 (2d Cir. 2005); *Palmieri v. Town of Babylon*, 2006 U.S. Dist. LEXIS 27694 (E.D.N.Y. 2006). Here, none of the allegations concerning actions taken by the City defendants implicate any activity that a reasonable government official would believe violated plaintiffs' constitutional rights. Indeed, there was no reason for the Mayor to believe that entering into either of the MOUs with ESDC and FCRC was improper in any fashion, as the MOUs established terms and conditions that fully accorded with the law. Nor was there any reason for Deputy Mayor Doctoroff or any other City official to believe that offering financial support on behalf of the City for the Atlantic Yards project but not for another project violated the U.S. Constitution. Indeed, as argued above, the designation of ESDC as project sponsor and lead agency, ESDC's undertaking public review pursuant to the UDC Act instead of ULURP, the exemption of state actions from local zoning pursuant to state

law, and the City's funding commitment for this significant economic development project are all patently legal. Given the objective reasonableness of the specific actions alleged by plaintiffs, the City defendants should be granted qualified immunity.

C. The Complaint Fails to State a Cause of Action Under Section 1983 Against The City Defendants Acting In Their Official Capacity

To assert a claim against a municipality under section 1983, a plaintiff must allege that a specific identifiable official policy caused the alleged violation of plaintiff's constitutional rights.¹ *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978). This required causal connection between the municipal policy and the claimed constitutional deprivation has been variously described by the Supreme Court as "the moving force" "direct causal link," and "closely related." *Monell*, 436 U.S. at 695; *City of Canton v. Harris*, 489 U.S. 378, 385, 391 (1989); *see also Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 200 (1997) ("Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the "moving force" behind the plaintiff's deprivation of federal rights") (emphasis in original); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). This causal connection cannot be assumed. *See Kearney v. County of Rockland*, 2006 U.S. App. LEXIS 14670 (2d Cir. 2006) (affirming summary judgment in favor of County where plaintiff failed to present evidence of causation).

Plaintiffs do not allege that either the City or EDC is the "moving force" behind the condemnation proceeding which plaintiffs identify as the basis for the alleged constitutional violations. Indeed, as noted above, the complaint makes no allegations specific either to EDC or

¹ A claim against a municipal official in his or her official capacity is treated as a claim against the entity for which the official is acting. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Accordingly, the City treats plaintiffs' claims against Mayor Bloomberg and Deputy Mayor Doctoroff in their official capacities as claims against the City and plaintiffs' claims against Andrew Alper and Joshua Sirefman in their official capacities as claims against the City Economic Development Corporation.

to the two EDC officials, Alper and Sirefman, named as defendants. As to the City, plaintiffs' claims have the same infirmities as their claims against the Mayor and Deputy Mayor in their individual capacities. The complaint contains no allegations that either the City or any City officials had any involvement in the condemnation proceeding, much less that the MOUs or the City's financial support for the project generally is "closely related" to, has "a direct causal link" to, or is "the moving force" behind that proceeding. Plaintiffs' failure to sufficiently allege causation is fatal to their allegations of municipal liability.

D. Plaintiffs' Claims of Conspiracy Cannot Save the Complaint

Plaintiffs' claims that defendants conspired with each other to deprive plaintiffs of their constitutional rights cannot remedy the insufficiency of their complaint. To assert a claim for conspiracy pursuant to Section 1983, plaintiffs must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing harm to plaintiff. Here, however, plaintiffs make only conclusory, nonspecific allegations regarding the City defendants' purported role in the alleged conspiracy. Accordingly, the complaints against the City defendants should be dismissed. *See Ciambriello v. County of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) (complaints containing only conclusory, vague, or general allegations that defendants engaged in conspiracy to deprive plaintiff of constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct).

CONCLUSION

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

Dated: December 15, 2006
New York, New York

Respectfully submitted,

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