

**Anderson v New York State Urban Dev.
Corp.**

2007 NY Slip Op 31247(U)

May 17, 2007

Supreme Court, New York County

Docket Number: 0118212/2006

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART

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ELISELLE ANDERSON, RONALD PARRISH, ROBERT JACKSON, WILLIAM A. LASHLEY, JR., ALLISON SNIFFIN, JONATHAN WILLNER, ROBIN WEIL, DANIEL SAKS, MIKKIA REVEILLAC, YVONNE CHAK, JOEL WEISKOPE, MARINA DEFRANZA, and ADAM RADBELL,

Plaintiffs,

Index No. 118212/06

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Defendant.

FILED
MAY 17 2007
NEW YORK COUNTY CLERK'S OFFICE

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Tolub, J.:

Defendant New York State Urban Development Corporation d/b/a Empire State Development Corporation moves, pursuant to CPLR 3211 (a) (2) and (7), to dismiss the plaintiffs' complaint.

Background

Plaintiffs are rent-stabilized tenants who reside in two buildings located at 473 Dean Street and 624 Pacific Street. These buildings are located within the area designated as Phase 1 of the proposed Atlantic Yards Arena and Redevelopment Project in Brooklyn ("the Project"). The Project includes the construction of a large sports arena and sixteen mixed-use buildings (See Atlantic Yards Land Use Improvement and Civic Project Modified General Project Plan, Defendant's Ex. A).

On August 23, 2006, pursuant to Article 2 of the New York

Eminent Domain Procedure Law ("EDPL"), defendant held a public hearing concerning the Project and the proposed acquisition by eminent domain of certain properties, including plaintiffs' residences. Plaintiffs were served with a copy of the public hearing notice. On December 8, 2006, pursuant to EDPL § 204, defendant issued its determination and findings ("the findings") approving the exercise of eminent domain to implement the Project and to acquire the necessary properties. These findings were published on December 11 and 12, 2006. On January 10, 2007, the plaintiffs commenced an EDPL § 207 proceeding in the Appellate Division, Second Department.¹

By this action, plaintiffs seek a declaration that (1) defendant is precluded from exercising eminent domain and/or condemnation of plaintiffs' homes and leases under the New York State Constitution and the Highways Law; (2) the New York State Division of Housing and Community Renewal, not the defendant, has exclusive jurisdiction over the non-renewal of plaintiffs' leases, termination of their tenancies, compensation, and demolition of plaintiffs' homes by their landlord; and (3) defendant has no statutory authority to cancel the rent-stabilized leases and extinguish plaintiffs' rent-stabilized tenancies through "friendly condemnation." Plaintiffs also seek injunctive relief prohibiting defendant from exercising

¹ This proceeding appears to be active.

jurisdiction and eminent domain/condemnation over plaintiffs.

Discussion

As a preliminary matter, this court addresses the question as to whether this court has jurisdiction over the subject matter of this action. Plaintiffs have taken the position that because they lack ownership interest in the subject property, they have no standing to bring an EDPL §207 proceeding and therefore, this action is properly before the court.

It is clear however, that pursuant to EDPL § 207(A), as defendants have pointed out, this court does not have subject matter jurisdiction. Under the statute:

any persons or persons jointly or severally aggrieved by the condemnor's determination and findings made pursuant to section two hundred and four of this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred and four herein.

(EDPL § 207 (A)). Moreover, pursuant to EDPL § 207 (C):

The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

- (1) the proceeding was in conformity with the federal and state constitutions,
- (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority [...].

The claims asserted by plaintiffs in this action seek to challenge defendant's statutory authority and jurisdiction to exercise eminent domain, and these are well within the scope of

review set forth in EDPL § 207 (C)(2). Plaintiffs constitutional challenges are also within the scope of EDPL § 207 (C)(1).

The language of the statute makes it abundantly clear that the jurisdiction of the Appellate Division of the Supreme court is exclusive subject to review only by the Court of Appeals. In addition to being heard and determined in an expeditious manner, the application should be brought in the judicial department where the "proposed facility" is located. Most significant however, is that it is settled law in this Department that EDPL § 207 may not be circumvented by bringing an Article 78 proceeding in Supreme Court (see, East Harlem Business and Residence Alliance, Inc., 273 AD2d 33 [1st Dept 2000]).

As previously mentioned, plaintiffs are concerned that they lack standing to bring an EDPL § 207 proceeding, and therefore, believe this court has the power to hear challenges to the jurisdiction of defendant, a state agency. This court disagrees in light of the statutory language referenced above.

Plaintiffs, for the purposes of bringing an EDPL § 207 proceeding, are condemnees. EDPL § 103 defines condemnees as "the holder of any right, title, interest, lien, charge or encumbrance in real property subject to an acquisition or proposed acquisition." "The term 'owner' when employed in statutes relating to eminent domain to designate persons who are to be made parties to the proceedings refers to all those who

have any lawful interest in the property to be condemned" (Petition of Holman, 268 AD 330, 331 [3rd Dept 1944]). Plaintiffs have a lawful interest as tenants in the property being condemned under their leases. Lessees have challenged findings and determination through EDPL § 207 proceedings (see In the Matter of Kaufmann's Carousel v City of Syracuse Industrial Development Agency, 301 AD2d 292 [4th Dept 2002]; Gourmet Management, Inc. v The Metropolitan Transportation Authority, 163 AD2d 184 [1st Dept 1990]).

Plaintiffs cite East Thirteenth Street Community v New York State Urban Development Corporation, 84 NY2d 287 (1994) and In the Matter of City of New York [Sanitation Garage Brooklyn District 3], 5 Misc 3d 1014A (Sup Ct, Kings County 2004) in support of their claims that they lack standing. However, these cases are distinguishable.

In East Thirteenth Street Community, the petitioners were condominium boards, tenants, and residents of buildings "near the project area" (East Thirteenth Street Community, 84 NY2d at 291). These petitioners were not tenants of the lots that were subject to condemnation, as the plaintiffs are in this action. Also, in Matter of City of New York [Sanitation Garage Brooklyn District 3], the plaintiffs include the Tenants Association, an organization representing the tenants of Marcy Houses, which is located approximately 400 feet from the Project; Yeshiva, which

operates a religious school directly opposite the Site, approximately 25 feet away; several businesses located within one block of the Project; Flushing that operates two residential buildings in the area; and Aaron Rottenberg and Samuel Rottenberg are residents of the community who live one block from the Project. Again, much like the petitioners in East Thirteenth Street Community, plaintiffs in the Sanitation Garage case were not located within the project site, and their property interests were not subject to condemnation.

The ultimate determination of standing, of course, must be made by the Appellate Division, Second Department, where plaintiffs have already brought an EDPL § 207 proceeding. This court does not have subject matter jurisdiction and is not the appropriate forum to hear plaintiffs' grievances.

This court has seriously considered the question of costs and sanctions, and whether they should be applied to this case (22 NYCRR §130-1.1(a)(c)). This action was brought both in the wrong church² and the wrong pew, which is to say that the issues presented should have been brought in the Appellate Division, and

² Brooklyn has often been referred to as the "City of Churches". The nickname's origin, though debated, dates to the mid-19th Century:

The City of Churches. Such in time, will be the distinctive appellation of Brooklyn. At present we can boast of more church edifices than any other city, of like proportions, in the United States, if not in the world; and "the cry is still, they come" (Brooklyn Daily Eagle, p. 2. March 6, 1844).

more particularly, the Appellate Division, Second Department. Moreover, it was brought in derogation of existing case law (see, East Harlem Business and Residence Alliance, Inc., 273 AD2d 33). However, the court is vested with discretion and notes that plaintiffs sought no preliminary stay and the within action was apparently brought in good faith. Under these circumstances, the court will not impose sanctions, as an award for costs is sufficient (CPLR § 8101 *et seq.*).

The court has considered the plaintiffs' remaining arguments and finds them without merit. The action is therefore dismissed.

Accordingly, it is


ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: May 17th, 2007

ENTER:


HON. WALTER B. TOMUB, J.S.C.

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