

**Peter Williams Enters., Inc. v New York State Urban  
Dev. Corp.**

2010 NY Slip Op 31333(U)

May 26, 2010

Sup Ct, NY County

Docket Number: 100738/10

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 100738/2010

PETER WILLIAMS

vs

NYS URBAN DEVELOPMENT CORP.

Sequence Number : 001

ARTICLE 78

INDEX NO. 100738/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this <sup>Petition</sup> ~~motion~~ <sup>to</sup> /for Art. 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this ~~motion~~ <sup>petition</sup> is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.

**FILED**

JUN 01 2010

NEW YORK  
COUNTY CLERKS OFFICE

Dated: 5-26-10

  
**MARCY S. FRIEDMAN** *s.c.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

2  
6710

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

PETER WILLIAMS ENTERPRISES, INC., et al.,

*Petitioners,*

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules,

- against -

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION,

*Respondent.*

\_\_\_\_\_ x

*Final* /10  
*Original* R  
**FILED**  
JUN 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioners challenge the approval by respondent New York State Urban Development Corporation, doing business as Empire State Development Corporation (ESDC), of a 2009 Modified General Project Plan (2009 MGPP) for the Atlantic Yards Project in Brooklyn. Respondent moves to transfer venue to Kings County.

Petitioners placed venue in New York County, pursuant to CPLR 506(b), based on the location of respondent's principal office. CPLR 507 provides, however, that venue shall be placed in the county where real property is located where "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property."

This proceeding challenges findings, made by ESDC in 2006, pursuant to the Eminent Domain Procedure Law (EDPL), as the predicate for condemnation of petitioners' properties. In a prior eminent domain proceeding brought in Supreme Court, Kings County, by order entered

on March 1, 2010, that Court (Gerges, J.) vested title to the properties of five of the six petitioners in ESDC. The instant proceeding thus clearly affects title to or the possession, use, or enjoyment of real property.

Where two venue provisions are in conflict, as here, venue is favored in the county in which the realty is situated. (Diamond v Papreka, 2005 NY Slip Op 50465 [U], 7 Misc 3d 1006[A] [Sup Ct, New York County 2005], citing Craig v Clifton Springs Country Club, Inc., 26 AD2d 903 [1966].)

Notably also, all of the petitioners in the instant proceeding, except the Gelin Group, LLC (Gelin), were respondents in the Kings County proceeding. As stated in the Kings County vesting order, the respondents moved for an order dismissing the eminent domain petition on the ground, among others, that findings made by ESDC pursuant to the EDPL in 2006 can no longer serve as the predicate for the seizure of respondents' homes and businesses because the 2006 Modified General Project Plan was "nullified and superceded" by the 2009 MGPP, and the "factual underpinnings of the determination of public use, benefit and purpose . . . have materially changed" since 2006. (Order at 2.) The instant proceeding alleges similarly that the 2006 Determination and Findings (D & F) should be vacated on the ground that "(i) the factual basis for the 2006 D & F has been materially and substantially undermined by subsequent events, and/or (ii) because Respondent itself materially vitiated those findings when it approved a new Modified General Project Plan on September 17, 2009 . . . , such that the 2006 D & F can no longer serve as the predicate for the confiscation of Petitioners' homes and businesses." (Notice of Petition, ¶ 1.) A substantial question therefore exists as to whether the relief in the instant proceeding is barred, on collateral estoppel or res judicata grounds, by the determination of the

Kings County proceeding.<sup>1</sup>

The instant proceeding should accordingly be transferred to Kings County based on settled venue rules and in order to avoid duplicate or inconsistent judicial determinations.<sup>2</sup> Contrary to petitioners' contention, transfer is not barred on the ground that one of the six petitioners, Gelin, was not a party to the Kings County proceeding. Assuming arguendo that Gelin has standing to maintain this proceeding -- a matter in dispute -- the venue procedures provide not for severance of the parties or claims, but for the court to set venue in the county proper as to at least one (or here, five of the six) of the parties. (See CPLR 502; Matter of Hurst v Board of Educ. for the Ithaca City Sch. Dist., 242 AD2d 130 [1998], lv dismissed & denied 92 NY2d 914.)

Petitioners' assertion that respondent has engaged in improper conduct, by bringing this motion to change venue, is plainly without merit. A motion to change venue is an established procedural remedy that is codified in New York's practice statute, and its use here is clearly legally authorized. Shortly after the Kings County proceeding was submitted to the court for decision, but before it was decided, the five petitioners who were respondents in the Kings

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<sup>1</sup>In deciding the venue motion, however, the court need not, and does not, make any finding as to whether all of the elements for application of the collateral estoppel or res judicata doctrine have been met.

<sup>2</sup>It is noted that these venue issues were not implicated in a prior proceeding involving the Atlantic Yards Project which this court decided by decision and order dated March 10, 2010. In Develop Don't Destroy Brooklyn v Empire State Dev. Corp. (Sup Ct, New York County, Index No. 114631/09), petitioners challenged ESDC's affirmance of the 2009 MGPP, on the ground that ESDC violated the State Environmental Quality Review Act by not preparing a Supplemental Environmental Impact Statement as a result of changes to the Project. They also argued that ESDC violated the New York Urban Development Corporation Act by not assuring that a plan was in place to alleviate the blight that ESDC previously found to exist at the Project site. The prior proceeding did not involve an eminent domain challenge, and did not affect title to real property.

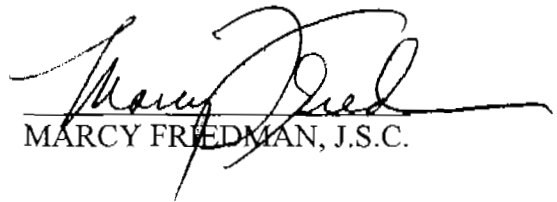
County proceeding commenced this New York County proceeding. They are represented by the same counsel in the two proceedings and, as discussed above, raise the same arguments that they raised in the Kings County proceeding. This conduct suggests forum shopping which cannot be countenanced by the court.

It is accordingly hereby ORDERED that respondent's motion is granted to the extent that the above-captioned proceeding, including any pending motions, be and is hereby removed from this Court and transferred to Supreme Court, Kings County; and it is further

ORDERED that the Clerk of this Court is directed to transfer the papers on file in this proceeding to the Clerk of the Supreme Court, Kings County, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes the decision and order of the court.

Dated: New York, New York  
May 26, 2010

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
JUN 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE