

**South Bronx Unite! v New York City Indus. Dev.  
Agency**

2014 NY Slip Op 31951(U)

June 18, 2014

Sup Ct, Bronx County

Docket Number: 260462/2012

Judge: Mary Ann Brigante-Hughes

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6-25-14

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

\_\_\_\_\_  
SOUTH BRONX UNITE!, ET ALS.

X

Petitioners,

-against-

**DECISION/ORDER**

Index No.: 260462/2012

NEW YORK CITY INDUSTRIAL DEVELOPMENT  
AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT  
CORPORATION, NEW YORK STATE DEPARTMENT  
OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT  
CORPORATION, FRESH DIRECT, LLC., UTF TRUCKING, INC.,  
and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

X

The following papers numbered 1 to 20 read on the below motion noticed on July 19, 2013 and  
duly submitted on the Part IA15 Motion calendar of **April 7, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Pet.'s NOM, Aff., Exhibits, Memo of Law	1,2,3,4
DOT Aff. In Opp., Exh., Memo of Law	5,6,7
Resp. Aff. In Opp., Exh., Memo of Law	8,9,10
Pet.'s Reply Aff.	11
Pet.'s Supp. Aff., Exhibits	12,13
Correspondence from 10/30/13 - 1/15/14	14-17
Resp. Supp. Aff. In Opp, Exh.	18,19
Oral Argument Transcript	20

Upon the foregoing papers in this hybrid Article 78 petition and declaratory judgment  
action, the petitioners individual members of the community in the neighborhood surrounding  
the Harlem River Yard in the Bronx, as well as organizational petitioners (collectively the  
"Petitioners"), move pursuant to CPLR 2221(e), for leave to renew their motion for leave to  
amend the pleadings and add new parties as to their third cause of action. The motion is  
opposed by respondents New York City Industrial Development Agency ("NYCIDA"), New  
York City Economic Development Corporation ("NYCEDC"), Fresh Direct, LLC and UTF  
Trucking, Inc. ("Fresh Direct"), Harlem River Yard Ventures, Inc. ("HRYV"), and the New York  
State Department of Transportation ("DOT").

I. Background and Procedural History

This matter in general arises out of the Petitioners' challenge to Fresh Direct's relocation of its operations from Long Island City, Queens, to the Harlem River Yard ("HRY") in the Bronx, and its associated construction and installation project on that property. This motion is limited to the third cause of action contained in the Petitioners' declaratory judgment action. That cause of action sought to invalidate the sublease between HRYV and Fresh Direct. HRYV leases the property from the DOT, and is seeking to sublease the property to Fresh Direct for its attempted relocation. Petitioners' third cause of action sought to invalidate this sublease on the grounds the conveyance is an unconstitutional transfer of State property to a private entity.

By order dated May 24, 2013, this Court, *inter alia*, dismissed the third cause of action for lack of standing to sue under State Finance Law, and denied the Petitioners' motion for leave to amend the complaint, since the complaint as amended also failed to adequately alleged that a state actor "caused, or is about to cause a wrongful expenditure." The amended petition also did not allege any involvement by the DOT in this attempted conveyance/sublease, and therefore the cause of action failed to adequately assert a mismanagement of state funds or property by a state actor. Petitioners' thereafter appealed that decision.

Petitioners now seek to renew its motion for leave to amend the third cause of action and to add necessary parties with respect to the third cause of action. Petitioners filed this motion on the grounds that new events occurred since their original petition, and they can now plead new and previously unavailable facts regarding the DOT and DOT Commissioner Joan McDonald's involvement in the proposed conveyance of the state property to Fresh Direct at the HRY. Petitioners argue that these newly available facts "adequately address what this Court found to be pleading deficiencies as to standing under State Finance Law §123-b.

The original pleadings and proposed amended pleadings asserted that a material modification of the HRY's 1993 Land Use Plan required DOT's prior approval to ensure its conformity thereto. In their motion papers, the Petitioners assert that on June 17, 2013, Fresh Direct and HRYV submitted an application, along with their revised development plan, to the City Planning Commission seeking approval of a material modification to the 1993 Land Use

Plan in relation to the Fresh Direct Project. Petitioners assert that Fresh Direct and HRYV were required to file any revised development plan application with the City Planning Commission and DOT simultaneously. Petitioners argue that they “have reason to believe that [HRYV] has submitted or will soon submit to the DOT and Commissioner has approved or will soon approve the proposed change to the 1993 Land Use Plan to allow the Fresh Direct project, as well as its construction plans.” The Petitioners contend that this approval will violate Article 7, Section 8 of the New York Constitution. The 1991 lease provided that its public purpose was to operate a “70,000 lift per year intermodal terminal to reduce regional truck traffic.” The sublease, however, will allegedly frustrate this public purpose by precluding the possibility of an intermodal terminal. Accordingly, the Petitioners argue that this newly-discovered information warrants renewal of its motion for leave to amend their third cause of action, since they now plead adequate facts to allege standing to sue under State Finance Law. Petitioners note that they have reasonable justification for failure to provide this information on their previous motion, because at that time, petitioners understood that HRYV had not yet submitted a request for the DOT to approve the sublease.

In opposition to the motion, the DOT originally contended that the motion must be denied because they had still not taken any action with respect to the Fresh Direct project. Accordingly, the petitioners have not alleged new facts regarding the issue. In any event, the DOT argued that facts that were not in existence at the time of the prior motion are generally not a proper basis for a motion to renew. The DOT also noted that the proposed amendments contained with their moving papers are entirely different from those found in their February 14, 2013 motion for leave to amend. The petitioners now seek to add wholly new claims regarding the commissioner of the DOT, which is inappropriate in an attempted motion to renew.

The remaining respondents submitted a joint opposition to the motion. They argue that the motion should be denied because, first off, the motion is not one to renew. It rather seeks to amend their now-dismissed petition to assert new allegations against new parties, which is outside the scope of a motion to renew. “Renewal” of a dismissed claim is not available here, and the petitioners have not demonstrated “new facts” in existence at the time of the prior motion, for which the petitioners have a “reasonable justification” for their failure to bring to the

court's attention, which would change the previous outcome. Respondents further argue that the motion is barred by the doctrine of *res judicata*.

In reply, Petitioners argued that the arguments made in opposition are contradictory. While the DOT argued that the alleged new facts are "speculative" since the DOT took no action on the sublease, it also joined the other respondents in arguing that the new facts are not new and should have been plead previously. Petitioners note that new facts do not necessarily have to be in existence at the time of a prior motion, where the new facts would change the prior determination. They note that the relief sought in the renewed pleading relating to the third cause of action is identical to that previously sought - namely enjoining the unconstitutional conveyance of public land to Fresh Direct.

After this motion was fully briefed, events occurred that impacted the parties' respective positions regarding the motions' proper disposition. On October 30, 2013, Petitioners wrote to the Court to advise that, through the appellate process, they learned that the DOT had received HRYV's request to modify the subject land use plan to accommodate the Fresh Direct project. This fact therefore "reversed" the factual assertions upon which the DOT based its opposition to the renewal motion. This letter sparked a response from Fresh Direct and HRYV that, first, this remained only a request that was yet unacted upon by the DOT. In any event, the application was not a "new fact" since Petitioners' had always expected it to occur. Moreover, the request to the DOT did not equate to "involvement" by the DOT in the sublease. The DOT also submitted a letter in response.

Thereafter, on December 17, 2013 the DOT wrote to this Court to advise that on December 12, 2013 the DOT completed its review of HRYV's request for certain approvals relative to the project, and found that the project was consistent with the Land Use Plan per section 8.02 of the 1991 Lease. The DOT nevertheless contended that this approval does not alter the motion to renew's lack of merit. In a January 2014 letter, Petitioners disagreed and argued that this approval cures the alleged pleading deficiencies concerning the involvement of a DOT officer in the proposed conveyance, and, consequently, alters this Court's prior determination regarding standing under State Finance Law §123-b.

This Court thereafter directed the parties to appear for oral argument on April 7, 2014.

Prior to argument, on March 27, 2014, the First Department upheld this court's denial of the Article 78 petition and dismissal of all of the petitioners' causes of action, modifying the order only to the extent of declaring that the NYCIDA's issuance of a negative declaration did not violate the New York State Environmental Quality Review Act (SEQRA) and was not arbitrary and capricious or an abuse of discretion. In affirming this Court's dismissal of the third cause of action, and denial of leave to amend, the First Department stated "petitioners' allegations in the amended petition that the Department of Transportation was involved because it must pre-approve a modification of the Land Use Plan is insufficient to confer standing under the statute." (*South Bronx Unite! v. New York City Indus. Development Agency*, 115 A.D.3d 607 [1<sup>st</sup> Dept. 2014]).

At oral argument, Petitioners urged that amendments are freely granted, and since the DOT has now approved the project, they could not plead these facts previously since the approval had not yet occurred, and therefore they have met the standard for a motion to renew under 2221(e). Arguments with respect to the mootness of the claim is a fact-based argument and is unavailable on a motion to dismiss.

The DOT argued that the motion to renew proffers a new amended petition seeking different relief. It also contains causes of action that have been previously dismissed. A motion to renew cannot be based on facts not previously in existence. They argue that the First Department's affirmance renders this proceeding moot. In December 2013, the DOT, pursuant to the 1991 lease, found that the Fresh Direct project was consistent with a land use plan and approved subtenants. It had no involvement in the negotiation of the sublease. It did not approve the sublease. In fact, under the 1991 lease, HRYV can freely enter into subleases. So under the provisions of the 1991 lease, the DOT's involvement is very limited. And so even if there was some way to allow the amendment, the amendment would be futile because the DOT did not approve the sublease.

Fresh Direct and the remaining respondents argue that the petition seeks to renew claims that have been dismissed, so there is nothing to renew. They reiterate that the DOT, at no time, approve the sublease between HRYV and Fresh Direct, because they had no authority to do so. The 1991 lease did not provide for that. The SEQRA review - which has been determined to be

proper and is not the subject of this motion - included the effect of the project on the intermodal terminal. Respondents argue that the petitioners are seeking to reinvigorate their claim by this “backdoor approach” and claim that this is a challenge to the constitutionality of the DOT lease – but that challenge was deemed time-barred, dismissed, and is not the subject of this motion. The third cause of action challenged the Fresh Direct - HRYV sublease.

Petitioners in reply argue that the new facts don’t necessarily have to be in existence at the time of the original motion to constitute grounds for a renewal motion. There has been no finding on the record saying that Fresh Direct does not interfere with the intermodal terminal, the SEQRA claims have no bearing on this cause of action. The sublease violates the state constitution because it eviscerates the public purpose for which the DOT leased the 96 acres of state property to the HRYV in order to operate an intermodal terminal. Petitioners argue that Fresh Direct will interfere with that public purpose - and “this is a classic claim brought under the State Constitution.”

II. Applicable Law and Analysis

A motion to renew must be based on new facts not presented in the original motion that would change the prior determination (CPLR 2221[e]). The moving party must demonstrate a reasonable justification for not presenting those new facts on the prior application (*see Nicholas v. Curtis*, 104 A.D.3d 526 [1<sup>st</sup> Dept. 2013][internal citations omitted]).

Generally, as urged by the respondents, a renewed motion must not be based on facts that were not in existence at the time of the original application (*see Johnson v. Marquez*, 2 A.D.3d 786, 789 [2<sup>nd</sup> Dept. 2003]; *Matter of Weinberg*, 132 A.D.2d 190 [1<sup>st</sup> Dept. 1987]). The First Department, however, has recognized some flexibility with this rule (*see Ramos v. City of New York*, 61 A.D.3d 51 [1<sup>st</sup> Dept. 2009][renewal was properly based on new evidence - the reversal of plaintiff’s conviction - even though the reversal occurred *after* the original motion decision was made]).

At the outset, the Court notes that the proposed new petition appears to renew causes of action that have already been dismissed and are not subject to the renewal motion - which petitioners claim is limited to the third cause of action. The second amended petition adds new

parties, contains claims relating to now-dismissed causes of action. To the extent that the second amended petition contains new parties or allegations unrelated to their limited motion to renew their third cause of action, the new amendments will not be considered by this court. The Court only considers the proposed amendments that relate to the third cause of action - brought pursuant to State Finance Law §123-b, challenging the constitutionality of the Fresh Direct-HRYV sublease, as an unlawful expenditure of property.

In their original application, the petitioners' third cause of action alleged that the Fresh Direct-HRYV sublease must be invalidated as an unconstitutional conveyance of public land for essentially a private purpose. The original and subsequently-amended petitions asserted that the DOT, though its commissioner, must pre-approve the sublease, in accordance with Section 8.05 of the DOT-HRYV 1991 lease. The prior motion then sought to amend the third cause of action to join, among others, Joan McDonald, commissioner of the DOT. The third cause of action was thereafter dismissed for lack of standing under State Finance Law, and leave to amend denied, because this Court found that the cause of action

“...fails to competently allege that this state officer caused, or is about to cause a wrongful expenditure. The claim involves an attempted sublease between HRYV, the lessor of the state-owned property, and Fresh Direct. The proposed second amended petition alleges no involvement by the DOT in this attempted conveyance/sublease, and the claim thus does not adequately assert a mismanagement of state funds or property by a state actor (*see Transactive Corp. v. The New York State Dept. of Social Services*, 92 N.Y.2d 579 [1998]).”

Decision and Order dated May 24, 2013.

In affirming dismissal of the third cause of action, the First Department held that the allegations in the amended petition that the DOT was involved because it must pre-approve any modification of the original land use plan was insufficient to confer standing under State Finance Law §123-b (*South Bronx Unite! v. New York City Indus. Development Agency*, 115 A.D.3d 607 [1<sup>st</sup> Dept. 2014]).

In support of the instant motion, the petitioners are alleging that in December 2013, the DOT rendered a decision approving the proposed use of the land, and approving Fresh Direct as HRYV's sub-tenant. The petitioners argue that the DOT's approval of the sublease constitutes

“new facts” that evince an unlawful disbursement of State property sufficient to confer them standing pursuant to State Finance Law. The new third cause of action, containing proposed amendments (most recently dated April 1, 2014), asserts that the sublease requires approval from the Department of Transportation through its commissioner, Joan McDonald. It further alleges that Joan McDonald has approved the Fresh Direct - HRYV sublease, including “[HRYV]’s request to allow Fresh Direct to build within the 28 acres reserved for the intermodal terminal and installation of the project as a whole, despite the fact that it eviscerates the stated public purpose of the Lease” (Proposed Second Amended Pet. at par. 261). The cause of action further asserts that the installation of the project represents an abandonment of the adjudicated public purpose of the 1991 lease – its use as a 70,000 lifts-per-year intermodal terminal (*Id.* at par. 264). Petitioners argue that these new developments change this Court’s prior determinations as to standing.

After review of all party submissions and considering the oral argument, this Court finds that the alleged new facts will not change the prior determination, and the motion to renew is denied.

Essential in examining this issue is the fact that HRYV’s contractual obligation to submit, among other things, land use plan modifications and proposed subtenant information to the DOT for approval, has been known to petitioners since the onset of this action. Indeed, the original petition and subsequently amended petitions alleged, in paragraph 72, that the 1991 lease required HRYV to submit requests to change the land use plan for the HRY to the DOT for approval. This Court took that allegation into consideration when dismissing the cause of action for lack of standing under State Finance Law. The Appellate Division further held specifically that this pre-approval requirement was insufficient to confer standing to sue. Now, the alleged “new facts” – that the DOT has actually performed its obligations under the lease, and made certain approvals for the project – do not alter the prior determinations. At bottom, it has been determined that the DOT’s level of involvement here does not amount to an allegation that a State actor is “causing, or about to cause a wrongful expenditure” of State property. This finding is consistent with the requirement that the statute be “narrowly construed” (*see Matter of Human Society of the United States v. Empire State Development Corporation*, 53 A.D.3d 1013, 1016

[3<sup>rd</sup> Dept. 2008]). Accordingly, the motion to renew must be denied because the purported new facts would not change this Court's prior determination as to standing.

This Court further emphasizes that this motion to renew court must be viewed in its full context – that is, it follows the denial of the original Article 78 petition and dismissal of the declaratory judgment action. In their original, second-amended petition, the petitioners' third cause of action sought to invalidate the HRYV-Fresh Direct sublease on the grounds that it will eviscerate the original intention of the lease - the use of 28 acres within the property as an intermodal terminal. The current procedural posture of this matter is as follows: (1) it has been adjudicated that respondent NYCIDA satisfied their SEQRA obligations in evaluating this project, and its issuance of a negative declaration – taking into account all appropriate environmental concerns, including the project's alleged impact on intermodal terminal space – was not arbitrary or capricious; (2) petitioners' second cause of action, seeking to invalidate the DOT-HRYV 1991 lease, has been dismissed as time-barred. The second cause of action was grounded in allegations that the Fresh Direct-HRYV sublease eviscerated the public purpose of the 1991 lease by rendering impossible the construction of an intermodal terminal, and consequently rendered the 1991 lease an unconstitutional conveyance of public land for a private purpose; (3) petitioners' originally-pleaded third cause of action was dismissed, and leave to amend denied as futile, since as noted, the petition did not adequately allege involvement by a state actor in the HRYV- Fresh Direct sublease/conveyance. The First Department subsequently rejected the contention that the DOT's obligation to approve the sublease was sufficient to confer standing; (4) the fourth cause of action, alleging that Fresh Direct was improperly accepted into the Excelsior Jobs Program and improperly awarded its associated tax benefits, was dismissed for lack of standing to sue.

While generally, leave to amend is freely granted (CPLR 3025), this court is not required to allow an amendment where the proposed amended pleadings patently lacks merit (*Eighth Ave. Garage Corp. v. H.K.L. Realty Corp. et al.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 [1st Dept 2009]). Here, even if the proposed amendment was permitted, the third cause of action would remain subject to dismissal (*Viacom Int'l. v. Midtown Realty Co.*, 235 A.D.2d 332 [1<sup>st</sup> Dept. 1997]). Here, assuming *arguendo* that renewal was granted, and the proposed amendment conferred them

standing to sue, this court finds that the factual underpinnings of petitioners' second-amended, renewed third cause of action have been resolved. Allowing the petitioners to amend their third cause of action would amount to an end-around challenge to the constitutionality of the HRYV-DOT lease - a claim that has long been time-barred. The second cause of action sought to invalidate the lease on essentially the same grounds found in the third cause of action - that the Fresh Direct - HRYV sublease frustrates the original land use plan for the HRY. Moreover, permitting this claim to proceed would effectively require re-litigation of the prior adjudication that the NYCIDA's SEQRA review, which took into account the alleged effects of the project on the viability of an intermodal terminal, was proper. Although they are separate causes of action and challenges to this project, the inextricable link between the NYCIDA review/declaration and the proffered reasons why the sublease should be invalidated cannot be ignored. Insomuch as this motion seeks to revive already-dismissed claims, it must be denied. At bottom, this Court finds that even if renewal was granted, upon renewal, the motion for leave to amend the pleadings would still be denied as futile.

III. Conclusion

Accordingly, it is hereby

ORDERED, that the petitioners' motion to renew pursuant to CPLR 2221(e) is denied.

This constitutes the Decision and Order of this Court.

Dated: 6/18, 2014

  
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Hon. Mary Ann Brigantti-Hughes, J.S.C.