

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

PRESENT: MADSEN
Justice

PART 11

DEVELOP DON'T DESTROY Bklyn INC
- v -
URBAN DEVELOPMENT CORP

INDEX NO. 104597/07
MOTION DATE 4/17/07
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided ~~in~~ accordance with the annexed Memorandum Decision, and order.

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 20, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

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

-----X
In the Matter of
DEVELOP DON'T DESTROY BROOKLYN, INC, et al,

Petitioners,

INDEX NO. 104597/07

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

-against-

URBAN DEVELOPMENT CORPORATION
d/b/a EMPIRE STATE DEVELOPMENT
CORPORATION, et al,

Respondents.

-----X
JOAN A. MADDEN, J.:

In this Article 78 proceeding involving the real estate redevelopment project in Brooklyn, which has become known as the Atlantic Yards Project (the "Project"), petitioners move for a temporary restraining order (TRO), staying the developer, respondent Forest City Ratner Companies ("Forest City"), from proceeding with the imminent demolition of certain buildings, pending the Court's determination of petitioners' motion for a preliminary injunction.

On April 5, 2007, petitioners moved by order to show cause for a preliminary injunction enjoining Forest City from proceeding with all demolition work, and commenced an Article 78 proceeding and an action for declaratory judgment challenging the environmental approval of the Project by the other respondents, all of which are agencies of New York State. Petitioners explain that they did not seek a TRO at that time, as while they were aware that Forest City had commenced asbestos work in preparation for demolition, they did not know exactly when Forest

City intended to commence demolition. At the April 5, 2007 conference with this Court,¹ Forest City's counsel represented that demolition would begin sometime during the week of April 16, 2007, and continue thereafter. At this Court's request, Forest City agreed to provide a demolition schedule specifying the dates when demolition would begin, and the buildings intended to be demolished on those dates. On April 11, 2007, Forest City provided a schedule indicating that from April 18, 2007 through the end of June, a total of fifteen buildings will be demolished.² Petitioners are now moving for a TRO at least with respect to nine buildings located in Blocks 1127 and 1129, which have been scheduled for demolition on April 18, April 23 and in mid-

¹On April 5, 2007, the Court conferred with the parties to set up a briefing schedule with respect to petitioners' motion for a preliminary injunction and the underlying Article 78 proceeding, which will be heard on May 3, 2007.

²Specifically, Forest City's letter dated April 11, 2007, states as follows. On or after April 18, 2007, demolition is anticipated to begin on four buildings:

- 1) a three-story building at 189 Flatbush Ave. (Block 1127, Lot 11)
- 2) a two-story building at 191 Flatbush Ave. (Block 1127, Lot 11)
- 3) a four-story building at 193 Flatbush Ave. (Block 1127, Lot 10)
- 4) a three-story building at 618 Pacific St. (Block 1127, Lot 18).

During the week of April 23, 2007, demolition will begin on four buildings:

- 1) a five-story industrial building/warehouse at 546 Vanderbilt Ave. (Block 1129, Lot 54)
- 2) a single-story building at 626 Pacific St. (Block 1127, Lot 22)
- 3) a two-story building at 465 Dean St. (Block 1127, Lot 54).
- 4) a one-story former truck rental facility at 622 Atlantic Ave. (Block 1119, Lot 1)

In mid-May, demolition will begin on the three-story building at 642-46 Pacific St. (Block 1127, Lot 30).

In June, demolition will begin on three buildings:

- 1) the former Wards Bakery industrial building at 800 Pacific St. (Block 1129, Lot 25)
- 2) a single-story building at 814 Pacific St. (Block 1129, Lot 45)
- 3) a three-story building with a single story garage and diner at 818 Pacific St. (Block 1129, Lot 46)
- 4) a single-story former auto repair shop at 542 Vanderbilt Ave. (Block 1129, Lot 50).

In "mid to late June," demolition will begin on two buildings:

- 1) a two-story building at 640 Pacific St. (Block 1127, Lot 29)
- 2) a two-story building at 177 Flatbush Ave. (Block 1118, Lot 5).

May, that is prior to the Court's May 3, 2007 hearing on petitioners' motion for a preliminary injunction.¹ Forest City opposes the motion, but agreed for a short time to refrain from commencing the demolition work on those building previously scheduled for demolition on April 18, 2007, while the Court considers whether petitioners are entitled to a TRO.

In support of their motion for a TRO, petitioners explain that the Project covers approximately 22 acres in the Prospect Heights neighborhood of Brooklyn, and that a substantial portion of the Project site consists of the Vanderbilt Yards, a below-street level rail yard owned by the MTA, and adjacent commercial property within the Atlantic Yards Urban Renewal Area. According to petitioners, most of the buildings identified by Forest City for demolition between April 18 and mid-May, are located on two mixed residential and commercial blocks located south of the Vanderbilt Yards and outside the Atlantic Yards Urban Renewal Area. Specifically, as to Blocks 1127 and 1129, petitioners allege that they are "a contiguous, integral part of the surrounding neighborhood," which until the Project was announced in December 2003 "were experiencing a rapid conversion of commercial spaces to residential use." Petitioners assert that they will suffer irreparable harm in the absence of a TRO, as the destruction of the buildings at issue in this motion will "irrevocably harm the neighborhood" by "turn[ing] a substantial portion of the neighborhood at issue into vacant lots before the Court has had the opportunity to consider fully the merits of petitioners' motion."

¹Petitioners' order to show cause does not specify the buildings by block and lot number, but states generally that they are seeking a TRO with respect to the demolition of "any building or structure, or portion thereof, in the footprint of the planned Project that lies on Blocks 1118, 1119, 1127, 1128 or 1129 thereof," until petitioners' preliminary injunction motion is decided. As noted above in footnote 1, some of the building scheduled for demolition in June fall within such blocks. At oral argument on the motion for a TRO, however, petitioners focused on the nine buildings that would be demolished before the hearing on the preliminary injunction.

In support of the motion, petitioners submit an affidavit from New York City Council Member Letitia James, who represents the district in which the Project is located. Ms. James states that “[t]o permit the demolition of so many buildings in the foot print . . . would improperly allow the devastation of an entire neighborhood for a Project that many never even be permitted to move forward in full or in part,” and that the demolitions “are adjacent to buildings where homeowners and tenants reside, and are clearly an intimidation tactic against those individuals.”

Petitioners further argue that Forest City has no alternative plans for the properties in issue in the event the Project does not go forward, and that those properties may remain indefinitely as vacant lots, and that a stay of the demolition until the Court considers the issues in connection with the preliminary injunction, will not prejudice Forest City, given other pending litigations involving the Project.

Finally, petitioners argue that under 6 NYCRR §617.3(a), Forest City is precluded from commencing demolition or any physical alterations to the project site until the SEQRA process in the underlying Article 78 proceeding is complete.⁴ Specifically, petitioners contend that since their procedural and substantive objections to the SEQRA process in the underlying Article 78 proceeding will be sustained and will result in a remand for environmental review, 6 NYCRR §617.3(a) will again bar Forest City from demolishing the buildings until such review is properly completed.

In opposition to the motion, Forest City argues that petitioners “are unable to demonstrate

⁴State Environmental Quality Review regulation, 6 NYCRR §617.3(a), provides that “[a] project sponsor may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with.”

that they will suffer irreparable injury to any cognizable legal right or interest of theirs in the absence of injunctive relief.” Forest City asserts that petitioners have no ownership or occupancy interest in the properties that are subject to demolition, as it is not disputed that the buildings in issue are owned by Forest City’s affiliates and are vacant.⁵ Forest City also argues that the work is being performed in accordance with all required permits and approvals. Specifically, Forest City points out that petitioners are not claiming that it failed to comply with New York City laws applicable to pre-demolition asbestos abatement or to demolition itself. Forest City further argues that even if petitioners were to prevail in this Article 78 proceeding and succeed in annulling the Project’s approval, petitioners “would have no legal or equitable right to compel [Forest City] to effectuate” an alternative plan for properties in issue. Finally, Forest City argues that 6 NYCRR § 617.3(a) does not “supply the missing legal right or interest,” as that regulation applies only while SEQRA review is under consideration by the agency, and the SEQRA review of the instant underlying project was concluded in December 2006.

CPLR 6301 and 6313(a) permit the Court to grant a TRO pending the hearing on a preliminary injunction “where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be held.” CPLR 6301;

⁵Forest City points out that petitioners’ motion for a TRO appears to include one building owned by the City of New York and used by the MTA, at 175 Flatbush Avenue (Block 1118, Lot 6), which Forest City intends to demolish, in connection with its “MTA related work.” Forest City states that as a result of the conference with the Court on April 5, 2007, it understood that petitioners were not objecting “to continuation of the work for the MTA,” which presumably includes this building. Although Forest City’s April 11, 2007 letter lists this building as scheduled for demolition, it does not provide a specific date for the demolition.

6313(a).⁶ A TRO is a drastic remedy which should be sparingly used. Sec 67A NY Jur2d, Injunctions §57; Silvestre v. DeLoaiza, 12 Misc3d 492 (Sup Ct, NY Co 2006). One commentator has noted that the movant must meet a higher burden of proof to obtain a TRO than to secure a preliminary injunction, as it must demonstrate not only that it will suffer irreparable injury, which is sufficient for a preliminary injunction, but also that the anticipated injury is “immediate.” See 7B McKinney’s, CPLR 6313, McLaughlin, Practice Commentaries.

Petitioners fail to make a sufficient showing that they will suffer immediate and irreparable injury if a TRO is not granted before the hearing on their application for a preliminary injunction. Petitioners essentially argue that the demolition of the nine buildings will “irrevocably harm the neighborhood.” However, petitioners fail to substantiate this argument with factual support showing how the removal of these nine buildings will affect the nature and character of the area. Specifically, petitioners provide no details as to the composition of the neighborhood, its geographical boundaries, or any valid analysis to support their allegations. Furthermore, petitioners have no property interest in any of the nine buildings scheduled for demolition before the hearing on the preliminary injunction, as the buildings are vacant and owned by Forest City affiliates. Petitioners do not controvert Forest City’s assertion that the work is being performed in accordance with all required permits and approvals. For these reasons, the Court concludes that petitioners have failed to establish that they will suffer irreparable and immediate harm. CPLR 6301 and 6313(a).

⁶In opposing the motion for a TRO, Forest City relies on the standard applicable to a preliminary injunction, which requires a showing of : 1) ultimate success on the merits; 2) irreparable harm in the absence of injunctive relief; and 3) a balance of equities in the movant’s favor. The court need not consider all these factors, since CPLR 6301 and 6313(a) require only “immediate irreparable harm” for a TRO. Aetna Ins. Co. v. Capasso, 75 NY2d 860 (1990).

Nor does petitioners' argument based on 6 NYCRR §617.3(a), provide a sufficient legal basis to stay the demolition of the nine buildings, as that regulation is limited to prohibiting "physical alteration" or demolition during the SEQRA process, which was completed in December 2006. Petitioners' argument is based on the presumption that they will succeed in nullifying the SEQRA determination in this Article 78, and at this point in this proceeding, there is an insufficient record for the Court to consider if there is a legal basis to support such a conclusion.

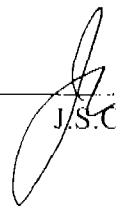
In reaching the decision herein, the Court makes no determination as to the challenges to the Project raised in petitioners' motion for a preliminary injunction or the underlying Article 78 proceeding.

Accordingly, it is hereby

ORDERED that petitioners' motion for a temporary restraining order is denied.

DATED: April 20, 2007

ENTER:



J.S.C.

FILED

APR 20 2007

NEW YORK
COUNTY CLERK'S OFFICE