

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of the New York
State Urban Development Corporation d/b/a
Empire State Development,

Petitioner

To acquire title in fee in certain real property,
required for the

**ATLANTIC YARDS LAND USE
IMPROVEMENT AND CIVIC PROJECT –
PHASE 2B**

**BLOCK 927, LOT 1 AND BLOCK 927, LOT 16
(FEE)**

as said property is shown on the current Tax Map of
the Borough of Brooklyn, City and State of New
York.

Index No. 3908/19

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the annexed Decision and Order, dated

August 12, 2020, was entered in the office of the Clerk of the County of Kings on the
12th day of August, 2020.

August 17, 2020
New York, New York

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/s/ Robert H. Baron

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At an IAS Term, Part 89 of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of August 2020.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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In the Matter of the Application of the NEW YORK STATE
URBAN DEVELOPMENT CORPORATION d/b/a
EMPIRE STATE DEVVELOPMENT

Index No 3908/19

Petitioner,

DECISION and ORDER

to acquire title in Fee Simple absolute in certain
real Property, where not heretofore acquired, for the

**ATLANTIC YARDS LAND USE IMPROVEMENT
AND CIVIC PROJECT – PHASE 2B**

BLOCK 927, LOT 1 and BLOCK 927, LOT 16 (FEE)

as said property as shown on the current Tax Map of the
Borough of Brooklyn, City and State of New York.

-----X
Claimant AJ Richards seeks to stay this condemnation proceeding pending an appeal of a declaratory judgment it obtained requiring its property to be purchased pursuant to the terms of an agreement with Forest City Ratner Companies LLC.

Upon reading the Order to Show Cause dated June 18, 2020, the Emergency Affirmation of *Robert H Baron Esq.*, of Cravath Swaine & Moore LLP, co-counsel with Goldberg, Weg & Marcus PLLC, *Dominic M Recchia Jr. Esq.*, and Goldstein, Rikon, Rikon, & Houghton, PC as attorneys for Condemnee AJ Richards, dated June 5, 2020, the Memorandum of Law in Support, dated June 5, 2020, the Affirmation in Support of

Robert H Baron Esq., dated June 5, 2020, and exhibits annexed thereto; the Affirmation in Opposition of *Adam H Brodsky, Esq of* Berger & Webb LLP, attorneys for the New York State Urban Development Corporation d/b/a Empire State Development (“ESDC”), dated July 2, 2020, the Memorandum of Law in Opposition dated July 2, 2020; the Reply Affirmation of Robert H Baron Esq., dated July 7, 2020, and the exhibit annexed thereto, the Reply Memorandum of Law, dated July 7, 2020; after argument of counsel and due deliberation thereon, the Order to Show Cause is granted for the reasons set forth below.

This proceeding is brought pursuant to the Eminent Domain Procedure Law (EDPL) to condemn property in connection with the Atlantic Yards Project. The property sought to be condemned in this proceeding is bounded roughly by Atlantic Avenue, Fourth Avenue, Pacific Street, and Flatbush Avenue in the Borough of Brooklyn.

Forest City Ratner Companies LLC (“FCRC”) and ATLANTIC YARDS DEVELOPMENT COMPANY LLC (“AYDC”) have been designated by ESDC as the developers of the Atlantic Yards project.

A.J. Richards is the owner of that part of the property located at the corner of Atlantic Avenue and 4th Avenue and currently operates a store on the site. AJ Richards seeks an order to stay this condemnation proceeding pending the determination of an appeal of a judgment issued by Justice Sylvia Ash which directed FCRC to provide AJ Richards with a replacement property on the site.

FCRC and AJ Richards executed a Letter of Intent (LOI), dated December 2, 2006, which provided that AJ Richards would sell its property to FCRC and in return for being given a condominium in the building to be built on the site as part of the project. The condominium would be on the street and mezzanine levels and would be used as a replacement property for its current store. As part of the LOI, AJ Richards also agreed

not to join any of the public challenges to the Atlantic Yards project. The final implementing documents for the LOI were never completed or executed.

In 2014 FCRC and its affiliates sold a portion of their interest in the project to the Greenland Group.

In 2015, FCRC directed ESDC to begin condemnation proceedings and ESDC gave AJ Richards notice of its intent to acquire the property by eminent domain.

AJ Richards then commenced an action against FCRC seeking specific performance of the LOI.

In an order and judgment dated, January 28, 2019, Judge Sylvia Ash granted AJ Richards judgment, declaring that the LOI was a valid and binding contract, that FCRC was in breach of the LOI, and that AJ Richards has no adequate remedy at law and would be irreparably harmed if FCRC acquired the property other than pursuant to the terms of the LOI.

The Order and Judgment further ordered FCRC to specifically perform its obligations under the LOI, and enjoined FCRC and anyone working in concert with FCRC, from breaching the LOI.

FCRC has appealed the order and judgment and the appeal is currently before the Appellate Division. No date for argument has yet been set.

ESDC filed this petition on November 21, 2019 a few days before the ten-year deadline pursuant to EDPL §401(C) for its time to file the petition was to run.

Claimant AJ Richards seeks a stay of this eminent domain proceeding until the Appellate Division decides FCRC's appeal or FCRC performs under the LOI. AJ Richards argues that it will be deprived of its judgment for specific performance and irreparably harmed if ESDC is able to vest the property. It also argues that allowing ESDC to vest the

property would violate the terms of Judge Ash's order enjoining FCRC, or those working in concert with FCRC, from breaching the LOI.

ESDC opposes the motion arguing that it is not bound by Judge Ash's order because it was not a party to the specific performance action and that it is not acting in concert with FCRC but pursuing its right to condemn the property independently.

ESDC's argument that it is not acting in concert with FCRC or its affiliates is not credible. In her decision Judge Ash found that FCRC directed ESDC to commence the condemnation proceedings.

Further, ESDC entered into a Land Acquisition Funding Property Management and Relocation Agreement (the "LAFPMRA") with AYDC, an affiliate of FCRC, which was named as the developer of the project. The LAFPMRA provided that AYDC would reimburse ESDC for all of the costs of condemning the project property and that ESDC would turn the properties over to AYDC to develop.

The LAFPMRA allows AYDC, as the developer to be involved throughout the condemnation proceedings. Section 2.04 of the LAFPMRA provides that AYDC has right to consult with ESDC about the condemnation proceedings. It grants AYDC the right to agree to accept a settlement offer by a condemnee that has been refused by ESDC or object to an offer by ESDC to a condemnee.

Additionally, AJ Richards has already partly performed under to LOI and both FCRC and ESDC have received the benefit of that partial performance. Specifically, one of the principal terms of the LOI was that AJ Richards would not join the community opposition to the project, and AJ Richards, in compliance with the LOI, did not oppose the project.

ESDC and FCRC are two independent entities, however as it relates to acquiring or condemning this property for the Atlantic Yards project they are acting in concert. To grant the petition to vest before the appeal is decided, would allow ESDC to abet FCRC in evading Judge Ash's order barring FCRC from acquiring the property outside of the LOI and directing FCRC to specifically perform under the LOI. For this reason, this case should be stayed until the appeal of Judge Ash's order and judgment is determined.

Additionally, the balancing of the equities as to whether this proceeding should be stayed, weighs decidedly in favor of AJ Richards. Judge Ash has held that a money judgment would not be an adequate remedy and that "AJ Richards would be irreparably harmed if Forest City or those working in concert with Forest City obtain the property, other than pursuant to the terms of the LOI."

As ESDC points out, the interests involved in the specific performance case are not identical to those in this proceeding. If the petition in this case is granted and the property is taken, then AJ Richards is entitled to just compensation but only for the value of the real property and fixtures, not for any loss to its business. The LOI on the other hand provides benefits to AJ Richards as a business in addition to the value of the real property. In this context, just compensation for the property, if taken, would not be an adequate remedy for the failure of FCRC to perform under the LOI.

ESDC also argues that it would be pointless to stay the proceeding pending the determination of the appeal because even if the order for specific performance is affirmed, ESDC would still have the right to condemn the property free of any encumbrances.

However, it is entirely possible that if Judge Ash's order is affirmed, that FCRC or Greenland will in fact comply with the order and purchase the property and give AJ Richards the replacement property as called for in the LOI. In that event, there would be

little reason for ESDC to condemn the property as it would already be owned by the developer.

Also, it appears that Judge Ash's order, if upheld, could bar FCRC, ADYC or its affiliates from reimbursing ESDC for costs it incurred in acquiring the property by eminent domain.

Lastly, ESDC would not be harmed if this proceeding was stayed. The only harm articulated by ESDC is delay in developing the project. However, ESDC has waited ten years since the final determinations of the challenges to the project and four years after they gave notice of their intent to take the property to commence this proceeding.

In it is evident that this proceeding was only filed last November because the time by which it had to be filed was about to run. There is no indication that the developer is ready to proceed with the project at this time if the property were vested.

Moreover, the developer is seeking approval to build a significantly larger building than the current plan provides for. The assertion by ESDC that "[t]o date the developer's proposal for greater bulk on site 5 has not been approved by ESD's Directors, and therefore as of today the project will be developed according to the MGPP (the Modified General Project Plans)" even if technically correct, does not provide any real assurance that the developer is ready to proceed at this time to construct the planned building at its current size.

It appears probable that no development on this property will occur until a decision is made on whether to seek the transfer development rights to enlarge the planned building and any necessary reviews are completed. Thus, a stay pending decision on the appeal will not actually cause a significant delay in development of the site.

WHEREFORE, it is hereby ORDERED that this proceeding is stayed pending resolution of the appeal in *A.J. Richards & Sons, Inc., v Forest City Ratner Companies LLC*, Case No. 2019-01624 (2nd Dept).

ENTER:



JSC

HON. WAYNE P. SAIITA
J.S.C.

KINGS COUNTY CLERK
FILED
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