

STATE OF NEW YORK
SUPREME COURT NEW YORK COUNTY

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In the Matter of

DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,

Petitioners,

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

- against -

EMPIRE STATE DEVELOPMENT CORPORATION,
FOREST CITY RATNER COMPANIES, LLC,

Respondents.

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JEFFREY S. BAKER, an attorney at law duly admitted to practice before the courts of the State of New York, hereby affirms the following under penalties of perjury:

1. I am a member of the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, counsel for the petitioners in the above-captioned proceeding. I am fully familiar with the facts and circumstances of this proceeding. I submit this affirmation in response to the Memorandum of Law and the Affirmation of Philip Karmel submitted by the Respondents.
2. Respondents' papers are notable for two primary factors. First, the outrageous argument that Petitioners' Motion to Renew should be denied because Petitioners should have presented the December 2009 Development Agreement to the Court before its decision and/or made a motion to expand the record. That argument is belied by the Court's clear direction to counsel that it would not permit any such motion to be filed. Second, Respondents completely fail to respond to the detailed provisions in my affirmation that demonstrate that Forest City Ratner Companies

**REPLY AFFIRMATION
OF JEFFREY S. BAKER
IN SUPPORT OF MOTION
TO REARGUE AND RENEW**
Index No.: 114631/09
IAS Part 57

(FCRC) is under no legal obligation to even begin Phase II of the project until at least 2025.

Respondents continue to hide behind the meaningless provisions of a promise to use “commercially reasonable efforts” to complete the project by 2019.

The Need for the Motion to Renew

3. As admitted by Respondents, the Development Agreement was not made available to the public until January 25, 2010 and a copy not provided to me until February 5th.
4. Respondents fail to recognize that this Court, at the oral argument on January 19, 2010 specifically directed the parties not to submit any letters or make any motions regarding this case without obtaining prior leave of the Court. (Tr. 91, a copy of the relevant pages of the transcript are attached as Ex. A).
5. In at least two conference calls with Court, I requested an opportunity for the Court to either order ESDC to produce the Development Agreement (before it was made available by FOIL) and then specifically on a February 11, 2010 conference call I asked if the Court would permit a motion to bring the Development Agreement to the Court’s attention since it demonstrated that “commercially reasonable efforts” meant far longer than 2019. The Court refused both requests. In fact on the February 11th call, Justice Friedman was quite adamant that she was only looking at the record as it existed when the ESDC issued its resolutions in September 2009.
6. Given the Court’s clear direction, Petitioners had no opportunity to make a motion before the decision and had I pushed the issue any further, I am sure I would have incurred the ire of the Court as she had made her ruling very clear. Thus it is beyond disingenuous for Respondents to blame Petitioners for not making a more timely motion, when the opportunity for such a motion was precluded. It is Respondents who knew about the existence of the Development Agreement and new it was not consistent with their representations to the Court who had the obligation to

bring it to the Court's attention.

7. Notwithstanding the clear bar on the opportunity for a Petitioners to bring the Development Agreement to the Court's attention, Respondents' cited cases arguing against the Motion to Renew are not relevant to this case. Courts have broad discretion in determining whether to grant a motion for leave to renew based upon facts omitted on a prior motion (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept. 2003] (courts have discretion to grant motion to renew in the interest of justice even if the facts could have been proffered on the prior motion); *U.S. Reinsurance Corp. v Humphreys*, 205 AD2d 187 [1st Dept. 1994] (under appropriate circumstances, a court has discretion to grant renewal even upon facts known to the movant at the time of the original motion), *appeal after remand* 240 AD2d 264; *Poag v Atkins*, 3 Misc3d 1109(A), *4 [Sup. Ct. New York County 2004] (court has discretion to grant motion in the interest of justice despite prior knowledge); *see also Moncrief v DiChiaro*, 52 AD3d 789, 790 [2d Dept. 2008] (even if some of the evidence relied upon in moving for renewal may have been known at the time opposition papers were submitted, court has discretion to grant renewal)).
8. A motion to renew may be entertained any time new facts and additional evidence is discovered, even if it is after a decision has been issued by the court (*see Harrell v Koppers Co. Inc.*, 154 AD2d 340, 341 [2d Dept. 1989]). Respondents' presentation to this Court in their respective Memoranda of Law that motions to renew are rigidly denied where a party could have presented such evidence while a decision was pending, is simply misleading. In fact, the cases cited *supra* reveal that courts have broad discretion in granting motions to renew, even where the movant knew of the evidence presented when making or opposing a motion and failed to present it to the court. In contrast, the Petitioners in the present Proceeding were unaware of the contents of the Development Agreement at the time this Proceeding was commenced and this fact presents an

even stronger basis for granting the motion to renew.

9. While the Respondents point to numerous decisions in which renewal motions were denied, the facts of each of these decisions are dissimilar to those at issue here and are easily distinguishable. In *Matter of Beiny*, 132 AD2d 190, 209-210 [1st Dept. 1987], *appeal dismissed* 71 NY2d 994, the court held that a renewal motion cannot be entertained where the new facts could have been raised in the original motion papers. *Matter of Beiny* does not support Respondent's position that Petitioners had an obligation to present these new facts *after* submission of its Article 78 Petition.
10. *Beyl v Franchini*, 37 AD3d 505 [2d Dept. 2007], a case relied upon by Respondent ESDC resulted in a denial of plaintiffs' motion to renew their opposition based upon more recent examinations by plaintiffs' physician, where there was no explanation as to why the examinations could not have been conducted earlier or why plaintiffs did not seek an adjournment of defendant's motion. However, the newly discovered facts in *Beyl* were known by plaintiffs and were actually developed by plaintiffs' physician, unlike the present facts that Petitioners only uncovered after submitting a Freedom of Information Law request.
11. In *Cooke Center for Learning and Dev. v Mills*, 19 AD3d 834, 837 [3d Dept. 2005], *lv. to appeal denied* 5 NY3d 846 [2005], relied upon by Respondent ESDC, the motion to renew was denied where the new facts presented were available while the initial motion was pending; however, the movant was simply unaware of their existence. This is simply not the case here. Respondents do not dispute that the Development Agreement was not available at the time this Proceeding was commenced and therefore could not have been raised by Petitioners.
12. In *McGovern v Tatten*, 213 AD2d 778, 779 [3d Dept. 1995], *lv. to appeal denied* 80 NY2d 1005 [1992], *rearg. denied* 81 NY2d 782, a motion to renew was denied where the movants failed to

show new facts that supported the motion and for not raising those issues while the motion was pending. However, under the present facts, the Petitioners did raise the new facts at issue discovered through a review of the Development Agreement and were advised by the Court that they were prohibited from serving additional motions in this Proceeding until a decision on the merits was reached.

13. The motion to renew in *William P. Paul Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept. 1992], a case relied upon by FCRC was denied as the documents proffered as new were not as “they represented conversations and negotiations in which their principals had taken part and had to be aware of ... [and constituted] the same facts plaintiffs had asserted in their opposition to the motions to dismiss ...” Certainly *Kassis* is inapplicable to the instant motion. There is no question that Petitioners were: (a) unaware of the Development Agreement at the time this Proceeding was commenced; and (b) the Development Agreement was admittedly not available to Petitioners until after this Proceeding was commenced. These facts, coupled with the fact that the parties were prohibited from making any motions support, Petitioners’ application for renewal and this Court has broad discretion to grant this requested relief.

Respondents Do Not Deny The Lack of Deadlines for Phase II

14. The crux of Respondents’ argument has been that it was reasonable for ESDC to use the 2019 completion date for the purposes of review under SEQRA and the UDCA. And in its decision the Court held that Respondents barely satisfied their responsibility and based its decision, in part, on the representations that FCRC would be held to “commercially reasonable efforts”.
15. In Petitioners’ Motion to Renew/Reargue, we pointed out that while there are some financial obligations and penalties associated with some of the elements of Phase I, there were effectively no penalties for Phase II and the earliest date for any default and penalties would be 2025 and

that those could be avoided with minimal compliance not constituting even any commencement of construction of Phase II.

16. Respondents' sole reply is to point to Section 8.1(d) of the Development Agreement which is only a reiteration of the statement in Section 2.2 that FCRC must use commercially reasonable methods to complete the project by 2019.¹
17. Respondents do not explain how the specific provision of Article VIII of the Development Agreement which have the specific completion dates could be deemed irrelevant and allow ESDC to find FCRC in default of the agreement if the project is not completed by 2019. Where a contract between the parties has such specific language, how could one party seek to enforce a more vague provision? Respondents do not address that issue.
18. In their memorandum of law, Respondents continue to claim that notwithstanding the clear provisions of the Development Agreement, FCRC has unspecified clear economic incentives to complete the project by 2019. However, in this litigation, FCRC has not submitted a single affidavit from anyone associated with FCRC making that statement or providing any objective evidence to that effect. There is no evidence to demonstrate that FCRC might not make a sufficient return on its investment with a partially completed Phase I and then seek to abandon or extensively prolong Phase II.
19. Respondents' failure to address the lack of enforceability of the ephemeral 2019 date is an acknowledgement of Petitioners' argument. Where this Court relied upon ESDC's representations that FCRC would be held to a binding commitment for completion by 2019, the Development Agreement demonstrated conclusively to the contrary.

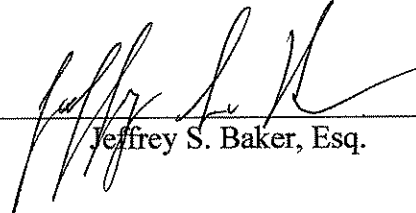
Relief

¹ ESDC's Memorandum of Law miscites the section as 8.2.

20. Petitioners request that the Court hold a hearing on this motion to determine the content and relevance of the Development Agreement. That hearing, at which the Court should require sworn testimony from ESDC and FCRC will clearly establish whether 2019 was a reasonable date on which ESDC should have based its decision.
21. The Court should also consider at a hearing the extent of construction and the reasonable extent of enjoining further work. ESDC has submitted only an unsupported affirmation alleging various investments without identifying the sources of the funds or the exact nature of the expenditures.
22. Upon information and belief a significant portion of the funds expended to date are public funds dedicated to infrastructure improvements and the MTA railyard which will have utility regardless of the nature of future development. Other funds expended by FCRC are associated with acquiring properties for the project and design and permitting costs.
23. Petitioners do not believe that the Arena should be allowed to proceed as a stand alone project. ESDC has never considered the Arena by itself and none of its findings regarding the alleged benefits of the project separate the Arena from the balance of the project. It was considered as a whole. If ESDC wants to approve the Arena by itself as a civic project under the UDCA, it must do so by a separate analysis and resolution.
24. Petitioners have diligently pursued litigation challenging a misguided project that if built will harm the community by an over-scaled project and if allowed to languish because it is so poorly considered will doom the community to a permanent state of blight and environmental harm. The belated release of the Development Agreement has revealed that the claim of a completed project by 2019 was never realistically considered and has no contractual obligation. We respectfully urge the Court to not condone the misrepresentations by ESDC and FCRC and to

grant the motion.

Dated: April 28, 2010
Albany, New York



Jeffrey S. Baker, Esq.