

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

-----x

DEVELOP DON'T DESTROY BROOKLYN, et al.,	:	Index No. 100686/06
	:	
Petitioners – Respondents,	:	AFFIRMATION IN
	:	SUPPORT OF
- against -	:	MOTION FOR STAY
	:	PENDING APPEAL
EMPIRE STATE DEVELOPMENT CORPORATION,	:	AND
	:	<u>FOR A PREFERENCE</u>
	:	
Respondent –Appellant,	:	
	:	
-and-	:	
	:	
FOREST CITY RATNER COMPANIES,	:	
	:	
Respondent.	:	

-----x

DOUGLAS M. KRAUS affirms, under the penalties of perjury pursuant to CPLR 2106, as follows:

1. I am a member of the Bar of the State of New York and of the firm of Skadden, Arps, Slate, Meagher & Flom LLP, counsel for Respondent-Appellant Empire State Development Corporation ("ESDC") in the above-captioned proceeding commenced pursuant to Article 78 of the CPLR.
2. I make this affirmation in support of ESDC's application for (i) a stay pending appeal with respect to that portion of the order below from which ESDC appeals, pursuant to CPLR §§ 5519(a)(1) and/or (c), and (ii) a preference expediting the briefing and argument of this appeal, pursuant to CPLR § 5521(a) and this Court's Rule 600.12. ESDC appeals from that portion of an order of Supreme Court (Hon. Carol Edmead, J.) dated February 14, 2006 and filed February 15, 2006 which enjoined ESDC

from "taking any further action which requires the services of [ESDC's] outside counsel David Paget and his firm" in connection with ESDC's ongoing environmental review of the proposed Atlantic Yards Arena and Redevelopment Project ("Atlantic Yards") in Brooklyn, and further ordered ESDC to engage new counsel on that matter "within 45 days." A copy of the order appealed from and the accompanying decision is attached hereto as Exhibit A.

3. ESDC respectfully submits that, as an agency of the State of New York, it is entitled to a stay without order of the Court pursuant to CPLR § 5519(a)(1). However, in the event the Court disagrees, ESDC submits that it has demonstrated facts herein sufficient to warrant the entry of a stay pursuant to CPLR § 5519(c).

The Need for a Stay and an Expedited Appeal

4. Significantly, in issuing the order appealed from, the court below found no actual improper conduct by Mr. Paget or his firm, and expressly stated on the record that *"I don't doubt on the issue of Paget that the Court's determination may not stand. . . . The court may be wrong on that, and on appeal, I will understand and read the reversal on that issue."* (See Excerpt of Transcript of Proceedings, attached as Exhibit B hereto) As shown in greater detail below and in ESDC's accompanying memorandum of law in support of this motion, the lower court's misgivings about its order are not surprising, since the order is at odds with well-settled law on the issue of attorney disqualification. The order is also causing serious and immediate harm to ESDC.

5. Specifically, ESDC, an agency of the State of New York formerly known as the New York State Urban Development Corporation, is the "Lead Agency" pursuant to the State Environmental Quality Review Act ("SEQRA") for purposes of the

environmental review of the proposed Atlantic Yards project, a complex multi-billion dollar redevelopment project proposed to be built by Respondent Forest City Ratner Companies ("Forest City") over the Metropolitan Transit Authority's Atlantic Terminal rail yards in Brooklyn.

6. Effective as of October 1, 2005, ESDC retained David Paget, Esq. and his firm, Sive Paget & Riesel, P.C., as its outside environmental counsel in connection with its environmental review of the project, and in particular the preparation of the Environmental Impact Statement required by SEQRA. Mr. Paget and his firm have been actively functioning in that capacity since that date. (See Affirmation of Anita W. Laremont, Esq., Senior Vice President and General Counsel of ESDC, at ¶ 5 (Exhibit C hereto), and Affirmation of David Paget, Esq. at ¶ 11 (Exhibit D hereto))

7. Mr. Paget is one of the preeminent environmental lawyers in the United States, and for the past 30 years he has served as outside environmental counsel to the ESDC on many of the largest and most complex development projects undertaken in New York State. (Laremont Aff. ¶¶ 3-4) There are very few environmental lawyers with Mr. Paget's background and experience -- and literally only a handful of them who possess Mr. Paget's expertise in the preparation of the type of Environmental Impact Statements required in connection with a project of the size and complexity of the proposed Atlantic Yards project. Accordingly, ESDC has great confidence in Mr. Paget and he is ESDC's counsel of choice on matters such as this. (Id.)

8. Until the court below issued its order, Mr. Paget and his firm were fully engaged in the environmental review process for the Atlantic Yards project, which was proceeding actively and on schedule. An initial public hearing, attended by more

than 500 persons, was held on October 18, 2005 to solicit comments on a forty-one page Draft Scope of Analysis for an Environmental Impact Statement, and the ESDC was considering those comments and was preparing to issue a Final Scope of Analysis for an Environmental Impact Statement (the "Final Scoping Document"), which will determine the issues, and the methodologies for analyzing those issues, that will be addressed in the Environmental Impact Statement that must be prepared in connection with the proposed project. Until the court below acted, ESDC had expected to issue the Final Scoping Document within approximately 30 days, following which it would then proceed to conduct the detailed environmental studies and analyses prescribed therein. (See Affidavit of Rachel Shatz, ESDC's Director of Planning and Environmental Review, at ¶¶ 6-8 (annexed hereto as Exhibit E))

9. Now, however, as a result of the order of the court below, ESDC has been deprived of its counsel of choice in this large and complex matter. In addition, the order of the court below has brought the environmental review process respecting the Atlantic Yards project -- and thus the project itself -- to a screeching halt, since experienced outside counsel is required for a project of this nature, and ESDC has been precluded from continuing to rely on Mr. Paget and his firm for this purpose. This effectively hands a significant tactical victory to Petitioners-Respondents, who have announced their steadfast opposition to the project, even before the environmental analysis has been prepared.

10. In this regard, I respectfully direct the Court's attention to the document annexed hereto as Exhibit F. In accordance with this Court's rules, shortly before noon on February 16, 2006, I spoke by telephone with Jeffrey S. Baker, Esq.,

counsel for Petitioners-Respondents, to advise him of ESDC's intention to appeal Mr. Paget's disqualification and to seek a stay and preference from this Court. Shortly thereafter, ESDC began to receive numerous inquiries from the press, and Petitioner-Respondent Develop Don't Destroy Brooklyn posted a press release on its web site, a copy of which is annexed hereto as Exhibit F, questioning ESDC's exercise of its right to appeal from the order of the court below and disparaging ESDC's environmental review process. ESDC -- which, for its part, has repeatedly declined press requests for comment on this lawsuit -- submits that an expedited appeal is warranted to settle the issue of its right to counsel of its choosing in this matter, and to prevent this issue from continuing to be used by Petitioners-Respondents as a tactical weapon in their ongoing battle against the Atlantic Yards project.

11. Finally, there is a distinct possibility that ESDC may not be able to find substitute counsel equivalent to Mr. Paget, since relatively few such counsel exist, and several of them are already engaged as counsel for other parties in the Atlantic Yards matter (most notably Richard Leland of Kramer Levin Naftalis & Frankel LLP and Stephen Lefkowitz of Fried Frank Harris Shriver & Jacobson LLP, both of whose firms represent Forest City, and Steven Kass of Carter Ledyard & Milburn LLP who represents the Metropolitan Transit Authority). An expedited appeal is thus appropriate in the interest of fairness, so that ESDC may promptly obtain a definitive answer to the question of whether it will in fact be required to retain new counsel on the Atlantic Yards project.

12. Thus, the order of the court below is causing real and immediate harm to ESDC and its review of the Atlantic Yards project, and warrants the entry of a stay pending appeal and immediate review by this Court.

The Order Disqualifying Mr. Paget was Clearly in Error

13. Moreover, as explained in greater detail in ESDC's accompanying memorandum of law, the order of the court below disqualifying Mr. Paget was based on clear errors of law.

14. By way of background, Petitioners-Respondents ("Petitioners") commenced this Article 78 proceeding by order to show cause on January 19, 2006, seeking a preliminary injunction barring Forest City from demolishing five vacant and dilapidated buildings within the Atlantic Yards project "footprint." In their Verified Petition, Petitioners contended that ESDC had improperly issued a Declaration of Emergency, dated December 15, 2005, authorizing the buildings' demolition, and sought an order annulling the Declaration. (A copy of Petitioners' Order to Show Cause and Verified Petition, with exhibits, is attached hereto as Exhibit G)

15. In their third cause of action, Petitioners sought an order disqualifying Mr. Paget and his firm from continuing to act as ESDC's outside environmental counsel in connection with the environmental review of the project, on the grounds that Mr. Paget had represented Forest City, the developer of the proposed Atlantic Yards project, at an earlier stage of the project prior to being engaged by ESDC, and that Mr. Paget's firm continued to represent Forest City on two small matters that were entirely unrelated to the project. Petitioners thus asserted that Mr. Paget had a conflict of interest that precluded his continued representation of ESDC.

16. However, Petitioners nowhere alleged that they had ever had an attorney-client relationship with Mr. Paget and/or his firm. The Court of Appeals and this Court have previously held that, absent such a relationship with the lawyer sought to be disqualified, a party lacks standing to seek such relief. The court below simply ignored this settled law, which is nowhere alluded to in the court's 41-page decision.

17. In addition, the affidavits submitted by ESDC, Forest City and Mr. Paget made clear that (i) it was always understood and expected, by both ESDC and Forest City, that Mr. Paget would ultimately represent ESDC in the event the Atlantic Yards project went forward to the stage of environmental review, (ii) at all times ESDC was aware of and consented to Mr. Paget's representation of Forest City at the early stages of the project, and (iii) Forest City consented to Mr. Paget's representation of ESDC when the environmental review process began. Thus, if any conflict existed, it was waived by Forest City and ESDC. (See Laremont Aff. ¶¶ 5-11; Paget Aff. ¶¶ 7-11; Affidavit of James P. Stuckey (Exhibit H hereto) ¶ 17) Again, however, the court below failed to address this important issue.

18. Finally, neither Petitioners nor the public at large were in any way prejudiced by Mr. Paget's representation of ESDC in this matter since, had the ESDC taken final action that Petitioners (or any other aggrieved person) believed was improper, they would have been able to challenge such action in an Article 78 proceeding on the merits. On the other hand, the disqualification of Mr. Paget severely prejudices ESDC, which has been deprived of its right to counsel of its choosing, and its environmental review of the Atlantic Yards project has been significantly impeded.

19. The court below failed to consider any of these arguments, and instead disqualified Mr. Paget, holding that "[t]he magnitude of the impact of ESDC's future actions are so monumental and will have such a considerable effect on an entire conglomerate of communities, that the slightest appearance of impropriety and conflict warrant the disqualification of Mr. Paget and his firm from the involvement in ESDC's review and approval process." (Opinion at 39-40) ESDC respectfully submits that this ruling is manifestly in error and is at odds with settled decisions of the Court of Appeals, this Court and other courts of this State, as well as the relevant Disciplinary Rules and the ethical opinions interpreting those Rules.

The Order Appealed from Should be Stayed  
and the Briefing and Argument of this Appeal Should be Expedited

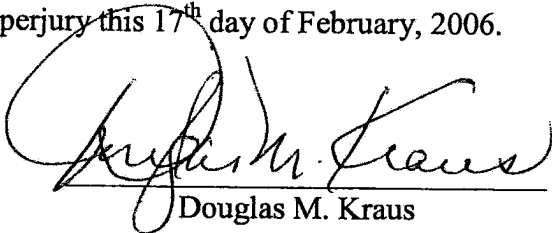
20. In light of the serious harm to ESDC from the disqualification of its counsel in this important and continuing matter, the size and significance of the Atlantic Yards project, the substantial legal infirmities of the lower court's ruling, and the fact that the court itself expressly recognized those infirmities when it issued its ruling -- stating on the record that its order "might be reversed" and was premised on a "slim reed" -- ESDC respectfully submits that the order appealed from should be stayed and the briefing and argument of this appeal should be expedited.

21. ESDC will be prepared to file its brief on the merits of this appeal on Tuesday, February 21, 2006, and respectfully requests that Respondent Appellees be directed to file their brief on Tuesday, February 28, 2006, with ESDC's reply brief to be filed on Friday, March 3, 2006. ESDC further respectfully requests that this appeal be scheduled for oral argument during the week of March 6, 2006.

22. The foregoing schedule should not cause undue hardship to the parties, since the issue on this appeal is a narrow one, the law is clear, and the issue was fully briefed and argued in the court below.

23. Accordingly, ESDC respectfully requests that this Court (i) stay that portion of the order appealed from, pending its consideration and determination of this appeal, (ii) grant a preference expediting the briefing and argument of this appeal substantially in accordance with the schedule proposed in paragraph 18, above, and (iii) grant such other and further relief as to this Court may seem just and proper.

Affirmed under the penalties of perjury this 17<sup>th</sup> day of February, 2006.

  
Douglas M. Kraus