

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----- X

BAR MAR. GROUP, LLC,

DECISION AND ORDER

Plaintiff,

-against-

Index No. 031181/2017

NEW YORK STATE HOUSING TRUST FUND CORPORATION,

(Motion #1 and 4)

Defendant.

----- X

Sherri L. Eisenpress, 3.

The following papers, numbered 1 to 16r were considered in connection with (i) Defendant's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3211, dismissing the Verified Complaint for failure to state a cause of action (Motion #1); and (ii) Plaintiff's Notice of Motion for leave to Amend and Supplement the Verified Complaint in the form annexed to the moving papers (Motion *4) :

PAPERS

NUMBERED

Motion #1

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/MEMORANDUM OF LAW!
EXHIBITS A-E 1-3

AFFIDAVIT IN OPPOSITION BY H. ADAM COHEN ESQ./MEMORANDUM OF LAW
IN OPPOSITION/EXHIBITS A-FF 4-5

MEMORANDUM OF LAW IN REPLY 6

LETTER FROM THE COURT DATED APRIL 4, 2018 7

LETTER FROM DEFENDANT DATED APRIL 4, 2018/EXHIBITS A-B 8

Motion #4

NOTICE OF MOTION/AFFIDAVIT or H. ADAM COHEN HQ IN SUPPORT/EXHIBITS
B-C, F-G, 3-K, N, T-CC, FF-LL/AFFIDAVIT OF SHELDON ROBERTS/AFFIDAVIT
OF JOEL BROWN/MEMORANDUM OF LAW IN SUPPORT 9-13

AFFIRMATION IN OPPOSITION/MEMORANDUM OF LAW IN OPPOSITION/
EXHIBIT A 14-15

MEMORANDUM OF LAW IN REPLY 16

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Background

Plaintiff filed a Summons and Complaint through the NYSCEF system on March 13, 2017. Plaintiff alleges that in June 2011, Ba Mar Group, LLC ("Ba Mar") purchased a mobile home community known as "Ba Mar" located at 400 Ba Mar Drive, Stony Point, New York, for \$8.45 million, which contained approximately 151 improved mobile home lots, roads, water and sewer lines. The property was located in a 100-year flood plain near the Hudson River. In October 2012, Superstorm Sandy struck the east coast, causing extensive flooding at the property, as well as damage to many of the manufactured homes located on the property. Prior to Superstorm Sandy, 143 of the 151 mobile homes were occupied by families in the Ba Mar community. As a result of the storm and the extensive flooding, approximately 35 of the homes were rendered temporarily uninhabitable,

Defendant New York State Housing Trust Fund Corp. ("HTFC") is a subsidiary public benefit corporation of the New York State Housing Finance Agency, created pursuant to N.Y. Priv. Hous. Fin. Law Sec. 45-a, or the "Enabling Statute." Part of HTFC's mission is to "further recovery, building, and resilience efforts of homes, businesses, and public infrastructure and facilities in storm-affected counties throughout New York State." Pursuant to the Enabling Statute, HTFC is empowered to, among other things, "acquire, hold and dispose of real or personal property for its corporate purposes." Significantly, it does not have the power to condemn property, exercise eminent domain, pass regulations, or effect takings for public use. Following Hurricane Sandy in 2012, Governor Andrew Cuomo created the Governor's Office of Storm Recovery ("GOSR"), within HTFC, to oversee the State's storm recovery efforts. Pursuant to the Disaster Relief Appropriations Act, 2013, HTFC, through GOSR, has received federal funding through the US Department of Housing and Urban Development ("HUD") to assist with disaster relief. HTFC must submit an action plan to HUD for approval prior to receiving any

federal funds for its programs.

HTFC created a Manufactured Home Community Resiliency Program ("the Program") to provide "individualized and comprehensive resiliency programs for residents of selected manufactured home communities. Some of the options of the program were as follows: (i) buyout of eligible properties; (ii) purchase of property outside the flood plain; (iii) improvements or new construction at existing locations; (iv) providing down payment assistance on new homes; and (v) relocation payments to residents, In 2013, Ba Mar residents received the news that its community had been selected to participate in the Program, When considering options for the community, HTFC contacted Plaintiff regarding whether it was willing to sell the property. Plaintiff alleges that after several months of work and communications, HTFC confirmed to the Owner that the appraisal estimated the Property's market value to be about \$10 million. However, on or about January 19, 2017, it Is alleged that during a conference call, instead of discussing contract terms and a closing date, HTFC's representative told the Plaintiff that, due to a "change in political climate" and a new and different understanding of budgetary constraints," HTFC had decided not to proceed with the purchase of the property.

It is further alleged that a meeting was scheduled to inform the residents of the Ba Mar community that HTFC would offer financial Incentives to **relocate the residents** away from the property, irrespective of the condition or location of their homes, At that meeting, HTFC offered Ba Mar residents who agreed to be relocated elsewhere, the following options: they could receive funds for a new manufactured home plus installation costs; down payment assistance; payments towards principal plus closing costs for purchase of a home; up to 42 months of rental payments; and relocation cost reimbursement to cover the cost of demolishing the resident's existing, home on the Property. The program was voluntary and the residents were required to apply to the Program in order to receive benefits. Residents were also told that they were welcome to stay in the Ba Mar community If they did not want to participate in the

program.

Plaintiff alleges that as a result of the HTFC's action in encouraging current residents to relocate elsewhere and In interfering with Plaintiff's ability to attract others to lease lots, HTFC has caused substantial financial damage to the owner, impairing the viability of Ba Mar's business and materially reducing the market value of the Property. Plaintiff further alleges that HTFC's refusal t6 assist those who wished to remain in their homes has Jed to an increasing, number of vacant homes and abandoned lots, which will worsen over time. Plaintiff asserts that HTFC's actions amount to a taking of property or property rights without due process and just process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution. Ba Mar seeks an award and judgment against HTFC for the value of its Property, in an amount believed to exceed \$10 million.

The Parties' Contentions

HTFC contends that the gravamen of Plaintiff's Complaint is that by offering voluntary assistance to Ba Mar community residents, Defendant has effected a taking of Plaintiff's Property without just compensation or due process. Defendant filed the instant pre-answer motion to dismiss the Complaint in its entirety on the ground that Plaintiff cannot satisfy the regulatory takings test set forth by the U.S. Supreme Court in Penn Central Transportation Co. V. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978). More specifically, Defendant argues that Plaintiff has failed to allege facts sufficient to satisfy any of the three required factors necessary to establish a taking.

First, HTFC argues that its voluntary assistance program is not in the nature of a regulatory taking. The program does not place any obligations or restrictions on Plaintiff or the Ba Mar community residents; Defendant has not condemned the property; Defendant has not ordered the residents to leave; and has not prohibited Plaintiff from continuing to rent the property to new residents. Defendant argues that, at best, the public benefit program may have some undefined effect on the market for rental lots on the property but that, standing

alone, does not make HTFC's actions regulatory as a matter of law.

Defendant also argues that Plaintiff has failed to allege facts sufficient to establish the program's significant economic impact necessary to state a regulatory taking claim under Penn Central. HTFC notes that Plaintiff has not set forth any specific economic impact the program has on the market value of the property before announcement of the program, how it decreased after the announcement, or how many residents have moved away since the announcement. Defendant asserts that the Complaint fails to establish that HTFC has Interfered with Plaintiff's investment-backed expectations for the Property. Defendant notes that Plaintiff has acknowledged that the property is at the mouth of a tributary of the Hudson River and sits at a lower elevation than the property to the west of it and that the 2011 Appraisal which Plaintiff expressly relied on In purchasing the property advises that the property "is a Special Flood Hazard Area Inundated by the 100-year flood plain." Defendant argues that Plaintiff's investment expectations when it purchased the property included the knowledge that its value and rental income could be diminished by the future risk of flooding. As such, it argues that Plaintiff cannot seek regulatory taking based on relief from HTFC resulting from the State's assistance to the New York residents who wish to be relieved of the threat of living in a flood zone. Lastly, Defendant argues that Plaintiff fails to state a due process claim in that Plaintiff has failed to identify a cognizable property interest of which Ba Mar has been deprived by HTFC and failed to set forth facts sufficient to establish that HTFC's actions were wholly without legal justification.

In opposition, Plaintiff argues that as a result of Defendant's actions, 95 of the 108 households have either left the property with HTFC's financial incentives or have applied to do so. It argues that the "voluntary" program which offered more than \$125,000 to families of limited means to leave the property constitutes a taking, as it would be very difficult for them to turn down the offered relief. These actions, Plaintiff argues, has had a profound economic impact that impairs the property's value. Additionally, Plaintiff argues that HTFC's focus on the

risk of flooding misapplies the investment-backed expectations requirement since regardless of an inherent risk of flooding, the takings analysis must focus on HTFC's actions which interfered with Plaintiff's reasonable expectations that it could lease lots and earn an economic return. Plaintiff argues that it could prepare for the risks of a flood, but not that the government would move its residents away with offers of monetary payments,

By letter dated April 4, 2018, the Court advised the parties that in reviewing the submitted moving and answering papers, it came to the Court's attention that the Motion to Dismiss was filed without including any of the pleadings. While this would be a basis upon which to deny the motion to dismiss, it was noted that Plaintiff essentially conceded in their answering papers that the complaint was defective, but expected the Court, without so moving, to grant leave to amend. As such, the Court adjourned the motion for submissions by either party, as they deemed appropriate under the circumstances.

In response, Plaintiff filed a motion to Amend and Supplement the Complaint to add additional facts, and annexed a red-lined copy indicating the proposed changes. Among the new facts asserts were that after the storm, many residents expressed their interest in continuing to reside at the property; that HTFC had decided to pursue a two-pronged solution, in which it would both purchase the property and relocate the community's residents; that after the storm Plaintiff estimates that the property value was approximately \$8 million as of September 30, 2016; by October 2017, residents of 95 lots at the Property had either moved away from the property or agreed to move away and all but 11 sites have vacated or agreed to vacate as a result of HTFC's financial incentives; each time IITFC's program incentivizes a resident to relocate away from the property, it irrevocably reduces the property's income and ability to support itself; following the announcement of its incentive program, Plaintiff utilized a national broker to market the property to approximately 87 market participants and no one has agreed to make the purchase; and HTFC's actions have destroyed the property's viability and value and it is estimated that the property now is of only nominal value. Plaintiff also

submits the affidavit of Joel Brown, the Vice President of Newbury Management Company, which manages the property. Plaintiff asserts that Mr. Brown's affidavit demonstrates that upon HTFC incentivizing the Property's resident to leave, by February 2018, the property already failed to generate income sufficient to satisfy its debt service and that the property retains only nominal value.

Plaintiff argues that motions to amend are to be freely granted where Defendant **will** suffer no prejudice or be surprised. It further asserts that the proposed amendments address facts that arose or became known after Plaintiff filed its initial complaint, including HTFC's "two-pronged" solution and additional exhibits evidencing the property's economic destruction.

In opposition, Defendant asserts that Plaintiff's proposed amendments to the Complaint are palpably insufficient to state a claim. **It** argues that even with the proposed amendments, Plaintiff cannot show that HTFC's offer of voluntary financial assistance is even a regulation, as it is neither coercive or mandatory and does not prohibit Plaintiff from renting lots on the property to new tenants or residents who choose to stay. Additionally, Plaintiff fails to set forth facts sufficient to show that Defendant interfered with Plaintiff's investment-backed expectations where Plaintiff knew when it bought the property that it sits in a high-risk flood zone and could lose tenants and market value If the property flooded. Plaintiff also asserts that Plaintiff only seeks to bolster its allegation that HTFC has negatively impacted the property's economic value but falls to support its contention that the property was, worth \$8 million after the storm, with supporting appraisals or arty market information, but is now worthless. Defendant further notes that Plaintiff's claim that it is precluded from renting the property is false, since by its own admission, 11 families have chosen to stay on the property and plaintiff is offering special promotions to encourage other residents to stay.

Discussion

On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the

Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. Campaign for Fiscal Equity, Inc. v. State, 861 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502 (1983); Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98, 675 N.Y.S.2d 143 (3d Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821, 478 N.Y.S.2d 55 (2d Dept. 1984), The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 431 N.Y.S.2d 60 (2d Dept. 1980); Pertato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (2d Dept. 1976). "However, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion. Palazzolov. Herrick, Feinstein, LLP, 298 A.D.2d 372, 751 N.Y.S.2d 401 (2d Dept. 2002); Barker v. Amorini, 121 A.D.3d 823, 995 N.Y.S.2d 89 (2d Dept. 2014).

In assessing a motion to dismiss for failure to state a cause of action, the court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint. Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972 (1994). Nonetheless, it is appropriate to grant a motion to dismiss pursuant to CPLR Sec. 3211 (a)(1) where documentary evidence submitted with the motion "utterly refutes the factual allegations of the pleading and conclusively establishes a defense to the claim as a matter of law. Darby Gm. Cos. v. Wulforst Acquisition, LLC, 130 A.D.3d 866, 867, 14 N.Y.S.3d 143 (2d Dept. 2015).

Leave to amend the complaint should be freely given in the absence of prejudice or surprise to the opposing party. Absent prejudice or surprise, a motion for leave to amend a complaint should be granted. Bogal v Finger, 59 A.D.3d 653, 874 N.Y.S.2d 217 (2d Dept 2009).

However, the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit. NHD Nioani, LLC v. Angelina Zabel Properties Inc., 161 A.D.3d 758, 77 N.Y.S.3d 78, 81 (2d Dept. 2018). "Whether to grant such leave is within the motion court's discretion, the exercise of which will not be lightly disturbed!" Id.; PetogL Tientv. Road., 41 A.D.3d 569, 838 N.Y.S.2d 591 (2d Dept, 2007).

A party challenging governmental action as an unconstitutional taking bears a substantial burden. Ganci v. New York City Transit Authority, 420 F.Supp.2d 190, 195 (S.D, N.Y. 2005), While It is clear that government regulation may permissibly effect economic interests or expectations, "if the regulation goes too far the government's action will be treated as a public taking for which just compensation is required!" Rochester Gas & Elec.Corp v. Public Serv. Commn. Of State of N.Y., 71 N.Y.2d 313, 324, 525 N.Y.S.2d 809 (1988). "Governmental action short of acquisition or occupation will result in a taking if the effects of the action are so complete as to deprive the owner of all or most of Its interest in the property." id. While there is no specific formula, and because Plaintiff does not allege a physical interference with or complete deprivation of all beneficial use of the property, its claim is governed by consideration of the regulatory takings factors set forth by the U.S. Supreme Court in Penn Central Transportation Co. V. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978); Id.

Under the Penn Central test, the Court must consider: (i) the economic impact of Defendant's actions on Plaintiff; (ii) the extent to which Defendant's actions Interfere with Plaintiff's distinct investment-backed expectations; and (iii) the character of Defendant's actions. Penn Central, 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." [internal citations omitted.] Id. The Second Circuit has held that failure to establish any single factor may be sufficient grounds for dismissal. Ganci, 420 F. Supp.2d at 204; Allen v. Cuomo, 100 F.3d 253, 262 (2d Cir.1996).

Turning first to the "character" of Defendant's actions, the Court finds HTFC's program to be a voluntary economic program offering federal financial assistance to residents affected by the storm, and is not in the nature of a regulatory taking. In A & D Auto Sales Inc. v. U.S., 748 F.3d 1142, 1153 (F.Cir. 2015), the Court specifically addressed whether there was a government action sufficient to invoke a takings analysis where the government offers financing to a third party as a way of inducing or requiring action that affects or eliminates the property rights of the plaintiff. In A & D Auto Sales, Plaintiff alleged that the government mandatorily required the automobile manufacturers to terminate their dealer franchises or else forgo any further financial assistance. *Id.* at 1148, The Court noted that government action directed to a third party does not give rise to a taking if its effects on the plaintiff are merely unintended or collateral. *Id.* However, where there has been "coercion" flowing from an existing relationship between the government and a third-party, there may be a taking. *Id.* at 1155. Circumstances relevant to coercion in the A & D Auto case included but were not limited to whether the government insisted on the terminations of the contracts, whether the terminations would have occurred in any event absent government action, and whether the government targeted the dealers for termination. *Id.*

Here, unlike A & D Auto Sales, while the Program may have affected market demand for the property, there is no prohibition or any coercive government action restricting Plaintiff from selling, disposing or using their property as they see fit, See Dimare Fresh, Inc. v. U.S. 808 F.3d 1301, 1311 (2d Cir. 2015). The program, which offers aid to vulnerable residents located in flood prone areas, does not place any obligations or restrictions on Plaintiff or the residents of the community. It does not require residents to move and does not prohibit Plaintiff from renting the property to current or future residents. Moreover, In the context of the protection of public health and safety, the 'private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." *Id.* Moreover, impairment of the market value of property

incident to otherwise legitimate government action ordinarily does not result in a taking. *Id.* at 1310. As such, the Complaint fails to state a cause of action on this ground alone.

Nor will Plaintiff be able to demonstrate the requirement regarding reasonable investment-backed expectations. The purpose of the investment-backed expectation requirement is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime," *Allen*, 100 F.3d at 262. There is no question in the matter at bar that when Plaintiff purchased the property that it was located in a flood plain, at the mouth of a tributary of the Hudson River, and that it sits on a lower elevation than the property to the west of it. Thus, the property was knowingly subject to the threat of flooding, a threat which came to fruition shortly after its purchase, Nor can Plaintiff reasonably plead surprise that the government may enact a policy to offer aid to its citizens that have suffered property damage, or who may be subject to the threat of property damage, as a result of flooding.

Lastly, Plaintiff moves to amend its Complaint to add allegations largely pertaining to the issue of economic loss. Proving economic loss requires a plaintiff to show what use or value its property would have but for the government action. *A & D Auto Sales*, 748 F.3d at 1157. Despite providing additional details about how many residents left the community after the program was offered to them, the Amended Complaint still fails to provide dollars and cents evidence, by way of an appraisal at a minimum, as to the value of the property now, compared to the value immediately after the storm. Rather, Plaintiff merely alleges that the property now has a "nominal value," which is simply insufficient to meet its burden,

While this Court will accept the allegation as true for purposes of the motion that the Plaintiff's return on its investment has been significantly reduced as a result of the program, "a property owner does not prove a taking solely by evidence that the value has been reduced by the regulation, even if it has been substantially reduced." *de St. Aubiri v. Flacke*, 68 N.Y.2d 66, 76, 505 N.Y.S.2d 859 (1986). Rather, "the property owner bears a heavy burden of

demonstrating by 'dollars and cents' evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return upon enforcement of the challenged regulation." Putnam County Natl. Bank v. City of New York, 37 A.D.3d 575, 576, 829 N.Y.S.2d 661 (2d Dept. 2C07); de St. Aubin, 68 N.Y.2d at 76; Spears v. Berle, 48 N.Y.2d 254, 263, 422 N.Y.S.2d 536 (1979). Plaintiff fails to allege sufficient facts to make such a showing. Thus, although leave to amend a Complaint should be given freely, where as here the amendment is patently devoid of merit, such motion should be denied. Since Plaintiff is unable to allege sufficient facts to state a cause of action for unconstitutional taking, the action must be dismissed.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion to Amend the Complaint (Motion #4) is DENIED in its entirety; and it is further

ORDERED that Defendants' Notice of Motion to Dismiss Plaintiff's Complaint for failure to state a cause of action is GRANTED in its entirety; and it is further

ORDERED that Plaintiff's Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court on Motions # 1 and

#4.

Dated: New City, New York
September 5, 2018



HOKIAIS ERR Li^s EtSENPRESS
Acting Justice of tKe Siipreme Court

TO:

All Parties (via- NYSCEF)

