To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DENNIS STARR, WESTCHESTER COUNTY VETERANS COUNCIL, AMERICAN LEGION POST 8 ROBERT BODDIE SR., WESTCHESTER COUNTY AMERICAN LEGION,

DECISION & ORDER
INDEX NO. 61010/2019
SEQ NOS. 1,2,&3

Plaintiffs,

-against-

CITY OF NEW ROCHELLE, TWINING PROPERTIES LLC, LETITIA JAMES AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 6-42, 49-53, 59, 62-65, 67-69, 72-77 were read in connection with pre-answer motions to dismiss the Amended Complaint brought by: Defendant Letitia James, as Attorney General of the State of New York (Seq 1) pursuant to CPLR 3211; Defendant City of New Rochelle (Seq 2) for an Order pursuant to CPLR 3211(a)(1), (5) and (7); and Defendant Twining Properties LLC, (Seq 3) for an Order pursuant to CPLR 3211(a)(1), (3) and(7). The court also conducted several conferences with counsel, including a conference on July 14, 2020, December 8, 2020, and February 17, 2021, in an attempt to amicably resolve the underlying concerns and avoid litigation and its attendant costs.

Plaintiffs[1] bring this action to prevent the demolition of the Armory Building, advocate that the building to be used for Veteran purposes, and seek a Declaratory judgment to enforce a restrictive covenant in a deed.

Based upon the foregoing, the motions are decided as follows:

It is well settled that pursuant to CPLR 3211(a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"[2] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v. Leader, 74 AD3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211(a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to "establish

[1] On May 14, 2020, this court (Ecker, J.) ordered that Dennis Starr be substituted as plaintiff in place of Robert McGuirl, and the caption be amended by substituting Dennis Starr as the lead plaintiff (NYSCEF#'s 60&61).

conclusively that plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action" (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish the allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88 [1994]; 730 J&J LLC v Fillmore Agency, Inc., 303 AD2d 486 [2d Dept 2003]; Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]). The documentary evidence offered must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable (Rabos v R&R Bagels & Bakery, Inc., 100 AD3d 849 [2d Dept 2012]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgage, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]).

As for the Attorney General's motion, the affidavit of Thomas A. Pohl, Deputy Counsel of the New York State Office of General Services (OGS) is proffered. It recites the following pertinent history of the New Rochelle Armory (NYSCEF#7). On July 24, 1997, the State of New York conveyed the New Rochelle Armory to New Rochelle, pursuant to a deed covenant

mandated by Section 34 of the Public Lands Law ("the Deed"), for $1.00, on the condition that it provides a reversion to the State in the event the property conveyed is not used for one or more of the purposes set forth in section 34. The Attorney General may institute an action in the Supreme Court for a judgment declaring a revesting of such title in the State (NYSCEF#18). Future development of the Armory Property site by the City of New Rochelle, implicating the restrictive covenant, would require the approval of OGS and/or the State Legislature. The record shows that OGS has not approved any development proposals for the Armory Property or offered any opinion as to whether any particular plan would implicate the restrictive covenant. The State has not instituted such an action in the Supreme Court to enforce the deed covenant.

In July 2017, The Armory became part of a Development Plan. New Rochelle met with the OGS to represent its Waterfront Community Planning including the Echo Bay housing development and elaborated on its plan to rehabilitate and adaptively reuse the Armory Property as part of the Plan, including civic space, a Veteran's memorial and amenities.

In December 2018-the redevelopment of the East Gateway Waterfront Area became the subject of a Land Development Agreement ("LDA") entered into between the City of New Rochelle and Pratt Landing Partners, LLC on December 20, 2018. Pratt Landing Partners, LLC is a limited liability company formed by two other LLCs: Twining Properties, LLC ("Twining"), a named defendant in this action, and Northwood Investors, LLC.

The proposed redevelopment of the East Gateway Waterfront Area contemplates: (a) rezoning of the area to accommodate the planned redevelopment; and subject to that rezoning, (b) a mixed-use redevelopment of the existing area which would include (i) remediation of relevant portions of the site; (ii) construction of necessary infrastructure; (iii) construction of public amenities; (iv) construction of rental or condominium apartments and

townhouses, retail businesses and a possible hotel; and (v) adaptive reuse of the Armory property. The LDA further provides that the existence of the use restriction "may preclude the use of the Armory for the purposes intended by the Developer." Per the LDA, the developer must use "commercially reasonable efforts" to either (a) obtain from the State a release of the use restriction set forth in the Letters Patent; or (b) acquire the Armory site from the State. Notably, the LDA provides that if the developer is unable to obtain a release from the State of the use restrictions contained in the Letters Patent, or otherwise purchase the Armory property, the developer may pursue the project only with respect to the other three parcels, not the Armory.

The Attorney General is named only in the Third Cause of Action of the Complaint which seeks to have the court declare that the Attorney General must enforce the restrictive covenants contained in the Deed.

The subject restrictive covenant provides that:

"In the event that said premises are not improved and maintained for park, recreation, street and highway purposes including incidental, necessary municipal business in conjunction therewith, the title hereby conveyed shall revert to The People of the State of New York and the Attorney General may institute a action in the Supreme Court for a judgment declaring a revesting of such title in the State."(NYSCEF#18).

Plaintiffs argue that the clear language of the restrictive covenant mandates that the City improve and maintain the Armory property for park and recreation purposes. Instead, the City has included the Armory property in various development proposals for the last five (5) years. The City has not used the Armory for park or recreation purposes and has for twenty (20) years allowed the Armory to deteriorate.

It is well-settled that “dedicated park areas in New York State are impressed with a public trust, and their use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the Legislature, plainly conferred”

(Grayson v Town of Huntington, 160 AD2d 835, 837 [2d Dept 1990]). A "public trust" is impressed upon parkland property when a municipality acquires title thereto and said title may not be divested or alienated without a special act of the Legislature (Vill. Green Realty Corp. v Glen Cove Cmty. Dev. Agency, 95 AD2d 259, 260 [2d Dept 1983]).

Further, to determine that a matter is ripe for judicial review, the court must consider 'whether the agency has reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' "(Kaneev v City of New York Env't Control Bd., 149 AD3d 742, 744 [2d Dept 2017]). The "mere participation in an ongoing administrative process is not, in and of itself, an actual concrete injury" Town of Riverhead v. Cent. Pine Barrens Joint Plan. & Pol'y Comm'n, 71 AD3d 679, 681 [2d Dept 2010]); (Kaneev v City of New York Envtl. Control Bd., 149 AD3d 742, 744 [2d Dept 2017]); (Equine Facility, LLC v Pavacic, 155 AD3d 1033, 1035 [2d Dept 2017]).

Here, the record supports the Attorney General's arguments that the agency has not yet reached a definitive position on the issue, and that plaintiffs will not suffer an undue hardship if judicial relief is not available at this point. OGS or the Legislature must approve any development plans for the Armory that would implicate the restrictive covenant. Any such approval would constitute a final legislative or agency action that could be challenged in court. Accordingly, plaintiffs have a remedy to protect any interests that could be impacted by future decisions regarding the Armory Taking into consideration the parties submission, and giving plaintiff the benefit of every positive inference, the court agrees with the Attorney General and finds that the action is premature as against the Attorney General. Any future development of the Armory Property site by the City implicating the restrictive covenant would require the

approval of OGS and/or the State Legislature. OGS has not approved any development proposals for the Armory Property or offered any opinion as to whether any particular plan would implicate the restrictive covenant; and the State of New York, through the Attorney General, has not instituted such an action in the Supreme Court to enforce the aforementioned deed covenant.

Accordingly, since OGS or the Legislature must approve any development plans for the Armory that would in any way alienate its use as parkland, the instant action which was filed prior to any such action is premature. In conclusion, the Attorney General's motion to dismiss is granted, and plaintiffs' amended complaint is dismissed as to defendant Attorney General.

Turning to the City's Motion to dismiss (Seq 2)- plaintiff alleges the following causes of action against the City (NYSCEF#2):

-First Cause of Action- (Breach of Duty of Obedience)," alleges that the City breached its fiduciary duty by transferring the Armory into private hands in violation of the "Letters Patent"
-Second Cause Of Action- (Injunction) The failure to enforce the restrictive covenants of the Armory property will cause plaintiff and all similarly situated persons irreparable harm in permanently depriving the citizens of the City and the State of New York the use and benefit of the property and facilities
-Third Cause Of Action: (Enforcement of Restrictive Covenant)- plaintiffs seek enforcement of restrictive covenants which were incorporated into the Deed.
-Fourth Cause of Action- (Declaratory Judgment) plaintiffs are entitled to declaratory judgment that the City remains bound by the restrictive covenants contained within the Deed which conveyed the subject property to the City, and that the City exceeded or will exceed its authority by granting title or use to the property at issue for a commercial enterprise, and/or in a rnanner which is offensive and/or obnoxious to the plaintiffs.
-Fifth Cause Of Action- (Intentional Destruction of the Premises) The City owes a fiduciary duty to the citizens and veterans of the City and the State of New York to ensure that the Armory was maintained and preserved in the condition that the premises was initially presented to the City and that the City has breached this duty through intentionally destroying the Armory property
-Sixth Cause Of Action- (Negligent and Permissive Destruction of the Premises) The City owes a fiduciary duty to the citizens and veterans of the City and the State of New York to ensure that the Armory was maintained and preserved in the condition that the premises was initially presented to the City, and that the City has breached this duly through the negligent and permissive destruction of the Armory property.

Reviewing these causes of action, contrary to plaintiff's contentions that they are not seeking damages for personal injury, but rather are merely seeking to have the City comply with

its legal obligations, the court finds that the First, Fifth and Sixth causes of action are indeed tort-based breach of fiduciary duty claims.

Since plaintiffs have not served the City with a notice of claim as required by Section 50-e of the General Municipal Law, the First, Fifth and Sixth causes of action are procedurally barred and must therefore be dismissed.

The City offers the affidavit of Luiz C. Aragon, the Commissioner of Development for the City (NYSCEF#15). Significantly, the transfer of the Armory Property under the LDA is expressly conditioned upon receiving approval therefrom by New York State, which has not been accomplished yet. Therefore, plaintiffs' assertion that the restrictive covenant has been violated by a transfer of the Armory Property to a private party fails.

The court also agrees with the City that the obligation to improve and maintain the Armory Premises for "park, recreation, street and highway purposes" flows not to plaintiffs, but rather to the State of New York.

Accepting the facts as alleged in the amended complaint as true, and according the plaintiff the benefit of every possible favorable inference, due to this action being brought prematurely, and there being no final decision as to the Armory's future, there is no basis to invoke the Supreme Court's power to render a declaratory judgment as to the rights and legal relations of the parties.

For all of the reasons cited hereunder, plaintiffs have failed to state a cause of action in the Second, Third, Fourth, causes of action, and the action is dismissed as against the City.

Turning to Twining's motion to dismiss (Seq 3), it contends that plaintiff's claims are barred in whole or in part by the lack of ripeness of the claim, plaintiff's failure to state a valid claim as against Twining and Plaintiff's lack of standing.

Twining offers the affidavit of Philip Wharton, the Chief Investment Officer of Twining. (NYSCEF#29). Mr. Wharton explains that Twining's interest in the Armory has been ongoing for almost 15 years, and during that time, Twining (through Pratt) has engaged with the community to create a developmental plan that would ultimately be beneficial to the community. Despite Plaintiff incorrectly claiming that Twining is a party to the LDA, the actual parties to the LDA are the City and Pratt.

Pursuant to CPLR 3211(a)(3) a court may dismiss a complaint where the plaintiff does not have legal capacity to sue. This requirement of standing by the plaintiff ensures that a party seeking judicial intervention has a connection to the alleged harm.

Standing is a threshold determination that a person should be allowed access to the courts to adjudicate the merits of a particular dispute, and requires an inquiry into whether the litigant has "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo, 42 AD3d 239, 242 [2d Dept 2007]).

Plaintiff has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated (159-MP Corp. v CAB Bedford, LLC, 181 AD3d 758, 760–61 [2d Dept 2020]).

Here, plaintiff's pleadings do not state any special damages as a result of the harm alleged. Plaintiff simply states only that the destruction of the Armory (which is not contemplated by the development) would generally harm "citizens of New Rochelle." Further, the harm that Plaintiff alleges, namely the demolition of the Armory, is not even contemplated by any party to this action.

Therefore, plaintiff failed to allege any harm distinct from that of the community at large, and failed to make the requisite showing and satisfy their burden that they had standing to commence this action (Vasser v City of New Rochelle, 180 AD3d 691, 692, leave to appeal denied, 35 NY3d 910 [2d Dept 2020]).

Accepting the facts as alleged in the amended complaint as true, and according the plaintiff the benefit of every possible favorable inference, the amended complaint fails to state a cause of action as against Twining.

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision. This constitutes the decision and order of the court. Accordingly, it is hereby

ORDERED, that the motions by the Attorney General (Seq 1), the City of New Rochelle (Seq 2), and Twining are **granted** and the complaint is **dismissed** in its entirety.

The Clerk shall mark his records accordingly.

Dated: April 21, 2021
White Plains, New York

Charles D. Wood
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HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF