

I Represented The Devil Of Brooklyn



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Being a true and exciting story that took place in Kings County with untold drama as in olden days.

BEFORE I DISCLOSE the identity of the Devil of Brooklyn, it is appropriate to inform the reader of the context in which this modern saga played out. No, it wasn't a demonic fight in front of the hot dog line at Nathan's in Coney Island, although that does occur with some frequency.

No, this legal tale is about a property owner in Prospect Heights who had the absolute gall to object to the taking of his property for an arena and related real estate development by a well-connected real estate developer. The nerve, the absolute *gall* of this person who would not, to paraphrase Dylan Thomas, "go gently into that good night." Was it something that U.S. Supreme Court Justice Potter Stewart said? Something about liberty and property being interrelated and neither could have meaning without the other? (The reference has been unabashedly lifted from Professor Gideon Kanner's excellent blog, Gideon's Trumpet, www.gideonstrumpet.info.) Fighting those in power. Contesting a powerful New York State Public Benefit Corporation determination that knew what was best for him and those other ordinary people. How dare he and his merry band of community members that came together to try to stop the tyranny of the power

brokers? It was an outrage. Standing in the way of a deal to a Russian billionaire — what absolute nerve!

Who is the devil of Brooklyn? As a child growing up in East Flatbush, I always thought that the devil was Walter O'Malley who had taken the Dodgers away to Los Angeles. (Actually, Mr. O'Malley wanted to build a new stadium at the intersection of Atlantic and Flatbush Avenues. He turned to the original power broker, Robert Moses, to condemn the land for his new ball park. Moses replied that the new stadium did not fit under the larger category of "public purpose." It is said that Moses just didn't care about Brooklyn or the Dodgers. The rest is history. Michael Shapiro, *The Last Good Season*. (2003). The proposed new baseball stadium was to be placed a block away from the present site for the arena.)

The devil standing in the way of all Brooklyn's glorious progress was Daniel Goldstein. And, I had the privilege of representing him in his condemnation case. I did not represent him in the courageous, but frustrating effort to stop the condemnation. That herculean effort was handled by Matthew D. Brinckerhoff, Esq., a superb attorney. Matthew D. Brinckerhoff is a partner in the New York Law firm of Emery Celli Brinckerhoff & Abady, LLP. I did author an amicus brief in the Court of Appeals on behalf of Willets Point United, Inc., a group that is presently fighting the proposed condemnation of 62 acres in Willets Point, Queens. The environmental challenges were handled by Jeffrey Baker, Esq., another outstanding litigator.

Daniel just didn't understand how a luxury condominium apartment he owned at 636 Pacific Street could be considered "blighted." Well no one else could either, but the building was sited directly on center court.

I have often said that blight is in the eye of the beholder. The New York State Urban Development Corporation, the condemnor here has to have a blight determination to proceed under its

statute. If it couldn't find blight, it could always go to the legislature to remove the condition. *See Matter of Fisher*, 730 N.Y.S.2d 516 (N.Y. App. Div. 2001), the aborted effort to condemn luxury buildings for a grandiose expanded New York Stock Exchange which cost the citizens of this great state some \$125 million before the project was abandoned.

It would turn to the same dependable consulting company it always used, who, it seems, never saw a parcel of real property that wasn't blighted. You may have just bought your home at the peak of the market. You may have paid top dollar for a superb home. Unfortunately, if some well-connected developer thinks your place would make a great big box retail store, there is little that you can do in New York to stop it. Forty-four states have enacted legislation to stop the condemnation of private property to turn over to a developer for economic gain — not New York, though *See* Michael Rikon, *Bulldozers At Your Doorstep*, 17 Prob. & Prop. 53 (Mar./Apr. 2003)

New York's highest court, in a series of recent cases starting with *Goldstein v New York State Urban Development Corp*, 921 N.E.2d 164 (N.Y. 2009) (yes, "our" *Goldstein*), held that blight designations could not be reviewed by the court unless they were obviously fraudulent. But, since there is virtually no discovery in a challenge to a "Determination and Findings," which is the resolution adopted that authorizes condemnation, there is, effectively, no chance to challenge a blight determination. *See* Michael Rikon, *Moving the Cat Into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"* 4 Alb. Gov't L. Rev. 154 (2011). At a public hearing held by State Senator Bill Perkins, an outspoken critic of the way New York condemns property, counsel for the same state public benefit corporation, was asked why the same consultant was always used, and if she could tell the Senator if there ever was an instance where blight was not found. He was told that they preferred to use an experienced consultant and, no, non-blight-

ed property was never found. Hearing before State Senator William Perkins, January 5, 2010.

Well, this really didn't sit well with a lot of people. 636 Pacific Street was a remarkable building. It was the Allied Storage Building, built in 1926. George S. Kingsley was the architect. The building was originally used for dry storage. The building was really quite lovely. It had colorful, cast two- and three-dimensional Egyptian-inspired blue and multi-colored ornamentation adorning the façade. A similar Kingsley storage building had been landmarked in Chicago. 636 Pacific Street should also have been landmarked, not demolished. In 2002, the building was converted into a 31-unit luxury condominium and sold out almost immediately.

Daniel and his wife, Shabnam Merchant, (and fellow opponent of the project), occupied a lovely, modern three-bedroom, two-bath apartment on the seventh floor with fabulous south and west views.

Before any official process had even started but with the known long-term threat of eminent domain, Forest City Ratner, the developer, bought out each and every other condo owner. Daniel refused to sell at any price. At this point, Daniel Goldstein and many other outraged neighbors organized to fight the project. They formed an organization, Develop Don't Destroy Brooklyn ("DDDB"). The non-profit organization was founded in February, 2004. (The DDDB webpage contains a wealth of materials. www.dddb.net.) The advisory board of DDDB contains a host of authors, artists, architects, religious leaders and urban planners. This was no small endeavor, with over 800 volunteers and a 20-person legal team. Over 4,000 people made donations to the cause. The neighborhood coalition consisted of 21 community organizations and a strong, well-organized group of very bright and determined people who were, and seven years later, are still fighting the project.

Daniel Goldstein was the co-founder of DDDB but hardly alone in the Battle for Brooklyn. Some of the others are Patti Hagan, his wife, Shabnam

Merchant, Candace Carponter, Esq., Lucy Koteen, Eric Reschke, Jezra Kaye, Eric McClure, Scott Turner, Lumi Rolley, Chris Owens, Gloria Mattera, Terry Urban, Steve Soblick, Paul Rothblatt, Steve Espinola, and Jim Vogel.

Daniel Goldstein was their spokesperson. The coalition retained counsel and litigated every step of the way to stop the project, or at least to have a rational review of what was to be a very large scale mixed-use real estate development that was originally to consist of a 19,000-seat arena, 4,500 units of housing, over 2.4 million square feet of office and retail space, six acres of open space and parking for 3,000 cars. Pratt Institute, a well respected Brooklyn college known for its architecture school, issued a critical analysis of the Atlantic Yards project. It didn't like the project at all. The report it issued, *Slam Dunk or Airball? A Preliminary Planning Analysis of the Brooklyn Atlantic Yards Project* (Preliminary Planning Analysis, Brooklyn Atlantic Yards, Pratt Institute) (available at <http://dddb.net/documents/whitepapers/PICCED/bay-execsummary.pdf>) was highly critical of the poorly planned development.

It noted that the project would likely have profound impacts on the adjoining neighborhoods and the fiscal condition of the borough and City well into the future. It commented, "First, the process through which this development has been advanced has not been sufficiently fair or accountable. It should be opened up for consideration of real alternatives, to ensure that the public is getting the best deal for its land and money."

The report also pointed out that there was insufficient information on two key issues for the proposed Brooklyn Atlantic Yards development: traffic impacts and public subsidies. On the latter topic, it noted that estimates of public subsidies ranged from \$200 million to more than \$1 billion.

After the loss in the Court of Appeals, the New York State Urban Development Corporation, which prefers to be called the "Empire State Devel-

opment Corporation” took title to the 22-acre Atlantic Yards project (for reference, the World Trade Center site is 16 acres). Perhaps it should change its name again to “Omnipotent Development Corporation.”

Title vested on March 1, 2010. Harassment of Mr. Goldstein began almost immediately. His block, where he was the sole resident, Pacific Street between Fifth and Sixth Avenues, was closed to traffic. My office prepared an Order to Show Cause with a temporary restraining order, but the developer relented somewhat in its total blockade.

Litigation to stop the project continued in various forms. As did civil protest. One of the fundamental objections to the project was that it was basically shoved down the community’s throat. The biggest development ever proposed in Brooklyn had no input from the local community and will have no input or oversight from local or state government. But the project would have a mind-boggling effect on the environment. And not a single city council member or state legislator ever got to vote on the project. It was stated by the opponents that 23,000 more cars would be flowing through the intersection of Flatbush and Atlantic Avenues. There would be 18,000 people coming into the community for arena events 250 days a year. It was also said that there would be roughly 15,000 new residents, but no new schools, hospitals, or fire stations.

Perhaps the most outrageous part of the whole land grab was the astounding amount of public money to a well-connected real estate developer. Forest City Ratner was, by this time, a well-known developer which had an unusual ability to enjoy the fruits of the government largess. It had developed a huge chunk of Downtown Brooklyn for MetroTech in the 1990s. That project involved the condemnation by the City of New York of 16 acres bounded by Jay Street, Johnson Street, Flatbush Avenue, and Myrtle Avenue. It also developed two malls and an office tower directly adjacent to the Atlantic Yards site, both on sites originally cleared by eminent do-

main, and the later received subsidy in the form of 9/11 Liberty Bonds. Forest City also developed other sites in the City and more recently the Ridge Hill project in Yonkers, New York.

It is stated that Forest City Ratner will receive over \$2 billion dollars in combined subsidies, special tax breaks, and overall government financial support. It will, according to DDDDB, lease the arena for 99 years at one dollar a year. The developer will not pay taxes but a payment in lieu of taxes (PILOT).

Ratner first bid \$50 million on the M.T.A.’s eight-acre rail yard (eight acres of the 22 acre project site) despite the M.T.A. appraisal of \$214.5 million. It eventually was forced to up its offer to a still bargain basement price of \$100 million. Mr. Goldstein and DDDDB actually spearheaded an effort to obtain a competing bid and came up with a winner. A well-known and respected developer in New York City, Extell made a bid to the M.T.A. in the amount of \$150 million. What’s more, Extell would not use eminent domain, indeed it despised the concept. Extell’s plan included going through ULURP, the City’s planning process which is open to the public for comment and vote by the City Council. I represented Extell when it was condemned in the 42nd Street Development project by the Empire State Development Corp. The acquisition (Site 8 South) was for Forest City Ratner which built the New York Times Building. Extell fought the condemnation because it was developing the site itself. *See W. 41st Street Realty, LLC v N.Y. State Urban Development Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003).

It would only build over the tracks and it proposed to build a school. We know that the Extell proposal did not fly — something about it being too appropriate, reasonable, and honest. But, I digress. Back to the Devil of Brooklyn. As mentioned before, the ESDC took title to the property on March 1, 2010. I filed a claim for the taking of Mr. Goldstein’s property on March 22, 2010.

On April 5, 2010, the condemnation counsel for ESDC, Berger & Webb, LLP, informed us that the condemnor was prepared to make an advance in the sum of \$510,000. This was substantially less than what Mr. Goldstein paid for his unit in a market that had more than doubled since the time of his purchase. Many thought that this number was more based on vengeance than sound appraisal theory.

Less than a week after making its advance payment offer, and before the money could even be collected, the condemnor moved by an Order to Show Cause for a Writ of Assistance to remove Mr. Goldstein and his family from his home.

The application to evict the condemnee was predicated on two supporting papers. The first by ESDC's very competent attorney, the second, and more interesting paper, was the affidavit of Mary-Anne Gilmartin, the Executive Vice President of Forest City Ratner in charge of the project. Ms. Gilmartin claimed that a failure to promptly issue the Writs would "cripple the project." It was also sworn that any delay "would defer the project's important benefits and expose FCRC and its affiliates to severe irreparable harm."

Well, this wasn't quite true. What was true was that Forest City Ratner had run out of cash and made a deal with a Russian multi-billionaire, Mikhail Prokhorov to sell most of the ownership of the Nets and a good part of the arena. In order to close this deal, it needed vacant possession of the site. Although, the same supporting papers were used in common in the Order to Show Cause against 10 different entities including Daniel, Ms. Gilmartin spent a considerable amount of time directly attacking our hero. She gave a long history of the litigation directed at this magnificent project which would transform "a largely derelict 22-acre site near downtown Brooklyn." It really isn't near "Downtown Brooklyn." (You have to take the subway to have some cheesecake at Junior's. That's near downtown Brooklyn.) The site was hardly der-

elict except for the parcels purchased by the developer which were allowed to become derelict.

The Executive Vice President wrote:

"6. Time after time, the Project's opponents have sought to frustrate and delay the Project through litigation and motion practice. In fact, the Project's opponents have publicly acknowledged their intention to use the prolonged pendency of multiple litigations to kill the Project. On August 3, 2009, The Brooklyn Daily Eagle reported that the Project's opponents, 'despite losing every major court case and lawsuit, vow to sue for as long as possible' ('Hours Before Cutthroat Deadline, Atlantic Yards Opponents File Legal Papers in Court'). The same newspaper previously attributed this telling statement to the Legal Director of Develop Don't Destroy (Brooklyn), Inc. ('DDDB'), the opposition's umbrella group, whose principal leader and spokesman, Daniel Goldstein, is a condemnee in the present proceeding: 'Can we bring other challenges? Absolutely. And we will.' (The Brooklyn Daily Eagle, May 19, 2009, 'Atlantic Yards Will Face More Lawsuits; Will It Face Eternal Delays?'). As shown below, however (and as the courts have recognized), the Project is important for the future of New York and is intended to bring enormous public benefits that the Project's opponents should not be allowed to thwart."

I thought the papers submitted were somewhat strident, actually perhaps a little hysterical. I was both surprised and pleased. Judges in general do not like to see personal attacks on parties. Nor do they like signing an order directing the sheriff to throw a family out on the street.

And, this application was going to be argued before one of the best judges in the State of New York, the Honorable Abraham Gerges. Justice Gerges presided in the Kings County Condemnation Part. (Justice Gerges is now retired.) The judge and his law clerk viewed Mr. Goldstein's apartment, as well as the other parcels taken. (A statutory view

is required pursuant to section 510 of the Eminent Domain Procedure Law.)

Since our firm restricts its practice to condemnation cases, we have handled applications for writs of assistance on many occasions. In my affirmation, I wrote that the application by the condemnor marked a new low in eminent domain practice and was based on pure vindictiveness and bad faith conduct. There were so many grounds for the denial of the application that there was hardly a chance it would be granted. One issue was that there had to be at least 90 days' notice after the advance payment was made available.

The condemnor started an ill-advised personal fight.

The "dybbuk" who was the target of these legal shenanigans knew much more about the project than the hapless Executive Vice President. Indeed, probably the only other person with more knowledge than Mr. Goldstein is Norman Oder, the award winning blogger whose Atlantic Yards report is necessary daily reading. www.atlanticyardsreport.blogspot.com. Mr. Goldstein stated:

"Nor, do they need the arena for at least three years since the Nets have a contract to play for three seasons in Newark if they so choose, and an option for a fourth season. Equally unavailable as a pretext for the violation of our rights is the excuse that vacant possession is necessary to sell eighty percent of the Nets to the Russian billionaire, Mikhail Prokhorov. See Gilmartin affidavit, footnote 3, p. 18. Indeed, this transaction is under congressional scrutiny because Mikhail Prokhorov has allegedly violated U.S. Treasury regulations by doing business in Zimbabwe. (See Article dated April 13, 2010 attached as Exhibit P). Also, NBA commissioner David Stern said on Friday, April 16, 2010, that the NBA Board of Governors could expedite his approval if Mr. Prokhorov so wished.

"It also is not necessary to remove us because 2,250 affordable units of housing are not in jeopar-

dy as Ms. Gilmartin incorrectly states in paragraph 20 of her affidavit. There are no available subsidies for these units now. There are no plans or even designs for a single residential tower. The development agreement between Forest City and ESDC allows Forest City until 2035 to build the "affordable" units over the 22-acre site.

"The entire underlying factual basis presented by the affidavits is false. The movant has deliberately misled the court and no part of anything presented can be relied on because of the falsehoods presented.

"In our opposition papers to the application for a Writ of Assistance, we have established that the condemnor has acted in a punitive manner and seeks the Writ to teach me and others who in future may oppose the use of eminent domain to take private property for a private developer a lesson.

"More importantly, we have established that the application must be denied because of the failure to comply with the requirement of the law."

There were some other whoppers, including the one that immediate vacant possession was necessary to test for asbestos. Wait a minute, wasn't the entire building empty except for Mr. Goldstein? Didn't Forest City have five years to do this? Wasn't the building converted to a luxury condo in 2002? What did the condemnor expect to accomplish with these yarns? They also claimed it would take them roughly six months to demolish the Devil's building, when they finally did the demolition it took less than one month.

What happened in court was that after oral argument, Justice Gerges asked us into his conference room. There was no question, that as a matter of law, the Writ could not be granted. The discussions then focused on the monetary amount to settle the "just compensation" claim, settle on a more imminent eviction date, and enable Mr. Goldstein to find temporary housing, storage, two moving expenses and his legal fees.

Oddly, the amount of compensation was agreed to very quickly. What took several hours was Forest City's insistence that Daniel not be permitted to speak in opposition to the project. He refused. In fact, he said not for \$10 million would he agree to waive his First Amendment rights. I told the judge that this was a Fifth Amendment case, not a First Amendment case and "just compensation" could not be conditioned on the waiver of another part of the Bill of Rights. He agreed, but responded that the developer needed something if only symbolic, then the judge showed his genius and drafted language that sounded good, but was meaningless. Daniel and his wife, Shabnam, were to withdraw from all litigation and would not commence any new litigation and would no longer be spokespersons or officers of Develop Don't Destroy Brooklyn, but will remain as members of the organization. Mr. Goldstein and Shabnam Merchant would be free to speak and exercise their First Amendment rights, but cannot actively oppose the project. Transcript of proceedings dated April 21, 2010.

Well we expected some publicity, but this was real news. The story was reported in every major New York newspaper and T.V. station. It was on the front page of the New York Times. What was interesting was the conduct of Forest City Ratner. The very next day, I received a call that a reporter from the Brooklyn paper had written a story that quoted Forest City executive, Maryanne Gilmartin saying, "The sticking point was how much money he wanted." It was impossible that she didn't know better. Forest City had three law firms with multiple counsel in court and at least 20 executives and other staff, Daniel Goldstein had me. It was outrageous that Forest City would act so improperly. Hardly the conduct expected of a major corporation, but it speaks volumes.

One of the best statements regarding Daniel Goldstein came from another blogger, Robert Thomas, Esq., who is an appellate and condemnation lawyer from Hawaii. His blog, [\[ondemnation.com\]\(http://www.inversecondemnation.com\), read daily by lawyers across the land, commented on the negative statements made after the settlement. Mr. Thomas wrote:](http://www.inversec-</p>
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"These comments are unfair, and reflect a gross lack of understanding of what it really means to be on the business end of eminent domain, especially in a situation such as this where Goldstein and his neighbors have been forced to move from their unblighted homes and businesses to make way for luxury residences and a new arena for the New Jersey Nets basketball team. All he and his neighbors were asking was that their properties not be seized and turned over to another private party, and that the government actually proves their homes and businesses were "blighted" as claimed.

"New York's federal courts didn't even want to hear their claims, while the highest state court concluded the question of whether their properties are really "blighted" as the city and the developer claim is an issue so complicated that it's beyond the ability of judges to grasp.

"To characterize Goldstein as "folding" or as a sellout is to imply that he presently has options other than to go down in a blaze of righteous glory. To suggest he was bought is the height of cynicism. He pretty much lost at every step, but continued his uphill struggle long after most people of less stout fabric would've folded up and quit. Yet he went forward, with nothing more than the hope that the courts might listen. These comments also overlook the personal, financial, and emotional toll a battle like this can take." See www.inversecondemnation.com. April 22, 2010.

So, all New Yorkers owe Daniel Goldstein a huge debt of gratitude. He helped expose the charade of "public purpose" and the need to once and for all to amend New York's law. As time has passed, many of the statements he made have absolutely turned out to be true. He stated that the developer's claims to build affordable housing were false and they were. He pointed out that the hiring of lobbyists corrupted the approval process and that

is certainly true, that the backroom dealing belied the claims of a project for the public benefit, that there would not be thousands of jobs by virtue of the project, again, true.

Even though Daniel is but a member of DDDDB, the fight continues with a recent significant victory. On November 9, 2010, Supreme Court Justice Marcy S. Friedman granted a petition directing that the developer file a Supplemental Environmental Impact Statement in view of the substantial changes in the project. *Develop Don't Destroy Brooklyn, Inc. v Empire State Development Corp.*, 914 N.Y.S.2d 572

(N.Y. Sup. Ct. 2010), *remanded*, 927 N.Y.S.2d 571 (N.Y. Sup. Ct. 2011), *aff'd*, 2012 N.Y. Slip Op. 2752 (N.Y. App. Div. Apr. 12, 2012). Thus, the appellate Division upheld the Supreme Court's order that a new environmental impact statement must be prepared. In this matter, DDDDB was represented by the very capable environmental law firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC.

Finally, has anyone other than me wondered how Forest City Ratner could sell part of the arena and keep the money when the public paid for it?

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