UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK J. LaFORGIA, LUCIO LaFORGIA,

Plaintiffs,

v.

EDWARD VERGANO, P.E., KEN HOCH, LINDA PUGLISI, RICHARD H. BECKER, FRANCIS X. FARRELL, ANN LINDAU-MARTIN, JOHN E. SLOAN, THE TOWN OF CORTLANDT,

Defendants.

No. 15-CV-8589 (KMK)

OPINION & ORDER

Appearances:

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KENNETH M. KARAS, District Judge:

Plaintiffs Frank J. LaForgia and Lucio LaForgia (collectively, "Plaintiffs") brought this Action against Defendants Edward Vergano, P.E., Ken Hoch, Linda Puglisi, Richard H. Becker, Francis X. Farrell, Ann Lindau-Martin, John E. Sloan (collectively, "Individual Defendants"), and the Town of Cortlandt (with Individual Defendants, "Defendants"), pursuant to 42 U.S.C. § 1983 alleging that Defendants violated their rights by taking personal and real property for public use without just compensation. (*See* Compl. (Dkt. No. 1).) Before the Court is

Defendants' Motion To Dismiss. (*See* Dkt. No. 23.) For the reasons to follow, the Motion is granted.

I. Background

A. Factual Background

The following facts are taken from Plaintiffs' Complaint and are assumed true for the purpose of resolving the Motion.

At all relevant times, Plaintiffs resided in the Town of Cortlandt, in Westchester County, New York. (*See* Compl. ¶¶ 6–7.) Although Plaintiffs give background information on all Individual Defendants, (*see id.* ¶¶ 9–23), for the reasons discussed below, only Ken Hoch's background is relevant to this Motion. At all relevant times, Hoch was (and still is) the Assistant to the Director of the Town of Cortlandt Department of Technical Services, Code Enforcement Division, and also the Code Enforcement Officer. (*See id.* ¶ 12.) Hoch was and is an officer, employee, servant, and/or agent of the Town of Cortlandt. (*See id.*)

During the relevant time period, Plaintiffs were the owners of personal property located at 7 Hardy Street, Lots 42–45, Verplanck, within the Town of Cortlandt. (*See id.* ¶¶ 24–25.) Plaintiffs also each had an interest in the real property located there (the "Property"). (*See id.*) Starting on or about November 2, 2012 and continuing through and until November 9, 2012, Individual Defendants "each took part in a decision" to condemn the Property. (*Id.* ¶¶ 26–27.) On November 9, Individual Defendants did, in fact, condemn the Property and Plaintiffs' personal property situated there and evicted Plaintiffs from the Property. (*See id.* ¶ 28.) As a result of the eviction, the Property was taken from Plaintiffs for public use by Individual Defendants, acting in favor of the Town of Cortlandt. (*See id.* ¶¶ 29–30.) The Town of Cortlandt has since continued to occupy and use the Property. (*See id.* ¶ 31.) At no point was

compensation paid to Plaintiffs for the taking of their property for public use. (*See id.* ¶¶ 32–33.) Plaintiffs allege that there were no exigent circumstances that would have warranted the actions of Defendants. (*See id.* ¶ 34.)

B. Procedural History

Plaintiffs filed their Complaint on November 2, 2015, bringing claims under § 1983 against both Individual Defendants and the Town of Cortlandt, alleging that the taking of their property without just compensation was in violation of their Fifth Amendment right to be paid just compensation for their property and their Fifth and Fourteenth Amendment rights to due process. (*See id.* ¶¶ 42–43, 58–59.) On March 8, 2016, Defendants filed a letter requesting leave to file a Motion To Dismiss, (*see* Dkt. No. 7), and after Plaintiffs failed to respond, the Court entered a briefing schedule on the motion, (*see* Dkt. No. 9). Before briefing on the motion commenced, however, Defendants filed a notice of death pursuant to Federal Rule of Civil Procedure 25(a)(1), alerting the Court that Plaintiff Lucio LaForgia had passed away. (*See* Dkt. No. 10.) Plaintiffs thereafter submitted a letter asking for leave to file a motion to substitute a proper party in place of Lucio, and leave was granted. (*See* Dkt. No. 12.) Plaintiffs thereafter filed the motion, (*see* Dkt. No. 14), which Defendants opposed, (*see* Dkt. No. 15).

On July 21, 2016, the Court denied Plaintiffs' motion to substitute. (*See* Dkt. No. 16.) The Court reasoned that Plaintiffs had not provided legal authority for the proposition that Lucio's claim survived his passing, and also pointed out that Plaintiffs had not offered any evidence that Frank LaForgia—the party that Plaintiffs proposed would take Lucio's place—was a "proper party," as he was neither the successor of the deceased nor, at the time, the representative of the estate. (*See id.*) The motion was therefore denied without prejudice, but

Plaintiffs were told they could renew their request. (*See id.*) As of the date of this Opinion & Order, Plaintiffs have not filed a renewed motion to substitute.

On August 3, 2016, Defendants filed a new letter motion requesting leave to file a Motion To Dismiss. (*See* Dkt. No. 17.) Plaintiffs responded on August 24, 2016, opposing the application. (*See* Dkt. No. 19.) At a conference held on October 19, 2016, (*see* Dkt. (minute entry for Oct. 19, 2016)), the Court entered a briefing schedule for the Motion, (*see* Order (Dkt. No. 22)). On November 3, 2016, Defendants filed their Motion and supporting papers. (*See* Dkt. Nos. 23–27.) On January 9, 2017, Plaintiffs filed their opposition, (*see* Dkt. Nos. 29–32), and on January 12, 2017, Defendants filed their reply, (*see* Dkt. No. 33).

II. Discussion

A. Standard of Review

When ruling on a Rule 12(b)(6) motion to dismiss, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). The Court, however, is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678 (internal quotation marks omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Specifically, the plaintiff must allege facts sufficient to show "more than a sheer possibility that a defendant has acted unlawfully," *id.*, and if the plaintiff has not

"nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed," *Twombly*, 550 U.S. at 570.

On a Rule 12(b)(6) motion to dismiss, the question "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012). Accordingly, the "purpose of Federal Rule of Civil Procedure 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits." *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (internal quotation marks omitted). To decide the motion, the Court "may consider facts asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (internal quotation marks omitted).

B. Analysis

1. Materials Considered

Before discussing the merits of the Motion, the Court must define the scope of the documents that will be considered. Defendants have appended a number of external documents to their Motion, including several affidavits, the deed to the Property and lease agreement, some notices and letters, and pictures of the Property. (*See* Decl. (Dkt. No. 24).) In their memorandum of law, Defendants make the following argument regarding the submission of these documents:

> When determining the sufficiency of a claim under Rule 12(b)(6), the Court is allowed to consider documents outside the pleading if the documents are integral to the pleading or subject to judicial notice. *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156 (2d Cir. 2006).

> The Complaint makes direct allegations concerning the ownership of the real property, a taking for public use and the absence of exigent circumstances. As such, the Court must consider the following documents, which relate to those allegations: the Property Deed; correspondence received from, plaintiff, FRANK J. LaFORGIA alleging rights and interests under that Deed; a Lease Agreement between the Town of Cortlandt and the Riveredge Owners Association; the certified Death Certificate of James Martin, the prior property owner; an Electrical Inspection Report; and the Notice of Condemnation.

(Mem. of Law Submitted in Supp. of Defs.' Rule 12(b)(6) Mot. To Dismiss ("Defs.' Mem.") 4 (Dkt. No. 26).) Defendants are incorrect.

Generally, a "complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (internal quotation marks omitted). However, even if a document is not incorporated by reference, a court "may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Id.* at 153 (internal quotation marks omitted). To be integral to a complaint, "the plaintiff must have (1) actual notice of the extraneous information and (2) relied upon the documents in framing the complaint." *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 123 (S.D.N.Y. 2010) (alteration and internal quotation marks omitted). A document "is not integral simply because its contents are highly relevant to a plaintiff's allegations, but only when it is clear that the plaintiff *relied* on the document in preparing his complaint." *McLennon v. City of New York*, 171 F. Supp. 3d 69, 89 (E.D.N.Y. 2016) (internal quotation marks omitted). Even where a document is integral to the complaint, "it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

With these standards in mind, it is apparent that the documents submitted by Defendants may not properly be considered on this Motion. Defendants argue only that the documents

"relate to" the Complaint's allegations, (*see* Defs.' Mem. 4), but this is not the standard. Defendants must show that Plaintiffs both had notice of the documents and relied on them in drafting the Complaint, and must also show that there is no dispute as to their authenticity. Plaintiffs, of course, could have no notice of the affidavits drafted by Defendants for purposes of filing the Motion, nor could Plaintiffs have relied on those affidavits in drafting the Complaint. *See Plains Marketing, L.P. v. Kuhn*, No. 10-CV-2520, 2011 WL 4916687, at *3 (E.D.N.Y. Oct. 17, 2011) ("There is no basis for considering extrinsic affidavits or other materials that are not referenced in or integral to the complaint."); *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 61 (S.D.N.Y. 2010) ("Because the [affidavit and exhibits] were submitted in response to issues raised in [the defendant's] motion to dismiss regarding [the plaintiff's] status as an independent contractor and [the defendant's] status as a manufacturer, the complaint does not mention, let alone rely heavily upon, these extrinsic documents."). As for the other exhibits, Defendants offer no reason why they believe the Court should conclude that Plaintiffs had notice of and relied on these documents in drafting the Complaint. While Plaintiffs may have had notice of the deed to the Property and the lease agreement, it is unclear whether they relied specifically on those documents in drafting the Complaint, or whether they simply drafted the Complaint based on their understanding of what their rights to the Property were. Defendants cannot unilaterally convert this Motion into one for summary judgment, *see* Fed. R. Civ. P. 12(d), and the Court is not inclined to do so without any Party taking discovery. The documents will not be considered, and the Motion will be decided solely on the allegations in the Complaint.[1]

[1] The Court recognizes that Plaintiffs have levied no objection to the consideration of some of these documents, (*see* Pls.' Mem. of Law in Partial Opp'n to Mot. To Dismiss 5–6 (Dkt. No. 30)), but the documents offer only an incomplete picture of the facts relevant to this Action, and only after discovery will the Court be able to assess the factual basis for the claims alleged.

2. Claims Against Individual Defendants

Plaintiffs have agreed to drop their claims against all Individual Defendants except Hoch. (*See* Pls.' Mem. of Law in Partial Opp'n to Mot. To Dismiss ("Pls.' Opp'n") 1 (Dkt. No. 30).) Accordingly, Plaintiffs' claims against all Individual Defendants except Hoch are dismissed.

3. Official Capacity Claim

Defendants argue that the claim against Hoch in his official capacity should be dismissed as duplicative. (*See* Defs.' Mem. 8–9.) Defendants are correct.

The Supreme Court has held that "[t]here is no longer a need to bring official-capacity actions against local government officials, for under *Monell* [*v. Department of Social Services of City of New York*, 436 U.S. 658 (1978)], local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). The Second Circuit has therefore endorsed the dismissal of claims against individual officers in their official capacity, "[b]ecause the claim against [individual officers] in their official capacity is essentially a claim against the [municipality]," *Curley v. Village of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001), and courts in the Second Circuit have accordingly dismissed claims against municipal officers in their official capacity as duplicative, *see, e.g.*, *Dudek v. Nassau Cty. Sheriff's Dep't*, 991 F. Supp. 2d 402, 413 (E.D.N.Y. 2013) ("At the outset, this Court dismisses *with* prejudice the claim against the individual officers in their official capacities . . . , because it is duplicative of the surviving *Monell* claim against the County."); *Castanza v. Town of Brookhaven*, 700 F. Supp. 2d 277, 284 (E.D.N.Y. 2010) ("Since the Town is named in the Complaint, the claims against [the] [d]efendants, in their official capacities, are dismissed as duplicative and redundant.").

Here, Plaintiffs have brought both a claim against Hoch in his official capacity and a claim against the Town of Cortlandt. (*See* Compl.) The claim against Hoch in his official capacity is duplicative of the claim against the municipality, and it is therefore dismissed.

4. Individual Capacity

Defendants next argue that Plaintiffs' claim against Hoch in his individual capacity should be dismissed for failure to allege Hoch's personal involvement in the condemnation of the Property. (*See* Defs.' Mem. 9–10.) Plaintiffs argue that because they have consented to the dismissal of the claims against all other Individual Defendants, the allegations made collectively against what the Complaint calls the "Town Official Defendants" should be construed as having been made against Hoch only. (*See* Pls.' Opp'n 4.)

"It is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, inter alia, the defendant's personal involvement in the alleged constitutional deprivation." *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013) (italics omitted). Respondeat superior is not a basis for liability under § 1983. *See Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir. 1999); *see also Carrillos v. Incorporated Village of Hempstead*, 87 F. Supp. 3d 357, 382 (E.D.N.Y. 2015); *Jamison v. Fischer*, No. 11-CV-4697, 2012 WL 4767173, at *3 (S.D.N.Y. Sept. 27, 2012). The Second Circuit has offered five ways a supervisory defendant may be held liable in a § 1983 suit:

> (1) the defendant participated directly in the alleged constitutional violation[;] (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong[;] (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom[;] (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). Although the Supreme Court's decision in *Iqbal* may have called into question the validity of some of these categories, *see Grullon*, 720 F.3d at 139, Plaintiffs have not raised any allegations with respect to the second, third, fourth, or fifth categories, and thus the Court need not address the impact of *Iqbal* on *Colon*.

Although Plaintiffs claim that the allegations against the "Town Official Defendants" should now be construed as being against only Hoch, their attempt to rewrite the Complaint at this stage is inappropriate. Whatever claims may remain in the case, the factual allegations in the Complaint are made with respect to a group of individuals called the "Town Official Defendants." (*See* Compl.) Admitting they have no claims against the other Individual Defendants does not change the allegations as they appear in the Complaint. After all, "[i]t is well settled that a party may not amend its pleadings in its briefing papers." *Enzo Biochem, Inc. v. Amersham PLC*, 981 F. Supp. 2d 217, 223 (S.D.N.Y. 2013); *see also Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 516 (S.D.N.Y. 2005) ("It is long-standing precedent in [the Second] [C]ircuit that parties cannot amend their pleadings through issues raised solely in their briefs."), *aff'd*, 157 F. App'x 398 (2d Cir. 2005).

But Plaintiffs' error in this regard is not necessarily fatal to their claim. "Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts [the] defendants that identical claims are asserted against each defendant." *Hudak v. Berkley Grp., Inc.*, No. 13-CV-89, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014); *cf. Harris v. NYU Langone Med. Ctr.*, No. 12-CV-454, 2013 WL 3487032, at *7 (S.D.N.Y. July 9, 2013) ("In order to comply with Rule 8, a complaint should offer specification as to the particular activities by any particular defendant . . . . Rule 8(a) . . . requires that a complaint against multiple defendants indicate clearly the defendants against whom relief is sought and the basis upon which the relief

is sought against the particular defendants." (alteration and internal quotation marks omitted)), *adopted by* 2013 WL 5425336 (S.D.N.Y. Sept. 27, 2013); *Howard v. Mun. Credit Union*, No. 05-CV-7488, 2008 WL 782760, at *12 (S.D.N.Y. Mar. 25, 2008) ("While Rule 8 does not prohibit 'collective allegations' against multiple defendants . . . , it does require that the allegations be sufficient to put each defendant on notice of what they allegedly did or did not do." (alteration and some internal quotation marks omitted)). While there may be circumstances in which allegations made collectively against several defendants are insufficiently specific to put the defendants on notice of their alleged conduct, *see, e.g.*, *DeFazio v. Wallis*, No. 05-CV-5712, 2006 WL 4005577, at *4 (E.D.N.Y. Dec. 9, 2006) (finding insufficient a complaint that contained "conclusory allegations of wrongdoing" and "generally lump[ed] 'the defendants' together as a group"), this is not such a scenario. Plaintiffs have alleged that all Individual Defendants, which includes Hoch, took part in the decision to condemn the Property and caused Plaintiffs to be evicted from their home. As Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," the allegation that Hoch, among others, caused the Property to be condemned and Plaintiffs evicted is sufficient to give Hoch "fair notice of what . . . [P]laintiff[s'] claim is and the grounds upon which it rests," *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (internal quotation marks omitted). Defendants' argument here is thus without merit.

5. Takings Claim

Next, Defendants argue that Plaintiffs have failed to state a takings claim, specifically, a de facto takings claim. (*See* Defs.' Mem. 14–15.) Defendants' argument is entirely misplaced, as Plaintiffs have not attempted to assert a de facto takings claim.

In order to state a takings claim under § 1983, a plaintiff must allege "(1) a property interest, (2) that has been taken under color of state law, (3) without just compensation." *Guichard v. Town of Brookhaven*, 26 F. Supp. 3d 219, 225 (E.D.N.Y. 2014). "If [a] local government decides to condemn private land and does so pursuant to statutory authority, a 'de jure' taking has occurred. Where, however, the local government does not institute formal condemnation procedures but its actions have so impaired property rights as to amount to a taking, a 'de facto' taking has occurred." 3 John Martinez, *Local Government Law* § 21:14. Thus, "[w]hile the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation," or de facto takings, "is predicated on the proposition that a taking may occur without such formal proceedings." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987). There are two broad types of de facto takings. The first "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The second is "where regulation denies all economically beneficial or productive use of land." *Id.*

The Complaint does not allege that the Property was taken by means of an unconstitutionally burdensome or intrusive regulation on the use of the land. Instead, the Complaint alleges that "on or about November 9, 2012, the **TOWN OFFICIAL DEFENDANTS** *did condemn and/or cause the condemnation* of the aforesaid personal property and interest in real property," and "did evict the plaintiffs from same and/or cause the eviction of the plaintiffs from same." (Compl. ¶ 28 (second emphasis added).) Thus, according to the facts as alleged in the Complaint, the Property was, in fact, formally condemned, and thus the case law cited by Defendants regarding regulatory takings is inapposite—the allegations raised by

Plaintiffs bear no resemblance to the situations described in *Lucas*. It is, for instance, of little relevance that, according to Defendants, the Complaint "does not plead any facts giving rise even to an inference that the Town [of Cortlandt] destroyed the economic value of the [P]roperty," (Defs.' Mem. 15), as Plaintiffs have not complained that the value of the Property has been diminished, but rather that they have lost their interest in the Property altogether.

It is true that Plaintiffs state in their opposition papers that "the taking involved in the complained of events was a de facto taking accomplished through condemnation on the purported grounds of safety and habitability." (Pls.' Opp'n 8 (italics omitted).) But notwithstanding their erroneous nomenclature, Plaintiffs rightly point out that "[t]he requirement to plead facts which give rise to an inference that the defendants destroyed the economic value of the property would only apply where the plaintiff was left in possession of the property and the value thereof was impaired by the complained of actions," and that "[t]hat is simply not the case herein." (*Id.* at 10.)

The remainder of Defendants' argument on this point relies on facts outside of the record. While the Court is entitled to take judicial notice of the fact that Hurricane Sandy struck Verplanck on or about October 29, 2012, *see Martin v. Beight*, No. 13-CV-855A, 2015 WL 1956506, at *2 (W.D.N.Y. Apr. 29, 2015) (report and recommendation) (taking judicial notice of weather conditions), the specific effect the weather had on the Property is not a question appropriate for resolution at this stage, nor can the Court assess the adequacy of the compensation offered, if any, by the Town of Cortlandt.

Nonetheless, even a physical taking effected via condemnation is subject to the prudential finality and exhaustion requirements set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See Kurtz v. Verizon N.Y.,*

Inc., 758 F.3d 506, 512–13 (2d Cir. 2014) (noting that *Williamson* applies to all takings claims). In *Williamson*, the Supreme Court explained that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. Moreover, because the Fifth Amendment proscribes only the taking of property "without just compensation," "if a [s]tate provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 194–95. Although, however, *Williamson* "applies to regulatory and physical takings alike, a physical taking in itself satisfies the need to show finality." *Kurtz*, 758 F.3d at 513.

Here, because Plaintiffs have alleged a physical taking of the Property via condemnation and physical possession, (*see* Compl. ¶¶ 26–31), *Williamson*'s finality requirement has been met, *see Kurtz*, 758 F.3d at 513. Plaintiffs have not alleged, however, that they have exhausted their state administrative remedies for obtaining just compensation for the condemnation. There is no question that New York provides a process for obtaining just compensation for the use of eminent domain, *see Viteritti v. Incorporated Village of Bayville*, 831 F. Supp. 2d 583, 591 (E.D.N.Y. 2011) (citing to New York State Eminent Domain Procedure Law and the New York State Constitution); *Allocco Recycling, Ltd. v. Doherty*, 378 F. Supp. 2d 348, 361 (S.D.N.Y. 2005) ("Well-settled law in [the Second] Circuit establishes that New York does provide adequate means for obtaining compensation for a . . . taking."), and Plaintiffs' failure to allege that they have taken advantage of those procedures is fatal to their takings claim, *see Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 379–80 (2d Cir. 1995) (affirming dismissal of a de jure takings claim where the plaintiff had failed to allege exhaustion of state remedies); *see also*

Guichard, 26 F. Supp. 3d at 225 (holding that a plaintiff bringing a takings claim "must allege that he exhausted state procedures for obtaining just compensation," and dismissing the complaint because the plaintiff "ha[d] not alleged exhaustion of his New York State remedies that may provide just compensation" (alteration omitted)); *Viteritti*, 831 F. Supp. 2d at 591 ("Courts within the Second Circuit have uniformly dismissed Fifth Amendment takings claims at the pleadings stage when plaintiffs fail to sufficiently allege that they have availed themselves of such state procedures.").

Accordingly, while Plaintiffs have otherwise alleged the elements of a takings claim, they have not properly alleged that they have exhausted state administrative remedies such that their claims are ripe. Although Defendants do not raise this argument, (*see* Defs.' Mem.), "[r]ipeness is a constitutional predicate to exercise of jurisdiction by federal courts," and therefore the Court "can raise the issue sua sponte," *United States v. Fell*, 360 F.3d 135, 139 (2d Cir. 2004) (italics and internal quotation marks omitted); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and cannot be bound by the wishes of the parties." (internal quotation marks omitted)). Plaintiffs' takings claims against both Hoch and the Town of Cortlandt, as alleged in the current Complaint, are not yet ripe, and therefore the Court lacks jurisdiction to adjudicate those claims.

6. Due Process

Defendants contend that Plaintiffs have failed to state a due process claim because New York offers adequate post-deprivation process for litigants who allege their property has been taken without just compensation. (*See* Defs.' Mem. 16–18.) Defendants' argument here, again, relies heavily on facts not available from the face of the Complaint, and is therefore largely

inappropriate on this Motion. But Defendants are nonetheless correct that Plaintiffs have not adequately alleged a due process claim.

First, there are no facts in the Complaint relating to the due process claim. Plaintiffs have not alleged that the process by which the condemnation was effected was constitutionally ineffective, that they were denied notice of the process, or that the process was unavailable to them. (*See* Compl. ¶¶ 26–31.) The first mention of due process comes in paragraph 40, wherein Plaintiffs allege that "[t]he aforesaid conduct to which the **TOWN OFFICIAL DEFENDANTS** subjected plaintiff **FRANK J. LaFORGIA** constituted the taking of private property for public use without just compensation and a violation of the plaintiff's right to due process of law." (*Id.* ¶ 40.) This same allegation is repeated with respect to Lucio LaForgia. (*See id.* ¶ 41.) These are the types of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," that the Supreme Court has held are insufficient to state a claim. *Iqbal*, 556 U.S. at 678. If Plaintiffs wish to allege a due process claim—either procedural or substantive—they must allege facts sufficient to at least put Defendants on notice of the basis of that claim. "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Second, to the extent Plaintiffs intend to raise a procedural due process claim, as suggested in their opposition papers, (*see* Pls.' Opp'n 10–11), the Second Circuit has held that the ripeness requirements of finality and exhaustion set forth in *Williamson* apply with equal force "to [procedural] due process claims arising from the same nucleus of facts as a takings claim," *Kurtz*, 758 F.3d at 515. This holding arises from the rationale that "the only process guaranteed to one whose property is taken is a post-deprivation remedy," and thus "a federal court cannot determine whether the state's process is constitutionally deficient until the owner

has pursued the available state remedy." *Id.* at 516. Moreover, this rule "prevents evasion of the ripeness test by artful pleading of a takings claim as a due process claim." *Id.* As such, Plaintiffs' procedural due process claims, to the extent they intend to raise such claims, are not ripe.

To the extent Plaintiffs intend to raise substantive due process claims, the Court cannot opine on the need for exhaustion without more information about the nature of the claims. *See id.* at 514 (noting that with respect to the applicability of *Williamson*'s finality and exhaustion requirements, "[s]ubstantive due process claims have been treated differently based on the nature of the claim").

Accordingly, Plaintiffs have not stated a due process claim, either procedural or substantive. Because Plaintiffs have not stated a claim against Hoch under § 1983, the Court need not examine, at this stage, his qualified immunity defense.

7. Rights Under the Deed and Lease

Relying on documents not attached to or referenced in the Complaint, Defendants contend that Plaintiffs have no interests in the Property under either the deed to the Property or the lease agreement. (*See* Defs.' Mem. 19–20.) As discussed above, consideration of these documents is inappropriate at this stage. Plaintiffs are of course subject to Federal Rule of Civil Procedure 11(b), which states that an attorney who signs a pleading certifies that, to the best of her knowledge, the factual contentions have evidentiary support. If, therefore, discovery proves Plaintiffs' claim of a property interest to be without any factual support, Defendants may take appropriate action.

8. *Monell* Liability

Although the Court has concluded that Plaintiffs have failed to state either takings or due process claims pursuant to § 1983, the Court nonetheless finds it appropriate to also assess the validity of Plaintiffs' claims against the municipality, so that Plaintiffs may be apprised of any defects in their claims before filing an Amended Complaint. In that respect, Defendants argue that Plaintiffs' claims against the Town of Cortlandt must be dismissed not only for the failure to allege a constitutional violation, but also because Plaintiffs have failed to allege that any unconstitutional action was taken pursuant to an official policy or custom. (*See id.* at 20–22.)

A municipal defendant "cannot be held liable under § 1983 on a respondeat superior theory." *Monell*, 436 U.S. at 691 (italics omitted). Rather, to prevail on a § 1983 claim against a municipal employer, a plaintiff must satisfy the requirements set forth in *Monell* and its progeny, which adhere to the well-settled principle that "Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.*; *see also Hunter v. City of New York*, 35 F. Supp. 3d 310, 322 (E.D.N.Y. 2014) ("In order to sustain a claim for relief pursuant to § 1983 against a municipal defendant, a plaintiff must show the existence of an official policy or custom that caused injury and a direct causal connection between that policy or custom and the deprivation of a constitutional right.").

A plaintiff may satisfy the "policy or custom" requirement by alleging one of the following:

> (1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.

Brandon v. City of New York, 705 F. Supp. 2d 261, 276–77 (S.D.N.Y. 2010) (citations omitted). In addition, a plaintiff must establish a causal link between the municipality's policy, custom, or practice and the alleged constitutional injury. *See Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008) (holding that "a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the moving force behind the alleged injury" (internal quotation marks omitted)).

Plaintiffs do not contest Defendants' assertion that they have not pointed to any policy or custom of the Town of Cortlandt that would give rise to *Monell* liability. (*See* Pls.' Opp'n 11–12.) Instead, Plaintiffs argue that "the acts of KEN HOCH constitute municipal policy in that he has final policymaking authority in the area in which the complained of action was taken," (*id.* at 12), thus invoking the second category of *Monell* liability. But while this may be true, Plaintiffs have not alleged as much in the Complaint. In fact, as detailed above, they offer no individualized allegations of Hoch's conduct, and their description of Hoch's employment with the Town of Cortlandt does not suggest that he has final policymaking authority. (*See* Compl. ¶¶ 11–12.) To the extent Plaintiffs believe they have a good-faith basis for asserting that Hoch has final policymaking authority within the meaning of *Monell*, they must adduce allegations to that effect in order to state a *Monell* claim.

III. Conclusion

Having failed to state claims against either Hoch or the Town of Cortlandt, and having agreed to dismiss their claims against the remaining Defendants, Plaintiffs have no surviving claims. However, as Plaintiffs have not yet filed an Amended Complaint, the Court will afford Plaintiffs an opportunity to amend their Complaint to properly state causes of action. Plaintiffs must file their Amended Complaint within 30 days of the date of this Opinion & Order.

Additionally, Plaintiffs have not yet filed a renewed motion to substitute a party. In a letter dated August 24, 2016, Plaintiffs indicated to the Court that "Frank LaForgia [was] in the process of obtaining an appropriate family tree affidavit with for [sic] estate proceedings," and that "[u]pon receipt of the affidavit, the estate submissions will be completed and ready for submission," whereupon "the Motion to Substitute will be submitted." (*See* Letter from Robert W. Folchetti, Esq., to Court (Aug. 24, 2016) (Dkt. No. 19).) Over 10 months later, Plaintiffs still have not filed a renewed motion to substitute. Thus, within 10 days of the date of this Opinion & Order, Plaintiffs must file a letter apprising the Court of the status of the estate proceedings.

Accordingly, for the foregoing reasons, the claims against Defendants Vergano, Hoch, Puglisi, Becker, Farrell, Lindau-Martin, and Sloan in their official capacities are dismissed with prejudice. The remaining claims are dismissed without prejudice. Plaintiffs have until 30 days from the date of this Opinion & Order to file an Amended Complaint. Plaintiffs have 10 days from the date of this Opinion & Order to file a letter updating the Court on the status of the estate proceedings. The Clerk of Court is respectfully directed to terminate the pending Motion. (*See* Dkt. No. 23.)

SO ORDERED.

DATED: July 12, 2017
White Plains, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE