CGS Taxi LLC v City of New York
2017 NY Slip Op 32573(U)
May 2, 2017
Supreme Court, Queens County
Docket Number: 713014/2015
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN IA Part 10
Justice

CGS Taxi LLC, Akal Taxi NYC LLC, D&P Baidwan LLC, Jaspreeet Singh, C&R Bhogal LLC and PEG Taxi NYC LLC, individually and on behalf of all others similarly situated, x	Index Number: 713014/2015
Plaintiffs,	Motion Date: March 8, 2017
- against -	Motion Cal. Number: 39
The City of New York and The New York City Taxi and Limousine Commission, x	Motion Seq. No. : 8

The following papers numbered 1 to 18 read on this motion by defendant City of New York and defendant New York City Taxi and Limousine Commission for summary judgment dismissing the complaint against them and on this cross motion by the plaintiffs for, inter alia, partial summary judgment and an order certifying this action as a class action

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-3
Notice of Cross Motion - Affidavits - Exhibits	4-8
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Upon the foregoing papers it is ordered that the motion by defendant City of New York and defendant New York City Taxi and Limousine Commission for summary judgment

dismissing the complaint against them is granted. The cross motion by the plaintiffs is denied.

I. Introduction

Plaintiff Jaspreet Singh, plaintiff CGS Taxi LLC, plaintiff D&P Baidwan, LLC, plaintiff C&R Bhogal, LLC, and plaintiff PEG Taxi, NYC, LLC successfully bid for New York City taxi medallions at public auction. Before the auction, defendant City of New York and defendant New York City Taxi and Limousine Commission (TLC) made public statements and issued promotional materials concerning medallions, medallion prices, and price trends. In the months prior to auctions held over several years, TLC published reports on the average sale price of both individual and corporate medallions. The plaintiffs allege that the reports issued by TLC contained false, inaccurate, and misleading statements. TLC allegedly exaggerated the price of medallions in public reports while concealing the true prices and made false statements concerning the directional trend in medallion prices.

The plaintiffs bid at the auctions held in 2013/2014, and they successfully purchased medallions at prices ranging from $803,000 to $ 875,000. After their purchases, the value of their medallions allegedly fell, and the plaintiffs attribute their losses not only to alleged fraud committed by the TLC, but also to the TLC's failure to restrict the activity of companies like Uber Technologies, Inc. The plaintiffs allege that a medallion gives them the exclusive right to pick up passengers via "street hail" in certain areas of the city and that Uber infringes on this right by picking up passengers who arrange for transportation through the use of an application on their smart phones.

The relevant regulatory background and distinctions concerning yellow cabs, black cars (which Uber vehicles supposedly are), and other types of vehicles for hire are given in three decisions issued by the Honorable Allan Weiss, a Justice of the New York State Supreme Court, County of Queens, in three cases : (1) *Glyca Trans LLC v. City of New York,* Index No. 8962/15 (September 8, 2015), (2) *XYZ Two Way Radio Service, Inc. v. The City of New York,* Index No. 5693/15 (September 8, 2015), and (3) *Melrose Credit Union v. The City of New York*, Index No. 6443/15 (September 8, 22015).

The cases decided by Justice Weiss were largely Article 78 in nature, the petitioners, who were parties with interests in medallions, essentially seeking to compel TLC to enforce laws and regulations protecting the exclusive rights of medallion holders. (Justice Weiss granted the respondents' CPLR 3211 dismissal motions.) The instant action, which purports to be a class action, is very different..

The first cause of action is for violation of General Business Law §349 which prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service." The second cause of action is for fraud. The third cause of action is for breach of the implied covenant of good faith and fair dealing. The fourth cause of action is for negligent misrepresentation. The fifth cause of action is for rescission of the auction sale transactions. The sixth cause of action, apparently for damages and/or rescission, is labeled "violation of licensing statutes and regulations." The seventh cause of action, also apparently for damages and/or rescission, is labeled "failure to enforce codes and rules pertaining to black car operations." The plaintiffs demand consequential damages, punitive damages, rescission of the auction sale transactions, costs and attorney's fees, but they do not demand Article 78 relief.

The plaintiffs also seek an order certifying this action as a class action.

On March 16, 2016, the defendants submitted a motion for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint against them. Pursuant to a decision and order dated April 18, 2016 (one paper), this court converted the motion into one for summary judgment pursuant to CPLR 3211(c).

II. The Allegations of the Plaintiffs

In late 2013 and early 2014, defendant TLC conducted three auctions for the sale of 400 taxi medallions for wheelchair accessible vehicles, 232 of which were corporate medallions which could be owned by investors and 168 of which were independent medallions which could only be owned by independent taxi drivers. The plaintiffs in this action, who are either taxi drivers or companies owned by taxi drivers, made successful bids ranging from $803,000 to $875,000 at the February, 2014 auction. The defendant city netted a total of approximately $400,000,000 from the three auctions.

Before conducting the auctions, the TLC distributed promotional materials about medallions, medallion prices, and price trends. In late 2013 or early 2014, the TLC published the *2014 Taxicab Fact Book* which stated: "The average annual price of independent medallions increased 260% between 2004 and 2012 while the average annual price of mini-fleet medallions increased 321% over the same time period." The TLC also issued a promotional pamphlet which contained a graph of medallion prices from January 2001 to 2014 which depicted the price of an independent medallion increasing from $200,000 to more than $1,000,000. The TLC failed to disclose in these promotional materials that there had been few, if any, sales of wheelchair accessible medallions.

The TLC statements about average medallion prices were inaccurate and inflated because, among other things, the TLC arbitrarily omitted certain transactions that were deemed to be below market value and the TLC included average prices for months in which there were no sales. The TLC's promotional materials conveyed the message that the market for taxi medallions was still rising up to the time of the 2014 auctions when, in fact, the market had already started to fall.

The TLC also misrepresented the directional trend in medallion prices by stating that the average sale price for an individual medallion was $1,050, 000 from July, 2013 until February, 2014. The average sales price had fallen to $982,000 by February, 2014.

The plaintiffs were harmed by not only by the misleading statements made by TLC before the auction, but by the TLC's regulatory conduct toward companies such as Uber Technologies, Inc. which provides rides to passengers who summon the vehicles by means of mobile electronic devices. The emergence of companies relying on the new technology caused medallion holders to experience severe competition. The value of a medallion depends on the limited number of them sold by the defendant city and the nearly exclusive right it confers to pick up passengers who summon them via a street hail. The TLC fact book stated: " Yellow taxicabs with medallions are the only vehicles authorized to pick up passengers by street hail anywhere in New York City." In disregard of the law, the TLC treated Uber-type vehicles as "black cars" even though black cars were not authorized to accept street hail passengers and could only provide transportation by pre-arrangement. There is little, if any, difference between a street hail and an e-hail, and the TLC never informed the plaintiffs of its plans to allow the unrestricted growth of e-hail vehicles.

Moreover, black cars had to be affiliated with a base or "central facility" which could only be licensed if it was owned by a franchisee or cooperative owner of the base. The 2014 fact book had stated: "Black Cars [:] Provide service mostly for corporate clients, setting fares by contracts with clients [.] About 80 base stations located throughout the five boroughs [.] About 10,000 vehicles [.] Vehicles must be affiliated with a base [.]" Disregarding legal requirements, the TLC licensed five Uber bases from which 20,000 purported black cars operated as of July, 2015. By March 5, 2017, there were 49,514 purported black cars affiliated with Uber. In reviewing a black car base license application, the TLC inquired if the applicant had a franchise agreement or cooperative agreement and if at least ten cars were listed on the agreement. The practice was to take into account the first ten cars and no more than the ten. When a base added cars after obtaining its license, the TLC made no inquiry as to whether the additional cars were parties to the cooperative agreement. The consequence is that Uber alone puts three times the number of e-hail vehicles on the road as there are medallion taxis.

The market for taxi medallions has declined sharply, and there are presently few sales of taxi medallions of any kind apart from foreclosures.

III. The Allegations of the Defendants

At the time that the plaintiffs bid for their medallions, Uber had already been operating in New York City for about three years as evidenced by a TLC base license issued December 13, 2011.

In December, 2013, the TLC announced that 168 wheelchair accessible independent medallions would be offered for sale at auction, and in a subsequent industry notice the TLC stated that bid packages would be made available at all TLC facilities and online at the Medallion Auction Homepage.

Each bid package included an Official Bid Form which contained the following bidder certification: " I CERTIFY THAT I HAVE NOT RELIED ON ANY STATEMENTS OR REPRESENTATIONS FROM THE CITY OF NEW YORK IN DETERMINING THE AMOUNT OF MY BID. *** I understand and agree that the [City] has not made any representations or warranties as to the present of future value of a taxicab medallion, the operation of a taxicab as permitted thereby, or as to the present or future application or provisions of the rules of the [TLC] or applicable law, other than a warranty of clear title to such medallion to successful, qualifying bidders therefore, and I acknowledge that no warranties are made, express or implied, by the [City] as to any matter other than warranty of clear title."

On the TLC's website, the agency posted past auction results and historical medallion transfer prices (a medallion transfer is a private sale of a medallion between individuals or other entities). Prior to the February, 2014 auction, the TLC published a booklet entitled the *2014 Taxicab Fact Book* which included data about medallion sales.

Five of the plaintiffs testified at their depositions that they neither visited the TLC website nor read the *2014 Taxicab Fact Book.* Satnam Singh, the owner of plaintiff CGS Taxi, testified that rather than reading these TLC sources, he made his decision to bid based on conversations he had with other drivers on the JFK Airport taxi line. Balbir Janjua, the owner of plaintiff Akal Taxi, testified that rather than reading the website or fact book, he got his information regarding medallion values from another driver and friends at LaGuardia Airport who told him what they understood TLC was saying about medallion values. Davinder Baidwan, the President of D&P Baidwan, testified that he saw two reports on Fox and CNN regarding the rise in the value of medallions, but he did not visit the TLC website or read the fact book. Plaintiff Jaspreet Singh got his information about medallion

values from other taxi drivers at JFK Airport, but he did not visit the website or read the fact book. Davir Singh Bhogal, the owner of plaintiff C&R Bhogal, testified that although he did not visit the website or read the factbook, he thought medallion values were increasing because friends told him so. While Ravinder Multani, the co-owner of plaintiff Peg Taxi NYC, did visit the website, he could not recall seeing posted transactions for $1,000,000, and he relied on the encouragement of other drivers, his brother, and two uncles when deciding to bid.

The actual bids made by the plaintiffs were less than the TLC reported average medallion value of $1,050,000. The actual bids made by the plaintiffs ranged from 17% to 24% lower than the TLC January average medallion value. The actual bids made by the plaintiffs were also below what they assert were the true averages for medallion values.

The plaintiffs in this case submitted bids for independent wheelchair accessible medallions at the February, 2014 auction. All six of the plaintiffs signed and notarized the bid forms containing the disclaimer of warranties made by the City. The plaintiffs also submitted an Affidavit of Non-Reliance required by the TLC Rules (35 RCNY §58-45[m][1] stating: " The Purchaser has not relied on any statement or representation of the TLC in connection with the purchase of the Medallion, including but not limited to, regarding the value of the taxicab medallions and has not relied on the actions or determinations of the TLC in respect of the Medallion."

For the February, 2014 auction, the TLC received 297 bids for the 168 available medallions, with the highest winning bid in the amount of $965,000, the lowest in the amount of $805,201.97, and the average winning bid at $863,742.

The Taxicab License Bill of Sale signed by purchasers of the medallions or their representatives states: " Said taxicab license(s) are conveyed subject to all other provisions of the laws of the State and City of New York, Administrative Code of the City of New York, and the Rules of the City of New York, including but not limited to the Rules of the NYC Taxi & Limousine Commission, as such laws and rules may from time to time be amended."

By February, 2014, Uber's presence in the City was well known and the use of electronic apps to secure transportation was widespread.

Most, if not all, of the plaintiffs in this case have not tried to sell their medallions.

IV. Notice of Claim

The plaintiffs did not file a notice of claim with the defendants, nor did the plaintiffs allege in their complaint that they had filed a notice of claim. Contrary to the argument made by the plaintiffs, this is not a case brought to vindicate a public interest where the filing of a notice of claim is not required. (*See, Mills v. Monroe Cty*., 59 NY2d 307.) This is a commercial case brought by a group of disappointed investors. No matter how numerous, they are seeking, inter alia, damages to resolve their own private disputes with the municipal defendants. (*See*, *Zoll v. Suffolk Reg'l Off-Track Betting Corp*., 259 AD2d 696.)

General Municipal Law §50-e, "Notice of claim," provides in relevant part: "1. When service required; time for service; upon whom service required.(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises ****." (*See, Williams ex rel. Fowler v Nassau County Medical Center* , t6 NY3d 531; *Boring v. Town of Babylon*, 147 AD3d 892.)

General Municipal Law §50-i, " Presentation of tort claims; commencement of actions," provides in relevant part: "1. No action or special proceeding shall be prosecuted or maintained against a city *** for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, *** unless, (a) a notice of claim shall have been made and served upon the city ***in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice ***, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based ***." (*See*, *Fernandez v. City of N.Y.,* 148 AD3d 995.)

Although General Municipal Law § 50-i speaks of cases "for personal injury, wrongful death, or damage to real or personal property," some courts, reading the statute broadly, have held that where a cause of action "sounds in tort," the notice of claim provisions of General Municipal Law §50-e and 50-i apply. (*See, Melia v. City of Buffalo*, 306 AD2d 935 [4th Dept.] [failure to provide the wage differential to plaintiff]; *Phelps Steel, Inc. v. City of Glens Falls*, 89 AD2d 652 [3rd Dept] [failure to provide compensation for the taking of private property for public use]. On the other hand, it has been held that " defendants' reliance upon the notice of claim requirements contained in General Municipal Law § 50-i ' is misplaced, as this statutory provision is confined to claims for personal injury, wrongful death or damage to property and does not apply to discrimination claims' ***. " (*Grasso* v. *Schenectady Cty. Pub. Library,* 30 AD3d 814, 816 [3rd Dept.], quoting *Parry v.*

Tompkins County, 260 AD2d 987, 988 [2d Dept.].) Language in *Margerum v. City of Buffalo* (24 NY3d 721), decided by the Court of Appeals on February 17,2015, suggests that General Municipal Law §50-i should be given the narrower reading. The Court of Appeals wrote: " Human rights claims are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-i." (*Margerum v. City of Buffalo*, *supra*, 730.) In the case at bar, the plaintiffs were not required to file a notice of claim pursuant to General Municipal Law §§50-e and 50-i read together.

New York City Administrative Code §7-201, "Actions against the city," provides in relevant part: " a. In every action or special proceeding prosecuted or maintained against the city, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims, upon which such action or special proceeding is founded, were presented to the comptroller for adjustment, and that the comptroller has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment ***." (*See*, *Raven Elevator Corp. v. City of N.Y.*, 291 AD2d 355; *Katzman v. City of N.Y.*, 183 Misc2d 501,[AT 1st].)

. New York City Administrative Code §7-201 required the plaintiffs to serve notices of claim before asserting all of their causes of action, including those sounding in contract, which include the third which is for breach of the implied covenant of good faith and fair dealing and that part of the fifth which is for rescission of the auction sale transactions because of a breach of the covenant of good faith and fair dealing.. (*See*, *City of N.Y. v. Kraus*, 110 AD3d 755; *EMD Const. Corp. v. N.Y. City Dep't of Hous. Pres. & Dev.*, 70 AD3d 893; *Raven Elevator Corp. v. City of N.Y.*, *supra*.)

New York City Administrative Code §7-201 and General Municipal Law §50-e together required the plaintiffs to serve notices of claim before asserting their causes of action for tort or for wrongful conduct in the nature of tort. The plaintiffs' causes of action for tort or for wrongful conduct in the nature of tort include the first cause of action, which is for violation of General Business Law §349, the second cause of action, which is for fraud, the fourth cause of action, which is for negligent misrepresentation, that part of the fifth cause of action which is for rescission of the auction sale transactions because of fraud, the sixth cause of action, apparently for damages and/or rescission because of "violation of licensing statutes and regulations," and the seventh cause of action, which is for "failure to enforce codes and rules pertaining to black car operations." (*See*, *Melia v. City of Buffalo,* 306 AD2d 935.)

Compliance with General Municipal Law § 50-e is a condition precedent to a tort action against a municipality (*see, Davidson v Bronx Municipal Hosp.*, 64 NY2d 59; *Maxwell v City of New York,* 29 AD3d 540; *Perkins v City of New York*, 26 AD3d 483; *Batista v City of New York*, 15 AD3d 304) , and compliance with New York City

Administrative Code §7-201 is also a condition precedent to an action against the City of New York. (*See*, *City of N.Y. v. Kraus*, *supra*; *EMD Const. Corp. v. N.Y. City Dep't of Hous. Pres. & Dev.*, *supra*.)

The failure to allege compliance with the applicable claim presentment requirements of General Municipal Law §50-e and/or Administrative Code of the City of NY § 7-201 requires the dismissal of a complaint absent waiver or estoppel. (*See, City of N.Y. v. Kraus, supra; EMD Const. Corp. v. N.Y. City Dep't of Hous. Pres. & Dev., supra; City of N.Y. v. 611 W. 152nd St., Inc.,* 273 AD2d 125.)

The plaintiffs argue that the defendant city and defendant TLC are estopped from raising the notice of claim requirements. "[A] municipal corporation may be equitably estopped from asserting lack of notice of claim when it has wrongfully or negligently engaged in conduct that misled or discouraged a party from serving a timely notice of claim or making a timely application for leave to serve a late notice of claim, and when that conduct was justifiably relied upon by that party ***." (*Konner v. N.Y. City Transit Auth.*, 143 AD3d 774, 776.)

While a municipal defendant may be equitably estopped from raising the late service or lack of service of a notice of claim as a defense (*see, Konner v. N.Y. City Transit Auth*, *supra*; *Bethel v. N.Y. City Transit Auth.*, 215 AD2d 206), in the case at bar, the court finds that the conduct of the defendants was not " calculated to, [nor] negligently did, mislead or discourage the plaintiff[s] from serving a timely notice of claim." (*Bethel v. N.Y. City Transit Auth.*, *supra*, 206*; see, Lubin v. City of N.Y.*, 148 AD3d 898.) A defendant is not required to raise the late service or lack of service of a notice of claim as an affirmative defense (*Singleton v. City of New York,* 55 AD3d 447; *Reaves v. City of New York*, 177 AD2d 437), and the failure to serve a timely notice of claim may be raised at any time prior to trial. (*Wade v. NYC Health & Hosps. Corp.*, 16 AD3d 677; *Frank v. City of New York*, 240 AD2d 198.) It is true that the failure to allege compliance with notice of claim requirements renders the complaint legally insufficient (*see*, *Reaves v. City of N.Y.*, 177 AD2d 437), but the city and the TLC were not required to include the failure to state to state a cause of action ground (CPLR 3211[a][7]) in their initial CPLR 3211 motion. "It should be stressed, however, that omitting the paragraph 7 ground (failure to state a cause of action) from the initial CPLR 3211 motion will not waive it; subdivision (e) allows the paragraph 7 motion to be made at any time. It is just a matter of determining what mechanical device to use for the paragraph 7 objection when the CPLR 3211 motion has been used up. The device should be the summary judgment motion of CPLR 3212." (Higgit, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C3211:51.)

While the city and the TLC did not raise the lack of service of a notice of claim in their CPLR 3211(a) motion, the ensuing delay was caused by this court's conversion of

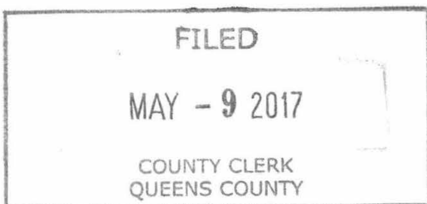
the motion into one for summary judgment pursuant to CPLR 3211(c) and the plaintiffs' insistence on conducting discovery. Moreover, the plaintiffs did not show that they justifiably relied on any conduct of the defendants in not filing a notice of claim (see, *Konner v. N.Y. City Transit Auth*, *supra*), and the court notes that unawareness of the provisions of law concerning the filing of a notice of claim does not constitute a reasonable excuse for the failure to comply with statutory requirements(*see, Dockery v. Dep't of Hous. Pres. & Dev. of City of N.Y.*, 223 AD2d 705), and law office failure has been deemed an unreasonable excuse for not complying with statutory requirements. (*See*, *Seif v City of New York*, 218 AD2d 595.)

The cases relied upon by the plaintiffs in support of their waiver and estoppel arguments are distinguishable from the one at bar. *Salesian Soc., Inc. v. Vill. of Ellenville* (41 NY2d 521) is distinguishable because in that case the parties entered into a written stipulation prior to trial stating the contention of parties, and the village did not raise any issue concerning compliance with notice of claim requirements. *In Flanagan v. Bd. of Ed., Commack Union Free Sch. Dist* (47 NY2d 613) the defense was raised for the first time at the appellate level. In *Jeshurin v. Liberty Lines Transit, Inc*. (191 AD2d 412) waiver was found where a municipal corporation first consented to the dismissal of its assertion that the complaint against it "fails to state a cause of action," but later attempted to assert that the plaintiff failed to serve a notice of claim within the one-year ninety day period.

The plaintiffs allege that if a notice of claim was required, they cured the defect when four of them filed notices of claim with the New York City Comptroller on December 16, 2016 and the Comptroller took no action. Each of the notices assert claims on behalf of a purported class. However, the plaintiffs' new allegation made for the first time in their reply memorandum of law dated March 7, 2017 may not be considered by the court. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion ***." (*USAA Fed. Sav. Bank v. Calvin*, 145 AD3d 704, 706; *All State Flooring Distributors, L.P. v. MD Floors, LLC*, 131 AD3d 834.) In any event, the late service of a notice of claim regarding the plaintiffs' causes of action sounding in tort required the permission of the court (*see*, General Municipal Law §50-e[5]; *Rosenblatt v. N.Y. City Health & Hosps. Corp.*, - AD3d-, - NYS3d-, 2017 WL 1393866), and the service of a late notice of claim upon the defendants without leave of the court was a nullity. (*See*, *Mosheyev v. N.Y. City Dep't of Educ.*, 144 AD3d 645; *Chtchannikova v. City of N.Y.*, 138 AD3d 908.) In regard to all of the plaintiffs' causes of action, they did not move for leave to serve a late notice of claim to comply with New York City Administrative Code §7-201, nor have they amended their complaint to allege compliance with the notice of claim requirements. (*See*, CPLR 3025.)

Dated: May 2, 2017

Kevin J. Kerrigan, J.S.C.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