

<b>Matter of Marsala v The City of Long Beach</b>
2012 NY Slip Op 30947(U)
April 3, 2012
Sup Ct, Nassau County
Docket Number: 14361/08
Judge: Thomas P. Phelan
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**  
*Justice.*

TRIAL/IAS PART 2  
NASSAU COUNTY

IN THE MATTER OF THE APPLICATION OF  
JOHN MARSALA, ADRI LEASING CORP.,  
BEACH & BAY LEASING CORP.,  
OCEAN BLACK CAR CORP.

Petitioners,

ORIGINAL RETURN DATE: 1/19/12  
SUBMISSION DATE: 02/21/12  
Index No. 14361/08

For a Judgment Pursuant to Article 78 of the  
CPLR and for a declaratory judgment pursuant  
to §3001 of the CPLR

-against-

MOTION SEQUENCE # 7 & 8

THE CITY OF LONG BEACH and CARMEN  
CIPPOLA d/b/a LONG BEACH CHECKER  
and BEECH STREET TAXI,

Respondents.

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross Motion.....	2
Second Amended Verified Petition.....	3
Reply.....	4, 5
Memorandum of Law.....	7, 8

Motion by petitioners for an order pursuant to CPLR 3212 granting them partial summary judgment declaring that they are the owners of 22 certain City of Long Beach taxi licenses in which they have a protected interest and cross-motion by the City of Long Beach ("the City") for an order pursuant to CPLR 3212

granting it summary judgment dismissing the petition and any and all cross-claims against it on the grounds that the petitioners do not have a protected property interest in said taxi licenses is determined as provided herein.

Petitioners challenge the City's refusal to renew a total of 22 of petitioners' taxi licenses, eleven on March 3, 2008, and eleven on July 23, 2008, as well as the City's issuance of six taxi licenses to respondent Carmen Cippola ("Cippola") on or about June 6, 2008. The City maintains that the petitioners' ability to renew the aforementioned taxi licenses expired when the licenses themselves lapsed. The City further maintains that under the circumstances, petitioners lack a protected property interest in the aforementioned taxi licenses

Petitioners have held a number of taxi licenses in the City of Long Beach for many years. Recent applications to renew a number of those licenses were denied, without a hearing, as untimely, giving rise to this proceeding.

In the Second Amended Verified Petition petitioners allege that on or about January 22, 2008, petitioners applied for renewal of 35 taxi licenses, twenty-four of which were renewed by the City on or about February 5, 2008, and eleven of which, on or about March 3, 2008, were not renewed on the grounds that the licenses were not in full force and effect at the time renewal was sought.

Petitioners further allege that in April 2008 petitioners applied for renewal of eleven other taxi licenses. By letter dated July 23, 2008, the City Manager advised petitioners that renewal of those licenses was also being denied since the licenses had expired and were not in full force and effect.

Also in July 2008 the partial denial of petitioner's January 22, 2008 application was reconsidered, and the City adhered to its original decision denying the renewal of eleven of the 35 licenses for which renewal had been sought on January 22, 2008.

The City Manager explained that the City's Code clearly provides that taxi licenses expire on the last day of February the year following their issuance and that the eleven taxi licenses for which renewal was first sought in January 2008 had expired on February 28, 2007, and the other eleven for which renewal was sought in April 2008 had expired on February 28, 2008. He concluded that

“[g]iven the facts and circumstances presented there is no justification to reissue these licenses to your various companies.”

Petitioners allege that all of petitioners' taxi licenses were purchased for good and valuable consideration, that heretofore petitioners have always been issued annual renewals and that the City's Code entitles taxi license holders to continue to hold those licenses until the licenses are suspended or revoked.

Petitioners additionally allege that respondent Cippola applied for taxi licenses which were held by petitioners on or about January 18, 2008, and that Cippola in fact had taxi cabs operating since December 8, 2007. Petitioners allege that the City issued to Cippola petitioners' taxi licenses notwithstanding petitioners' ownership of them on or about June 6, 2008, and that the City's issuance of petitioners' licenses to Cippola amounted to a revocation. Petitioners specifically allege that their taxi licenses numbered 1, 2, 5, 6, 10, 11 and 15 were applied for and issued to Cippola.

In their Second Amended Verified Petition dated July 31, 2009, the petitioners advance twelve causes of action. As and for their first claim, they allege that the City failed to perform a duty enjoined upon it by law in violation of CPLR 7803(1). As and for their second claim, petitioners allege that the City's denial of petitioners renewal application was violative of lawful procedure and was arbitrary and capricious and/or an abuse of discretion in violation of CPLR 7803(3). By their third claim, petitioners allege a failure to hold a hearing. As and for their fourth and fifth claims, petitioners seek to recover damages of the City and Cippola, respectively. Petitioners' sixth claim seeks injunctive relief. By petitioners' seventh claim, petitioners allege that respondents conspired to deprive petitioners of their taxi licenses. Petitioners' eighth, ninth and tenth claims allege violations of 42 USC § 1983, and by their eleventh claim, petitioners allege a violation of Article 1, Section 6 of the New York State Constitution. Finally, petitioners' twelfth claim alleges an unlawful taking of their property.

Section 24-45 of the Long Beach City Code provides that “[n]o person shall use any motor vehicle in the conduct of a taxicab business unless a license therefor is first issued by the city clerk and is in full force and effect.” As for renewals, Section 24-51 of the Long Beach City Code provides “[e]ach license . . . shall expire on the last day of February next succeeding the date of issuance thereof”

and that “[a]n application for renewal must be filed at least (14) days before its expiration, and if not so filed, the renewal fee for such license shall be two hundred dollars (\$200.00).” If a renewal application is filed at least 14 days before it expires, the renewal fee is \$100.

Prior to March 3, 2008, the day on which the City refused to renew 22 of petitioners’ taxi licenses, Section 24-47 of the Long Beach City Code provided “no license for the operation of a taxicab in the city shall be issued by the city clerk other than the **renewal** of an **existing** license (emphasis added).” However, on March 3, 2008, the Long Beach City Code was amended and the restriction limiting the issuance of taxi licenses to only renewals was rescinded, and the City Code was amended to provide that “the total number of licenses issued by the City Clerk . . . shall not exceed fifty (50) in number.”

Pursuant to Section 24-52 of the Long Beach City Code, the transfer or sale of a taxi license must be approved by the Police Commissioner. Once so approved, the purchaser may apply for a license but, even if qualified, may only procure one if the prior owner consents to the cancellation of its license. In that way, the total number of licenses authorized under the Code is not exceeded. Needless to say, the amendment to the City Code dispensed with the requirement that the former license holder’s consent to the cancellation of its license before a new application for a taxi license could be approved.

Pursuant to Section 24-58 of the Long Beach City Code, City driver’s licenses are required to drive taxis; such licenses are not transferrable pursuant to Section 24-63 of the City Code.

Section 24-38 of the City Code provides for suspension or revocation of taxi licenses as follows: “The hack bureau or the city clerk may at any time revoke any license issued pursuant to this article for reasonable cause after a hearing, at which the driver or owner may present his proof and cross-examine witnesses.” It also provides that “[i]f the holder of a taxicab license has discontinued operations for more than sixty (60) days . . . it shall be deemed reasonable cause for the revocation of the license.”

The act of renewing or denying license renewal, as well as suspending or revoking them, is discretionary. Accordingly, *mandamus* does not lie to compel a

discretionary act, (*Town of Riverhead v New York State Dept. of Environmental Conservation*, 50 AD3d 811, 813 [2d Dept 2008], citing *Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]; *Matter of Gimprich v Board of Education of City of New York*, 306 NY 401, 406 [1954]; *People ex rel. Hammond v Leonard*, 74 NY 443, 445 [1878]; see also, *Haydock v Passidomo*, 121 AD2d 540 [2d Dept 1986]. The first claim seeking a writ of *mandamus* is dismissed.

While a hearing is required where a license is suspended or revoked (*M.S.B.A. Corp. v Markowitz*, 23 AD3d 390 [2d Dept 2005], citing *Matter of Benvenuto v Suffolk County Dept. of Consumer Affairs*, 144 AD2d 455, 456 [2d Dept 1998]; *Matter of Active Appliance Corp. v County of Suffolk*, 251 AD2d 659 [2d Dept 1998]; *Matter of Richard I, Inc. v Ambach*, 90 AD2d 127, 130 [3d Dept 1982], *aff'd* 61 NY2d 784 [1984], *cert den.*, 469 U.S. 822 [1984]; see, *Matter of Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Wallfor, Inc. v Eaton*, 127 AD2d 838, 840 [2d Dept 1987]), a hearing is not required where only renewal is at stake (*Daxor Corp. v State Dept. of Health*, 90 NY2d 89 [1987], *cert den.*, 533 US 1074 [1998], *rearg den.*, 90 NY2d 937 [1997], *cert den.*, 523 U.S. 1074 [1998]).

In addition, while due process under the Fourteenth Amendment must be afforded when a license is revoked or suspended, it is not required when a license has expired. Issuance of renewal reverts to an exercise of discretion as “there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing” (*Testwell, Inc. v New York City Department of Bldgs.*, 80 AD3d 266, 274 [1<sup>st</sup> Dept. 2010], citing *Matter of Daxor Corp. v State of N.Y. Dept. of Health*, *supra*, at p. 97-98; see also *Matter of M.S.B.A. Corp. v Markowitz*, *supra*). The third claim whereby petitioners challenge the denial of a hearing is dismissed.

The denial of a renewal application by a municipality is upheld if it is neither arbitrary nor capricious. (See, *Gluck v City of Syracuse*, 244 AD2d 873 [4<sup>th</sup> Dept 1997], *lv den.*, 92 NY2d 802 [1998]; see also, *M.S.B.A. Corp. v Markowitz*, *supra*; *Hirsch v Hastings*, 70 AD2d 1052 [4<sup>th</sup> Dept 1979].

The issue accordingly becomes whether the City’s determination was supported by a rational basis and was not arbitrary and capricious (*Testwell, Inc. v New York*

*City Department of Bldgs.*, 8AD3d at 275-276, citing *Matter of M.S.B.A. Corp. v Markowitz*, 23AD3d, at 391. “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” (*Testwell, Inc. v New York City Department of Bldgs.*, 8AD3d at 275-276, citing *Matter of Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, *supra*; *Matter of Arrocha v Board of Educ. of City of New York*, 93 NY2d 361, 363-364 [1999]).

Indeed, in *Hirsch v Hastings*, *supra*, the Appellate Division explained “[i]n considering the merits of [an] applicant for renewal of a license or permit, [that] application for a renewal is to be regarded in exactly the same manner as an application for a new license (quotations omitted)” (*Hirsch v Hastings*, *supra*, quoting *Application of Restaurants Longchamps*, 271 App. Div. 684, 686 [1<sup>st</sup> Dept 1947], *aff’d sub. nom. Restaurants & Patisseries Longchamps v O’Connell*, 296 N.Y. 888 [1947]).

Moreover, “[i]n such cases the ‘inquiry [of the court] is limited to a determination whether the record discloses circumstances which leave no possible scope for the reasonable exercise of that discretion.’” (*Hirsch v Hastings*, *supra*, quoting *Matter of Stracquadanio v Department of Health of City of New York*, 285 NY 93, 95, 96 [1941]).

The City’s interpretation of its Code to the effect that petitioners’ licenses expired on the last day of February is eminently reasonable. Indeed, that fact is clearly set forth in the City Code. Similarly, the City’s position that once a license expires, its “renewal” is no longer possible is also reasonable. That the annual renewal fee increases from \$100 to \$200 when application therefor is not made at least 14 days prior to a license’s expiration hardly means that licenses do not expire on the last day of February as is clearly set forth in the City Code.

Prior to the amendment to the City Code, petitioners may have had a property interest in their licenses. However, while Section 24-47 of the Code formerly provided that only renewal licenses could be issued, the Code no longer so provides nor did it on March 3, 2008, when the City rejected the petitioners’ renewal applications or when it issued Cippola his licenses.

“[T]he City has plenary authority to enact ordinances that define the scope of any entitlement and the concomitant authority to enact new ordinances that eliminate


that entitlement.” (*Gluck v City of Syracuse*, 244 AD2d 873 [4<sup>th</sup> Dept 1977], lv den., 92 NY2d 802 [1998]).

This is particularly so where, like here, it can be argued that petitioners were utilizing their ownership of the licenses in an attempt to effect how many taxis could operate in the City of Long Beach. By not renewing all of their taxi licenses for over a year, petitioners significantly reduced the number of taxis in service from the 50 the City sought to have.

In sum, in view of the fact that petitioners’ taxi licenses had expired, the propriety of the City’s denial of petitioners’ renewal applications was not arbitrary or capricious. As for Cippola’s procurement of licenses, they were newly issued; approval by the Police Commissioner and petitioners was not required.

This decision constitutes the order of the court.

Dated: April 3, 2012

  
THOMAS P. PHELAN, J.S.C.

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**ENTERED**  
**APR 05 2012**  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE