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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 100557/2011
ASTRA MEDIA GROUP, LLC
vs.
NYC TAXI AND LIMOUSINE
SEQUENCE NUMBER : 002
CONSOLIDATION/JOINT TRIAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied. As this Court has dismissed the Article 78 proceeding, the proceeding cannot be consolidated with the primary action Astra Media v Clear Channel, Index No. 600793/09.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

AUG 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

AUG 10 2012

Dated: _____

Alice Schlesinger, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

ASTRA MEDIA GROUP, LLC,

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

-against-

THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondent.

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Index No. 100557/11
Motion Seq. No. 001 and 002

SCHLESINGER, J.:

The controversy between the parties here, involving rooftop advertising for taxicabs operating in New York City, has sparked multiple lawsuits and voluminous impassioned briefs discussing issues as wide and varied as the playing card monopoly that existed in centuries-old England. Some explanation of the various lawsuits and the somewhat extended procedural history is necessary to an understanding of the matters now pending before this Court, despite the risk of monotony.

Astra Media Group, LLC (Astra) filed the above-captioned Article 78 proceeding against The New York City Taxi and Limousine Commission (the TLC) in 2011 to challenge the denial of its request for approval of its specialized design for four-sided rooftop advertising displays. The TLC moved to dismiss the proceeding as time-barred, and Astra opposed. After the papers were submitted, both parties asked this Court to hold the matter in abeyance because the TLC was in the process of promulgating regulations governing taxicab rooftop advertising that could arguably moot the issues.

Unbeknownst to this Court at that time, in 2009, two years before this Article 78 proceeding was commenced, Astra filed a plenary action against the TLC and Clear Channel Taxi Media, LLC and its affiliates (Clear Channel), another company in the business of taxicab advertising, seeking monetary damages and related relief (*Astra Media Group, LLC v Clear Channel Taxi Media, LLC, et al.,* Index No. 600793/09). There Astra claimed, among other things, that the TLC and Clear Channel had conspired to drive Astra out of business so that Clear Channel could increase its market share and profits in violation of the Donnelly Act (NY Gen Bus Law §340, *et seq.*).

Based upon Astra's assertion in the plenary action of a claim against Clear Channel under the Sherman Antitrust Act, Clear Channel removed the action to the US District Court for the Southern District of New York and then moved for summary judgment, as did the TLC. By Memorandum and Order dated December 29, 2009, US District Court Judge Naomi Reice Buchwald granted both motions for summary judgment. *See, Astra Media Group, LLC v Clear Channel Taxi Media, et al.*, 679 F. Supp.2d 413 (SDNY 2009). On appeal, the Second Circuit upheld the dismissal of the Sherman Antitrust Act claim but remanded the state law claims to the District Court with a direction to remand those claims to the state court. 414 Fed. Appx. 334 (2nd Cir 2011).

Because the plenary action was still pending in federal court when this Article 78 proceeding was commenced in 2011, the Article 78 – standing alone – was assigned to this Court, a Medical Malpractice Trial Part that also hears special proceedings. When the plenary action was restored to the Supreme Court calendar, Astra moved under the 2011 index number to have the newly restored plenary action consolidated with the Article 78 proceeding. The Clerk's Office then referred to this Court the two defense

motions for summary judgment in the 2009 plenary action, pending the determination of the motion to consolidate.[1]

When this Court held oral argument, Astra confirmed the statement in its papers that it was no longer in business. Additionally, the TLC confirmed that it had promulgated regulations effective October 24, 2011 that barred the type of four-sided taxicab rooftop advertising display that Astra had previously manufactured. The regulations also expressly limited the advertising to the two sides of the display. 35 RCNY §67-16; see also §§ 58-34 and 67-03. In support of the new rule, the TLC asserts that advertisements on the front and back of a rooftop display distract the drivers in front and behind the taxi and are unsafe, while advertisements limited to the two long sides of the display sufficiently serve the advertiser's purpose without creating a hazard. While Astra disagrees with the claimed rationale behind the new regulation and also asserts that it is entitled to an exception to the rule, it does not dispute that the TLC followed all proper procedures when promulgating the regulations or otherwise challenge the regulations on their face.

In light of these developments, the Court at oral argument asked Astra and the TLC to supplement their briefs to address whether the Article 78 proceeding should be dismissed as moot. Astra argued that its petition was not moot because it might some day re-enter the taxicab advertising market and because the new regulations give the TLC discretion to approve Astra's four-sided design. The TLC, in contrast, asserts that

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[1] Had the plenary action remained in the NYS Supreme Court in 2009, it would have been assigned to a General IAS Part, and not to this Court, based on the rules governing assignments. Additionally, the motion to consolidate and the Article 78 proceeding presumably would have been referred to that Part as well in 2011 if the plenary action was still pending.

the regulations leave no room for discretion and render the Article 78 proceeding moot, as well as time-barred. The TLC urges this Court to dismiss the Article 78 and deny the motion to consolidate this proceeding with the plenary action, which is primarily a business dispute between Astra and Clear Channel. A determination of the mootness issue revolves around the facts of this case and the terms of the recently promulgated regulations.

Background Facts

From 2001 until some time last year, Astra Media was engaged in the business of manufacturing and selling rooftop advertising displays for taxicabs in New York and other cities. While its displays offered both static and digital options, Astra's signature design, which it patented, was the Taxi Sponsoring System (TSS) that displayed advertisements on all four sides; i.e., on the two long rectangular sides of the rooftop display as seen on New York taxicabs today, as well as on the shorter front and back triangular sides of the display.

Until it promulgated the new regulations in 2011, the TLC had only limited regulations governing taxicab advertising and essentially required only that any design be approved by the TLC. The TLC typically confirmed its approval of a particular design by a contract in the first instance and then by letter for renewals approximately every two years; in 2007 the TLC changed its practice to require a written Memorandum of Understanding (MOU), as discussed more fully below.

Astra obtained its initial approval from the TLC by contract dated September 16, 2004 (Petition, Exh 2). While Astra asserts that the approval was for its four-sided design based on the successful completion of a pilot project that included drawings and

safety tests, the contract does not explicitly reference the display of advertisements on all four sides of the rooftop unit.

By having advertisements on all four sides of its display, Astra was able to generate greater advertising revenues and thereby persuade more taxi owners to use its display by paying those owners greater fees. With increased profits, Astra in 2006 expanded its business from manufacturing to include the installation and servicing of rooftop displays. By letter dated July 26, 2006, the TLC approved Astra's continued use of its rooftop advertising unit, again without describing the display as four-sided. Significantly for this proceeding, the TLC expressly stated in its letter that the "approval is contingent upon the Taxi Sponsoring System's continual compliance with all TLC equipment specifications and regulations, including any future amendment of our regulations." (Exh 4).

About a year later, by letter dated July 5, 2007, the TLC advised Astra that it was adopting a new procedure requiring that all rooftop advertisers enter into a Memorandum of Understanding (MOU) so that the TLC would "have uniform approval requirements with each of the rooftop advertisers." (Exh 5). Soon thereafter, by letter dated August 29, 2007, the TLC advised Astra that its rooftop displays would be removed from all taxicabs unless Astra signed the new MOU to be effective September 1, 2007 (Exh 7). Most significantly, the new MOU revoked Astra's existing approval, expressly banned four-sided displays, and limited all future approvals to two-sided displays, stating in relevant part that:

> The rooftop device shall be two-sided, each side rectangular in shape, and display advertising material to the sides of the vehicle, and not display advertising material to the front and back of the vehicle.

Although Astra claims that it negotiated a grandfathering provision allowing it to continue using its four-sided displays through August 31, 2008, Astra did sign the MOU on October 5, 2007 agreeing to use only two-sided displays thereafter (Exh 8, ¶1.3). The MOU also indicated that the TLC was in the process of promulgating regulations governing rooftop advertising displays. Then, by letter dated February 26, 2008, the TLC notified Astra that it had concluded that Astra was in violation of the October 2007 MOU due to its use of a four-sided static display, which was not the display that the TLC had approved (Exh 9). The TLC in its letter threatened Astra with termination of the MOU unless the alleged violation was corrected within 21 days.

In response, on March 31, 2008, the parties executed a new MOU valid through August 31, 2009 (respondent's Cross-Motion, Exh I). The MOU expressly limited the advertising to two-sides of the rooftop display and indicated that the TLC would consider a further extension of the MOU it had not promulgated new regulations as of the date the MOU was set to expire. The MOU further stated in paragraph 2.8 that Astra was required to discontinue any non-conforming advertisements within 30 days. As the expiration date of the MOU approached, the TLC wrote to Astra on May 14, 2009 extending the MOU through August 31, 2010 (Cross-Motion, Exh J). However, the letter indicated that "All other provisions of the original MOU remain in full force and effect," presumably including the requirement to discontinue nonconforming displays within 30 days of the original MOU, or by April 30, 2008.

Recognizing that every MOU it had signed since 2007 expressly prohibited the use of four-sided displays, Astra decided to make a last-ditch effort to persuade the TLC to change its position. Not only did it commence the above-discussed plenary action against

the TLC in the spring of 2009, but Astra also wrote to the TLC on August 24, 2010, as its MOU was about to expire, requesting a one-year extension of the existing MOU through August 31, 2011 and asking that the TLC approve Astra's four-sided design, "so long as it does not prejudice its position in the litigation and appeal." (Exh 10). Astra acknowledged in its letter that it was not making a formal application for such approval, but instead was inquiring as to the procedure to follow to make such an application.

By letter dated September 17, 2010, the TLC granted Astra's request for a one-year extension of its existing MOU, through August 31, 2011. However, the TLC clearly and unequivocally declined Astra's request regarding its desire to use four-sided rooftop advertising displays (Exh 11). Astra commenced this Article 78 proceeding by filing on January 14, 2011, within four months of the TLC's September 17, 2010 letter. The TLC moved to dismiss the proceeding as time-barred, asserting that Astra's request that the TLC reconsider its position banning four-sided advertising could not extend the statute of limitations, which ran from the time the TLC first communicated that decision to Astra in 2007. As indicated earlier, the TLC eventually promulgated regulations confirming its policy to limit advertising to two sides of the taxicab rooftop display, effective October 2011.

Discussion

This Court finds that this Article 78 proceeding must be dismissed on various grounds. First, Astra's challenge to the TLC's denial of its request for approval of its four-sided taxicab rooftop advertising design is moot because Astra is no longer a viable company doing business. In addition, and even more significantly, the TLC's new regulations clearly and unequivocally prohibit the type of four-sided design that Astra seeks to use, and Astra in no way challenges the TLC's rulemaking authority or the procedures

that the TLC used in promulgating the regulations. Wholly specious and speculative is Astra's claim in its Supplemental Memorandum (at p 2) that it "remains engaged in finding a way to use the TSS in the New York City market. Astra may re-enter the market in a number of different ways, including: raising funds; partnering with another actual or potential market participant; and selling or licensing its right to use the TSS."

Equally without merit is Astra's claim that the new regulations give the TLC discretion to approve four-sided advertising displays. In support of its contention, Astra cites 35 RCNY §67-17(c)(4), which states in relevant part that:

> *Variation in approved design.*
>
> (i) If the Rooftop Advertising Fixture Provider wants to deviate from an approved design, it must inform the TLC of any material variation in the original, approved design before installing a modified fixture.
>
> (ii) The TLC shall, within fourteen (14) business days, inform the Rooftop Advertising Fixture Provider whether an additional authorization is required with respect to the modified Rooftop Advertising Fixture.

It is simply not reasonable to conclude that the above language gives the TLC such broad discretion to deviate from the regulations, which clearly and unequivocally limit approvable designs to two-sided displays. Indeed, 35 RCNY §67-16(c)(4) could not be more explicit in prohibiting advertising on all four sides of the display, stating in relevant part (with emphasis added) that:

> *Requirements for Obtaining TLC Approval of a Rooftop Advertising Fixture.*
>
> (4) The Rooftop Advertising Fixture must
>
> (i) be two-sided, each side of a shape that is longer across and shorter in height, although not necessarily a rectangle;

(ii) display advertising material to the sides of the vehicle, and

(iii) **not display advertising material to the front and back of the vehicle.**

As the TLC credibly asserts in its Supplemental Memorandum (at p 3), the purpose of the provision cited by Astra is to provide a mechanism whereby a party can seek approval for a minor modification of an approved design (such as the color or material of the display) without having to go through the lengthy and costly process of having the modified device tested and certified by a licensed Professional Engineer and approved by the TLC's Safety and Emissions Division. It was not intended to authorize a wholesale abandonment of the limitations set forth in the regulations.

Equally unavailing is Astra's claim that the new regulations do not moot its claim because it is entitled to invoke the "Grandfather Clause" created by the Rules (Supplemental Memorandum, p 3). Specifically, Astra contends that 35 RCNY§67-16(b) provides that any advertising fixture authorized by a Memorandum of Understanding "in effect" on August 30, 2011 "shall be deemed to comply with the requirements of these rules." Astra asserts that if this Court were to find that the TLC wrongfully terminated Astra's license for four-sided displays, then Astra would be entitled to the benefit of this Grandfather Clause.

However, if any license was granted for a four-sided advertising display, that license was referenced in the initial 2004 agreement, which was terminated by the TLC effective August 31, 2007. Since that time, each and every MOU signed by the parties explicitly stated that only displays with two-sided advertising were permitted. While Astra was given a short grace period to remove noncompliant displays, it was never after 2007 permitted

to install or maintain four-sided rooftop displays. Since the TLC had consistently limited all companies to two-sided displays beginning in 2007, presumably no MOU in effect in 2011 authorized four-sided displays. In any event, as made clear in the facts detailed above, Astra did not have an MOU in effect permitting four-sided displays when the regulations took effect in October 2011.

The TLC is also entitled to the dismissal of this proceeding as time-barred. Contrary to Astra's claim, the TLC rendered a clear and unambiguous, final and binding determination barring four-sided displays in 2007. Astra's August 24, 2010 letter requesting an extension of its existing MOU — which authorized only two-sided advertising — and inquiring how to formally request that the TLC reconsider its position and approve Astra's four-sided advertising display, did not extend the four-month statute of limitations in CPLR §217(1). The law is well-settled that neither inquiries regarding a determination, nor requests for reconsideration, extend the applicable statute of limitations. *See Lubin v Board of Educ. of City of NY,* 60 NY2d 974 (1983); *Matter of De Milio v Borghard*, 55 NY2d 216 (1982); *Matter of Johnson v New York City Employees' Retirement Sys.* 277 AD2d 136 (1st Dep't 2000); *Matter of Simmons v Popolizio,* 160 AD2d 368 (1st Dep't 1990), *aff'd* 78 NY2d 917 (1991).

Accordingly, it is hereby

ORDERED that the motion to dismiss by respondent the New York City Taxi and Limousine Commission is granted (Mot Seq 001); and it is further

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed; and it is further

ORDERED that the motion by petitioner Astra Media Group, LLC, to consolidate this special proceeding with the plenary action *Astra Media Group, LLC v Clear Channel Taxi Media, LLC, et al.,* Index No. 600793/09, (Mot Seq 002) is denied, and the plenary action is referred to the Clerk for reassignment to a General IAS Part.

FILED

AUG 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 10, 2012

AUG 10 2012

ALICE SCHLESINGER J.S.C.