Glyca Trans LLC v City of New York
2015 NY Slip Op 31703(U)
September 8, 2015
Supreme Court, Queens County
Docket Number: 8962/15
Judge: Allan B. Weiss
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SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2 HON. ALLAN B. WEISS

GLYCA TRANS LLC, MICDEE LLC, CITY BOYS CORP., MAMADY SANOU, MOHAMMOD KAYUM YELLOW CAB SLSJET MANAGEMENT CORP., TAXIFLEET MANAGEMENT LLC., WINNERS GARAGE, INC, and THE COMMETTEE FOR TAXI SAFETY

Petitioners

-against-

THE CITY OF NEW YORK; THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION; and MEERA JOSHI, in her Capacity as Chair of the The New York City Taxi and Limousine Commission

Respondents.

Index Number: 8962/15

Motion Date: 9/1/15

Motion Seq. No. 1

Respondent City of New York, respondent New York City Taxi and Limousine Commission (TLC), and respondent Meera Joshi, the Chair of the New York City Taxi and Limousine Commission, have moved for an order pursuant to CPLR 3211(a)(3), (5), and (7) and CPLR 7804(f) dismissing this Article 78 proceeding brought against them.

This case arises from the introduction of new technologies in the ground transportation industry that are used to dispatch vehicles and to connect passengers with drivers. The use of a smartphone application to obtain a ride has blurred the distinction between a street hail and a pre-arrangement and has disturbed the balance of economic interests within the industry.

The petitioners are yellow taxi medallion owners, drivers of yellow taxis, leasing agents, entities that manage taxi medallions, and a trade association of licensed leasing agents that manages medallion taxis. The petitioners complain that the TLC has allowed companies like Uber Technology, Inc. "to compete unfairly with yellow taxis, dramatically altering the economics of the industry and robbing medallion owners of the basic entitlement the City sold them in exchange for hundreds of millions of dollars."

[* 2]

There are three relevant classes of vehicles that are available for passenger hire in New York City: (1) yellow medallion taxis, (2) green taxis, and (3) non-medallion for hire vehicles, including black cars, luxury limousines, and livery vehicles (collectively For- Hire Vehicles or FHV's). A medallion is a yellow plate issued by the TLC and purchased at an auction that is fastened to the hood of the taxi. (*See*, NYC Code §19-502 [h].) " 'For-hire vehicle' means a motor vehicle carrying passengers for hire in the city, with a seating capacity of twenty passengers or less, not including the driver, other than a taxicab, coach, ***." (NYC Code §19-502[g].) A livery vehicle is defined by its affiliation with a base station and is neither a black car nor a luxury limousine. (*See*, NYC Code §19-502 [s},[t].) "'Black car' means a for-hire vehicle dispatched from a central facility whose owner holds a franchise from the corporation or other business entity which operates such central facility, or who is a member of a cooperative that operates such central facility, where such central facility has certified to the satisfaction of the commission that more than ninety percent of the central facility's for-hire business is on a payment basis other than direct cash payment by a passenger." (NYC Code §19-502[u].)

NYC Code §19-502 (l) provides: " 'Taxi', 'taxicab' or 'cab' means a motor vehicle carrying passengers for hire in the city, designed to carry a maximum of five passengers, duly licensed as a taxi cab by the commission and permitted to accept hails from passengers in the street." (*See, Greater New York Taxi Ass'n v. New York City Taxi and Limousine Com'n,* 25 NY3d 600 [2015].) 35 RCNY§51-03,"Definitions," contains references to "street hails," which, the court infers, are those made through calling out, whistling, or gestures by passengers near the curb.

NYC Code § 19-504(a)(1) provides in relevant part: "No motor vehicle other than a duly licensed taxicab shall be permitted to accept hails from passengers in the street." Yellow medallion taxis can pick up passengers who hail them anywhere in New York City and also have certain exclusive rights to pick up passengers through hails in particular areas of New York City.(*See, Greater New York Taxi Ass'n v. State* 21 NY3d 289 [2013].) The part of Manhattan that is south of East 96th Street and West 110th Street, an area where yellow medallion taxis have exclusive rights, is known as the central business district. (*See*, *Greater New York Taxi Ass'n v. State, supra*.) Green taxis, not required to have a medallion and created in 2011 primarily to service street hails in the outer boroughs, can answer street hails anywhere in New York City except in areas reserved for yellow medallion taxis.

"In contrast to yellow cabs, livery vehicles are prohibited from picking up street hails and may accept passengers only on the basis of telephone contract [sic] or other prearrangement (see Administrative Code of City of N.Y. § 19–507[a] [4]). The livery client contacts a 'base station' that dispatches a livery vehicle to the requested location

(Administrative Code of City of N.Y. § 19–511).” (*Greater New York Taxi Ass'n v. State, supra* at 297.) Black cars also cannot pick up hailing passengers anywhere in the City of New York. “No driver of any for-hire vehicle shall accept a passenger within the city of New York by means other than prearrangement with a base unless said driver is operating either a (i) taxicab licensed by the TLC with a medallion affixed thereto, or (ii) a vehicle with a valid HAIL license and said passenger is hailing the vehicle from a location where street hails of such vehicles are permitted.” (Chapter 9 of the Laws of 2012, §11.) A hail license essentially authorizes a vehicle to pick up passengers by street hail in New York City except in areas reserved for yellow medallion taxis. (*See*, Chapter 9 of the Laws of 2012, §12[r].) Black cars must be dispatched through their affiliated base station with passenger pick-up scheduled for a specific time and place.“A Driver must not solicit or pick up Passengers other than by prearrangement through a licensed Base, or dispatch of an Accessible Vehicle.” (35 RCNY § 55-19.)

Thus, under existing law and regulations, yellow medallion taxis and green taxis in unrestricted areas are the only vehicles authorized to transport passengers who hail them on the street, and FHV’s are only permitted to service passengers who make pre-arrangements with a base station.

In May 2011, the practical difference between a hail and a pre-arrangement became blurred with the introduction of smart phone applications that operate in the FHV sector. While the number of cars available to respond to a passenger request made via a smart phone app and the speed of the response made the electronic communication in some ways similar to the street hail, nevertheless, the TLC permitted FHV vehicles to use the smart phone apps. According to Joanne Rausen, the Assistant Commissioner for Data and Technology of the TLC : “ In order to encourage the development of new technologies and services, while at the same time protecting the riding public, TLC permitted app use in the FHV sector on the condition that app providers;(1) obtain a TLC issued FHV base license; or (2) enter into an agreement with an existing TLC-licensed base to act as a referral and advertising service for such base.” Rausen states that “as many as 42 percent of all FHV’s are affiliated with bases that reported having passenger-facing smartphone apps,” and “passengers using smartphones to schedule FHV service can do so by utilizing one of the 76 different apps reported to TLC by 134 different bases.”

The New York City Taxi and Limousine Commission (TLC) also started a pilot program which allowed yellow medallion taxis to arrange passenger pickups by way of smart phone applications. According to Rausen, “Accessing medallion taxis through an app is a form of pre-arrangement,” and “ [n]othing in the governing statutes or rules prohibits medallion taxis from accepting rides via pre-arrangement.” The pilot program withstood a legal challenge by members of the black car industry. (*See, Black Car*

Assistance Corp. v. City of New York, 110 AD3d 618 [2013].) The Appellate Division, First Department, held that (1) the pilot program did not violate the TLC's authority under the city charter to regulate and supervise experimentation; (2) "the program complies with Administrative Code § 19–511(a) requiring the licensing of communications systems upon such terms as TLC deems advisable," and (3) the pilot program did not violate Administrative Code § 19–507(a)(2), which prohibits drivers from refusing, "without justifiable grounds, to take any passenger or prospective passenger to any destination within the city."

On January 29, 2015, the TLC approved new rules (the E-Hail Rules) dealing with the licensure of e-hail applications in taxis. The new rules concerned, inter alia, what the TLC called an "E-hail" and an "E-Payment." Section 1 of the Rules provided in relevant part: " E-Hail is a Hail requested through an E-Hail Application." " E-Hail Application or E-Hail App. A Software program licensed by the TLC under Chapter 78 residing on a smartphone or other electronic device ***." "Hail. A request, either through a verbal (audio) action such as calling out, yelling, or whistling, and/or a visible physical action, such as raising one's hand or arm, or through an electronic method, such as an E-Hail App, for on-demand Taxicab or Street Hail Livery service at the metered rate of fare as set forth in §58-26 and §82-26 of these Rules by a person who is currently ready to travel."

Uber Technology, Inc. (UTI) and its affiliated entities (collectively Uber) provide ground transportation services in New York City through black car bases. UTI developed a smart phone app which enables passengers to obtain transportation services through its use. Passengers download the Uber app to their smartphones and create an account with UTI, placing a credit card number with UTI. When a passenger uses the Uber app, it displays a map showing the locations of available vehicles and informs the passenger of the approximate travel time of the closest available vehicle to the passenger's location. After a passenger requests transportation, the Uber app transmits the request to the nearest available driver who is signed in to the Uber app. If the driver declines the request or does not accept the request within fifteen seconds, the request is sent to the next closest driver. The driver providing service receives a percentage of the payment made to Uber. In January, 2015 Uber reported that it had approximately 16,000 drivers actively accepting passengers through the Uber app.

Uber does not regard its drivers as employees, and its does not operate, lease, or own its vehicles. Uber purports to "partner' with its drivers, and some of these drivers, affiliated with other ground transportation companies, make a side deal with Uber to drive its customers while also driving for the other companies.

The petitioners, who regard Uber and similar companies as a competitive taxicab network that circumvents eighty years of regulation, began the instant hybrid action/special proceeding which, inter alia, challenges the TLC's determination to allow black cars like Uber's to respond to passenger requests made via smart phone app. The petitioners have seized upon the TLC's promulgation of rules on or about January 29, 2015 (the E-Hail Rules) which permit yellow and green taxis to pick up passengers via "e-hails" using a TLC approved smart phone application. The petitioners assert that the new rules make clear that an e-hail is a hail–not a pre-arrangement, and they argue that black car companies like Uber may not pick up passengers via a hail. The petitioners seek, inter alia, to compel the TLC to enforce rules and regulations prohibiting black car companies like Uber from responding to hails.

On or about April 24, 2015, the TLC published proposed rules (the E-Dispatch Rules) pertaining to the dispatch of FHV's, including rules pertaining to electronic dispatch via apps. The TLC approved the rules on June 22, 2015, and the rules, which include a definition of an electronic dispatch ("Dispatch arranged through a licensed FHV Dispatch Application") and a Pre-Arranged Trip (" A Pre-Arranged Trip, for a Street Hail Livery, is a trip commenced by a Passenger pre-arranging a trip through a Base, by telephone, smartphone application" [emphasis added], website, or other method") took effect on July 29, 2015. (The promulgated rules may be found on the internet,) The rules provide that all entities that dispatch FHV vehicles, including by way of smart phone applications, must obtain a license and must conform to uniform protection and safety standards. According to Rausen, the rules "seek to, inter alia, establish uniform standards for smartphone apps utilized by FHV companies, license all apps, require the provision of important information to the passenger, establish standards to protect private information *** clarify that SHL's [Street Hail Livery] may accept dispatch by app, restrict the location at airports where FHV's may accept an electronic dispatch via app ***and require bases to have a way for all customers to contact the base with customer service related issues and complaints."

The petitioners purport to be aggrieved by an "arbitrary and discriminatory" regulatory scheme which, by treating passenger communications to FHV companies by smart phone apps as a pre-arrangement, allegedly violates exclusive rights granted to medallion taxis by law. NYC Code 19-503(b) provides in relevant part: "No rule or regulation promulgated subsequent to the effective date of this local law may be inconsistent with or supersede any provision of this local law ***." The petitioners allege that "[a]n e-hail is a hail," not a pre-arrangement, for two basic reasons. First, e-hail apps enable passengers to hail vehicles immediately, not at some point in the future. *** Uber's app only enables a passenger to request to be picked up immediately, just like a street hail. Second, Uber's app connects passengers and drivers directly and automatically, without a dispatcher, just like a street hail." According to the petitioners,

the mis-classification of smartphone communications gives FHV companies like Uber unfair advantages. Uber drivers do not have to assume the tremendous financial burden of purchasing a medallion, and Uber drivers are not required to accept regulated meter-fare rates. Consequently, the petitioners assert, "cab drivers are flocking from yellow taxis to Uber black cars in droves, the medallion taxi industry s suffering from an historic driver shortage, and the value of medallions is plummeting."

In deciding this case, the court is mindful that it must be " careful to avoid *** the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." (*Klostermann v. Cuomo,* 61 NY2d 525, 541 [1984]; *Gonzalez v. Village of Port Chester,* 109 AD3d 614 [2013].) It is not the court's function to adjust the competing political and economic interests disturbed by the introduction of Uber type apps..

The petitioners first cause of action actually combines several causes of action, and the court will start by dealing with the cause of action which is in the nature of mandamus to compel (*see*, CPLR 7801, 7803[1]; *Regini v. Board of Educ. of Bronxville Union Free Schools,* 128 AD3d 1073 [2015]) the respondents to enforce laws and regulations permitting only taxis to respond to street hails. "The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought ***." (*Ogunbayo v. Administration for Children's Services,* 106 AD3d 827 [2013] ; *Daniels v. Lewis,* 95 AD3d 1011 [2012] [failure to state a cause of action]). "Mandamus to compel is appropriate only where a clear legal right to the relief sought has been shown, the action sought to be compelled is one commanded to be performed by law and no administrative discretion is involved " (*New York Civil Liberties Union v. State of New York,* 3 AD3d 811, 813-814 [2004]; *Clayton v. New York City Taxi & Limousine Com'n*, 117 AD3d 602 [2014] [discretionary government function-- motion to dismiss granted].) Mandamus may be obtained "to compel acts that officials are duty-bound to perform." (*Klostermann v. Cuomo*, supra at, 540; *Gonzalez v. Village of Port Chester*, *supra* [grant of taxicab licenses was not a ministerial act that could be compelled by mandamus].)

"The extraordinary remedy of mandamus is available in limited circumstances only to compel the performance of a purely ministerial act which does not involve the exercise of official discretion or judgment, and only when a clear legal right to the relief has been demonstrated ***." (*Rose Woods, LLC v. Weisman,* 85 AD3d 801, 802 [2011] [emphasis added]; *Wisniewski v. Michalski*, 114 AD3d 1188 [2014] ; *Gonzalez v. Village of Port Chester*, *supra*.)

"[M]andamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial ***." (*New York Civil Liberties Union v. State,* 4 NY3d 175, 184 [2005].) "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result ***." (*New York Civ. Liberties Union v. State of New York*, *supra* at 184; *Gonzalez v. Village of Port Chester, supra*.) "The act sought to be compelled must be ministerial, nondiscretionary and nonjudgmental, and be premised upon specific statutory authority mandating performance in a specific manner ***." (*Brown v. New York State Dept. of Social Services,* 106 AD2d 740, 741 [1984]; *New York Civil Liberties Union v. State of New York*, supra.)

An Article 78 proceeding in the nature of mandamus may be dismissed pursuant to CPLR 3211(a)(7): (1) where it does not seek to compel the performance of a ministerial act (*see*, *Clayton v. New York City Taxi & Limousine Com'n*, *supra*; *New York Civil Liberties Union v. State of New York, supra* at 813 ["we find no error in Supreme Court's determination that plaintiffs also essentially seek relief in the nature of mandamus to compel registration review of their schools pursuant to 8 NYCRR 100.2(p), but fail to state a claim for such relief because the administrative action they seek is discretionary rather than ministerial"]) and/or (2) where the allegations of the petition do not show that there is a "clear legal right" to relief. (*See*, *Burch v. Harper*, 54 AD3d 854 [2008].)

The cases concerning mandamus to compel an administrative body to enforce the law are not easily reconciled. (*Compare, Jurnove v. Lawrence*, 38 AD3d 895 [2007] ["while the courts will not interfere with the exercise by law enforcement officials of their broad discretion to allocate resources and devise enforcement strategies, mandamus will lie if they have abdicated their responsibilities by failing to discharge them, whatever their motive may be"] *with*, *Church of Chosen v. City of Elmira*, 18 AD3d 978 [2005] ["With respect to the alleged code violations by petitioners' neighbors, the decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and relief in the nature of mandamus is simply unavailable "], *and Mayes v. Cooper,* 283 AD2d 760, 761 [2001] [petition to compel the enforcement of local zoning ordinance does not lie to compel the performance of "such a discretionary function"].) But even under the *Jurnove* test, mandamus to compel does not lie in this case, because, as the parties' submissions have shown, the TLC, actively engaged in regulating the introduction of new smart phone technology in the ground transportation industry, has not "abdicated" its responsibilities to enforce the law.

This case fundamentally concerns an administrative determination to classify and treat passenger communications to companies like Uber as a type of pre-arrangement rather than as a hail. In determining whether the petitioners have a cause of action in the

nature of mandamus to compel, the court need not rule on the legality of the administrative classifications. It is enough for the court to find that this discretionary matter lies at the heart of this case and intertwines with any duty of the TLC to enforce its rules and regulations pertaining to hails. It is enough for the court to find that this is not a case where no administrative discretion is involved (*see*, *New York Civil Liberties Union v. State of New York, supra*), but rather one involving the "the exercise of reasoned judgment." (*New York Civ. Liberties Union v. State of New York*, *supra* at 184.) Mandamus " does not lie to compel an act which involves an exercise of judgment or discretion ***" (*Brusco v. Braun*, 84 NY2d 674, 679 [1994].), and the petitioners' cause of action for such relief is not adequate because it does not involve a " purely ministerial act." (*Rose Woods, LLC v. Weisman*, *supra* at 802.)

The petitioners also do not have a cause of action for relief in the nature of mandamus to compel because the pleadings and submissions do not show a clear right to relief. "Where, as here, evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one ***." (*Hallwood v. Incorporated Village of Old* Westbury,130 AD3d 571 [2015]; *Agai v. Liberty Mut. Agency Corp*., 118 AD3d 830 2014]*; Fishberger v. Voss*, 51 AD3d 627 2008].) The respondents' submissions on this motion refute any allegations in the petition concerning a clear right to relief. Rausen alleges: "The purpose of the E-Hail Rules was to officially set forth detailed rules governing the operation of electronic app services in taxis. The rules promulgated on January 29, 2015 in no way pertain to FHV service or the conduct of FHV drivers in providing FHV service. The rules strictly pertain to allowing yellow medallion taxis and the green Street Hail Livery ("SHL") vehicles to utilize electronic apps to connect with prospective yellow and green taxi passengers." A clear right to relief cannot be found on the basis of a set of rules which the administrative agency does not regard as having any relevance to FHV vehicles. "An agency's interpretation of its own regulations 'is entitled to deference if that interpretation is not irrational or unreasonable '." (*IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal* 10 NY3d 474, 481 2008], quoting *Matter of Gaines v. New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 549 [1997].)

The first count of the petition also contains a cause of action in the nature of mandamus to review (*see*, CPLR 7803[3]), challenging "the TLC's decision to allow black cars to accept e-hails" as "arbitrary and capricious." The petitioners do not have a cause of action for Article 78 relief in the nature of mandamus to review. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." (*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].) The petitioners complain

that the TLC has acted arbitrarily and capriciously in exempting Uber type companies from specifications and inspections concerning meter systems, in allowing Uber type companies to violate base dispatch rules, and to violate franchise/cooperative rules. The pleadings and submissions do not show that the TLC's actions were arbitrary and capricious. It is true, as the petitioners assert, that "[w]here two cases are so similar as to require the same treatment, to treat them differently would be evidence that the determination should be considered arbitrary and capricious ***." (*Buffalo Civic Auto Ramps, Inc. v. Serio,* 21 AD3d 722, 725 [2005]; *see, Matter of Charles A. Field Delivery Service, Inc*., 66 NY2d 516 [1985].) But Uber type companies are a new form of black car companies, and the TLC, having the authority to promote technological innovation and new services, may, where necessary, treat the new companies somewhat differently from the traditional companies. Uber-type companies may not fit neatly into the traditional black car regulatory scheme, and the TLC must be allowed a reasonable amount of administrative discretion in applying rules as new circumstances arise. Although the petitioners resist the change, a pre-arrangement may be made through a computer, and a computer can act as a dispatcher, which it seems to the court, meets the essentials for a black car company, and the TLC must be allowed some slack in dealing with relatively minor matters of operation.

Moreover, the E-Hail Rules and E-Dispatch Rules are not inconsistent with any provision in the City Charter or Administrative Code, and the TLC did not abuse its discretion in treating electronic communications as hails or pre-arrangements according to different regulatory purposes. The TLC did not act arbitrarily and capriciously in adopting the E-Hail and E-Dispatch Rules since its powers are very broad. (*See*, *Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., supra* ["The City Council granted the TLC extremely broad authority to enact rules ***"].) The TLC, which may set public transportation policies and, in Rausten's words, "encourage the development of new technologies and services," had sufficient regulatory authority to treat app communications as both hails or pre-arrangements. The TLC had sufficient authority to treat the app communications differently depending on the needs, including the economic viability, of the particular segment of the ground transportation industry dealt with.

The cause of action in the nature of mandamus to review is also time-barred. A party must begin an Article 78 proceeding by filing a petition within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party. (*See*, CPLR. § 217[1], 304; *Best Payphones, Inc. v. Dept. of Info. Tech. & Telecomms*., 5 NY3d 30 [2005].) According to Rausten, "On December 13, 2011, TLC issued the first FHV base license to an Uber-owned entity, namely Unter, LLC." Since the TLC made its determination to allow Uber and similar companies to operate in the city as FHV vehicles in 2011, the cause of action for mandamus to review is also time--barred.

Rules adopted in later years merely implement the determination made in 2011 to treat passenger communications via app as pre-arrangements.

The first count of the petition also contains a cause of action for declaratory relief, but it is merely duplicative of the causes of action which seeks Article 78 relief.(*See*, *Gable Transport, Inc. v. State*, 29 AD3d 1125 [2006].)

The petitioners' second cause of action, is captioned "Violation of NYC Charter §2303[b][4]– Declaratory and Injunctive Relief')." NYC Charter §2303[b][4] provides in relevant part: "Additional taxicab licenses may be issued from time to time only upon the enactment of a local law providing therefor." The petitioners allege: "By permitting black cars to accept e-hails anywhere in the city, the TLC has effectively expanded the number of medallions in circulation without legislative authorization." The petitioners have no cause of action. The City Charter only prohibits the respondents from actually increasing the number of taxicab licenses without the enactment of a local law. The City Charter does not prohibit the respondents from developing new forms of transportation using new technologies even though they result in stiff competition to medallion taxis. The owner of a medallion only receives the exclusive right to respond to street hails anywhere in the city. The TLC did not violate the City Charter when it treated a passenger's use of a smart phone app to request transportation as a pre-arrangement rather than as a street hail. The request is made through a computer system. Although the speed of the response to a passenger's request made via an app may be comparable to the speed of the response to a street hail, Uber type companies do not function in the same way that medallion taxis operate. Because of the substantial difference between the ways that Uber type companies and medallion type companies function, increased competition is insufficient to establish a violation of the City Charter.

The third cause of action, captioned "Violation of SEQRA and CEQR– Declaratory and Injunctive Relief," is based upon The State Environmental Quality Review Act (SEQRA) (ECL Art. 8) and The City Environmental Quality Review Rules (CEQR) (43 RCNY 6–01 et seq. ; 62 RCNY 5–01 et seq.). ECL 8-0109, "Preparation of environmental impact statement," provides in relevant part " 2. All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." CEQR similarly provides for the preparation of an environmental impact statement. (*See*, 62 RCNY § 6-08.) The petitioners allege that the TLC's determination "to allow thousands of black cars to cruise the City's streets and pick up e-hails" will have a significant impact on the environment, but the TLC failed to prepare an environmental impact statement. Since the issue here is whether the TLC's determination to allow Uber type companies to operate was made in violation of lawful procedure pertaining to SEQRA and CEQR, that issue is properly raised in a cause of

action based on Article 78, not in a cause of action for a declaratory judgment. (*See*, *Coney–Brighton Boardwalk Alliance v. New York City Dept. of Parks and Recreation*, 122 AD3d 924 [2014] ; *East Moriches Property Owners' Ass'n, Inc. v. Planning Bd. of Town of Brookhaven,* 66 AD3d 895 [2009].) In any event, the four month statute of limitations applicable to an Article 78 proceeding applies to the cause of action for a declaratory judgment. (*See*, *Walton v. New York State Dept. of Correctional Services*, 8 NY3d 186 [2007].) " If a declaratory judgment action could have been commenced by an alternative proceeding for which a specific limitation period is statutorily provided, then that period applies instead of CPLR 213(l)'s six-year catchall provision ***." (*Gress v. Brown,* 20 NY3d 957, 959 [internal quotation marks and citations omitted].) The TLC made its determination to allow Uber-type companies to operate in 2011, and consequently the third cause of action is time-barred.

Moreover, the petitioners lack standing to maintain the third cause of action. A party seeking to challenge an administrative determination "must show that it would suffer direct harm, injury that is in some way different from that of the public at large."(*Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 774 [1991]; *Bloomfield v. Cannavo,* 123 AD3d 603 [2014]; *Shelter Island Ass'n v. Zoning Bd. of Appeals of Town of Shelter Island,* 57 AD3d 907 [2008]; *Gallahan v. Planning Bd. Of City Of Ithaca* 307 AD2d 684, 685 ["Many of petitioner's allegations regarding the project relate to indirect effects upon 'traffic patterns, noise levels, air quality and aesthetics throughout a wide area,' which generally are insufficient to establish standing "].) The petitioners' allegations do not show that their purported injuries would differ from the public at large. Furthermore, to establish standing a plaintiff must show "injury in fact," meaning that he will actually suffer harm by the challenged administrative action. (*New York State Ass'n of Nurse Anesthetists v. Novello* 2 NY3d 207, 211 [2004].) In the case at bar, the claim of environmental harm—that thousands of additional black cars will cause environmental harm— is speculative and insufficient to establish injury in fact. (*See*, *New York State Ass'n of Nurse Anesthetists v. Novello*, *supra*; *Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller*, 15 AD3d 194 [2005].) Speculation about increased traffic congestion does not suffice to confer standing upon a party. (*See*, *Riverhead PGC, LLC v. Town of Riverhead,* 73 AD3d 931, 934 [2010] ["petitioner has not adequately demonstrated actual injury-in-fact with its speculation that increased traffic congestion to the west of its property will significantly damage its customer base"]; *Shelter Island Ass'n v. Zoning Bd. of Appeals of Town of Shelter Island, supra* [generalized allegations of increased traffic insufficient]) Finally, "[t]o qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature ***." (*Mobil Oil Corp. v. Syracuse Indus. Development Agency,* 76 NY2d 428, 433 [1990].) The petitioners allege that their livelihoods as professional drivers will be adversely affected by increased traffic congestion, which is economic, not environmental, injury.

The petitioners' fourth cause of action is based on the Takings Clause of the Fifth Amendment to the federal constitution which is made applicable to the states through the Fourteenth Amendment and which provides that private property shall not be taken for public use without just compensation. (*See, Held v. State, Workers' Compensation Bd.,* 85 AD3d 35 [2011].) The petitioners allege that the TLC's determination to allow Uber type companies to operates substantially impairs the value of their medallion interests and amounts to an unconstitutional taking. "Governmental regulation of private property effects a taking if it is 'so onerous that its effect is tantamount to a direct appropriation or ouster' ***. " (*Consumers Union of U.S., Inc. v. State of New York*, 5 NY3d 327, 357 [2005] , quoting *Lingle v. Chevron U.S.A. Inc*., 544 US 528, 537 [2005]; *Held v. State, Workers' Compensation Bd., supra.)* "While there is no set formula to determine whether a statute 'goes too far and effects a regulatory taking,' the primary factors to consider are [1] its 'economic effect on the [property owner], [2]the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action' ***." (*Held v. State, Workers' Compensation Bd., supra* at 43, quoting *Palazzolo v. Rhode Is.*, 533 US 606, 617 [2001]; *In re New Creek Bluebelt, Phase 4*, 122 AD3d 859 [2014].) The petitioners do not have a cause of action for a regulatory taking. (*See, Putnam County Nat. Bank v. City of New York,* 37 AD3d 575 [2007].) In regard to the first factor, the pleadings and submissions do not adequately allege that the medallion owners have been deprived of all beneficial use of their property or that they cannot earn a reasonable return on their investment. (*See*, *de St. Aubin v. Flacke,* 68 NY2d 66 [1986]; *Linzenberg v. Town of Ramapo,* 1 AD3d 321 [2003]; *Loujean Properties, Inc. v. Town Bd. of the Town of Oyster Bay,* 160 AD2d 797 [1990].) Speculation about the future does not suffice. Even assuming that the regulatory activity of the TLC has diminished the value of medallions, "standing alone, a serious and significant diminution of property value will typically not be deemed to constitute a regulatory taking ***." (*In re New Creek Bluebelt, Phase 4, supra* at 861-862.) " [A] property owner does not prove a taking solely by evidence that the value has been reduced by the regulation, even if it has been substantially reduced ***." (*de St. Aubin v. Flacke, supra* at 77.) "The extent of monetary diminution necessary to support a conclusion that there was a taking requires a loss in value 'one step short of complete' ***." (*Adrian v. Town of Yorktown,* 83 AD3d 746, 747 [2011], quoting *Noghrey v. Town of Brookhaven*, 48 AD3d 529, 532 [2008]) The petition and submissions do not adequately allege that the regulatory activity of the TLC has impacted the petitioners at this level. In regard to the second factor, the only reasonable expectation that the medallion interests could have held was that the medallion conferred upon them exclusive rights to respond to street hails in certain areas of the city. Passenger communications to Uber-type companies via a smart phone are not street hails which are requests made by passengers standing on the street who gesture or make an utterance. While it is true that the development of the app has allowed Uber-type companies to effectively compete with medallion companies in such ways as the speed of the response and the number of cars available, any expectation that

the medallion would function as a shield against the rapid technological advances of the modern world would not have been reasonable. In this day and age, even with public utilities, investors must always be wary of new forms of competition arising from technological developments. In regard to the third factor, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ***than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.***." (*Penn Cent. Transp. Co. v. City of New York ,* 438 US 104, 124 [1978].) In the case at bar, the diminution in value of the petitioners' property interests, if any, occurred merely as an unintended consequence of the TLC's attempt to develop new technologies to promote the public good. The petitioners do not have a cause of action based on the Takings Clause of the Fifth Amendment to the federal constitution.

The petitioners fifth cause of action is based on Article I, §7 of the New York State Constitution which provides that "Private Property shall not be taken for public use without just compensation." (*See*, *Walton v. New York State Dept. of Correctional Services,* 13 NY3d 475 [2009]; *City of New York v. Mobil Oil Corp*., 12 AD3d 77 [2004].) There was no appropriation of private property for public use without just compensation (see, *Walton v. New York State Dept. of Correctional Services, supra*), and on similar grounds applicable to the federal claim, the petitioners do not have a cause of action under the state constitution for a regulatory taking. (*See*, *Dawson v. Higgins*, 197 AD2d 127 [1997] [rent control].)

Accordingly, that branch of the cross motion which is for an order pursuant to CPLR 3211(a)(7) and CPLR 7804(f) dismissing the petition for failure to state a cause of action is granted. That branch of the cross motion which is for an order pursuant to CPLR 3211(a)(3) and CPLR 7804(f) dismissing the petition for lack of standing is granted as to the third cause of action and is otherwise denied as moot. That branch of the cross motion which is for an order pursuant to CPLR 3211(a)(5) and CPLR 7804(f) dismissing the petition on statute of limitations grounds is granted as to the cause of action which is in the nature of mandamus to review, granted as to the third cause of action, and is otherwise denied as moot.

Settle order.

Dated: 9/8/15

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J.S.C.