Fokhor v Mega Funding Corp.
2019 NY Slip Op 33871(U)
November 4, 2019
Supreme Court, Queens County
Docket Number: 701403/2019
Judge: Kevin J. Kerrigan
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J Kerrigan IA Part 10
Justice

Mohammed Fokhor, x
Plaintiff,

- against -

Mega Funding Corp., City of New York,
New York City Taxi and Limousine Commission,
Port Authority of New York and New Jersey
and the Metropolitan Transportation Authority,

Defendants.
x

Index
Number 701403 2019

Motion
Date July 15, 2019

Motion Seq. No. 2

The following papers EF numbered below read on this motion by defendant Metropolitan Transportation Authority for an order pursuant to CPLR 3211(a)(2) and (7) dismissing the complaint against it

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	10-15
Answering Affidavits - Exhibits	38-40
Reply Affidavits	
Memoranda of Law	16,47

Upon the foregoing papers it is ordered that the motion is granted.

I. The Allegations of the Complaint

Plaintiff Mohammed Fokhor owns New York City Yellow Taxicab Medallion No. 1B53 which he uses to operate his taxicab business. Defendant Mega Funding Corp. is a lending institution. Defendant New York City Taxi and Limousine Commission (TLC) is an agency of defendant City of New York. Defendant Metropolitan Transit Authority (MTA), a public benefit corporation, operates subways, buses, and commuter trains. Defendant Port Authority of New York and New Jersey was created by a compact between the two states with duties concerning transportation in the "Port District."

In previous years, the TLC restricted the number of yellow taxi medallions so that their market value rose to approximately $1,100,000 each by 2012. Subsequently, the City of New York, through the TLC, authorized the creation of a new class of taxi medallions, the green New York City taxi medallions, which flooded the market with additional taxicabs. At the same time, New York City , through the TLC, allowed the operation of computerized taxi services, such as Uber and Lyft, which enabled passengers to summon a vehicle through app-based devices.

Despite its knowledge of these circumstances and of the decreasing value of yellow taxi medallions, defendant Mega continued to finance the purchases of taxi medallions. In or about 2016,the plaintiff borrowed $640,000 from defendant Mega which has sent notices to him demanding payments that he is unable to make.

The value of the plaintiff's taxi medallions was diminished because of (1) a fifty- cent surcharge imposed by the MTA on a yellow medallion taxicab ride but not on a ride in an app-based vehicle, and (2) the MTA's wrongful and negligent refusal to coordinate its activities with those of the other defendants.

II. Discussion

A. Notice of Claim

The failure to comply with statutory notice of claim requirements can result in the dismissal of a complaint pursuant to CPLR 3211(a)(7). (*See, e.g., Mosheyev v. New York City Dept. of Educ.*, 144 AD3d 645 [2nd Dept 2016]; *Bertolotti v. Town of Islip*, 140 AD3d 907 [2nd Dept 2016].)

Public Authorities Law §1276, "Actions against the authority," which applies to the MTA (*see,e.g, Watkins-Bey v. City of New York*, 174 AD3d 553 [2nd Dept 2019]; *Russian Samovar, Inc. v. Transit Worker's Union of Am.*, 45 AD3d 499 [1st Dept 2007]), provides in relevant part: "2. An action against the authority founded on tort, *** , shall not be commenced *** unless a notice of claim shall have been served on the authority within the time limited by and in compliance with all the requirements of section fifty-e of the general municipal law."

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 ***, 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 ***."

"Timely service of a notice of claim is a condition precedent to the commencement of an action sounding in tort against the Metropolitan Transportation Authority (see General Municipal Law § 50–e[1][a]; Public Authorities Law §§ 1212[2]; 1276[2]; ***." (*Cuccia v. Metro. Transp. Auth.*, 150 AD3d 849, 849, [2nd Dept 2017].)

New York Public Authorities Law §1276(1) provides in relevant part: "As a condition to the consent of the state to such suits against the authority, in every action against the authority for damages, for injuries to real or personal property or for the destruction thereof, or for personal injuries or death, the complaint shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action is founded were presented to a member of the authority or other officer designated for such purpose and that the authority has neglected or refused to make an adjustment or payment thereof."

In the case at bar, the complaint does not allege facts showing compliance with General Municipal Law §50-e and Public Authorities Law §1276(1) and (2), and the complaint is dismissable for that reason alone. (*See,Davidson v. Bronx Mun. Hosp.*, 64 NY2d 59; *Brunache v. MV Transp., Inc.*, 151 AD3d 1011, 1012 [2nd Dept. 2017] ["Service of a notice of claim within 90 days after accrual of the claim is a condition precedent to the commencement of an action sounding in tort against the NYCTA and the MTA"].)

There is no merit in the argument made by the plaintiff's attorney that the notice of claim statutes do not apply to ongoing negligence. (*See, Stone v. Town of Clarkstown*, 82 AD3d 746 [2nd Dept. 2011] ["the plaintiffs' third cause of action alleging negligence should have been dismissed as against the Town to the extent it alleged conduct which occurred prior to the 90–day period preceding the filing of the plaintiffs' notice of claim"]; *Caldwell v. New York City Transit Auth.*, 39 Misc3d 1242[A], 2013 WL 3119024 {Sup Ct 2013] [for a continuing wrong plaintiff's damages are limited to those occurring within the 90–day period before service of the notice of claim].) In any event, the plaintiff in this case does not allege that he filed a notice of claim at any time, and, thus, the statutes read together require the dismissal of the entire complaint. The additional argument made by the plaintiff's attorney that notice of claim statutes do not apply when the municipal entity is a third party defendant also has no merit. The municipal defendants in this case are not third party defendants or similar to third party defendants, and , moreover, this is not a case concerning a statutory duty to indemnify. (*See, Montalto v. Westchester St. Transp. Co.*, 102 AD2d 816 [2nd Dept1984].)

In cases brought in the New York State Supreme Court, County of Queens similar to the one at bar , the failure to comply with notice of claim requirements has resulted in the dismissal of tort claims brought by taxicab medallion owners.(*See* .e.g., *Sapoznik v. Progressive Credit Union*, Index No. 707734/19 [Kerrigan, J.] [MTA]; *Melrose Credit Union v. Teris*, Index No. 708268/18 [Dufficy, J.]; *Fuentes v.Lomto Federal Credit Union,* Index No. 714485/18 [E. Hart, J].)

B. Failure to State a Cause of Action

Here, as in *Lomto Federal Credit Union v. Dumont* (New York State Supreme Court, County of Queens, Index No. 705910/19 [Risi, J.]), a similar case involving a third party complaint brought by a yellow medallion owner, there is a failure to state a cause of action against the MTA.

"Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible entitled to any such consideration ***." *(Everett v. Eastchester Police Dep't*, 127 AD3d 1131, 1132 [2nd Dept 2015] [internal citations and quotation marks omitted]; *Cruciata v. O'Donnell & Mclaughlin, Esqs.*, 149 AD3d 1034 [2nd Dept 2017].)

In the case at bar, the plaintiff's allegation that the MTA "wrongfully charges a fifty-cent surcharge per New York City Yellow Medallion Taxi ride" is factually inaccurate. The New York State Legislature authorized the surcharge (*see,* New York Tax Law Article 29-A), and the TLC implemented it. The MTA does not have the power to tax. (*See, Metro. Transp. Auth. v. Nassau Cty.*, 28 NY2d 385[1971].) Moreover, the MTA has no involvement in the licensing, regulating, or taxing of taxis, and there is no basis for the allegation that the MTA wrongfully failed to coordinate its activities with those of other defendants.

Dated: November 4, 2019

Kevin J. Kerrigan, J.S.C.

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COUNTY CLERK
QUEENS COUNTY