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COURT OF APPEALS  
STATE OF NEW YORK

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SINGH,

Appellant,

-against-

NO. 22

CITY OF NEW YORK,

Respondent.

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20 Eagle Street  
Albany, New York  
March 14, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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1           ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2           number 22, Singh v. City of New York.

3           MR. RIFKIN: Good afternoon, Your Honors. My  
4           name is Mark Rifkin on behalf of the appellants. May I  
5           reserve three minutes for rebuttal?

6           ACTING CHIEF JUDGE CANNATARO: You have three  
7           minutes.

8           MR. RIFKIN: There are two issues in this case.  
9           One concerns the dismissal of a breach of contract claim.  
10          The other concerns the dismissal of a GBL 349 claim. With  
11          the courts' permission, I'd like to address the breach of  
12          contract claim first.

13          The principal issue on this appeal from the  
14          dismissal of the breach of contract is whether the bid form  
15          that the City provided to 400 - - - to auction off 400  
16          yellow taxi medallions in the public - - - three public  
17          auctions permitted the TLC to disregard low standing, well  
18          established rules in the code - - - the New York City  
19          Administrative Code that restricted the ownership of black  
20          cars. And in doing so, allowed tens of thousands of  
21          nonconforming black cars principally owned by Uber and Lyft  
22          to flood the city streets and compete directly with the  
23          yellow tax medallions they had just sold in those three  
24          public auctions.

25          The effect of the - - - of the conduct of the TLC



1 after the auctions was to substantially erode the yellow  
2 cabs' revenue and, therefore, destroy the benefit of the  
3 bargain, and the value of the bargain that they had just  
4 made with the purchasers of those yellow cabs.

5 JUDGE SINGAS: Was that the bargain though?  
6 Weren't they just saying we're going to give you these  
7 medallions, and you'll have them free of any of their  
8 encumbrances?

9 MR. RIFKIN: Of course they were saying that they  
10 were going to sell them the medallions, which they did.  
11 And they certainly warranted clear title. But the duty of  
12 good faith and fair dealing required that the City and the  
13 TLC allow the purchases of those medallions at the upset  
14 prices that the City had set for the auctions to enjoy the  
15 fruit of that deal. And - - - and it is that restraint on  
16 the ability of the City and the TLC to do what they did in  
17 derogation of the TLC's regulatory authority - - -

18 JUDGE WILSON: Would you - - -

19 MR. RIFKIN: - - - that violates - - -

20 JUDGE WILSON: - - - would the breach - - - would  
21 the breach of contract action be the same for somebody who  
22 bought a medallion twenty years ago?

23 MR. RIFKIN: In all respects, probably not.

24 JUDGE WILSON: Why?

25 MR. RIFKIN: I think that - - - and this - - -



1 and this is because the question that the covenant of good  
2 faith and fair dealing requires to be answered is whether  
3 one party has destroyed the value of the bargain for the  
4 other party. And there, there is a legitimate factual  
5 question whether the passage of twenty years would have  
6 enabled the purchaser of a - - - of a yellow cab medallion  
7 twenty years ago to have enjoyed the benefit of the bargain  
8 such that if the City had changed the administrative code  
9 and permitted these yellow - - - these Uber and Lyft  
10 vehicles to enter the market without complying with the  
11 ownership requirements, if that had been - - - been done, I  
12 think it would be a factual defense that the purchaser and  
13 the medallions had the opportunity to enjoy the benefit of  
14 the bargain. But that would be a factual question, and  
15 wouldn't be appropriate to dismiss in any event.

16 JUDGE WILSON: So your answer - - -

17 MR. RIFKIN: But it's here.

18 JUDGE WILSON: - - - seems more like a regulatory  
19 takings claim than a breach of contract claim.

20 MR. RIFKIN: It is not. It is not. I think it's  
21 close, but it is not.

22 Here, the principal is simply this. When the  
23 City agrees to sell an asset, any asset, doesn't matter.  
24 Yellow medallions are happy to be the asset of choice here.  
25 When the City agrees to sell an asset, it has the same



1 obligation, the same contractual obligation that every  
2 other contracting party in the State of New York has had  
3 for a century. Let the other side enjoy the benefit of the  
4 bargain - - -

5 JUDGE GARCIA: Counsel, I want to - - -

6 MR. RIFKIN: - - - and here.

7 JUDGE GARCIA: - - - pick up on that point, and I  
8 think it follows on what Judge Wilson is asking you.

9 One thing I struggle with in this case is related  
10 to Count 3 of your complaint, which is your good faith  
11 allegation, it goes to, as you were saying, their  
12 enforcement of the licensing for black car bases. Right?  
13 That's what you allege in this count. That's what the City  
14 isn't doing.

15 MR. RIFKIN: Well, we - - - respectfully, Your  
16 Honor, what we say is that the TLC disregarded.

17 JUDGE GARCIA: Right.

18 MR. RIFKIN: That it effectively abandoned its  
19 obligation to regulate the industry.

20 JUDGE GARCIA: So it's an - - - it's a lack of  
21 enforcement of these rules, right? And it's a municipal  
22 entity that is looking at a transit system and trying to  
23 balance certain things, and I think - - - I am trying to  
24 figure out binding the City for twenty years, you know,  
25 should we have horses, you know, they were - - - you know,



1 because the cars came- - - you know, this was technology,  
2 and the City, you know, is an way is responding to that.

3 One, so you have this kind of idea which I see in  
4 Winstar at the Supreme Court where if you do that to a  
5 government entity, it better be pretty clear that they've  
6 agreed not to change their regulatory scheme. And I think  
7 counter to Winstar, here we have something where that  
8 notice arguably lets you know that they reserve the right  
9 to change their regulations and their enforcement  
10 practices.

11 MR. RIFKIN: The - - - there was nothing in the  
12 agreement between the City and the buyers that allowed - -  
13 -

14 JUDGE GARCIA: Well, there is this notice, which  
15 I know you claim just only goes to clear title, but seems  
16 to say, you know, "as to the present or future application  
17 of the provisions of the rules of the City and Taxi and  
18 Limousine Commission or with the law other than a warranty  
19 of clear title".

20 So it seems at a minimum, that's not under this  
21 Winstar idea approach, and its unmitigated commitment to do  
22 a certain thing with respect to regulations enforcement.

23 MR. RIFKIN: We don't - - - we don't say that at  
24 all, and we don't believe that the court needs to conclude  
25 that in order to reverse the Appellate Division's decision.



1           The fact is that the City hadn't changed the  
2           administrative code when it sold these yellow medallions at  
3           auction, and it hadn't changed the administrative code when  
4           it - - - when the TLC allowed these nonconforming  
5           admittedly - - -

6           JUDGE GARCIA: Why couldn't they do it in the  
7           future?

8           MR. RIFKIN: I'm sorry, Your Honor.

9           JUDGE GARCIA: But you want to bind them from one  
10          change in the code, I guess, but also from enforcing it in  
11          a different way.

12          MR. RIFKIN: No. It's not a question of  
13          enforcement. The TLC lacked the authority under the  
14          administrative code to - - - to allow nonconforming - - -  
15          admittedly nonconforming black cars to flood the market.  
16          There's no question that the TLC was not authorized to do  
17          what it did. The City doesn't defend on that basis.

18          If the City had changed the administrative code,  
19          I agree; we would be looking at a different fact pattern.

20          ACTING CHIEF JUDGE CANNATARO: Is the logic any  
21          different with respect to a lack of enforcement? I mean,  
22          let's assume that there was no agreement to change the  
23          code. But you're saying that there's some implied warranty  
24          that compels the City to enforce its regulations. And we  
25          say in so many other contexts that that's a strictly



1 governmental function, and you could specify it explicitly  
2 in the contract without the disclaimer language which is  
3 problematic, or - - - or you can create a special duty that  
4 required the -- the City to enforce its regulation in some  
5 way, but neither of those really seem to be apparent.

6 MR. RIFKIN: And none of those things is required  
7 here, because the - - - the facts in the case are far  
8 simpler than that.

9 Had the City wanted to change the administrative  
10 code, it would have had to go through the appropriate  
11 legislative procedures and deal with the appropriate  
12 political consequence of its desire to do that. No one is  
13 suggesting that the City did not have the right to do that,  
14 and no one is asking the court, certainly, we are not  
15 asking the court to impose on the City any obligation to  
16 keep - - - to keep the administrative code in place. That  
17 simply isn't part of our case.

18 But without having that, and without having the  
19 protection of a change in the law, the buyers of these  
20 medallions, the property owners who bought these medallions  
21 from the City had a right to expect that the City would act  
22 in good faith and deal fairly with them, and if the City  
23 intended to change the code, as they did years later, the  
24 City had an absolute and unqualified right to do that. But  
25 in the meantime, these buyers had a right to rely on the





1 duty of good faith and fair dealing in the absence of a  
2 change.

3 We are not asking the court to impose any  
4 restraint, any restriction whatsoever on the City's ability  
5 to change the administrative code. We're simply saying  
6 play by the rules.

7 JUDGE GARCIA: But you're saying - - -

8 MR. RIFKIN: It reminds me a little bit of the  
9 argument we heard just a moment ago.

10 JUDGE GARCIA: But to Chief Judge Cannataro's  
11 point, you're saying enforce the rules, and that's a fair  
12 argument; it's just that it's a municipality. And again,  
13 in Winstar it says - - - it was found - - - you know, not  
14 binding, but this is how they approached it - - -  
15 government had plainly made promises to regulate in a  
16 certain fashion. Here, you don't have a promise to  
17 regulate in a certain fashion in this contract.

18 MR. RIFKIN: Agreed.

19 JUDGE GARCIA: In fact, you have that language in  
20 that disclaimer saying, you know, we can change the rules.

21 MR. RIFKIN: Well, nothing in the bid form said  
22 that the TLC had the right to ignore the regulations.  
23 Nothing in the bid form said that the TLC had the right to  
24 license noncomplying black cars. Nothing in the bid form  
25 said that the TLC could abandon its regulatory authority.



1 Nothing in the course of dealing between the parties  
2 suggested that the TLC was going to do that. It was  
3 unprecedented. And - - - and the City's argument that it  
4 had done so is premised respectfully on some of the  
5 statements about Uber's presence in the marketplace before  
6 these auctions took place.

7 Uber wasn't even identified, mentioned, at all.  
8 E-hailing wasn't even a subject that was described in the  
9 2014 - - -

10 JUDGE WILSON: You start - - -

11 MR. RIFKIN: - - - taxi fact book.

12 JUDGE WILSON: You started by saying that the  
13 rule you're advocating would apply to any sort of asset  
14 sale by the City, and so that makes me worry a little bit.  
15 You know, for example, there's a big piece of municipal  
16 property. The City sells it to a buyer. The City had been  
17 actively policing the area, and then decides to divert its  
18 resources somewhere else afterwards. The buyer then makes  
19 the same kind of argument you're making that now crime is  
20 running rampant through the development they're planning to  
21 build, and this is a problem and this breaches the good-  
22 faith and fair dealing covenant in the - - - in the  
23 contract - - -

24 MR. RIFKIN: Well - - -

25 JUDGE WILSON: - - - because they allocated their



1 enforcement resources differently.

2 MR. RIFKIN: And if the City had the discretion  
3 to do that.

4 JUDGE WILSON: That's the question, right?

5 MR. RIFKIN: And that's - - - and of course, that  
6 is the question. And to us the difference is that here,  
7 the City told the TLC the conditions under which it could  
8 license black cars. And those ownership requirements  
9 forever had restrained the marketplace, and that's why the  
10 number of black cars prior to these three auctions, the  
11 number of black cars had been relatively consistent. And  
12 it was only when the TLC stopped following the City's  
13 policy and did not comply and did not enforce the  
14 regulations that it was obligated to enforce, it was only  
15 then that the number of black cars exploded and destroyed  
16 the value of the medallions they had just sold almost a - -  
17 - almost a half a billion dollars. That's the difference,  
18 is we see this not as an exercise of the City's legislative  
19 prerogative or administrative discretion. We see this as a  
20 failure of the City to abide by its own rules and  
21 regulations, to play fairly under the rules that said a  
22 black car has to qualify this way. It's non - - - in a  
23 sense it's nondiscretionary.

24 The black car must meet the ownership and  
25 franchise requirements that are set forth in the City



1 Administrative Code. There's no dispute they did not do so  
2 here. And we submit that in the absence of any kind of  
3 authority for the TLC to allow these noncomplying,  
4 nonconforming black cars to flood the market, it was a  
5 breach of the duty of good faith and fair dealing.

6 JUDGE WILSON: So the City, I think, I just read  
7 in the papers, I'm not sure if this is correct, announced  
8 that it's - - - the current administration decided not to  
9 prosecute unlicensed vendors. So do people who paid for  
10 vending licenses now have the same type of claim that  
11 you're examining?

12 MR. RIFKIN: No. I suspect that the decision  
13 whether to prosecute falls within the discretion of the - -  
14 - of the police and the power of the City.

15 JUDGE WILSON: That may destroy the market for  
16 their licenses?

17 MR. RIFKIN: It may or it may not. But again, it  
18 may fall within the police and power - - - the discretion  
19 of the police and power of the City. But the TLC had no  
20 discretion to ignore the administrative code respectfully.

21 ACTING CHIEF JUDGE CANNATARO: Thank you.

22 MR. RIFKIN: Would the court care to hear any  
23 argument on the GBL 349 claim?

24 ACTING CHIEF JUDGE CANNATARO: No, thank you.

25 MR. RIFKIN: Okay. Thank you.



1 MR. TOWNSEND: Good afternoon Your Honors.  
2 Jeffrey Townsend for the respondent.

3 The court should affirm. On the implied covenant  
4 claim, plaintiff claim as pled is precluded by the clear  
5 terms of the bid form and subsequent documents that the  
6 plaintiff's principal freely executed and agreed to. And  
7 the theory focused on appeal, which is this idea of the  
8 commission changing its approach in some way is not pled -  
9 - -

10 JUDGE TROUTMAN: What did plaintiff buy? What  
11 did - - - what reasonably objectively did plaintiff believe  
12 that plaintiff had purchased?

13 MR. TOWNSEND: Plaintiff was buying medallions  
14 that allowed him to run taxis to - - - subject to the  
15 commission's rules which are stated in all the agreements  
16 that he freely executed to - - - as those were required and  
17 for street hails, and that was fulfilled.

18 Uber's - - - the classification of using Uber to  
19 arrange a prearrangement as opposed to a street hail was  
20 clearly stated by the TLC two years before the auction,  
21 Your Honors.

22 JUDGE WILSON: You do understand why they feel  
23 duped, no? I mean you think they're walking with their  
24 eyes open and it was their fault or something like - - -  
25 you don't think that they - - - if they had known what they



1 know now they would have struck the same deal?

2 MR. TOWNSEND: I think they're disappointed, and  
3 that's - - - that's fair, Your Honor - - - Judge Wilson.  
4 But the - - - certainly, Uber entering the New York City  
5 market and markets globally had a huge impact. That - - -  
6 that's true. That wasn't covered by the implied covenant.  
7 The - - -

8 ACTING CHIEF JUDGE CANNATARO: What would be  
9 covered by the implied covenant here? What sorts of - - -  
10 what does the contract pertain to, and where does the  
11 implied covenant come in hypothetically?

12 MR. TOWNSEND: Sure. At a hypothetical level,  
13 for example, Your Honor, I believe the contract required  
14 someone who wants to sell a taxicab medallion to submit  
15 that, or finance it to submit that to approval by the  
16 commission. If the commission just for - - - for example,  
17 refused to look at that application or was unreasonable in  
18 rejecting it, that's - - - that's the implied covenant type  
19 claim.

20 JUDGE GARCIA: What if they sold 10,000  
21 medallions the next year?

22 MR. TOWNSEND: So again, Your Honor, given that  
23 the purchase was subject to the commission's laws and  
24 rules, I think that's - - - I think that's not an implied  
25 covenant claim. The fruit of the bargain was to receive



1 these medallions to run the street hails - - - or to answer  
2 street hails.

3 ACTING CHIEF JUDGE CANNATARO: So the City could  
4 have authorized the creation of an additional 10,000  
5 medallions six months later and auction those?

6 MR. TOWNSEND: In that case, perhaps there's a  
7 different claim, because the commission - - - the  
8 commission usually sold medallions in response to state  
9 legislation as this court heard in 2013. The - - - the  
10 medallions that this plaintiff was purchasing were part of  
11 what - - - up to 2,000 additional medallions that were to  
12 come online, as well as essentially 18,000, what's called,  
13 green taxis that were to be sold because of the HAIL Act  
14 that was passed in 2011 and 2012.

15 But even in that scenario, Your Honors, the - - -  
16 the purchaser was buying knowing that there were a great  
17 deal more competitors entering the market - - - or  
18 potentially entering the market.

19 JUDGE SINGAS: Yeah. But nowhere near what ended  
20 up happening. So what about that argument that you're  
21 intentionally undermining the value of these medallions?

22 MR. TOWNSEND: Sure, Your Honor.

23 So we certainly disagree that we intentionally  
24 undermined the value of the medallions, and the complaint  
25 nowhere alleges that there was a change - - - a deliberate



1 change in the commission's approach.

2 The motion to dismiss, so I'm bound by the  
3 allegation that these black car bases did not qualify.  
4 That's at pages 67 and 68.

5 But also at 67 and 68 is the allegation that  
6 these black car bases affiliated with Uber, several of them  
7 had been approved up to a year before the auction. And  
8 nowhere in the complaint, on the other hand, is there an  
9 allegation that these facts - - - that the commission knew  
10 that fact, and then changed its approach in some way, or  
11 that it varied its approach as between Uber-affiliated  
12 black car bases and all the other black cars.

13 JUDGE TROUTMAN: So is the difference in your  
14 argument is that plaintiffs paid for hailing rights means  
15 other cars aren't allowed to do the same thing? So is that  
16 what he bargained for? So they got what they bargained  
17 for?

18 MR. TOWNSEND: They - - - they - - - he got the  
19 medallions he paid for, yes, Your Honor. The taxis are - -  
20 - have a monopoly on street hails.

21 JUDGE TROUTMAN: Um-hum.

22 MR. TOWNSEND: And in 2011, the commission has  
23 clearly stated that using Uber was a prearrangement, not a  
24 street hail, and that, again predates that auction. That  
25 did not change.





1 JUDGE TROUTMAN: So allowing the prearrangement,  
2 your argument is - - - does not undermine what the  
3 plaintiffs bargained for?

4 MR. TOWNSEND: It does not, Your Honor. And  
5 again, it predates the contract. So when - - - when  
6 considering it by covenant, we think about what would a  
7 reasonable purchaser understand to be an unstated promise  
8 of the agreement given that the commission had already  
9 stated that the use of Uber was a prearrangement, and not a  
10 - - - and not a street hail, it - - - a reasonable  
11 purchaser couldn't think that when buying a taxicab  
12 medallion he was buying the right to - - - to have Uber not  
13 be treated as a prearrangement.

14 JUDGE SINGAS: But you didn't take that into  
15 consideration when you set the price for the medallion?

16 MR. TOWNSEND: I think the taxicab medallion - -  
17 - the commission took the - - - the market of the taxicab -  
18 - - market as it was - - - as it existed and - - - and set  
19 the price accordingly.

20 ACTING CHIEF JUDGE CANNATARO: Is there any claim  
21 under the implied warranty for the failure to enforce the  
22 requirement as it existed for the black car permits?

23 MR. TOWNSEND: No, Your Honor. Precisely because  
24 of the expressed language of the bid form, which is example  
25 is at page 135 that clearly says present or future



1 application of rules or laws. This is a reservation of the  
2 commission's authority to enforce the rules and law as - -  
3 - as it understands it. That - - - that's what that  
4 language means.

5 JUDGE GARCIA: Their point is you don't have the  
6 authority to disregard the rules?

7 MR. TOWNSEND: That was a - - - as a municipal  
8 entity, a regulatory entity we have the authority to apply  
9 our rules as we understand them. We had that authority  
10 before the agreement. That language in the bid form  
11 reserves - - -

12 JUDGE GARCIA: You understood these black car  
13 bases to be legitimately licensed under the rules as they  
14 existed at the time.

15 MR. TOWNSEND: Right, Your Honor. And I just  
16 want to respond to something I heard opposing counsel said  
17 in terms of no dispute; there is a dispute, outside of the  
18 - - - again, it's the motion to dismiss. So I'm bound by  
19 the allegations in the complaint. Outside the motion to  
20 dismiss, absolutely we dispute that. Absolutely we dispute  
21 that they did not submit documentation, or that we had any  
22 reason to think they did not comply.

23 But even within the confines of the motion to  
24 dismiss record, Your Honor, we had a - - - we had a very  
25 clear language in the bid form that specifically states



1 that we were making no promises concerning the present or  
2 future application of our rules or applicable law. So we  
3 were reserving the rights we already had to regulate as we  
4 understood it.

5 Using the implied covenant to allow the  
6 plaintiffs to get out of that language, it just would  
7 really undermine this concept of contractual certainty and  
8 predictability that underlie the approach to contractual  
9 interpretation in the state.

10 Your Honors, if I could just turn briefly to the  
11 GBL 349 claim.

12 The - - - the question here is whether the word  
13 tort in the - - - in the statute 50-e means only statutory  
14 - - - excludes all statutory causes of action from the - -  
15 - from its ambit. There's really no support for that.

16 The plaintiffs rely on guide on 2. The point on  
17 guide on 2, though, is that in this court the court said  
18 that GBL 349 claims are similar to and akin to common law  
19 fraud claims. In guide on this court had - - - had to fit  
20 it - - - this into a binary: fraud, 213.8, statutory 2 - -  
21 - 214.2. There's no binary in 50-e. It just uses the word  
22 tort. So as long as it's akin to the common law tort of  
23 fraud, 349 logically sits within - - -

24 ACTING CHIEF JUDGE CANNATARO: Are all 349 claims  
25 akin to tort? Could there - - - could there - - - could



1           there be some - - - you know, in the Venn diagram, could  
2           there be some class of 349 claims that don't look like  
3           torts?

4                   MR. TOWNSEND: I don't think with regard to 349,  
5           Your Honor, given that 349 is meant to be a consumer fraud  
6           protection statute. And again is similar to and draws from  
7           the common law tort. I think it - - - it logically would  
8           flow that 349 - - -

9                   ACTING CHIEF JUDGE CANNATARO: Isn't that some  
10          just highly misleading representations about the quality of  
11          a service or a product? Doesn't sound very tortious to me,  
12          but it could conceivably be a 349 claim, couldn't it?

13                   MR. TOWNSEND: Well, again, it - - - it would be  
14          pretty similar essentially to common law fraud, which  
15          obviously no one disputes is a tort, Your Honor. So I - -  
16          - I think that it would be hard to say that 3 - - - that  
17          349 claims would not be torts. And certainly here, where  
18          plaintiffs based their allegations on 349 on very similar  
19          allegations that overlap what they're now abandoned fraud  
20          and negligent misrepresentation cases. That wouldn't be  
21          the - - - this wouldn't be the case to reach it.

22                   JUDGE WILSON: I have to say I - - -

23                   ACTING CHIEF JUDGE CANNATARO: Oh, I'm sorry.

24                   JUDGE WILSON: I wonder if - - - I mean, this  
25          looks to me very like regulatory activity at bottom.



1 You're trying -- you're trying to regulate how people are  
2 moving around Manhattan, how many taxis happen to be black  
3 taxis, how many subways, all the various different methods  
4 of transportation, and to apply GBL 349 to a regulatory  
5 decision like that seems weird to me.

6 MR. TOWNSEND: That's their point, Your Honor.  
7 And Supreme Court held as an alternative ground for  
8 dismissing a 349 claim that 349 did not apply to a  
9 municipality including engaging action such as this. That  
10 is certainly an alternate grounds for affirming of a 349 -  
11 - -

12 ACTING CHIEF JUDGE CANNATARO: Is that settled  
13 law or is that a novel holding?

14 MR. TOWNSEND: It was - - - the Supreme Court was  
15 drawing on prior case law that involved state agencies. So  
16 to the extent it's novel, it's just the extension of the  
17 same conduct on state agencies to municipalities.

18 With regard to the idea that this is  
19 discretionary activity, I would note Your Honor the  
20 Appellate Division, Second Department, rejected the claim  
21 that under Article 78 someone could force the City to apply  
22 these black car base rules in a certain way. I believe  
23 that was the Progressive Credit Union case. That because  
24 this is discretionary action. It's a policy-making action  
25 and so mandamus didn't apply. Thank you Your Honor.



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ACTING CHIEF JUDGE CANNATARO: Thank you.

MR. RIFKIN: Your Honors, I heard counsel for the City say that the upset price, the minimum bid price was set in the auction on the basis of market conditions as they existed at the time of the auctions. Those market conditions never change. They were that black cars had to be owned by either a franchise or a cooperative. These black cars were neither. At least, that's what's alleged in the complaint, and we'll be mindful that this was a motion to dismiss. It was effectively granted by the Appellate Division.

The - - - those conditions never changed. However, once these 360 medallions were sold to these buyers, the TLC, without changing those market conditions radically changed the landscape by letting now nonconforming, for the first time ever - - - for the first time ever let nonconforming cars into the market to compete directly with the - - - with the yellow cabs that they just sold those medallions for. And we think that's why the duty of good faith and fair dealing apply so squarely here.

JUDGE TROUTMAN: What about the argument that the cabs has a right - - - hailing rights, and the Uber cars are prearranged?

MR. RIFKIN: Before these auctions took place, the only Uber base that had ever been licensed, and the

1 only mention of anything about it was - - - was a license  
 2 that was granted in 2011 to a luxury limousine service that  
 3 was owned by - - - by a base called Uter. Am I right about  
 4 that? Not even Uber, but Uter. It was - - - it was, in  
 5 fact, what Uber became, but that was it. It was licensed  
 6 as a luxury limousine service, not even as a black car. It  
 7 was licensed as a luxury limousine service.

8 The - - - the 2014 fact book that the City  
 9 published, didn't even mention Uber, didn't even mention  
 10 Lyft, didn't even mention E-hailing; none of this. None of  
 11 this was even considered by anyone to be market conditions  
 12 as they existed at the time the City set the upset price  
 13 for the auc - - - for the medallions that were sold, and at  
 14 the time the buyers bought the medallions. And this was a  
 15 radical change. It was not within the history of the  
 16 parties. It was not within the regulatory prerogative of  
 17 the TLC to do it. And if we're going to lead to the  
 18 conclusions that it was, it - - - it certainly requires  
 19 that - - - that the issue be explored factually and develop  
 20 not appropriate for a motion to dismiss.

21 If I may very briefly, I'd like to turn quickly  
 22 to 349.

23 The City's position on GBL 349 that - - - that it  
 24 applies - - - that it doesn't apply to state agencies was  
 25 not briefed. It is a new issue. We understand that if the



1 court concludes this that it's perfectly an acceptable  
 2 basis to affirm on another ground. But if the court is  
 3 going to address the question of whether GBL 349 should or  
 4 should not be heard - - - should or should not apply to a  
 5 municipal authority, it ought to do that on the basis of a  
 6 fully developed briefing record so that we have the  
 7 opportunity to explain our position on it.

8 But with respect to the question of whether 50-e  
 9 applies, the statute itself requires that the claim be  
 10 based in tort. And if we're talking about all sorts of  
 11 metaphysical distinctions here, and the - - - and the tort  
 12 theory of GBL 349 in the City's view seems to be shifting  
 13 shapes from one statute to another statute.

14 Our position on it is very clear. This Court has  
 15 already said that GBL 349 is different than fraud claims.  
 16 It's - - - it's not a fraud claim. For example, you don't  
 17 need to prove reliance to prove a GBL 349 claim. That's an  
 18 essential element of a fraud claim.

19 You don't need to prove intent to prove a GBL 349  
 20 claim. That's certainly an element of a fraud claim. All  
 21 of these things mean that a GBL 349 claim is not a claim  
 22 founded in tort.

23 The City is asking that the court rewrite - - -  
 24 rewrite GML 50-e, and change those words from a case  
 25 founded in tort to a case similar to tort.





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And of course, I don't need to re-emphasize the fact that the G - - - the - - - the City has taken contrary positions on whether it's a tort for one purpose and not a tort for another purpose; we can't have that. That sort of uncertainty is not the sort of thing that we ought to be deciding these statutes of timeliness under.

ACTING CHIEF JUDGE CANNATARO: Thank you.

MR. RIFKIN: Thank you very much.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Singh v. City of New York, No. APL-2021-166 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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