

Black Car Assistance Corp. v County of Nassau

2007 NY Slip Op 34073(U)

December 11, 2007

Supreme Court, Nassau County

Docket Number: 1378-05/

Judge: Lori Currier Woods

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

-----X
BLACK CAR ASSISTANCE CORPORATION,

Plaintiff,

-against-

THE COUNTY OF NASSAU, THE OFFICE OF
CONSUMER AFFAIRS OF THE COUNTY OF
NASSAU, ROGER C. BOGSTEAD IN HIS
CAPACITY AS COMMISSIONER OF THE OFFICE
OF CONSUMER AFFAIRS OF THE COUNTY OF
NASSAU, THE TAXI AND LIMOUSINE
COMMISSION OF THE COUNTY OF NASSAU,
Defendants.

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 18

Index No.: 1378/2005

Motion Seq. No.:05, 06 & 07

DECISION AND ORDER

-----X

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Motion by defendants for renewal and reargument of plaintiffs' motion for leave to serve a second amended complaint is **Denied**. Motion by defendants to preclude plaintiff from offering any evidence of damages on its fourth cause of action is **Granted** only to the extent compelling aforementioned production of documents. Motion by plaintiff for leave to file a third amended complaint is **Granted** in part and **Denied** in part. Motion by plaintiff for partial summary judgment as to liability on its first four causes of action is **Denied**. Upon searching the record, partial summary judgment is **Granted** to defendants dismissing that part plaintiffs' claim which is based on violation of the notice and publication requirements.

This is an action seeking a declaratory judgment that Nassau County Ordinance No. 113-2005 is involved in that it established for-hire vehicle registration fees which were excessive and discriminatory. Plaintiff also asserts that the Ordinance was enacted in violation of notice and publication requirements. Aside from declaratory relief, plaintiff also seeks a refund of the registration fees paid by its members, less \$5 for each registration fee.

Plaintiff Black Car Assistance Corporation hereinafter referred to as "BCAC", is a trade association whose members dispatch livery vehicles, commonly known as "black cars," and operate in the greater New York area. Black cars are late model luxury vehicles which are dispatched "over the air" and provide ground transportation on a contract basis. Plaintiffs' members are dispatching companies, whose shareholders or franchisees are owners or owner-operators of livery vehicles. The typical dispatching company has approximately 250 members and dispatches approximately 250 vehicles. Some of plaintiffs' members dispatch a greater number of cars, and some dispatch a much smaller number of vehicles. The owner-operators who are dispatched by BCAC's members are licensed and their vehicles are registered with the New

York City Taxi and Limousine Commission. Defendants are the County of Nassau (“the County”), its Office of Consumer Affairs, and its Taxi and Limousine Commission.

Pursuant to General Municipal Law §181, cities, towns, and villages which have authority to enact Ordinances are authorized to adopt Ordinances regulating the registration and licensing of taxicabs. In May 2003, the Nassau County Legislature enacted a “home rule message,” requesting New York State to authorize the County to regulate the registration of taxicabs and limousines (See Municipal Home Rule Law §40). In August 2003, in response to the request, the state legislature amended General Municipal Law §181 to authorize the County to regulate the registration of taxicabs and limousines by Ordinance. Notably, the amendment did not authorize the County to enact Ordinances regulating licensing.

Pursuant to this delegation of authority, the County enacted Ordinance No. 90-2003, to establish a Nassau County Taxi and Limousine Commission and to provide for the registration of “for-hire vehicles.” The local law defined “for-hire vehicle” as meaning a taxicab, limousine, or private livery vehicle carrying passengers for hire (Ordinance 90-2003 §1[c]). The Ordinance provided that “No person may operate or permit to operate a for-hire vehicle in the County of Nassau without a certificate of registration for such vehicle issued by the Nassau County Office of Consumer Affairs”(§ 2).¹ The Ordinance further provided that a certificate of registration shall be

¹The Ordinance defined “operate” to mean drop off or pick up passengers(§ 1[e]). Thus, a for-hire vehicle driver who picked up a passenger in Queens and dropped the passenger off in Suffolk would not have been operating a for-hire vehicle in Nassau County within the meaning of the Ordinance.

issued only i] to for-hire vehicle operators and base station owners² who hold taxicab, limousine,³ or private livery vehicle licenses issued by another municipality, in addition to any license required by the state of New York; or ii) pursuant to rules adopted by the Office of Consumer Affairs, to persons who operate for-hire vehicles outside of jurisdictions of such municipalities(Id).⁴ The Ordinance provided that the operator and any base station owner were to “jointly register” with the County every for-hire vehicle on an annual basis (Id). The registration certificate was to be conspicuously displayed within the view of passengers. The for-hire vehicle was to be issued a registration sticker which was to be displayed on the outside of the driver’s door and was to indicate whether the vehicle was registered as a taxicab, limousine, or private livery vehicle (Id). A for-hire vehicle registered by the County could not be operated in a manner not authorized by the registration. Every for-hire vehicle registered by the County that was licensed by a municipality within the County was, to the extent practicable, to be issued Nassau County Taxi and Limousine Commission license plates, which were required to be displayed (Id).

The Ordinance provided that all initial taxicab, limousine, and livery vehicle registration fees were to be fixed at the rate of \$750 per vehicle (§3). All annual renewal fees were fixed at

²The Ordinance defined “base station” to mean the location from which a for-hire vehicle is dispatched(§1[a]).

³The Ordinance defined “limousine” to mean a chauffeured for-hire vehicle seating not fewer than seven nor more than ten persons, including the driver, used solely for hire in connection with funerals, weddings, proms, social events, sports and similar functions on a prior agreement, fixed-rate basis(§ 1[d]).

⁴ § 2(ii) of the Ordinance appears to have authorized Consumer Affairs to issue regulations governing the issuance of for-hire vehicle registrations to individuals licensed to operate a private livery vehicle by the Department of Motor Vehicles but not licensed by any municipality.

the rate of \$50.00 per vehicle. A person who possessed a taxicab, limousine, or livery vehicle license or registration issued by a municipality within the County of Nassau was exempt from all but \$5.00 of the registration fee (§ 4[a]). A person who possessed a taxicab, limousine, or livery vehicle license or registration issued by a jurisdiction outside the County that “reciprocated” with the County, in permitting for-hire vehicles registered by the County to operate in such jurisdiction without obtaining a license or upon payment of a registration fee of no more than \$5.00, was also required to pay only a \$5.00 registration fee (§4[b]). New York City medallion taxicabs that were permitted to accept “hails” from passengers in the street within the City were exempt from the Ordinance (§ 4[c]). Additionally, a person providing ground transportation operated on a regular route or between specified points and provided in a motor vehicle with a seating capacity not exceeding fifteen (15) passengers including the driver was exempt from the Ordinance (§4[d]).⁵

A violation of the Ordinance No. 90-2003 was punishable as a Class A misdemeanor (§ 5). In addition to the fines provided by the Penal Law, a person who violated the Ordinance was subject to a civil fine of \$750.00 to \$5,000.00, depending upon the number of prior violations (Id).

The Ordinance also established the Nassau County Taxi and Limousine Commission, with authority to conduct hearings on violations and to recommend to the Commissioner of Consumer Affairs rules and regulations needed to effectuate the Ordinance (§ 6[d][e]). The Commission’s findings with regard to violations were subject to review by the Commissioner of Consumer Affairs (§ 7). The Ordinance provided that it was to take effect immediately; provided, however,

⁵§ 4[d] was apparently intended to exempt “commuter vans” from the registration requirement.

that no notice of violation or summons was to be issued for 45 days following its enactment (§ 9).

On January 28, 2005, plaintiff commenced this action, challenging Ordinance No. 90-2003 on the ground that it discriminated against owner-operators who were not Nassau County residents and constituted an illegal revenue raising device. Plaintiff sought a declaratory judgment that the Ordinance was discriminatory and its fees excessive. Plaintiffs also sought a permanent injunction against the Ordinance's enforcement. By so-ordered stipulation dated September 14, 2005, the parties stipulated that a vehicle registered with the New York City Taxi and Limousine Commission could be registered with the Nassau County Office of Consumer Affairs for a fee of \$5.00, pending enactment of a new Ordinance providing for a "universal" Nassau County registration fee of \$300.00. The stipulation further provided that livery drivers licensed by municipalities within Nassau County, or by municipalities which entered into "reciprocation agreements" with the County, could register their vehicles for a fee of \$30.00.

In October 2005, the Nassau County Legislature enacted Ordinance No. 113-2005, amending its prior for-hire vehicle Ordinance. The main purpose of the amendment was to expand the definition of "for-hire vehicle" and modify the procedure for enforcement. Ordinance No. 113-2005 defines "for-hire" vehicles as taxicabs, limousines, commuter vans, and private livery vehicles, but not including a bus operating along a fixed route or any vehicle over which the County does not have jurisdiction pursuant to state or federal law (§ 1[c]). The latter Ordinance continues the prohibition on operation of for-hire vehicles in Nassau County without a certificate of registration issued by the Consumer Affairs Office (§ 2). Certificates of registration may be issued to taxi medallion owners, as well as for-hire vehicle and base station owners, who hold taxicab, limousine, or private livery vehicle licenses issued by another municipality. Pursuant to

rules adopted by Consumer Affairs, registrations may still be issued to persons who operate for-hire vehicles outside of the jurisdictions of such municipalities (Id). The owner of the taxi medallion, as well as the owner of the for-hire vehicle and any base station owner, are required to jointly register the for-hire vehicle on an annual basis. As in the prior Ordinance, the registration certificate shall be conspicuously displayed within the view of passengers. However, the registration sticker shall be displayed as required by the rules of the Taxi and Limousine Commission (Id). As in the prior Ordinance, for-hire vehicles registered by the County and licensed by a municipality within the County shall, to the extent practicable, be issued Nassau County Taxi and Limousine Commission license plates, which are required to be displayed (Id).

The Ordinance provided that the initial annual registration fee was reduced to \$300.00 per vehicle (§ 3). However, annual renewal registration fees were raised to \$250.00 per vehicle (Id). As in the prior Ordinance, a person who possessed a for-hire vehicle license or registration issued by a municipality within the County was required to pay a registration fee of only \$5.00 (§ 4). As before, a person who possessed a for-hire vehicle license or registration issued by a jurisdiction outside the County that “reciprocated” with the County, in permitting for-hire vehicles registered by the County to operate in such jurisdiction by paying a registration fee of no more than \$5.00, was also required to pay only a \$5.00 registration fee (Id). New York City medallion taxicabs that are permitted to accept hails in the street were still exempt from the Ordinance, provided they were not equipped for radio dispatch (Id).

Violation of the Ordinance remains punishable as a Class A misdemeanor (§ 5). The minimum civil fine is reduced to \$300.00, but the maximum civil fine of \$5,000.00 remains the

same (Id).⁵ Additionally, unregistered vehicles are now subject to impounding and civil forfeiture (§ 6). The latter Ordinance also continues the authority of the Nassau County Taxi and Limousine Commission to recommend rules and regulations needed to effectuate the Ordinance (§ 7). However, hearings on violations are now held before a hearing officer designated by the Commissioner of Consumer Affairs (§ 8). As before, a final determination on the violation is made by the Commissioner (Id). The Ordinance provided that it was to take effect immediately (§10).

After Ordinance 113-2005 was enacted, plaintiff amended its Complaint in order to challenge the amended Ordinance.⁶ By order dated December 1, 2005, the court denied plaintiffs' motion for a preliminary injunction restraining enforcement of the amended Ordinance. The court determined that plaintiff's members could seek refunds of their registration fees, if plaintiff established that the Ordinance was discriminatory. Because there was an adequate remedy at law, plaintiff had not established the irreparable harm requirement for a preliminary injunction (*Singer v. Riskin*, 304 AD2d 554 [2d Dept 2003]).

Subsequent to Nassau County's enactment of its for-hire vehicle Ordinance, the New York State legislature amended Article 17-B of the Vehicle and Traffic Law, effective November 14, 2006. The new Article 17-B, which is comprised of VTL §498, is entitled, "Interjurisdictional

⁵The amendment also reduces the minimum fine for a second violation within five years and the minimum fine for a third violation within five years(Id).

⁶The first amended complaint has not been submitted to the court. Nevertheless, it appears that there was no change in plaintiff's discrimination claim.

prearranged for-hire vehicle operation.”⁷ The “declaration of legislative findings and intent” accompanying the bill states that “It is important both that for-hire transportation providers be able to cross jurisdictional boundaries when necessary without undue difficulty or expense, and that local regulatory bodies are able to ensure that their constituents are being served by transportation providers that meet appropriate standards of safety and responsibility.” The declaration further states, “[A]s more jurisdictions take on the important role of regulating for-hire transportation on a county-wide level, it has become necessary to establish a regional system, setting forth specific licensing and safety standards, for the regulation of interjurisdictional trips by for-hire vehicles.” The apparent purpose of the Article is to promote uniformity of regulation of for-hire vehicles and for-hire vehicle drivers within the City of New York and the outlying counties of Nassau and Westchester.

VTL §498(1)(b) defines “licensing jurisdiction” as meaning a city with a population of one million or more, or a county within New York State contiguous to such city, that requires the issuance of a license, permit, or registration for a vehicle to perform the prearranged pick up or drop off of one or more passengers in such jurisdiction for compensation. Since Nassau County is contiguous to New York City and requires such a registration, it is a “licensing jurisdiction” within the meaning of the statute. VTL §498(1)(c) defines a “prearranged for-hire vehicle” as meaning a motor vehicle other than a bus that is used in the business of transporting passengers for compensation on a prearranged basis, and operated in such business under a license or permit

⁷The new Article 17-B replaces the former Article 17-B which was entitled, “Intermunicipal for-hire vehicle operation.”

issued by a licensing jurisdiction.⁸ VTL §498(1)(d) defines the term “prearranged, for-hire vehicle license” as meaning a license, permit, registration, certification or other approval issued by a licensing jurisdiction to the owner of a prearranged for-hire vehicle for the purpose of providing prearranged transportation for compensation. Thus, a prearranged for-hire vehicle registration issued by the Nassau County Office of Consumer Affairs is a “prearranged for-hire vehicle license” within the meaning of VTL §498(1)(d).⁹

VTL §498(3) is entitled, “Standards for Prearranged For-Hire Vehicle Transportation.”

The subdivision provides that a licensing jurisdiction shall be deemed to be in compliance with its provisions if the licensing jurisdiction: a) requires the suspension of the prearranged for-hire vehicle license of the owner or the prearranged for-hire vehicle driver’s license of the driver against whom there is an outstanding judgment or unpaid civil penalty for a violation of the VTL relating to traffic in any other licensing jurisdiction meeting the standards and requirements of subdivision 3, and subdivisions 4 and 6 of VTL §498, b) requires that the prearranged for-hire vehicle license be affixed to the windshield, c) requires the owner of each prearranged for-hire vehicle licensed by the jurisdiction to maintain a minimum level of insurance coverage, d) requires each prearranged for-hire vehicle to be inspected annually and display a valid inspection sticker, e) maintains an electronic data base containing names of holders of prearranged for-hire vehicle licenses, the VIN number of the vehicle, and violations issued to the holder of the license, f) require that the driver of the prearranged for-hire vehicle have a driver’s license valid to operate

⁸The term specifically applies to “livery, black car, or luxury limousine” vehicles.

⁹To be distinguished from a pre-arranged for-hire vehicle license is a “pre-arranged for-hire vehicle driver’s license.” The latter term refers to a license, permit or other approval to operate a pre-arranged for-hire vehicle issued by a licensing jurisdiction (VTL §498(1)[e]).

the vehicle, g) requires that the prearranged for-hire vehicle be driven only by the holder of a prearranged for-hire vehicle driver's license, h) requires the driver to display his or her prearranged for-hire vehicle driver's license in the vehicle or have it available to produce upon request of a passenger or law enforcement personnel, i) requires that a record of each "interjurisdictional trip" be entered prior to commencement of the trip in a log maintained in the vehicle, and j) requires that the owner of the prearranged for-hire vehicle hold a valid vehicle registration issued by the Department of Motor Vehicles.

VTL §498 (4) is entitled, "Standards for Drivers of Prearranged For-Hire Vehicles." The subdivision provides that a licensing jurisdiction shall be deemed to be in compliance with its provisions if, as a condition of licensure of prearranged for-hire vehicle drivers, it requires the following: a) the prearranged for-hire vehicle driver must be fingerprinted and his or her criminal history obtained from the Department of Criminal Justice Services, b) the driver must not have been convicted of a "serious criminal offense,"¹⁰ c) a mandatory, 30-day suspension of the prearranged for-hire vehicle driver's license upon accumulation of a specified number and type of conviction on the license within a fifteen-month period, and mandatory revocation of license upon the accumulation of an additional number of convictions, d) the driver must submit to annual drug testing, and e) completion of a state-approved defensive driving course no more than six months

¹⁰Serious criminal offense means a felony involving the use of a motor vehicle, a felony involving distribution of drugs, leaving the scene of an accident, operating a pre-arranged for-hire vehicle while the driver's license was suspended for prior violations committed while operating a pre-arranged for-hire vehicle, causing a fatality through the negligent operation of a pre-arranged for-hire vehicle, homicide, or a felony for assault, sexual offense, kidnaping, or burglary(VTL §498(1)[f]). For a serious criminal offense to be the basis of denial of a pre-arranged for-hire vehicle license, the offense must also meet the criteria of Article 23-A of the Correction Law (See Correction Law §750 et seq).

prior to the application.

Pursuant to VTL §498(6), upon the issuance of a summons in a licensing jurisdiction to a prearranged for-hire vehicle licensed or registered in another jurisdiction, the jurisdiction in which the summons was issued shall notify the jurisdiction in which the vehicle is licensed or registered of the issuance of the summons. The licensing jurisdiction in which the summons was issued shall also notify the jurisdiction in which the vehicle is licensed or registered upon the summons' disposition(Id).

VTL §498(2) is entitled "Reciprocity." Subdivision (2)(a) provides that a prearranged for-hire vehicle that is licensed by a licensing jurisdiction meeting the standards and requirements set forth in subdivisions 3, 4, and 6 shall be authorized to pick up passengers in such jurisdiction for drop off within the same jurisdiction, to pick up passengers in another licensing jurisdiction for drop off within the licensing jurisdiction, to pick up passengers in the licensing jurisdiction for drop off in another licensing jurisdiction, and to transit other licensing jurisdictions.¹¹

Subdivision (2)(a) further provides that no other licensing jurisdiction may require a prearranged for-hire vehicle which is licensed by a licensing jurisdiction meeting the standards and requirements set forth in subdivisions 3, 4, and 6 to also be licensed by such other licensing jurisdiction or to pay any prearranged for-hire vehicle license fee in order to be allowed to pick up or drop off passengers within or to transit such jurisdiction. A licensing jurisdiction meeting the standards and requirements shall provide written confirmation thereof to other licensing

¹¹Additionally, if a pre-arranged for-hire vehicle licensed by a jurisdiction meeting the standards and requirements picks up a passenger outside the licensing jurisdiction, it is authorized to temporarily discharge and subsequently pick up the passenger outside the licensing jurisdiction during the course of the pre-arranged transportation (VTL §498(2)[c]). Presumably, the ultimate discharge of the passenger would be required to be in the licensing jurisdiction.

jurisdictions, containing information sufficient to establish that the licensing jurisdiction meets the standards and requirements (VTL §498(2)[a]).¹² A prearranged for-hire vehicle licensed by a licensing jurisdiction not meeting the standards and requirements shall be authorized to pick up or drop off passengers in another licensing jurisdiction only if the owner obtains a prearranged for-hire vehicle license from the other licensing jurisdiction (VTL §498(2)[b]).¹³

By order dated January 4, 2007, the court granted plaintiffs' motion for leave to file a second amended complaint. The second amended complaint continues to allege that the for-hire vehicle registration Ordinance discriminates against for-hire vehicle owners who are not Nassau County residents and that the registration fees are excessive. The second amended complaint makes the additional claim that Ordinance No. 113-2005 was enacted in violation of notice and publication requirements. In the second amended complaint, plaintiff asserts a claim for damages to recover approximately \$500,000 in illegal for-hire vehicle registration fees paid by its members. In granting plaintiffs' motion, the court held that plaintiff had standing to assert a claim for money damages on behalf of its individual members. The court further held that General Municipal Law § 50-[i] did not bar plaintiffs' claims because the time to file a notice of claim had not expired. The court deemed the proposed second amended complaint served on defendants as of January 4, 2007. On February 12, 2007, plaintiff served a supplemental notice of claim on the

¹²The parties do not expressly state whether New York City meets the standards and requirements of subdivisions 3, 4, and 6 of VTL §498. Nevertheless, because plaintiff asserts that there is now "reciprocity" between Nassau County and New York City, the court will assume that New York City meets the standards and requirements.

¹³Subdivision (2)(b) also provides for a pre-arranged for-hire vehicle licensed by a non-compliant licensing jurisdiction to pick up or discharge passengers in another licensing jurisdiction pursuant to a written agreement or "memorandum of understanding" between the licensing jurisdictions (VTL §498(2)[b]).

County asserting a claim for unjust enrichment or monies had and received based upon the registration fees which allegedly discriminated against non-Nassau County residents.

Defendants now move for renewal and reargument of plaintiffs' motion for leave to file a second amended complaint. Defendants argue that plaintiff is without standing to pursue a claim for money damages because the registration fees were paid not by plaintiff's members, the dispatching companies, but rather by the dispatching companies' individual members. Defendants assert that because individual owner-operators cannot be members of BCAC, the present action is not authorized by plaintiff's certificate of incorporation. Defendants also move to preclude plaintiff from offering evidence on the issue of damages for failure to provide discovery.

Plaintiff cross-moves for leave to file a third amended complaint, bringing a class action on behalf of owner-operators of black cars who paid the registration fees. The proposed plaintiffs include i) Black Car Assistance Corporation, ii) certain members of BCAC who paid registration fees on behalf of their individual members, iii) certain owner-operators affiliated with BCAC members who paid the registration fees directly, and iv) a dispatcher who is not a member of BCAC but who paid registration fees on behalf of its "drivers."¹⁴ The proposed third amended complaint reasserts plaintiffs' claims that the for-hire vehicle registration fees are excessive, that the fees are discriminatory based upon the residence of the owner-operator, and that Ordinance No. 113-2005 was adopted in violation of the notice and publication requirements. The proposed

¹⁴Proposed plaintiff Shamrock Dispatch, Inc. claims to have paid Nassau County for-hire vehicle registration fees. It is not clear whether Shamrock is the owner of the for-hire vehicles for which the registration fees were paid or whether Shamrock paid the fees on behalf of owner-operators which it dispatches.

third amended complaint adds a claim for discrimination based upon the county in which the for-hire vehicle is registered. Pursuant to 42 U.S.C. §1983, the proposed third amended complaint asserts a claim for damages for these alleged civil rights violations in the amount of the registration fees paid. The proposed third amended complaint seeks to add a claim for attorney misconduct pursuant to Judiciary Law §487. Plaintiffs allege that Assistant County Attorneys Nancy Nicotra and Tatum Fox made false statements to the court to the effect that the Nassau County for-hire vehicle registration fees would be used to conduct background checks of the owners of these vehicles. Since plaintiff includes within the proposed class drivers who paid not only registration and renewal fees but also fines, it appears to seek to recover fines which were paid for violation of the Ordinance. Plaintiff also moves for partial summary judgment as to liability with respect to its discrimination, excessive fee, and lack of notice claims.

To establish standing, an organizational plaintiff must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts, and that the case would not require the participation of individual members (*Ass'n of Nurse Anesthetists v. Novello*, 2 NY3d 207, 211 [2004]). An organization is "representative" of the organizational purposes it asserts, if the interests which the organization seeks to protect are germane to the purposes of the organization (*Dental Society v. Carey*, 61 NY2d 330, 333 [1984]). Furthermore, the organization must be an appropriate one to act as the representative of the group whose rights it is asserting (*Id.*).

Where the members of a trade association have organizational standing to sue on behalf of their individual members, the trade association itself should also have such standing. Because Black Car's members appear to have organizational standing to sue on behalf of their members,

BCAC has standing to sue on behalf of owner-operators who are dispatched by its members. While any illegal registration fees which are recovered must be refunded to the party who paid them, the case will not require the participation of individual owner-operators.

Defendants note that BCAC's certificate of incorporation provides that membership in BCAC is limited to corporations which are engaged in the business of "non-medallion two-way radio or other over the air dispatched ground transportation service provided on a contract basis." Since owner-operators are not engaged in the business of "over the air" dispatching, they are not eligible to become members of BCAC. However, the reason for this restriction on corporate membership is that for certain aspects of ground transportation service, the interests of the dispatcher may differ from those of the owner-operator. For example, dispatchers and owner-operators may differ on such issues as the rates for transportation service, the maximum number of hours a driver may be required to be on call, and the amenities required to be provided in the vehicle. However, defendants offer no reason why the interests of dispatcher and owner-operator should differ as to the fee for registering the for-hire vehicle. The court concludes that a challenge to allegedly discriminatory registration fees is germane to BCAC's purposes. Because BCAC is an appropriate organization to represent owner-operators with respect to challenging registration fees, it has standing to bring the present action. *Accordingly, defendants' motion to renew or reargue plaintiffs' motion for leave to serve a second amended complaint is denied.*

The court next proceeds to plaintiffs' motion for partial summary judgment. On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384

[2005]). If this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). However, failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*).

Licensing fees must bear a reasonable relation to the cost of the licensing and regulation program which they are intended to defray (*Paramount Film Distributing Corp. v. New York*, 30 NY2d 415, 419 [1972]). In determining the reasonableness of a licensing fee, the court must also consider whether the program of regulation is likely to further the interests of both the industry and the public (*Id.* at 422). To establish a prima facie case as to its excessive registration fee claim, plaintiff must show that the Nassau County for-hire vehicle registration fee bore no reasonable relation to the cost of Nassau County's for-hire vehicle regulation program. The court concludes that plaintiff has not made this showing as to either the \$750.00 fee or the \$300.00 fee which was subsequently enacted.

Plaintiff argues that it has met its burden simply by establishing that defendants had no authority to conduct background investigations of for-hire vehicle drivers whose vehicles were registered outside the County because the County was not authorized to enact ordinances regulating licensing. However, because of the presumption of validity, the court must assume that the County incurred significant costs enforcing the prohibition on unregistered for-hire vehicles operating in Nassau County. Contrary to plaintiffs' position, the cost of enforcement is properly considered as a component of the cost of regulation (See *Fairhaven Apts. v. North Hempstead*, 8 AD3d 425 [2d Dept 2004]).

To establish a prima facie case as to its claim of discrimination based upon the licensing jurisdiction in which a for-hire vehicle is registered, plaintiff must show that the fee for registering “out of county” vehicles, as compared to the fee for registering vehicles licensed or registered by a municipality within the county, was disproportionately high, considering the relative cost of regulation. Plaintiff appears to assume that Ordinance No. 113-2005 was “preempted” by VTL §498, and the displacing of local law is tantamount to a legislative determination that the Nassau County Ordinance was discriminatory.

The Court notes that the “declaration of legislative findings and intent” states, “It is the intent of the legislature that the regulatory system established by this act shall govern only vehicles seeking to provide for-hire transportation in jurisdictions in which they are not otherwise licensed to operate, and that existing provisions of law governing the licensure of vehicles providing for-hire transportation within a jurisdiction shall not be affected thereby.” This declaration does not imply that VTL §498 is intended to displace county regulation of registration of for-hire vehicles. Because local Ordinances carry a strong presumption of validity, the burden is on the challenger to show that an Ordinance is preempted (*Zorn v Howe*, 276 AD2d 51 [3d Dept 2000]). Interpreting VTL §498's legislative scheme as a whole, it appears that the purpose of the statute is to require “reciprocity” based upon for-hire vehicle safety and security standards rather than maximum registration fees. Thus, the clear intent of the statute is that Nassau and Westchester Counties will continue to regulate the registration of for-hire vehicles. The state mandate that reciprocity be based upon safety and security standards does not imply that the prior regulation, reciprocity based upon maximum registration fees, was discriminatory. Moreover, in the absence of evidence to the contrary, the court must presume that the

municipalities within Nassau County which license for-hire vehicles perform significant regulatory functions, such as background checks, which benefit residents throughout the County. The Court concludes that plaintiff has failed to establish a prima facie case as to discrimination based upon the licensing jurisdiction in which a for-hire vehicle is registered.

To establish a prima facie case of discrimination based upon county of residence, plaintiff must show that owner-operators who resided outside Nassau County were treated differently, that is, paid higher for-hire vehicle registration fees, than Nassau County residents (*In re Gordon*, 48 NY2d 266, 271[1979]). The court notes that plaintiff has failed to show disparate treatment based upon residence because it has failed to show any correlation between the place of residence of the owner of the for-vehicle and the jurisdiction where the vehicle is registered.

Moreover, even assuming that owner-operators of for-hire vehicles who resided outside Nassau County were treated differently, plaintiff has failed to show that disparate treatment was not justified. The privileges and immunities clause of the United States Constitution was promulgated to create a national economic union, with one citizenry, by placing the citizens of each state on an equal footing with citizens of other states, as far as the advantages resulting from citizenship in those states are concerned (*New York v. New York*, 94 NY2d 577, 592 [2000]). One of the privileges which the clause guarantees to citizens of other states is that of doing business in a state on terms of substantial equality with the citizens of that state. Plaintiff points to no similar provision in the New York State Constitution placing the citizens of a county within the state on an equal footing with citizens of other counties. Moreover, the privileges and immunities clause itself is not absolute (*Id* at 593). Thus, in imposing a licensing fee, a municipality may distinguish between residents and nonresidents if there is a substantial reason for the difference in treatment

and the discrimination practiced against nonresidents bears a substantial relationship to the objectives of the regulatory program (Cf. *New York v. New York*, supra, 94 NY2d at 593). The Court notes that plaintiff has failed to show that there was no substantial reason for higher registration fees for nonresidents, or that there was no substantial relationship between the higher fees and the objectives of the for-hire vehicle registration regulatory program.

The Court next proceeds to plaintiffs' claim of violation of the notice and publication requirements. Municipal Home Rule Law §20(5) provides that if a county does not have an elective chief executive officer, no local law shall be passed by the legislature until a public hearing on the law has been held. The statute requires that the public hearing be held on at least three days notice (Municipal Home Rule Law §20[5]). Section 20 does not impose similar legislative public hearing or notice requirements on the legislatures of counties which have elective chief executive officers. However, §105 of the Nassau County Charter provides that no Ordinance shall be passed unless it has been on file with the clerk of the legislature in final form for at least one week, and unless it is entered on an agenda posted in a conspicuous place in the county court house at least one week prior to passage. The Ordinance must also have been published at least once in the official newspaper not less than four days prior to the meeting at which action is to be taken. Posting and publication are methods reasonably calculated to reach the press, opponents of particular legislation, "legislature-watchers," or others who might be interested in the proposed law (*Lewis v. Klein*, 45 NY2d 930, 932 [1978]). However, "Courts are reluctant to question the internal procedures in the general law making process" (Id). Technical compliance with notice provisions is not essential to the validity of a municipal enactment, provided the notice given complies with the substance of the provision (*41 Kew Gardens Road*

Associates v Tyburski, 124 AD2d 553, 554 [2d Dept 1986]).

In opposition to plaintiffs' motion for summary judgment with respect to its claim for violation of the notice and publication requirements, defendants submit the affidavit of William Geier, Clerk of the Nassau County Legislature.¹⁵ In his affidavit, Mr. Geier states that Ordinance No. 113-2005 was on file in his office for at least one week prior to the legislative meeting. Mr. Geier further states that the Ordinance was posted in the County Courthouse, the Nassau County Office Building, and the County Executive Building at least one week prior to the meeting. Mr. Geier further states that the Ordinance was published in *Newsday* on October 7, 2005, more than a week before the legislative meeting, which took place on October 17, 2005. Plaintiff has submitted no evidence to rebut these allegations as to notice and publication. Accordingly, plaintiffs' motion for partial summary judgment as to liability on its first four causes of action is **denied**.¹⁶

CPLR §3212(b) provides that if it appears that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion. This is known as the court's power to "search the record" and may be granted only with respect to a claim on which summary judgment is sought (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373 [2005]). Upon searching the record, the Court concludes, as a matter of law, that Ordinance No. 113-2005 was enacted in accordance with the notice and

¹⁵The affidavit is Ex. A to defendants' opposition to motion for summary judgment.

¹⁶Because the court concludes that plaintiff has not established a prima facie entitlement to judgment on the merits, it does not reach defendants' arguments that the notice of claim statute bars relief and many of the individual claims are untimely.

publication requirements of §105 of the Nassau County Charter.¹⁷ Accordingly, *partial summary judgment is granted to defendants and Count III of the second amended complaint is dismissed.*

CPLR §3025(b) provides that leave to amend shall be freely granted. However, leave to amend may be denied where the proposed pleading is plainly without merit (*Thomas Crimmins Contracting Co. v Cayuga Construction Co.*, 74 NY2d 166 [1989]). In ruling upon plaintiffs' motion for leave to amend, the Court will consider the merit of those claims not previously asserted.

CPLR §901 sets forth the prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all if 1) the class is so numerous that joinder of all members is impracticable, 2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members, 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, 4) the representative parties will fairly and adequately protect the interests of the class, and 5) class action is superior to other available methods for the fair and efficient adjudication of the controversy.

BCAC alleges that its members dispatch approximately 10,000 drivers daily in the New York metropolitan area. While it is not clear that 10,000 individual owners paid the Nassau County registration fee, the court will assume for the purposes of this motion to amend that plaintiff can satisfy the numerosity requirement. It appears that plaintiff's claim as to the excessiveness and discriminatory nature of the for-hire vehicle registration fees are typical of the

¹⁷Because Ordinance No. 113-2005 replaces Ordinance No. 90-2003, it is not necessary to determine whether the latter Ordinance was enacted in compliance with the notice and publication requirements.

class. Consistent with the court's ruling with respect to the issue of standing, it appears that Black Car, and the proposed representative parties, will fairly and adequately protect the interests of the class. However, it does not appear that common questions predominate over questions affecting individual members or that a class action is the superior method for the adjudication of the controversy.

Where a taxing statute or municipal rule is invalidated, payment of a tax or fee cannot be recovered unless the payment was involuntary (*Video Aid Corp. v. Wallkill*, 85 NY2d 663, 666 [1995]). Payment under express protest is an indication that a tax is not paid voluntarily. Where protest has been interposed, the municipality is notified that it may be obliged to refund the taxes or fees and must be prepared to meet that contingency (Id). Otherwise, moneys remitted as taxes or fees are applied to authorized public expenditures, and financial provision is not made for refunds. Similarly, if payment of the tax or fee is made under actual duress or coercion, the failure to formally protest will be excused (Id). In reality, the payment of a tax or municipal fee is by nature involuntary. Whether a payment is considered involuntary in the context of an action for reimbursement of taxes or fees to a governmental entity is a question of intention to be resolved upon consideration of the totality of circumstances (Id).

Assuming that plaintiff were to establish that the for-hire vehicle registration fees were excessive or discriminatory, an owner-operator could not recover a refund of registration fees paid unless he or she could establish that the fee was paid involuntarily. The court rejects plaintiffs' argument that defendants are estopped from arguing that payment of the registration fees was not involuntary. In defendants' memorandum of law in opposition to plaintiffs' motion for a preliminary injunction, defendants' counsel stated "Should plaintiff prevail in this matter,

each member of Black Car Assistance Corporation, who paid the registration fees, would be due a refund of its registration fee less five dollars.”¹⁸ The court interprets “prevailing” as meaning not only that the registration fee was excessive or discriminatory but also that payment of the fee was involuntary. Thus, counsel’s statement was not an informal judicial admission that would be binding upon the defendants.

Plaintiff has not alleged that any owner-operator paid the registration fee under express protest. A licensing fee is paid under duress if failure to pay the fee results in an absolute bar from engaging in an occupation (*Paramount Film Distributing Corp. v. New York*, supra, 30 NY2d at 419. An owner-operator who failed to pay the Nassau County for-hire vehicle registration fee would have been prohibited from picking up or dropping off passengers in Nassau County. However, without evidence as to what percentage of an individual owner-operator’s business was comprised of transportation originating or terminating in Nassau County, the Court could not make a determination as to whether the owner-operator’s payment of the registration fee was involuntary. Thus, the court concludes that the common questions of excessiveness and discrimination do not predominate over the individual question of involuntariness.

Class certification is generally disfavored where governmental operations are involved and subsequent plaintiffs will be adequately protected under the principle of stare decisis (*Tosner v. Hempstead*, 12 AD3d 589, 590 [2d Dept 2004]). However, the “government operations” rule does not apply where the purported class consists of a large number of identifiable individuals seeking monetary damages (*Id.*). Nevertheless, an action has already been commenced by a trade

¹⁸Defendants’ memorandum of law in opposition to plaintiff’s motion for preliminary injunction at 10.

association whose members contract with the vast majority of class members and may be expected to have notified them of the pendency of the action. Moreover, pursuant to the declaratory judgment statute, the court has ample discretion to order payment of damages to BCAC members and individual owner-operators directly without the necessity of a class action (CPLR §3001; *Great Neck Plaza v. Rent Guidelines Board.*, 60 A.D.2d 593 [2d Dept 1977]). Thus, it does not appear that a class action is superior to other available methods for the fair and efficient adjudication of the action. *Accordingly, plaintiff's motion for leave to file a third amended complaint is denied with respect to the allegations seeking certification as a class action.*

Judiciary Law §487 provides in pertinent part that, “An attorney or counselor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party forfeits to the party injured treble damages, to be recovered in a civil action.” In order to constitute a violation of the statute, the misrepresentation by the attorney must be intentional (*Izko Sportswear Co. v. Flaum*, 25 AD3d 534, 537 [2d Dept 2006]). The Court is satisfied that the misstatements by defendants’ counsel with regard to the purpose for which the registration fees would be used was not intentional. While counsel are cautioned to be more careful as to the accuracy of representations made to the court, it is clear that a claim for attorney misconduct has not been stated. *Accordingly, plaintiffs’ motion for leave to file a third amended complaint is denied with respect to the cause of action pursuant to Judiciary Law §487.* Except to the extent denied above, plaintiffs’ motion for leave to file a third amended complaint is **granted**. Plaintiff may serve a third amended complaint in compliance with the above within 30 days of service of a copy of this order.

On February 16, 2007, defendants served their second request for discovery and inspection. The request seeks documents of specific BCAC members, relating to i) method of payment of Nassau County for-hire vehicle registration fees, ii) copies of the New York State registration for each for-hire vehicle registered with the County, iii) "miscellaneous fees" incurred by Carey Limousine, NY, iv) plaintiffs' corporate charter and related documents, and v) communications between plaintiff and its members. Defendants move to preclude plaintiff from offering any evidence as to damages for failure to comply with the request for discovery and inspection.

In view of the public policy barring recovery of fines and penalties, plaintiffs' damages must be limited to illegal for-hire vehicle registration fees involuntarily paid by Black Car members and individual owner-operators (*Abraham v Rockwell Intern'l Corp.*, 326 F.3d 1242 [Fed. Cir. 2003]). Thus, the request for production is overboard to the extent that it seeks discovery with respect to the payment of fines for violation of the Nassau County Ordinance. The court notes that plaintiff has provided defendants with a detailed table showing car number, Nassau County registration number, amount of registration fee paid, and name of owner-operator for a large number of vehicles. Plaintiff has also provided defendant with a CD-rom, purportedly containing much detailed information concerning registration fees paid by plaintiff's members. Moreover, the relevant information relating to for-hire vehicles registered with the County is presumably in the Office of Consumer Affairs' possession. Information concerning Department of Motor Vehicle registration of for-hire vehicles registered with the County may be obtained by defendants directly from the Department or from other sources. The Court also notes that plaintiff has provided defendants with its certificate of incorporation and the by-laws of the corporation.

Thus, as a matter of discretion, the court **declines** to compel plaintiff to make any further production of corporate documents or documents containing for-hire vehicle registration information (CPLR §3126).

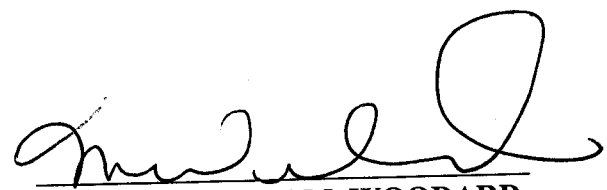
Communications between plaintiff and its members concerning the action might be relevant to the issue of whether for-hire vehicle registration fees were voluntarily paid by the members and also by the owner-operators whom they dispatch. The relevance of such communications is not diminished by the Court's refusal to allow the case to proceed as a class action. Accordingly, defendants' motion to preclude is **granted** only to the extent that plaintiff is directed to produce all written communications with its members concerning the present action.

The parties are directed to appear for a Certification Conference on January 22, 2008 at 11:00 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 11, 2007
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

G:\Black Car Assistance Corp v. The County of Nassau.wpd

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