

<b>City of New York v Transportazumah LLC</b>
2011 NY Slip Op 32748(U)
October 3, 2011
Supreme Court, New York County
Docket Number: 401763/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

*JAFFE* BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 401763/2010

CITY OF NEW YORK

vs  
TRANSPORTAZUMAH LLC

Sequence Number : 007

VACATE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

*CAL # 28*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for *vacate*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

5, 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

OCT 04 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: *10/3/11* OCT 03 2011

*[Signature]*  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X

THE CITY OF NEW YORK,

Index No. 401763/10

Plaintiff,

Motion Date: 7/12/11

-against-

Motion Seq. No.: 007

**DECISION AND ORDER**

**FILED**

TRANSPORTAZUMAH LLC,

**OCT 04 2011**

Defendant.

-----X

NEW YORK  
COUNTY CLERK'S OFFICE

BARBARA JAFFE, J.S.C.:

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By notice of motion dated August 18, 2010, defendant moves pursuant to CPLR 3211(a)(2) for an order dismissing the complaint for lack of subject matter jurisdiction, and for an order vacating my prior decision and order dated March 9, 2011, and the preliminary injunction granted by another justice of this court by decision and order dated July 19, 2010. Plaintiff opposes.

I. BACKGROUND

The underlying facts in this case are set forth in my March 2011 decision and order in

which I granted plaintiff's motion for summary judgment, denied defendant's cross motion to dismiss, declared that plaintiff is in violation of New York City Administrative Code § 6-202, and permanently enjoined defendant from operating its bus service within the City of New York without obtaining a City franchise. I held that defendant's bus service is a bus line as defined by New York State and New York City laws, that defendant was operating as a common carrier and not as a charter service, that defendant was operating a bus line, and that it is required to obtain a franchise before operating its bus line within City. I implicitly rejected defendant's contention that it is a transportation broker.

## II. CONTENTIONS

Defendant now argues that federal law preempts New York State and City laws relating to the rates, routes or services of freight forwarders or brokers, alleging that it is a broker under federal law and that Administrative Code § 6-202 is unenforceable against it. It also contends that as federal law applies, this court has no subject matter jurisdiction over plaintiff's complaint or authority to even decide the preemption issue. (Mem. of Law, dated May 17, 2011).

Plaintiff asserts that even if federal law preempts City law, the court nonetheless has subject matter jurisdiction over plaintiff's complaint and defendant's defenses, and that defendant waived the defense of federal preemption by failing to raise it in its answer. It also denies that federal law preempts Administrative Code § 6-202 as applied to defendant as defendant is neither a freight forwarder nor broker. (Mem. of Law, dated June 1, 2011). In reply, defendant reiterates its prior arguments. (Reply Mem. of Law, dated June 7, 2011).

### III. ANALYSIS

#### A. Waiver

Defendant did not waive its defense based on preemption by failing to plead it in its answer, having raised it here, thereby affording plaintiff an opportunity to address it. (*See eg People ex rel. Spitzer v Applied Card Sys., Inc.*, 27 AD3d 104, 109 n3 [3d Dept 2005], *lv denied* 7 NY3d 741 [2006] [defense that federal Truth in Lending Act preempted state claims not waived by failure to raise it as affirmative defense as it was used as defense in summary judgment motion and no prejudice resulted]; *Kirilescu v Am. Home Prods. Corp.*, 278 AD2d 457 [2d Dept 2000], *lv denied* 96 NY2d 933 [2001] [same]).

Moreover, this court has the authority to determine whether plaintiff's claims against defendant are preempted by federal law. (James Lockhart, Annotation, *Preemptive Effect of Federal Aviation Administration Authorization Act*, 49 USCA §§ 14501[c], 41713[b][4], 29 ALR Fed 2d 563, § 3; *see eg Retail Shoe Health Comn. v Reminick*, 62 NY2d 173 [1984], *cert denied* 471 US 1022 [1985] [well-established that even if federal statute preempts state law, state court may decide issues necessary to resolve state claims]; *Kings Choice Neckwear, Inc. v DHL Airways, Inc.*, 2003 WL 22283814 [SD NY 2003] [remanding case back to New York State Supreme Court; "(i)t is well established that a defense relying on the preemptive effect of a federal statute does not normally provide a basis for removal" to federal court, and "as a general matter, where there is no diversity jurisdiction, it is for a state court to decide whether federal law provides a defense to state-law claims by preempting those claims.").

#### B. Preemption

Pursuant to 49 USC 14501(b)(1) (the Act):

[N]o State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

Pursuant to 49 USC § 13102(2), a broker is defined as “a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.” A “motor carrier” is “a person providing motor vehicle transportation for compensation,” and “transportation” includes the movement of passengers or property. (49 USC 13102[14], [23]).

Based on the facts set forth in my March 2011 decision and order, which defendant does not contest here, defendant engages in none of the conduct which would entitle it to claim status as a broker. Rather, it owns and operates a bus line for compensation by leasing buses, directing and controlling the bus drivers' routes, organizing the routes, schedules, and fares, and collecting and retaining money from passengers on the buses. Moreover, “[o]ne is not precluded from being a motor carrier by the mere fact that none of its own motor vehicles are used in the transporting of goods.” (*Custom Cartage, Inc. v Motorola, Inc.*, 1999 WL 965686 [ND Ill 1999], and cases cited therein). Defendant has thus not demonstrated that it is a broker under the Act as opposed to a motor carrier.

To the extent defendant claims it is a motor carrier for compensation, jurisdiction of the Secretary of Transportation and the Surface Transportation Board in enforcing the Act is limited to the transportation of or procurement of transportation of passengers, property, or both by motor carrier between a place in one state and a place in another state or between a place in one

state and another place in the same state through another state. (49 USC 13501[1]; *see also In re Grand Jury Subpoena Duces Tecum Issued to Southern Motor Carriers Rate Conference, Inc.*, dated Aug. 13, 1975 [ND Georgia 1975] [regulation of intrastate transportation exempt from Act's authority]). The Secretary and Board also lack jurisdiction over brokers for motor carriers of passengers (49 USC 13506[a][14]), and, unless necessary, have no jurisdiction over transportation provided entirely within a municipality (49 USC 13506[b][1]).

In *Exec. Transp. Sys. LLC v Louisville Regional Airport Auth.*, a transportation services provider sued a regional airport authority and a local government for injuries allegedly caused by their imposition of certain regulations and ordinances on its services. It asserted that the defendants' local regulations and ordinances were preempted by the Act and thus unenforceable against it. The court found, however, that absent any evidence that the plaintiff's transportation services were operated interstate, it did not establish that the Act applied, thus failing to show that it was subject to federal jurisdiction or that the Act preempts the defendant's local laws. (678 F Supp 2d 498 (WD Ky 2010)).

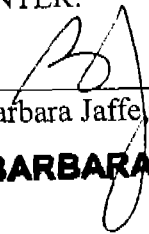
Here, as it is undisputed that defendant's bus line operated wholly within New York City, defendant fails to demonstrate that the Act applies to it, thereby rendering moot its claim that the Act preempts Administrative Code § 6-202. (*See eg Kozak v Hillsborough Pub. Transp. Commn.*, 695 F Supp 2d 1285 [MD Fla 2010], *aff'd* 644 F3d 1347 [11<sup>th</sup> Cir 2011] [as plaintiff did not establish that it provided services covered by Act, defendant's authority to require plaintiff to obtain permit and certificate of public necessity and convenience before providing services not preempted by Act]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion is denied in its entirety.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: October 3, 2011  
New York, New York

OCT 03 2011

**FILED**  
OCT 04 2011  
NEW YORK  
COUNTY CLERK'S OFFICE