

XYZ Two Way Radio Serv., Inc. v City of New York
2015 NY Slip Op 31701(U)
September 8, 2015
Supreme Court, Queens County
Docket Number: 5693/15
Judge: Allan B. Weiss
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MEMORANDUM

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

XYZ TWO WAY RADIO SERVICE, INC. AND
ELITE LIMOUSINE PLUS, INC.,

Index No.: 5693/15

Petitioners,

Motion Date: 7/20/15

-against-

Motion Seq. No.: 1

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

Respondents.

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

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

There are two relevant classes of vehicles that are available for passenger hire in New York City: (1) yellow medallion taxis and (2) non-medallion for hire vehicles, including black cars, luxury limousines, and livery vehicles (collectively For-Hire Vehicles or FHV's). A medallion is a yellow plate issued by the TLC and purchased at an auction that is fastened to the hood of the taxi. (*See*, NYC Adm Code §19-502 [h].)

NYC Adm Code §19-502 (l) provides: “ ‘Taxi’, ‘taxicab’ or ‘cab’ means a motor vehicle carrying passengers for hire in the city, designed to carry a maximum of five

passengers, duly licensed as a taxi cab by the commission and permitted to accept hails from passengers in the street.” (*See, Greater New York Taxi Ass'n v. New York City Taxi and Limousine Com'n*, ___ AD3d ___, 2015 WL 3885462.) 35 RCNY §51-03, ”Definitions,” contains references to “street hails,” which, the court infers, are those made through calling out, whistling, or gestures by passengers near the curb.

NYC Code § 19-504(a)(1) provides in relevant part: “No motor vehicle other than a duly licensed taxicab shall be permitted to accept hails from passengers in the street.” Yellow medallion taxis can pick up passengers who hail them anywhere in New York City and also have certain exclusive rights to pick up passengers through hails in particular areas of New York City. (*See, Greater New York Taxi Ass'n v. State* 21 NY3d 289 [2013].) The part of Manhattan that is south of East 96th Street and West 110th Street, an area where yellow medallion taxis have exclusive rights, is known as the central business district. (*See, Greater New York Taxi Ass'n v. State*, *supra*.)

Green taxis, not required to have a medallion and created in 2011 primarily to service street hails in the outer boroughs, can answer street hails anywhere in New York City except in areas reserved for yellow medallion taxis.

“In contrast to yellow cabs, livery vehicles are prohibited from picking up street hails and may accept passengers only on the basis of telephone contract [sic] or other prearrangement (see Administrative Code of City of N.Y. § 19–507[a] [4]). The livery client contacts a ‘base station’ that dispatches a livery vehicle to the requested location (Administrative Code of City of N.Y. § 19–511).” (*Greater New York Taxi Ass'n v. State*, *supra* at 297.) Black cars cannot pick up hailing passengers anywhere in the City of New York. “No driver of any for-hire vehicle shall accept a passenger within the city of New York by means other than prearrangement with a base unless said driver is operating either a (i) taxicab licensed by the TLC with a medallion affixed thereto, or (ii) a vehicle with a valid HAIL license and said passenger is hailing the vehicle from a location where street hails of such vehicles are permitted.” (Chapter 9 of the Laws of 2012, §11.) (A hail license essentially authorizes a vehicle to pick up passengers by street hail in New York City except in areas reserved for yellow medallion taxis. (See, Chapter 9 of the Laws of 2012, §12(r).) Black cars must be dispatched through their affiliated base station with passenger pick-up scheduled for a specific time and place. “A Driver must not solicit or pick up Passengers other than by prearrangement through a licensed Base, or dispatch of an Accessible Vehicle.” (35 RCNY § 55-19.)

Thus, under existing law and regulations, yellow medallion taxis and green taxis in unrestricted areas are the only vehicles authorized to transport passengers who hail

them on the street, and black cars are only permitted to service passengers who make pre-arrangements with a base station.

In May 2011, the practical difference between a hail and a pre-arrangement became blurred with the introduction of smart phone applications that operate in the FHV sector. While the number of cars available to respond to an e-hail and the speed of the response made the e-hail in some ways similar to the street hail, nevertheless, the TLC permitted FHV vehicles to use the smartphone apps. According to Joanne Rausen, the Assistant Commissioner for Data and Technology of the TLC : “ In order to encourage the development of new technologies and services, while at the same time protecting the riding public, TLC permitted app use in the FHV sector on the condition that app providers;(1) obtain a TLC license issued FHV base license; or (2) enter into an agreement with an existing TLC-licensed base to act as a referral and advertising service for such base.” Rausen states that a survey has shown that “as many as 42 percent of all FHV’s are affiliated with bases having passenger-facing smartphone apps, and passengers using smartphones to schedule FHV service can do so by utilizing one of the 76 different apps reported to TLC by 134 different bases.”¹¹⁰ AD3d 618

The New York City Taxi and Limousine Commission (TLC) also adopted a pilot program which allowed yellow medallion taxis to arrange passenger pickups by way of smart phone applications. According to Rausen, “Accessing medallion taxis through an app is a form of pre-arrangement,” and “[n]othing in the governing statutes or rules prohibits medallion taxis from accepting rides via pre-arrangement.” The pilot program withstood a legal challenge by members of the black car industry. (*See, Black Car Assistance Corp. v. City of New York*, 110 AD3d 618 [2013].) The Appellate Division, First Department, held that (1) the pilot program did not violate the TLC’s authority under the city charter to regulate and supervise experimentation; (2) “the program complies with Administrative Code § 19–511(a) requiring the licensing of communications systems upon such terms as TLC deems advisable,” and (3) the pilot program did not violate Administrative Code § 19–507(a)(2), which prohibits drivers from refusing, “without justifiable grounds, to take any passenger or prospective passenger to any destination within the city.”

On January 29, 2015, the TLC approved new rules dealing with the licensure of e-hail applications in taxis. The new rules concerned, inter alia, what the TLC called an “E-hail” and an “E-Payment.” Section 1 of the Rules provided in relevant part: “ E-Hail is a Hail requested through an E-Hail Application.” “ E-Hail Application or E-Hail App. A Software program licensed by the TLC under Chapter 78 residing on a smartphone or other electronic device ***.” “Hail. A request, either through a verbal (audio) action such as calling out, yelling, or whistling, and/or a visible physical action, such as raising one’s

hand or arm, or through an electronic method such as an E-Hail App, for on-demand Taxicab or Street Hail Livery service at the metered rate of fare as set forth in §58-26 and §82-26 of these Rules by a person who is currently ready to travel.”

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

Uber does not regard its drivers as employees, and it does not operate, lease, or own its vehicles. The petitioners allege that Uber purports to “partner” with its drivers and that some of these drivers, affiliated with other ground transportation companies, make a side deal with Uber to drive its customers while also driving for the other companies. Nearly all of Uber’s drivers allegedly use black cars.

The petitioners allege that they conduct black car businesses which dispatch vehicles from physical bases to provide pre-arranged services, but not services requested through hails. The petitioners further allege that Uber “lures” their drivers away from their legitimate black car businesses by enabling the drivers to respond to hails. The loss of drivers and customers has allegedly caused the petitioners to lose substantial revenue.

On May 8, 2015, the petitioners began the instant action, seeking to protect themselves from further economic harm. They have seized upon the TLC’s promulgation of rules on or about January 29, 2015 which permit yellow and green taxis to pick up passengers via “e-hails” using a TLC approved smartphone application. The petitioners assert that the new rules “make clear that an e-hail is a hail—not pre-arrangement,” and they argue that black car companies like Uber may not pick up passengers via a hail. The petitioners seek to compel the TLC to enforce rules and regulations prohibiting black car companies like Uber from responding to hails.

The court notes initially that the petitioners have brought a hybrid action for a declaratory judgment and an Article 78 proceeding. (*See, e.g., New York State Nurses Ass'n v. Erie County Medical Center Corp.*, 126 AD3d 1437 [2015].) The proper procedural vehicle for challenging the TCL's alleged failure to enforce the law is an Article 78 proceeding, not an action for a declaratory judgment. (*See, Newton v. Town of Middletown*, 31 AD3d 1004 [2006].) Moreover, the Article 78 proceeding renders the cause of action for declaratory relief duplicative and unnecessary, warranting the dismissal of the latter. (*See, Gable Transport, Inc. v. State*, 29 AD3d 1125 [2006].) "A trial court may decline to entertain an action for declaratory judgment where other adequate remedies are available, such as a CPLR article 78 proceeding to challenge an administrative determination ***." (*Gable Transport, Inc. v. State, supra* at 1128.)

The petitioners have brought an Article 78 proceeding in the nature of mandamus to compel. (*See, CPLR 7801, 7803*[1]; *Regini v. Board of Educ. of Bronxville Union Free Schools*, 128 AD3d 1073 [2015].) "The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought ***." (*Ogunbayo v. Administration for Children's Services*, 106 AD3d 827 [2013]; *Daniels v. Lewis*, 95 AD3d 1011 [2012] [failure to state a cause of action]). "Mandamus to compel is appropriate only where a clear legal right to the relief sought has been shown, the action sought to be compelled is one commanded to be performed by law and no administrative discretion is involved" (*New York Civil Liberties Union v. State of New York*, 3 AD3d 811, 813-814 [2004].) *Clayton v. New York City Taxi & Limousine Com'n*, 117 AD3d 602 [2014] [discretionary government function--motion to dismiss granted].) Mandamus may be obtained "to compel acts that officials are duty-bound to perform." (*Klostermann v. Cuomo*, 61 NY2d 525, 540 [1984]; *Gonzalez v. Village of Port Chester*, 109 AD3d 614 [2013][grant of taxicab licenses was not a ministerial act that could be compelled by mandamus].)

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

"[M]andamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial ***." (*New York Civil Liberties Union v. State*, 4 NY3d 175, 184 [2005].) "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial

act envisions direct adherence to a governing rule or standard with a compulsory result ***.” (*New York Civ. Liberties Union v. State of New York*, *supra* at 184; *Gonzalez v. Village of Port Chester*, *supra*.) “The act sought to be compelled must be ministerial, nondiscretionary and nonjudgmental, and be premised upon specific statutory authority mandating performance in a specific manner ***.” (*Brown v. New York State Dept. of Social Services*, 106 AD2d 740, 741 [1984]; *New York Civil Liberties Union v. State of New York*, *supra*.)

In deciding this case, the court is mindful that it must be “ careful to avoid *** the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.” (*Klostermann v. Cuomo*, *supra* at 541; *Gonzalez v. Village of Port Chester*, *supra*.) It is not the court’s function to adjust the competing political and economic interests disturbed by the introduction of e-hail apps.

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

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

introduction of new smart phone technology in the ground transportation industry, and has not “abdicated” its responsibilities to enforce the law.

This case fundamentally concerns an administrative determination to classify and treat passenger communications to companies like Uber as a type of pre-arrangement rather than as a hail. The parties did not delve into this particular issue too deeply, and the court expresses no opinion here about the legality of the administrative determination. It is enough for the court to find that this discretionary matter lies at the heart of this case and intertwines with any duty of the TLC to enforce its rules and regulations pertaining to hails. It is enough for the court to find that this is not a case where no administrative discretion is involved (*see, New York Civil Liberties Union v. State of New York, supra*), but rather one involving the “the exercise of reasoned judgment.” (*New York Civ. Liberties Union v. State of New York, supra* at 184.) Mandamus “does not lie to compel an act which involves an exercise of judgment or discretion ***” (*Brusco v. Braun*, 84 NY2d 674, 679 [1994].), and the petition is not adequate because it does not involve a “purely ministerial act.” (*Rose Woods, LLC v. Weisman, supra* at 802.)

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

Finally, it is to be noted that although not mentioned by the petitioner on or about April 24, 2015, the TLC published proposed rules pertaining to the dispatch of FHV's, including rules pertaining to electronic dispatch via apps. The TLC approved the rules on June 22, 2015, and the rules, which include a definition of an electronic dispatch, took effect on July 29, 2015. The rules provide that all entities that dispatch vehicles for FHV vehicles, including by way of smartphone applications, must obtain a license and must conform to uniform protection and safety standards. These are the rules relevant to the petitioners' case.

Accordingly, that branch of the cross motion which is for an order pursuant to CPLR 3211(a)(7) and CPLR 7804(f) dismissing the petition is granted. The remaining branches of the motion are denied as moot.

Settle order.

Dated: 9/8/15

J.S.C.