Fokhor v Mega Funding Corp.
2019 NY Slip Op 33866(U)
November 7, 2019
Supreme Court, Queens County
Docket Number: 701403/2019
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan Justice IA Part 10

Mohammed Fokhor, Plaintiff, x

- against -

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

Defendants. x

Index Number 701403 2019

Motion Date July 15, 2019

Motion Seq. No. 4

The following papers EF numbered below read on this motion by defendant City of New York and defendant New York City Taxi and Limousine Commission for an order pursuant to CPLR 3211(a) (2), (5), and (7) dismissing the complaint against it

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	23-32
Answering Affidavits - Exhibits	44-46
Reply Affidavits	
Memorandum of Law	31

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

I. The Allegations of the Complaint

Plaintiff Mohammed Fokhor owns New York City Yellow Taxicab Medallion No. 1B53 which he uses to operate his taxicab business. Defendant Mega Funding Corp. is a lending institution. Defendant New York City Taxi and Limousine

Commission (TLC) is an agency of defendant City of New York. Defendant Metropolitan Transit Authority (MTA), a public benefit corporation, operates subways, buses, and commuter trains. Defendant Port Authority of New York and New Jersey was created by a compact between the two states with duties concerning transportation in the "Port District."

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

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

The value of the plaintiff's taxi medallions was diminished because of (1) a fifty- cent surcharge imposed by the MTA on a yellow medallion taxicab ride but not on a ride in an app-based vehicle, and (2) the MTA's wrongful and negligent refusal to coordinate its activities with those of the other defendants. The value of the plaintiffs' taxi medallions was also diminished because the Port Authority "forbids the New York City Medallion Taxicabs to pick up passengers at Newark Airport and to return said passengers to New York City," and "[t]his causes New York City Yellow Taxicabs to lose money on every required trip to Newark Airport as they must return to New York City with no passengers."

II. Discussion

A. Notice of Claim

The plaintiff has asserted a cause of action for negligence against the defendant city and defendant TLC (collectively the city defendants) seeking to recover damages. The defendants state without contradiction that the plaintiff failed to file a notice of claim against them, and they demand the dismissal of the complaint against them pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Their defense has merit for the reasons extensively discussed by this court in *CGS Taxi LLC v The City of* New *York* (Index No. 713014/2015, 2017 WL 2734862 [Sup. Ct. County of Queens May 2, 2017]) and in *Singh v The City of New York* (Index No. 701402/2017, 2017 WL 4791469 [Sup. Ct.,

County of Queens Sep. 28, 2017].) The service of a notice of claim within ninety (90) days after the accrual of a claim is a condition precedent to actions seeking monetary damages against the city defendants . (*See*, General Municipal Law §50-e [1][a]; General Municipal Law § 50-i [1] ; NYC Admin. Code §7-201 (a); *Maxwell v City of New York*, 29 AD3d 540 [2nd Dept. 2006].)

The plaintiff's attorney argues that the notice of claim statutes do not apply to ongoing negligence. He did not support his argument with relevant authority, and there is case law to the contrary. (*See,e.g., Stone v. Town of Clarkstown*, 82 AD3d 746 [2nd Dept. 2011] ["the plaintiffs' third cause of action alleging negligence should have been dismissed as against the Town to the extent it alleged conduct which occurred prior to the 90–day period preceding the filing of the plaintiffs' notice of claim"].) The plaintiffs in this case do not allege that they filed a notice of claim at any time, and, thus, the notice of claim statutes read together require the dismissal of the entire complaint. Moreover, the alleged wrongful acts by the city defendants (the fifty-cent surcharge on yellow taxis, the restriction on airport pick-ups, and lack of coordination among the defendants) are not continuing wrongs, but were distinct acts occurring in the past. The doctrine of continuing wrong does not apply where the plaintiff is actually complaining about the continuing effects of earlier unlawful conduct rather than continuing wrongful acts. (*See, Rowe v. NYCPD*, 85 AD3d 1001 [2nd Dept 2011]; *Lomto Fed. Credit Union v. Dumont*, 64 Misc.3d 1205[A] [Table] 2019 WL 2572156 [Text[[Sup. Ct. 2019] [refusing to apply the continuing wrong doctrine in a similar case].) The additional argument made by the plaintiff's attorney that notice of claim statutes do not apply when the municipal entity is a third party defendant also has no merit. The municipal defendants in this case are not third party defendants or similar to third party defendants, and, moreover, this is not a case concerning a statutory duty to indemnify. (*See, Montalto v. Westchester St. Transp. Co.*, 102 AD2d 816 [2nd Dept1984]; *Melrose Credit Union v Matatov*, Index No 714295/2016, 2017 WL 5659516[Sup. Ct. Queens County, Oct. 30, 2017].)

The failure to comply with statutory notice of claim requirements can result in the dismissal of a complaint pursuant to CPLR 3211(a (5) and)(7). (*See, e.g., Mosheyev v. New York City Dept. of Educ.*, 144 AD3d 645 [2nd Dept 2016]; *Bertolotti v. Town of Islip*, 140 AD3d 907 [2nd Dept 2016]; *Belpasso v. Port Auth. of New York & New Jersey*, 103 AD3d 562[2013].) "The law is clear that when a notice of claim requirement is statutorily imposed it is usually deemed an element of the substantive cause of action and as such its satisfaction must be pleaded in the complaint ***." (*Fratto v. W. Reg'l Off-Track Betting Corp.*, 147 Misc.2d 577 [Sup. Ct. 1990].) The city defendants are entitled to the dismissal of the complaint against them for failure to allege the service of a notice of claim.

B. Immunity from Suit for Discretionary Acts

"Although the State long ago waived sovereign immunity on behalf of itself and its municipal subdivisions, the common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions ***." (*Valdez v. City of New York*, 18 NY3d 69, 75–76 [2011].) "A public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent ***." (*Lauer v. City of New York*, 95 NY2d 95, 99 [2000]; *Valdez v. City of New York*, 18 NY3d 69[2011].) The city defendants are also entitled to the dismissal of the complaint against them pursuant to CPLR 3211(a)(7) because of their immunity from suit for discretionary acts.

Dated: November 7, 2019

Kevin J. Kerrigan, J.S.C.