

<b>Fokhor v Mega Funding Corp.</b>
2019 NY Slip Op 33867(U)
November 7, 2019
Supreme Court, Queens County
Docket Number: 701403/2019
Judge: Kevin J. Kerrigan
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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

The Port Authority, created in 1921, when pursuant to the United States Constitution, Congress approved the compact between the states of New York and New Jersey providing for its creation, operates various airports, ports, terminals, transportation facilities, and other facilities in the region. The Port Authority's Rules and Regulations state: "Ground transportation services may be provided at an Air Terminal without specific pre-arrangement by the operator of a vehicle licensed to carry passengers for hire in response to hails from prospective passengers on public streets of the municipality whose boundaries include the location within an Air Terminal at which the vehicle is located."

By concurrent legislation, the states of New York and New Jersey consented to suits against the Port Authority upon compliance with certain jurisdictional conditions precedent. The consent was made conditional upon compliance with New York Unconsolidated Laws § 7107, “Limitation of actions; service of notice of claim required,” which provides in relevant part: “The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced. \*\*\*.” (See, *Conn v. Tutor Perini Corp.*, 174 AD3d 680 [2<sup>nd</sup> Dept 2019].)

“Compliance with the condition precedent in the statute [Uncons.Laws of NY § 7107] of giving sixty days notice is mandatory and jurisdictional. The failure to satisfy this condition will result in withdrawal of defendant's consent to suit and compels the dismissal of the action for lack of subject matter jurisdiction.” ( *Lyons v. Port Auth. of New York & New Jersey*, 228 AD2d 250, 251, [1<sup>st</sup> Dept 1996]; *Belpasso v. Port Auth. of New York & New Jersey*, 103 AD3d 562 [1<sup>st</sup> Dept 2013].)

There is no merit in the argument made by the plaintiff's attorney that the notice of claim statutes do not apply to ongoing negligence. (See, *Stone v. Town of Clarkstown*, 82 AD3d 746 [2<sup>nd</sup> 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”]; *Caldwell v. New York City Transit Auth.*, 39 Misc3d 1242[A], 2013 WL 3119024 {Sup Ct 2013} [for a continuing wrong plaintiff's damages are limited to those occurring within the 90–day period before service of the notice of claim].) In any event, the plaintiff in this case does not allege that he filed a notice of claim at any time, and, thus Section 7107 requires the dismissal of the entire complaint. 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 [2<sup>nd</sup> Dept 1984].) Even third party claims for contribution and indemnification have been dismissed for failure to comply with Section 7107. (See, *Avis Budget Car Rental, LLC v. JD2 Envtl., Inc.*, 2016 WL 3251394, 19 [E.D.N.Y., 2016] [“ Whether or not an action has accrued has no bearing on whether a party must file a notice of claim prior to commencing litigation”]; *W&W Steel, LLC v Nat. September 11 Memorial and Museum*, No. 2013 WL 4734304, [2013]. )

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 [2<sup>nd</sup> Dept 2016]; *Bertolotti v. Town of Islip*, 140 AD3d 907 [2<sup>nd</sup> 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].)

In cases brought in the New York State Supreme Court, County of Queens similar to the one at bar, the failure to comply with notice of claim requirements has resulted in the dismissal of tort claims brought by taxicab medallion owners. (See .e.g., *Sapoznik v. Progressive Credit Union*, Index No. 707734/19 [Kerrigan, J.] [PA]; *Melrose Credit Union v. Teris*, Index No. 708268/18 [Dufficy, J.]; *Fuentes v. Lomto Federal Credit Union*, Index No. 714485/18 [E. Hart, J].)

The plaintiffs’ complaint against the Port Authority is dismissable for failure to comply with statutory notice of claim requirements.

The plaintiffs’ complaint against the Port Authority is also dismissable because of another failure to state a cause of action. The plaintiffs’ tort claims are barred because the State is immune from liability for the discretionary acts of its officials. (*Donald v. State*, 17 NY3d 389 [2011].) “The Port Authority is and of necessity has to be a State agency.” (*Whalen v. Wagner*, 4 NY2d 575, 584 [1958]; *In re World Trade Ctr. Bombing Litig.*, 17 NY3d 428[2011].) The act of the Port Authority in forbidding yellow taxis to return from Newark Airport to New York City with passengers is considered “discretionary” because it took “the exercise of reasoned judgment.” ( See, *Donald v. State*, *supra*, 395.)

Dated: November 7, 2019

  
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Kevin J. Kerrigan, J.S.C.

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