NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI IA Part 3
Acting Supreme Court Justice

----------X Index Number 705910/2018

LOMTO FEDERAL CREDIT UNION,

Plaintiff,

-against-

Motion Seq. #1, 2, 3 and 4

ARNOLD DUMONT,

Defendant.

----------X

ARNOLD DUMONT

Third-Party Plaintiff,

-against-

TAXI FLEET MANAGEMENT, LLC, THE CITY OF NEW YORK, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Third-Party Defendants.

----------X

AMENDED DECISION/ORDER

The following papers numbered 1 to 7 read (a) on this motion (Seq. No.2) by third-party defendant Port Authority of New York and New Jersey for an order pursuant to CPLR §3211(a)(2) dismissing the third party complaint against it, (b) on this motion (Seq. No. 3) by third-party defendants City of New York and New York City Taxi and Limousine Commission (collectively "the city defendants") for an order pursuant to CPLR §3211(a)(2),(5), and (7) dismissing the third-party complaint against them, (c) on this motion (Seq. No. 4) by third party defendant Metropolitan Transportation Authority for an order pursuant to CPLR §3211(a)(2),(5), and (7) dismissing the complaint against it, and (d) on this motion (Seq, No. 1) by defendant/third-party plaintiff Arnold Dumont for a preliminary injunction, inter alia, directing plaintiff Lomto Federal Credit Union to return to him New York City Yellow Taxicab Medallion 2B96.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1
Notices of Motion - Affidavits - Exhibits	2-4

Answering Affidavits - Exhibits 5-6
Memorandum of Law 7

Upon the foregoing papers, it is ordered that the motions are consolidated for determination as follows:

I. Background

Defendant/third-party plaintiff Arnold Dumont ("Dumont") purchased NYC taxi cab medallion No. 2B96 in 1986 for the purchase price of $125,000.

On April 17, 2018, plaintiff Lomto Federal Credit Union ("Lomto") began the instant action against defendant Dumont in the New York State Supreme Court, County of Queens alleging the following: On or about March 28, 2014, the plaintiff loaned the defendant $624,000, as evidenced by a note requiring monthly payments in the amount of $2,418.23 for thirty-five months and a final payment in the amount of $603,748.76 due on March 27, 2017. The plaintiff secured the note by the defendant's execution of a security agreement and UCC-1 financing statements. The defendant used the loan proceeds primarily for business purposes including the refinancing of New York City Taxi Medallion #2B96. The defendant acknowledges that he used this extra money for school tuition, for the purchase of new taxicabs and for a divorce settlement to his wife. The defendant defaulted on the repayment of the note, and plaintiff sent him written notice of default demanding repayment of the note plus interest and late charges. The defendant failed to cure his default, the plaintiff foreclosed on the medallion, and it was sold at an auction conducted on March 6, 2018. The plaintiff's complaint seeks a deficiency judgment in excess of $608,258 plus interest, costs, disbursements, and reasonable attorney's fees. Defendant Dumont's answer contains counterclaims for negligence, violation of General Business Law §349, and violation of the Truth in Lending Act (15 USC 69 et seq.).

On July 19, 2018, defendant Dumont began a third-party action against Taxi Fleet Management LLC, The City of New York, The New York City Taxi and Limousine Commission, The Port Authority of New York and New Jersey, and the Metropolitan Transportation Authority alleging the following: He drove New York City Medallion taxi cabs for thirty-two years until poor health caused him to lease Medallion 2B96, which he owns, to third-party defendant Taxi Fleet Management, LLC ("Taxi Fleet"). Defendant Taxi Fleet agreed to pay a fee of $3,500 per month for the lease of the medallion, which would have covered the $2,418 per month Dumont owed Lomto. Taxi Fleet defaulted on the required lease payments, which caused Dumont to default on the payments he owed to Lomto. Third-party defendant New York City Taxi and Limousine Commission ("TLC") regulates the taxicab industry. The TLC permitted the market price of a medallion to rise to approximately $1,100,000 by 2012, but thereafter, third-party defendant City of New York, acting through the TLC, caused the market value of a medallion to decline steeply by allowing green taxicabs and app-based companies, such as Uber, to transport passengers. Despite knowledge of the declining value of medallions, plaintiff Lomto continued to finance their purchase. The loan made to defendant Dumont was "irresponsible, improper, and void under the laws governing Federal

Credit Unions."

The third-party complaint further alleges the following: Third-party defendant Metropolitan Transportation Authority ("MTA") places a $.50 surcharge on a ride in a yellow medallion taxi, which it does not place on rides in app-based vehicles. The TLC charges yellow medallion taxis $.30 per ride for "driver improvement," but does not place this surcharge on app-based companies. The TLC requires yellow medallion taxicabs to take passengers from New York City to the airport in Newark, New Jersey, but third-party defendant Port Authority of New York and New Jersey ("PA") forbids yellow medallion taxis to transport passengers from Newark Airport to New York City. App-based companies are not subject to this restriction, which causes yellow medallion companies to lose money. While the federal government has removed the management of Lomto and substituted a new management appointed by the National Credit Union Administration (NCUA), defendant Dumont has been unable to obtain refinancing of his loan. The third-party complaint demands, *inter alia*, a permanent injunction " directing all of these defendants and Plaintiff Lomto, as administered by the National Credit Union Administration, from further negligently creating policies and rules which make it impossible to economically operate a New York City Medallion taxicab, specifically, Mr. Dumont's New York City Yellow Medallion No. 2B96."

II. The Motion By Third Party Defendant PA (Seq. No. 2)

Third-party defendant PA has moved to dismiss the third party complaint against it pursuant to CPLR §3211(a)(2) on the ground that "the court has not jurisdiction of the subject matter of the cause of action" and that third-party plaintiff Dumont has failed to comply with the provisions of New York Unconsolidated Laws §7107.

New York Unconsolidated Laws §7107, "Limitation of actions; service of notice of claim required," provides that the consent of the PA to suit against it is granted upon the condition that a lawsuit be commenced within one year after the cause of action has 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 Lyons v. Port Auth. of New York & New Jersey*, 228 AD2d 250 [1st Dept 1996].)

In the case at bar, the third-party complaint demands judgment "against the Third-Party Defendants and each of them" providing for a preliminary injunction and "a sum of money in excess of the jurisdictional limits of all lower courts ...." Since the third-party action concerns, *inter alia*, "the recovery or payment of money," the statute requires Dumont to serve a notice of claim upon the PA which he did not do.

"Compliance with the condition precedent in the statute 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*, *supra*, 571–572.) "Absent compliance with the notice of claim requirement, the court lacks subject matter jurisdiction" (*Belpasso v. Port Auth. of New York & New Jersey*, 103 AD3d 562, [1st Dept 2013].)

The affirmation in opposition submitted by counsel for defendant/third-party plaintiff Dumont does not deny the failure to serve a notice of claim upon the PA. Instead, counsel notes that there have already been six driver/owner suicides in the taxi industry because of difficult financial conditions in the taxicab industry and there may be more in the future. While the court is mindful of the financial difficulties caused by changing conditions in the taxicab industry, attempts to obtain Article 78 and related relief against the TLC and other entities have not succeeded. (*See, Matter of Melrose Credit Union*, 161 AD3d 742, [2nd Dept . 2018][affirming an order of the Honorable Allan B. Weiss]; *Glyka Trans, LLC v. City of New York*, 161 AD3d 735 [2nd Dept. 2018] [affirming an order of the Honorable Allan B. Weiss])

III. The Motion By The Third Party City Defendants (Seq. No. 3)

The City defendants have moved to dismiss the third party complaint against them on the grounds that (1) it is barred by the statute of limitations, (2) defendant/third-party plaintiff Dumont failed to file a notice of claim, and (3) defendant/third-party plaintiff Dumont failed to state a cause of action.

In regard to the statute of limitations, the City defendants made a showing that their alleged wrongful acts occurred more than four months before defendant/third-party plaintiff Dumont filed his third-party complaint. For example, the TLC has licensed app-based companies since at least December 2011. CPLR §217(1),which constitutes the general statute of limitations applicable to Article 78 proceedings, provides a four-month statute of limitations for Article 78 proceedings which is applicable unless a shorter time is provided in the law authorizing the proceeding. (*see*, *In re Long Island Power Auth. Ratepayer Litig.*, 47 AD3d 899[2nd Dept 2008]; *Sherwood Vill. Co-op. Section B, Inc. v. City of New York*, 173 AD2d 461 [2nd Dept 1991].) To the extent that the third-party complaint seeks relief available to defendant/third-party plaintiff Dumont in an Article 78 proceeding, the four-month statute of limitations applies (*see, Greens at Half Hollow, LLC v. Suffolk Cty. Dep't of Pub. Works*, 147 AD3d 942, [2nd Dept. 2017].) Despite the label attached to a cause of action, a court will look at its substance to determine whether it actually seeks Article 78 relief. (*see*, *In re Long Island Power Auth. Ratepayer Litig*, *supra*.) Moreover, the doctrine of continuing wrong is not applicable to the case at bar because 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].)

With respect to the notice of claim, to the extent that the complaint seeks monetary damages, the service of a notice of claim within 90 days after accrual of Dumont's claim was a condition precedent to commencing an action against the City defendants. (*see, Rist v. Town of Cortlandt*, 56 AD3d 451[2nd Dept 2008]; *Maxwell v. City of New York*, 29 AD3d 540 [2nd Dept(2006].) While the service of a notice of claim is not required when equitable relief rather than money damages are

sought (*see*, *Kahn v. New York City Dep't of Educ*., 79 AD3d 521[1st Dept2010], aff'd, 18 NY3d 457[2012]), in the case at bar the complaint seeks primarily monetary damages and purports to seek unlikely injunctive relief. (*see*, *Rowe v. NYCPD,* 85 AD3d 1001, 1002 2nd Dept [2011] ["Supreme Court properly rejected the plaintiff's contention that his claims were equitable in nature, as the plaintiff's principal objective was to recover money damages"],) Dumont's demand for money damages is not "merely incidental to the requested injunctive relief. " (*Johnson v. City of Peekskill*, 91 AD3d 825, 826,[2nd Dept 2012].)

In regard to the failure to state a cause of action, defendant/third-party plaintiff Dumont alleged only discretionary acts on the part of the PA, MTA, TLC, and the City. "A municipality acting in a discretionary governmental capacity may rely on the governmental function immunity defense. That defense provides immunity for the exercise of discretionary authority during the performance of a governmental function ." (*Turturro v. City of New York*, 28 NY3d 469, 478–79 [2016] [internal quotation marks and citations omitted; *Reynolds v. Krebs*, 143 AD3d 1256, [4th Dept. 2016].) "[E]ven if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority." (*Valdez v. City of New York*, 18 NY3d 69, 76. [2011].) In any event, defendant/third-party plaintiff Dumont alleges intentional acts by the City defendants, and negligence is not an intentional tort. (*See, Borrerro v. Haks Grp., Inc*., 165 AD3d 1216[2nd Dept. 2018]; *Barreto v. Kotaj*, 46 Misc3d 47, [App. Term. 2014].) "[A]llegations of intentional conduct cannot form the basis of a claim founded in negligence." (*Dunn v. Brown*, 261 AD2d 432, 433 [2nd Dept 1999].) Finally, the elements of a cause of action for negligence include a " (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*see*, *Solomon v. City of New York,* 66 NY2d 1026, 1027,) and a vague allegation that the third-party defendants in this case were negligent "for failing to work together to preserve one of the New York Metropolitan region's most important industries" does not meet pleading requirements.

IV. The Motion by Third Party Defendant MTA (Seq. No. 4)

Third- party defendant MTA has moved for an order pursuant to CPLR §3211(a) (2), (5), and (7) dismissing the third-party complaint against it. The motion has merit. The third-party complaint alleges in relevant part: "The Metropolitan Transportation Authority wrongfully charges a fifty-cent surcharge per New York City Medallion Taxi ride," but does not impose this charge on competitors. "Timely service of a notice of claim is a condition precedent to the commencement of an action sounding in tort against the Metropolitan Transportation Authority..." (*Cuccia v. Metro. Transp. Auth*., 150 AD3d 849, 849[2nd Dept. 2017].) The defendant/third-party plaintiff's causes of action which are in the nature for Article 78 relief are time-barred (*see, Greens at Half Hollow, LLC v. Suffolk Cty. Dep't of Pub. Works*, *supra*; *In re Long Island Power Auth. Ratepayer Litig*, *supra*.) as is his cause of action for negligence which is controlled by a one year and ninety days statute of limitations. (*see*, Public Authorities Law. § 1276[2]; *Griffin v. Perrotti*, 121 AD3d 1041 [2nd Dept 2014].) The complaint fails to state a cause of action against the MTA in that the tax allegedly imposed by it was actually imposed by the New York State Legislature and implemented by the

TLC. (*see*, New York Tax Law §1281.)

V. The Motion By Defendant Dumont For A Preliminary Injunction (Seq. No.1)

Defendant/third-party plaintiff Dumont has moved for a preliminary injunction, *inter alia*, directing plaintiff Lomto Federal Credit Union to return to him New York City Yellow Taxicab Medallion 2B96. The party seeking a preliminary injunction must demonstrate a likelihood of success on the merits, irreparable injury if provisional relief is withheld, and a balance of the equities in his favor. (*Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 AD3d 856 [1st Dept 2003].) In the case at bar, defendant/third-party plaintiff Dumont failed to show a likelihood of success on the merits on any cause of action in this lawsuit. The court notes that the PA, the MTA, and the city defendants have successfully shown that they are entitled to the dismissal of the third-party complaint against them. Defendant/third-party plaintiff Dumont also did not show that there is any basis for returning the taxi medallion to him. The foreclosure sale occurred on March 6, 2018, and plaintiff Lomto successfully bid $1.00 (one dollar). UCC § 9-609, "Secured Party's Right to Take Possession After Default.," provides in relevant part: "(a) [Possession; rendering equipment unusable; disposition on debtor's premises.] After default, a secured party: 1) may take possession of the collateral." (*see, Bank of Am., N.A. v. Won Sam Yi,* 294 F. Supp3d 62, 71 [WDNY. 2018].) UCC 9-610, "Disposition of Collateral after Default," authorizes a secured creditor, *inter alia*, to sell the collateral after taking possession. (*see*, *Prudential Sec. Credit Corp., LLC v. TeeVee Toons*, *Inc.*, 16 AD3d 192,[1st Dept 2005], and the sale must be held in a commercially reasonable manner. (*see*, *Bank of Castile v. B. Beardsley Management and Enterprises, Inc.*, 106 AD3d 1528 [4th Dept 2013]}*; Commerce Commercial Leasing, LLC v. PIO Enterprises, Inc.*, 78 AD3d 1105 [2nd Dept 2010].) Defendant/third-party plaintiff Dumont did not show that the sale of his medallion was not made in a commercially reasonable manner, nor did he demonstrate that there will be irreparable injury if provisional relief is withheld. Lomto's complaint and the claims Dumont has against Lomto concern money, and an injury compensable in money is not irreparable. (*see, McLaughlin, Piven, Vogel v. W.J. Nolan & Co.,* 114 AD2d 165, [2d Dept 1986].)

The antiquated regulatory framework currently governing the taxi/app based ride industry needs to be examined by our legislators. We must ensure the protection of the public, the economic interest of owners and the health and safety of taxicab and livery service drivers before the destined arrival of driverless vehicles.

Based on the foregoing, the motion by third-party plaintiff Dumont is denied and the motions to dismiss by third-party defendants are granted and third-party's complaint is dismissed as and against the City of New York, the New York City Taxi and Limousine Commission, the Port Authority of New York and New Jersey and the Metropolitan Transportation Authority only.

This is the decision and order of the Court.

Date: February 3, 2021

HON. JOSEPH RISI, A.J.S.C.

FILED
2/5/2021
12:02 PM
COUNTY CLERK
QUEENS COUNTY