Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan Part 10
Justice

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Daler Singh DBA Gilzian Enterprise LLC, Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC and Dyre Taxi LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

The City of New York and The New York City Taxi and Limousine Commission,

Defendants.
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Index No. 701402/ 2017

Motion Date December 16, 2019

Motion Sequence No. 16

The following EF papers numbered 465 to 619 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	465-510
Answering Affidavits - Exhibits.....	513-566
Reply Affidavits.....	611-619

Upon the foregoing papers it is ordered that this motion is decided as follows:

That branch of the motion for summary judgment dismissing the complaint as it pertains to plaintiff Singh is granted. The remaining branches of the motion for summary judgment dismissing the causes of action for breach of the implied covenant of good faith and fair dealing and for recission with respect to the remaining plaintiffs is denied.

Defendants' motion for summary judgment seeks dismissal of

Singh's causes of action against them upon the grounds of lack of standing and lack of capacity to sue and dismissal of the remaining causes of action of co-plaintiffs for breach of the implied covenant of good faith and fair dealing and for recission (*see Singh v The City of New York*, 2017 NY Slip Op 32215 [U]).

New York law provides that a motion for summary judgment shall be granted if "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). The moving papers "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (*id.*)

In addition, in deciding a summary judgment motion, the court's role is to determine whether any triable issues exist, not the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (see *Santelises v Town of Huntington*, 124 AD3d 863 [2d Dept 2015]). Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012].)

Defendants support their motion, inter alia, with an attorney's affirmation and excerpts of defendants' deposition transcripts.

This action commenced with the filing of a summons and complaint on January 30, 2017 by Daler Singh, dba Gilzian Enterprise LLC on behalf of himself and a putative class based on Daler Singh's purchase of an independent wheelchair accessible taxi medallion at a public auction held by the City of New York and the Taxi and Limousine Commission (TLC) (collectively the defendants) on February 26, 2014. Daler Singh formed Gilzian Enterprise LLC for the purpose of owning the taxi medallion, which cost the company $821,215. The complaint contained causes of action for violation of General Business Law § 349, fraudulent inducement, breach of the contractually implied covenant of good faith and fair dealing, negligent misrepresentation, and rescission.

The complaint was amended on March 27, 2017 to add seven plaintiffs: Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC. Richard Chipman organized Danielle Eve Taxi LLC, EAC Taxi LLC, DEC

Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC (the Chipman companies) for the purpose of owning two yellow taxi medallions each (a company with two medallions is called a mini-fleet). Jointly, these plaintiffs purchased 14 corporate wheelchair accessible, taxi medallions at a public auction held on November 13, 2013. The purchase price for the mini-fleets ranged from $2,118,000 to $2,518,000 and totaled $16,426,000. The bids were accepted on November 14, 2013 and notice of acceptance was posted on the TLC's website on November 15, 2013.

Before the auctions, the defendants made public statements and issued promotional materials concerning medallions, medallion prices, and price trends. In the months prior to the auctions, TLC published reports on the average sale price of both individual and corporate medallions. The plaintiffs allege that the reports issued by the TLC contained false, inaccurate, and misleading statements. The TLC allegedly exaggerated the price of medallions in public reports while concealing the true prices and made false statements concerning the directional trend in medallion prices.

According to the Rules of the TLC, the auctions are held by sealed written bids, which are submitted by hand delivery at the time and place designated by the TLC. (35 RCNY § 65-06.) A notice of the sealed bid sale is publicized at least 30 days prior to the deadline for bidding. (35 RCNY § 65-05[a].) The Chairperson of the TLC sets the upset minimum price for the bids. (35 RCNY § 65-05[b][1].) In this case, one Notice of Medallion Sale (Industry Notice #13-38), dated October 11, 2013, indicated that "[t]he minimum upset price for Accessible Minifleet Medallions is $850,000 per medallion, or $1,700,000 per lot." Any bid less than the minimum upset price would be rejected as non-responsive. (35 RCNY § 65-05[b][4].) The form of the bid is created by the TLC and once the bid is made, it cannot be withdrawn. (35 RCNY § 65-06[a][1], [e].)

According to the January 2014 Factbook, the market sets the price for the medallion, which is based on the following factors: "taxi fares and tips, demand for taxi service, availability and cost of taxicab medallion financing, market for the medallion, anticipated return on the investment to acquire a medallion as compared to other investments, [and] cost of operating a taxi." In the 2014 Factbook, TLC reported that "200 mini-fleet wheelchair-restricted medallions [were] auctioned off at an average price of $2.27 Million (mini-fleet medallions [were] sold in pairs, making the average price $1.13 Million per medallion)."

After the plaintiffs made their purchases, the value of their medallions allegedly fell and plaintiffs attribute their losses not only to the public reports and statement issued by the TLC, but also

to the TLC's failure to restrict the activity of companies like Uber Technologies, Inc. (Uber), which are considered black cars. The plaintiffs allege that a medallion gives them the exclusive right to pick up passengers via "street hail" in certain areas of the city and that Uber infringes on this right by picking up passengers who arrange for transportation through the use of an application on their smart phones. Plaintiffs also allege that the TLC allowed Uber to suddenly and dramatically increase the number of black cars in service flooding the market of passengers taxi medallion owners serve especially in Manhattan and at the New York airports. As a result, plaintiffs allege a substantial decline in revenue caused by a decrease in per-shift fares earned and a loss of drivers willing to lease their medallions. This decline in revenue, plaintiffs' allege, caused the inability to pay monthly installments on the mortgages secured by the medallions and caused the value of the medallions to fall.

Defendants argue that rather than promising to safeguard the value of the medallions, the Official Bid Forms, Affidavits of Non-Reliance and Taxicab License Bills of Sale contained language explicitly disclaiming any such responsibility. Defendants refer to the Official Bid Forms that state "that the City of New York has not made any representations or warranties as to the present or future value of a taxicab medallion, the operation of a taxicab as permitted thereby, or as to the present or future application or provisions of the rules of the Taxi & Limousine Commission or applicable law." As a result, defendants argue that plaintiffs cannot now claim there was a breach of an implied covenant that directly contradicts the plain language of the contract. Defendants further argue that "[i]n purchasing the medallions, plaintiffs undertook the risk of changes in the industry that could impact the value of the medallions they purchased."

Moreover, defendants argue that the express terms of the contract preclude any obligation on their part to protect plaintiffs from competition arising from Uber and other app-based for-hire vehicle companies. The companies obtained their licenses after completing the TLC's application, which include the required affirmation of compliance with TLC rules and regulations. Defendants claim that at the time of the auctions in November 2013, Uber was operating as a black car for two years. In fact, the defendants refer to the Industry Notices issued in 2011, which states that "while the use of these [smart phone applications] by for-hire vehicles and for-hire vehicle bases is permitted, this use must be in compliance with TLC regulations." In addition, the defendants argue that while the number of black cars grew thereafter, plaintiffs had no reason to believe that defendants undertook an implied contractual obligation to prevent this growth as there was no cap on the number

of black car licenses the TLC could issue. Defendants further argue that there is no legal basis for the notion that there was an implied obligation on defendants to enact such legislation, such as Local Law 147 of 2018, which paused the issuance of new for-hire vehicle licenses.

With respect to the branch of the motion for dismissal of the complaint as it pertains to plaintiff Singh, this Court, in its order issued on February 4, 2019 granting the City's motion to amend its answer to assert the affirmative defenses of lack of standing and lack of capacity to sue stated, " 'The law is clear that the trustee of the estate of a bankrupt is vested with title to all of the bankrupt's property, including rights and choses in action. The trustee in bankruptcy, with the approval of the bankruptcy court, may elect to abandon assets of the bankrupt. Following abandonment, title revests in the bankrupt * * * However, this doctrine has no application to unscheduled assets of which the trustee was ignorant and had no opportunity to make an election.' (*Weiss v. Goldfeder*, 201 AD2d 644, 645 [2d Dept1994] [internal quotation marks and citations omitted].) '[A] debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf***' (*George Strokes Elec. & Plumbing Inc. v. Dye*, 240 AD2d 919, 920, [3d Dept (1997]; *123 Cutting Co. v. Topcove Assocs., Inc.*, 2 AD3d 606, [2nd Dept 2003])." This Court accordingly granted the City's motion to amend its answer based upon the facially meritorious nature of the defenses sought to be added and the failure of Singh, in opposition, to establish that these defenses lacked merit as a matter of law. Likewise, in opposition to the instant motion for dismissal based upon those newly-added defenses, Singh has again failed to offer any cognizable opposition. Indeed, the bankruptcy trustee appropriately commenced a separate action entitled *Bankruptcy Estate of Daler Singh, d/b/a Gilzian Enter. LLC v City of New York* (Index No. 716032/2019). Accordingly, the action by Singh must be dismissed in its entirety.

With respect to the remaining defendants' cause of action for breach of the implied covenant of good faith and fair dealing and their attendant equitable cause of action for recission, the terms "good faith" and "fair" are ideals that are ingratiated in our culture as guiding principles and have been taught from childhood. They are firmly rooted in the manner in which business is conducted in our society. Good faith, for example, "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." (*see* Restatement [Second] of Contracts § 205 [1981]).

A covenant of good faith and fair dealing is implicit in all contracts (*see Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). "Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.* at 389 [internal quotation marks and citations omitted]). "[T]he undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Havel v Kelsey-Hayes Co.*, 83 AD2d 380, 382, quoting 11 Williston, Contracts [3d ed.], § 1295, p. 37; *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion" (*Dalton v Educational Testing Serv.*, *supra* at 389). Further, the contractually implied covenant is not without limits as it can be enforced only to the extent it is consistent with the terms of the contract (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]; *SNS Bank v Citibank*, 7 AD3d 352, 354–355 [2004]).

As stated by the Court of Appeals, "[W]ith respect to auctions, the general rule is that a seller's acceptance of an auction bid forms a binding contract, unless the bid is contingent on future conduct (*City of New York v Union News Co.*, 222 N.Y. 263, 270, 118 N.E. 635 [1918]). While an auction can be conditional, meaning property can be withdrawn after the close of bidding, it will not be deemed conditional absent explicit terms (see *Slukina v 409 Edgecombe Ave. Hous. Dev. Fund Corp.*, 2013 N.Y. Slip Op. 31966[U], *8, 2013 WL 4446914 [Sup.Ct., N.Y. County 2013])" (*Stonehill Capital Management, LLC v Bank of the West*, 28 NY3d 439, 449 [2016]).

Thus, an auction bid, such as the one at issue, constitutes a contract to which the implied covenant of good faith and fair dealing attaches. In this case, the relevant bids took place on November 13, 2013 and were accepted on November 14, 2013. While defendants refer to the language in the Affidavits of Non-Reliance and Taxicab License Bill of Sale subsequently executed by Richard Chapman on behalf of defendant companies on January 14, 2014 and February 14, 2014, respectively, the Official Bid Forms were not conditional and, thus, constituted the binding contracts. Therefore, the Court rejects defendants' argument that the express language in said Affidavits and the Bills of Sale disclaim the contractually implied covenant in the Official Bid Forms.

Inasmuch as the Official Bid Forms were drafted solely by the

defendants, basic principles of contract law require their strict interpretation against the drafters (*see* Restatement (Second) of Contracts § 206; 11 Williston on Contracts, § 32:12 [4th ed. 2009]). The Court looks to the terms of the Official Bid Forms as a whole and finds that defendants' arguments fail to eliminate triable issues of fact. Defendants' arguments focus on only certain terms in the Official Bid Forms to support their claim that there is a disclaimer of the contractually implied covenant. However, the Court is required to determine whether this implied covenant is "implicit in the agreement viewed as a whole" (*Rowe v Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 [1978]) and not only portions thereof. A viewing of the contract as a whole supports the conclusion that the implied covenant is not barred by its express terms (see *Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]).

Specifically, at the top of the Official Bid Forms, it states, "I ACKNOWLEDGE that I am familiar with the Rules of the NYC Taxi & Limousine Commission governing the ownership of taxi medallions and agree to comply with same at all times, including with respect to the requirements regarding the completion of this transaction if I am a successful bidder. I further ACKNOWLEDGE that I have read the rules relating to Criteria for Taxicab Ownership and am qualified to own a taxicab. *** I further acknowledge that I understand that the use and transferability of any taxicab medallion and the operation of a taxicab pursuant to the license represented by the medallion are subject to and conditioned upon compliance with the requirements of the rules of the NYC Taxi & Limousine Commission and applicable law, as may be amended from time to time."

By signing the Official Bid Forms, plaintiffs acknowledged familiarity with the Rules of the TLC and agreed to comply therewith, which included familiarity with the purpose, role, and powers and duties of the TLC. The purpose and role of the TLC in New York City dates back to 1937 when the taxicab industry was declared a vital and integral part of transportation.[1] At that time, the Board of Aldermen of the City of New York, the New York City Council's predecessor body, found the taxicab market was flooded with an excessive number of taxicabs. (*Rudack v Valentine*, 163 Misc 326, 327 [Sup Ct, NY County 1937], citing Code of Ordinances of the City of New York, Chapter 27a, § 1.) This caused "undue and needless traffic congestion; long hours and inadequate income for taxicab drivers; excessive competition because of the number of taxicabs . . . [and] unfair competition" among other things. (*Id.* at 327.) As a result, a city ordinance was adopted on March 1, 1937, and approved by the mayor on March 9, 1937, known as the "Haas Act" (Chapter 27a, Code

[1] See section 19-501 of the New York City Administrative Code.

of Ordinances). The Haas Act established the current medallion system, and limited the number of medallions. Since then the City of New York has controlled and regulated the taxicab industry, including yellow cabs, black cars, and other types of for hire vehicles.[2]

To meet its stated purpose, as in the Haas Act, the Rules of the TLC provide that it "will issue licenses and adopt and enforce rules regulating the [taxicab] business and industry". (35 RCNY § 52-02.) In addition, encompassed in its specific powers and duties when regulating, the TLC has a duty to "(1) Formulate and adopt rules reasonably designed to carry out the purposes of the Commission. . . . (4) Establish and enforce standards to ensure all Licensees are and remain financially stable. . . . (7) Develop and implement a broad public policy of transportation as it pertains to the forms of public transportation regulated by the Commission. (8) Encourage and provide procedures to encourage innovation and experimentation relating to type and design of equipment, modes of service and manner of operation. (35 RCNY § 52-04[a][1], [3], [7], [8].)

Contrary to defendants' arguments, the terms of the Official Bid Forms do not disclaim the reasonable expectations of plaintiffs to ensure the financial stability of medallion taxicabs in accordance

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[2] The distinctions between yellow cabs, black cars and other for hire vehicles are given in three decisions issued by the Honorable Allan Weiss, a Justice of the New York State Supreme Court, County of Queens, in three cases: (1) *Glyca Trans LLC v. City of New York*, Index No. 8962/15 (September 8,2015), (2) *XYZ Two Way Radio Service, Inc. v. The City of New York*, Index No. 5693/15 (September 8, 2015), and (3) *Melrose Credit Union v. The City of New York*, Index No. 6443/15 (September 8, 2015).

The cases decided by Justice Weiss were largely Article 78 in nature, and the petitioners, who were parties with interests in medallions, essentially sought to compel TLC to enforce laws and regulations protecting the exclusive rights of medallion holders. Justice Weiss granted the respondents' CPLR 3211 dismissal motions. In the *Matter of Glyka Trans, LLC, et al. v City of New York et al.*, a hybrid proceeding pursuant to CPLR Article 78 and action for declaratory relief, the Appellate Division, Second Department affirmed the dismissal, holding, *inter alia*, that " TLC's alleged decision to 'allow black cars to pick up e-hails' did not, as a matter of law, constitute an unconstitutional taking of the petitioners' property." (161 AD3d 735, 740 [2d Dept 2018].) The instant action, which purports to be a class action, is very different.

with the policies underpinning the TLC Rules and, consequently, the value of the medallions that is based upon their revenue-generating ability. It is uncontroverted that the undeniably high sale prices of taxi medallions has hitherto been market-driven based upon their legislatively-created scarcity that gave them the sole right to pick up street hails. Up until the invention of the app-based taxi model, the revenue that medallions could expect to produce was reasonably predictable and stable, based upon their finite number and the number of black cars and other for-hire vehicles tangentially competing with them. There is no question that this changed with the introduction of competition from a new technology-based class of taxi services, introduced by Uber and thereafter expanding to other app-based companies emulating Uber's model. Although Ubers and other app-based taxis are not, strictly speaking, street hails as medallion taxis are, the ease of summoning one quickly at any time with merely the swipe of an icon on a cell phone to a street corner or any location makes these taxis different from "black car" limousines that must be ordered by calling the company's dispatch office and requesting a pick-up at a specific address, often with a significant wait time, and makes arranging a taxi pick-up as easy and spontaneous, often more so, than standing at the curb and attempting to hail with arm-waving and whistles an on-duty and unoccupied medallion cab, often while vying for the same cab with others.

This Court takes judicial notice that Uber and other such app-summoned taxi services, because of their ease of access, compete directly with medallion yellow taxis, arguably at a distinct advantage since they are not legislatively limited in their numbers under a medallion system and can operate without having to pay millions of dollars for the privilege of owning a medallion. Although the evidence on this record does not establish that the City misrepresented the current revenue figures for the subject medallions published to prospective bidders, and although Uber had been operating in the City of New York for approximately two years prior to the medallion auction, the evidence presented also does not resolve questions concerning whether the City knew at the time, and did not disclose, that Uber and other app-based taxi services were planning to expand their operations significantly, that the TLC was not going to limit the numbers of such taxis and that the resulting increased competition would adversely affect the current and projected revenue figures published to defendants for the purpose of inducing them to place bids for the purchase of the medallions, and, consequently, the market value of the medallions. Although the purchase of the subject medallions was clearly intended as an income producing investment subject to similar market value risks as the purchase of real estate, unlike the risk of a downturn in the real estate market that real estate investors accept as being largely unpredictable due to the vagaries of the marketplace and the economy,

over which the seller has no control and for which the seller has no responsibility, a question presented here is whether the alleged plummeting value of the subject medallions since the action sale was the result of the City's subsequent allowing of Uber and app-based services to expand their operations in the City and its failure to protect medallion owners from unfair competition by Uber and its app-based progeny. Defendants fail to eliminate triable issues of fact as to whether the City breached an implied covenant by failing to prevent unfair competition with the medallion taxicabs by limiting the number of Uber vehicles and other app-based for-hire vehicle companies into the market. That plaintiffs have not established that defendants breached the implied warranty of fair dealing does not establish an entitlement to summary judgment. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004] [quoting Larkin Trucking Co. v Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept 1992]; see also *Gonzalez v Beacon Terminal Assocs., L.P.*, 48 AD3d 518, 519 [2d Dept 2008]; *Dalton v Educational Testing Service*, 294 AD2d 462 [2d Dept 2002]). The City has failed to meet its affirmative burden on summary judgment.

Accordingly, the remaining branches of the motion for summary judgment dismissing plaintiffs' causes of action for breach of the implied covenant of good faith and fair dealing and for recission are denied. To the extent not specifically addressed herein, defendants' remaining arguments are without merit.

Dated: May 7, 2020

Kevin J. Kerrigan, J.S.C.

FILED

5/14/2020
10:04 AM

COUNTY CLERK
QUEENS COUNTY