

Michael M. Buchman

September 30, 2009

VIA ELECTRONIC FILING AND OVERNIGHT DELIVERY

The Honorable Raymond J. Dearie
United States District Court Chief Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Luckers, Cohen and Goldstein. v. Bayside Cemetery and Congregation Shaare
Zedek, Civil Action Nos. 07 Civ. 3823, 08 Civ. 3555, 08 Civ. 3923(RJD)(JMA)*

Dear Chief Judge Dearie:

I represent Plaintiffs in the above-referenced actions.

Enclosed please find a recent Second Circuit decision in *County of Nassau v. Hotels.Com*, 577 F.3d 89 (2d Cir. 2009) which is highly relevant to the pending application to overturn Magistrate Judge Azrack's recent minute entry.

Respectfully submitted,



Michael M. Buchman

c: Stephen M. Axinn (Counsel for Defendant Congregation Shaare Zedek)
Magistrate Judge Joan Azrack

Source: [Legal](#) > [Cases - U.S.](#) > [Federal Court Cases, Combined](#)Terms: "hotels.com" and nassau and "class certification" ([Edit Search](#) | [Suggest Terms for My Search](#)) Select for FOCUS™ or Delivery

577 F.3d 89; 2009 U.S. App. LEXIS 17748, *

COUNTY OF NASSAU, NEW YORK, on behalf of itself and all others similarly situated, Plaintiff-Appellant, -v.- **HOTELS.COM**, LP; **HOTELS.COM** GP, LLC; HOTWIRE, INC.; TRIP NETWORK, INC., D/B/A CHEAPTICKETS.COM; CENDANT TRAVEL DISTRIBUTION SERVICES GROUP, INC.; EXPEDIA, INC.; INTERNETWORK PUBLISHING CORP., D/B/A LODGING.COM; LOWESTFARE.COM, INC.; MAUPINTOUR HOLDING, LLC; ORBITZ, INC.; ORBITZ, LLC; PRICELINE.COM, INC.; SITE59.COM, LLC; TRAVELOCITY.COM, INC.; TRAVELOCITY.COM, LP; TRAVELWEB, LLC; and TRAVELNOW.COM, INC, Defendants-Appellees.

Docket No. 07-3919-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

577 F.3d 89; 2009 U.S. App. LEXIS 17748

January 22, 2009, Argued

August 11, 2009, Decided

PRIOR HISTORY: [*1]

Appeal from a judgment of the United States District Court for the Eastern District of New York (Spatt, Judge).

[County of Nassau v. Hotels.com](#), 594 F. Supp. 2d 251, 2007 U.S. Dist. LEXIS 85808 (E.D.N.Y., 2007)**DISPOSITION:** VACATED and REMANDED.**CASE SUMMARY**

PROCEDURAL POSTURE: Plaintiff county filed an action alleging that defendants, online sellers and/or resellers of hotel rooms, had been calculating their taxes based on the discounted price that they negotiated with hotels and accordingly remitting too little to the county. The United States District Court for the Eastern District of New York dismissed the complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. The county appealed.

OVERVIEW: The county sought jurisdiction under the Class Action Fairness Act of 2005 (CAFA), [28 U.S.C.S. § 1332\(d\)\(2\)](#). The county requested certification of a statewide class of all New York cities, counties, and other local governmental entities that had imposed hotel taxes since March 1, 1995. The court asked *nostra* sponte whether the requirements of CAFA were satisfied because the district court lacked jurisdiction to hear the case if they were not. The court found that there were substantial questions as to whether **class certification** was appropriate. There was a distinct possibility that questions common to the members of the class did not predominate over those affecting only individual members because the cause of action for each member of the class might have arose under a law unique to that class member. The various class members could have collected and administered their taxes through sufficiently similar means and manners to satisfy the certification requirement, and members could have shared significant common questions of fact regarding the way in which defendants conducted their businesses. This, however, was a question for the district court to consider in the first instance.

OUTCOME: The judgment of the district court was vacated. The case was remanded to the district court to determine whether **class certification** was appropriate.

CORE TERMS: hotel, tax law, class certification, class members, class action, motel rooms, certification, administered, collected, sponte, questions of law, matter jurisdiction, administrative processes, person entitled, individual members, jurisdictional, predominate, exhaustion, discounted, resellers, occupied, *nostra*, rent, com

LEXISNEXIS® HEADNOTES Hide[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [Jurisdiction Over Actions](#) > [Limited Jurisdiction](#)

HN1 It is a fundamental precept that federal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the United States Constitution or Congress. [More Like This Headnote](#)

[Civil Procedure](#) > [Class Actions](#) > [Class Action Fairness Act](#)

HN2 The Class Action Fairness Act of 2005, [28 U.S.C.S. § 1332\(d\)\(2\)](#), grants district courts original jurisdiction over class action suits on certain conditions, among them that the number of members of all proposed plaintiff classes in the aggregate be no less than one hundred. [28 U.S.C.S. § 1332\(d\)\(5\)\(B\)](#). [More Like This Headnote](#)

[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [General Overview](#)[Civil Procedure](#) > [Dismissals](#) > [Involuntary Dismissals](#) > [General Overview](#)

HN3 If subject matter jurisdiction is lacking and no party has called the matter to a court's attention, the court has the duty to dismiss the action sua sponte. [More Like This Headnote](#)

[Civil Procedure](#) > [Class Actions](#) > [Prerequisites](#) > [General Overview](#)

HN4 To warrant certification of a federal class action lawsuit, plaintiffs must establish that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. [Fed. R. Civ. P. 23\(a\)](#). [More Like This Headnote](#)

[Civil Procedure](#) > [Class Actions](#) > [Prerequisites](#) > [Maintainability](#)

HN5 Under [Fed. R. Civ. P. 23\(b\)\(3\)](#) a district court must satisfy itself, inter alia, that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. [Fed. R. Civ. P. 23\(b\)\(3\)](#). [More Like This Headnote](#)

[Tax Law](#) > [State & Local Taxes](#) > [Administration & Proceedings](#) > [General Overview](#)

[Tax Law](#) > [State & Local Taxes](#) > [Administration & Proceedings](#) > [Collection](#)

HN6 [N.Y. Tax Law § 1202-q\(2\)](#) and [Nassau County, N.Y., Hotel Tax Law § 3\(B\)](#) provide that the tax shall be collected and administered by such means and in such manner as other taxes which are now collected and administered. [More Like This Headnote](#)

COUNSEL: PETER J. CLINES, for Lorna B. Goodman, Office of the [Nassau County Attorney](#), Mineola, N.Y. ([Robert S. Schachter](#), [Joseph Lipofsky](#), [Paul Kleidman](#), and [David R. Kromm](#), [Zwerling, Schachter & Zwerling, LLP](#), Garden City, N.Y., and New York, N.Y., on the brief), for Plaintiff-Appellant.

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[Chad Arnette](#), Kelly Hart & Hallman, LLP, Fort Worth, Tex., for Defendants-Appellees Travelocity.com, Inc., Travelocity.com LP, and Site59.com LLC.

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[John D. Pernick](#), Bingham McCutchen LLP, San Francisco, Cal., for Defendant-Appellee, [Maupintour Holding, LLC](#).

JUDGES: Before: [WALKER](#) and [CALABRESI](#), Circuit Judges. *

* The Honorable [Sonia Sotomayor](#), originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Local Rule 0.14(2); [United States v. Desimone](#), 140 F.3d 457 (2d Cir. 1998).

OPINION

PER CURIAM:

Plaintiff-Appellant County of [Nassau](#) (the "County" or "[Nassau](#)") appeals a decision of the District Court dismissing its complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. [County of Nassau v. Hotels.com, LP](#), 594 F. Supp. 2d 251 (E.D.N.Y. 2007). The District Court based its decision on the failure of the County to allege that it complied with administrative processes for assessing and collecting taxes, thus exhausting its administrative remedies, prior to commencing [\[*3\]](#) its action to recover those taxes. See *id.* at 258-59. On appeal, the County argues that no requirement of exhaustion exists, that the District Court failed to defer to the County Treasurer's interpretation of the County tax law at issue, and that exhaustion would in any event be futile.

Without considering whether the County needed to exhaust administrative processes to sustain jurisdiction, we remand for consideration of a different jurisdictional concern, which we raised *nostra sponte* at oral argument: whether the complaint meets the requirements for **class certification** under [Fed. R. Civ. P. 23](#), without which both we and the District Court would lack jurisdiction over the suit as presently constituted.

BACKGROUND

The County's allegations are set out at length in the District Court's opinion. See 594 F. Supp. 2d at 252-54. Relevant to our purposes, the County alleges that the defendants are online sellers and/or resellers of hotel rooms who negotiate discounted room rates with hotels and then resell the rooms at higher retail rates. The State of New York authorizes the County to impose a tax "upon persons occupying hotel or motel rooms in such county." N.Y. Tax Law § 1202-g(1). Pursuant [***4**] to this authority, the County enacted the **Nassau County Hotel and Motel Occupancy Tax**, which provided that the tax:

shall be paid by the person liable therefor to the owner of the hotel or motel room occupied or to the person entitled to be paid the rent or charge for the hotel or motel room occupied for and on account of the County of **Nassau** imposing the tax and that such owner or person entitled to be paid the rent or charge shall be liable for the collection and payment of the tax. . . .

Nassau County Misc. Local Laws tit. 24 § 3(D) ("**Nassau County Hotel Tax Law**"), available at http://www.nassaucountyny.gov/website/GenericServices/docs/NassauCountyMiscLaws_Dec2008.pdf.

The County alleges that the tax owed under this law is correctly calculated as a percentage of the price that occupants pay to the defendant resellers, and that the defendants are required to remit that amount to the County. It further alleges that, rather than paying this amount, each defendant has been calculating its taxes based on the discounted price that it negotiated with the hotels and accordingly remitting too little to the County.

In its complaint, the County sought jurisdiction under the Class Action Fairness [***5**] Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d) (2). It requested certification of a "state-wide class of all New York cities, counties and other local governmental entities that have imposed hotel taxes since March 1, 1995." Compl. P 34.

DISCUSSION

^{HN1} "It is a fundamental precept that federal courts are courts of limited jurisdiction' and lack the power to disregard such limits as have been imposed by the Constitution or Congress." *Durant, Nichols, Houston, Hodgson, & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009) (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)). Because the case presents no federal questions, the only statutory jurisdictional grant that might allow us to consider the case with its current parties is ^{HN2} CAFA, which grants district courts original jurisdiction over class action suits on certain conditions, among them that "the number of members of all proposed plaintiff classes in the aggregate" be no less than one hundred. 28 U.S.C. § 1332(d)(5)(B). Although the parties stipulated that the requirements of CAFA are met, we asked *nostra sponte* whether they are in fact satisfied, as the District Court lacked jurisdiction to hear the case if they [***6**] were not. See *Durant, Nichols*, 565 F.3d at 62 (^{HN3} "If subject matter jurisdiction is lacking and no party has called the matter to the court's attention, the court has the duty to dismiss the action *sua sponte*.").

There are substantial questions as to whether **class certification** would be appropriate in this case. ^{HN4} To warrant certification of a federal class action lawsuit, plaintiffs must establish that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The County brought its suit under Fed. R. Civ. P. 23(b)(3), see Compl. P 36, ^{HN5} under which the district court must also satisfy itself, *inter alia*, that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); see also *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007).

In [***7**] its post-argument letter brief, **Nassau** estimates that over one hundred local governments - counties, cities, towns, and villages - in the State of New York that it claims imposed hotel taxes on the defendants. If true, this allegation would satisfy § 1332(d)(5)(B). But the allegation raises the distinct possibility that questions common to the members of the class do not predominate over those affecting only individual members. Assuming that each locality imposes its hotel tax as **Nassau** does, under its own tax law, the cause of action for each member of the plaintiff class might well arise under a law unique to that class member. As a result, construction of at least some of these laws would likely require individualized inquiry even if the language of each hotel tax is broadly similar. Both the New York State statute pursuant to which **Nassau's** hotel tax has been enacted and **Nassau's** hotel tax law itself ^{HN6} provide that the tax shall be collected and administered "by such means and in such manner as other taxes which are now collected and administered." N.Y. Tax Law § 1202-g(2); **Nassau County Hotel Tax Law § 3(B)**. Accordingly, construction of **Nassau's** hotel tax law is not resolved by [***8**] the language of the law itself, but requires inquiry into all of the other taxes administered and collected by the county.

This is not to say that **Nassau** faces an insurmountable burden in seeking **class certification**. The various class members may collect and administer their taxes through sufficiently similar "means and . . . manner[s]" to satisfy the certification requirement, and class members may share significant common questions of fact regarding the way in which the defendant companies conduct their businesses. This, however, is a question for the District Court to consider in the first instance. Accordingly, we remand to the District Court to determine whether **class certification** is appropriate.

We also note that both parties have suggested the possibility of dropping Site59.com, the sole defendant with New York citizenship. If this were done, the District Court would seem to have jurisdiction under 28 U.S.C. § 1332(a)(1), even if a class of fewer than one hundred members were certified or if the County were to refile its complaint as an individual action. Should

class certification prove inappropriate, the District Court should consider whether Site59.com should be dropped from [*9] the action pursuant to Fed. R. Civ. P. 21.

CONCLUSION

For the foregoing reasons, we **VACATE** the judgment of the District Court and **REMAND** the case for further proceedings consistent with this order. This panel retains jurisdiction to decide any renewed appeal following the disposition of the remand.







Source: [Legal > Cases - U.S. > Federal Court Cases, Combined](#) 

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