| **Diaz v Mahmood** |
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| 2023 NY Slip Op 34278(U) |
| November 30, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 515746/2018 |
| Judge: Richard J. Montelione |
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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 30th day of November 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

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AMY DIAZ,

Plaintiff,

-against-

SAJID MAHMOOD, UBER TECHNOLOGIES INC. and MANUEL MARTE,

Defendants.

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**MOTION IN LIMINE**

**DECISION and ORDER**

Index No.: 515746/2018

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

| Papers | NYSCEF DOC. # |
|---|---|
| | |
| Defendant Uber Technologies Inc.'s various Motions in Limie; Motion to Quash..... | 150-179 |
| Plaintiff Diaz's Answering/Opposing/Affirmations/Affidavits/Exhibits..... | 180-197 |
| Reply Affirmations/Affidavits/Exhibits..... | |
| Other..... | |

MONTELIONE, RICHARD J., J.

After reviewing the various in limine motions, opposition thereto, hearing oral argument on the record on November 30, 2023, and after due deliberation, the court makes the following determinations:

MS#7

NYSCEF 150. MOTION IN LIMINE – defendant Uber Technologies Inc. ("Uber") seeks exclusion of any non-precedential court or administrative rulings (NYSCEF 150).

OPPOSITION: plaintiff argues, *inter alia*, that the motion is premature and deprives her of the ability to present a full case, that case law only applies to the "preclusive effect" of the findings or decisions.

DETERMINATION: Motion to preclude GRANTED because determination of any non-

precedential court or administrative rulings are not relevant. *See Uy v A. Hussein*, 186 AD3d 1567, 1569, 131 NYS3d 70, 2020 NY Slip Op 05080, 1, 2020 WL 5648396 [2d Dept 2020]:

> Uber correctly contends that the decision of the appeal board was not entitled to preclusive effect in this action. With exceptions not applicable here, Labor Law § 623 (2) provides that '[n]o finding of fact or law contained in a decision rendered pursuant to [Labor Law article 18] by . . . the appeal board . . . shall preclude the litigation of any issue of fact or law in any subsequent action.' Thus, pursuant to statute, the appeal board decision cannot be given collateral estoppel effect in this action (*see id.*; *Matter of Lewis v New York State Div. of Human Rights*, 163 AD3d 818, 820 [2018]; *Derrick v American Intl. Group, Inc.*, 126 AD3d 576 [2015]).

The court further rejects the argument that the determination of an administrative body does not preclude the introduction of such determination at trial. This would be incongruent with appellate decisions that specifically hold that such determination is not to be considered.

MS#8.

NYSCEF 151. MOTION IN LIMINE - defendant Uber Technologies Inc. seeks the exclusion of any and all evidence, testimony, and argument that Uber owed plaintiff a heightened duty of care owed by common carriers.

OPPOSITION: The plaintiff argues, *inter alia*, that defendant Uber misapplied the law as it pertains to common carriers in New York State.

DETERMINATION: Motion to exclude argument or jury charge regarding defendant Uber owing a heightened duty of care owed by common carriers is GRANTED. Liability has already been established as to defendant Sajid Mahmood. If defendant Mahmood is found by the jury to be an employee or agent of Uber, Uber shall be found vicariously liable because clearly the services rendered would be considered "within the scope of employment." ie. an accident occurring while driving a paying passenger to a requested destination. *See Alkhabbaz v Best*, 176 AD3d 661, 662, 107 NYS3d 684, 685, 2019 NY Slip Op 07043, 2019 WL 4849520 [2d Dept 2019]:

> 'An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment' (*Davis v. Larhette,* 39 A.D.3d 693, 694, 834 N.Y.S.2d 280; *see Beres v. Terranera,* 153 A.D.3d 483, 486, 60 N.Y.S.3d 207; *Pinto v. Tenenbaum,* 105 A.D.3d 930, 931, 963 N.Y.S.2d 699).

Moreover, mention of "common carrier" at this stage of the litigation would also be

prejudicial because this status, if applicable, is directly related to either the *employment* or *agency* relationship between the two defendants as a matter of law.

MS#9

NYSCEF 152. MOTION IN LIMINE - seeking exclusion of any undisclosed evidence and testimony of previously unidentified witnesses.

OPPOSITION: General opposition.

DECISION: Denied without prejudice to renew at the appropriate time at trial. This court will not render an advisory opinion. There is no legal basis for requesting the relief because there is no showing that plaintiff will present evidence that should otherwise have been disclosed.

MS#10

NYSCEF 153 MOTION IN LIMINE - restricting all witnesses that are not parties to the action from entering the courtroom until they are called to testify.

OPPOSITION: General Opposition.

DECISION: Reserve decision. There has already been a determination of liability and there appears to be no eye-witness testimony needed regarding the accident. Assuming testimony from witnesses regarding employment or agency status, counsel may move the court for specific rulings when a witness in the public area of the courtroom is brought to the court's attention or counsel may ask if any of a party's witnesses are in court. Expert witnesses who are not fact witnesses will not be excluded if they assist respective counsel during the course of the trial. *See Perry v Kone, Inc.*, 147 AD3d 1091, 49 NYS3d 696, 2017 NY Slip Op 01395, 2017 WL 690607 [2d Dept 2017].

Ms#11

NYSCEF 154. MOTION IN LIMINE - requiring that all parties provide advance notice of a witness' identity prior to the intended appearance of said witness.

Opposition: General Opposition.

Decision: GRANTED to the extent that all parties shall provide a complete list of witnesses to all other parties and shall provide the anticipated sequence of testimony forthwith. The court will use its discretion in changing the sequence upon good cause given scheduling or other issues regarding the witnesses. Regardless of who calls a witness to testify, in order to expedite the proceedings, the court suggests the parties enter into a stipulation whereby the cross examination of any witness may go beyond the direct examination if the questions address an issue that is relevant to the prosecution or the defense of the case so as to avoid re-calling a witness to offer testimony in defense or rebuttal. If the party called to testify has an adverse interest to the party

calling the witness to testify, leading questions may be asked of the witness.

MS#12

NYSCEF 155. MOTION IN LIMINE – to preclude testimony related to finances, profits, losses, or economic status of Uber. 1. All evidence of Uber's financial condition or profits be excluded from evidence; 2. All counsel be instructed not to comment on such evidence or make any attempt to introduce testimony or evidence regarding the same or refer to the financial condition or profits of Uber; 3. All counsel informs all of their witnesses not to make any reference or comment to such evidence.

Opposition: General opposition.

Decision: GRANTED. 1. All evidence of Uber's financial condition or profits is excluded from evidence; 2. All counsel are instructed not to comment on such evidence or make any attempt to introduce testimony or evidence regarding the same or refer to the financial condition or profits of Uber; 3. All counsel shall inform all of their witnesses not to make any reference or comment to such evidence.

MS#13

*NYSCEF 156. MOTION IN LIMINE* – seeking prohibition of any evidence related to similar or same occurrences, claims, or lawsuits against Uber.

Opposition: General Opposition.

Decision: GRANTED. No evidence of other occurrences or accidents or lawsuits shall be mentioned during the course of the trial.

MS#14

*NYSCEF 157. MOTION IN LIMINE* – seeking preclusion of prejudicial terms.

1) Referring to Uber as a "cab" or "taxi" company, a ridesharing service, or a transportation service. GRANTED.

2) Describing Uber as a "carrier;" GRANTED.

3) Describing the transportation provided to riders as "driving services." DENIED. There is no question of fact that the transportation provided by drivers using the Uber App. is "driving services" from point of pick-up to point of destination. Whether defendant Mahmood was an employee of Uber providing driving services is a factual issue to be determined by the jury.

4) Any use of the term "Uber driver" or variation of that term thereof. DENIED. This term is in the vernacular. Counsel may argue that the title "Uber driver" does not determine the employment or agency status of the driver. Any suggestion to the contrary will result in a

curative instruction to the jury.

5) Reference, testimony, or attempts to introduce evidence of an "Uber car" "Uber car transportation," (as alleged in the Complaint) or "Uber vehicle" because Uber did not own, lease, manage, or maintain Sajid Mahmood (hereinafter "Mahmood")'s vehicle. DENIED. The description is within the vernacular. Counsel may argue that the title "Uber driver" does not determine the employment or agency status of the driver. Any suggestion to the contrary will result in a curative instruction to the jury.

6) Reference to Uber "employing" Mahmood. DENIED in part and GRANTED in part. Plaintiff's attorney may say allegedly "employed" or "the evidence will show" employment or agency. No expert opinion will be allowed as to whether or not the defendant driver is an employee or agent of Uber because this is a factual determination to be made by the jury and the expert may not decide the issue which by the nature of the expert's testimony must be both factual and *legal*. The jury will be given the law by the court and the jury will apply the facts to the law.

7) Reference, testimony, or attempts to introduce evidence to the number of "Uber drivers" on the road at any given time, in New York or in any other jurisdiction. GRANTED to the extent that prior to the introduction of evidence through testimony, plaintiff's counsel must make an offer of proof as to how this information is relevant in the jury's determination as to whether the defendant Mahmood was an employee or agent of Uber.

8) Reference, testimony, or attempts to introduce evidence that Mahmood or other users of the Driver App were or are "Uber Driver(s)." DENIED. *See* MS#14, ¶ 4.

9) Reference, testimony, or attempts to introduce evidence of Mahmood's earnings or income as an "Uber driver." GRANTED in part and DENIED in part. Any documentary evidence in the form of tax forms, income tax, etc. which may reflect upon the employee/employer status of defendant Mahmood is permissible; questions or evidence only involving earnings or income are not permissible. Any other issues must be raised by objections during the course of the trial.

10) Describing the Uber App software licensing process as "applying for" or suggesting that an "application" by users was necessary to secure a license to gain access to the Uber App or Driver App. DENIED as there is an insufficient showing of the legal basis for the objection and the court will not speculate. This denial does not preclude defendant Uber from raising an appropriate objection during the course of the trial. This denial does not preclude defendant Uber from arguing or contending that the licensing process is not an application process.

11) Describing a user's or Plaintiff's request for a ride made through the Rider App as "Requesting an Uber" (DENIED), "calling an Uber" (DENIED), "taking an Uber" (DENIED), "hailing an Uber" (GRANTED as "hailing" implies on street request which is not permissible) or "dispatching an Uber" (DENIED as there is an insufficient showing of the legal basis for the objection and the court will not speculate. This denial does not preclude arguing or contending that Uber does not "dispatch").

12) Describing a user or Plaintiff "paying Uber" for any trip, including but not limited to the subject trip provided by independent third-party transportation provider, Mahmood. DENIED. There is no question of fact that Uber is paid, deducts part of the payment for itself, and forwards the remainder to the driver.

13) Reference, testimony, or attempts to introduce evidence of defendant Mahmood being referenced as an employee, agent, apparent agent, and/or legal partner of Uber. Decision RESERVED. Specific objections may be made during the course of the trial. Plaintiff may argue that the "evidence will show" or "our contention is" that defendant Mahmood is an employee or agent but may not argue that defendant Mahmood is a "legal partner of Uber" as this is confusing unless an offer of proof is made as to why this terminology is appropriate.

14) Reference, testimony, or attempts to introduce evidence that Uber dictates and/or doesn't dictate number of hours driven. Decision RESERVED. The request seeks an advisory opinion, and there is an insufficient showing of the legal basis for the objection and the court will not speculate. Depending on the development of the evidence, this may or may not be relevant.

15) Reference, testimony, or attempts to introduce evidence of any "Uber meeting." DENIED as there is an insufficient showing of the legal basis for the objection and the court will not speculate. Specific objections may be made during the course of the trial.

16) Reference, testimony, or attempts to introduce evidence of instructions and training by Uber to Mahmood, including but not limited to "training" on how to use the Driver App. Decision RESERVED. The request seeks an advisory opinion, and there is an insufficient showing of the legal basis for the objection and the court will not speculate. Depending on the development of the evidence, this may or may not be relevant.

17) Reference, testimony, or attempts to introduce evidence of instructions or training by Uber to Mahmood on how to use GPS functions. Decision RESERVED. The request seeks an advisory opinion, and there is an insufficient showing of the legal basis for the objection and the court will not speculate. Depending on the development of the evidence, this may or may not be relevant.

18) Reference, testimony, or attempts to introduce evidence that Uber provided Mahmood with a GPS. Decision RESERVED. It is unclear whether GPS functions have any relevance in determination of either employment status or agency but plaintiff and Uber are given the opportunity to make an offer of proof outside the presence of the jury.

19) Reference, testimony, or attempts to introduce evidence that Mahmood phone was/is an "Uber phone" and/or was provided to Mahmood by Uber. DENIED. The movant fails to inform the court whether defendant Mahmood was in fact provided a phone by Uber and the court will not speculate. Specific objections may be made during the course of the trial.

20) Reference, testimony, or attempts to introduce evidence as to "Uber investigators." DENIED. The movant fails to inform the court exactly what evidence it is referring to and the court will not speculate. Specific objections may be made during the course of the trial.

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MS#15

NYSCEF 158. MOTION IN LIMINE – precluding parties use of the "reptile theory."

OPPOSITION: General Opposition.

Decision RESERVED. The narrow issue of the employment status between the two defendants does not easily evoke sentiments of protecting "themselves and their families." Specific objections may be made during the course of the trial and the court will not hesitate to give a curative instruction if there are inappropriate arguments having nothing to do with the issues that must be determined by the jury. Plaintiff has indicated on the record that he will not make such arguments.

MS#16

*NYSCEF 159. MOTION IN LIMINE* - preclusion of any argument, testimony, comment or reference to any evidence of all media coverage in any format and from any source. GRANTED.

MS#17

*NYSCEF 160. MOTION IN LIMINE* - preclusion of testimony as to lost wages or future neck treatment.

Opposition: General Opposition

Decision: DENIED without prejudice to raise this issue after the liability phase of the trial and before the commencement of the damages portion of the trial.

MS#18

NYSCEF 164. MOTION IN LIMINE - preclusion of any argument, testimony, comment or reference to/by Dr. Kornelia Teslic, M.D. Argument: Dr. Kornelia Teslic, M.D., was noticed as a treating physician but she should be precluded from testifying about diffusion tensor imaging ("DTI") and its use in diagnosing plaintiff with traumatic brain injury as the imaging methods are not widely accepted for clinical use in the medical community. Dr. Sze, professor of radiology at Yale University School of Medicine, DTI data results from "computerized image analysis."

Opposition: General Opposition.

Decision: DENIED without prejudice to raise this issue after the liability phase of the trial and before the commencement of the damages portion of the trial.

MS#19

NYSCEF 170. MOTION IN LIMINE to quash judicial subpoena of Chad Dobbs. Defendant

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Uber argues that Benjamin Carroll, Senior Manager of Corporate Business Operations at Uber Technologies Inc. was deposed over a two-day period and nonetheless plaintiff subpoenaed Mr. Dobbs without any reason given as to why his testimony would be necessary given the redundancy of his testimony in light of Benjamin Carroll being produced pursuant to subpoena. Plaintiff also subpoenaed Kyle Lewis, in-house counsel for Uber.

Opposition: Plaintiff seeks additional information not available from Benjamin Carrol alone.

Decision: GRANTED and the subpoenas are quashed. The court is not persuaded by any arguments that the additional witnesses' testimony would not be redundant. Further, Kyle Lewis is in-house counsel for Uber and there are document demands that could have been sought during discovery, and there is no showing that this witness would provide any testimony not provided by Mr. Carroll or that the documents could not have been sought prior to the note of issue being filed.

*See Pena v New York City Tr. Auth.*, 48 AD3d 309, 309-10, 852 NYS2d 80, 81, 2008 NY Slip Op 01585, 2008 WL 450822 [1st Dept 2008]:

> The trial court providently exercised its discretion in granting defendant's motion to quash the subpoena issued by plaintiff during trial seeking the production of defendant's logbooks. The circumstances presented do not warrant allowing plaintiff to conduct additional discovery almost a year after the filing of the note of issue (*see Genevit Creations v. Gueits Adams & Co.*, 306 A.D.2d 142, 760 N.Y.S.2d 323 [2003], *lv. dismissed in part and denied in part* 1 N.Y.3d 617, 777 N.Y.S.2d 11, 808 N.E.2d 1270 [2004]; *Henry L. Fox Co., Inc. v. Sleicher,* 186 A.D.2d 537, 588 N.Y.S.2d 795 [1992] ).

*See Genevit Creations, Inc. v Gueits Adams & Co.*, 306 AD2d 142, 142, 760 NYS2d 323, 2003 NY Slip Op 15289, 2003 WL 21386649 [1st Dept 2003]:

> The motion court properly exercised its discretion in quashing plaintiffs' subpoena duces tecum, which was overbroad in its demands and was served to obtain further discovery after plaintiffs had filed a note of issue and certificate of readiness for trial, certifying that all necessary discovery had been completed (*see Soho Generation of New York, Inc. v. Tri–City Ins. Brokers, Inc.*, 236 A.D.2d 276, 277, 653 N.Y.S.2d 924; *Mestel & Co., Inc. v. Smythe Masterson & Judd, Inc.*, 215 A.D.2d 329, 330, 627 N.Y.S.2d 37).

*See Matter of Lisa W. v Seine W.*, 9 Misc 3d 1125(A), 862 NYS2d 809, 2005 NY Slip Op 51782(U), 2005 WL 2882454, at *7 [Fam Ct 2005]:

> "[a] trial subpoena as a 'fishing expedition' to obtain materials that could have been obtained in pretrial disclosure" (*Mestel & Co. v. Smythe Masterson & Judd,* 215 A.D.2d 329, 627 N.Y.S.2d 37 [1st Dept 1995] ), nor can a trial subpoena be used as a substitute for discovery, to ascertain the existence of evidence (*Matter of Terry D.*, 81 N.Y.2d 1042, 1044 [1993] ) or, to obtain otherwise unavailable discovery.

However, plaintiff may make an application, outside the presence of the jury, after testimony is given by Benjamin Carrol, and make an offer of proof, as to any additional testimony required from other employees of Uber, in the event Mr. Carrol fails to answer any relevant questions or otherwise offers testimony that is incomplete or misleading.

MS#20

*NYSCEF 175 (MS#20). MOTION IN LIMINE* to preclude the testimony of Mark S. Gottlieb. Movant's argument: expert witness improperly seeks to testify as to the defendant Mahmood being an employee based upon review of records and testimony of parties.

Opposition: Plaintiff argues, *inter alia*, the issues are complicated, and the expert has knowledge beyond the ken of the jury.

Decision: GRANTED. The issue of the employment status between the defendants is a factual determination for the jury. This determination is not beyond the grasp of the jury when the court provides it with the relevant law. The expert would have to make a legal analysis in order to apply his determination of the facts making the expert's opinion based partially on his application of the law to the facts as he finds them to be which is improper. *See People v Lee*, 96 NY2d 157, 726 NYS2d 361, 750 NE2d 63 (2001). There is no opinion of the expert that meets the "confidence sufficient to satisfy acceptable standards of reliability and certainty" given that the issue of employment or agency has not been determined based on the technology now utilized by drivers, Uber and consumers. *People v Brown*, 67 NY2d 555, 505 NYS2d 574, 9496 NE2d 663 (1986).

It is,

ORDERED, that all parties shall provide the court with proposed closing jury charges on liability, and contentions of the parties, where appropriate, with proposed verdict sheets on liability, FORTHWITH.

This constitutes the decision and order of the Court.

Hon. Richard J. Montelione

FILED
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