REGINALD GREEN, ET AL	*	**NO. 2017-C-0695**
VERSUS	*	**COURT OF APPEAL**
FRANKLIN ELIEZER GARCIA-VICTOR, ET AL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

LEDET, J., DISSENTS WITH REASONS

This is a multi-plaintiff, multi-defendant suit. In their petition,[1] the plaintiffs—twenty-six individual taxi cab drivers (the "Cabbies")—assert a single cause of action against the defendants—thirty-one independent transportation providers who use the Uber app (the "Ubers"). The single cause of action is an alleged violation of the Louisiana Unfair Trade Practices Act (the "LUTPA"). The sole issue before us is whether the Cabbies' petition states a LUTPA cause of action. Contrary to the majority, I would find that the Cabbies fail to state a LUTPA cause of action. In so finding, I rely on the following three factors: (i) lack of class action; (ii) lack of causation; and (iii) lack of conspiracy claim.

Lack of Class Action

Key to the trial court's reasoning in overruling the Ubers' exception of no cause action is the assertion in the Cabbies' petition of a defendant class. The Cabbies' petition not only names multiple individual defendants, but also seeks to certify a defendant class, defined as "[a]ll UberX drivers operating in New Orleans during the time of April 16, 2015 through the present." Relying on the defendant-class action assertion, the trial court reasoned as follows:

> The reason I think it's a close call is because what they're attempting to do is assert a Class, assert claims broad enough in order to create a class action. I understand what's going on. They're not attempting to

[1] The petition in question is the "Second Amending, Supplemental and Restated Petition."

> do specific, this plaintiff, this defendant so much as to assert, to assert actions broad enough so as to create a group of people who potentially would qualify as a class.

The trial court's reliance on the potential creation (certification) of a defendant-class is misplaced.

The express language of the LUTPA belies any legislative intent to authorize a private party to bring either a plaintiff or a defendant class action. The pertinent statutory provision, La. R.S. 51:1409(A), states as follow:

> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages.

As one court noted, "[t]his provision of LUTPA is entitled, 'Private Actions.' This language in La. R.S. 51:1409(A) refers to 'the clear ban against class actions by private persons' under the Act." *Indest-Guidry, Ltd. v. Key Office Equip., Inc.*, 08-599, p. 23 (La. App. 3 Cir. 11/5/08), 997 So.2d 796, 810 (citing *State ex rel. Guste v. General Motors Corp*., 370 So.2d 477, 483 (La. 1978) (Dennis, J., concurring)).[2]

The Cabbies lack the right to bring a defendant-class action asserting a LUPTA cause of action. At this juncture, however, the defendant-class has not been certified. *See Landreneau*, 197 F.Supp.2d at 556 (observing that "[s]hould the plaintiffs' suit become certified as a class action, they would no longer have a claim under LUTPA"). I thus agree with the majority that the "Cabbies are persons pursuant to La. R.S. 51:1409(A)" and that the Cabbies have the right to bring an

---

[2] *See also J-W Power Co. v. State ex rel. Dep't of Revenue & Taxation*, 10-1598, p. 11, n. 11 (La. 3/15/11), 59 So.3d 1234, 1242 (citing *Indest–Guidry*, *supra* (citing *State ex rel. Guste*, *supra*)) (observing that "[t]he jurisprudence indicates that this statute precludes the use of a class action in this context"); *Morris v. Sears, Roebuck & Co*., 99-2772, p. 3 (La. App. 4 Cir. 5/31/00), 765 So.2d 419, 421 (observing that "[t]he Louisiana Unfair Trade Practices Act (LUPTA), R.S. 51:1401, *et seq*., expressly prohibits a private class action"); *Landreneau v. Fleet Financial Group*, 197 F.Supp.2d 551, 557, n. 30 (M.D. La. 2002) (citing *Montegut v. Williams Communs., Inc*., 109 F.Supp.2d 496, 498 (E.D. La. 2000); *Morris*, *supra*) ("observing that "[b]oth federal and state court jurisprudence confirms that private individuals may not assert class actions under LUTPA").

individual LUTPA claim. Given the current procedural posture of the case, it is appropriate to address the exception of no cause of action based on the current status of this case—a multi-plaintiff, multi-defendant suit.

Lack of causation

In deciding the issue presented here, it is necessary to determine whether, as to each defendant, the Cabbies' petition states a LUTPA cause of action. The Louisiana Supreme Court, in *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 09-1633, p. 6 (La. 4/23/10), 35 So.3d 1053, 1057, promulgated a two-prong test for establishing a LUTPA cause of action: (i) the person must suffer an ascertainable loss; and (ii) the loss must result from—be caused by—another's use of unfair methods of competition and unfair or deceptive acts or practices. *NOLA 180 v. Treasure Chest Casino, LLC*, 11-853, p. 6 (La. App. 5 Cir. 3/27/12), 91 So.3d 446, 450 (citing *Cheramie*, *supra*). The majority finds both elements of this test satisfied here. Accepting, *arguendo*, that the Cabbies adequately pled an ascertainable loss and an unfair trade practice,[3] I disagree with the majority's finding that the Cabbies have adequately pled causation.

Key to the majority's finding that the Cabbies adequately pled causation is the majority's reasoning that the Ubers' argument to the contrary goes to the merits and is more appropriately addressed at the summary judgment stage. The majority's reasoning is as follows:

> The Ubers . . . contend that the Cabbies "failed to meet their burden of establishing causation." The Ubers' assertions correspond with a more merit-based examination like that considered on a motion for summary judgment. However, at this early procedural stage, we are unaware of the actual evidence assembled by the Cabbies.

I disagree.

[3] The majority finds that the Cabbies pled an ascertainable loss, stating that "the Cabbies alleged an ascertainable loss (loss of income, relevant market share, business reputation, goodwill, and attorneys' fees and costs), specific amounts to be determined during discovery/trial."

The Cabbies' petition contains only a conclusory allegation that the Ubers, collectively, are operating in violation of the law and thus causing economic harm to the Cabbies. As the Ubers contend, the Cabbies' petition fails to allege that any particular plaintiff suffered an ascertainable loss caused by a particular unfair trade practice performed by any particular defendant. The conclusory allegations of the petition regarding the Ubers' collective acts are insufficient to state a cause of action against the individual defendants. *See Manzo v. Uber Techs., Inc*., No. 13 C 2407 (N.D. Ill. July 14, 2014) (*unpub.*), 2014 WL 3495401 at *4 (observing that "on a motion to dismiss the Court need not accept as true [plaintiff's] claim that Uber operates illegally under the Chicago Municipal Code, as this is an allegation of law, not fact"); *Willis v. Brooks*, 12-1674, p. 7 (La. App. 4 Cir. 6/12/13), 119 So.3d 890, 894 (observing that "mere conclusory allegations of LUTPA violations are insufficient to sustain a claim under the statute").

In *2400 Canal, LLC v. Bd. of Sup'rs of Louisiana State Univ. Agr. & Mech. Coll*., 12-0220, 12-0221, 12-0222, pp. 8-9 (La. App. 4 Cir. 11/7/12), 105 So.3d 819, 825-26, this court recognized the principle that legal conclusions alleged in a petition cannot be considered in deciding an exception of no cause of action; we explained this principle as follows:

> Legal conclusions asserted as facts are not considered well-pled factual allegations for purposes of an exception of no cause of action. A court may not consider legal conclusions "clothed as fact." Simply stated, courts "are not compelled to accept a party's legal conclusions as facts." "If the pleader alleges [legal] conclusions and not material facts (such as a petition in a negligence action which alleges only that the defendant failed to use "due care"), the pleader has failed to state a cause of action."

Id. (internal citations omitted). Simply stated, the principle is that "conclusions of law and conclusions drawn by the pleader from the facts he has alleged should not be considered as true for the purposes of the exception [of no cause of action]." 1

Frank L. Maraist and Harry T. Lemmon, LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE § 6.7 (1999).

Applying the principle here, the Cabbies pled particular examples of alleged illegal acts of individual defendants; however, the Cabbies acknowledge that these alleged individual acts are not the basis for their single LUTPA claim. Instead, the Cabbies allege, and the majority finds, that their claim is based on the cumulative effect of the Ubers' collective acts of committing such illegal acts.[4] The Ubers contend that "[t]here is no basis for treating multiple separate occurrences as a single agglomeration that creates one big 'LUTPA claim.'" I agree. Given the Cabbies are basing their allegations against the Ubers upon mere examples of alleged violations of local ordinances and state regulations coupled with the conclusory nature of the Ubers' alleged collective acts and the cumulative effect of such acts, I would find that the Cabbies have failed to state a cause of action.

Moreover, the Ubers' alleged violation of local ordinances and state regulations cannot support an unfair competition claim, when enforcement of those ordinances and regulations has been left to state and local regulatory authorities. The ordinances and regulations relied upon to support the Cabbies' claims under LUTPA do not provide for causes of actions by private persons. Further, the Cabbies have not asserted that the Ubers have been prosecuted or fined for the alleged violations. Thus, the Cabbies have not, and cannot, assert any cause of action under LUTPA based upon the Ubers' alleged violations of those ordinances and regulations.

Lack of conspiracy

The Cabbies also allege that the Ubers engaged in a conspiracy. In particular, they aver that the Ubers "engaged in activities among themselves and

[4] Particularly, paragraph 77 of the petition states that the Cabbies suffered an ascertainable loss of money "as a direct and foreseeable result of the illegal and unlawful unfair trade practices committed by Defendants[.]"

with others to exclude Plaintiffs from competing in the market for the same customer, which is an unfair trade practice and unfair competition." The particular allegation is based on the 2015 Voo Doo festival; the Cabbies aver as follows:

> On October 31, 2015 through November 1, 2015, Defendants in concert with third parties and among themselves, were successful in prohibiting taxicabs from dropping off and picking up passengers at the Voo Doo Experience music festival. . . [O]nly Uber[s] were permitted to drop off and pick up outside the festival gates . . . Taxicabs were barred from picking up passenger [sic] at the gate.

Conspiracy by itself is not an actionable claim under Louisiana law. *Crutcher-Tufts Resources, Inc. v. Tufts*, 07-1556, p. 3 (La. App. 4 Cir. 9/17/08), 992 So.2d 1091, 1094 (citing *Ross v. Conoco, Inc.*, 02-0299 (La. 10/15/02), 828 So.2d 546). The actionable element of a conspiracy claim is not the conspiracy itself; rather, it is the tort that the conspirators agree to perpetrate and actually commit in whole or in part. *Ames v. Ohle*, 11-1540, p. 11 (La. App. 4 Cir. 5/23/12), 97 So.3d 386, 393 (citing *Thomas v. North 40 Land Development, Inc*., 04-0610, p. 23 (La. App. 4 Cir. 1/26/05), 894 So.2d 1160, 1174). This court, in *Thomas*, *supra*, observed the following:

> Under La. C.C. article 2324, "[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act." La. C.C. art. 2324(A). To establish a conspiracy, a plaintiff is required to provide evidence of the requisite agreement between the parties. *Guidry v. Bank of LaPlace*, 94-1758, p. 9 (La. App. 4 Cir. 9/15/95), 661 So.2d 1052, 1058. Stated otherwise, the plaintiff is required to establish a meeting of the minds or collusion between the parties for the purpose of committing wrongdoing. *Id.*

04-0610 at p. 23, 894 So.2d at 1174.

"The conspiracy action is 'for damages caused by acts committed pursuant to a formed conspiracy, and all of the conspirators will be regarded as having assisted or encouraged the performance of those acts.'" *Thomas*, 04-0610, p. 22, 894 So.2d at 1174 (quoting *Chrysler Credit Corp. v. Whitney Nat'l Bank*, 51 F.3d 553, 557 (5th Cir.1995)); *see also Prime Ins. Co. v. Imperial Fire and Cas. Ins. Co.*, 14-0323, p. 10 (La. App. 4 Cir. 10/1/14), 151 So.3d 670, 677. A conspiracy

can be proved by "actual knowledge, overt actions with another, such as arming oneself in anticipation of apprehension, or inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator." *Stephens v. Bail Enforcement of Louisiana,* 96-0809, p. 10 (La. App. 1 Cir. 2/14/97), 690 So.2d 124, 131.

Here, the Cabbies have failed to name the alleged co-conspirators. The Cabbies have failed to allege that the Ubers had control over who was allowed to drop off or pick up passengers at the Voo Doo festival. The Cabbies have failed to make any allegations regarding who made such decisions and whether there was an actual agreement between the Ubers and the other unknown co-conspirators to exclude the Cabbies. The Cabbies have failed to allege that they specifically attempted to drop off or pick up passengers at the Voo Doo festival. In sum, the Cabbies have failed to sufficiently allege a cause of action for conspiracy against the Ubers.

For the foregoing reasons, I would grant the writ application filed by the Relators, the Ubers; reverse the trial court's ruling denying the exception of no cause of action; and remand to the trial court for further proceedings.[5]

[5] The record reflects that at least one of the named defendants was not a party to the exception of no cause of action. For this reason, I would remand to the trial court for further proceeding as opposed to rendering judgment dismissing the case.