SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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DANIEL MINZER

Plaintiff,

- v -

ANGELO BARGA, ZWOLF-NY, LLC, and UBER TECHNOLOGIES

Defendants.

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INDEX NO. 151979/2019

MOTION DATE 09/27/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21 through 29 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is granted.

Plaintiff Daniel Minzer alleges he was struck in the face by defendant Angelo Barga ("Barga"), who was allegedly acting as a driver employed by defendants Zwolf-NY, LLC ("Zwolf-NY") and Uber Technologies (collectively, "Uber") at the time of the incident. Plaintiff's amended complaint sets forth nine causes of action for (1) assault, (2) battery, (3) respondeat superior liability, (4) apparent authority liability, (5) negligent hiring, supervision, and retention, (6) fraudulent misrepresentation, (7) negligent misrepresentation, (8) breach of contract, and (9) violations of New York's Deceptive Trade Practices Act, New York General Business Law §349. Uber moves to dismiss the Third, Fourth, Fifth, Sixth, Seventh, and Ninth causes of action pursuant to CPLR 3211 (a)(7) for failure to state a cause of action.

Uber Technologies is a transportation service that connects drivers and passengers via its mobile application. Uber Technologies controls the route, destination, number of stops and fare of every ride. Zwolf-NY is a New York City Taxi and Limousine Commission (TLC) licensed

dispatcher that plaintiff believes to be Uber Technologies' alter ego in New York City. According to plaintiff, Zwolf-NY, on behalf of Uber Technologies, dispatched Barga on the night of the incident. Plaintiff alleges that Barga, at the time, was an at-will employee of Uber who was vetted by Uber and subject to Uber's code of conduct. Plaintiff asserts that Uber's online representations led plaintiff to believe his safety was assured.

On February 24, 2018, plaintiff allegedly requested a ride on the Uber application with a friend. Plaintiff's friend wore a brace due to a knee injury. The Uber application assigned Barga as plaintiff's driver. Once inside the vehicle, plaintiff asked Barga to make two stops. Barga became agitated and refused. After making a statement to the effect of "do you want to have a broken leg like your friend," Barga exited the vehicle, walked to the back, and punched plaintiff on the right side of his face before driving away. Plaintiff was charged $10.40 for a ride that neither he nor his friend participated in.

In a CPLR 3211 motion to dismiss, courts construe the pleadings liberally, presume all alleged facts to be true, and accord plaintiffs "the benefit of every possible favorable inference . . . within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). A motion to dismiss is granted only if the factual allegations do not "manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

Plaintiff's third cause of action seeks to impose vicarious liability on Uber for its alleged employee's violent act under the doctrine of respondeat superior. Such cause of action must be dismissed because, assuming arguendo for purposes of this motion that Barga was an employee of Uber's at the time of the alleged incident, Barga acted outside the scope of his alleged employment.[1]

[1] The Court does not need to determine whether Barga was an independent contractor or an employee at this time, as this can be done at the summary judgment stage. *See Phillips v. Uber Techs., Inc.*, No. 16-cv-295 (DAB), 2017 U.S.

Torts committed by employees within the scope of employment render their employers liable. *Riviello v Waldron*, 47 N.Y.2d 297, 302 (1979). Liability does not attach for torts committed "solely for personal motives unrelated to the furtherance of the [employer's] business." *N.X. v Cabrini Medical Center*, 97 N.Y.2d 247, 252 (2002). In *Riviello*, the Court of Appeals set forth five factors to guide the analysis: "the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated." 47 N.Y.2d at 303.

As Uber points out, Barga's violent outburst was not foreseeable to Uber. NYSCEF Doc. No. 27, at 5. Contrary to the work-related motivation plaintiff tries to advance, a sudden tortious act is not expected of, or commonly done by, drivers to resolve disputes over fares or the conduct of the passenger. NYSCEF Doc. No. 25, at 10. Barga's assault on plaintiff deviated drastically from drivers' professional standards. *Id.*, at 5. Although it happened in the course of Barga's employment by Uber, it was not done in furtherance of Uber's business. Thus, Uber cannot be held vicariously liable. *See, Adams v. New York City Transit Auth.*, 211 A.D.2d 285, 295 (1st Dep't 1995) (holding that a subway station clerk's attack on a passenger falls "completely outside any possible definition of the scope of her employment"); *Ferris v. S.L. Capital Corp.*, 289 A.D.2d 50, 50 (1st Dep't 2001) (holding a bus driver was not acting within the scope of this employment when he punched a taxicab passenger nearby). While plaintiff correctly contends that whether an employee acted within the scope of his employment is a fact-intensive inquiry, the present case is distinguishable from *Macineirghe v. County of Suffolk*, 13-cv-1512(ADS)(SIL), 2015 WL

Dist. LEXIS 94979, at *11 (S.D.N.Y. June 17, 2017) (applying New York state law). For purposes of this motion, Barga is assumed to be an employee of Uber.

4459456, (E.D.N.Y. Jul. 21, 2015), as plaintiff's pleading in the instant case does not give rise to a reasonable belief that liability should attach.

Plaintiff's fourth cause of action alleging apparent authority liability must also be dismissed. The principal must imbue the agent with apparent authority with "words or conduct . . . communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *Hallock v. State*, 64 N.Y.2d 224, 231 (1984). Plaintiffs must show they reasonably relied upon "the misrepresentation of the agent because of some misleading conduct on the part of the principal . . . ." *Id.* Even if Uber had clothed Barga with apparent authority vis-à-vis the ride, Barga was not authorized, directed, or imbued with the authority, to use force. Neither was the use of force customary in this profession. In light of these considerations, the Court does not find Barga could have acted with apparent authority in relation to the subject incident. *See Goldfarb v. Hudson*, 75 A.D.2d 775 (1st Dep't, 1980) (concluding the taxi company did not give the driver apparent authority for driving a passenger in his personal car). The Court also notes that Barga had no actual or apparent authority regarding the amount of the fare, the destination, or the number of stops as these are all items that are agreed to between Uber and the passenger prior to the driver being dispatched to pick up the passenger.

Plaintiff likewise fails to state his fifth claim for negligent hiring, supervision, and/or retention. An essential element of these claims is that "employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." *Sheila C. v. Povich*, 11 A.D.3d 120, 129–30. To make out a claim for negligent hiring, plaintiff must allege "defendants knew or should have known of such employees' propensity for the sort of conduct that caused plaintiff's injuries." *Chagnon v. Tyson*, 11 A.D.3d 325, 326 (1st Dep't 2004). Absent this showing, dismissal is proper. *See, id.* (affirming the dismissal when plaintiff, who was hurt in a melee arising

out of a planned "face-off," could not cure the defect). Nothing in the pleading establishes this element or suggests an inference that Uber was alerted to such a possibility. Further, while it is possible, as plaintiff suggests, that discovery may reveal "customer reviews or complaints" thereby potentially substantiating notice of a violent propensity, plaintiff's belief in this regard is purely speculative. Claims based on speculation must be dismissed. *See, Milosevic v O'Donnell*, 89 A.D.3d 628, 629 (1st Dep't 2011).

For the sixth and seventh causes of action, plaintiff alleges Uber made fraudulent and negligent misrepresentations regarding passenger safety. Plaintiff has not set forth, however, a reasonable basis for the Court to determine that Uber's alleged misrepresentations caused plaintiff's loss or injury. For fraudulent misrepresentations claims, plaintiff must establish: (1) that defendants knowingly made a misrepresentation for the purpose of inducing reliance, (2) that defendants' misrepresentation caused plaintiff's justifiable reliance, and (3) that plaintiff's justifiable reliance on defendants' misrepresentation caused the injury. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996). For negligent misrepresentation claims, plaintiff must demonstrate: (1) that plaintiff reasonably relied on defendants' incorrect representations, (2) that plaintiff and defendants shared a privity-like relationship, and (3) that plaintiff's reasonable reliance on defendants' misrepresentation caused the injury. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007). Essential to both of these claims is a causal nexus that "defendant's misrepresentation must have induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Laub v. Faessel*, 297 A.D.2d 28, 31 (2002).

Plaintiff's complaint sufficiently pleads transaction causation as he claims he would not have chosen the service but for Uber's safety promises. NYSCEF Doc. No. 25, at 22. Nothing in

the pleading, however, suggests loss causation—i.e., that Uber's alleged misrepresentations of safety, rather than Barga's attack, directly caused plaintiff's loss. *See, Greentech Research, LLC v Wissman*, 104 A.D.3d 540, 540 (1st Dep't 2013) (noting that plaintiffs' failed to establish loss causation because plaintiffs suffered losses as a direct result of "negative press reports about defendants," and not as a direct result of defendants' alleged misrepresentations); *see also, Laub v. Faessel*, 297 A.D.2d 28 (1st Dep't 2002) (while defendant's misrepresentations concerning his investment competencies induced plaintiff to follow defendant's recommendations on the purchase of equities, defendant had not made misrepresentations concerning the financial health of the invested companies, which was the actual "direct and proximate cause" of plaintiff's financial losses);

Further, CPLR § 3016(b) requires fraud claims to state "the circumstances constituting the wrong" with "specific facts with respect to the time, place, or manner of the defendant's purported misrepresentations," as well as the specific words used by the defendant. *Lanzi v Brooks*, 43 N.Y.2d 778, 780 (1977); *see also, Brown v Wolf Group Integrated Communications, Ltd.*, 23 A.D.3d 239 (1st Dep't 2005); *Riverbay Corp. v. Thyssenkrupp N. Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep't 2014). Plaintiff pleads merely that he was aware of Uber's alleged safety promises. NYSCEF Doc. No. 25, at 5. It makes no mention of how or when plaintiff came to possess this information, thereby failing the particularity requirement.

The complaint's ninth and final cause of action alleges violations of New York General Business Law §349, which suffers similar defects as the two preceding claims. Plaintiffs suing under §349(h) must show they were injured because of defendant's materially misleading and consumer-oriented conduct. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000). In *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 207 (2004), the Court of

Appeals deemed the causation too derivative when the plaintiff insurers' losses resulted directly from smoking-related illnesses of their subscribers, rather than from the defendant tobacco companies' products. By the same logic, Barga's assault is the only direct cause of plaintiff's injury. Even if plaintiff would not have suffered the injury but for Uber's promises, "more than an allegation of 'but for' cause to state a claim for relief under §349(h)" is required. *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 623 (2009) (finding plaintiff municipality's tax revenue losses "entirely derivative of injuries . . . suffered by misled consumers" and too removed from defendants' out-of-state sale of cigarettes).

Based on the foregoing, defendants' motion to dismiss to plaintiff's Third, Fourth, Fifth, Sixth, Seventh, and Ninth causes of action is granted.

A preliminary conference is ordered in this action on June 24, 2020 at 10:30am.

This constitutes the decision and order of the Court.

5/22/2020
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE