

<b>Birencwajg v Compaore</b>
2020 NY Slip Op 33585(U)
October 30, 2020
Supreme Court, New York County
Docket Number: 158784/2019
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12**

*Justice*

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INDEX NO. 158784/2019

SILVINA BIRENCWAJG,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 001

- v -

MOISE COMPAORE, BHARAT BHUSHAN,  
GRUBHUB, INC., CHALK POINT KITCHEN, 525  
BROOME STREET RESTAURANT, LLC,  
INDIEFORK, LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14-41, 43-61, 63-65, 89-91

were read on this motion to \_\_\_\_\_ dismiss \_\_\_\_\_.

By notice of motion, defendants 525 Broome Street Restaurant, LLC and Indiefork LLC s/h/a Chalk Point Kitchen, 525 Broome Street Restaurant, LLC, and Indiefork LLC move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the verified complaint. Plaintiff opposes.

By notice of cross motion, defendant Grubhub, Inc. cross-moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the verified complaint, and pursuant to CPLR 3212 for an order summarily awarding it contractual indemnification against codefendants. Plaintiff opposes, and 525 Broome and Indiefork oppose to the extent that Grubhub seeks contractual indemnification.

### I. VERIFIED COMPLAINT (NYSCEF 16)

Plaintiff alleges that Indiefork, 525 Broome, and Chalk, contracted with Grubhub for food delivery service, and pursuant to that contract, defendant Moise Compaore was hired to deliver food. On October 9, 2017 while on his way to deliver food for Chalk on an electric bicycle on Broome Street in Manhattan, Compaore and defendant Bharat Bhushan, who was driving a motor vehicle on the street, collided. Compaore drove his bicycle onto the sidewalk where he collided with plaintiff, and she sustained injury. Plaintiff alleges that defendants were negligent in causing the bicycle to injure her.

### II. BACKGROUND

By agreement dated September 11, 2014, Chalk contracted for Grubhub's services and agreed to indemnify and hold it harmless for any claims "arising out of [Chalk's] activities or any breach or alleged breach of these representations and warranties." (NYSCEF 22).

A police report dated the day of the accident, October 9, 2017, reflects that Bhushan had told an officer that Compaore, the bicyclist, had struck his taxi from behind and then attempted to flee but hit plaintiff on the sidewalk, and that in his recital of the accident, Compaore denied any contact with Bhushan's vehicle and admitted that he had ridden his bicycle on the sidewalk where he struck plaintiff. (NYSCEF 44).

Almost one year later, by contract dated August 31, 2018, Compaore agreed to deliver food for Grubhub and maintain his own equipment and insurance. The agreement provides that Compaore is an independent contractor, free to provide services to other businesses, including Grubhub's competitors, and that Grubhub will not withhold taxes. (NYSCEF 57).

By affidavit dated December 18, 2019, 525 Broome's and Indiefork's managing member at the time of the accident states that Chalk was owned by 525 Broome, and Indiefork was

managing member of 525 Broome. He maintains that neither 525 Broome nor Indiefork employed, controlled, or supervised Bhushan or Compaore, and that while Chalk used Grubhub as a food delivery service, it did not employ or control Grubhub's employees. The only relationship Chalk had with Grubhub at the time was that customers would pay Grubhub for food delivery, and that once a month, Grubhub would pay Chalk, after collecting its fees and commissions. (NYSCEF 17).

By affidavit dated February 4, 2020, Grubhub's senior manager states that Grubhub entered into contracts with Chalk, 525 Broome, and Indiefork, and that pursuant to Grubhub's delivery partner agreement, Compaore is an independent contractor, free to accept or reject any delivery offer received, with no set work schedule or minimum number of working hours. He notes that Compaore received no performance reviews and was not supervised. (NYSCEF 56).

### III. CONTENTIONS

#### A. 525 Broome and Indiefork (NYSCEF 14-18)

525 Broome and Indiefork contend that they lacked sufficient control over Compaore to be held liable, and that even had they employed him, the accident was the result of an intervening act and superseding cause.

#### B. Grubhub (NYSCEF 21-26)

Grubhub denies employing Compaore, relying on their agreement which reflects that his status is as an independent contractor responsible for maintaining his own delivery equipment, schedule, and vehicle for deliveries, and with the ability to engage in other employment and receive wages without any tax withholding. Grubhub also denies having caused plaintiff's injuries, and adopts 525 Broome's and Indiefork's arguments concerning a lack of causation. It also argues that it is entitled to contractual indemnification from codefendants, as the accident

arose from Chalk's activities.

C. Plaintiff (NYSCEF 43-52)

Plaintiff contends that both the motion and cross motion are premature absent discovery or an answer from 525 Broome and Indiefork. She maintains that she is entitled to an opportunity to question defendants as to their business relationships and the nature of Compaore's employment, and contends that the affidavit of the managing member of 525 Broome and Indiefork is self-serving and does not constitute documentary evidence. Moreover, that the agreement between Compaore and Grubhub denominates Compaore as an independent contractor, she maintains, is not dispositive. In addition, absent discovery, it cannot be determined whether there was a superseding cause of the accident, and she observes contradictions in the police report as to the circumstances of the accident.

D. 525 Broome's and Indiefork's opposition to Grubhub's cross motion (NYSCEF 53-54)

525 Broome and Indiefork contend that a non-employee's off-premises food delivery does not constitute Chalk's "activities" as provided in the contract, and that any ambiguity should be interpreted against the drafter, Grubhub. They argue that there is no dispute that Compaore was not employed by Chalk, and that they cannot be contractually obligated to indemnify Grubhub for its own negligence under General Obligations Law § 5-322.1(1).

E. Grubhub's reply (NYSCEF 55-59)

Grubhub contends that it is not moving for summary judgment, but to dismiss the complaint based on documentary evidence, and that its senior manager's testimony and the contracts are sufficient to warrant dismissal. It observes that Compaore does not oppose its cross motion, and reiterates that he is an independent contractor. To the extent that 525 Broome and Indiefork deny that Compaore is an independent contractor, Grubhub observes that they submit

no supporting evidence and that the indemnification clause in its agreement with Chalk clearly and unambiguously provides that Compaore's delivery arises from Chalk's activities. It denies that the indemnification clause is unenforceable as GOL § 5-322.1(1) applies only to construction agreements.

F. 525 Broome's and Indiefork's sur-reply (NYSCEF 60-64)

They reiterate their earlier contentions.

G. Plaintiff's sur-reply (NYSCEF 65)

Plaintiff reiterates her earlier contentions.

IV. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

A pleading may also be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

To the extent that defendants rely on the partner agreement between Compaore and Grubhub as documentary evidence that he is an independent contractor, it is dated after plaintiff's accident, and in any event, while it is a factor to be considered, Compaore's characterization as an independent contractor in the contract is not dispositive as to whether there

exists an employment relationship. (*See Sanabria v Agüero-Borges*, 117 AD3d 1024, 1026 [2d Dept 2014] [contract designating person as independent contractor not dispositive as to person's status]).

Rather, whether one is an employee or an independent contractor is a question of fact and depends on "the degree of control and direction reserved to the employer." (*Villa Maria Inst. of Music v Ross*, 54 NY2d 691, 692 [1981]). Plaintiff's allegation that Compaore is Grubhub's, Chalk's, 525 Broome's, and Indiefork's employee must be accepted as true (*Leon*, 84 NY2d at 87), and the managing member's self-serving affidavit may not be relied on to disprove those allegations at this stage (*see Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011] [affidavit does not constitute documentary evidence, where it does not "conclusively establish" a defense]).

Causation is generally a question of fact (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 312 [1980]), and defendants' argument that plaintiff's accident was the result of an intervening event is fatally conclusory. In any event, the police report reflects that material issues of fact exist concerning the circumstances of the accident.

As issues of fact remain as to Compaore's employment relationship with defendants and as to the circumstances of the accident, an award of indemnity is likewise premature.

#### V. CONCLUSION

Accordingly, it is hereby


ORDERED, that defendants 525 Broome Street Restaurant, LLC's and Indiefork LLC's motion is denied in its entirety; it is further

ORDERED, defendant Grubhub, Inc.'s cross motion is denied in its entirety; it is further

ORDERED, that defendants Chalk Point Kitchen, 525 Broome Street Restaurant, LLC,

and Indiefork LLC serve their answer on plaintiff within 20 days of the date of this order; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their preliminary conference on or before December 2, 2020, or appear for a preliminary conference in room 341, 60 Centre Street, New York, New York, on December 2, 2020 at 2:15 pm or virtually if necessary.

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BARBARA JAFFE, J.S.C.

10/30/2020  
DATE

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	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE