SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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SOHAIB SALAAM,

Plaintiff,

- v -

NICOLE BOWMAN, STORK DRIVER, LLC, VIA TECHNOLOGIES, INC, VIA TRANSPORTATION, INC., FLATIRON TRANSIT, LLC

Defendants.

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INDEX NO. 158332/2017

MOTION DATE 03/24/2022, 03/15/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 144, 145, 146, 147, 148, 149, 150, 151, 154, 156, 157

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 140, 141, 142, 143, 152, 153, 155

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by Defendants Via Transportation, Inc. (Via) and Flatiron Transit, LLC (Flatiron) for an order granting them summary judgment: (i) dismissing the complaint and any cross claims against them; and (ii) on their cross claims against defendant Nicole Bowman (Bowman) for contractual indemnification, common law indemnification, and breach of contract (Motion No. 006) and the motion by Defendant Stork Driver, LLC (Stork) for summary judgment and dismissal of Via's, Flatiron's and defendant Via Technologies, Inc.'s cross claims for contractual indemnification and breach of contract (Motion No. 007) are consolidated and decided as follows:

This action arises from a motor vehicle accident in which plaintiff, a pedestrian, was allegedly struck by a car driven by defendant Bowman, who was providing transportation through a cellphone application called Via. Via and Flatiron claim that because Bowman was an independent contractor, they have no vicarious liability for her actions. They seek indemnification from her based on their contract and seek recovery for breach of contract for failure to procure insurance naming Flatiron as an additional insured. In its motion, Stork contends that it has no

contractual obligation to indemnify Via and Flatiron because the indemnification provision in its contract with Flatiron does not apply in these circumstances.

BACKGROUND

On July 29, 2017, at around 12:16 pm, plaintiff, a pedestrian, was crossing 1st Avenue at the intersection of East 38th Street, New York, New York, when he was struck by a vehicle operated by Bowman (NYSCEF Doc. No. 122, defendant Via and Flatiron's statement of material facts [DSOMF], ¶ 3; NYSCEF Doc. No. 149, plaintiff's counterstatement of material facts [PSOMF], ¶ 3). At the time, Bowman was providing commercial transportation services through a ride sharing application and platform developed by defendant Via (NYSCEF Doc. No. 122, DSOMF, ¶¶ 5, 32). Bowman had one passenger in the vehicle and was on route to pick up another passenger (*id.*, ¶ 6). Leading up to the accident, Bowman was traveling along 38th Street coming from 2nd Avenue toward 1st Avenue. She stopped at the traffic light at the intersection of 38th Street and 1st Avenue, and then turned left onto 1st Avenue when she struck plaintiff (*id.*, ¶¶ 7-14). Bowman was using the Via application to pick up passengers and was following its GPS turn-by-turn instructions (NYSCEF Doc. No. 149, PSOMF, ¶ 10). She used a mounted hands-free apparatus to hold her phone while providing transportation services through the Via application (NYSCEF Doc. No. 122, DSOMF, ¶ 22).

Via and Flatiron

Via is a technology company that created the Via application and Flatiron is its wholly owned subsidiary that coordinates transportation services, dispatching "driver partners" to fulfill trips arranged through Via's application (*id.*, ¶¶ 33-34). At the time of the accident, Bowman was affiliated with Flatiron as a "driver partner" and provided transportation services through Via's platform (*id.*, ¶ 35). Flatiron required its "driver partners" to go through a registration process and submit documents demonstrating that they were a Taxi and Limousine Commission (TLC) licensed driver, had TLC-required insurance and a TLC approved vehicle (*id.*, ¶ 37). Before registering with Flatiron for use of the Via application, Bowman obtained her livery license from the TLC (*id.*, ¶ 36). When she registered with the Via application, Bowman provided proof of her TLC license, insurance and vehicle registration (*id.*, ¶ 38).

Independent Contractor Agreement

When a "driver partner" is approved, Via and Flatiron require the driver to sign an Independent Contractor Agreement (*id.*, ¶ 38; NYSCEF Doc. No. 136, independent contractor agreement). That agreement, signed by Bowman and Flatiron, provides that Bowman was retained as an independent contractor to provide "for-hire vehicle (FHV) black car base" in accordance with TLC rules (NYSCEF Doc. No. 136, independent contractor agreement §1). The parties agreed that Flatiron would not withhold any payroll taxes and Bowman was responsible to pay all taxes (*id.*, §§ 3, 9). Via drivers received a 1099 at the end of the year, not a W-2 (NYSCEF Doc. No. 122, DSOMF, ¶ 76). Bowman agreed that she would be the sole owner or lessee of the vehicle she used, she would maintain the vehicle, and have it inspected in accordance with TLC rules, and that the vehicle would be a "sports utility vehicle or sedan of a make, model and year acceptable" to Flatiron (NYSCEF Doc. No. 136, independent contractor agreement § 7[a]). She further agreed that the vehicle would be "covered by auto-liability insurance which complies with the type and amount of insurance required under the applicable rules of the TLC for black car FHVs, which names [Flatiron] as an additional insured" and she would maintain valid TLC licenses and FHV decals, and other permits and fees related to the performance of driving services for Flatiron (*id.*). She agreed to provide Flatiron with a copy of a current certificate of insurance along with proof that Flatiron was named as an additional insured (*id.*, § 7[b]). The agreement further provided that Bowman could work any schedule she chose and provide driving or other services to the public outside of the time during which she is working for Flatiron, and she would not receive any fringe benefits from Flatiron (*id.*, § 9). In section 11 of the agreement, Bowman agreed to "protect, defend, indemnify and hold [Flatiron], and its parent, affiliates" "harmless from and against any and all claims, demands, actions, suits" that are "actually or allegedly, directly or indirectly, arising from or connected with" Bowman's performance of the driving services under the agreement (*id.*, § 11).

Lease of the Vehicle

Bowman leased the vehicle she was driving through defendant Stork (NYSCEF Doc. No. 122, DSOMF, ¶¶ 48-49). Previously, in September 2016, Stork entered into a Preferred Provider Program Agreement with Via (NYSCEF Doc. No. 143). Under that agreement, Stork agreed to purchase a number of new Mercedes Metris vehicles to lease to Via drivers and Via agreed to market and promote Stork to its Via drivers (*id.*). Stork was the registered owner of Bowman's

vehicle and had a lease agreement solely with her (NYSCEF Doc. No. 122, DSOMF, ¶¶ 50-52). If Bowman had earnings from driving with the Via application, her weekly lease payments to Stork were made by Flatiron directly from her earnings and she would receive the difference. If she did not drive that week, Bowman made the weekly lease payment herself (NYSCEF Doc. No. 132, deposition of Nicole Bowman [Bowman tr] at 38-39). Stork was responsible for maintaining the vehicle (NYSECF Doc. No. 122, DSOMF, ¶ 57).

Bowman's Use of the Via Application

Once Bowman logged into the Via application, she would be provided with pickup information for the potential customer, including which side of the road to pick up the passenger. The application then provided her with GPS navigation with turn-by-turn directions to the drop-off location (*id.*, DSOMF, ¶¶ 83-88). When the passenger gets in the vehicle, Bowman would touch the application on her phone and leave the application open during the entire ride, following its turn-by-turn instructions (NYSCEF Doc. No. 149, PSOMF, ¶ 90; NYSCEF Doc. No. 132, Bowman tr at 45-46, 114-115, 12-123).

Plaintiff commenced this negligence action, claiming that Bowman, Via and Flatiron were negligent in the ownership, operation, maintenance, management and control over the vehicle that struck plaintiff (NYSCEF Doc. Nos. 123, 127). The complaint alleges that Bowman was an employee/agent of Via and/or Flatiron, was using the Via application and was otherwise distracted by the vehicle GPS system at the time of the accident (*id.*).

In their answer, Via and Flatiron deny the material allegations, asserting a number of affirmative defenses, and asserting cross claims against Bowman and Stork for contractual indemnification, common law indemnification, and breach of contract (NYSCEF Doc. No. 124, 129).

Via and Flatiron now move for summary judgment dismissing the complaint and any cross claims against them and granting them summary judgment on their cross claims against Bowman (Motion No. 006). On dismissal of the complaint, they urge that they did not own, operate, control, maintain or manage Bowman's vehicle. They submit Bowman's deposition testimony that Stork owned the vehicle and that she and Stork maintained and inspected it (NYSCEF Doc. No. 132, Bowman tr at 104, 129; NYSCEF Doc. 133, deposition of William O'Flanagan [Stork tr] at 16-17; see also NYSCEF Doc. No. 134, deposition of Alexander Lavoie [Via/Flatiron tr] at 136-137). As to operation and control, Via and Flatiron point to Bowman's testimony that she drove

the vehicle and followed the GPS navigation and that she did not interact with the GPS while she was driving and upon approaching the intersection when she began turning onto 1st Avenue (NYSCEF Doc. No. 132, Bowman tr at 34-36, 45, 116-118).

Via and Flatiron also contend that they are not vicariously liable for Bowman's acts because she was an independent contractor and not an employee. They point to evidence that: they did not guide or monitor Bowman's behavior; Bowman received a 1099, not a W-2; Bowman obtained her own liability insurance; she signed the Independent Contractor Agreement; she received no fringe benefits; she could use and was using other rideshare applications in July 2017; she leased, maintained and inspected her own vehicle and Stork owned it and performed the maintenance; she set her own days and hours; and Via and Flatiron did not train her in the operation of her vehicle. They contend that, as a matter of law, the totality of the circumstances establishes that Bowman cannot prove any key indicia of an employer-employee relationship. Further, they urge that there are no exceptions to the independent contractor defense in this action. There is no basis to find negligence in selecting, instructing or supervising; the work is not inherently dangerous; and Via and Flatiron are not subject to a non-delegable duty. Bowman was licensed by the TLC, which performs its own background check, the vehicle was inspected by the state and the TLC, and Bowman was not subject to any violations for the two weeks she was driving for Via.

On their cross claims against Bowman, Via and Flatiron urge that the Independent Contractor Agreement provides for full contractual indemnification, and because it requires that Bowman procure insurance naming Flatiron as an additional insured, it is enforceable even if it provides for indemnification for Via and Flatiron's own negligence. They contend that the language in the indemnification provision is clear in obligating Bowman to defend, indemnify, and hold them harmless (NYSCEF Doc. No. 136, independent contractor agreement § 11). Via and Flatiron maintain that they tendered this matter to Bowman and her insurer, Hereford Insurance Company (Hereford), but Hereford stated that it was not obligated to defend or represent Via or Flatiron since they were not insureds and the policy contained an exclusion that applied (NYSCEF Doc. No. 139, tender letters). In addition, they contend that Bowman was required to obtain insurance naming Flatiron as an additional insured (NYSCEF Doc. No. 136, independent contractor agreement § 7), and that Hereford's denial of their tender requests is undisputed proof that Bowman breached the independent contractor agreement.

In opposition, plaintiff argues that Via and Flatiron offer conflicting evidence in support of dismissal of the complaint and, thus, fail to make out a prima facie case. Plaintiff points to Bowman's testimony that she had no discretion to alter her method of work when driving for Via and Flatiron. She stated that she had to notify Via when she picked up a passenger and follow their turn-by-turn directions to pickup and drop-off locations because the passengers did not tell her their destination, and she could not deviate from the Via route (NYSCEF Doc. No. 132, Bowman tr at 33-35, 45, 76, 114-115, 121-123). With respect to control over the means of work, plaintiff points to Flatiron's requirement that Bowman obtain a specific type of license, insurance and vehicle and that the vehicle be maintained in accordance with Flatiron's standards (NYSCEF Doc. No. 136, independent contractor agreement). Plaintiff also points to evidence that Via directly deducted Bowman's weekly lease payment from Bowman's earnings and remitted the balance to Bowman as proof that it had control over Bowman's vehicle. At best, plaintiff argues that there are questions of fact as to whether Bowman was an independent contractor, particularly in light of her testimony that Via and Flatiron controlled all of her driving through the Via application and required that she take all dispatched customer trips (NYSCEF Doc. No. 132, Bowman tr at 33-35). Plaintiff also urges that defendants' contention that they are not liable because Bowman admitted that she was not looking at the Via application at the time of the accident is inconsistent with Bowman's testimony that she was following the application's turn-by-turn instructions and, in any event, it simply raises an issue of fact (*see Uy v Hussein*, 186 AD3d 1567, 1569-1570 [2d Dept 2020]). Finally, plaintiff argues that even if Bowman was an independent contractor, Via and Flatiron may be liable under an exception to that defense for their negligent supervision of Bowman.

Bowman opposes the motion on several grounds. First, she argues that Via is relying on an unauthenticated agreement (NYSCEF Doc. No. 136). Second, she contends that the indemnification provision in that agreement is ambiguous, unconscionable and unenforceable. It provides that she indemnify Via for Via's own negligence and that this is unenforceable under New York General Obligations Law (GOL) § 5-322.1. Next, she asserts that there are questions of fact as to Via's negligence in requiring their drivers to use the application's turn-by-turn instructions on their phone while driving, which creates a distraction for the drivers. She also urges that since there has been no finding of liability, it is premature to enforce a purported indemnification agreement. On Via's and Flatiron's breach of contract claim, Bowman argues

that "the policy (which is in compliance with TLC regulations) falls outside of the definition of coverage in the Hereford policy" (NYSCEF Doc. No. 144). She urges that because Via is asking to be insured on the same policy as the driver for Via's negligence, it is impossible to comply with such.

Stork also moves for summary judgment (Motion No. 007) for dismissal of Via's and Flatiron's cross claims for contractual indemnification and breach of contract. It contends that the indemnification provision in the Preferred Provider Program Agreement only applies to claims and actions arising from a breach of that agreement or gross negligence or willful misconduct, which is not at issue in this action.

Via and Flatiron oppose Stork's motion on the ground that it is untimely since it was filed more than 60 days after the filing of the note of issue. They further contend that there are fact issues as to whether the Preferred Provider Program Agreement applies and whether Stork violated it in its ownership and/or leasing entrustment of the vehicle to Bowman. In addition, they urge that Stork fails to address their cross claims of common law indemnification and contribution.

DISCUSSION

The branch of Via and Flatiron's motion for summary judgment dismissing the complaint and any cross claims against them is denied. The branch of their motion on their cross claims as against Bowman is granted only on the contractual indemnification and breach of contract cross claims but denied as to common law indemnification. Stork's motion is denied as untimely.

Respondeat Superior Liability

Via and Flatiron seek dismissal of the complaint on the grounds that they were not maintaining, inspecting or in control of the subject vehicle and that Bowman was an independent contractor and, therefore, they are not vicariously liable for Bowman's alleged negligence. The court finds that while Via and Flatiron are not the registered owners and not obligated to maintain the vehicle, whether they are vicariously liable for Bowman's actions is a triable issue of fact on this record.

The doctrine of respondeat superior renders an employer vicariously liable for the negligence of its employee acting within the scope of the employment (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]). However, "an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" (*Rosenberg v Equitable*

Life Assur. Socy. of U.S., 79 NY2d 663, 668 [1992]; *see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008]; *Fiscina v Boro Rug & Carpet Warehouse Corp.*, 195 AD3d 998, 999 [2d Dept 2021]; *Edwards v Rosario*, 166 AD3d 453, 453-454 [1st Dept 2018]). The "determination of whether someone is an independent contractor is a fact-specific question" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 301 [2017]). It "turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the more important consideration" (*Fiscina v Boro Rug & Carpet Warehouse Corp.*, 195 AD3d at 999 [internal quotation marks and citation omitted]). Merely "incidental control over the result produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship" (*Matter of Ted Is Back Corp. [Roberts]*, 64 NY2d 725, 726 [1984]; *Fiscina v Boro Rug & Carpet Warehouse Corp.*, 195 AD3d at 999). "Whether an actor is an independent contractor or an employee for purposes of tort liability is usually a factual issue for the jury" (*Fiscina v Boro Rug & Carpet Warehouse Corp.*, 195 AD3d at 999 [internal quotation marks and citation omitted] [triable issue raised where although carpet installer received no fringe benefits, no W-2, was paid on a project by project basis, and provided his own tools and equipment, he was provided with a uniform with company logos, was required to tell customers he was an employee, and was provided with carpet, glue and a copy of the layout for the job]; *see also Raymond v Hillebert*, 195 AD3d 1386, 1387 [4th Dept 2021] [triable issue raised as to whether delivery truck driver was employee where defendant company rented the truck, could install its signage on truck, designed delivery routes, set delivery times, and required incident reports after accidents]; *Evans v Norecaj*, 172 AD3d 576, 577 [1st Dept 2019] [triable issue raised as to whether restaurant can be held vicariously liable for valet parking attendants' negligence]; *Cross v Supersonic Motor Messenger Courier, Inc.*, 140 AD3d 503, 504 [1st Dept 2016] [fact issue raised where although delivery driver signed independent contractor contract, delivery company dictated insurance he was required to maintain, company dispatcher controlled delivery process, driver used company forms, wore company shirt and truck had company logo]). That the parties sign an agreement labeled "Independent Contractor Agreement" is not dispositive of the issue of control, rather, it is a factor to be weighed with others (*Carlson v American Intl. Group, Inc.*, 30 NY3d at 301).

Here, contrary to Via's and Flatiron's contention, the evidence submitted in support of their motion, including Bowman's deposition testimony and the testimony of Via's and Flatiron's representative, Alexander Lavoie, as well as the independent contractor agreement between Flatiron and Bowman, does not eliminate all triable issues of fact as to whether Bowman was an independent contractor (*see Carrion v Orbit Messenger*, 82 NY2d 742, 744 [1993] [triable issue whether delivery truck driver was independent contractor]; *Fiscina v Boro Rug & Carpet Warehouse Corp.*, 195 AD3d at 999 [rug company failed to make prima facie showing that installer was independent contractor]; *Nachman v Koureichi*, 165 AD3d 818, 820 [2d Dept 2018] [delivery service company failed to make prima facie showing that driver was independent contractor]; *Christ v Ongori*, 82 AD3d 1031, 1032 [2d Dept 2011] [delivery company failed to make prima facie showing that delivery driver was independent contractor]; *Rivera v Fenix Car Serv. Corp.*, 81 AD3d 622, 623 [2d Dept 2011] [contract with car service drivers raised fact issue as to whether driver was independent contractor where it contained detailed regulations beyond basic standards of conduct and rules of operation]). The moving defendants point to proof that Bowman made her own hours and could work for other driving applications (NYSCEF Doc. No. 132, Bowman tr at 106-107); received no fringe benefits and received a 1099 tax form as opposed to a W-2 (NYSCEF Doc. No. 132, Bowman tr at 103; see also NYSCEF Doc. No. 136, independent contractor agreement); provided her own vehicle, which Stork maintained, and obtained insurance (NYSCEF Doc. No. 132, Bowman tr at 104), which supports that she was an independent contractor. Bowman's testimony, however, also shows that Via and Flatiron provided turn-by-turn instructions through its application's GPS function which Bowman was required to follow (NYSCEF Doc. No. 132, Bowman tr at 33-35, 45, 76, 114-115, 121-123); required Bowman to have the Via magnetic logos on her vehicle (*id.*, Bowman tr at 121-122); directed the vehicle and insurance requirements for Bowman (NYSCEF Doc. No. 136; NYSCEF Doc. No. 134, Via/Flatiron tr at 41); collected from customers and paid Bowman on a trip performance basis (NYSCEF Doc. No. 132, Bowman tr at 103-104); paid Bowman's toll expenses (see NYSCEF Doc. No. 151); and arranged for the lease of the vehicle, paid for the lease directly, and then paid Bowman the difference (NYSCEF Doc. No. 132, Bowman tr at 38-39). This proof demonstrates that Via and Flatiron controlled significant aspects of Bowman's work by dictating which customers to pick up and which route to take to transport them to the destination and controlled all aspects of pricing and payment (*see Matter of Vega [Postmates Inc. – Commissioner of Labor]*,

35 NY3d 131, 138 [2020]). In addition, in the Independent Contractor Agreement, they directed that the vehicle be a "for-hire black car," "a sports utility vehicle or sedan of a make, model and year acceptable to the Company," that the vehicle be covered "by auto-liability insurance which complies with the type and amount of insurance required under the applicable rules of the TLC for black car FVHs, which names the Company as an additional insured," and that Bowman provide them with her driver's license, "TLC for-hire vehicle license, TLC inspection report, FH-1 form and vehicle registration" (NYSCEF Doc. No. 136, independent contractor agreement § 7, at 3). These requirements could demonstrate an employment rather than an independent contractor relationship (*see Uy v Hussein*, 186 AD3d at 1569 [fact issue raised as to whether Uber was vicariously liable for driver's conduct]; *Edwards v Rosario*, 166 AD3d at 454 [fact issue raised where delivery driver maintained insurance dictated by company, used company forms and wore company uniform]; *see also Matter of Hossain [Groundanywhere LLC - Commissioner of Labor]*, 205 AD3d 1282, 1283 [3d Dept 2022] [driver for a cellphone application providing transportation to customers is an employee under unemployment insurance law]; *Matter of Rivera [Northeast Logistics, Inc.- Commissioner of Labor]*, 204 AD3d 1185, 1186-1187 [3d Dept 2022] [employment relationship found under unemployment law between logistics company and its delivery drivers based on proof of that company required license and insurance, directed that drivers display ID and wear company clothing, paid a fuel surcharge, and directed date, time, and location of assignment]; *Matter of Lowry [Uber Tech., Inc. – Commissioner of Labor]*, 189 AD3d 1863, 1863 [3d Dept 2020] [Uber is an employer of its drivers under unemployment insurance law]; *cf. Matter of Bogart [LaValle Transp., Inc. – Commissioner of Labor]*, 140 AD3d 1217, 1219 [3d Dept 2016] [long haul drivers not employees under unemployment insurance law where drivers not required to lease truck from company, could hire other drivers to haul their load, could negotiate their rates with company, were not supervised by the company, were not reimbursed for expenses, and carried their own business cards]). This conflicting proof demonstrates that there are triable issues for the finder of fact. In light of Via's and Flatiron's failure to meet their prima facie burden, the court need not address the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Moving defendants' reliance on *Chaouni v Ali* (105 AD3d 424 [1st Dept 2013]), *Corcho v Adlai Limo, Inc.* (2017 WL 1089727 [Sup Ct, Bronx County 2017]), and *Galo v Fast Operating Corp.* (2015 NY Slip Op 32535 [U] [Sup Ct, NY County 2015]), is misplaced as those cases are

all factually distinguishable. *Chaouni* involved a limousine driver for a limousine dispatch company called Dial 7, in which the limousine company presented undisputed evidence establishing that the driver was an independent contractor, including that: the driver owned and paid all costs associated with the vehicle; the driver was paid by the customer (except if a credit card was used by phone to the company) and kept a fixed percentage of the fares and 100% of the tips; the company did not withhold taxes and issued a 1099, not a W-2; the driver could select days worked, could accept or reject assignments, and could work for other livery base stations; and did not wear any uniform (*Chaouni*, 105 AD3d at 425). Here, in contrast, the moving defendants required Bowman to use the Via application and its turn-by-turn GPS directions. In addition, Bowman did not own her vehicle but leased it through Stork, and Via made Bowman's lease payment to Stork, deducting the amount it paid from its payments to Bowman. Moreover, all customer payments were made to Via not Bowman, Via paid the cost of tolls and required Bowman to attach a magnetic Via logo to her car. Similarly, in *Corcho v Adlai Limo, Inc.*, the limousine company presented undisputed evidence that the only interaction between it and the driver are the calls that the company made to the driver as a dispatch base (*Corcho*, 2017 WL 1089727 at * 1). Again, the evidence presented by the moving defendants here involves more control over the means of Bowman's pickups through the turn-by-turn GPS directions upon her acceptance of a job, and interactions with her lease of the vehicle and her payment for the jobs accepted. Similarly, in *Galo v Fast Operating Corp.* (2015 NY Slip Op 32535 at ** 4), the company was essentially a dispatcher and the driver provided and maintained his own vehicle, received no salary but retained a percentage of fares and all tips, and could reject dispatches. Again, in the instant case, the submitted evidence that Via and Flatiron collected all customer payments, facilitated and paid the lease for Bowman, paying the balance due to Bowman, and provided her with the turn-by-turn GPS directions, is sufficient to raise an issue of fact as to the moving defendants' control over Bowman's work which could give rise to their liability under the doctrine of respondeat superior. Therefore, summary judgment dismissing the complaint against them is denied. To the extent that Via and Flatiron seek dismissal of cross claims against them, such request is denied as they fail to address any cross claims.

Contractual Indemnification Cross Claim Against Bowman

Via and Flatiron seek summary judgment on their cross claim against Bowman for contractual indemnification. The indemnification provision in the Independent Contractor Agreement between Flatiron and Bowman provides, in relevant part, as follows:

> "Driver Partner further agrees to protect, defend, indemnify and hold Company, and its parent, affiliates, successors, assigns, heirs, and each of its shareholders, directors, officers, employees, insurers, agents, and representatives (including, without limitation, attorneys and financial representatives) (collectively, the "Indemnified Parties"), harmless from and against any and all claims, demands, actions, suits, proceedings, demands, liabilities, losses, assessments, judgments, arbitration awards, damages, costs or expenses of any kind or nature whatsoever, including any Indemnified Party's attorneys' fees and costs, at all levels (including, without limitation of the foregoing, those relating to actual or alleged death or injury to individuals and damage to property), actually or allegedly, directly or indirectly, arising or resulting from or connected with:
>
> (a) Driver Partner's performance or failure to honor any promises made herein, or Driver Partner's performance or failure to perform the Transportation Services under this Agreement, including but not limited to any liability arising out of accidents in which the Driver Partner is involved while performing the Transportation Services;
>
> (b) The omission or commission of any act, lawful or unlawful, by Driver Partner or any employee or agent of Driver Partner, whether or not such act is within the scope of the agency relationship with such employee or agent"

(NYSCEF Doc. No. 136, Independent Contractor Agreement § 11, at 5).

"Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an 'unmistakable intent' to indemnify" (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006]). As the Court of Appeals explained:

> "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances"

(*id.* at 417 [internal quotation marks and citations omitted]).

The indemnification provision here requires Bowman to indemnify Flatiron "and its parent, affiliates" for "any and all claims, demand, actions" "arising or resulting from or connected with," Bowman's performance of "Transportation Services" "including but not limited to any liability arising out of accidents in which the Driver Partner is involved while performing the

Transportation Services" (NYSCEF Doc. No. 136, independent contractor agreement § 11 at 5). This broadly drawn provision clearly evinced an intent that Bowman indemnify Flatiron and Via for any claims arising from accidents Bowman is involved in while performing transportation services as a Via driver and the plain meaning of those words fairly includes the liability for negligence on their part (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d at 417). Thus, Via and Flatiron are not required to demonstrate the absence of their own negligence before invoking this indemnity clause (*see Levine v Shell Oil Co.*, 28 NY2d 205, 212 [1971]; *see Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274-275 [2007]). Significantly, the Independent Contractor Agreement contained an insurance procurement provision, directing drivers like Bowman to obtain auto liability insurance for the vehicle "which complies with the type and amount of insurance required under the applicable rules of the TLC [Taxi and Limousine Commission]," and names Flatiron as an additional insured, and also provides a waiver of subrogation in favor of Flatiron (NYSCEF Doc. No. 136, independent contractor agreement, § 7, at 3). This shows that Flatiron and Via were not exempting themselves for liability to a victim for their own negligence. Rather, the parties allocated the risk of liability to third parties between themselves through the use of insurance (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d at 419). Thus, this broad indemnification provision coupled with the insurance procurement requirement affords a victim of an auto accident with Bowman, like plaintiff, adequate recourse for damages that he or she suffers. Flatiron and Via have demonstrated their prima facie right to contractual indemnification under this provision.

In opposition, Bowman advances two arguments to support her contention that Via and Flatiron are not entitled to contractual indemnification. First, she contends that this provision is unenforceable under New York's General Obligation Law (GOL) § 5-322.1 because it would provide for indemnification to Via for Via's own negligence. Second, she contends that it is overbroad and unconscionable because it requires indemnification of "any act, lawful or unlawful" and "whether or not such act is within the scope of the agency relationship with such employee or agent." (NYSCEF Doc. No. 136, independent contractor agreement § 11). This, she asserts, seeks indemnification for even lawful acts unrelated to the business with Via.

Bowman's first argument is rejected. GOL § 5-322.1 is applicable to agreements exempting owners and contractors involved in the construction, alteration, repair and maintenance of a building from liability for their own negligence, and does not apply to this agreement (*see*

Emerson v KPH Healthcare Servs., Inc., 203 AD3d 1272, 1274 [3d Dept 2022] [GOL § 5-322.1 does not apply to a contract to clear snow and ice from a parking lot]; *Goll v American Broadcasting Cos., Inc.*, 10 AD3d 672, 674 [2d Dept 2004] [contract between carrier and shipper was not subject to unenforceability provision in GOL § 5-322.1 since it did not relate to "construction, alteration, repair or maintenance of a building"]).

Bowman's contention that the provision is overbroad is based on a misreading of the language itself. The clause (b) provides for indemnification for "[t]he omission or commission of any act, lawful or unlawful, by Driver Partner or any employee or agent of Driver Partner, whether or not such act is within the scope of the agency relationship with such employee or agent" (NYSCEF Doc. No. 136, independent contractor agreement, § 11). It is a subdivision of the main language of the indemnification clause and clearly applies to the lawful or unlawful acts of Bowman or any employee or agent of Bowman in performing the transportation services for Via or Flatiron.

Bowman's assertion that summary judgment on this cross claim is premature because there are factual issues as to Via's negligence in requiring its drivers to use the Via's GPS directions and plaintiff's claim of driver distraction, is rejected. The indemnification provision is broad and covers such alleged negligence. In addition, it also includes the defense of any claims arising from accidents that occur while Bowman is performing transportation services through Via so it is not premature to seek such defense. Finally, Bowman's contention that the Independent Contractor Agreement was unauthenticated is belied by Bowman's own testimony that she recognized the document as the agreement she signed when registering with Via and that the document contained her signature at the bottom (NYSCEF Doc. No. 132, Bowman tr at 112-113). Bowman has failed to raise any triable issue of fact on this cross claim, and summary judgment of liability is granted to Via and Flatiron.

Breach of Contract Cross Claim

The moving defendants are also granted summary judgment on their cross claim for breach of contract against Bowman. On a claim for breach of contract, the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach, and resulting damages (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]; *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The plaintiff must

identify the specific provisions of the contract that the defendant breached (*see Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891, 893 [2d Dept 2017]).

Here, Via and Flatiron submit the Independent Contractor Agreement in which Bowman agreed to procure insurance that provides additional insured coverage to Flatiron (NYSCEF Doc. No. 136, independent contractor agreement § 7, at 3). They submit proof that they tendered the policy to Hereford, Bowman's insurer, and that Hereford stated that it was not obligated to defend them because they did not fall within the definition of an insured under the policy, that is, they were not named as additional insureds (NYSCEF Doc. No. 145). This satisfies their prima facie burden. In opposition, Bowman fails to address this cross claim. Her assertion that the applicable insurance policy does not cover Via's and Flatiron's additional insured claim only further supports that she breached her obligation to procure such coverage (*see Lenart Realty Corp. v Petroleum Tank Cleaners, Ltd.*, 116 AD3d 536, 538 [1st Dept 2014]; *Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 575 [1st Dept 2012]; *Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 [1st Dept 2010] [breach of contract to provide effective coverage, triggering "arising out of" clause in indemnity provision]). Thus, summary judgment of liability is granted to the moving defendants on this cross claim against Bowman.

Common Law Indemnification

Via and Flatiron fail to make any arguments in support of their request for summary judgment on their cross claim against Bowman for common law indemnification. Thus, this branch of their motion is denied.

Stork's Motion (No. 007)

Stork's motion for summary judgment dismissing Via's and Flatiron's indemnification cross claims against it is denied as untimely. Under CPLR § 3212, a court "has considerable discretion to fix a deadline for filing summary judgment motions," so long as the deadline is not "earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]; *Gonzalez v Pearl*,179 AD3d 645, 646 [2d Dept 2020]; *Appleyard v Tigges*, 171 AD3d 534, 535-536 [1st Dept 2019]; *Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008]).

Here, the note of issue was filed on January 7, 2022 (NYSCEF Doc. No. 135), and pursuant to this Part's Rules and the case scheduling order (NYSCEF Doc. No. 130), summary judgment motions were required to be filed within 60 days of the filing of the note of issue. Defendant Stork filed this motion on March 15, 2022, more than 60 days after the filing of the note of issue, rendering its motion untimely (*see* CPLR § 3212 [a]; *Brill v City of New York*, 2 NY3d at 651). Moreover, Stork has not established good cause for its belated filing, and, in fact, never addresses the untimeliness of its motion (*see Baram v Person*, 205 AD3d 470, 471 [1st Dept 2022]; *Appleyard v Tigges*, 171 AD3d at 536). The fact that the motion was filed within 120 days after the filing of the note of issue is insufficient in light of Stork's failure to comply with this court's own deadline of 60 days (*see Appleyard v Tigges*, 171 AD3d at 536). Therefore, its motion is denied.

Accordingly, it is

ORDERED that the branch of the motion of defendants Via Transportation, Inc. and Flatiron Transit, LLC for summary judgment on the complaint and dismissing any cross claims against them (Motion No. 006) is denied; and it is further

ORDERED that the branch of the motion of defendants Via Transportation, Inc. and Flatiron Transit, LLC on their cross claims against defendant Nicole Bowman (Motion No. 006) is granted only to the extent that summary judgment of liability is granted on the cross claims for contractual indemnification and breach of contract to procure insurance and is otherwise denied; and it is further

ORDERED that the motion of defendant Stork Driver, LLC (Motion No. 007) for summary judgment dismissing Via and Flatiron's cross claims is denied.

This constitutes the Decision and Order of the Court.

9/21/2022
DATE

JAMES G. CLYNES, J.S.C.

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