At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the day of December 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DEC 20 2024

DECISION AND ORDER

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CELIO M. CASTRO,

Plaintiff,

-against-

Index No.: 508099/2020
Mot. Seq. 003

RICHARD T. MARKIS,
UBER TECHNOLOGIES, INC., UBER USA, LLC,
RASIER-NY, LLC,

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendants Uber Technologies, Inc., Uber USA, LLC, and Rasier-NY, LLC's Notice of Motion for Summary Judgment, Attorney Affirmation in Support affirmed by Melinda Flecker, Esq. on January 29, 2024, Statement of Material Facts, Exhibit A-*Duncan v. Uber Technologies, Inc.*; Exhibit B-Deposition Transcript of Uber; Exhibit C-Affidavit of Erin O'Keefe; Exhibit D-November 19, 2021 Deposition Transcript of Richard Markis; Exhibit E-March 17, 2023 Deposition Transcript of Richard Markis; Exhibit F-Technology Service Agreement; Exhibit G-Police Accident Report; Exhibit H-Plaintiff's Summonses and Complaints and Consolidation Order; Exhibit I-Plaintiff's Bill of Particulars; Exhibit J-Defendants Answers to Plaintiff's Complaint; Exhibit K-Note of Issue and Certificate of Readiness; Exhibit L-Preliminary Conference Order; Exhibit M-*Cortese v. Uber Technologies, Inc.*; Exhibit N-1-Decision and Award in *Oakley-Williams*; Exhibit N-2-Decision and Award in *Vasquez*; Exhibit O-Decision and Award in *Ashar v. Uber Technologies, Inc.*; Exhibit P-Decision and Award in *Smith v. Uber Technologies, Inc.*; Exhibit Q-Decision and Award in *Shenouda*; Exhibit R-*Eklund* Transcript and Decision.....	
Plaintiff's Attorney Affirmation in Opposition affirmed by Diane Bernard, Esq. on April 18, 2024, Counter Statement of Facts.....	43-64
Affirmation in Reply affirmed by Melinda Flecker, Esq. on April 30, 2024, Exhibit S-Order Granting Rule 33 Motion, Statement of Material Facts in Response to Plaintiff's Opposition.....	65-66
	67-69

MONTELIONE, RICHARD J., J.

This is an action to recover for personal injuries allegedly sustained by Celio M. Castro ("Plaintiff") as a result of being struck by a motor vehicle at or near the intersection of East 4th Street and 2nd Avenue in New York County. Plaintiff commenced the instant action by filing a summons and verified complaint on May 27, 2020, wherein he alleges that he was riding his bicycle on October 26, 2019, when a motor vehicle owned and operated by Richard T. Markis ("Defendant") struck him

causing serious and permanent injuries. Issue was joined by defendant Markis by filing a verified answer and demand for the plaintiff's verified bill of particulars on July 30, 2020. On November 19, 2021, defendant Markis testified at a deposition that at the time of the accident he was operating his vehicle as an Uber driver. (NYSCEF # 49, p. 12, ¶ 11-18). As a result of defendant Markis's testimony, plaintiff commenced a second action against Uber Technologies, Inc., Uber USA, LLC, and Rasier-NY LLC (collectively "Uber") in Kings County under Index No. 500675/2022 (Action No. 2). Plaintiff subsequently moved to consolidate Action No. 2 with the instant action and that motion was granted. (NYSCEF # 36). Now, Uber moves this Court for an order granting summary judgment dismissing plaintiff's complaint and any of defendant Markis's cross-claims against Uber pursuant to CPLR 3212[b].

Legal Standard

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 [1988]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 [2d Dep't 1999]; *Tassone v. Johannemann*, 232 A.D.2d 627, 628 [2d Dep't 1996]. The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. *Alvarez v. Prospect Hosp*, 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York, supra at 562; Friends of Animals, Inc v. Associated Fur Mfrs, Inc*, 46 N.Y.2d 1065 [1979].

Discussion

Defendant Uber contends that an order of summary judgment in their favor is warranted on the grounds that Uber did not control defendant Markis and cannot be held vicariously liable for his alleged negligent conduct and, because Uber did not own, operate, lease or maintain defendant Markis's vehicle. In support of this position, Uber directs the court's attention to the deposition testimony of defendant Markis (NYSCEF # 49-50), the affidavit of Erin O'Keefe, Senior Manager of Corporate Business Operations for Uber Technologies, Inc., and the Technology Service Agreement ("TSA") between defendant Markis and defendant Uber (NYSCEF # 51).

The methodology for determining whether an employment relationship exists for the purpose of tort liability is detailed in *Bynog v Cipriani Group*, 1 NY3d 193, 198, 802 NE2d 1090, 770 NYS2d 692 [2003]:

> ...[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule.

In this case, the record establishes that defendant Markis was not on a fixed schedule and worked at his own convenience. On November 19, 2021, Markis testified that he was on his way to pick up a

passenger using the Uber app just before the accident occurred. (NYSCEF # 49, p.12, ¶11-18). He further testified that he had been picking up Uber passengers for "about six hours" on October 26, 2019. *Id.* at p.14, ¶14-16. He also testified that during those six hours he took breaks and "probably" stopped for "a cup of tea and maybe a muffin…". *Id.* at p. 15, ¶ 2-8. Lastly, defendant testified that he was planning on ending his day of picking up Uber passengers after his last pick-up. *Id.* at p. 25, ¶6-9. The last "pick-up" that defendant Markis refers to in his testimony is the passenger that he was on his way to pick up prior to the accident occurring. *Id.* at p.12, ¶15-18. Defendant Markis's testimony establishes that (1) Uber exercised no control over his work schedule; and (2) that he had the discretion to stop accepting ride requests at any point.

The next factors are determining whether Uber paid defendant Markis a salary and whether he received fringe benefits. Uber directed the court to the affidavit of Erin O'Keefe, Senior Manager of Corporate Business Operations for Uber Technologies, Inc. (NYSCEF # 48). Erin O'Keefe attests that there are two versions of the Uber app: (1) one that is accessible to the public through a smartphone to request rides; and (2) one that is accessible to a driver through his or her smartphone to connect with individuals making ride requests ("Driver App"). *Id.* at ¶5. In order for a driver to gain access to the driver app, they first must create an account, provide personal identifying information, photocopies of a valid driver's license, photocopies of a valid TLC license, proof of commercial insurance, and TLC-plated vehicle registration. *Id.* at ¶9. Once this process is complete, the driver must electronically accept and enter into a TSA with Uber USA, LLC before using the Driver App. *Id.* at ¶10. Indeed, defendant Markis entered into a TSA with Uber USA, LLC. (NYSCEF # 51). The TSA defines the relationship between the drivers who sign up to use the Driver App and Uber USA, LLC. Section 4.1 of the TSA reads in relevant part, "Customer is entitled to charge a fare for each instance of completed Transportation Services provided to a User that are obtained via the Uber Services…Customer acknowledges and agrees that the Fare provided under the Fare Calculation is the only payment Customer will receive in connection with the provision of Transportation Services…". The plain language of the TSA suggests that Uber did not pay defendant Markis a salary and is entirely silent on fringe benefits. Moreover, defendant Markis's deposition testimony lends further support to Uber's position.

On March 17, 2023, defendant Markis testified that he went to the "Uber help center" and provided them with his New York State driver's license, TLC license and other documents to sign up for the Driver App. (NYSCEF # 50, p. 42, ¶ 23-25, p.43, ¶ 2-5). However, defendant Markis testified that there was no interview process, he was not given any documents by anyone at the help center, there were no restrictions on the car he chose to drive, he did not have any superiors at Uber to report to, there was no dress code he had to abide by, and Uber was not involved in the maintenance or inspection of his vehicle. *Id.* at p.44, ¶8-p.47, ¶11.

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff concedes that Uber did not own or maintain defendant Markis's vehicle. Plaintiff maintains that Uber is vicariously liable for the subject accident because they exercise "substantial control" over drivers. However, plaintiff has not provided any evidence to support this position. The evidence clearly establishes that defendant Markis (1) owned and maintained the subject vehicle; (2) was able to set his own hours; (3) had the discretion to accept, reject, or cancel ride requests; (4) exercised exclusive control over the vehicle used to transport passengers; (5) did not receive a salary from Uber; and (6) did not receive fringe benefits from Uber. Therefore, this Court finds that Uber is not vicariously liable.

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In light of the foregoing, it is

ORDERED that defendants UBER TECHNOLOGIES, INC., UBER USA, LLC, AND RASIER-NY, LLC's motion for summary judgment pursuant to CPLR 3212 [b] dismissing the plaintiff's complaint and co-defendant Richard Markis's cross-claims as alleged against them is GRANTED; and it is further

ORDERED that all other requests for relief herein are denied.

This constitutes the decision and order of the Court.

ENTER

Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK
FILED
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