To be Submitted by:
MIRIAM F. CLARK

APL-2019-00218
Bronx County Clerk's Index No. 28254/16E

Court of Appeals

of the

State of New York

An Individual Described Herein by the Pseudonym
"MARGARET DOE,"

Plaintiff-Appellant,

– against –

BLOOMBERG L.P.,

Defendant,

– and –

MICHAEL BLOOMBERG,

Defendant-Respondent,

– and –

NICHOLAS FERRIS,

Defendant.

BRIEF FOR *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK (NELA/NY) IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Counsel for *Amicus Curiae* NELA-NY certifies that it has no corporate parent, subsidiary, or affiliate.

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INTRODUCTION

The Appellate Division decision wrongly grafts restrictive New York State Human Rights Law ("NYSHRL") concepts onto the New York City Human Rights Law ("NYCHRL" or "City Law"), which by its own terms is intended to be construed liberally without regard to similar state and federal law. As this Court held in *Albunio v City of New York* (16 NY3d 472 [2011]), the provisions of the City HRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Id.* at 477-78).

In the March 8, 2016 report of the Committee on Civil Rights that accompanied Local Law 35 (the Committee Report), the New York City Council stated: "Over at least the last 25 years, the Council has sought to protect the HRL from being narrowly construed by courts, particularly through major legislation adopted in 1991 and 2005. These actions have expressed a very specific vision: a Human Rights Law designed as a law enforcement tool with no tolerance for discrimination in public life." *See* New York City Council Committee on Civil Rights Report, dated March 8, 2016, at 8, available at http://www.antibiaslaw.com/sites/default/files/Committee%20Report.pdf.

In crafting the "encouraged, condoned or approved" standard, the Appellate Division relied on a 35 year old case, *Matter of Totem Taxi, Inc. v. New York State Human Rights Appeal Bd.* (65 NY2d 300, 306 [N.Y. 1985]) that was expressly

rejected by the NYC Council in enacting the Restoration Act. *See* Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb. L.J. at 116 (2006).

In this brief, we seek first to clarify that under the NYCHRL, unlike the NYSHRL, claims of discrimination may be made directly against individual employees and agents. § 8-107(1)(A). To the extent that the complaint in this case makes allegations against Mr. Bloomberg under that provision of the statute, the court should look to the language of that provision, interpreted as always in light of the liberal and robust remedial purpose of the City Law. The same is true of the aiding and abetting provision of the NYCHRL section or § 8-107(13).

With regard to plaintiff's allegations that Mr. Bloomberg is an employer for purposes of the vicarious liability section of the City Law, section or § 8-107(13)(b), we argue in light of the robust purposes of the NYCHRL, this Court should reject the *Patrowich/Totem Taxi* standard created by the Appellate Division. *Doe v. Bloomberg, L.P.*, 178 AD3d 44, 47 [1st Dept 2019]).

INTEREST OF AMICUS CURIAE NELA-NY

The National Employment Lawyers Association (NELA) is a national bar association dedicated to the vindication of individual employees' rights. NELA-NY, incorporated as a bar association under the laws of New York State, is NELA's New York affiliate, with more than 300 members. NELA-NY's activities

and services include continuing legal education and a referral service for employees seeking legal advice and/or representation. Through its various committees, NELA-NY also seeks to promote more effective legal protections for employees.

PRELIMINARY STATEMENT

Amicus NELA-NY submits this brief in support of Plaintiff-Respondent Doe. This brief specifically addresses the standard that should be applied under the NYCHRL to claims brought against individuals.

The Appellate Division decision wrongly grafts restrictive NYS Human Rights Law concepts onto the NYC Human Rights Law, which by its own terms is intended to be construed liberally without regard to similar state and federal law. As this Court held in *Albunio v. City of New York* (16 NY3d 472, 477-78 [2011]), the provisions of the City HRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."

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With regard to plaintiff's allegations that Mr. Bloomberg is an employer for purposes of the vicarious liability section of the City Law, §8-107 (13)(b), we argue in light of the robust purposes of the NYC HRL, this court should reject the

Totem Taxi standard created by the Appellate Division. *Doe v. Bloomberg, L.P.*, 178 AD3d 44, 47 (1st Dept 2019).

POINT I

THE COURT SHOULD REMAND WITH INSTRUCTIONS THAT THIS MATTER BE CONSIDERED IN LIGHT OF SECTIONS 8-107(1)(A) AND 8-107(6) OF ADMINISTRATIVE CODE OF CITY OF NEW YORK

Unlike the NYSHRL, the NYCHRL is clear that individual employees and agents may be liable for engaging in employment discrimination.

Section 8-107(1)(a) provides:

It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status of any person:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment such person; or

(3) To discriminate against such person in compensation or in terms, conditions or privileges of employment. (Emphasis added.)

The City statute therefore explicitly makes it unlawful for any employer or employee or agent to engage in employment discrimination.[1] The City statute differs from the State statute in this regard.

However, the Appellate Division has chosen to ignore this key provision of the NYCHRL. Therefore, this Court should remand this case for a determination of whether the allegations in the complaint are sufficient to survive a motion to dismiss under §8-107(1)(A).

In doing so, the Court should bear in mind, as the Second Department held in *Kaplan v. New York City Dept of Health & Mental Hygiene*, (142 AD3d 1050, 1051 [2d Dept 2016]).

> A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action. Therefore, whether the pleading will later survive a motion for summary judgment, or

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[1] In the majority opinion, the Appellate Division made the following statement, unsupported by case law citation:

"Additionally, pursuant to the plain language of the statute, where the only employer is an individual and there is no corporate employer, the individual may be held strictly liable for the discriminatory acts of his or her managers and supervisors as such individual is the only possible employer under the statute". *Doe v. Bloomberg, L.P.*, 178 A.D.3d 44, 47- 48 (1st Dept 2019).

It is unclear which provision of the NYCHRL the Appellate Division was referring to. If it was referring to §8-107(1)(A), this is an incorrect interpretation – individuals under the City law may be held responsible along with corporate employers.

> whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory. *Kassapian v City of New York*, 155 AD3d 851, 853 [2d Dept 2017]. As the Supreme Court held, "at this stage, as no discovery has taken place, it is unknown the extent of (Bloomberg's) involvement with the decision-making process at Bloomberg, LLP. It is also undiscovered if Bloomberg had a direct connection if any to the sexual harassment that took place from September 2012 to October 2015." (NYSCEF Doc No. 47, order, in *Doe v. Bloomberg L.P.*, 178 AD3d 44 [1st Dept 2019, No. 28254/2016E]).

In addition, the City law tracks the State law in providing that it is unlawful for any person to aid or abet, incite compel or coerce the doing of any of the acts forbidden by the Human Rights Law. (§8-107(6)). (Emphasis added.) This provision also is not limited to persons defined as "employers" but provides for liability for individuals who aid and abet.

In the present case, the decision below should be reversed and the court instructed to determine whether plaintiff's allegations are sufficient to survive a

motion to dismiss as to whether Bloomberg as a "person" aided and abetted in the conduct of Bloomberg LP.

POINT II

IN DETERMINING WHETHER AN INDIVIDUAL IS AN EMPLOYER UNDER THE CITY LAW, THE COURT SHOULD NOT BE GUIDED BY RESTRICTIVE STATE LAW CONCEPTS DERIVED FROM *TOTEM TAXI*

When *Patrowich v Chemical Bank* (63 NY2d 541, 543 [1984]) was decided in 1984, the Court was faced with the question: under what circumstances could an individual be sued as an employer under the New York State Human Rights Law?

Under the NYSHRL—except for the aiding and abetting provisions—the only entities subject to suit were "employers." The *Patrowich* court grappled with the question of under what circumstances an individual could be considered an employer. The *Patrowich* court reasoned:

> The Human Rights Law definition of employer (Executive Law, § 292, subd 5) relates only to the number of persons employed and provides no clue to whether individual employees of a corporate employer may be sued under its provisions. The contrary is, however, suggested by subdivision 3-b of section 296, which makes it a discriminatory practice for "any real estate broker, real estate salesman or employee or agent thereof" to make certain representations, for it indicates that the Legislature differentiated that provision from the general definition of "employer."

In *Patrowich*, the court held:

> A corporate employee, though he has a title as an officer and is the manager or supervisor of a corporate division,

> is not individually subject to suit with respect to discrimination based on age or sex under New York's Human Rights Law (Executive Law, art 15) or its Labor Law (§ 194) or under the Federal Age Discrimination in Employment Act (29 USC § 623) or Equal Pay Act (29 USC § 206, subd [d]) if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others.
>
> *Id.* at 542.

"A corporate employee …is not individually subject to suit… if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others" clearly implies that a corporate employee IS subject to individual suit if he has an ownership interest OR the power to make personnel decisions. *Id*. *Patrowich* itself does not mention any further requirements for bringing suit against individuals under the NYS HRL.[2]

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[2] The plain- language interpretation of *Patrowich* has been accepted by some courts. *Makinen v. City of NewYork* (167 F Supp 3d 472 (S.D.N.Y. 2016), *affd in part and revd in part on other grounds* 722 Fed Appx 50 [2d Cir 2018]). Others, like the Appellate Division in this case, have willy-nilly grafted various restrictions onto *Patrowich* apparently as a way of protecting the corporate veil, but avoiding what seems to be the case's plain meaning. For example, in addition to the standard applied by the Appellate Division in this case and in *Boyce v Gumley-Haft, Inc*. (82 AD3d 491, 492 [1st Dept 2011]), courts have invented standards ranging from the much less restrictive the "minimal culpability" standard (*Marchuk v. Faruqi & Faruqi, LLP*, 100 F Supp 3d 302, 309 ([S.D.N.Y. 2015]); to the "some allegation of participation by the individual engaged in a discriminatory act" standard (*Zach v. E. Coast Restoration & Constr. Consulting Corp*., No. 15 Civ. 0007(NRB), 2015 WL 5916687, at * 1 [S.D.N.Y. Oct. 7, 2015]) to the completely confusing "ownership interest plus aiding and abetting or condoning" [Footnote continued on next page]

The Appellate Division in this case, uncomfortable with the plain language of *Patrowich*, grafted onto *Patrowich* a standard for vicarious liability derived from the 1985 case of (*Matter of Totem Taxi*, 65 N.Y.2d 300, (1985). *Totem Taxi* was a public accommodations case in which the court held that a taxi company was not responsible for the conduct of a driver who told four black women passengers that "you n---ers make me sick." *Id*. at 302.

The *Totem Taxi* court held:

> If there is any ambiguity in the statute with respect to employer liability for employees' acts it is not to be found in the subdivision dealing with public accommodations. That subdivision separately identifies the owner or proprietor and the employee as persons independently subject to the statute and expressly imposes liability only on the person who actually commits the discriminatory act. Thus the employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it.)

Totem Taxi, 65 N.Y.2d at 305. (Emphasis added.) As described above, the New York City Law, by providing explicitly for absolute vicarious liability for employers for the conduct of their supervisors, is directly contrary to *Totem Taxi*,

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standard, which conflates two different provisions of the statute. *McRedmond v, Sutton Place Restaurant & Bar, Inc.*, 95 AD3d 671, 673 [1st Dept 2012]).

which only mandates liability if the employer approved of, condoned or encouraged the supervisors' conduct.

The New York City law provides:

> An employer is liable for the acts of its employees under the specific scenarios sent forth in §8-107(13)(b): Either the employee was a manager or supervisor or the employer (or a manager or supervisor) knew of the discriminatory conduct and acquiesced or failed to take immediate and appropriate corrective action or the employer should have known of the conduct and failed to take reasonable diligence to prevent it.

Administrative Code of the City of N. Y. § 8-107[13][b][1]). In fact, the restriction on vicarious liability in *Totem Taxi* itself was a motivating factor for creating a broad vicarious liability regime under the City Law as part of the 1991 Amendments:

> "Even on the state level, narrow interpretations of civil rights laws have retarded progress. For example, the State Court of Appeals has made it virtually impossible to hold taxi companies responsible for the discriminatory acts committed by their drivers." Mayor David N. Dinkins, Remarks, supra note 4, at 1, quoted in Eyes on the Prize at 116, n. 68.

Moreover, in the more than 35 years since *Totem Taxi* was decided, it has been partially superseded even on the state level. Many courts interpreting state law have ignored it in favor of the less restrictive federal *Faragher*/*Ellerth* framework that courts have used to determine vicarious liability. (*See e.g. Woolcock v. Mt. Sinai St. Lukes-Roosevelt & Continuum Health Partners*, 2019

NY Slip Op 30651(U) [Sup Ct, NY County 2019]) *at *21*, citing *Faragher v. City of Boca Raton* (524 US 775 ([1998]), *see also Burlington Indus., Inc. v. Ellerth* 524 US 742 [1998].) Moreover, the 2019 amendments to the NYSHRL, among other things, broadens the possibility of vicarious liability under the NYSHRL by providing that an individual's failure to complain of discrimination or harassment cannot be determinative of the question as to whether her employer is vicarious liable for such discrimination or harassment. NYS Exec Law 296(h).

Therefore, the Appellate Division's grafting of *Totem Taxi* onto *Patrowich* to create a restrictive City Law standard for vicarious liability is directly contrary to both the plain meaning and the legislative intent of the City Law, which takes a broader view of vicarious liability.

In *Zakrzewska v. New School* (14 NY3d 469 [2010]), this Court noted that:

> We have "generally interpreted" state and local civil rights statutes "consistently with federal precedent" where the statutes "are substantively and textually similar to their federal counterparts" (*McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 429, 821 NE2d 519, 788 NYS2d 281 [2004]. But we also "construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660, 860 NE2d 705, 827 NYS2d 88 [2006]).

Id. at 479.

On the question of individual liability, the State and City Laws are dissimilar, substantively and textually. It was therefore reversible error to apply

the restrictive *Totem Taxi* standard in determining when an individual can be liable as an employer under the City Law.

CONCLUSION

The decision below should be reversed.

Dated: April 23, 2020
New York, New York

By: Miriam F. Clark

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On behalf of Amicus Curiae National Employment Lawyers Association—New York;

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR Section 500.1(j) the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: April 23, 2020

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