Appellate Division, Second Department, Docket No. 2017-12988
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Court of Appeals
State of New York

DALER SINGH, DBA GILZIAN ENTERPRISE LLC, DANIELLE EVE TAXI LLC, EAC TAXI LLC, DEC TAXI LLC, EC TAXI LLC, CHIPS AHOY TAXI LLC, ECDC TAXI LLC, and DYRE TAXI LLC individually and on behalf of all others similarly situated,

Appellants,

against

THE CITY OF NEW YORK and THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

GEORGIA M. PESTANA
Acting Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
Tel: 212-356-2500
Fax: 212-356-1148
rdearing@law.nyc.gov

RICHARD DEARING
ERIC LEE
of Counsel

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PRELIMINARY STATEMENT

In 2013, Richard Chipman, a taxi magnate, purchased 14 corporate medallions, or licenses to operate taxi fleets in New York City. Four years later, Chipman sued the Taxi and Limousine Commission, chiefly complaining that the Commission failed to block the growth of Uber, a smartphone-based competitor that had begun operating in the City well before his purchase. Supreme Court dismissed most of his claims. On appeal, the Second Department unanimously affirmed those dismissals and ordered the remaining claims dismissed as well.

Chipman now seeks leave to appeal, after failing to obtain leave below. The Court should deny the motion, as it rests on a distortion of the facts and misreading of the law. The Appellate Division correctly applied settled law on all points.

The case has two parts, neither warranting leave. First, Chipman's contract claims simply do not present the broad issues about the implied covenant of good faith and fair dealing that are discussed in his motion. Instead, the Appellate Division rejected the claims on the case-specific ground that the contract documents

here preclude Chipman's theory of breach. His claims rest on the contention that the Commission had an implied obligation to intervene as a regulator to thwart Uber's growth-based business strategy. But transaction documents signed by Chipman repeatedly stressed that the Commission was making no promises about application of its rules or other laws. The Appellate Division's ruling implicates no conflict in authority, question of statewide importance, or even serious claim of error.

Second, on the tort side of the case, Chipman has conceded that his common-law claims for fraud and negligent misrepresentation fail because he did not serve a timely notice of claim on the City. But he nonetheless seeks review of the Appellate Division's ruling that his statutory claim under General Business Law § 349—alleging the same injuries and same deceptive conduct—fails for the same reason. The issue turns on whether his statutory claim sounds "in tort," and it clearly does, just as he concedes his kindred common-law claims do. Here, too, Chipman identifies no error—let alone split in authority or issue of broad importance.

OVERVIEW OF THE CASE

A. Medallion taxis and black cars

The Commission regulates and licenses various types of vehicles for hire in the City. This case principally concerns two categories of vehicles in the for-hire-vehicle market: medallion taxis and black cars.

A medallion is a license that permits the holder to operate a (yellow) taxi. *See* 35 R.C.N.Y. § 51-03. Taxis are the only vehicles permitted to accept street hails throughout New York City. Admin. Code § 19-504(a)(1). Street hails—flagging down an available taxi on a street by waving, shouting, or whistling—are a subset of hails, a term that includes verbal, physical, or electronic requests for a taxi. *See* 35 R.C.N.Y. § 51-03.

Unlike taxis, black cars cannot accept street hails. Instead, black cars operate only with some form of prearrangement. *See* Admin. Code § 19-516. In fact, the black car industry first arose when large numbers of taxis began arranging rides for businesses by radio calls, which led to a severe shortage of taxis for street

hails (Record on Appeal ("R") 371). As a result, the Commission banned radio calls in taxis but permitted them in black cars (*id.*).

In the past decade, with the advent of modern technology, new companies, most prominently Uber and Lyft, have allowed passengers around the world, including in New York City, to prearrange black car rides through smartphone applications. *See, e.g., Matter of Glyka Trans, LLC v. City of N.Y.*, 161 A.D.3d 735, 735 (2d Dep't 2018) (noting the "rapid growth of for-hire vehicle services provided by companies such as Uber").[1] Indeed, the record here reflects that Uber "debut[ed]" in the City in 2011, "initiating rapid growth" in the number of black cars (R371).[2]

Two years later, in 2013, recognizing that the taxi industry was also interested in using new technology, the Commission

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[1] *See also* Bee Shapiro, *Mom's Van Is Called Uber*, N.Y. Times, Sept. 25, 2013, https://perma.cc/EZ23-KDMN; Ian Lovett, *Where Car Is King, Smartphones May Cut Traffic*, N.Y. Times, July 12, 2013, https://perma.cc/SAF5-EFLY; Joshua Brustein, *In App Land, Lots of Ways to Get a Ride*, N.Y. Times Bits Blog (Dec. 2, 2012, 6:00 PM), https://bits.blogs.nytimes.com/2012/12/02/get-a-ride-apps; Mickey Meece, *Car-Pooling Makes a Surge on Apps and Social Media*, N.Y. Times, July 4, 2012, https://perma.cc/84Q8-DKQF.

[2] *See also* Jenna Wortham, *With a Start-Up Company, a Ride Is Just a Tap of an App Away*, N.Y. Times, May 3, 2011, https://perma.cc/F5HK-ZQFK.

authorized taxis to use smartphone apps to arrange rides, first in a pilot program and later in approved rules (R57–58).[3]

New York courts have rejected lawsuits brought by the taxi industry faulting the Commission for allowing new companies like Uber to compete against taxis.[4] Courts around the country have also rejected similar lawsuits brought against municipalities over the reduced value of taxi licenses.[5]

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[3] Commission, *Notice of Promulgation of Rules* (Jan. 29, 2015), https://perma.cc/N84X-YST6.

[4] *See, e.g., Melrose Credit Union v. City of N.Y.*, 247 F. Supp. 3d 356, 359 (S.D.N.Y. 2017), *aff'd sub. nom. Progressive Credit Union v. City of N.Y.*, 889 F.3d 40, 44–45 (2d Cir. 2018) (rejecting claims by medallion owners, financiers, and taxi trade associations that the Commission's supervision of black car companies allegedly impaired their property rights or their entitlement to equal protection); *Matter of Melrose Credit Union v. City of N.Y.*, 161 A.D.3d 742, 745–47 (2d Dep't 2018) (rejecting effort by medallion financiers to halt the expansion of black cars because they failed to establish direct harm or standing to sue); *Glyka Trans,* 161 A.D.3d at 738–41 (holding that the Commission rationally concluded that the smartphone-arranged ride was a black-car prearrangement and different from a taxi street hail).

[5] *See, e.g., Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 160–61 (3d Cir. 2018); *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, 839 F.3d 613, 616 (7th Cir. 2016); *Boston Taxi Owners Ass'n v. City of Boston*, 180 F. Supp. 3d 108, 119-120 (D. Mass. 2016); *Ill. Transp. Trade Ass'n v. City of Chicago*, 134 F. Supp. 3d 1108, 1113-14 (N.D. Ill. 2015), *rev'd on other grounds*, 839 F.3d 594 (7th Cir. 2016).

B. Factual background

1. Uber's presence in New York City, and the absence of any numerical cap on black cars, before Chipman's purchases

Two facts about the years leading up to the transactions here help frame this case. First, as noted, Uber began using its smartphone technology in New York City in 2011 (R371). Second, while the number of taxi licenses in the City has long been capped by statute,[6] there had never been any similar cap on the number of black-car licenses in the City as of the date of these transactions.

2. Chipman's medallion purchases in 2013

The plaintiffs are seven limited liability companies that Chipman—an experienced businessman who specializes in the financing, management, and brokerage of medallions—formed in

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[6] *See* Mot. 5–6; N.Y.C. Charter § 2303(4); *Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d 289, 297 (2013). For much of the 20th century, the cap on taxis remained unchanged (R56). In recent decades, both the City Council and the State Legislature have on occasion raised the cap (R56). *See Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 297.

order to own more medallions (*see* Pl. App. Br. 16; R54-55).[7] In 2013, Chipman purchased 14 corporate medallions at an industry auction authorized by a new state statute (R55, 80),[8] which the Legislature enacted to increase the number of wheelchair-accessible taxis in the City.

The bid guide for the industry auction was detailed (R87–90). For each bid, bidders were required to complete a bid form, submit a certified check or money order for $10,000 as a deposit, and include a letter of commitment, issued by a government-licensed lender, for no less than 80% of the bid amount (R88). Each bid covered two paired corporate medallions (R80).

Chipman submitted 10 bids that ranged from $1.818 million to $2.518 million for the paired medallions (R119–23, 135–40). Seven of his bids won (R119-120), totaling over $16 million for 14

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[7] *See* Westway Medallion Sales, Meet Our Team, Richard Chipman, https://perma.cc/M7H9-PEA9 ("Richard is one of the most experienced and well-respected members of the industry."). The other original plaintiff, Daler Singh, was dismissed for lack of standing while the appeal was pending.

[8] At the time, a corporate medallion allowed a person like Chipman to own multiple taxi medallions, which were typically leased to drivers in shifts (R59, 227).

corporate medallions (R55). Just 12 individuals—including Chipman—acquired all 200 medallions at the auction (R119–21).

On each bid form, which he personally signed, Chipman certified that he "ha[d] not relied on any statements or representations from the City of New York in determining the amount of [his] bid" (R135–40). Chipman agreed that the City did not make any representations about "the present or future value of a taxicab medallion" or "the present or future application or provisions of the rules of [the Commission] or applicable law" (*id.*). Chipman also agreed that "no warranties [were] made, express or implied, [by the City on] any matter other than the warranty of clear title." (*id.*). And he acknowledged that the medallions were conveyed "subject to" the Commission's regulations and other applicable law, as may be amended (*id.*).

After seven of his bids prevailed, Chipman submitted signed and notarized affidavits of non-reliance, in which he reaffirmed that he had not relied on any statements, representations, actions, or determinations by the Commission, including any concerning "the value of taxicab medallions" (R144–155). He also reaffirmed

that the licenses were subject to laws that could be "amended from time to time" (*id.*).

Chipman also signed bills of sale (R158–63), which once again provided that (1) the Commission made no warranties, either express or implied, on anything other than clear title; (2) the Commission made no representations about the present or future value of the licenses; and (3) the licenses were contingent on all applicable state and local laws and regulations, which were subject to change (*id.*).

3. Uber's growth strategy in ensuing years

As Chipman alleges in his complaint, in the years after he obtained his additional taxi licenses, Uber grew tremendously in New York City, as it did all over the country and, indeed, globally. By 2015, Uber had more than 20,000 affiliated cars in the City (R68). In 2017, it had more than 46,000 affiliated cars, more than triple the number of taxis in the City (R69).

This rapid increase reflected Uber's growth-at-any-cost business strategy. Backed by venture capital, Uber deliberately sought massive growth at a loss, in the hopes that capturing

market share over incumbent interests would lead to profitability down the road.[9]

Uber's business strategy did not go unnoticed in New York City. In 2015, Mayor de Blasio sought legislation capping black-car growth, only to see the effort fail (R69). But in 2018, a renewed legislative push succeeded, making New York the first major city in the United States to impose such a cap on companies like Uber.[10]

The groundbreaking 2018 law placed a one-year moratorium on new licenses and granted the Commission new authority to cap licenses going forward. See L.L. 147/2018. The Commission has since exercised that authority, and a cap on black cars remains in place today. Uber unsuccessfully sued to challenge both the local law and the rule adopted by the Commission pursuant to it. *See Zehn-NY LLC v. City of N.Y.*, 2019 N.Y. Misc. LEXIS 5875, at *1 (Sup. Ct., N.Y. Cnty., Oct. 28, 2019); *Zehn-NY LLC v. N.Y. City*

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[9] Richard Waters, Shannon Bond, *Uber Faces a Long Road to Profitability—If It Gets There at All*, L.A. Times, May 13, 2019, https://perma.cc/868W-W9MB.

[10] Emma G. Fitzsimmons, *Uber Hit With Cap as New York City Takes Lead in Crackdown*, N.Y. Times, Aug, 8, 2018, https://perma.cc/BZ4S-FUHJ.

Taxi & Limousine Comm'n, 2019 N.Y. Misc. LEXIS 6789, at *1 & *7-8 (Sup. Ct., N.Y. Cnty., Dec. 23, 2019).

C. Supreme Court's partial grant of the Commission's motion to dismiss

In 2017, Chipman's corporate entities sued the Commission, asserting (1) claims alleging deceptive conduct—for fraudulent inducement, negligent misrepresentation, and deceptive acts against consumers under General Business Law § 349; and (2) contract claims—for breach of the implied covenant of good faith and fair dealing and rescission (R52–78).

Supreme Court (Kerrigan, J.) dismissed all three claims alleging fraudulent or deceptive conduct because Chipman had failed to comply with notice-of-claim requirements under state and local law (R14–16). The court also held that the GBL § 349 claim failed for additional reasons (R16–19). Supreme Court declined to dismiss the contract claims (R19–20).

While conceding that the claims for fraudulent inducement and negligent misrepresentation claims were properly dismissed, Chipman appealed the dismissal of the § 349 claim for deceptive

practices, while the Commission cross-appealed the decision to allow the contract claims to proceed.

D. The Appellate Division's unanimous decisions dismissing the complaint and denying leave to appeal

In 2020, the Appellate Division, Second Department, unanimously denied Chipman's appeal while granting the Commission's cross-appeal. *See Singh v. City of New York*, 189 A.D.3d 1697 (2d Dep't 2020). As a result, the court ordered that the entire complaint be dismissed. *Id.*

First, the Appellate Division held that the § 349 claim, asserting that the Commission committed deceptive, consumer-oriented practices, sounded "in tort." *Id.* at 1699. Because Chipman had not served a timely notice of claim, the court held that Supreme Court properly dismissed the claim under General Municipal Law § 50-e and Administrative Code § 7-201. *Id.*

Second, the Appellate Division held that the lower court erred in declining to dismiss the contract claims. *Id.* at 1699–701. The court explained that because the official documents forming the parties' contract were in the record, the claims could be

resolved as matter of law. *Id.* The court noted that in those documents, Chipman had agreed that the Commission made no representations or warranties about the present or future value of the medallions, the present or future content of the Commission's rules, or the present or future application of its rules. *Id.*

The Appellate Division also noted that because Chipman alleged a breach of the implied covenant of good faith, the key issue was whether a "reasonable person" in his position would be justified in believing that the promises allegedly breached were included in the contract. *Id.* The court held that in light of the clear and express language in the contract documents, "no reasonable person" in his shoes would have believed that the Commission would "act or refrain from acting in any manner in order to guarantee the value of [his] medallions," because such promises would be "inconsistent" with the contract documents' terms. *Id.* at 1700.

The Appellate Division denied Chipman's motion for reargument or leave to appeal. *See Singh v. City of N.Y.*, 2021 N.Y. Slip Op. 65665(U) (2d Dep't May 5, 2021).

REASONS TO DENY LEAVE TO APPEAL

This Court should deny leave. To obtain it, Chipman must show that the case presents a conflict with this Court's decision, an issue of statewide importance, or a conflict among the departments of the Appellate Division. *See* 22 N.Y.C.R.R. § 500.22(b)(4). Chipman has shown none of those things.

A. The Appellate Division's decision on the contract claims does not raise a leaveworthy issue.

1. This case does not present the issues that Chipman seeks leave on.

Chipman's motion asks the Court to review a non-issue. Despite his contentions (Mot. 18–21), the case is not about whether a party can disclaim the implied covenant of good faith and fair dealing. There's no relevance to Chipman's extended discussion of how the U.S. Supreme Court—in a case addressing federal preemption—has described States' handling of that issue. *See Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014). The issue is not in this case.

Nor did the Commission argue, or the Appellate Division hold, that a disclaimer of any representation about value defeats

the implied covenant of good faith and fair dealing (Mot. 21–25). That issue, too, is not presented here.

Instead, the dispositive issue is whether Chipman's particular theory of breach is sustainable on this record. That turns on a bedrock principle the Court has many times reaffirmed: the duty of good faith and fair dealing cannot be used to inject an implied promise into a contract that is "inconsistent" with its express terms. *See. e.g.*, *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995); *Murphy v Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983). After reviewing the contract documents in this case, the Appellate Division concluded that the specific terms of the parties' contract for the taxi licenses were not compatible with any implied promise on the part of the Commission to throttle Uber's growth—as claimed by Chipman.

Chipman's effort to reimagine the case as raising broad theoretical issues of contract law is a diversion. The Appellate Division correctly resolved the case-specific question at the heart of his contract claims, based on this particular contract's terms.

2. The Appellate Division correctly resolved this contract dispute under the terms of the agreement and settled contract law.

To understand why the Appellate Division correctly resolved the contract claims on the facts of this case, it is helpful to explain the particular theory of breach alleged by Chipman here. From the start, Chipman has conceded that the Commission never breached any express term of their contract. Instead, his contract claims rely entirely on the implied covenant of good faith and fair dealing. And he seeks to use that doctrine to read a highly unlikely promise into the parties' contract: he contends that the Commission made an unstated promise to regulate in a manner that would stifle the growth of Uber and other competitors for Chipman's benefit (R66–73).

Indeed, Chipman argues (Mot. 18–20) that this unstated and anti-competitive promise to block Uber's growth—assuming the Commission even had authority to do so—was at the heart of the deal. And he has maintained that position while acknowledging, in his own complaint and through documentary evidence he submitted, two key facts known as of the time that he obtained his

taxi licenses: (1) Uber had begun operating in the City a couple of years earlier; and (2) while a longstanding statutory limit capped the number of taxi licenses, there was no similar cap on the number of black-car licenses (*see, e.g.,* R55–78, 371, 390).

With this established backdrop in mind, the Appellate Division concluded correctly that Chipman had no viable contract claims here. In the unambiguous contract documents, the Commission repeatedly stated that it was making no representations about the "present or future … provisions" of its regulations, the "present or future application" of its regulations, or about the "present or future value" of the medallions (R134–63). The Commission also repeatedly explained that it was making no warranties, whether express or implied, about any matter other than clear title (*id.*). And the Commission repeatedly noted that its regulations and other laws were subject to change (*id.*).

The Appellate Division thus held that in light of those express terms and the regulatory landscape, no reasonable person in Chipman's shoes would have justifiably believed that the Commission had promised to intervene to thwart the business

strategy of Uber and other competitors in order to maintain the value of Chipman's licenses. *Singh*, 189 A.D.3d at 1700–01; *see Moran v. Erk*, 11 N.Y.3d 452, 457 (2008) (no reasonable person would have believed alleged implicit promise was made, as it was inconsistent with contract's "plain language").[11]

Contrary to Chipman's assertion (Mot. 21–25), the ruling here does not conflict with the two decisions he cites. In *Roli-Blue, Inc. v. 69/70th Street Associates*, 119 A.D.2d 173, 174–78 (1st Dep't 1986), a commercial tenant was allowed to plead an implied-covenant claim where its landlord's own affirmative actions rendered the tenant's use of the leased premises illegal. And in *Legend Autorama, Ltd. v. Audi of America, Inc.*, 2011 N.Y. Misc. LEXIS 3564, *aff'd*, 100 A.D.3d 714 (2d Dep't 2012), an implied-covenant claim could proceed because the contract included an express obligation on the defendant franchisor to actively assist the plaintiff in all aspects of the business.

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[11] *Accord 1357 Tarrytown Rd. Auto, LLC v. Granite Props., LLC*, 142 A.D.3d 976, 977 (2d Dep't 2016); *ELBT Realty, LLC v. Mineola Garden City Co., Ltd.*, 144 A.D.3d 1083, 1084 (2d Dep't 2016); *Behren v. Warren Gorham & Lamont, Inc.*, 24 A.D.3d 132, 133 (1st Dep't 2005).

Nothing similar is present here. The parties didn't reach any understanding that the Commission would intervene to regulate Chipman's competitors in a manner that actively assisted his business. To the contrary, the contract repeatedly stated that the Commission was making no promises about application of its rules or other laws, and repeatedly advised Chipman that the transfer was being made subject to applicable laws, which could be amended (but, of course, might not be).

And unlike the exclusivity contract in *Wood v. Lucy, Lady Duff-Gordon,* 222 N.Y. 88 (1917), the contract here wasn't "silent" (Mot. 18–20). Just the opposite. Again, across all the contract documents, the Commission stated that it was making no promises about its regulatory decisions or the future value of the medallions. To imply a binding promise that the Commission would regulate Uber to further Chipman's investment preferences would be "inconsistent with other terms of the contractual relationship," which made clear that no promises were being made about the regulatory future. *Singh*, 189 A.D.3d at 1700–01.

Chipman misses the point in suggesting that no one could have foreseen Uber's growth (Mot. 21–25). The question is not whether he is blameworthy for failing to predict Uber's rise. Nor is it whether, as a policy matter, the City Council could have enacted its pioneering law capping black-car licenses even sooner. The question is instead whether Chipman can justifiably claim that the Commission made an unspoken contractual promise to insure him against potential market threats like Uber. And he cannot.

Chipman mistakenly relies on several Queens County trial court decisions predating the Appellate Division's decision here (Mot. 13–16). All the cited decisions followed Justice Kerrigan's reasoning, which the Appellate Division has soundly rejected. The *Akal* case, moreover, was brought by the same attorneys who filed this one, on behalf of other medallion owners, several of whom did business with Chipman. The cited trial-court decisions from copycat suits add nothing, which may be why Chipman failed to alert the Appellate Division to them before it ruled. At bottom, the Second Department's cogent decision undercuts the earlier trial-court rulings, not the other way around.

The Appellate Division reached the correct conclusion: because the Commission made clear that it was making no promises about regulatory policies, it cannot be deemed to have implicitly promised to intervene to thwart market threats from competitors like Uber, especially when neither local nor state law at the time capped the number of cars those competitors could have. *Singh*, 189 A.D.3d at 1700–01. By their terms, the City's taxi licenses did "not include a right to be free from competition." *Matter of Glyka*, 161 A.D.3d at 741 (quoting *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 741 (7th Cir. 2018)). Chipman could not have justifiably believed that the Commission had silently granted him that very right.

B. The Appellate Division's decision on the § 349 claim does not raise a leaveworthy issue.

On the GBL § 349 claim, Chipman purports to identify conflicts between the Appellate Division's decision and existing Court of Appeals case law, but none exist.

The Appellate Division correctly applied settled law in dismissing the § 349 claim. Three points chart the course. First, it

is undisputed that Chipman failed to serve a timely notice of claim on the City. *See* Gen. Mun. L. § 50-e (a party asserting a claim "founded upon tort" against a municipality must serve a notice of claim within 90 days of the date on which the claim arose). Second, Chipman does not contest that his claims for fraudulent inducement and negligent misrepresentation were properly dismissed for failure to serve a timely notice of claim. And third, it is unchallenged that Chipman's § 349 claim rests on the same allegations that support his claims for fraudulent inducement and negligent misrepresentation (R74–76).

The Appellate Division correctly concluded that Chipman could not evade the notice-of-claim requirement by applying a different label to the same allegations. His § 349 claim alleging deceptive conduct on the Commission's part was exactly what it sounded like—a claim sounding in tort—and so required a timely notice of claim. *Singh*, 189 A.D.3d at 1699. Chipman points to no appellate court that has held or suggested otherwise.

To the contrary, New York courts have regularly applied notice-of-claim requirements to statutory claims that are akin to

common-law torts. *See, e.g., Matter of Nadler v. City of New York*, 166 A.D.3d 618, 618 (2d Dep't 2018) (personal-injury-related Labor Law claims); *Matter of Dominguez v. City Univ. of N.Y.*, 166 A.D.3d 540, 541 (1st Dep't 2018) (same); *Matter of Kim v. Dormitory Auth. of State of N.Y.*, 140 A.D.3d 1459, 1460 (3d Dep't 2016) (same); *Zahra v N.Y.C. Hous. Auth.*, 39 A.D.3d 351, 351 (1st Dep't 2007) (claim under General Municipal Law § 205-a); *Corcoran v. N.Y. Power Auth.*, 202 F.3d 530, 541 (2d Cir. 1999) (federal statutory claim for radiation injury). The Appellate Division's decision fits comfortably within this case law.

Chipman has no meaningful response on the core point that his § 349 claim sounds "in tort." *Singh*, 189 A.D.3d at 1699. Instead, he cites two wholly inapposite decisions: *Margerum v. City of Buffalo*, 24 N.Y.3d 721 (2015), and *Gaidon v. Guardian Life Insurance Company of America*, 96 N.Y.2d 201 (2001).

Neither case helps him. In *Margerum*, this Court simply held that employment discrimination claims under the Human Rights Law—claims absent here—were not tort claims subject to General Municipal Law § 50-e. 24 N.Y.3d at 731. Statutory claims

for employment discrimination do not resemble any New York common-law tort. In fact, New York recognizes no tort for wrongful discharge. *See, e.g., Lobosco v. N.Y. Tel. Company/NYNEX*, 96 N.Y.2d 312, 316 (2001).

But none of that matters here. This case, of course, does not involve claims for employment discrimination. Instead, it involves claims for deceptive practices under GBL § 349, which are plainly similar to the common-law torts of fraud and negligent misrepresentation. Nothing in *Margerum* calls that into question.

The other case Chipman cites, *Gaidon v. Guardian Life Insurance Company of America*, 96 N.Y.2d 201 (2001), only confirms our point. There, the Court expressly recognized that § 349 claims are "akin" and "similar" to claims for common-law fraud. *Id.* at 209 (quotation marks omitted). These observations are dispositive on the notice-of-claim question.

Gaidon, of course, went on to hold because § 349 claims are not identical to claims for common-law fraud, the applicable limitations period is governed by CPLR 214's provision covering liabilities "created or imposed by statute." *Id.* But that holding is

irrelevant here, because the notice-of-claim requirement, unlike *Gaidon*'s statute-of-limitations inquiry, does not turn on whether a claim derives from a statutory or common-law source. It instead turns on the different and broader question whether the claim "sounds in tort"—which § 349 claims certainly do.

There is nothing leaveworthy about this case. The Appellate Division properly held that Chipman's § 349 claim—no less than his common-law claims for fraud and negligent misrepresentation stemming from the same alleged acts and resulting in the same alleged injuries—required a timely notice of claim.

CONCLUSION

The motion should be denied.

Dated: New York, New York
June 18, 2021

Respectfully submitted,

GEORGIA M. PESTANA
Acting Corporation Counsel
of the City of New York
Attorney for Respondents

By: _____
RICHARD DEARING
Assistant Corporation Counsel

100 Church Street
New York, New York 10007
212-356-2500
rdearing@law.nyc.gov

RICHARD DEARING
ERIC LEE
of Counsel