SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GREGORY PIATEK,

Plaintiff,

-against-

THE HAPPIEST HOUR NYC, and JON NEIDICH individually,

Defendants.

Index No. 152578/2017

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants the Happiest Hour NYC (the "Happiest Hour") and Jon Neidich ("Neidich") (collectively, the "Defendants"), by and through their undersigned attorneys, respectfully submit this memorandum of law, together with the accompanying Affirmation of Elizabeth C. Conway ("Conway Aff."), dated July 28, 2017, and the exhibits thereto, in support of their motion, pursuant to CPLR 3211(a)(7) and (1), to dismiss with prejudice the causes of action in the Complaint (the "Complaint") filed by Plaintiff Gregory Piatek ("Plaintiff" or "Piatek").

PRELIMINARY STATEMENT

By his Complaint, Plaintiff has commenced an action that bears all the hallmarks of a publicity stunt rather than any cognizable legal claim. Indeed, while Plaintiff wasted no time in trumpeting his politically-charged grievances to the press within hours of his March 2017 filing, he did not serve Defendants with the actual lawsuit until the imminent deadline for doing so in June 2017.[1] The putative causes of action are frivolous on their face, and documentary evidence conclusively establishes that the Plaintiff's account of events is pure fiction written at Defendants' reputational and economic expense.

Specifically, Plaintiff has concocted a story that the defendant bar and its owner refused to serve Plaintiff and ultimately ejected him from the premises because he was wearing a hat displaying the words, "Make America Great Again" (the "MAGA Hat") and perceived as supporting President Trump. He contends that Defendants discriminated against him under the New York State Human Rights Law, Executive Law § 296(2)(a) and (6) ("NYSHRL") and the New York City Human Rights Law, N.Y.C. Administrative Code §8-107(4) ("NYCHRL") based on what Plaintiff characterizes as the "creed" memorialized on his MAGA Hat, intentionally

[1] *See* Conway Aff. ¶ 3.

caused him to suffer emotional distress, and that these acts were the product of negligent hiring, training, supervision, and retention.

While he alleges that the bar and its staff *refused to serve him*, conspicuously omitted from the Complaint and the press accounts that Plaintiff stirred up, however, is the fact that the Happiest Hour charged Plaintiff for well over a dozen beers and cocktails during the time at issue, that he paid for all those drinks using his credit card, and that he was sufficiently pleased with his service at the bar that he added a 20% gratuity to the bill. Thus, in addition to the fact that each of Plaintiff's claims is fatally flawed on its face, the signed, itemized credit card receipt puts the lie to Plaintiff's outrageous and disparaging claims.

Plaintiff's claims for discrimination based on "creed" under the NYSHRL and the NYCHRL are entirely baseless because Plaintiff does not properly allege he is even a member of a protected class. Plaintiff's reliance on his "creed" is inapt because the relevant legal meaning of "creed" is reserved for the protection of one's "religious beliefs", not the vague generalities Plaintiff alleges in his Complaint. Although Plaintiff does not clearly articulate his "creed", we are told that it consists of a set of "sincerely held beliefs" of "freedom/free speech" and in "making America great again" that led him to wear the MAGA Hat. And while Plaintiff claims he did not wear the MAGA Hat as a "symbol of politics," the Complaint seems to allege that Defendants discriminated against Plaintiff based on his perceived political support of President Donald J. Trump. New York courts have refused to extend the protections afforded to one's "creed" to include a plaintiff's social or political beliefs like those asserted by the Plaintiff, and have held that such beliefs are *not* actionable under discrimination laws.

Plaintiff's claim for intentional infliction of emotional distress must be dismissed because he fails to allege any conduct by Defendants that is sufficiently "extreme and outrageous" to support such a claim.

The Complaint also fails to state a viable claim for negligent hiring, supervision, training and retention because Plaintiff does not properly allege *any* element of this cause of action: Defendants' underlying negligence; the employees' alleged "propensity" to engage in tortous conduct; Defendants' knowledge of such "propensity"; or that Plaintiff sustained a substantial physical injury as a result of Defendants' conduct. And to the extent that the Complaint contains only conclusory allegations that merely parrot the elements of a cause of action, it cannot survive a motion to dismiss.

Lastly, documentary evidence conclusively contradicts the Complaint's foundation: that Defendants refused service to Plaintiff. Plaintiff's receipt from January 28, 2017 (the "Receipt") confirms that not only did Defendants serve Plaintiff, but Defendants served Plaintiff and his friends sixteen alcoholic drinks, costing $182.91, over the course of two hours. Plaintiff signed the Receipt himself and added a twenty percent tip to the tab. This is hardly the conduct of a person who, allegedly, was ridiculed and humiliated by bar staff on account of his perceived political beliefs before being "aggressively" thrown out of the building and "into the cold" by bouncers without even having been served. The Receipt defeats Plaintiff's claims and provides an additional and independent basis requiring dismissal.

Defendants' motion to dismiss should be granted in its entirety, with prejudice, and Plaintiff should bear all of the costs that Defendants have incurred in responding to his baseless Complaint.

THE ALLEGATIONS

The pertinent allegations in the Complaint[2] are summarized below:

On January 28, 2017, after dinner, Plaintiff and two of his friends, who were visiting from Philadelphia, went to the Happiest Hour, which is a cocktail bar and restaurant in New York City. Ex. 1 ¶¶ 11. Plaintiff was wearing a hat that displayed the words, "Make America Great Again." *Id.* ¶ 10. Plaintiff claims that he wore the MAGA Hat, "as a symbol of freedom of speech and as a symbol of his creed," and "not as a symbol of politics." *Id.* ¶ 1. Earlier that day, Plaintiff had visited the National September 11 Memorial & Museum at the World Trade Center and "felt it was necessary to wear a particular hat in remembrance of the souls who lost their lives and as a symbol of freedom/free speech." *Id.* ¶¶ 7, 9.

According to Plaintiff, after he sat down at the Happiest Hour's bar, the bartender attending his section ignored Plaintiff and his friends for a period of fifteen to twenty minutes "and gave Plaintiff a 'death stare.'" *Id.* ¶¶ 12-13. When Plaintiff's friend requested a drink, he claims that the bartender replied, while "[v]isibly flustered, annoyed and filled with hatred," by asking, "Is that hat a joke?" *Id.* ¶¶ 14, 15. Plaintiff alleges that the bartender then confirmed that she had "been ignoring [him] just because of [his] hat," and that Defendants' employees refused to serve him "on account of his beliefs." *Id.* ¶¶ 16, 18, 21-22. Plaintiff further alleges that another bartender walked over to Plaintiff and, referring to the MAGA Hat, "berated" him over his "sincerely held beliefs" before calling him a "'terrible' human being.'" *Id.* ¶¶ 19-20.

Plaintiff claims that he then "realized he was being discriminated against on account of his sincerely held beliefs," and asked to speak to the bar's manager. *Id.* ¶ 23. The manager

[2] A true and correct copy of the Complaint is attached as Exhibit 1 to the Conway Aff.

allegedly told Plaintiff, after conferring with others, that, "'I spoke directly to the owner and the owner told me that anyone who supports [the United States President Donald J.] Trump or believes what you believe is not welcome here! And you need to leave right now because we won't serve you!'" *Id.* ¶¶ 26-27. Plaintiff claims that, "[i]mmediately thereafter," the bar's bouncers surrounded Plaintiff and his friends and aggressively "escorted" them out of the building and onto the cold street, but only after remarking that they were doing what the owner had instructed and "the only reason you have to get thrown out is because of what you believe and who you support." *Id.* ¶¶ 29-30.

After speaking with two NYPD officers outside the bar, the evening ended, in Plaintiff's words, as "perhaps the most discriminatory, humiliating and 'Saddest Hour' of his life." *Id.* ¶¶ 32-33. As a result of this alleged discrimination, victimization, and humiliation, Plaintiff claims that he suffers from "anxiety and severe emotional distress." *Id.* ¶¶ 34-35.

Nowhere in his Complaint does Plaintiff acknowledge that, as set forth on his signed credit card Receipt[3] from the Happiest Hour, that the bar actually served him and his friends over a dozen drinks and that Plaintiff paid for them and added a 20% gratuity to boot.

ARGUMENT

For Plaintiff to survive Defendants' motion to dismiss, the court must find "from [the pleading's] four corners factual allegations . . . which taken together manifest [a] cause of action cognizable at law . . . ." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Plaintiff's failure to allege facts that, if proven, would tend to establish each and every element of a putative claim is fatal under CPLR § 3211(a)(7). *See, e.g., Weiner v. Hershman & Leicher, P.C.*, 248 A.D.2d 193, 193 (1st Dep't 1998).

[3] A true and correct copy of Plaintiff's Receipt is attached as Exhibit 2 to the Conway Aff.

While the facts alleged in a complaint generally must be accepted as true and accorded the benefit of all reasonable inferences, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *Gertler v. Goodgold*, 107 A.D.2d 481, 485 (1st Dep't 1985), *aff'd*, 66 N.Y.2d 946 (1985). Factual allegations presumed to be true, may be properly negated by affidavits and documentary evidence pursuant to CPLR 3211(a)(1). *See Excel Graphics Techs., Inc. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 69 (1st Dep't 2003)(internal quotation and citations omitted) (holding dismissal warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law").

Applying the foregoing standards, the Complaint must be dismissed in its entirety.

I. THE DISCRIMINATION CLAIMS SHOULD BE DISMISSED

Plaintiff's second, third, and fourth causes of action allege discrimination under New York State and City Human Rights Laws based on Plaintiff's so-called "creed". *See* NYSHRL, § 296(2)(a) and (6); NYCHRL §8-107(4).[4] Plaintiff claims that Defendants unlawfully discriminated against him because they refused to serve him and ejected him from the Happiest Hour because of his "sincerely held beliefs" of "freedom/free speech" that led him to wear the MAGA Hat. Ex. 1 ¶¶ 9-10. While Plaintiff claims he did not wear the MAGA Hat as a "symbol of politics," the Complaint alleges, if read liberally, that Defendants discriminated against Plaintiff based on his perceived political support of President Trump and the slogan of "making America great again". *Id.* ¶ 18. Even if Plaintiff's allegations are true – which Defendants deny – Plaintiff has not stated viable causes of action under the relevant statutes because

[4] Pursuant to NYCHRL §8-502(c), Plaintiff is required to serve a copy of the Complaint upon the city commission on human rights and the corporation counsel. *See Cheung v. Merrill Lynch, Pierce, Fednner & Smith, Inc.* 913 F. Supp. 248, 253 (S.D.N.Y. 1996) (dismissing plaintiff's NYCHRL claim with leave to replead where plaintiff failed to comply with pre-filing requirement of §8-502(c)).

discrimination claims based solely on social or political beliefs are *not* actionable under New York State or City discrimination laws. Plaintiff does not properly allege he is a member of a protected class and cannot overcome this fatal flaw by invoking the statutory term "creed," the legal meaning of which is reserved exclusively for protecting religious beliefs.

NYSHRL, § 296(2)(a) forbids "any place of public accommodation . . . directly or indirectly, to refuse, withhold from or deny to such person any accommodations, advantages, facilities or privileges thereof, directly or indirectly, . . . because of the . . . creed . . . of any person" Section 296(6) prohibits any person from aiding and abetting any unlawful discrimination prohibited under § 296. Similar to § 296(2)(a), NYCHRL §8-107(4)(a) prohibits any public accommodation "because of any person's actual or perceived … creed … to refuse, withhold from or deny to such person full and equal enjoyment, on equal terms and conditions, of any of the accommodations …." To state a claim for discrimination under either NYSHRL or NYCHRL, a plaintiff must allege (1) that he or she is a member of an enumerated protected class; (2) defendant owns or operates a place of public accommodation;[5] and (3) defendants discriminated on the basis of plaintiff's protected class. *See* NYSHRL, Executive Law § 296(2)(a); NYCHRL §8-107(4)(a). Plaintiff cannot establish two of the three elements: that Plaintiff is a member of a protected class; or that Defendants unlawfully discriminated against him based on his "creed."

Courts have consistently held that a person's "creed" means one's religious beliefs, not his or her political or social views. In *Cummings v. Weinfeld*, for example, the petitioners brought an action against their landlord for refusing to renew their lease, claiming that the landlord's refusal was unlawful discrimination based on "creed." *Cummings v. Weinfeld*, 30

[5] Defendants do not dispute that the Happiest Hour is a place of public accommodation.

N.Y.S.2d 36 (Sup. Ct. N.Y. Cty. 1941). The petitioners claimed that their protected "creed" was based on their membership in a social advocacy group that promoted tenants' rights to organize, assemble, etc., and petitioner's "beliefs" with regard to such advocacy and assembly. *Cummings,* 30 N.Y.S.2d at 37. The court interpreted the word "creed" in connection with the New York State Public Housing Law. That law was based on the New York Civil Rights Law and a new section of the New York State Constitution dealing with civil rights, which prohibited discrimination because of "race, color, creed or religion…." *Id.*

The court rejected petitioners' argument that "the word 'creed' may refer to any beliefs, be they economic, political or sociological," and held that "creed means religious belief." *Id.* at 38. In reaching its decision, the court relied on legislative history and intent, the civil rights provision of the New York Constitution, and various definitions of "creed," all of which referred to religion in some manner: "confession or articles of faith …formal declaration of religious belief; any formula or confession or religious faith; a system of religious belief …." *Id.* (internal quotations and citations omitted). The court also observed that "[n]owhere in the debates [of the New York Constitutional Convention concerning the phrase "race, color, creed or religion"] is there even the slightest indication that it was intended that the word 'creed' embraced any beliefs other than religious beliefs." *Id.* (citations omitted). *See also Avins v. Magnum*, 450 F.2d 932, 933 (2d. Cir. 1971) (regarding as "frivolous" plaintiff's claim that the jurisdictional limitation of the New York State Commission Against Discrimination to situations involving discrimination on the basis of "race, *creed*, color, or national origin" was unconstitutional because it failed to also include discrimination based on political beliefs as a protected class) (emphasis added).

Although not controlling authority, it is nonetheless instructive that at least one New Jersey court has also rejected the argument that the term "creed" when used within the context of

discrimination laws includes political or social beliefs as a protected class. In *Shuchter v. Division on Civil Rights*, 117 N.J. Super. 405, 407 (1971), the court was squarely faced with deciding "whether the word 'creed,' as used in the [New Jersey] Law Against Discrimination, includes beliefs other than those relating to a man's religion. . . ." *Id.* at 406-407 (internal citation omitted). The plaintiff was a "pacifist organization which expound[ed] certain political, ethical and philosophical beliefs, including opposition to the Vietnam War," and claimed that its landlord discriminated against it by refusing to lease it a storefront because of the plaintiff's political beliefs. *Id.* at 407. In rejecting petitioner's argument that "political beliefs" qualified as "creed" under New Jersey's civil rights laws, the court relied on legislative history to reach the same conclusion as the New York court in *Cummings*: the word "creed" in civil rights legislation contemplates "the holding of certain beliefs with respect to religious principles." *Id.* at 407. *See also Rasmussen v. Glass*, 498 N.W.2d 508, 511-514, 517 (Minn. Ct. App. 1993) (applying *Cummings* and *Schuchter* to reverse a decision of the Minneapolis Civil Rights Commission interpreting the word "creed" under the Minneapolis Civil Rights Ordinance, as "creed" does not include "more than religion and religious beliefs.").

In this case, Plaintiff claims that he qualifies for protection under the NYSHRL and NYCHRL because of a so-called "creed" that apparently consist of a vague and ambiguous set of "sincerely held beliefs" that led him to wear the MAGA Hat and can only be characterized as political or perhaps "patriotic" or "social," but certainly not "religious." Ex. 1 ¶¶ 9, 10. Neither NYSHRL nor NYCHRL list these species of beliefs as falling with a protected class, and we have not found any federal or state case law in New York extending the definition of "creed" to include such beliefs. Plaintiff's claims should be dismissed because he has not established that he is a member of a protected class. *See Lugo v St. Nicholas Assoc.*, 772 N.Y.S.2d 449 (Sup. Ct.

N. Y. Cty. 2003), *affd*, 18 A.D.3d 341 (1st Dep't 2005) (dismissing discrimination claims where plaintiff was not a member of any protected class under state or local ADA laws).

Thus, in addition to the fact that Plaintiff's allegations are too vague to support a discrimination claim, *see Sanders v. 230 FA, LLC, the Estate of Steven A. Greenberg*, No. 1637/13, 2014 WL 12607330, at *12 (Sup. Ct. Kings Cty. April 14, 2014) (dismissing NYSHRL and NYCHRL claims where plaintiff merely alleged vague allegations that door staff discriminated based on race), Plaintiff's alleged "beliefs," like those of the plaintiffs in *Cummings* and *Shuchter*, are not religious in any manner and, therefore, cannot support a discrimination claim based on "creed." *See also Jalal v. Lucille Roberts Health Clubs, Inc*., No. 15-CV-07802, 2017 WL 2242967, at *5 (S.D.N.Y. May 22, 2017), *appeal docketed*, No. 17-1936 (2d Cir. June 19, 2017) (dismissing Title II "religious" discrimination claim grounded solely on "appearance or attire" because those are not protected classes); *Eisert v. Town of Hempstead*, 918 F. Supp. 601, 615 (E.D.N.Y. 1996) (dismissing New York discrimination claims based on plaintiff's "political association" because the subject statutes protect individuals only against discrimination on the basis of "age, race, *creed*, color, national origin, sex, disability, or marital status") (emphasis added).

While Plaintiff claims he did not wear the MAGA Hat as a "symbol of politics," the only plausible way to construe his allegations is that Defendants purportedly discriminated against him because of his perceived political support for President Donald J. Trump. *See, e.g.*, Ex. 1 ¶ 27 (alleging that Defendants' employee told him that "'anyone who supports Trump or believes in what you believe is not welcome here!'"). Again, Plaintiff's discrimination claims fail because, in addition to their general pleading deficiencies due to vagueness, "creed" does not include for protection the types of beliefs that Plaintiff alleges here.

Further, the putative third cause of action does not and cannot state a claim against defendant Neidich individually for "aiding and abetting" a violation of the NYSHRL pursuant to § 296(6), where, as here, Plaintiff fails to state an underlying claim for discrimination. *See Kelly G. v Bd. of Educ. of City of Yonkers*, 99 A.D.3d 756, 758–59 (2d Dep't 2012).

The second, third, and fourth causes of action based on purported discrimination should be dismissed.

II. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM SHOULD BE DISMISSED

Plaintiff's first cause of action asserts a claim for intentional infliction of emotional distress ("IIED") based on the allegation that Defendants "ostraciz[ed], yell[ed], refus[ed] to serve, and eject[ed]" Plaintiff because of his MAGA Hat and perceived support for President Trump. Ex. 1 ¶ 40. The Complaint, however, does not and cannot properly state a claim for IIED against Defendants.

A. The Complaint Does Not Adequately Allege Extreme and Outrageous Conduct

To state a claim for IIED, the plaintiff must properly allege four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (1993). "This standard is extraordinarily strict, thus liability will flow only from conduct that is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community*." Perry v. Burger King*, 924 F. Supp. 548, 553 (S.D.N.Y. 1996) (internal quotations omitted) (citing to, among others, *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (1983)). "Consequently, the requirements of the rule are rigorous, and difficult to satisfy." *Howell*, 81 N.Y.2d at 122

(citation and quotation omitted). Indeed, "[t]his threshold of outrageousness is so difficult to reach that . . . [t]hose few claims . . . that have been upheld by [the First Department] were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." *Seltzer v. Bayer*, 709 272 A.D.2d 263, 264-265 (1st Dep't 2000) (citations, including to cases where the conduct at issue persisted for years, omitted).

Assuming, without conceding, that all of Plaintiff's allegations regarding Defendants' conduct is true, the alleged actions still neither rise to the requisite level of extreme and outrageous conduct, nor go beyond all possible bounds of decency. Indeed, "federal courts in New York routinely dismiss claims of IIED in the employment context, with the only exception being where employment discrimination claims are accompanied by allegations of both sexual harassment and battery." *Ibraheem v. Wackenhut Servs., Inc.*, 29 F. Supp. 3d 196, 215 (E.D.N.Y. 2014). *See also House v. Wackenhut Servs., Inc.*, No. 10 Civ. 9476 (CM)(FM), 2011 U.S. Dist. LEXIS 144883, at *13-14 (S.D.N.Y. Dec. 16, 2011) (granting motion to dismiss and holding that "[a]cts which merely constitute harassment, disrespectful or disparate treatment, a hostile environment, humiliating criticism, intimidation, insults or other indignities fail to sustain a claim of [IIED] because the conduct alleged is not sufficiently outrageous.") (*quoting Semper v. N.Y. Methodist Hosp.* 786 F.Supp.2d 566, 587 (E.D.N.Y. 2011)).

Courts have also generally required more than "overt acts of discrimination" to establish IIED. In *Perry*, for instance, a restaurant customer sought recovery for IIED by claiming that he was denied access to the restaurant's bathroom because of his race, and that defendants' employees made "racially-based offensive comments" to him. 924 F. Supp. at 553. The court granted defendant's motion to dismiss, emphasizing the rarity of instances where New York cases have found the complaint sufficient to state a claim for IIED in the employment context,

and noting that in those rare instances "the claims have been accompanied by allegations of sex discrimination and more significant battery." *Id.* (quoted source omitted). Similarly, in *O'Connor v 11 W. 30th Street Rest. Corp.*, the plaintiff alleged that the defendant restaurant refused to serve him on two occasions due to plaintiff's race. Nos. 94 Civ. 2951 (LMM), 93 Civ. 8895 (LMM), 1995 WL 354904, at *8 (S.D.N.Y. June 13, 1995). As in *Perry*, the court granted defendant's motion to dismiss the IIED claim because, "the conduct alleged, while, if true, lamentable, does not reach the level of extreme outrage necessary to sustain such a claim." *Id.*

Plaintiff does not allege any "extreme and outrageous" or longstanding and systemic harassment. Rather, he alleges only that, during a brief post-dinner encounter, Defendants ignored him for fifteen to twenty minutes at the bar, refused to serve him, called him a "terrible human being," mocked his hat, "berated" him for his perceived support of President Trump, and ejected him from a bar filled with strangers. Ex. 1 ¶¶ 20, 31. This cannot alone constitute extreme and outrageous conduct, and Plaintiff's conclusory assertions to the contrary are insufficient to cure this defect. Defendants' motion to dismiss his IIED claim should be granted.[6]

III. THE CLAIM FOR NEGLIGENT HIRING, TRAINING, RETENTION, AND SUPERVISION SHOULD BE DISMISSED

Plaintiff's fifth cause of action asserts a claim of negligent hiring, training, retention and supervision against both Defendants. To establish this claim under New York law, Plaintiff "must establish a duty owed by the defendant employer, a breach of that duty by the defendant

[6] If the Court does not dismiss Plaintiff's discrimination claims, the Plaintiff's IIED claim fails for the separate and independent reason that it is duplicative of Plaintiff's alleged discrimination claims and embraced by a traditional tort theory. *See Katouchis v. Rockefeller Group, Inc.*, No. 700782-2014, 2014 WL 6078582, at *2 (Sup. Ct. Queens Cty. Oct. 9, 2014) (dismissing IIED claim where complained-of conduct the same as NYCHRL claim, which allows for emotional damages).

employer, and damages proximately caused by the defendant employer's breach." *Monte v. Ernst & Young LLP*, 330 F Supp. 2d 350, 365–66 (S.D.N.Y 2004), *affd*, 148 Fed Appx. 43 (2d Cir. 2005) (citation and internal quotations omitted). As a necessary element of this claim, a plaintiff must also properly allege that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Hopper v Banana Republic, LLC*, No. 07 Civ. 8526(WHP), 2008 WL 490613, at *2 (S.D.N.Y. Feb. 25, 2008) (internal quotation and citation omitted). The Complaint includes only vague and conclusory allegations that Defendants owed him a duty and had or should have had the requisite knowledge." Ex. 1 ¶¶ 55-56. Plaintiff's negligence cause of action fails and should be dismissed with prejudice for any one of the following reasons:

First, as discussed above, Plaintiff has not properly alleged that Defendants' employees engaged in *any* unlawful conduct by allegedly "refusing to serve him," "escorting" him out of the Happiest Hour, calling him a "terrible human being," *etc*., on the basis that he was wearing the MAGA Hat and was perceived as supporting President Trump. *See* Section I. Further, "[c]laims of negligent hiring/retention involving discriminatory harassment are generally not actionable." *Monte*, 330 F Supp. 2d at 365–66. Accordingly, Plaintiff cannot establish underlying conduct by Defendants' bartenders, employees and/or manager that serves as an appropriate basis for Defendants' negligent hiring and supervision claim.

Second, "in New York, negligent hiring/retention claims are usually sustained only where a plaintiff has suffered significant physical injury." *Id.* (citation omitted). Plaintiff does not properly allege any such injury here. Plaintiff's Complaint does not allege that Plaintiff sustained any physical injury, let alone a significant personal injury. The Complaint merely alleges he suffered from "emotional distress, mental anguish" and other non-defined "damages

for which he is entitled to compensatory, equitable and other lawfully available relief." Ex. 1 ¶ 59. For this reason, too, the negligent hiring claim should be dismissed.

Third, the Complaint fails to properly allege that Defendants' bartenders or managers had a "propensity" for the conduct Plaintiff claims caused his "injury." The only reference in the Complaint is a conclusory statement that "Defendants' knew or should have known of their employees' propensity for the conduct that caused the injury." *Id.* ¶ 56. Plaintiff fails to identify the precise background of any particular supervisor or employee that provides the basis for the so-called "propensity" for such conduct, or how Defendants should have known about these alleged deficiencies. Such vague and conclusory allegations of Plaintiff's "propensity" and Defendants' "knowledge" of such propensities cannot sustain a claim for negligent hiring against Defendants. *See Hopper*, 2008 WL 490613, at *2 (granting motion to dismiss negligent hiring claim where complaint included only speculative and implausible facts concerning alleged propensities and defendants' knowledge).

IV. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF'S RECEIPT CONCLUSIVELY DEMONSTRATES THE FALSITY OF HIS ALLEGATIONS

One crucial allegation serves as the foundation for all of the claims in Plaintiff's Complaint: that Defendants refused to serve Plaintiff any food or beverage at the Happiest Hour. *See, e.g.,* ¶¶ 13-16, 18, 21-23, 27, 31, 40. This allegation is demonstrably false based upon documentary evidence signed by Plaintiff himself. The documentary evidence submitted herewith provides a separate and independent ground for dismissing the Complaint with prejudice pursuant to CPLR § 3211(a)(1).

Plaintiff's receipt from the Happiest Hour dated January 28, 2017 (the "Receipt"), a true and correct copy of which is attached to the Conway Aff. as Exhibit 2, shows that not only did the Happiest Hour serve Plaintiff, but that its staff served him and his friends *16 alcoholic drinks*.

The Receipt shows that Plaintiff signed and paid for the 16 drinks, totaling $182.91, on Plaintiff's Visa credit card. Specifically, the Receipt shows that over approximately a two hour period (9:31 PM-11:26PM), Defendants served Plaintiff the following alcoholic drinks:

- 4 "Bell of the Ball" –signature cocktails
- 4 Miller High Life beers
- 1 Ketel One – vodka cocktail
- 4 Lagunitas IPA beers
- 3 "Maid to Order" – signature cocktails
- 1 Tito's – vodka cocktail

The Receipt flatly contradicts Plaintiff's allegations that he was refused service at the Happiest Hour on January 28, 2017. *See, e.g.*, ¶¶ 13-16, 18, 21-23, 27, 31, 40.

The Receipt also demonstrates that the allegations in the Complaint are fabricated. Plaintiff claims that Defendants discriminated against him, engaged in "extreme and outrageous conduct," that he was "thrown out into the cold and emotional distressed, and it was "the most discriminatory, humiliating and 'Saddest Hour' of his life. ¶¶ 2, 33-34. Yet, the Receipt shows that not only did Plaintiff pay in full for the 16 drinks (which totaled $182.91), but Plaintiff left Defendants a 20% tip of $36.00. It defies reason that Plaintiff would not only have paid for his drinks, but voluntarily tipped the bartenders 20%, if Defendants had treated him as alleged in the Complaint and Plaintiff was injured and aggrieved as alleged.

In sum, Plaintiff's Complaint should be dismissed because the documentary evidence conclusively establishes that Defendants did in fact serve him on the night at issue, thereby eviscerating the entire foundation of Plaintiff's claims.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint as against Defendants in its entirety and with prejudice, and grant the Defendants such other and further relief as the Court deems just and proper.

Dated: July 28, 2017
New York, New York

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