UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL PEDICABS, LLC and BOURAMA CAMERA,

Plaintiffs,

-v-

THE CITY OF NEW YORK, MAYOR BILL DE BLASIO, in his official and individual capacities, DEPARTMENT OF CONSUMER AFFAIRS COMMISSIONER JULIE MENIN, in her official and individual capacities, NEW YORK CITY PARKS DEPARTMENT COMMISSIONER MITCHELL SILVER, in his individual and official capacities, NEW YORK POLICE DEPARTMENT COMMISSIONER WILLIAM BRATTON, in his official and individual capacities, DCA INSPECTOR ALEXANDER GERSHKOVICH, and POLICE or PARKS ENFORCEMENT OFFICERS and/or DCA INSPECTORS JOHN DOES and JANE DOES in their individual capacities,

Defendants.

16-cv-1925 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

On March 15, 2016, plaintiffs Capitol Pedicabs, LLC, and Bourama Camera (collectively, "plaintiffs") commenced this action under 42 U.S.C. § 1983 for violation of their Fourth and Fourteenth Amendment rights by New York City, its agencies, and its officers; they also challenge New York City regulations as arbitrary and capricious. (ECF Nos. 1, 25.) Plaintiffs filed their Second Amended Complaint on February 20, 2017. (ECF No. 25.) Pending before the Court is defendants' motion

to dismiss plaintiffs' Second Amended Complaint. For the reasons set forth below, that motion is GRANTED.

I. BACKGROUND

The factual allegations below are drawn from plaintiffs' Second Amended Complaint ("SAC"), (ECF No. 25), and presumed true for purposes of this motion.[1]

Plaintiff alleges that starting in 2011, defendants have engaged in a "ticketing campaign against drivers and owners of pedicabs." (Id. ¶ 30.) In that regard, officers have allegedly conducted "mass stops of pedicab drivers." (Id. ¶ 38.) Searches incident to such stops included "looking under the [pedicabs'] passenger seats and overturning the pedicab to inspect the parts underneath." (Id. ¶ 65.) The SAC refers to such stops and searches as "inspections." (See, e.g., id. ¶¶ 59, 66.) According to plaintiff, "[d]uring the inspections, the inspectors often require[d] that the driver discharge passengers without being paid." (Id. ¶ 66.) And on at least one occasion, this practice "resulted in a ticket being issued for improperly discharging passengers." (Id.)

Plaintiffs allege that because of this conduct, they removed half their fleet from service; and that to do otherwise risked a fine, license revocation, loss of registration plates, and legal fees associated with fighting these violations. (Id. ¶¶ 58-60.) Plaintiffs assert that on May 25, 2013, they incurred "a substantial bill" fighting a violation that was ultimately "dismissed by an administrative law judge

[1] The Court did not consider any of defendants' submitted exhibits in deciding this motion, nor did it rely on any factual allegations outside those presented in the Second Amended Complaint.

on grounds of constitutional insufficiency." (Id. ¶¶ 43, 61.) "[O]ther pedicab businesses were forced to pay $4,000 and $8,000 penalties." (Id. ¶ 57.)

Plaintiffs explain these inspection-stops as stemming from "instructions" officers were given "from above" to "stop all pedicabs." (Id. ¶¶ 47-48.) Because this instruction was "impossible to follow," defendant Alexander Gershkovich allegedly stopped individual plaintiff Bourama Camera's pedicab "based on his own discretion, without guidance or reasonable suspicion." (Id. ¶ 49.) Camera claims to have been "stopped and ticketed more times than he can accurately recall"—he "quit driving pedicabs" because it "no longer made economic sense for him to continue working when he could be stopped at any time" and "subjected to over an hour of probing inspection." (Id. ¶¶ 11, 64.)

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must provide grounds upon which their claim rests through "factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, the complaint must allege "'enough facts to state a claim to relief that is plausible on its face.'" Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In applying that standard, the Court accepts as true all well-pled factual allegations, but it does not credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." Id. Furthermore, the Court will give "no effect to legal conclusions couched as factual allegations." Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007) (citing Twomblv, 550 U.S. at 555). If the Court can infer no more than the mere possibility of misconduct from the factual averments—in other words, if the well-pled allegations of the complaint have not "nudged [plaintiff's] claims across the line from conceivable to plausible"—dismissal is appropriate. Twombly, 550 U.S. at 570.

III. DISCUSSION

For purposes of this decision, plaintiffs' claims are separated as follows: (1) the Fourth Amendment claim under § 1983; (2) the Fourteenth Amendment claim under § 1983; and (3) the regulatory challenge. The Court addresses each in turn, then turns to the issues of municipal liability and qualified immunity, another ground upon which the defendants move for dismissal.

A. Fourth Amendment Claim

1. Legal Principles

The Equal Protection Clause directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Courts "uphold forms of state action under the Equal Protection Clause

so long as the classification at issue bears some rational relationship to a legitimate state interest. On the other hand, where a suspect class or a fundamental right is at issue in the classification, [courts] apply a more searching form of scrutiny." Hayden v. Paterson, 594 F.3d 150, 169 (2d Cir. 2010).

The Fourth Amendment protects persons against unreasonable searches and seizures; its "central concern . . . is to protect liberty and privacy from arbitrary and oppressive interference by government officials." United States v. Ortiz, 422 U.S. 891, 895 (1975). The "ultimate measure" of the constitutionality of a governmental search or seizure is its "reasonableness." United States v. Bailey, 743 F.3d 322, 331 (2d Cir. 2014) (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995)). Generally, "reasonableness" requires a particularized judicial warrant based on probable cause prior to a search or seizure. Bailey, 743 F.3d at 331. However, in Terry v. Ohio, the Supreme Court held that in certain circumstances, "reasonableness" allows a police officer to temporarily detain a person for questioning without a warrant. 392 U.S. 22, 25 (1968).

A Terry stop of a person or vehicle must be justified by a "reasonable suspicion" to believe that the individual is "engaged in illegal activity." United States v. Arvizu, 534 U.S. 266, 273 (2002). Reasonable suspicion requires more than a mere "hunch;" rather, it demands "specific and articulable facts" and a "particularized and objective basis" to suspect illegal conduct. Terry, 392 U.S. at 21, 27; Arvizu, 534 U.S. at 273. A reviewing court will look at the "totality of the circumstances" when determining whether there was a reasonable suspicion to

support a Terry stop. Bailey, 743 F.3d at 333. The standard for a reasonable suspicion is "not high." See Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (citing Terry, 392 U.S. at 30). It is "less demanding than probable cause," and only requires sufficient facts to reasonably suspect that criminal activity "'may be afoot.'" United States v. Singletary, 798 F.3d 55, 60 (2d Cir. 2015) (quoting Terry, 392 U.S. at 30) (emphasis in original)).

The Supreme Court has upheld vehicle checkpoints and random stops as constitutionally valid in a variety of circumstances. For a random stop of a vehicle, the Court generally requires "at least articulable and reasonable suspicion that a . . . vehicle or an occupant is . . . subject to seizure for violation of law" and prohibits policies that allow for the "unbridled discretion of police officers." Delaware v. Prouse, 440 U.S. 648, 663 (1979). "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative" to discretionary stops, id. (emphasis added), as are "roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others," id. at 663 n.26.

2. Discussion

Plaintiffs claim that defendants stopped pedicabs without "reasonable suspicion or probable cause." (SAC ¶ 39.) But the SAC does not support a reasonable inference that plaintiffs' Fourth Amendment rights were violated. Only one specific stop is described, and plaintiffs allege no facts to plausibly suggest a lack of reasonable suspicion. The allegation that officers were instructed to "stop all

pedicabs" drives much of plaintiffs' claim—they argue that the instruction was "impossible to follow" and thus resulted in discretionary stops "without guidance or reasonable suspicion." (SAC ¶¶ 47, 49.)

It is certainly the case that policies and practices such as checkpoints may run afoul of the Fourth Amendment if officers have too much discretion in deciding whom to stop. See, e.g., Prouse, 440 U.S. at 649 (1979) (prohibiting vehicle seizures without reasonable suspicion at the "unbridled discretion of law enforcement officials"); United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) ("To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers."); United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980) ("[T]here must be a line separating investigatory stops supported by 'specific, objective facts' from those stops occurring essentially at the 'unfettered discretion of officers in the field.'" (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)). But a policy that requires officers to "stop all pedicabs" does not leave officers with unchecked discretion—in fact, it does just the opposite. Officers may not have been able physically to inspect every single pedicab that drove by, but that does not indicate that the stops which did occur were unconstitutional. Rather, "stop all pedicabs" is a constitutional policy that simply reached its limits in practice. Nothing in the SAC suggests that officers chose to stop any particular pedicab for reasons other than timing or randomness.

(I.e., if an officer was already engaged in inspecting a pedicab, she may have been unable to stop a second pedicab riding by.)

And even if this checkpoint-like practice were unconstitutional, plaintiffs do not sufficiently allege facts supporting that the stops which occurred lacked reasonable suspicion. They offer no facts to support this element of a Fourth Amendment claim, other than stating that one of the (presumably many) charges was dismissed by an administrative law judge. This fails the pleading standard set forth in Twombly. 550 U.S. 544.

Plaintiffs also claim that defendants' alleged policy of suspending pedicab licenses based on "three or more violations" leaves too much room for discretion by officers. (SAC ¶ 41.) These allegations are simply too general to state a claim for relief—plaintiffs cite no instances of this policy being implemented against even a single pedicab driver. And they claim that defendant Department of Consumer Affairs ("DCA") issued a "record 24,176 tickets" in 2012—but they provide no additional data outside a claim that "many of these" were issued to pedicab owners. (SAC ¶ 11.) These generalized assertions, standing alone, do not tend to show that defendants violated plaintiffs' Fourth Amendment rights.[2] As such, this claim must be DISMISSED.

[2] Additionally, the Court notes that, since § 1983 claims face a three-year statute of limitations in New York, any Fourth or Fourteenth Amendment claims based on alleged constitutional violations which occurred prior to March 15, 2013—three years prior to the filing of this lawsuit—would be time-barred. Pauk v. Bd. of Trustees of City Univ. of New York, 654 F.2d 856 (2d Cir. 1981).

B. Fourteenth Amendment Claim

1. Legal Principles

The Equal Protection Clause directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, (1985). Courts "uphold forms of state action under the Equal Protection Clause so long as the classification at issue bears some rational relationship to a legitimate state interest. On the other hand, where a suspect class or a fundamental right is at issue in the classification, [courts] apply a more searching form of scrutiny." Hayden v. Paterson, 594 F.3d 150, 169 (2d Cir. 2010). "When a party challenges a government classification that does not involve a suspect class or burden fundamental rights, courts apply rational basis scrutiny. The classification will be constitutional so long as 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Spavone v. New York State Dep't of Corr. Servs., 719 F.3d 127, 136 (2d Cir. 2013) (quoting Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 219 (2d Cir. 2012)). In other words, a state policy is presumed to be constitutional, and plaintiffs must prove—or, in the case of a motion to dismiss, sufficiently allege—otherwise. Plaintiffs state an equal protection claim where they sufficiently allege "that they were intentionally treated differently from other similarly-situated individuals without any rational basis." Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)).

2. Discussion

Here, plaintiffs have not sufficiently alleged that their Fourteenth Amendment rights were violated. The focus of this claim is that pedicabs were treated differently from "similarly situated for hire vehicle industries such as livery for hire vehicles and taxicabs." (SAC ¶ 42.) However, they claim only that the regulations imposed upon them were "harsher, excessive, unfair, and [with] unequal impact" vis-à-vis similarly situated industries. Plaintiffs neither make any reference to specific regulations imposed on other industries—or on their own—nor do they discuss the rate at which other drivers are stopped or investigated. The "stop all pedicabs" policy, on its own, does not imply that other industries dealt with substantially different standards. Additionally, plaintiffs do not sufficiently allege that livery for hire vehicles and taxicabs are, in fact, similarly situated. Both, for example, utilize motorized and covered (as opposed to open-air) vehicles—two of many distinguishing characteristics that could reasonably give rise to separate policies and regulations.

And even if plaintiffs had set out a stronger claim that there are in fact similarly situated industries who were treated differently, they do not plausibly claim that the city lacked a rational basis for the varied policies. When plaintiffs are not members in a suspect class—and plaintiffs here are not, nor do they claim to be—the burden of refuting rational basis rests with the plaintiffs. Here, they allege no facts to suggest they could bear that burden. Thus, their Fourteenth Amendment claim is DISMISSED.

C. Regulatory Challenge

Finally, plaintiffs challenge New York City's pedicab regulations as arbitrary and capricious. But plaintiffs fail to specify which regulation they are challenging, or, for that matter, which New York State law is being violated. Plaintiffs base their argument on a claim that suspending pedicab licenses for "'three or more violations' leaves too much discretion in the hands of the officials on a case-by-case basis . . . ." (Id. ¶ 41.) This is not specific enough to survive Iqbal's standard of plausibility, since plaintiffs do not provide any facts upon which this Court can make a plausible inference that any regulation was arbitrary and capricious.[3]

D. Municipal Liability

1. Legal Principles

Even if plaintiffs' allegations under the Fourth and Fourteenth Amendment sufficiently stated a claim for relief under § 1983, to allege municipal liability a plaintiff must assert that "policies or customs that [were] sanctioned by the municipality led to the alleged constitutional violation." Missel v. Cnty. of Monroe, 351 Fed. App'x 543, 545 (2d Cir. 2009) (quoting Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006)); see also Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). A Monell claim can survive a motion to dismiss where the plaintiff "make[s] factual allegations that support a plausible inference that the constitutional violation took place pursuant to either a formal course of

[3] Even if plaintiffs had stated a claim, however, the claim would likely be time-barred. The only city regulations alluded to in the Second Amended Complaint were passed in 2007, according to plaintiff. These regulations face a four-month statute of limitations. N.Y. C.L.P.R. § 217.

action officially promulgated by the municipality's governing authority or the act of a person with policy making authority for the municipality." Missel, 351 Fed. App'x. at 545. "The mere assertion, however, that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993) (overruled on other grounds); see also Weir v. City of New York, 05-cv-9268, 2009 WL 1403702, at *1 (S.D.N.Y. May 19, 2009).

Additionally, "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." City of Canton v. Harris, 489 U.S. 378, 387 (1989). However, that failure must amount to a "deliberate indifference to the rights of persons with whom the police come into contact"; "only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983. Harris, 489 U.S. at 388-89; see also Connick v. Thompson, 563 U.S. 51, 72 (2011) (rejecting a failure-to-train claim where plaintiff "did not prove a pattern of similar violations that would establish that the policy of inaction [was] the functional equivalent of a decision by the city itself to violate the Constitution" (internal quotations omitted)).

2. Discussion

Plaintiffs' SAC repeatedly blames "defendants' policies, practices, and/or customs" for their unconstitutional actions. (See, e.g., SAC ¶¶ 33, 35, 72, 87.) They also argue that defendant City of New York and its agencies failed to properly train

its officers to ensure that stops were performed constitutionally. However, the "deliberate indifference" standard is a high one, and plaintiffs do not allege facts that suggest they might be able to meet it.

The only specific policy alleged is that officers "stop all pedicabs"—this does not demonstrate a deliberate indifference for plaintiffs' rights, as it does not suggest a violation of the Fourth or Fourteenth Amendments. There is also no alleged fact to imply that the City or its agencies did not properly train its officers; plaintiffs offer only "mere conclusory statements," Iqbal, 556 U.S. at 678, that defendants' policies and failure to train caused the allegedly unconstitutional conduct, see, e.g., SAC ¶ 89, 91). The most specific statement is that defendant Gershkovich's stop of [p]laintiff Camera "result[ed] in a situation that required the inspector to make [a] difficult choice of the sort that training or supervision will make less difficult." (Id. ¶ 49.) But plaintiffs fail to allege any facts to support this legal conclusion—without more, a claim of municipal liability cannot survive the motion to dismiss.[4]

[4] The Court notes also that the claims against defendants De Blasio, Menin, Silver, and Bratton, in their official capacities, are treated as claims against the city and its agencies. Coon v. Town of Springfield, 404 F.3d 683, 687 (2d Cir. 2005) (noting that "a § 1983 suit against a municipal officer in his official capacity is treated as an action against the municipality itself" (citing Brandon v. Holt, 469 U.S. 464, 471-73 (1985))). Thus, the SAC also fails to state a claim against these defendants.

Additionally, the SAC also fails to state a cognizable claim against defendants the New York DCA, Parks Department, and Police Department, because the New York City Charter prohibits suits against these entities; rather, claims must be brought against the City of New York. New York City, N.Y., Charter § 396.

E. Qualified Immunity

1. Legal Principles

Municipalities do not receive qualified immunity, but the "principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." Pearson v. Callahan, 555 U.S. 223, 244 (2009). A "two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials," though courts may decide to take those steps in either order. Camreta v. Greene, 563 U.S. 692, 707 (2011); see also Saucier v. Katz, 533 U.S. 194 (2001) (explaining the two-step inquiry). And "in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, inter alia, the defendant's personal involvement in the alleged constitutional deprivation." Grullon v. City of New Haven, 720 F.3d 133, 138 (2d Cir. 2013). "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." Farrell v. Burke, 449 F.3d 470, 484 (2d Cir. 2006) (quoting Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (citation and internal quotation marks omitted)).

2. Discussion

As to defendants de Blasio, Menin, Silver, and Bratton, all of whom are or were high-ranking officials, the SAC fails to state a claim that any were involved in the implementation of an allegedly unconstitutional policy or conduct pursuant to

that policy. Without facts to support defendants' personal involvement, plaintiffs cannot sustain a § 1983 claim against these defendants in their individual capacities.

As to defendant Gershkovich, who was not a high-ranking official but is alleged to be an officer who stopped plaintiff Camera on at least one occasion, (SAC ¶¶ 48-51), the SAC fails to allege that he is not qualifiedly immune from suit. On the facts presented, Gershkovich did not violate plaintiffs' constitutional rights (see infra); but even if he had, plaintiffs do not allege any facts to indicate that Gershkovich should have known he was acting unconstitutionally or unreasonably.

IV. CONCLUSION

For the reasons stated above, the Court hereby GRANTS defendants' motion to dismiss at ECF No. 26 in its entirety. Plaintiffs' Second Amended Complaint (ECF No. 25) is DISMISSED. The Clerk of Court is directed to terminate this action, 16-cv-1925.

SO ORDERED.

Dated: New York, New York
October 2, 2017

KATHERINE B. FORREST
United States District Judge