



Petition, which was dismissed with prejudice after a fact finding hearing. Petitioner asserts that relevant certified, medical records, which were not introduced at the fact finding hearing can now be produced and thus, warrant re-opening of the fact finding hearing.

This action stems from several Family Offense Petitions filed by petitioner over the last ten months. Petitioner's initial Family Offense petition, filed in Queens County Family Court on July 14, 2003, alleged that on July 12, 2003 respondent slapped petitioner in front of their children, kicked and threatened to kill petitioner and then barred petitioner and the children from the home. Said petition was dismissed with prejudice on August 12, 2003, after a fact finding hearing presided over by Judge Guy P. Dephillips where both parties were represented by counsel.

The court found that petitioner failed to prove by a preponderance of the evidence, that respondent had committed the alleged family offenses. The court further found petitioner to be incredible and the Petition to be without merit. Thus, pursuant to the dismissal of the Petition, the Temporary Order of Protection in favor of petitioner, which had been in effect pending the outcome of the hearing, was vacated.

Respondent was arrested on July 16, 2003 as a result of the July 12<sup>th</sup> incidents and was charged with Assault in the Third Degree (PL §120.00) and Criminal Contempt in the Second Degree (PL §215.50-3).

In addition to the allegations made in the July 14<sup>th</sup> Family Offense Petition, the criminal complaint further alleged that the defendant struck the complaining witness with a hot iron on her thigh, necessitating medical treatment at a local hospital.

A Criminal Court Temporary Order of Protection in favor of the complaining witness, petitioner herein, was issued and in effect until the criminal charges were dismissed and sealed pursuant to CPL §30.30 on December 15, 2003.

During the time that the aforementioned criminal charges against the defendant, Respondent herein, were pending and the Temporary Order of Protection was in effect, the Petitioner filed a new Family Offense Petition on September 8, 2003, wherein Petitioner alleged that Respondent threatened her with "voodoo magic" and "wants to kill [her]".

Judge DePhillips granted Petitioner an ex-parte Temporary Order of Protection on October 9, 2003 and extended the order on November 6, 2003.

Petitioner sought the Family Court's assistance once again, on December 17, 2003 when she filed a supplemental petition alleging that Respondent violated the Temporary Order of Protection on December 17, 2003, by entering her home and punching her with his "closed fist", causing her to lose consciousness for "15- 25 minutes".

The Temporary Order of Protection was vacated on March 22, 2004 by Judge DePhillips, upon Respondent's application to the court. At that appearance, Respondent also made an application to dismiss both the amended petition and the violation petition on res judicata, collateral estoppel and stare decisis grounds and for failure to state a cause of action. Judge DePhillips directed the parties to submit memoranda of law on the issue. At that time, the case, having been identified as IDV appropriate, was transferred to the instant Court.

The IDV Court, established in Queens County, hears domestic violence cases where a party has an open criminal complaint as well as a pending case in Family Court or a matrimonial case in Supreme Court. Each case retains its own identity, although all of the cases are heard by the same Supreme Court Justice.

The Family Court Act and the Criminal Procedure Law grant concurrent jurisdiction over "Family Offenses" to the Family and Criminal Courts. FCA §115(e), FCA §812, CPL §100.07. A petitioner may choose to proceed in Family Court seeking a civil remedy with " ... the purpose of attempting to stop the violence, end the family disruption and obtain protection" based on the same allegations under which the Respondent is being prosecuted in Criminal Court. FCA §812(2)(b). Alternatively, concurrent proceedings in Criminal Court are " ... for the purpose of prosecution of the offender and can result in a criminal conviction of the offender". Id. The

legislative intent is clear, that two actions based on the same allegations may proceed simultaneously in the Family Court and in the Criminal Court for separate and distinct purposes and seeking distinct remedies. See People v. Wood, 95 N.Y.2d 509,513 (2000).

Furthermore, the evidentiary standard to be applied in each case is different. In a criminal case, the charges against a defendant must be proven by the People beyond a reasonable doubt, while in a Family Offense Petition, the burden is on the petitioner to prove the allegations by a preponderance of the evidence. The District Attorney is not bound by the Family Court's findings of fact nor its evidentiary rulings and may commence a prosecution based on the same facts.

Respondent's argument, that the Family Offense Petition and subsequent violation petitions filed in Family Court cannot survive where the criminal case has been dismissed, is without merit. Thus, the motion to dismiss on those grounds is hereby denied.

Respondent argues that since the July 14<sup>th</sup> Family Offense petition was fully litigated and dismissed on the merits, with prejudice, the legal doctrines of res judicata, collateral estoppel and stare decisis bar the Petitioner from bringing any new Family Offense petitions relating to the July 12, 2003 incident against the Respondent.

Petitioner counters that the aforementioned legal doctrines do not bar the instant actions, and that even if they apply to the

portion of the Family Court amended petition that refers to the already litigated July 12th, 2003 events, the remaining allegations should survive since they are based on new incidents.

Petitioner cross-moves to renew and reargue<sup>1</sup> the July 14th 2003 petition and maintains that petitioner, who speaks only French-Creole, was prejudiced by the fact that an interpreter was not provided to her when she filed the petition. Petitioner argues further that, through no fault of her own, she did not obtain a copy of her medical records for treatment she received as a result of the alleged July 12<sup>th</sup> 2003 incidents and, that such medical certified records are now available and petitioner should be given an opportunity to produce such records at a new hearing.

The Court hereby denies petitioner's motion for renewal and finds that res judicata and collateral estoppel apply to the July 14<sup>th</sup> Family Offense petition.

The doctrine of stare decisis, or legal precedent, holds that a court is bound to follow the legal holdings articulated by courts deciding similar issues in prior actions. See Eastern Consolidated Properties, Inc. v. Adelaide Realty Corp., 95 N.Y.2d 785, 788 (2000). The doctrine of legal precedent is not at issue in the instant case. Rather, the instant case deals with issues of fact and procedure.

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<sup>1</sup>Petitioner's motion to renew the July 14<sup>th</sup> petition after its dismissal with prejudice, on the merits is procedurally incorrect at this late juncture. Rather, petitioner should have filed a timely appeal with the Appellate Division.

The doctrine of Res Judicata would apply to the portion of the instant Family Offense petition which relates to the incidents that occurred on July 12, 2003. The New York Court of Appeals has stated that "[u]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action ... [and] ... [a]s a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347 (1999) Citing Matter of Reilly v. Reid, 45 N.Y.2d 24, 27, O'Brien v. City of Syracuse, 54 NY2d 353, 357. However, where the statute specifically grants concurrent jurisdiction such claims may be litigated simultaneously in different courts, under certain circumstances, as in the instant case.

It must be noted that the Double Jeopardy Clause of the 5<sup>th</sup> Amendment prevents this Court from trying both the Family Court violation petition and the Criminal Court Contempt charge based on the same instance of an alleged violation of the order of protection. Double Jeopardy is triggered " ... where the same act or transaction constitutes a violation of two distinct statutory provisions ..." thus making it possible for the court to impose on the defendant " ... multiple criminal punishments for the same offense". People v. Wood, Supra. In such a situation, "... the test to be applied to

determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Id. citing Blockburger v. United States, 284 US 299(1932). The Court of Appeals has held that a violation petition under FCA Article 8 and a charge of Criminal Contempt in the Second Degree (PL §215.50-3) contain the same elements and thus, the adjudication of one case necessarily prevents the other case from proceeding when based on the same act. Id.

New York codified the US Supreme Court's "same elements test" under CPL §40.20, further articulating distinct exceptions to double jeopardy protections, CPL §40.20(2)(a-h), none of which are applicable to the instant case.

In the instant case, Judge Dephillips dismissed the July 14<sup>th</sup> 2003 petition with prejudice, after a fact finding hearing, thus, barring the Petitioner from bringing a new action in the Family Court based upon the same incidents that were previously litigated. Specifically, that on July 12, 2003, Respondent punched and kicked the petitioner. Judge Dephillip's finding in that case does not bar petitioner from bringing actions based on claims that arose out of new facts that occurred on subsequent dates between Petitioner and Respondent.

Respondent cites Girylyuk v. Girylyuk, 149 A.D.2d 665, 666 (2<sup>nd</sup> Dept. 1989) for the proposition that res judicata prevents a litigant from petitioning on matters that "... were or should have been

litigated" between the parties on a previous action. Girylyuk is distinguishable from the instant case in that, in Girylyuk, respondent moved to dismiss the petition, where the court had denied the motion to dismiss before, on the same allegations that he had posited in his first, unsuccessful motion for dismissal.

Respondent argues that petitioner's Family Offense Petition and the criminal complaint contained the same factual allegations and therefore, litigation of those particular facts must be confined, as per the doctrine of res judicata, to one action, either in Criminal Court or Family Court. This argument fails since the New York State Legislature specifically grants concurrent jurisdiction to both Family and Criminal Courts to adjudicate family offenses.

The doctrine of collateral estoppel prevents re-hearing of the July 14<sup>th</sup> petition. Collateral estoppel or issue preclusion

... precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same'... The doctrine applies if the issue in the second action is identical to an issue that was raised, necessarily decided and material in the first action, and the Plaintiff had a full and fair opportunity to litigate the issues in an earlier action" Parker v. Blauvet Volunteer Fire Co., 93 N.Y.2d 343, 349 (1999) Quoting Ryan v. New York Tel. Co., 62 NY2d 494, 500.

While petitioner raises matters that were not part of the litigation, petitioner fails to demonstrate a relevant legal or factual issue, not previously litigated, that might warrant re-opening the hearing. Rather, petitioner posits collateral matters, not directly relevant

to the four corners of the petition, such as her language barrier and the failure to produce her certified medical records, as grounds to re-open the hearing.

Finally, petitioner argues that the interest of justice compels the re-opening of the fact finding hearing on the July 14, 2003 petition. Respondent, on the other hand, submits that the interest of justice compels dismissal of the instant petitions.

This Court holds that the petitioner will not suffer deprivation of "substantial justice" in granting respondent's motion to dismiss that portion of the petition relating to the July 12<sup>th</sup> incident, and while introduction of the previously unavailable medical reports might have led to a different result upon re-litigation, such considerations do not constitute newly discovered evidence. See, Hantz v. Fishman, 155 A.D.2d 415 (2<sup>nd</sup> Dept. 1989). Rather, petitioner's former attorney failed to produce the medical records, the reason for which lies within that attorney's judgment or lack thereof.

Perhaps most importantly, Judge Dephillips specifically barred re-litigation of the July 14<sup>th</sup> petition when he dismissed the petition with prejudice. The Integrated Domestic Violence Court of the Supreme Court of the State of New York, does not act as an appellate court to review the Family Court fact finding hearing. Petitioner's remedy was to file a timely appeal with the Appellate Division.

Respondent argues that the instant cases should be dismissed in the 'interest of justice'. Respondent maintains that since Petitioner has failed to prove the allegations in the July 14<sup>th</sup> Family Offense petition, Petitioner should be prevented from seeking relief where there was an alleged violation of a valid order that was issued pursuant to a later dismissed petition.

Pursuant to Family Court Act § 848,

[a]n assault, attempted assault or other family offense ... which occurs subsequent to the issuance of an order of protection under this article shall be deemed a new offense for which the petitioner may file a petition alleging a violation of an order of protection or file a new petition alleging a new family offense ...

A petitioner may seek relief from the Family Court where an order of the court has been violated, as long as that order is valid, regardless of the eventual outcome of the proceeding on the original petition.

Respondent's motion to dismiss section 3(b) of the amended petition for failure to state a cause of action, is likewise denied. Respondent argues that the petition is defective in that it accuses the respondent of only making threatening statements verbally to Petitioner and fails to allege any physical action or violence. Respondent, relying on People v. Dietze, 75 N.Y.2d 47(1989), maintains that allegations of threatening words, unaccompanied by physical action should be dismissed at the pleading stage. Respondent's reading of Dietze is faulty. The "clear and present danger" requirement that transforms mere speech into unprotected,

criminal speech is an issue to be determined by the trier of fact.

See, Id.

Moreover, whether there was a valid Order of Protection in effect at the time of the alleged violation and its terms are issues to be determined by the trier of fact and not resolved at the pleading stage. Family Court Act §846 requires that a violation petition must contain "... an allegation that the respondent has failed to obey a lawful order of this court or an order of protection issued by a court of competent jurisdiction ...". Section 3(b) of the amended petition includes such an allegation. Thus, this Court holds that petitioner adequately pleads a violation of an existing Order of Protection and hereby denies respondent's motion to dismiss, without a hearing, in its entirety.

This constitutes the Decision and Order of this Court.



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Hon. Esther M. Morgenstern