

Shell v Rajacic

2020 NY Slip Op 33325(U)

October 9, 2020

Supreme Court, New York County

Docket Number: 161454/2019

Judge: Kathryn E. Freed

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 161454/2019

LINDA SHELL,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION AND ORDER

MICHELLE RAJACIC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for SUMMARY JUDGMENT.

In this action seeking to recover damages for, *inter alia*, assault and battery, plaintiff Linda Shell moves, pursuant to CPLR 3212, for summary judgment on liability as against defendant Michelle Rajacic (Docs. 6-15). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 6, 2018, at approximately 12:35 a.m., plaintiff was allegedly working as a receptionist at the City Club Hotel located at 55 West 44th Street in Manhattan ("the hotel") when defendant entered the hotel and demanded that plaintiff grant her access to one of the rooms (Doc. 1 ¶ 5). Plaintiff informed defendant that she would need to provide identification before a room key could be provided, but defendant refused this request (*id.* ¶ 6-7). Defendant then proceeded

to insult, spit on and attack plaintiff (*id.* ¶ 9). Defendant was arrested and pleaded guilty to assault in the third degree (*see* NY Penal Law § 120.00) (*id.* ¶ 10).¹

In November 2019, plaintiff commenced the captioned action by filing a summons and verified complaint as against defendant, alleging intentional infliction of emotional distress ("IIED") ("first cause of action") and assault and battery ("second cause of action") (*id.* ¶ 3-23). On February 5, 2020, defendant interposed an answer, raising several affirmative defenses (Doc. 4). Plaintiff filed an amended summons and verified complaint on February 10, 2020, which appears to be identical in substance to the first verified complaint (Doc. 5).

In support of her motion, plaintiff submits, *inter alia*, an affidavit; an email from an assistant district attorney notifying plaintiff that defendant had pleaded guilty to assault in the third degree in Criminal Court, New York County and was sentenced to, *inter alia*, a 12-week court-monitored anger management program; and a transcript of defendant's allocution (Docs. 8-9, 15). Additionally, plaintiff submits what she purports to be a true and accurate copy of a video that she recorded from her cell phone showing a part of the altercation, as well as surveillance videos from inside the hotel that accurately depict the incident without sound (Doc. 8 ¶ 7, 14).^{2 3}

¹ A defendant is guilty of assault in the third degree, pursuant to NY Penal Law § 120.00, when, "[w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person or to a third person."

² The Court was only able to view the cell phone recording because, according to an error message displayed when attempting to play the surveillance videos, said files are "unsupported, the file extension[s] [are] incorrect, or the file[s] [are] corrupt."

³ Since the video footage was on a compact disc, which cannot be filed with the Court, plaintiff should have e-filed a "Notice of Hard Copy Exhibit Filing" (NYSCEF Form EF-21) in addition to providing defendant with the disc. Although plaintiff's counsel did not file the form, this Court disregards his omission given that defendant received a copy of the disc from plaintiff (Doc. 13) and was therefore not prejudiced (*see* CPLR 2001). Plaintiff's counsel is directed to e-file form EF-21 upon receipt of this order, and such filing shall be effective *nunc pro tunc*.

In her affidavit, plaintiff affirms that defendant "went on a prolonged and violent verbal rant against [her]," calling her "a piece of shit"; a "fucking asshole"; a "dirty fucking nigger"; a "dirty fucking raunchy skank"; a "dirty fucking hood rat" and a "fucking ghetto ass" (Doc. 8 ¶ 6). Plaintiff started to record defendant on her cell phone as defendant continued to call her names (Doc. 8 ¶ 7-8). Plaintiff affirms that defendant then proceeded to the elevator and plaintiff followed behind her, telling defendant that she was not allowed to enter the guest areas without first providing photo identification (Doc. 8 ¶ 9). Plaintiff further avers that defendant then spat directly into her face and struck her in the head with a cell phone (Doc. 8 ¶ 10-12).

The video that plaintiff recorded from her cell phone shows a Caucasian woman, whom plaintiff purports to be defendant, yelling and using racist slurs. From this video clip, it appears that the parties were arguing about whether defendant's credit card sufficed as identification to grant her access to the requested room. In response to defendant's insults, plaintiff repeatedly requested that defendant produce a valid identification and stated, in relevant part, "you can call me whatever you want, I don't care, it's not going to hurt my feelings." The cell phone video does not show the alleged assault.

Plaintiff maintains that, as a result of the assault, she sustained disc herniations and bulges in her neck and spine, ringing in her ears, and sensory deficits in her hands and arms (Doc. 8 ¶ 16). Moreover, plaintiff affirms that defendant's conduct has affected her psychologically, that she is "extremely anxious and uncomfortable around Caucasians and fearful of their intentions" and that, as a result of this incident, she sought treatment with a psychologist for adjustment disorder with mixed anxiety and depression, insomnia, and related psychological injuries (Doc. 8 ¶ 17).

LEGAL CONCLUSIONS:**Assault and Battery**

"To sustain a cause of action for assault, a plaintiff must show that the defendant engaged in physical conduct that placed him or her in imminent apprehension of harmful contact" (*Fugazy v Corbetta*, 34 AD3d 728, 729 [2d Dept 2006] [internal quotation marks and citations omitted]; see *Nicholson v Luce*, 55 AD3d 416, 416 [1st Dept 2008]; *Donnelly v Christian*, 2019 NY Slip Op 31407[U], 2019 NY Misc LEXIS 2550, *2-3 [Sup Ct, NY County 2019]; *Brady v Koby*, 2009 NY Slip Op 30088[U], 2009 NY Misc LEXIS 3967, *6 [Sup Ct, NY County 2009]). Moreover, "[t]he elements of a cause of action to recover damages for battery are bodily contact, made with intent, and offensive in nature" (*Fugazy v Corbetta*, 34 AD3d at 729 [2d Dept 2006] [internal quotation marks, brackets and citations omitted]; see *Tillman v Nordon*, 4 AD3d 467, 468 [2d Dept 2004]).

"A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue" (*Grayes v DiStasio*, 166 AD2d 261, 262-263 [1st Dept 1990] [internal citations omitted]; see *Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp.*, 143 AD3d 597, 599 [1st Dept 2016]). "The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate" (*Jeffrey v Griffin*, 1 NY3d 34, 39 [2003]).

Here, plaintiff's proof in support of her motion is sufficient to establish her *prima facie* entitlement to summary judgment with respect to her claims for assault and battery (second cause of action). On October 4, 2018, defendant pleaded guilty to assault in the third degree, admitting that on the date and time in question she had the intent to cause physical injury to plaintiff and that she struck her in the left eye with a cellphone, causing her bruising and substantial pain (Doc. 15).

Thus, defendant's guilty plea in the related criminal action, which stems from the same incident that is the subject of this action, precludes defendant from litigating the issue of liability relating to both assault and battery (*see Olsson v MacDonald*, 16 AD3d 1017, 1018 [3d Dept 2005]; *Jeffreys v Griffin*, 301 AD2d 232, 234 [1st Dept 2002]; *DeSantis v Manhasset Union Free Sch. Dist.*, 274 AD2d 373, 373 [2d Dept 2000]; *Lichti v Marovic*, 2015 NY Misc LEXIS 2947, *4-5 [Sup Ct, Kings County 2015]). Plaintiff's *prima facie* entitlement to summary judgment on these causes of action is further supported by her affidavit.

By failing to oppose the motion, defendant has failed to show that she lacked a full and fair opportunity to litigate the issue of liability in the criminal case with respect to these claims (*Myers v City of New York*, 179 AD3d 530, 530 [1st Dept 2020]), and she has otherwise failed to raise an issue of fact to preclude summary judgment.

Intentional Infliction of Emotional Distress

The elements of a cause of action in IIED include "(1) extreme and outrageous conduct; (2) an intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; (4) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). It is well-settled that the element of extreme and outrageous conduct is difficult to satisfy (*see id.* at 122; *Seltzer v Bayer*, 272 AD2d 263, 264 [1st Dept 2000]; *Lofaso v City of New York*, 2008 NY Slip Op 30277 [U], 2008 NY Misc LEXIS 8419, *28 [Sup Ct, NY County 2008]) and, to meet this standard, plaintiff must show that the conduct is "so outrageous in character and extreme in degree to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community" (*Richards v Security Resources*, ___ AD3d ___, ___, 2020 NY Slip Op 05472, 2020 LEXIS 5588, *2 [1st Dept 2020]);

see *Cohn-Frankel v United Synagogue of Conservative Judaism*, 246 AD2d 332, 332 [1st Dept 1998]). Further, "[i]t has been noted that where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for [IIED]" (*Vasarhelyi v New School for Social Research*, 230 AD2d 658, 661 [1st Dept 1996] [internal quotation marks and citation omitted]).

Moreover, "[w]hile the use of racial or ethnic epithets has been found to be deplorable and to evidence a certain 'narrowmindedness and meanspiritedness'" (*Herlihy v Metro. Museum of Art*, 214 AD2d 250, 262-263 [1st Dept 1995]), quoting *Leibowitz v Bank Leumi Trust Co.*, 152 AD2d 169 [2d Dept 1989]), "the courts have been reluctant to allow recovery for their use under the banner of [IIED] absent a 'deliberate and malicious campaign of harassment or intimidation'" (*Herlihy v Metro. Museum of Art*, 214 AD2d at 263, quoting *Nader v Gen. Motors Corp.*, 25 NY2d 560, 569 [1970]). This reasoning is consistent with this Court's longstanding principle that "[m]ere threats, annoyances or other petty oppressions, no matter how upsetting, are insufficient to constitute the tort of [IIED]" (*Owen v Leventritt*, 174 AD2d 471, 472 [1st Dept 1991]; *Bowling v 220 W. 42nd St., LLC*, 2011 NY Slip Op 31938[U], 2011 NY Misc LEXIS 3494, *15-16 [Sup Ct, NY County 2011] [dismissing an IIED claim arising from a five-minute altercation where plaintiffs were disparaged due to their sexual orientation]).

That branch of plaintiff's motion seeking summary judgment on her [IIED] claim is denied because she has failed to establish, *prima facie*, that the conduct complained of, while certainly reprehensible, was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. Although defendant's racist statements were deplorable, this Court finds that, even accepting the additional allegations of defendant's abhorrent conduct (i.e., that defendant hit and

spat on plaintiff), plaintiff has failed to establish, as a matter of law, that this *single* incident constitutes a "deliberate and malicious campaign of harassment or intimidation" (*see generally Lopez v City of New York*, 901 F. Supp 684, 691 [SDNY 1995]; *Owen v Leventritt*, 174 AD2d 471, 472 [1st Dept 1991]; *Roberts v Pollack*, 92 AD2d 440, 448 [1st Dept 1983]; *Zheng v Rivera*, 2014 NY Slip Op 33217[U], 2014 NY Misc LEXIS 5399, *7-8 [Sup Ct, NY County 2014]).

Even assuming, *arguendo*, that defendant's actions rose to this level, viewing the proof in the light most favorable to the non-moving party, this Court finds that plaintiff's statement to defendant during the altercation, i.e., that she was unbothered by the insults belies her claim that defendant's conduct caused her severe emotional distress.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion is granted to the extent that she seeks summary judgment on her assault and battery cause of action (second cause of action), and the motion is otherwise denied; and it is further

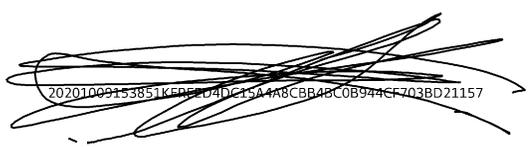
ORDERED that, within 20 days after this decision and order is uploaded to NYSCEF, plaintiff shall serve a copy of this decision and order, with notice of entry, on plaintiff and on County Clerk (60 Centre Street, Room 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that, within 20 days after this decision and order is uploaded to NYSCEF, plaintiff shall e-file a "Notice of Hard Copy Exhibit Filing" (NYSCEF Form EF-21); and it is further

ORDERED that this constitutes the decision and order of the Court.

10/9/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	