

Cole v LoDuca
2016 NY Slip Op 31806(U)
April 14, 2016
Supreme Court, Suffolk County
Docket Number: 01129-2015
Judge: William G. Ford
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SHORT FORM ORDER**INDEX No.: 01129-2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE: 01-05-16
ADJ. DATE: 04-07-16
Mot. Seq. #: 001 - Mot D

PHILIP COLE,

Plaintiff,

- against -

JAMES M. LODUCA, MRC RECOVERY, INC.,
AMERICAN HONDA FINANCE
CORPORATION d/b/a HONDA FINANCIAL
SERVICES, HUNTINGTON HONDA, INC.,
HVT, INC., & CONSOLIDATED ASSET
RECOVERY SYSTEM, INC.,

Defendant.

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Upon the following papers numbered 1-20 read on this Motion for Summary Judgment ; Notice of Motion and supporting papers 1-11; Defendants Opposition papers 12-20 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Philip Cole for an order pursuant to CPLR 3212 granting him summary judgment is **GRANTED**.

Plaintiff Philip Cole brings this personal injury action against defendants James N. LoDuca, American Honda Finance Corporation, d/b/a American Honda Financial Services, Huntington Honda, Inc. (hereinafter referred to as "Honda"), HVT, Inc. and Consolidated Asset Recovery System, Inc. ("CARS"). According to the pleadings, plaintiff leased a Honda Civic motor vehicle from the Huntington Honda car dealership sometime in February 2012. He claims that LoDuca is liable to him for an assault and battery allegedly committed while LoDuca was in the employ of the defendants.

It is alleged by plaintiff that on or about February 6, 2014, defendants, through their agent, employee or assignee LoDuca attempted repossession of plaintiff's motor vehicle at his residence. At that time, plaintiff claims that acting in the scope of his employment as a repo-man, LoDuca assaulted him, striking him with a flashlight leaving him unconscious and bleeding.

Plaintiff filed Summons and Complaint against defendants on January 22, 2015. Issue was joined with LoDuca's service of an answer with a cross-claim against defendants alleging a duty to defend him in the litigation, and a counterclaim against plaintiff alleging he was the initial aggressor and that LoDuca's alleged tortious actions were justified or in self-defense.

As a result of plaintiff's injuries, LoDuca was arrested and charged with two counts of assault in the second degree, a D felony, for causing serious physical injury with a dangerous instrument and for victimizing a person more than 65 years of age and the actor is at least 10 years younger than the victim. *See Pen. L. § 120.05 [2] & [12] [McKinney's 2015].* After indictment before the grand jury, LoDuca was tried before a jury in Suffolk County Court on July 20, 2015, the Hon. William J. Condon presiding. After the defendant waived his right to the submission of the People's case before a jury, instead opting for a bench trial before the court, under the advice of counsel, LoDuca entered a plea of guilty to a reduced charge of assault in the third degree, an A misdemeanor and was sentenced to a conditional discharge and an order of protection. All of this is reflected by the certified transcript of the County Court proceedings, copy of the grand jury indictment, and certificate of disposition, all of which plaintiff has attached in support of his motion. Pl. Aff. in Supp., Exs. 5-7; Altman Aff. in Opp., Ex. A.

Plaintiff has moved the Court seeking an order granting him summary judgment on liability against LoDuca, and further dismissing LoDuca's counterclaim against plaintiff, principally arguing that LoDuca is collaterally estopped from relitigating the issue of his liability for assault and battery (Pl. Am. Compl. Count 1) based upon the resolution of LoDuca's criminal case by guilty plea, wherein he admitted to being the actor who struck plaintiff with a flashlight with intent to cause him serious physical injury. On this point, the Court is in agreement.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see Gilbert Frank Corp. v Federal Insurance Co., supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept. 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept. 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra, citing Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept. 1985], *affd.*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

To the extent that defendants seek to establish the existence of triable issues of fact, however, they are reminded that conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (*see Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493, 512 NYS2d 419 [2d Dept. 1987]).

The doctrine of collateral estoppel is based on the notion that it is not fair to permit a party to relitigate an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point (*Gilberg v Barbieri*, 53 NY2d 285, 423 NE2d 807, 441 NYS2d 49 [1981]). Thus, where a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from relitigating the issue of his liability (*see Blaich v Van Herwynen*, 37 AD3d 387, 829 NYS2d 639 [2d Dept. 2007]). Here, the defendant's conviction of assault in the third degree upon a plea of guilty arose out of the same events as those alleged in this action, and his admissions upon allocuting to the charge established his civil liability for damages for recklessly causing plaintiff's personal injuries (*see Bazazian v Logatto*, 299 AD2d 433, 749 NYS2d 537 [2d Dept. 2002]).

"Where a criminal conviction is based upon facts identical to those in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from relitigating the issue of liability." "The doctrine applies whether the conviction results from a plea or a trial. "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action." "The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (*Hartman v. Milbel Enter., Inc.*, 130 AD3d 978, 15 NYS2d 125 [2d Dept. 2015] [internal citations omitted]).

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. All that is required to give collateral estoppel effect to a criminal conviction is that there be an identity of issues in the criminal and subsequent civil actions and that the defendant have had a full and fair opportunity to contest the issues raised in the criminal proceedings (*Grayes v. DiStasio*, 166 AD2d 261, 263, 560 NYS2d 636 [2d Dept. 1990]).

Based upon the record presently assembled, plaintiff has met his burden of proof to establish entitlement to judgment as a matter of law on liability. Plaintiff's medical records establish that as a result of the altercation with LoDuca, he was knocked unconscious by a blow to the head from LoDuca's flashlight, and was found by medical personnel unconscious and bleeding on his garage floor. Pl. Aff. in Supp., Ex. 8.

LoDuca had a full and fair opportunity in his criminal case to litigate his guilt or innocence of the charged assault. While represented by counsel, and on his advice, he opted to plead guilty. The colloquy between LoDuca and Justice Condon, testimony defendant gave under oath and on questioning during his plea allocution, LoDuca supplied the identity, intent and dangerous instrument elements of the crime of assault. The guilty plea was entered on July 20, 2015, seven months after the commencement of this litigation, thus defendant cannot claim that he was unaware of the potential preclusionary consequences of his plea, and its use by plaintiff as indicated here. Thus he is collaterally estopped now in this action from denying that he committed the assault or arguing the justification or self-defense affirmative defenses as he had a full and fair opportunity to litigate the identical issue shared by this case and his prior one, whether he committed an assault on plaintiff. LoDuca also had the chance to raise any and all defenses arising from the same transaction, occurrence or common core of operative facts stemming from his interaction with plaintiff on February 6, 2014, and having declined to raise those defenses previously in the criminal case for tactical reasons, now bars him from now doing so now by counterclaim. *See Bazazian v. Logatto*, 299 AD2d 433, 749 NYS2d 537 [2d Dept. 2002]" defendant's conviction of assault in the third degree arising out of the same events as those alleged in this action established his civil liability for damages for negligently and/or recklessly causing (plaintiff's) personal injuries]; *accord Olsson v. MacDonald*, 16 AD3d 1017, 792 NYS2d 250 [3d Dept. 2005]; *Malvestuto v. Malvestuto*, 259 AD2d 1021, 688 NYS2d 331 [4th Dept. 1999].

Defendants MRC Recovery and Honda have opposed plaintiff's motion in part arguing that the record plaintiff has submitted in support of his motion is insufficient to support any finding or determination concerning their vicarious liability for LoDuca's alleged tortious actions. Here the Court is in agreement. Because plaintiff has not submitted any evidence suggestive of defendants' employment policy governing LoDuca's employment as repo-man, the Court cannot at this date issue a finding for plaintiff and render judgement as a matter of law finding defendants liability under *respondeat superior*. Thus to the extent that plaintiff's motion seeks a determination on this issue, it is **DENIED** without prejudice with leave to renew at the close of fact-finding during the discovery and disclosure process.

Lastly, LoDuca submitted opposition arguing that his co-defendant Honda and CARS should be found vicariously liable and that the record contains sufficient proof to this effect. As previously indicated, the Court disagrees with this characterization. To the contrary, the evidentiary record presently provided on the instant motion fails to indicate whether LoDuca was known to have prior and similar criminal conduct, prior and similar violent tendencies, and most importantly, whether defendants had conducted a background check to put them in a position to know of these things. Thus the reliance LoDuca places on *Fernandez v. Rustic Inn, Inc.* is misplaced. See *Fernandez v. Rustic Inn, Inc.*, 60 AD3d 893, 876 NYS2d 99 [2d Dept. 2009][standing for the proposition that defendant employer is not vicariously liable for the torts of its employee where the tortious conduct takes place after-hours, physically away from the workplace, and no proof exists that employer knew or should have known of defendant's violent tendencies].

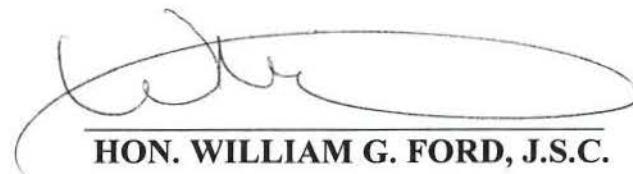
Accordingly it is,

ORDERED that the motion by plaintiff for summary judgment in his favor is **GRANTED** against defendant James LoDuca as to liability and **DENIED** without prejudice as to defendants MRC and Honda; and it is further

ORDERED that the Plaintiff is directed to serve counsel for all appearing parties with a copy of this decision and order with Notice of Entry.

The foregoing constitutes the decision and order of this Court.

Dated: April 14, 2016
Riverhead, New York



HON. WILLIAM G. FORD, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION