SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

CYNTHIA MARX,

Plaintiff,

- against -

THOMAS BURKE,

Defendant.

INDEX NO. 7425/2006

MOTION
DATE April 24, 2007

MOTION
CAL. NO. 26

The following papers numbered 1 to 14 read on this motion by the plaintiff for partial summary judgment on the issue of liability. The plaintiff cross-moves to inter alia compel disclosure.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Notice of Cross Motion/Affid(s) in Opp.-Exhibits...	6 - 9
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Upon the foregoing papers the motion and cross-motion are determined as follows:

This action arises out of an incident that occurred on May 14, 2005 at approximately 2:56 a.m. which resulted in the arrest of the defendant that same date. Plaintiff alleges in her instant civil complaint that she was "assaulted and battered" by the defendant, while in his answer the defendant asserts, among other things, that his actions were committed in self-defense. The plaintiff, a retired New York City Police Officer, and the defendant, a retired New York City Firefighter, were in a relationship at the time of the incident and resided at the apartment where it commenced. Both had been drinking on the night of the occurrence.

The procedural history of the criminal case, while not complex, constitutes the essential basis for plaintiff's claim for summary judgment. On March 31, 2006, while represented by a privately retained attorney, the defendant pled guilty in New York City Criminal Court to committing Assault in the Third Degree, a class A misdemeanor, (Penal Law §120.00), and Harassment in the Second Degree, a violation (Penal

Law §240.26). In connection with this plea, the defendant admitted in his allocution to "striking" the plaintiff with "intent to cause some injury". As part of the plea agreement, the defendant was promised that if he completed a twelve week alcohol abuse program, stayed out of trouble, and did not violate an order of protection issued to the plaintiff, his plea would be "vacated" and he would be "sentenced to a violation only".

However on the preceding day, March 30, 2006, the plaintiff had commenced this civil action by the filing of a summons and complaint in the Supreme Court. While the record is devoid of proof as to the date of service of the summons and complaint, defendant eventually served a verified answer dated June 30, 2006.

Finally on July 21, 2006, after submitting proof of his successful completion of the alcohol abuse program, the defendant's plea to Assault in the Third Degree was vacated and defendant was sentenced to a conditional discharge on his remaining plea to Harassment in the Second Degree.

The plaintiff now moves for summary judgment on the issue of liability based upon the doctrine of collateral estoppel. Specifically, plaintiff asserts that the defendant's initial guilty plea and allocution of March 31, 2006, wherein he admitted to striking her with intent to cause injury, precludes the defendant from contesting the issue of whether he assaulted and battered her in the present action.

The doctrine of collateral estoppel prevents a party from relitigating an issue that was "raised, necessarily decided and material in the first action", provided the party had a full and fair opportunity to litigate the issue (See, Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 349; Ryan v New York Tel Co., 62 NY2d 494, 500; Sclafani v Story Book Homes, Inc., 294 AD2d 559). The doctrine is an equitable defense "grounded in the facts and realities of a particular litigation, rather than rigid rules" (Buechel v Bain, 97 NY2d 295, 303). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests on the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (Ryan v New York Tel Co., supra at 501).

In the context presented here, "collateral estoppel may be employed in a civil action to preclude relitigation of issues actually and necessarily determined in a prior criminal action" (Launders v Steinberg, 39 AD3d 57; see also, S.T. Grand, Inc. v City of New York, 32 NY2d 300). Moreover, it is irrelevant whether the conviction arises from either a plea or after a trial (See, Blaich v Van Herwynen, 37 AD3d 387).

In particular, a conviction of a crime (PL §10[6]) such as Assault in the Third Degree can form the basis of civil liability for injuries resulting from a defendant's actions (See e.g., Bazazian v Logatto, 299

AD2d 433; Costello v Lupinacci, 253 AD2d 478; see also, In re Denise "GG", 254 AD2d 582). On the other hand, where the prior proceeding involved "trivial stakes", like the charge of a non-criminal petty offense in a lower criminal court, a conviction may not automatically be entitled to preclusive effect (See, Gilberg v Barbieri, 53 NY2d 285, 292; Goepel v City of New York, 23 AD3d 344; cf., Lili B. v Henry F., 235 AD2d 512).

In this case, the defendant indisputably pled guilty to committing a crime that involved the same operative facts as those presented in the case at the bar. However this initial plea to Assault in the Third Degree was subsequently vacated. With respect to criminal convictions, "[c]ollateral estoppel can only be invoked when there is finality, i.e., a judgment of conviction" (People v Evans, 72 AD2d 751; see also, Goodman, 69 NY2d 32, 38). Consequently, the effect of the court permitting the defendant to withdraw his plea was to restore him "to pre-plea status" (Van Wie v Kirk, 244 AD2d 13). Additionally, the "realities" of the defendant's plea to Assault in the Third Degree does not lend itself to forming the foundation of an estoppel herein as he apparently only pled guilty to committing the crime at issue in return for a promise that the plea would be vacated upon the satisfaction of certain conditions (See, Sullivan v Breese, 160 AD2d 997, 998-99). Accordingly, the defendant can not be estopped from defending this action on the basis of his March 30, 2006 plea to Assault in the Third Degree.

Defendant's entire plea, however, was not vacated and his conviction of Harassment in the Second Degree remained. Therefore, the court must determine whether the defendant should be estopped from litigating his civil liability based upon his conviction of this violation.

Penal Law §240.26[1] provides that a "person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact". In the realm of intentional torts, a person acts intentionally when there is "a substantial probability that a certain result would take place" (See e.g., Utica Fire Ins. Co. v Shelton, supra at 706, quoting, County of Broome v Aetna Cas. & Sur. Co., 146 AD2d 337, 340). In light of the defendant's acknowledgment as part of the March plea bargain that he struck the plaintiff with "intent to cause some injury", the identicality and decisiveness requirements for estoppel are satisfied. Thus, the only remaining issue to be addressed by the court is whether the defendant had a full and fair opportunity to contest the charges against him in the New York City Criminal Court.

Generally, whether a party has had a full and fair opportunity to contest a prior decision "'requires consideration of the realities of the litigation' . . . [and] the fundamental inquiry is whether re-litigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the

parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 153, quoting Gilberg v Barbieri, 53 NY2d 285, 292; see also, Altegra Credit Co. v Tin Chu, 29 AD3d 718; Chambers v City of New York, 309 AD2d 81).

The particular issue raised in this case, whether a harassment conviction should be given conclusive effect in a civil action for damages, was examined by the Court of Appeals in Gilberg v Barbieri, supra. In that case, the court determined that a conviction for harassment after a bench trial in the City Court of Mount Vernon would not preclude the defendant from defending a subsequently commenced civil suit arising out of the same operative facts. Among the factors particular to the case considered by the Court of Appeals in determining that the defendant was not afforded a full and fair opportunity to defend the noncriminal offense were "the relative insignificance of the charge", "the lack of a right to a jury trial", the "brisk" and "informal" nature of the trial, "the relative insignificance of the outcome", that "the defendant did not choose to litigate the matter first" and that the defendant and the City Court judge were apparently unaware of the potentiality that the defendant could be collaterally estopped in a subsequent civil proceeding (Gilberg v Barbieri, supra at 293).

The Court of Appeals also justified its decision in Gilberg broadly on policy grounds holding that "granting collateral estoppel effect to convictions in this type of case would not reduce the amount of litigation in the long run", would provide an "incentive" to plaintiffs to bring "minor criminal charges" as a prelude to commencing a civil action and would frustrate the "proper function" of lower criminal courts to expediently resolve minor criminal cases by forcing a defendant to "defend a violation charge with a vigor out of all proportion to its otherwise petty nature" because of a looming civil action (Gilberg v Barbieri, supra at 294).

The court is persuaded that the facts of this matter are sufficiently akin to those presented in Gilberg to compel a determination that the defendant was not afforded a requisite full and fair opportunity to defend the underlying criminal claims. Like Gilberg, the charge at issue in this case was minor and the sentence, a conditional discharge and completion of a substance abuse program, was relatively insignificant. Similarly, the defendant did not commence the criminal court proceeding and there is no indication that his criminal counsel, or even the court, was aware of the pending civil proceeding presumably because the instant summons and complaint had only been filed with the court the day before he pled guilty.

It is also significant that both in Gilberg and this action the

parties assert divergent views of how the incidents transpired, the originating events involved high emotions and include claims of provocation and self-defense (Compare, Savocchi v Theodoropoulos, 2006 NY Misc LEXIS 2875 with, Akwaboa v Bowe, 2004 NY Slip Op 50726U).

Accordingly, the branches of the plaintiff's motion for partial summary judgment on the issue of liability and for partial summary judgment dismissing the defendant's first counterclaim are denied. The branches of the defendant's cross-motion for disclosure are withdrawn.

Dated: June 28, 2007

Peter J. Kelly, J.S.C.