

Payne v Balan

2007 NY Slip Op 32503(U)

August 8, 2007

Supreme Court, New York County

Docket Number: 0111807/2006

Judge: Jane S. Solomon

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SCANNED ON 8/14/2007
* 1
SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SOLOMON
Justice

PART 55

Index Number : 111807/2006

INDEX NO. 111807/2006

PAYNE, HEATHER

MOTION DATE 5-14-07

vs

BALAN, NELLO

MOTION SEQ. NO. 002

Sequence Number : 002

MOTION CAL. NO. _____

DISMISS

motion to/for dismiss

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1-3

Answering Affidavits – Exhibits _____

4-6

Replying Affidavits _____

7-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in
accordance with the annexed memorandum decision
and order.

FILED
AUG 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/8/07

JANE S. SOLOMON *s.c.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Not to be appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

HEATHER PAYNE,

Plaintiff,

INDEX NO. 111807/2006

-against-

NELLO BALAN, NELLO NY LTD., and
THE NELLO GROUP INTERNATIONAL, LTD.,

DECISION and ORDER

Defendants.

-----X

JANE S. SOLOMON, J.

In this tort and breach of contract action, defendants Nello Balan ("Balan"), Nello NY Ltd., and The Nello Group International, Ltd. (collectively, "Defendants") move to dismiss the Third and Fourth Causes of Action in the Amended Complaint. Plaintiff Heather Payne ("Payne") cross-moves for summary judgment on the First Cause of Action and for an award of costs and sanctions. For the reasons described herein, both the motion and the cross-motion are denied.

Background

From on or about February 2005 through March 2006, Payne alleges that she was involved in a personal and professional relationship with Balan, who is the owner and sole proprietor of the other Defendants. The first cause of action in

the amended complaint describes five encounters between the parties which are the basis of the claim entitled "assault", although the contentions largely are of "battery". As relevant here, paragraph 18 describes an event of March 7, 2006, in which Balan "kicked and punched [her], choked her, gouged her eyes with his fingers, kneeled on her chest with his knees, kicked her in the groin, pulled her hair, threw her into a wall by her hair, and smothered her face into a pillow and mattress intentionally preventing [her] from breathing."

Balan was arrested and charged with assault and other charges in connection with this incident. On or about May 22, 2006, in the Criminal Court of the City of New York, New York County, Balan pleaded guilty to and was convicted of the crime of Attempted Assault in the Third Degree. During Balan's plea allocution, he admitted to attempting to strike Payne in the eye with his elbow.

In August 2006 Payne commenced this lawsuit alleging eight causes of action. The First (Assault), Second (Battery), Third (Outrageous Conduct Causing Emotional Distress) and Fourth (Negligence) causes of action were all alleged against Balan individually; the remaining causes of action are based on contractual or quasi-contractual theories and are alleged against all three Defendants. On February 9, 2007, in deciding a motion

by Balan, this Court granted the motion to dismiss the Complaint in its entirety "only to the extent that the Complaint shall be repleaded and the extraneous material amounting to a seduction claim which NY law does not recognize deleted." The order also provided that the amended complaint should be served by March 5th and answered by April 10th, so as to have a Preliminary Conference on April 16th. Payne's cross-motion for summary judgment on her assault claim based on Balan's guilty plea was denied.

On February 13, Payne served an Amended Complaint maintaining all causes of action pleaded in the original Complaint and removing allegations deemed improper by this Court. Defendants now move again to dismiss, this time only as to the Third and Fourth Causes of Action. Payne cross-moves again for partial summary judgment on the First Cause of Action and for an award of costs and sanctions, arguing that the decision on Defendants' motion to dismiss directed an Answer to the Amended Complaint, eliminating the right to move again to dismiss.

At oral argument of these motions on May 14, 2007, I agreed with Payne that the Amended Complaint should have been answered. Holding otherwise would provide further delays with motion practice while discovery is proceeding. I reserved decision on Payne's cross-motion for summary judgment based on the guilty plea and for sanctions.

Discussion

Cross-Motion on Assault

Payne first purports to bring her cross-motion for summary judgment on the assault claim under CPLR § 3212. Since issue has not yet been joined, the motion again is premature. She also purports to bring her motion under CPLR § 3213, which must be based upon an instrument for the payment of money only or a judgment. A prior criminal conviction for assault does not necessarily permit a motion pursuant to CPLR § 3213. See McMillan v. Williams, 116 Misc.2d 171 (Sup. Ct. NY Co. 1982).

Moreover, Balan's conviction does not appear to fully resolve the first cause of action. Finally, as indicated above, the complaint and the plea allocution are not perfectly consistent in detail.

Sanctions

The Court declines to sanction Defendants, particularly where plaintiff has twice improperly moved for relief on her own behalf.

Accordingly, it hereby is

ORDERED that Defendants' motion to dismiss the Third and Fourth Causes of Action of the Amended Complaint is denied in its entirety; and it further is

ORDERED that Payne's cross-motion for summary judgment on the First Cause of Action and for sanctions is denied in its entirety.

Dated: August 8, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

AUG 14 2007.

NEW YORK
COUNTY CLERK'S OFFICE