

McGrane v Yevoli

2007 NY Slip Op 33701(U)

November 9, 2007

Supreme Court, Nassau County

Docket Number: 6689-05/

Judge: Michele M. Woodard

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

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ANNE MCGRANE,

Plaintiff,

**MICHELE M. WOODARD,
J.S.C.**

-against-

TRIAL/IAS Part 18

Index No.: 16689/05

RICHARD YEVOLI and DOMINICK CURTOLA,

Motion Seq. No.: 03, 04

Defendants.

DECISION & ORDER

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The Plaintiff, ANN MCGRANE, moves for summary judgment on the issue of liability. Defendant DOMINICK CURTOLA, moves for an order granting him summary judgment and dismissing the Plaintiff's Amended Verified Complaint on the issue of liability or an order dismissing the Amended Complaint for failure to state a cause of action for battery and that the Second Cause of Action alleging a claim for emotional distress was added without leave of court.

This matter arises out of incidents that occurred on the night of November 24th into the early morning hours of November 25, 2004. On November 25th, Plaintiff was sexually assaulted by Defendant CURTOLA while she was a guest in the home of Defendant YEVOLI.

In November 2006, Defendant CURTOLA (hereinafter "Defendant") pled guilty to the felony of Sexual Abuse in the First Degree in criminal court as a result of the events that occurred on November 25th.

The following is copied from the transcript of the plea allocution:

THE COURT: Would you tell me what happened on November 25, 2004 at about 1:30 a.m., at 63 The

Glade, Syosset, Nassau County, New York?

THE DEFENDANT: I went into bed with Anne went down on her and she –

THE COURT: What does that mean?

THE DEFENDANT: I placed my mouth on her vagina.

THE COURT: Had she previously given you consent to do that?

THE DEFENDANT: No. She kissed me. That was it.

THE COURT: You did that without her consent?

THE DEFENDANT: Yes.

THE COURT: And against her will?

THE DEFENDANT: Yes.

MR.TURKIN: Judge, I believe that – - I don't know if it was against her will. She was incapable of giving consent because she was sleeping. I believe that would be a more accurate statement.

Do you admit you placed your mouth on the victim's vagina without her consent because she was physically helpless at that time because she was sleeping?

THE DEFENDANT: Yes.

MR.TURKIN: I believe that is a factually accurate rendition of the facts which I believe them to have occurred based on the testimony adduced in the grand jury and, I believe with the defendant's admission he is admitting all of the factual elements of actually a greater crime. But, again, the People have consented, with the permission of the victim, to allow the defendant to plead guilty to the lesser crime, and he has obviously admitted those elements as well.

THE COURT: Is there any question in your mind as to whether you wish to plead guilty at this time?

THE DEFENDANT: No.

THE COURT: Every statement you made today has been under oath. Do you understand the significance of an oath, and if you have lied in answer to any of these questions you could be prosecuted for the crime of perjury?

THE DEFENDANT: Yes.

THE COURT: Take a moment to speak to Mr. Ferzola, and after you speak to him I want you to tell me whether everything you just told me has been true?

THE DEFENDANT: Yes.

THE COURT: The Court is satisfied that the defendant understands the nature of the charges, nature of the plea, possible consequences of his plea; that the defendant has discussed his legal rights with his attorney and the defendant understands that he is waiving his constitutional rights and the plea is voluntary and of his own free will.

The Court is further satisfied that the defendant has acknowledged his guilt and is willing to assume responsibility for it. By pleading guilty the defendant has assured prompt and certain punishment to himself without delay.

The Court believes it is in the interest of justice to accept the plea from this defendant.

Will the clerk please take the plea.

THE CLERK: Do you now wish to withdraw your previously entered plea of not guilty and plead guilty to Sexual Abuse in the First Degree?

THE DEFENDANT: Yes.

THE CLERK: How do you plead; guilty or not guilty?

THE DEFENDANT: Defendant pleads guilty.

THE COURT: Date for sentence, June 14.

Plaintiff MCGRANE argues that it is well settled that 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. And where a criminal conviction is based upon facts identical to those at issue in a related action, the Plaintiff in the civil action can successfully use the doctrine of collateral estoppel to bar the convicted defendant from relitigating the issue of his liability.

The Defendant's main argument to the Plaintiff's application is that Plaintiff cannot prove that the Defendant's contact with the Plaintiff was intended by him to be without her consent. However, during his plea allocution the District Attorney asked the Defendant "do you admit you placed your mouth on the victim's vagina without her consent because she was physically helpless at the time because she was sleeping?" and the Defendant responded "yes."

The next issue is whether the pleadings were insufficient to allege a battery. To recover damages for a battery, a plaintiff must prove that the defendant intended to make an offensive bodily contact with plaintiff, and such contact occurred without plaintiff's consent . *See Bastein v. Sotto, 299 A.D.2d 432 (2002)*. The Defendant argues that nowhere in the complaint does it allege that he *intended* to touch the Plaintiff without her consent, only that Plaintiff did not give her consent because she was sleeping. Clearly, there was an offensive bodily contact. The Defendant's argument that it did not rise to the level of battery

because there was no intent is not valid. If, as admitted by both Plaintiff and Defendant, Plaintiff was asleep and therefore unable to give consent, the Court must infer that she was not consenting and that the Defendant, who knew she was asleep, was aware of her lack of consent. As such, he did in fact intend to touch her without her consent.

Although the injury may be unintended, accidental or unforeseen, a plaintiff seeking to establish a civil battery need only prove that the defendant intentionally touched his person without his or her consent. *Villanueva v. Comparetto*, 180 AD 2d 627 (1992).

The pleadings are sufficient to allege a battery when read as a whole. Additionally, the Defendant is estopped from raising the issue of liability as to the battery based upon the above referenced allocation in the prior criminal plea.

Defendant's final issue is that the Second Cause of Action in the Amended Verified Complaint alleging a claim for emotional distress was added without leave of Court and otherwise lacks merit. Under Rule 3025 (a) of the CPLR, a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. (b) A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. The Order dated March 30, 2007 by Hon. Daniel Martin granted plaintiff "leave to serve an amended complaint which asserts a cause of action for battery against defendant Curatola and further leave to move again for summary judgement based thereon." The Plaintiff did not receive leave from the court to

amend the Complaint to allege a claim for emotional distress, nor did all parties stipulate to such an action and the Plaintiff has not shown good cause for the court to grant this relief now. Accordingly, it is hereby

ORDERED that the Second Cause of Action alleging emotional distress is DISMISSED. It is further

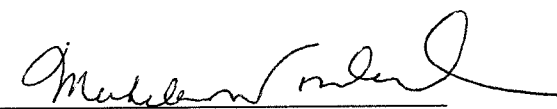
ORDERED that Plaintiff's motion for summary judgment on the issue of liability is GRANTED. It is further

ORDERED that Defendant's motion for summary judgment is DENIED. The parties are directed to appear in DCM on November 27, 2007 at 9:30 a.m. for a Preliminary Conference consistent with the Court's Decision and Order.

This constitutes the DECISION and ORDER of this Court.

DATED: November 9, 2007
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED

NOV 14 2007

NASSAU COUNTY
COURT CLERK'S OFFICE