

**Lofaso v City of New York**

2008 NY Slip Op 30277(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0104621/2000

Judge: Paul G. Feinman

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

**HON. PAUL G. FEINMAN**

PRESENT: \_\_\_\_\_  
*Justice*

PART 52

Index Number : 104621/2000

LOFASO, SANDY

vs

CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 104621/2000

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

112  
3, 4, 5, 6, 7, 8

9

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: Cross motion  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

JAN 30 2008

NEW YORK

COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.**

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

Dated: 1/11/08

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
SANDY LOFASO and EVELYN LOFASO,  
Plaintiffs,

Index Number 104521/2000  
Mot. Seq. Nos. 004 & 005

against

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT, POLICE OFFICER  
BRENDEN CROWE (Individually and in his capacity  
as a police officer), POLICE OFFICER ANTHONY  
PELLICANE, "JOHN DOE" POLICE OFFICERS 1  
through 4 (being fictitious names of unidentified  
defendants), METROPOLITAN LIFE INSURANCE  
COMPANY, STUYVESANT TOWN PETER  
COOPER SECURITY DIVISION, and "JOHN DOE"  
SECURITY OFFICERS 5 through 8 (being  
fictitious names of unidentified defendants),  
Defendants.

**DECISION AND ORDER**

**FILED**  
JAN 30 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
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Papers considered in review of these motions for summary judgment and cross-motion to amend:

	<b>Papers</b>	<b>Numbered</b>
<b>Sequence 004</b>	Notice of Motion and Affidavits Annexed.....	<u>1-2</u>
	Affirmation in Opp., Affidavit of Service, Memo of Law.....	<u>3-5</u>
	Affidavit in Opposition.....	<u>6</u>
	Affirmation in Opposition.....	<u>7</u>
	Affirmation in Reply.....	<u>8</u>
<b>Sequence 005</b>	Notice of Cross-Motion by Plaintiffs.....	<u>9</u>
	Notice of Motion, Memo of Law, Affidavit of Service.....	<u>1-3</u>
	Affirmation in Opposition.....	<u>4</u>
	Reply Affirmation.....	<u>5</u>

**PAUL G. FEINMAN, J.:**

The motion and cross-motion bearing sequence number 004 and the motion bearing

sequence number 005 are consolidated for purposes of decision.

This is a personal injury action arising out of a physical altercation between two adult tenants of Stuyvesant Town-Peter Cooper Village in one of its playgrounds. Co-defendant Metropolitan Life Insurance Company, the owner of the playground and landlord of the two tenants, moves for summary judgment and dismissal of the complaint and all cross-claims and counterclaims as against it (motion sequence number 004). Plaintiffs and the City of New York oppose the motion. Plaintiffs cross-move to amend their reply to add the doctrines of collateral estoppel or issue preclusion as defenses to the counterclaims contained in co-defendant Brendan Crowe's answer.

Plaintiffs move for summary judgment as against Crowe (motion sequence number 005).

#### *Facts*

Plaintiffs Sandy and Evelyn LoFaso and co-defendant Brendan Crowe are all tenants in the Stuyvesant Town-Peter Cooper Village housing development. Co-defendant Metropolitan Life Insurance Company (Met Life) owned the development and all of the premises including recreation areas (Not. of Mot. Ex. A, Ver. Ans. ¶ 5). Met Life employed security guards for the housing development (Ver. Answer ¶ 3).

According to Sandy LoFaso, he and defendant Crowe had words about who had the right to play with a playground ball, and Crowe "attacked" him, hitting him several times including in the face, and cutting his lip (Not. of Mot. Ex. D, EBT of Sandy LoFaso [hereinafter LoFaso EBT], 33, 57, 60, 63, 223). LoFaso believes he kicked Crowe about twice in self-defense (EBT 141, 142). LoFaso had taken karate for about a year and a half when he was in his later 20s, but had never been in a fight as an adult with a grown man (LoFaso EBT 140-141). He did not use

any specific karate moves in this incident (LoFaso EBT 216).

According to Brendan Crowe, after words over the ball, LoFaso brushed against him three times and then struck him in the face with his fist (Pl. Not. of Mot. Ex. 6, EBT of Brendan Crowe [hereinafter Crowe EBT], 43, 44, 45-46). In self-defense, Crowe flayed his arms and struck LoFaso (Crowe EBT 46, 48). He only learned later that he had given LoFaso a bloody lip (Crowe EBT 48).

Crowe left the park, partly running, and returned to his apartment with his infant son. LoFaso reported the incident to Met Life security officer Sapta Nataadiningrat, who was driving past (LoFaso EBT 73, 74-75). The officer's superior, Peter Herkenham, when contacted, directed Nataadiningrat to pursue the individual. Herkenham had overall supervision of one tour of duty of security officers, although at that time, the Met Life security force did not have police powers and could only make a citizen's arrest by detaining the individual and notifying the police (Not. of Mot. Ex. E, EBT of Peter Herkenham [hereinafter Herkenham EBT], 8-10, 17-18).

LoFaso walked over to a "gathering of security vehicles" across the park, and explained what happened and said that he wanted to press charges (LoFaso EBT 74, 75). Herkenham spoke with LoFaso and with other people in the vicinity. According to Herkenham, there were no eye witnesses (Herkenham EBT 38-39). He ascertained if LoFaso needed immediate medical assistance, and then responded to Officer Nataadiningrat's call that he had found Crowe (Herkenham EBT 36). His impressions of LoFaso was that he was "quite, quite upset. He appeared to have a nosebleed" and was bleeding from the lip (Herkenham EBT 36:17-18, 37).

Nataadiningrat had followed Crowe into his building and asked him to return to the scene (Not. of Mot. Ex. H, 2003 EBT of Sapta Nataadiningrat [hereinafter Nataadiningrat EBT], 29).

Nataadiningrat did not notice any facial injury to Crowe (Nataadiningrat EBT 49). According to Nataadiningrat, Crowe told him he had to take his child inside, and added that “it was just a little push,” and that LoFaso “just fell” and it was “nothing major” (Nataadiningrat EBT 29, 31, 32). Crowe showed him his police badge and said he was on the police force and could not afford to lose his job (Nataadiningrat EBT 32-33). Crowe also suggested, “Just say you didn’t find me, you know. Just say you lost me in the building” (Nataadiningrat EBT 35:12-14). According to Nataadiingrat, Crowe also told him that he knew Eddie Grace and Peter Herkenham, both sergeants for Met Life (Nataadiningrat EBT 35). However, Crowe testified that although he was carrying his driver’s license and police ID and badge as identification, he did not remember showing his badge or stating that he was a police officer (Crowe EBT 57-58). Crowe said that he did not ask any Met Life security officer to change the facts of the incident (Crowe EBT 149-150).

Sergeant Grace, the Met Life supervising sergeant on duty, and Herkenham both responded to Nataadiningrat’s radio call (Nataadiningrat EBT 36, 38-39). Crowe recognized Herkenham as someone he had known, not well, since grammar school, but did not remember mentioning his name or Grace’s name (Crowe EBT 58, 60, 61).<sup>1</sup> According to Nataadiningrat, Crowe told them that he pushed LoFaso who fell (Nataadiningrat EBT 38). According to Herkenham, Crowe told him that LoFaso shoved him and took a swing at him, and he reacted instinctively to defend himself (Herkenham EBT 45-45). Herkenham did not notice any physical injury to Crowe (Herkenham EBT 43).

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<sup>1</sup>Similarly, Herkenham testified that he had known Crowe for about 25 years although he did not consider him or his family to be friends (Herkenham EBT 76).

Nataadiningrat told Herkenham and Grace about his conversation with Crowe and was advised that they would take over the investigation from that point (Nataadiningrat EBT 42). They all returned to the playground area (Nataadiningrat EBT 40). Nataadiningrat left to fill out a Met Life incident report (Nataadiningrat EBT 46). After signing and dating it, he gave it to Sgt. Grace who read it and then told him to change it by omitting the part about the badge (Nataadiningrat EBT 47, 51, 52). Nataadiningrat refused to do so in fear of being suspended by the Chief of Security, Robert McKenna (Nataadiningrat EBT 52, 56).

At the scene, according to LoFaso, Herkenham advised him to let the matter drop (LoFaso EBT 81). He told LoFaso that he had grown up with Crowe and they were very good friends (LoFaso EBT 86-87). Herkenham also said there could be cross-charges (LoFaso EBT 88). He wanted LoFaso and Crowe to settle their differences, but LoFaso objected to an apology (LoFaso EBT 87, 90). Herkenham stated that he did not suggest that the charges be dropped but did suggest to both LoFaso and Crowe individually that, based on his experience, seeking an arrest could result in cross-complaints with both parties arrested and, as it seemed to be a "juvenile dispute," perhaps they could discuss it and reach some kind of agreement (Herkenham EBT 52).

When the first police officers arrived, Herkenham described to them a verbal dispute that escalated into physical contact and indicated that the second party was an *off-duty officer* (Herkenham EBT 74, 75). One of the first officers to arrive, Officer Pellicane, was told before he arrived that the incident involved a police officer, and was told by Herkenham that Crowe was the officer at issue (Not. of Mot. Ex. G, EBT of Anthony Pellicane, 49, 87). Herkenham himself also spoke by phone to the officers' supervisor (Herkenham EBT 75, 77). A NYPD sergeant

arrived and decided to move everyone to the station house for further investigation (Herkenham EBT 83).

LoFaso was eventually escorted to the hospital by the police, and received about nine stitches in his lip (LoFaso EBT 105, 108). Crowe was driven to Cabrini Hospital by two officers, and then referred to Bellevue Hospital (Crowe EBT 79-80, 82). According to Crowe, he was diagnosed with a dislocated jaw and his teeth were wired shut and remained partly wired for about two weeks thereafter (Crowe EBT 88, 94, 96). However, Crowe's March 17, 1999 medical records from Bellevue Hospital reflect that a CT scan and x-ray did not show evidence of fracture or dislocation of the jaw (Pl. Not. of Mot. Ex. 12). According to Crowe, he stayed in Bellevue for three days (Crowe EBT 105). When asked about the records from Bellevue which do not show a dislocation or fracture, he denied being told that fact or remembering it (Crowe EBT 91).

In the later evening, because Nataadiningrat was bothered by having been told to change part of his report, he went to the LoFaso apartment building and used the intercom to tell Ms. LoFaso, anonymously, that Crowe was a police officer (Nataadiningrat EBT 65-66). Ms. LoFaso told her husband that she received two anonymous calls made from the lobby intercom stating that the man who attacked her husband had a badge and that the police and guards were making plans to hurt her husband (Pl. Aff. in Opp. Ex. 16, EBT of Evelyn LoFaso [hereinafter E. LoFaso EBT], 47-48, 50, 53). She learned the caller's identity about a year later when Officer Nataadiningrat identified himself to her on the street, and told her how he had been pressured to change his report (E. LoFaso EBT 54, 56).

After LoFaso was treated at the hospital, he was taken to the police precinct where he was

told that he was being arrested for hitting a police officer (LoFaso EBT 119, 123-124, 130). He learned then that Crowe claimed a dislocated or a broken jaw (LoFaso EBT 126). LoFaso was charged with assault in the second degree, a class D felony (LoFaso EBT 245-246). Eventually he was arraigned and released on his own recognizance after having been held in custody pre-arraignment (Ver. Compl. ¶ 83).

Crowe was also arrested. However, he was charged with assault in the third degree, a class A misdemeanor and issued a Desk Appearance Ticket (Crowe EBT 106; Pl. Not. of Mot., Fitzgerald Aff. ¶ 35; Ex. 9 [NYPD Complaint Report and DAT]). The NYPD immediately began an internal investigation into Crowe's conduct. On March 17, 1999, the NYPD issued disciplinary Charges and Specifications against Crowe (Pl. Not. of Mot. Ex. 13). The charges stated, in sum, that Crowe "did wrongfully cause physical injury to person known to this Department, to wit: did strike said person in the face, resulting in said person requiring eight stitches to the upper lip." He was charged with Assault in the Third Degree (PL § 120.00) and Prohibited Conduct (P.G. #104-01, p. 3, para. 4, Code # 08). He was suspended from duty for eight days (Crowe EBT 117, 119).

In August 1999, the New York County District Attorney's office dropped the criminal charges against both LoFaso and Crowe (Pl. Not. of Mot., Fitzgerald Aff. ¶ 37).

On April 18, 2000, at an informal police department conference, Crowe agreed to plead guilty to the administrative charges (Pl. Not. of Mot. Ex. 13, Stipulated Agreement). According to terms of the stipulation, Crowe acknowledged that he was entitled to a Disciplinary Hearing with its rights of representation, confronting of witnesses, and appeal, and understood that it would be recommended that the Police Commissioner penalize him with eight days suspension

and loss of two vacation days. He “fully understood” the terms of the plea and penalty and had discussed their ramifications with his attorney, and “accept[ed] said decision, and as a condition of accepting such decision of the Police Commissioner, [he] hereby waive[d] any and all rights granted to [him] under all applicable laws of the City and State of New York and acknowledge[d] that this acceptance is the same as a finding of guilt after a hearing.” He further admitted that the agreement was “executed voluntarily without duress or coercion, expressed or implied.” The Police Commissioner approved the penalty on June 6, 2000.

According to the testimony of Ms. LoFaso, she and her husband have found it uncomfortable to walk through Stuyvesant Town as many people know her husband had been arrested for assaulting a police officer (E. LoFaso EBT 59). Because of this incident, there has been “somewhat of a rift” between the couple and she and her husband have less frequent sexual relations than before the incident (E. LoFaso EBT 36, 37).

LoFaso contends in part that the police investigation was tainted. According to the testimony, Nataadiningrat told the Assistant District Attorney that he had been asked to change his incident report, and explained that the report then in the possession of the District Attorney’s office was not that which he had prepared but rather a typed version with less information (Nataadiningrat EBT 67-69).<sup>2</sup> However, according to Herkenham, the entire incident report as

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<sup>2</sup>At Nataadiningrat’s second deposition in 2006, he was shown the handwritten incident report signed by him and noted that his description of the incident as an “assault,” had been crossed out in red ink and the word “harassment” had been substituted (Pl. Not. of Mot. Ex. 15, 2006 EBT of Supta Nataadiningrat, 130, 133). He stated that his report might have been two pages, rather than the one produced at his deposition (Nataadiningrat 2006 EBT 137, 138). The second page would have contained the information about Crowe’s statements, although he admitted that by describing Crowe’s statements on the second page, the events were not set forth in their proper narrative order (Nataadiningrat 2006 EBT 165).

documented by the Met Life security force was turned over to the NYPD (Herkenham EBT 82). At Herkenham's deposition, he was shown a typed copy of the incident report for this occurrence, which stated at the bottom that it had been written by Officer Nataadiningrat, although unsigned (Herkenham EBT 62-63). He agreed there were times when he would return a report to an officer to correct what appeared to be a discrepancy or error (Herkenham EBT 67-68). He also testified about a typed synopsis of the incident. He explained that a synopsis was made only when an incident was "unusual" or concerned a continuing investigation (Herkenham EBT 65). This synopsis described the incident as a "dispute" that "resulted in fisticuffs," with LoFaso suffering a "mouth laceration" and Crowe a "broken jaw." (Pl. Not. of Mot. Ex. 20). It stated that Crowe "received a broken jaw from Mr. Lofaso as a result of the altercation. It has been alleged that Mr. Lofaso is trained in one of the martial arts." The synopsis concluded that none of the security officers gave false or misleading statements to the police.

An affidavit proffered by plaintiffs, written by Robert McKenna, then the Met Life Chief of Security at Stuyvesant Town-Peter Cooper Village (McKenna Aff. in Opp. ¶ 3), offers a response to certain of Herkenham's deposition testimony. McKenna recalls that on about March 17, 1999, Herkenham and Grace each informed him that there had been a fight between two tenants, and that LoFaso was a black belt in one of the martial arts and had "sucker"-kicked Crowe, that LoFaso had suffered a scraped lip which he probably got from a fall, and that Crowe had sustained a broken or dislocated jaw (McKenna Aff. in Opp. ¶ 27-29). His two reporting officers did not tell him items such as Nataadiningrat's version of the events or that his version of the report was allegedly altered, or that LoFaso's lip was lacerated (McKenna Aff. in Opp. ¶ 31). McKenna himself changed Nataadiningrat's incident report to the extent of changing "assault" to

“harassment,” based on what he had been told by Herkenham and Grace (McKenna Aff. in Opp. ¶ 33).

McKenna’s affidavit states that the existence of three incident reports, the handwritten one by Security Officer Nataadiningrat that he himself stamped, and two others, both typewritten and unsigned or signed by other officers, one on a form that is slightly different in format, was unprecedented (McKenna Aff. ¶¶ 48-59). He affirms that he, not Herkenham, was responsible for reviewing incident reports, and notes that the synopsis sets forth the allegations solely as told to him by Herkenham and Grace (McKenna Aff. ¶¶ 63-64). McKenna strongly suggests that Herkenham improperly took over the coordinating the investigation of this incident with the police and the District Attorney’s office, and failed to provide a complete and accurate report to the law enforcement authorities and to the supervisors (McKenna Aff. ¶¶ 65-68).

#### *The Complaint*

Plaintiffs commenced this civil suit on March 9, 2000 with a complaint alleging 14 causes of action (Pl. Not. of Mot. Ex. 1). As to defendant Met Life, plaintiffs allege that it failed in its duty to protect LoFaso from the assault (Ver. Compl. ¶ 44). They allege that Met Life had warranted to maintain the safety and security of the housing development, including the playgrounds (Ver. Compl. ¶ 40) and that this duty included protecting residents from criminal and tortious acts, as well as ensuring proper investigations of such actions, and proper coordination and interaction with law enforcement authorities (Ver. Compl. ¶ 43). They allege that the officers breached the contract between Met Life and plaintiffs when they provided false or incomplete information to the police (Ver. Compl. ¶ 62). They further allege that Met Life and its security force failed to adequately screen, hire, train, supervise, or discipline their security

officers in connection with the investigation, and that the officers' personal animus against LoFaso or their desire to protect friends or police officers improperly motivated them to cause LoFaso's false arrest (Ver. Compl. ¶ 112). They also allege that the police and the security guards conspired to punish LoFaso for seeking to have Crowe arrested (Ver. Compl. ¶¶ 93, 95).

As against co-defendant Crowe, plaintiffs allege assault and battery, false arrest, false imprisonment, intentional infliction of emotional distress, prima facie tort, violation of Constitutional rights, and improper influence by Crowe of his fellow police officers and the Met Life security guards to cooperate in bringing false charges against LoFaso.

In addition to his facial injuries, LoFaso has suffered mental and emotional distress, humiliation, sleepless nights, nervousness, and was held up to ridicule and scorn in his community (Ver. Compl. ¶¶ 33, 36, 90, 97). Because of the psychological trauma suffered by LoFaso, his wife, co-plaintiff Evelyn LoFaso, has been deprived of the comfort, services, companionship, and society of her husband (Ver. Compl. ¶¶ 124-126).

#### *Discussion*

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]).

The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]). It is not the court's function to assess credibility (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997], citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Where the movant meets its burden of producing sufficient admissible proof, the burden shifts to the opposing party to submit proof in admissible

form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (See, *Thanasoulis v National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1<sup>st</sup> Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, and accusations (*Zuckerman v City of New York*, 49 NY2d 557, 577 [1980] ). Unsubstantiated allegations are also insufficient (*Id.*).

Met Life's Motion for Summary Judgment (Sequence Number 004)

Met Life moves for summary judgment in its favor on the causes of action asserted against it, some of which are also brought against all the defendants. These include: breach of contract for Met Life's failure to protect plaintiff from the assault and for giving false and misleading information to the responding police officers (Third and Fourth); stating falsely and maliciously that plaintiff had assaulted and injured Crowe (Fifth); false arrest and malicious prosecution (Sixth and Seventh); conspiracy to prosecute plaintiff and to protect Crowe (Eighth); intentional infliction of emotional distress (Ninth); negligent hiring and training (Twelfth); and loss of consortium (Fourteenth).

Plaintiffs oppose the motion. The City of New York adopts the plaintiffs' opposition as its own to the extent it does not otherwise implicate the City as a liable party (Kalnitzky Aff. in Opp. ¶ 2).

1. The Third and Fourth Causes of Action: Breach of Contract

Plaintiffs allege that Met Life breached their contract. The owner or landlord of a housing development, has a legal duty, codified in Real Property Law § 235-b, to "warrant that the premises so leased or rented and all areas used in connection therewith in common with other

tenants or residents are fit for human habitation and . . . that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their . . . safety.” (RPL § 235-b [1]). See *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 (1998) (landlords have a “common-law duty to take minimal precautions to protect tenants from foreseeable harm,” including a third party's foreseeable criminal conduct, and citing *Jacqueline S. v City of New York*, 81 NY2d 288, 293-294, *rearg denied* 82 NY2d 749 [1993]); *610 W. 142nd St. Owners Corp. v Braxton*, 137 Misc 2d 567, 568 (Civ Ct, NY County 1987), *mod. on other grounds* 140 Misc. 2d 826, 827 (App. Term, 1st Dept. 1988) (landlord's failure to adequately protect its tenants' security is a breach of the warranty of habitability).

However, a tenant may recover damages only on a showing that the landlord's negligent conduct was a proximate cause of the injury (*Burgos*, 92 NY2d at 548, citing *Miller v State of New York*, 62 NY2d 506, 509 [1984]). Thus, the plaintiffs must “raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries” (*see, Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001] [holding that when moving for summary judgment as against the landlord, plaintiff need only raise triable issue of fact regarding the conduct and proximate causation]).

Here, plaintiffs have raised no issue of fact that would tend to support a claim that Met Life or its security staff were in any way the proximate cause of the incident between Crowe and LoFaso. Accordingly, Met Life's motion to dismiss the third cause of action as against it is granted.

The fourth cause of action also claims breach of contract based on the security officers' alleged providing of false or misleading information to the police in contradistinction to the

policies and procedures set forth in their own security manual. Plaintiffs allege that this manual, in effect, forms a contract with the tenants at Stuyvesant Town-Peter Cooper Village. Their argument has little substance, however, as it has been held that a party may not be held liable to another for failing to follow a voluntary self-imposed policy (*Boehme v A.P.P.L.E.*, 298 AD2d 540 [2d Dept. 2002]). The Met Life internal rules and procedures do not form the basis to impute a contract with plaintiffs. Met Life's motion to dismiss the fourth cause of action as against it is granted.

## 2. The Fifth Cause of Action: Defamation

The fifth cause of action alleges defamation. The elements of defamation are the making of a false statement which is published without privilege or authorization to a third party, and which constitutes fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (*Dillon v City of New York*, 261 AD2d 34, 38 [1<sup>st</sup> Dept. 1999], citing Restatement [Second] of Torts § 558; *Foster v Churchill*, 87 NY2d 744, 751 [1996]). As noted in *Dillon*, the CPLR requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." (CPLR 3016 [a]). In addition, the complaint must also allege the time, place, and manner of the false statement and specify to whom it was made (*Dillon*, at 38, citing *Arsenault v Forquer*, 197 AD2d 554 [2d Dept. 1993]; *Vardi v Mutual Life Ins. Co.*, 136 AD2d 453 [1<sup>st</sup> Dept. 1998]).

Plaintiffs argue that the arrest and prosecution of LoFaso was published by Herkenham and Grace and other Met Life staffers throughout the housing development, noting Ms. LoFaso's deposition testimony that people believed her husband had supposedly assaulted a police officer (Pl. Memo of Law in Opp., p. 14). They argue that the claim that LoFaso assaulted a police

officer is a statement concerning a serious offense and that defendants have committed slander per se (*see, Liberman v Gelstein*, 80 NY2d 429, 435 [1992] [“slander per se’ [ ] consist[s] of statements (i) charging plaintiff with a serious crime”]).

Plaintiffs do not detail the particular words at issue in the complaint. Even were the court to construe that, “LoFaso was arrested for assaulting a police officer” was the statement at issue, it cannot be said that this is a false statement. LoFaso was, in fact, arrested for assaulting Crowe. Unlike *Kotowski v Hadley*, 38 AD3d 499 (2d Dept. 2007), where a series of emails containing allegedly defamatory statements was sent to tenants and shareholders in an apartment complex and made at various shareholder meetings, in the present action, there is no indication of the means the statements were published, or by whom and to whom. Generalized awareness of a statement is not a sufficient basis to establish a claim of defamation. Accordingly, Met Life’s motion to dismiss the fifth cause of action as against it is granted.

### 3. The Sixth Cause of Action: False Arrest<sup>3</sup>

The sixth cause of action is for false arrest or false imprisonment. “One commits a false arrest if he or she intentionally and without the right to do so arrests – or takes into custody – a person who is aware of such arrest and does not consent to it.” (NY Pattern Jury Instructions [PJI] 3:5). The claim requires that the plaintiff establish that the defendant intended to confine, and is not established merely upon a showing that the defendant’s words or actions caused a

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<sup>3</sup>Plaintiffs argue in their opposition memo to Met Life’s motion for summary judgment, that the claims of false arrest/false imprisonment and malicious prosecution constitute violations of LoFaso’s Fourth Amendment Rights under the U.S. Constitution (Pl. Memo of Law at 12-14). The complaint, however, does not contain a cause of action brought pursuant to 42 U.S.C. § 1983, and plaintiffs may not add the claim by making an argument herein concerning its merits.

police officer to confine the plaintiff (*see Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1<sup>st</sup> Dept. 2005]). Thus, where a civilian complainant furnishes information or identifies a plaintiff as the perpetrator of a crime to law enforcement authorities, who then freely exercise their own judgment as to whether an arrest should be made and criminal charges filed, the complainant will not be held liable for false arrest or malicious prosecution (*Du Chateau v Metro-North Comm. RR. Co.*, 253 AD2d 128, 131 [1<sup>st</sup> Dept. 1999]). As explained in *Mesiti v Wegman*, 307 AD2d 339 (2d Dept. 2003), a plaintiff must demonstrate that the defendant “played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act” (307 AD2d at 340, quoting *Du Chateau v Metro-North Commuter R. R. Co.*, *supra* at 131), and also that the defendant affirmatively induced the officer to act, such as by “taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition” (*Mesiti*, at 340, quoting 59 NY Jur 2d, False Imprisonment and Malicious Prosecution § 37).

Plaintiffs have set forth allegations that Sandy LoFaso was arrested although he was the victim of the assault. Met Life asserts that the arrest was made after the police conducted an initial investigation, including speaking with LoFaso, Crowe, and the Met Life officers, and that the police ultimately determined, based on Crowe’s allegation of having been assaulted, that there was probable cause to make the arrest. The decision to arrest LoFaso ultimately rested with the police officers summoned to the scene. While there are disputed issues of facts regarding what the particular officers of Met Life said or did, nothing in the evidence attributed to them would rise to the level of importuning the police such that liability can be attached for the police decision to arrest LoFaso. Accordingly, Met Life’s motion for summary judgment and dismissal

of the sixth cause of action is granted.

4. The Seventh Cause of Action: Malicious Prosecution

The seventh cause of action is for malicious prosecution. In order to state a cause of action for malicious civil prosecution, the claimant must allege (1) the institution of an action or proceeding by the other party, (2) malice as the motivating factor, (3) lack of probable cause, (4) and termination of the proceeding in favor of the claimant (*Butler v Ratner*, 210 AD2d 691, 693 [3d Dept. 1994]; *app. denied*, 85 NY2d 924 [1995]). There is also a requirement to show special injury (*Engel v CBS, Inc.*, 93 NY2d 195, 204-205 [1999]). Plaintiffs sufficiently establish the institution of a proceeding and termination in their favor. Whether there was probable cause for LoFaso's arrest is a disputed question of fact, and probable cause is a jury question when the facts are in dispute (*Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 529 [1991]). However, there is nothing to suggest that the Met Life employees were the source of probable cause inasmuch as they were not eyewitnesses.

In addition, plaintiffs have not sufficiently shown the element of malice. Malice may be shown by a reckless or grossly negligent disregard for a plaintiff's rights (*Ramos v New York*, 285 AD2d 284, 300-301 [1<sup>st</sup> Dept. 2001]), including when a defendant makes a false charge (*Dennis v Ryan*, 65 NY 385, 389 [1875]), or withholds material information (*Ramos v New York*, 285 AD2d at 299-300). Malice can be proved by circumstantial evidence (*Dean v Kochendorder*, 237 NY 384, 389 [1924]), and can be inferred by want of probable cause (*Martin v Albany*, 42 NY2d 13, 17 [1977]). Here, while there may be questions as to whether the police acted reasonably when confronted with the facts as testified to by LoFaso and Crowe and the various Met Life witnesses, it cannot be said that Met Life acted with a reckless disregard for

LoFaso's rights. Met Life's motion to dismiss the seventh cause of action is granted.

5. The Eighth Cause of Action: Conspiracy

In New York, there is no independent tort of conspiracy. "The actionable wrong lies in the commission of a tortious act, or a legal one by wrongful means, but never upon the agreement to commit the prohibited act standing alone" (*Hickey v Travelers Ins. Co.*, 158 AD2d 112, 118 [2d Dept. 1990], quoting *Cuker Indus. v Crow Constr. Co.*, 6 AD2d 415, 417 [1<sup>st</sup> Dept. 1958]). Plaintiffs' allegations that the defendants conspired to have LoFaso arrested and to cover up Crowe's liability are properly the basis of other causes of action. Accordingly Met Life's motion to dismiss the eighth cause of action must be granted.

6. Ninth Cause of Action: Intentional Infliction of Emotional Distress

The elements of a claim for intentional infliction of emotional distress are: (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 injury; and (4) severe emotional distress (NY PJI 3:6, Comment, p. 57, citing *Howell v New York Post Co., Inc.*, 81 NY2d 115 [1993]). The element of outrageous conduct is difficult to satisfy (*see, Seltzer v Bayer*, 272 AD2d 263, 264-265 [1<sup>st</sup> Dept. 2000]). It is in the first instance, a question for the court (*Rocco v Smithtown*, 229 AD2d 1034, 1035 [4<sup>th</sup> Dept.], *app. dismissed* 88 NY2d 1065 [1996]). Here, even accepting LoFaso's version of the facts, the actions taken or not taken by Met Life's security officers did not rise to the level of outrageous conduct sufficient to support a finding of intentional infliction of emotional distress. Accordingly, Met Life's motion for summary judgment and dismissal of the ninth cause of action is granted.

7. The Twelfth Cause of Action: Negligent Hiring and Supervision

The twelfth cause of action claims that Met Life failed to properly hire, train, and supervise its security staff. An employer may be “required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee’s propensity for the sort of behavior which caused the injured party’s harm.” (*Detone v Bullit Courier Serv., Inc.*, 140 AD2d 278, 279 [1<sup>st</sup> Dept.], *lv denied* 73 NY2d 702 [1988] [citations omitted]). An employer’s negligence can consist of having placed the employee in a position to cause a foreseeable harm which would have likely been spared the injured party had there been reasonable care taken in making decisions respecting hiring and retention (*Detone*, at 279). Here, plaintiffs do not offer any evidence to show that Met Life should have foreseen that any of its employees had a propensity to engage in the actions alleged, and accordingly, Met Life’s motion for summary judgment and dismissal of the twelfth cause of action must be granted.

8. The Fourteenth Cause of Action: Loss of Consortium

The branch of Met Life’s motion to dismiss the fourteenth cause of action alleging loss of consortium claim as against it is granted inasmuch as Lofaso’s claims against Met Life have been dismissed.

Plaintiff’s Cross-Motion to Amend their Reply (Sequence Number 004)

Plaintiffs move pursuant to CPLR 2215 and 3025 to amend their reply to add the affirmative defense of collateral estoppel or issue preclusion. They seek to amend their complaint so as to have the proper basis for their motion to dismiss Crowe’s answer and counterclaims, which is the motion which bears sequence number 005 .

Plaintiffs cross-motion is procedurally incorrect inasmuch as a cross-motion is made

when one seeks relief against the moving party, here, Met Life (CPLR 2215). In any event, collateral estoppel is an independent ground for dismissal under CPLR 3211 (a) (5), and need not be pleaded as an affirmative defense in the answer (Siegel, N.Y. Practice, 4<sup>th</sup> ed. § 223).

Accordingly, plaintiffs' so-called cross-motion is denied as academic.

Plaintiffs' Motion for Summary Judgment (Sequence Number 005)

Plaintiffs move for summary judgment as against defendant Brendan Crowe. Crowe's Verified Answer asserts 12 affirmative defenses and 6 counterclaims (Pl. Not. of Mot. Ex. 2). His affirmative defenses include culpability; assumption of risk; self-defense; qualified immunity as a police officer, and justification, lack of intent, and absence of malice. The counterclaims are: (1) assault (2) false arrest; (3) libel and slander; (4) malicious prosecution; (5) intentional infliction of emotional distress; and (6) negligence.

Plaintiffs argue that Crowe should be precluded from offering his defenses or counterclaims because the issues raised were previously decided in the NYPD administrative proceeding. In the course of those proceedings, Crowe executed a April 18, 2000 stipulation in which he admitted acts constituting an assault in the third degree. Plaintiffs contend that Crowe's defenses and counterclaims were necessarily addressed during the course of crafting his stipulation since, under criminal law principles, a defendant is entitled to seek to interpose a claim of self-defense or justification and where the evidence sufficiently supports a claimed defense, the defense should be considered (see CPL § 300.10 [2]; *see also, People v Watts*, 57 NY2d 299, 301 [1982]). The defense of justification, codified at CPL § 35.15, provides that persons may use physical force upon another when they reasonably believes it is necessary to defend themselves from what they reasonably believe is the use or imminent use of unlawful

physical force by another person. A claim of self-defense cannot be raised where the other's conduct was provoked by the actor with intent to cause physical injury; or where the actor was the initial aggressor.<sup>4</sup> Plaintiffs argue that if Crowe could have pleaded justification to mitigate the charge of assault, he would have, and that as he pleaded guilty at the disciplinary hearing and waived his rights, it means that there was no basis for a claim of self-defense.

Issue preclusion prohibits a party from relitigating an issue which was decided against it in a prior action (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]). When a party seeks to invoke the doctrine, it must establish that the identical issue was necessarily decided in the prior action and that it is decisive in the present action (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). Where the parties apparently differ in the two actions, the party seeking issue preclusion must show that there is nonetheless an identity of issues (*see, Gerson-Ogden, Inc. v Tempo Communications*, 85 AD2d 550, 551 [1<sup>st</sup> Dept. 1980]). The party opposing application of the doctrine must establish that there was not a full and fair opportunity to litigate the issue in the prior proceeding (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). Among the specific factors to be considered are the nature of the forum, the importance of the claim in the prior litigation or proceeding, the incentive and initiative to litigate, the actual extent of litigation, counsel's competence and expertise, whether there is new evidence, the differences in the applicable law, and the foreseeability of future litigation (*Ryan v*

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<sup>4</sup>According to the instructions given to civil jurors when the charge is battery, where a defendant raises justification as a defense, that defendant has the burden of establishing by a fair preponderance of the credible evidence, that he or she reasonably believed the plaintiff was attacking or about to attack him or her and that the force used to prevent injury was reasonable under the circumstances. (PJI 3:3).

*New York Tel. Co.*, 62 NY2d 494, 491 [1984]).

The “full and fair opportunity to litigate” requires establishing that the issue in question was actually litigated and determined in the prior action (*Singleton Mgt. v Compere*, 243 AD2d 213, 217 [1<sup>st</sup> Dept. 1998]; *Matter of Halyalkar v Board of Regents*, 72 NY2d 261, 268 [1988]). The issue must have been material to the first action or proceeding and essential to the decision rendered therein (*Ryan v New York Tel. Co.*, 62 NY2d at 500). When applying these principles, the Court of Appeals has cautioned that they “are not to be mechanically applied as a mere checklist. Collateral estoppel is an elastic doctrine.” (*Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1988]).

The issue of whether the administrative proceeding has collateral estoppel effect requires the court to apply the test articulated in the Court of Appeals case, *Jeffreys v Griffin*, 1 NY3d 34 (2003), *aff'g* 301 AD2d 232 (1<sup>st</sup> Dept. 2002). The Court examined the type of administrative proceeding at issue, the issues in question, and the realities of the litigation, to determine whether issue preclusion was appropriate. A plea of guilty to a criminal charge encompassing the elements of battery will preclude the defendant from litigating the issue of liability at the subsequent civil trial (*Lili B. v Henry F.*, 235 AD2d 512 [2d Dept. 1997]; *see, D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 668-669 [1990]).

Under New York law, where it is found that a defendant intentionally caused an offensive bodily contact upon the plaintiff, the defendant will be found to have committed a battery (NY PJI 3:3). Where a defendant sufficiently establishes that he or she was acting in self-defense by establishing that he or she reasonably believed that the plaintiff was attacking or about to attack him or her, and that the force used by the defendant to prevent his or her own injury was

reasonable, then the defendant will not be found liable for battery (PJI 3:3). Thus, in *Captain v Hamilton*, 178 AD2d 938 (4<sup>th</sup> Dept. 1991), the court granted summary judgment to the plaintiff and dismissed the defendant's affirmative defense of justification based on collateral estoppel, reasoning that he should be precluded from relitigating the issue of his own liability based upon his prior conviction of reckless assault in the third degree. However, the court also found that there were issues of fact regarding the plaintiff's culpability, and thus denied the plaintiff's motion for summary judgment on that issue (178 AD2d at 938, 939).

Given the explicit statement in the stipulation signed by Crowe that he pleaded guilty to "all" that was set forth as specification number one in the March 17, 1999 Charges and Specifications, and that he waived "any and all rights" and "acknowledged that this acceptance is the same as a finding of guilt after a hearing," the plaintiffs have sufficiently established that there is a unity of issue as to their claims of assault and battery. Here, where Crowe pleaded guilty to assault, it must also be understood that the question of justification was taken into consideration as a part of the plea. Accordingly, plaintiffs' motion for summary judgment is granted to the extent that Crowe is precluded from offering defenses or counterclaims alleging justification or self-defense. However, as assault in the third degree can encompass both reckless and intentional conduct (cf. Pl § 120.00[1] and [2]), and it is not clear which subsection of the crime was that admitted to by Crowe, there can be no issue preclusion as to his defenses of lack of intent and absence of malice, and his counterclaim of negligence (*see, Captain v Hamilton*, 178 AD2d 938). In addition, the affirmative defense of culpability was not resolved and remains a question of fact. However, the defenses of assumption of risk and qualified immunity as a police officer, were necessarily resolved by the criminal plea and are precluded in this litigation.

Crowe's counterclaims of assault, false arrest, malicious prosecution, libel and slander, and intentional infliction of emotional distress, are also dismissed for the same reason. Thus, remaining in Crowe's answer are his defenses as to culpability, lack of intent, absence of malice, and certain procedural defenses, and the counterclaim asserting negligence.

Accordingly, it is

ORDERED that defendant Met Life's motion for summary judgment and dismissal of the complaint and all cross-claims and counterclaims is granted and the complaint and any cross claims are dismissed as against defendant Met Life only; and it is further

ORDERED that plaintiffs' cross-motion to amend is denied as academic; and it is further

ORDERED that plaintiffs' motion for summary judgment as against defendant Brendan Crowe is granted to the extent that summary judgment is granted as to the first and second causes of action as against Crowe only; and it is further

ORDERED that plaintiffs' motion for summary judgment and dismissal of Crowe's defenses and counterclaims is granted to the extent of dismissing the affirmative defenses of assumption of risk, self-defense, qualified immunity as a police officer, and justification; and dismissing all of the counterclaims except for that sounding in negligence, and is otherwise denied; and those affirmative defenses and counterclaims are severed; and it is further

ORDERED that the parties are to appear as previously scheduled on February 9, 2008 in Mediation-I, Supreme Court, 80 Centre Street.

This constitutes the decision and order of the court.  
Dated: Jan. 11, 2008  
New York, New York

**FILED**  
JAN 30 2008  
NEW YORK  
COUNTY CLERKS OFFICE  
*[Signature]*  
J.S.C.

**HON. PAUL G. FEINMAN**