

Brady v Koby

2009 NY Slip Op 30088(U)

January 12, 2009

Supreme Court, New York County

Docket Number: 106532/08

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 106532/2008

BRADY, JOHN T.

VS.

KOBY, RICHARD

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 106532/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

<u>1, 2</u>
<u>3, 4</u>
<u>5</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-D

Answering Affidavits — Exhibits 1-7

Replying Affidavits + such. A

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached decision
and order.

FILED

JAN 20 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: January 12, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if 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 1

-----X
JOHN T. BRADY and CARLA C. BRADY,

Plaintiffs,

Index No. 106532/08

- against -

RICHARD KOBY,

Defendant:

FILED

JAN 20 2009

CLERK OF SUPREME COURT
NEW YORK

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SHULMAN, J.:

In this action alleging assault, battery, and intentional infliction of emotional distress, plaintiffs move for summary judgment on liability. Defendant cross-moves to compel disclosure.

Plaintiffs, a married couple, and defendant were living in the same cooperative apartment building. Plaintiff John T. Brady ("plaintiff") alleges the following. On July 13, 2007, he left his apartment with his dog to go for a walk. The elevator stopped and defendant exited the elevator. Defendant uttered some expletives having to do with plaintiff's being on the cooperative board. Plaintiff said that defendant needed to get some sleep, and entered the elevator with his dog. The elevator door started to close but defendant prevented it from closing. Defendant entered the elevator and struck plaintiff twice while screaming abusive expletives. The blows forced plaintiff's back against the elevator handrail. Defendant left the elevator and plaintiff continued to the lobby. There, he asked the doorman to call the police, which was done. Plaintiff says that the assault caused injuries to his head and right flank and severe emotional distress.

Defendant does not deny the attack. According to defendant, as he was exiting the elevator, he encountered plaintiff with his dog. Plaintiff said that he would "sic" the dog on defendant. Defendant says that he pushed plaintiff backwards using just the right amount of force to push plaintiff off balance to prevent an attack by plaintiff's dog. He says that he did not strike plaintiff, but rather pushed him twice in the chest.

As evidence of the attack, plaintiff produces a soundless digital video disc (DVD) tape made by the surveillance camera in the elevator. Defendant argues that the DVD should not be considered as evidence, since plaintiff fails to lay a proper foundation for its admissibility. Defendant does not state that the DVD does not show what happened in the elevator. Defendant maintains that Barry Campfield, who provides a supporting affidavit, is not an expert on video surveillance systems and hence cannot competently testify that the system was operating correctly on the relevant date. Defendant points out that Campfield does not describe what activities he undertook on or about that date to determine that the system was operating properly, and that he does not establish a chain of custody.

"Silent witness" is the name given to the kind of automated recording surveillance system which does not require an ever-present operator, such as the system here (see 44 Am Jur Trials, Videotape Evidence § 171, sec. 60 [Westlaw ed, 44 Am Jur Trials 171]). Courts have been reluctant to set up specific requirements for laying a foundation for silent witness evidence, since the context in which the evidence was obtained and its intended use at trial will be different in virtually every case (*id.*). However, as with all evidence, the proponent of silent witness evidence must establish its accuracy and competency. "Thus, certain aspects of the more traditional

authentication requirements applied to photographs and film motion pictures, such as chain of custody or proof that the camera was installed and working correctly, may be necessary to authenticate the item of videotape evidence ..." (*id.*). A videotape "may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*People v Patterson*, 93 NY2d 80, 84 [1999]). The proponent must convince the "court to a relative certainty that the photographic evidence has not been altered in any significant way ..." (44 Am Jur Trials 171, sec. 60; *see also* 16 Am Jur Proof of Facts 3d, Foundation for Contemporaneous Videotape Evidence § 493, sec. 16 [Westlaw ed, 16 AMJUR POF 3d 493]).

Plaintiff's motion attaches an affidavit by Barry Campfield who alleges the following. Campfield has been the resident manager of the cooperative for four years. The security system by which the DVD was made was installed in 2006. Since then, Campfield has operated the system and viewed the security videos. He is in charge of the video system and the custodian of the video records. Making such records for security purposes is in the regular course of business for the cooperative. At the time that this video record was made, the video recording system was operating properly.

Campfield further states that this DVD consists of a simultaneous record of the events that took place in the elevator at the relevant date and time. He compared the DVD with the original video files and determined that they are identical. He states that the DVD is a true and accurate copy of the record of the events that occurred in the elevator on the relevant date.

The person who claims to maintain the video system says that it worked properly on the date this record was made, that the system recorded the interior of the elevator on the relevant date, and that the DVD is a true and accurate copy of the original video files. This court finds that this statement sufficiently lays a foundation for admissibility of the DVD.

The court viewed the DVD. It shows defendant in the elevator. The elevator door opens and defendant exits. Plaintiff and his dog enter the elevator. The door starts to close, defendant puts his hand in the door space preventing closure, comes in the elevator and either strikes or pushes plaintiff. Plaintiff moves back against the elevator wall. Defendant takes a few steps back, then comes forward again, and strikes or pushes plaintiff a second time. Defendant exits the elevator.

To sustain a cause of action for assault, a plaintiff must show that the defendant engaged in physical conduct that placed him or her in imminent apprehension of harmful contact (*Fugazy v Corbetta*, 34 AD3d 728, 729 [2d Dept 2006]). To establish a cause of action for battery, a plaintiff must show that there was intentional and offensive bodily contact (*id.*).

Via his affidavit and the DVD, plaintiff has shown both assault and battery. Defendant claims that his use of force was justified in that he was apprehensive of an attack by plaintiff's dog. In order to establish the defense of justification in a civil battery action, defendant must show that he was under a danger or apparent danger of death or of great bodily harm (*see Barbagallo v Americana Corp.*, 32 AD2d 622, 628 [1st Dept 1969]). Also, the person claiming that self defense justified the attack must have used only the amount of force reasonably necessary to protect himself and no more (*Merzon*

v County of Suffolk, 767 F Supp 432, 448 [ED NY 1991]; *Decker v Werbenec*, 36 Misc 2d 220, 221 [Sup Ct, Ulster County 1962]).

Whatever transpired outside of the elevator in the hall, it was as plaintiff was leaving in the elevator and the elevator door was closing that defendant chose to enter the elevator. Instead of leaving the scene, defendant chose to go back in the elevator and attack plaintiff. These actions do not show that defendant acted to protect himself. Defendant does not show that he was in danger. His defense of self defense thus fails.

Once a plaintiff establishes an assault and battery, a defendant's claim that the plaintiff's words or actions provoked the attack goes to the mitigation of damages (*Pirodsky v Pirodsky*, 179 AD2d 1066, 1067 [4th Dept 1992]). The extent to which each party was responsible for the attack is determined at the same stage as the issue of damages (*id.*; *DeSantis v Manhasset Union Free School Dist.*, 274 AD2d 373 [2d Dept 2000]). Plaintiff's threat that he would sic the dog on defendant, if proven, may reduce the damages, if any, that defendant becomes obligated to pay.

Defendant cross-moves to compel disclosure and opposes the motion on the basis that the parties have not engaged in any discovery. Plaintiffs commenced this action on May 12, 2008. In July 2008, defendant served a notice of examination before trial, interrogatories and a request for the production of documents on plaintiffs' counsel. Defendant's attorney states that the parties scheduled depositions, but that defendant would not proceed with them until the other disclosure requests were fulfilled. Plaintiffs did not respond to the discovery demands and moved for summary judgment on August 19, 2008.

CPLR 3212 (a) provides that a party may move for summary judgment at any time after issue is joined (CPLR 3212 [a]). In practice, parties usually do not make such motions until after they have had some discovery. In this case, as defendant fails to allege anything or to point out anything in the DVD that would raise an issue of fact regarding the attack on plaintiff, disclosure is not needed as to whether the attack took place. Disclosure is needed regarding defendant's claim that plaintiff provoked the attack and regarding plaintiff's alleged injuries. Plaintiffs should answer defendant's discovery requests, and the parties should proceed with depositions. At this point, the court sees no need to compel disclosure. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on liability is granted; and it is further

ORDERED that the remainder of the action shall continue; and it is further

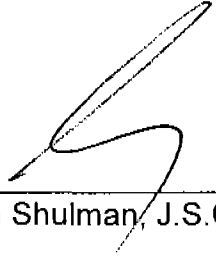
ORDERED that defendant's cross motion to compel disclosure is denied.

Counsel for the parties are directed to appear for a preliminary conference on February 10, 2009 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

The foregoing is the decision and order of this court. A copy of this decision and order has been sent to counsel for the parties.

Dated: January 12, 2009

FILED
 JAN 20 2009
 COUNTY CLERK'S OFFICE
 NEW YORK


 Hon. Martin Shulman, J.S.C.