Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

DWAYNE BUCKLE,	Index No. 18933/07
Plaintiff, -against-	Motion Date November 12, 2008
CHENESE LOYAL, LANIA LOYAL, KHAMIYSHA COATES, PATREESE JOHNSON, VENICE BROWN, RENATA HILL AND TERRAIN DANDRIDGE,	Motion Cal. No. 7
Defendants.	Motion Seq. No. 2
	Conf. Date January 27, 2009

	PAPERS NUMBERED
Notice of Motion-Affid-Exhib..	1-6
Answering Affid-Exhib.....	7-10
Memo of Law.....	11-12

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on August 18, 2006 due to an assault upon him on Sixth Avenue, at the intersection of Third Street, in the County of New York, City and State of New York.

Defendant Terrain Dandridge (defendant) moves for an order pursuant to CPLR 3211(a)(1) and 3211(a)(7) dismissing the complaint as against her.

Defendant asserts that the complaint must be dismissed as against her on the grounds that she was acquitted at trial of all but one criminal charge and the Appellate Division, First Department, reversed her single conviction and dismissed the indictment as it pertained to her. People v Hill, 2008 WL2445651. The State of New York has not appealed the decision. Defendant argues that the Appellate

Division made factual findings concerning her involvement in the underlying incident providing her a defense upon documentary evidence. In particular, the court found that: under no view of the evidence could the jury have found that defendant performed an act that directly caused serious physical injury to plaintiff; she did not have or act with the mental culpability necessary to sustain the indictment, much less the conviction for a gang assault; she was only involved in the altercation in a limited manner; and her conviction was against the weight of the evidence.

Although served with the motion, none of the other defendants have submitted any papers in opposition to the motion.

Plaintiff opposes the motion and asserts that the findings of the Appellate Division only address evidence presented at the criminal trial. No discovery has taken place in this civil case, to wit, no depositions have been conducted and no bills of particulars or documents have been exchanged. Questions of fact may be raised by evidence in this case with respect to defendant's liability. Absent discovery in this action, there is no way to determine what evidence may be considered in evaluating the facts which may be different from that revealed in the criminal trial.

Plaintiff's counsel asserts that defendant is moving to dismiss this civil action based solely on the findings of the Appellate Division in the criminal action. Defense counsel has acknowledged the general rule that does not hold criminal acquittal determinations as preclusive on the facts of civil litigation arising out of the same set of facts. The Appellate Division decision only addresses the evidence presented regarding the charges of gang assault and concludes that defendant did not aid another member of the group to cause physical injury. This civil action alleges that said defendant individually attacked plaintiff with the intent of inflicting offensive bodily contact and causing plaintiff to suffer apprehension of immediate and harmful contact. In addition, the complaint alleges that defendant's acts were extreme in degree, outrageous in character, beyond the possible bounds of decency and intolerable in a civilized community so as to cause plaintiff emotional harm. Said defendant was not charged with intentional infliction of emotional distress in the criminal trial. The claims for assault and battery may have been before the criminal court but any evidence presented thereon may be different from the evidence to be presented

in this action. No affidavit from defendant has been submitted. Plaintiff has a right to an examination before trial of said defendant. An affidavit by the plaintiff is submitted in opposition to the motion.

In reply, defendant argues that the cases cited by plaintiff are inapplicable to this motion as they relate to the summary judgment standard and not this CPLR 3211 motion to dismiss. Defendant was acquitted of all individual charges but the gang assault which was later reversed by the Appellate Division and the indictment dismissed as against her. The complaint should be dismissed because no significant dispute exists as to a material fact alleged as defendant did not participate in or cause plaintiff's injuries; the documentary evidence utterly refutes plaintiff's factual allegations establishing a defense as a matter of law; plaintiff's affidavit contains mere conclusory statements which do not state a cause of action upon which relief can be granted, and discovery is not necessary as plaintiff has failed to show facts within defendant's sole knowledge or possession necessary to oppose the motion.

The motion by defendant Dandridge for an order pursuant to CPLR 3211(a)(1) and 3211(a)(7) dismissing the complaint is denied.

The plaintiff's complaint alleges, in pertinent part, as a first cause of action that: defendant was the member of a gang which, on August 18, 2006, used foul language, harassed, intimidated and threatened to strike plaintiff; defendant punched, attacked and stabbed plaintiff; defendant intended to cause and did cause a harmful contact with plaintiff; defendant committed a gang assault and battery on plaintiff; defendant was convicted of a gang assault on plaintiff; said occurrence was caused by reason of the recklessness, carelessness, intended acts, battery and negligent acts of the defendant; and plaintiff was severely injured, sustained severe nervous shock, mental anguish, great physical pain and emotional upset. The second cause of action alleged an attack with the intention of inflicting offensive bodily contact and the intent to cause and causing apprehension of an immediate and harmful contact. The third cause of action alleged that said acts were beyond all possible bounds of decency, atrocious and utterly intolerable in a civilized community, extreme and outrageous in character.

In the criminal action, defendant was acquitted of all charges except for gang assault in the second degree which conviction was reversed by the Appellate Division, First Department. With respect thereto, the court noted: "A person is guilty of gang assault in the second degree when, with intent to cause 'physical injury to another person and when aided by two or more other persons actually present, [s]he causes serious physical injury to such person' (Penal Law § 120-06). Under no view of the evidence could the jury have found that either of these defendants performed an act that directly caused serious physical injury, since the only serious injury suffered by the complainant was the stab wound inflicted by another co-defendant. In order to find these defendants guilty of gang assault, the jury would have had to find that each defendant, acting with the mental culpability required for the commission of the crime, solicited, requested, commanded, importuned or intentionally aided the knife-wielding co-defendant to engage in the conduct constituting the offense (Penal Law § 20.00). Viewing the evidence in the light most favorable to the prosecution, we conclude there was insufficient evidence that defendant Dandridge's limited involvement in the altercation was intended to aid, or actually aided, any other member of the group to cause physical injury. Even if we were to find that the evidence was legally sufficient, we would nevertheless find that Dandridge's conviction was against the weight of the evidence (People v. Danielson 9 NY3d 342 [2007])."

As noted by the court in Turkat v. Lalezarian Developers, Inc., 52 AD3d 595: "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory (see Town of Riverhead v. County of Suffolk, 39 AD3d 537, 539, 834 NYS2d 219; Hartman v. Morganstern, 28 AD3d 423, 424, 814 NYS2d 169). A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence that forms the basis of the defense is such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims (see Saxony Ice Co., Div. Of Springfield Ice Co., Inc. v. Ultimate Energy Rest. Corp., 27 AD3d 445, 446, 810 NYS2d 344), which is not the case here."

On the papers submitted on this motion, it cannot be said that the complaint fails to state a cause of action or that the documentary evidence is sufficient for a CPLR 3211(a)(1) dismissal.

As noted by the court in Reed v. State, 78 NY2d 1: "An acquittal of criminal charges is not equivalent to a finding of innocence. On the contrary, 'an acquittal on any basis which does not involve the defendant bearing part of the burden of proof merely stands for the proposition that the People have failed to meet the higher standard of proof required at the criminal proceeding.' (People ex rel. Matthews v. New York State Div. Of Parole, 58 NY2d 196, 203, 460 NYS2d 746, 447 NE2d 689). An acquittal may prevent relitigation of issues necessarily resolved in the defendant's favor at a subsequent criminal proceeding because that higher standard of proof applies at the subsequent proceeding (People v. Acevedo, 69 NY2d 478, 484-486, 515 NYS2d 753, 508 NE2d 665; People v. Goodman, 69 NY2d 32, 38, 511 NYS2d 565, 503 NE2d 996). However, where the subsequent proceeding is a civil one, involving a lower standard than proof beyond a reasonable doubt, an acquittal is not proof of innocence. These principles apply regardless of the nature of the subsequent civil proceeding. For example, the alleged victim of an assault may maintain a personal injury action against the defendant even though criminal charges based on the assault have been dismissed (Kalra v. Kalra, 149 AD2d 409, 410-411, 539 NYS2d 761)."

Accordingly, the motion by defendant Terrain Dandridge is denied.

Dated:July 16,2009

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HON. DAVID ELLIOT