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

PRESENT: **JUSTICE DORIS LING-COHAN** PART 36

Justice

Drew Pascarella,

- v -

Erik Zarrella.

INDEX NO. 115324/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for partial summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided to the extent set forth in the attached memorandum decision.

PC 3/19/10 @ 9:30 AM.

Dated: 2/19/10

J.S.C.
JUSTICE DORIS LING-COHAN

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 36

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DREW PASCARELLA,

Plaintiff,

-against-

ERIK ZARRELLA,

Defendant.

Index No. 115324/08

Motion Seq. No.: 001

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DORIS LING-COHAN, J.:

This is a personal injury action, which arises out of an alleged assault that took place on or about November 18, 2007 at a bar known as "Down the Hatch" located at 179 West 4th Street, New York, New York. Plaintiff Drew Pascarella alleges he was assaulted by defendant Erik Zarrella. As a result of the altercation, plaintiff allegedly sustained injuries, which required surgery.

The New York City Police Department was called to the scene, at which time defendant was arrested. Defendant was charged with, and thereafter tried and convicted of, violating New York Penal Law § 120.00, assault in the third degree. *See* Fredrick A. Schulman Affirmation, Exh C.

Plaintiff now moves: (1) for partial summary judgment in his favor, pursuant to CPLR 3212(e), on the issue of liability; (2) to dismiss defendant's affirmative defenses; and (3) to set this case down for an immediate inquest and assessment of damages. Based on the following, plaintiff's motion is denied in part and granted in part, as set forth below.

It is well settled that the proponent of a summary judgment motion must make a *prima*

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action. *See Zuckerman*, 49 NY2d at 562. "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

The Court notes that both plaintiff and defendant failed to provide a party affidavit with their motion papers. Instead, only attorney affirmations were supplied by both parties, which are improper to provide admissible evidence as to the facts and circumstances of the case based on personal knowledge. *GTF Mktg. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985); *Zuckerman*, 49 NY2d at 560; *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 585 (1st Dep't 1982). Regardless, since plaintiff ultimately failed to make a *prima facie* showing of entitlement to judgment as a matter of law, the motion for partial summary judgment is denied.

Plaintiff argues that there are no material issues of fact, as defendant is collaterally estopped from re-litigating the issues herein and, therefore, partial summary judgment on liability should be granted in his favor and this matter set down for an assessment of damages. Plaintiff contends that the allegations in the matter at hand arise out of the same incident for which

defendant already has been tried and convicted.

In opposition, defendant points to the fact that plaintiff has not responded to defendant's various discovery demands, despite the fact that they were served over five months ago. Defendant contends that, as discovery has not been responded to and, thus, it is unclear whether defendant's actions were causally related to some or all of plaintiff's alleged injuries from the subject incident, the within motion is premature and should be denied.

Contrary to defendant's assertion, the discovery demands, which plaintiff has allegedly failed to respond to, appear to relate to the issue of damages, and not liability, since defendant states that "it is unclear which specific injuries are to be alleged to have resulted from the subject incident." Michael R. Petrocelli Affirmation in Opp, ¶ 4. However, plaintiff's motion is nonetheless denied based on different grounds set forth below.

As a general principle, a criminal conviction is conclusive proof of the underlying facts in a subsequent civil action. *S. T. Grand, Inc. v City of New York*, 32 NY2d 300, 305 (1973). The doctrine of collateral estoppel has a binding effect in a subsequent action, sufficient to prevent the re-litigating of issues already decided. *See D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 (1990). "For the doctrine [of collateral estoppel] to apply, the issues raised must be identical and must have been decided in the prior action and be decisive to the present action; and the party that is precluded must have had a full and fair opportunity to contest the prior determination." *Hughes v Farrey*, 30 AD3d 244, 247 (1st Dep't 2006); *see also Grayes v DiStasio*, 166 AD2d 261, 263 (1st Dep't 1990).

In this action, plaintiff is suing defendant for assault and battery. In a civil context, in order to prove battery, "a plaintiff need only prove *intentional* physical contact by defendant

without plaintiff's consent." *Hughes*, 30 AD3d at 247 (emphasis added and internal quotations omitted); *see also Buggie v Cutler*, 222 AD2d 640, 641 (2d Dep't 1995) (a plaintiff must "show that the defendant intended to inflict personal injury on [plaintiff] without [plaintiff's] consent, that the defendant took action to carry out that intent, and that [the defendant] did in fact injure [the plaintiff]."). However, in a criminal setting, a person convicted of assault in the third degree, as was defendant, could be guilty of one of three different assaults: intentional, reckless, or criminally negligent. Penal Law § 120.00 provides that:

> A person is guilty of assault in the third degree when:
> 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
> 2. He recklessly causes physical injury to another person; or
> 3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

As clear by the above differing standards for criminal and civil assault and battery, a defendant could be convicted of criminal assault under the second or third ground that does not require intent, but not liable for civil assault and battery, which does require intent. When different standards exist for the criminal charge and the civil cause of action, there is no identity of issues and collateral estoppel is improper. *Hughes*, 30 AD3d at 247–48; *Almeyda v Zambito*, 171 AD2d 633, 633 (2d Dep't 1991).

In *Hughes*, prior to the civil case, defendant was charged with attempted second-degree murder and lesser charges, as a result of stabbing his wife. He thereafter pleaded guilty to assault in the second degree. During the civil action, the plaintiff in *Hughes* moved for summary judgment on her battery cause of action, arguing that because of the defendant's plea in the

criminal action, collateral estoppel applied in order to preclude the defendant from re-litigating the issues. *Hughes*, 30 AD3d at 245, 247. However, the First Department disagreed and stated,

> While defendant admitted to "stabbing" plaintiff, he did not state that he intentionally did so, but stated that he acted recklessly under circumstances evincing depraved indifference. The inference plaintiff seeks to draw, i.e., that defendant intentionally made contact without her consent and caused injury, is perhaps a reasonable one but collateral estoppel may not be applied because it is not the only inference that can be drawn. Based on the allocution alone, the trier of fact could find that defendant recklessly or unintentionally stabbed plaintiff.

Id. at 247–48; *see also Almeyda v Zambito*, 171 AD2d 633, 633 (2d Dep't 1991) (where the Appellate Division, Second Department, in holding that the lower court erred in granting partial summary judgment for the plaintiff stated: "Since culpability for assault in the second degree can arise out of either an intentional or a reckless act, it cannot be said that the question of the defendant's intent to assault or batter the plaintiff was necessarily decided in the related criminal action herein.") (internal citations omitted).

Similar to the above cases, given that defendant was convicted of assault in the third degree (Penal Law § 120.00), which could have been based on any one of three different mental states[1], plaintiff has not made a *prima facie* showing that he is entitled to judgment as a matter of law, as the first element of collateral estoppel, i.e. that there is an identity of issues, has not been met.[2] Collateral estoppel is inappropriate here, where the particular issue in the two cases, albeit

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[1] There is no indication in the motion papers of which ground of assault in the third degree, as set forth in Penal Law § 120.00, defendant was convicted of.

[2] The Court notes that both plaintiff and defendant failed to provide a party affidavit with their motion papers. Instead, only attorney affirmations were supplied by both parties, which are improper to provide admissible evidence as to the facts and circumstances of the case based on personal knowledge. *GTF Mktg. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985);

based on the same incident, has not necessarily been decided in the prior criminal action. Thus, plaintiff's motion for partial summary judgment on liability is denied.

Plaintiff also moves to strike defendant's affirmative defenses. Defendant asserted eleven affirmative defenses in his answer. Plaintiff argues that, based on the argument that defendant is estopped from re-litigating the issues here, defendant has no defenses in this action and, therefore, defendant's affirmative defenses should be stricken. Defendant, on the other hand, argues that his affirmative defenses are not all liability-related and were not adjudicated in the criminal trial.

CPLR 3211(b) states that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." As to defendant's fourth affirmative defense that defendant was not legally served with process or was improperly served, plaintiff has demonstrated that such defense should be stricken. CPLR 3211(e) provides that an objection that the summons and complaint has not been properly served is waived if the party does not move for relief on that ground within 60 days after serving that pleading. Here, defendant raised that defense in his answer dated April 29, 2009 and, to date, has not moved on this ground. Thus, the fourth affirmative defense is stricken.

Further, the eleventh affirmative defense that plaintiff's claims are barred by the statute of limitations, is also stricken. Pursuant to CPLR 215(3), the applicable statute of limitations for a battery cause of action is one year. *Nachbaur v St. Luke's-Roosevelt Hosp. Ctr.*, 263 AD2d 361, 361 (1st Dep't 1999). In this case, plaintiff alleges that the incident in question occurred on or

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Zuckerman, 49 NY2d at 560; *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 585 (1st Dep't 1982). Regardless, since plaintiff ultimately failed to make a *prima facie* showing of entitlement to judgment as a matter of law, the motion for partial summary judgment is denied.

about November 18, 2007. Such date is confirmed by the complaint taken by the New York Police Department. *See* Fredrick A. Schulman Affirmation, Exh A. As it is undisputed that this action was commenced on November 14, 2008, the within action is timely. Therefore, the eleventh affirmative defense as to statute of limitations is stricken.

With regard to the remaining affirmative defenses, plaintiff has failed to establish that they should be stricken. Plaintiff has not articulated or set forth any specific ground as to why they should be stricken. Instead, plaintiff made only a conclusory assertion that defendant's affirmative defenses have no merit, without providing any fact-specific arguments or any case law beyond setting forth the CPLR 3211(b) standard. Moreover, as partial summary judgment in favor of plaintiff was not granted, which was plaintiff's primary basis for moving to strike the affirmative defenses, the motion is denied as to the remainder of the affirmative defenses.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendant's fourth and eleventh affirmative defenses are stricken; and it is further

ORDERED that all outstanding discovery shall be exchanged within 30 days of entry of this order and **the parties shall appear for a preliminary conference on March 19, 2010 at 9:30 AM in Room 428, 60 Centre Street, New York, New York**; and it is further

ORDERED that within 30 days of entry of this decision/order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated: 2/19/10

Doris Ling-Cohan, J.S.C.

J:\COLLATERAL ESTOPPEL\Pascarella, seq 1, sj - denied for P, crim convict as coll estoppl - no identity of issue.wpd