

Alazraki v Glynn

2010 NY Slip Op 33310(U)

November 4, 2010

Supreme Court, Suffolk County

Docket Number: 05-25622

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 7-15-10
ADJ. DATE 10-6-10
Mot. Seq. # 010 - MG

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- against -

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JOHN PENSA, DANIEL DOERLER, NICHOLAS :
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Upon the following papers numbered 1 to 24 read on this motion for summary judgment(010)1-14; Notice of Cross-Motion and supporting papers; Answering Affidavits and supporting papers15-22; Replying Affidavits and supporting papers23-24; Other; it is

ORDERED that this motion (010) by the defendant Daniel Doerler, pursuant to CPLR 3212 for summary judgment dismissing the second cause of action claiming assault and battery and dismissing all cross-claims premised upon the second cause of action is granted and the second cause of action and cross-claims premised upon the same are dismissed with prejudice.

The complaint of this action arises out of an incident which occurred on October 23, 2004 at North Indiana Avenue, Town of Lindenhurst, County of Suffolk, State of New York wherein the plaintiffs allege that they were assaulted and battered by the defendants herein. As concerns the defendant Daniel Doerler with regard to this motion, a second cause of action asserts that Doerler, without any just cause or provocation, intentionally, knowingly, willfully and maliciously assaulted, battered, beat, punched in the face with closed fists, shoved and pushed the plaintiff, Christopher Alazraki to the ground and continued to assault Alazraki with great force and violence about the head, face, and body, and kicked Alazraki while he was in a prone position, causing Alazraki to sustain severe bodily injury.

The defendants, Donna Glynn, William Domaratus and John Glynn, have asserted a first cross claim against the remaining co-defendants, including Daniel Doerler, wherein they seek judgment over and against him. John Pensa, has asserted a first cross claim in his answer against the co-defendants, including Daniel Doerler, on the basis of apportionment and judgment over against them.

Daniel Doerler seeks summary judgment dismissing the second cause of action on the basis that Doerler's conduct does not rise to the requisite intentional conduct to support claims of assault and battery, and in that Alazraki's conduct in unilaterally attacking the defendant Doerler rendered the plaintiff a voluntary participant in a fight and therefore, Alazraki assumed the risk of injury precluding him from recovering for his injuries.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In support of motion (001), the moving defendant Doerler has submitted, inter alia, an attorney's affirmation; copies of the summons, notice of appearance and demand for the complaint, answers with cross claims served by the defendants, verified bill of particulars served by the plaintiffs Christopher Alazraki, Ryan Fiske, Kurt Brown and John Fiske; unsigned copies of the transcripts of the examinations before trial of Christopher Alazraki dated May 22, 2007 and John Pensa dated January 27, 2009, and the signed transcript of the examination before trial of Daniel Doerler dated July 15, 2008. The unsigned transcripts of the examinations before trial of Alazraki and Pensa are not accompanied by an affidavit pursuant to CPLR 3116 and are therefore not in admissible form to be considered on a motion for summary judgment.

In opposing this motion, the plaintiff, Christopher Alazraki, has submitted, inter alia, an attorney's affirmation; copies of the pleadings; the unsigned copies of the deposition transcript of Christopher Alazraki dated May 22, 2007, and Daniel Doerler dated July 15, 2008. The transcript of Christopher Alazraki is not in admissible form pursuant to CPLR 3212 and therefore is not considered in opposition to this motion.

Daniel Doerler testified at his examination before trial that his birth date is October 23, 1987. He graduated from Lindenhurst High School in 2005. On October 23, 2004, on his birthday, the within incident occurred while he was attending a graduation party at John Glynn's house. He arrived at Glynn's house at about 9:00 p.m. along with three or four of his friends, but he did not remember whom he was with. One of his friends brought a 12-pack of beer in bottles to the party. Alcohol was being served at the Glynn house in the nature of beer and liquor, but he did not know where it came from. He stated he consumed one or two beers at home, the first at about 8:45 p.m. and did not remember drinking a second. There were about fifty people at the party when he arrived, some were walking around with beer in their hands. He saw an ice luge and people were pouring shots down it. He remembered seeing ten bottles of liquor, but did not recall what kind. He did not recall any coolers with beer and did not remember there being any beer in the garage. He thought he had about three beers at the Glynn's house after he arrived, but did not remember if he consumed the third beer. He felt relaxed but stated he was not drunk, had no difficulty talking and did not fall. He did not remember seeing his friends, John Pensa, John Glynn, or Josh Bebbino consume any alcohol and he did not see anyone intoxicated. Also at the party were Katy Parmalee (Pensa's former girlfriend), and another female, Rebecca LaFlair.

Doerler continued that the incident with Chris Alazraki occurred around 9:30 p.m. He was in the backyard by the patio at the Glynn house when Tommy O'Hanlin told him Pensa wanted to talk to him. He went out to the street, North Indiana, and Pensa told him that Katy Parmalee went down the block with Kurt Brown to smoke some weed and that Pensa said he was going to stop them from smoking. He and O'Hanlin went along as he thought if something started he could stop it. They walked to the corner of North Indiana and Charles Street and Pensa ran ahead. When they then turned into the high school parking lot, he saw Katy Parmalee, who was alone, but did not see where Pensa went. They then went around the second corner to turn into the school parking lot and saw Brown and Pensa fighting, toe to toe, both swinging. He then saw Alazraki, about five feet from Pensa and Brown, running toward Pensa. He then saw Alazraki on Pensa's back, but he did not know if Alazraki was trying to break up the fight or was fighting, however, he did not see him throw any punches. He and O'Hanlin ran to break up the fight. O'Hanlin grabbed Alazraki by the shirt and pulled him off Pensa, pulling him around. He arrived right after that when Alazraki, who was on his feet, came running at him and either punched, tackled or grabbed him. He went down on all fours onto the ground with Alazraki on top of him holding his arms around his throat and neck.

In a civil action the elements which determine the liability for an assault and battery are that there is bodily contact, that such contact be harmful or offensive in nature, and the defendant intended to make the contact. (*Portnoy v Bucalo et al*, 82 Misc2d 590 [Supreme Court of New York, Trial Term, Nassau County 1975]).

An assault is an unlawful offer or attempt with force or violence to do corporal hurt to another and when combined with an actual use of force, constitutes assault and battery (*Decker v Werbenec*, 36 Misc2d 220 [Supreme Court of New York, Special Term, Ulster County 1962]). To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact (*Bastein et al v Sotto et al*, 299 AD2d 432 [2nd Dept 2002]). An assault is a threat of bodily harm, accompanied by an uplifted fist or hand, or by a threatening gesture, with intent to strike, and sufficiently near to execute such designs, constitutes an assault. A mere menace, unaccompanied by an attempt or threat to

strike, is not an assault (*Clayton v Keeler*, 18 Misc 488 [Supreme Court of New York, Trial Term, New York County 1896]). An assault is the intentional placing of another in apprehension of imminent harmful or offensive contact (*Kowk Tung Tom et al v Lenox Hill Hospital et al*, 165 Misc2d 313 [Supreme Court of New York, New York County 1995]).

A battery, as distinguished from an assault, is where the person is actually struck or touched in a violent, angry, rude or insolent manner. Every laying on of hands is not a battery. Intention must be considered (*Clayton v Keeler*, supra). The intent to do harm is not a necessary element of a battery. A claim for battery is stated if one alleged bodily contact that is offensive and is made with intent. The necessary intent is the intent to make contact, not to do injury (*Kowk Tung Tom et al v Lenox Hill Hospital et al*, 165 Misc2d 313 [Supreme Court of New York, New York County 1995]). To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent (*Bastein et al v Sotto et al*, supra).

Doerler seeks to dismiss the second cause of action which asserts that Doerler, without any just cause or provocation, intentionally, knowingly, willfully and maliciously assaulted, battered, beat, punched in the face with closed fists, shoved and pushed the plaintiff, Christopher Alazraki to the ground and continued to assault Alazraki with great force and violence about the head, face, and body, and kicked Alazraki while he was in a prone position, causing Alazraki to sustain severe bodily injury.

Here, Doerler argues, his conduct did not rise to the requisite intentional conduct to support claims of assault and battery. Doerler also argues that Alazraki's conduct in unilaterally attacking the defendant Doerler rendered the plaintiff a voluntary participant in a fight and therefore, Alazraki assumed the risk of injury precluding him from recovering for his injuries.

The unrefuted admissible evidence establishes that after O'Hanlin pulled Alazraki off of Pensa's back, Alazraki then came running at Doerler and either punched, tackled or grabbed him, causing Doerler to go down on all fours onto the ground with Alazraki on top of him holding his arms around Doerler's throat and neck. When Doerler told Alazraki to get off of him because he was not trying to fight him, Alazraki continued to keep his arms around his throat and neck. Doerler then told Alazraki a few more times to get off but he wouldn't let go, so he started to defend himself, grabbing Alazraki's hair and punching his head back to get leverage, punching him about four times, but Alazraki did not let go. He was not sure where he hit him, whether it was on the nose or the facial area, or his head or torso. He was able to get on top of Alazraki on all fours and hold him down and the fighting stopped. He asked Alazraki if he was finished fighting and Alazraki told him to get off. He pushed Alazraki away and that was the end of it between Doerler and Alazraki. Doerler then pulled Pensa off Brown as they were still fighting. Alazraki then yelled, "You guys are all dead. Now I'm going to get Fiske. I'm going to get my friend." Alzaraki then started running towards Pensa, and when he reached Pensa, Pensa hit Alzaraki with his right hand with a closed fist into Alzaraki's face. Alzaraki fell against the fence and onto the ground, then got up and ran away.

It is determined that Doerler has established prima facie entitlement to summary judgment dismissing the second cause of action and cross-claims asserted against him as Doerler's unrefuted testimony establishes that he had a bona fide defense in response to the unprovoked attack upon him by Alazraki. It has been held that no provocative act, conduct, insult or word, if unaccompanied by an overt act of hostility, will justify an assault, no matter how offensive or exasperating they may be (see, *Decker v Werbenec*, 36 Misc2d 220 [Supreme Court of New York, Special Term, Ulster County 1962]). Justification in the way of a self-defense may be a defense in an action for assault and battery but only to the extent made necessary to an innocent party

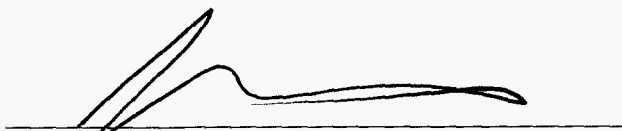
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because of an attack, said rule being subject to the fundamental limitation that in protecting oneself no more force is permissible than will reasonably affect such protection (*Decker v Werbenec*, supra).

Doerler has established that the provocation by Alazraki attacking him induced a response by Doerler who was under the immediate influence of the passion of the moment and was wrongfully excited by Alazraki's attack. Doerler was down on all fours, with Alazraki's arms and hands around Doerler's neck and throat, when Doerler decided to act to protect himself and get Alazraki off of him after first verbally advising he did not want to fight and telling him to get off. It is a general rule that in the defense of one's self, one may use no more force than that which reasonably appears necessary for protection (see, *Barbagallo v American Corp, et al*, 32 AD2d 622 [1st Dept 1969]). Doerler then acted in self-defense, throwing some punches at Alazraki while Alazraki still had him in a hold around his neck and throat. He was then able to get on top of Alazraki, and the fighting stopped, with Doerler asking Alazraki if he was finished fighting. Doerler has demonstrated that he used no more force than necessary as Alazraki then moved on to attack Pense.

The plaintiffs and co-defendants have raised no triable issues of fact to preclude summary judgment dismissing the second cause of action.

Dated: November 4, 2010



HON. JOSEPH C. PASTORESSA

 FINAL DISPOSITION X NON-FINAL DISPOSITION