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| <b>Lui v Wong</b>                                                                                                                                                                                                                                                |
| 2017 NY Slip Op 31703(U)                                                                                                                                                                                                                                         |
| August 14, 2017                                                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 151707/2016                                                                                                                                                                                                                                       |
| Judge: Barbara Jaffe                                                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

# SUPREME COURT OF THE STATE OF NEW YORK

## NEW YORK COUNTY

PRESENT: Hon. Barbara Jaffe  
Justice

PART 12

Index Number : 151707/2016

LUI, DAVID

vs

WONG, CHRISTOPHER

Sequence Number : 003

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ ☐ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ ☐ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ ☐ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 8/14/17

Barbara Jaffe, J.S.C.  
**BARBARA JAFFE**  
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
DAVID LUI and JIAN LU,

Index No. 151707/16

Plaintiffs,

Motion seq. no. 003

-against-

**DECISION & ORDER**

CHRISTOPHER WONG, an individual,

Defendant.  
-----X

BARBARA JAFFE, JSC:

**For plaintiffs:**

Corey T. Lee, Esq.  
C.T. Lee & Associates  
225 Broadway, Suite 3005  
New York, NY 10007  
212-566-5509

By notice of motion submitted on default, plaintiffs seek an order granting them a default judgment on the issue of liability, and other relief.

**I. BACKGROUND**

On March 1, 2015, defendant injured plaintiffs by repeatedly striking Lu with a baseball bat and by stabbing Lui with a knife. He was subsequently found guilty after a jury trial of first-degree assault. (NYSCEF 46).

On or about February 26, 2016, plaintiffs commenced this action against defendant for assault, battery, *prima facie* tort, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. (NYSCEF 47). On or about March 30, 2016, defendant served plaintiffs with a verified answer with cross-claims. (NYSCEF 48). On September 21, 2016, a preliminary conference was held. (NYSCEF 51).

By consent to change attorney dated February 2, 2017, defendant replaced his attorney with himself. (NYSCEF 53). Thereafter, he failed to proceed with discovery or appear at three successive compliance conferences, notwithstanding orders directing him to appear and expressly warning that, should he fail to appear, plaintiffs would be permitted to move for a default judgment. (NYSCEF 54, 56, 64). He was duly notified of each order. (NYSCEF 55, 57, 64).

Plaintiffs offer in support, *inter alia*, excerpts of Lui's trial testimony as to the assault and affidavits from each plaintiff describing the assault and their physical injuries. (NYSCEF 58-9, 62). They also submit a copy of their verified complaint, in which they, *inter alia*, summarize their injuries: Lui suffered a stab wound to the abdomen for which he underwent surgery, and he alleges that in his present condition, he is medically disqualified from serving in the New York Army National Guard and from pursuing employment with the New York Police Department. Lu's injury left him with a limp, and rendered him unable to work for approximately six months.

The complaint also sets forth, in relevant part, the following:

15. [a] member of [d]efendant's group charged [p]laintiff L[ui]. Fearing for his safety, [p]laintiff L[ui] . . .

22. As a result of the foregoing, [plaintiffs] sustained, *inter alia* . . . emotional distress, mental anguish . . .

#### THIRD CAUSE OF ACTION (Intentional Infliction of Emotional Distress)

49. Defendant acted in an extreme and outrageous conduct by striking one of [p]laintiff on the head with a bottle, and stabbing him and hitting the other [p]laintiff with a baseball bat to the body . . .

51. Defendant's actions led to a causal connection between the conduct and injury . . .

52. Due to the [d]efendant's action . . . [p]laintiffs suffered and are still suffering [from] severe emotional distress . . .

#### FIFTH CAUSE OF ACTION (Negligent Infliction of Emotional Distress)

62. Defendant owed a duty to [plaintiffs] to protect [them] from a particular injury or damage . . .

63. Defendant unreasonably endangered the [plaintiffs'] physical safety or caused the [plaintiffs] to fear for their safety . . . .

(NYSCEF 47).

## II. ANALYSIS

### A. Discovery sanction

A defendant's answer may be stricken for a willful and contumacious failure to comply with court-ordered discovery. (*Loeb v Assara New York I L.P.*, 118 AD3d 457 [1<sup>st</sup> Dept 2014]; *Suffolk P.E.T. Mgmt., LLC v Anand*, 105 AD3d 462 [1<sup>st</sup> Dept 2013]). Willfulness and contumaciousness may be inferred from the repeated failure to comply with court orders, absent an adequate excuse. (*Xina v City of New York*, 13 AD3d 440, 441 [2d Dept 2004]).

Having failed to participate in discovery or appear at three successive compliance conferences, defendant's willfulness and contumaciousness are reasonably inferred. (See *Goldstein v CIBC World Markets Corp.*, 30 AD3d 217 [1<sup>st</sup> Dept 2006] [pleading stricken after plaintiff warned at numerous compliance conferences that continued noncompliance could result in dismissal]). Thus, his answer is stricken, and he is deemed in default as to this action.

### B. Default judgment

To be entitled to a default judgment, however, a plaintiff must establish, *prima facie*, the defendant's liability as to each cause of action. (CPLR 3215(a); *Guzetti v City of New York*, 32 AD3d 234, 235 [1<sup>st</sup> Dept 2006]; *Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999], *appeal dismissed* 93 NY2d 998, *lv denied* 94 NY2d 753). While there is no precise "quantum of proof" necessary to support a default judgment, the plaintiff must proffer "some firsthand confirmation of the facts forming the basis for the claim." (*Guzetti v City of New York*, 32 AD3d 234, 235–36 [1<sup>st</sup> Dept 2006]). A complaint verified by the plaintiff may suffice, although one

that is conclusory, skeletal, or absent sufficient factual support, will not. (*Luna v Luna*, 263 AD2d 470 [2d Dept 1999]; *Rivera v Hawthorne Associates*, 2015 WL 6166994 [Sup Ct, New York County 2015]). Consequently, it must be determined whether plaintiffs have demonstrated their causes of action, *prima facie*.

A criminal conviction is conclusive proof of the facts on which the conviction rests. (*Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]; *Schindler v Royal Ins. Co.*, 258 NY 310, 314 [1932]). It must thus be determined whether defendant's conviction of first-degree assault constitutes *prima facie* evidence of each cause of action in the complaint.

#### 1. Civil assault and battery

A conviction for first-degree assault constitutes, at a minimum, *prima facie* proof of defendant's liability for civil assault and battery. (*Cf. Costello v Lupinacci*, 253 AD2d 478, 478 [2d Dept 1998] [conviction of third-degree assault for same events as those alleged in civil action established liability for assault and battery]; *Villanueva v Comparetto*, 180 AD2d 627, 629 [2d Dept 1992] [conviction of second-degree assault by jury established liability for civil battery]).

#### 2. Prima facie tort

Absent any dispute that defendant's criminal conviction establishes that his acts were unlawful, the cause of action for *prima facie* tort is not established. (*See Burns Jackson Miller Summit & Spitzer v Lindner*, 88 AD2d 50, 71 [2d Dept 1982], *affd* 59 NY2d 314 [1983] ["we need not evaluate the first three elements [of *prima facie* tort] as it is readily apparent that the plaintiffs cannot and did not allege that the strike in question was a *lawful* act"] [emphasis in original]).

#### 3. Negligence

A cause of action for negligence is irreconcilable with a cause of action for assault and battery. (*See Mazzaferro v Albany Motel Enterprises, Inc.*, 127 AD2d 374, 376 [3d Dept 1987]

[in light of proof that act intentional, evidence of negligence irrelevant, and party could recover for intentional tort of assault and battery, but not negligence]; *Barreto v Kotaj*, 46 Misc 3d 47, 48 [App Term, 1<sup>st</sup> Dept 2014] [“once intentional offensive contact has been established, the actor is liable for assault and not negligence, inasmuch as there is no such thing as a negligent assault”]). Consequently, defendant’s conviction for first-degree assault does not constitute *prima facie* evidence of negligence]).

#### 4. Intentional and negligent infliction of emotional distress

To establish intentional infliction of emotional distress, a plaintiff must show:

“(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.” (*Chanko v Am. Broad. Cos. Inc.*, 27 NY3d 46, 56 [2016]).

To establish negligent infliction of emotional distress, a plaintiff must show “a breach of a duty owed to him which unreasonably endangered his physical safety, or caused him to fear for his own safety.” (*Sacino v Warwick Valley Cent. Sch. Dist.*, 138 AD3d 717, 719 [2d Dept 2016]).

Absent any evidence at the criminal trial that plaintiffs suffered emotional injury, emotional distress may not be inferred from the conviction alone. (*See Roe v Barad*, 230 AD2d 839 [2d Dept], *lv denied* 89 NY2d 938 [1997] [record from prior criminal proceeding did not show plaintiff suffered emotional distress, nor did it establish that defendant intended to cause, or knew that his conduct would result in emotional distress]). Moreover, plaintiffs neither mention emotional distress in their affidavits, nor include it among the injuries summarized in their complaint. Although they allege that defendant caused them to fear for their physical safety, they specify only that Lui feared for his physical safety when charged at by “a member of defendant’s group,” not defendant himself. Moreover, although they allege a causal connection between their physical injuries and emotional distress, they do so in a conclusory manner.

Consequently, plaintiffs do not establish, *prima facie*, their causes of action for intentional or negligent infliction of emotional distress. (See *Luna*, 263 AD2d at 470 [default judgment denied where complaint conclusory and bereft of factual allegations constituting claim]).

### III. CONCLUSION

Given this result, I need not address plaintiffs' other arguments, or an earlier motion filed by Lu. Accordingly, it is hereby,

ORDERED, that plaintiffs' motion is granted to the extent that defendant's answer with counter-claims is stricken, and plaintiffs are granted a default judgment on their claims for assault and battery; it is further

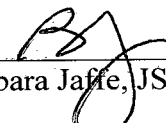
ORDERED, that plaintiffs' motion is denied to the extent that it seeks a default judgment on their claims for *prima facie* tort, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, and these claims are severed; it is further

ORDERED, that an assessment of damages against defendant is directed; it is further

ORDERED, that within 30 days of the assessment of damages, plaintiffs advise the court as to how they intend to proceed with the balance of their complaint; and it is further

ORDERED, that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the appropriate fees, if any, to place this action on the appropriate trial calendar for the assessment herein directed.

ENTER:

  
Barbara Jaffe, JSC

DATED: August 14, 2017  
New York, New York