Sun v Richbourg
2021 NY Slip Op 30490(U)
February 23, 2021
Supreme Court, New York County
Docket Number: 157391/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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MICHELLE SUN,

Plaintiff,

- v -

LUKE RICHBOURG,

Defendant.

---X

INDEX NO. 157391/2017

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 96-98, 102-129, 140, 143, 145

were read on this motion for summary judgment.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting her summary judgment on her claims of assault, battery, and intentional infliction of emotional distress. Defendant opposes.

I. PERTINENT BACKGROUND

A. Amended complaint (NYSCEF

Plaintiff and defendant were in an intimate relationship for four months. When plaintiff ended the relationship, she alleges, defendant called her from different phone numbers, texted her persistently, and harassed her. On September 10, 2016, she filed a police report alleging same.

Three days later, defendant waited for plaintiff outside of her apartment building, and when she exited, he followed her down the street, approached her aggressively, and threw a foul-smelling brown liquid at her. Defendant had stated to plaintiff that he was "persistent" and that she was making an "enemy" out of him.

Plaintiff advances claims for assault and battery, based on his conduct in throwing the liquid at her, intentional infliction of emotional distress, and *prima facie* tort. On August 20, 2018, the cause of action for *prima facie* tort was dismissed. (NYSCEF 29).

B. Answer (NYSCEF 43)

In September 2018, defendant filed his answer, in which he interposed the following affirmative defenses: unclean hands, provocation, and self-defense, and a counterclaim for defamation.

C. Family and criminal court proceedings

On September 22, 2016, plaintiff filed an amended family offense petition against defendant, alleging that he had committed the following family offenses: attempted assault, assault in the second or third degree, aggravated harassment in the second degree, harassment in the first or second degree, disorderly conduct, menacing in the second or third degree, reckless endangerment, stalking, criminal mischief, sexual abuse in the second or third degree, sexual misconduct, forcible touching, strangulation, criminal obstruction of breathing or circulation, identity theft, grand larceny, and coercion in the second degree. (NYSCEF 118). The case was assigned to the New York County Integrated Domestic Violence (IDV) Part of the New York State Supreme Court.

Plaintiff had also filed a criminal complaint against defendant. (NYSCEF 120). In October 2017, defendant pleaded guilty to harassment in the second degree, which resolved the criminal case against him, and was directed to satisfy certain conditions in order to have his plea withdrawn. (NYSCEF 97). After defendant complied with the conditions imposed, he was permitted to withdraw his guilty plea and received an adjournment in contemplation of dismissal. The case was ultimately dismissed. (*Id.*).

On January 16, 2019, during an appearance in the IDV Part, plaintiff narrowed her family offense petition to the offenses of harassment in the first degree, aggravated harassment in the second degree, menacing in the second and third degrees, stalking, coercion, criminal mischief, and disorderly conduct. She withdrew the assault and attempted assault offenses. (NYSCEF 119).

A fact-finding hearing was held in the IDV Part, and on May 13, 2019, the presiding justice issued her decision. Plaintiff and defendant were the sole witnesses at the four-day hearing. As pertinent here, plaintiff testified that she had started seeing a therapist after she retained her lawyer, and that she went to urgent care sometime after the incident due to the trouble she had with sleeping and nightmares; she suffered no physical harm from the liquid being thrown on her. (NYSCEF 97).

The justice found that plaintiff had established that defendant had committed the offenses of harassment in the first degree, aggravated harassment in the second degree, menacing in the second degree and third degree, stalking in the fourth degree, and criminal mischief, but that he had not engaged in disorderly conduct or coercion (NYSCEF 97), finding in pertinent part, as follows::

> [The finding that defendant] committed acts which constitute family offenses is based. in part, on incidents which were testified to by both parties, namely the September 13 incident, multiple texts and the spoofed call on September 10, 2016. [Defendant] admits to making the "spoofed" call and sending text messages to [plaintiff] after she directed him to stop contacting her. The court finds that neither the spoofed call, nor the text messages that [defendant] sent served a legitimate purpose, and that they were meant to harass;
>
> [Defendant] admits to waiting outside [plaintiff's] home for at least an hour before approaching [her] on September 13, 2016, all the while chewing tobacco and spitting into a bottle, the contents of which he later threw at her . . . The court also finds that [plaintiff] suffered emotional trauma as a result of [defendant's] actions, which were physically menacing, and that her fear of physical injury was not only reasonable, but warranted. . . The court does not credit [defendant's] testimony that he threw the "tobacco juice"

> contents of the bottle at [plaintiff] as a "reaction" to [her] allegedly spitting at him. The court does not credit [defendant's] depiction of the incident in any way, and finds that [he] intended to damage [plaintiff's] personal property, given the surrounding circumstances. which included the time of day, and how long he waited outside while filling the bottle with tobacco juice.

(*Id*.).

The justice thus granted plaintiff a five-year order of protection against defendant. (*Id*.).

II. CONTENTIONS

A. Plaintiff (NYSCEF 96)

Plaintiff asks that judicial notice be taken of defendant's guilty plea and the record of the IDV proceeding. Based on both, she argues that collateral estoppel and *res judicata* prevent defendant from relitigating the facts and arguments decided against him. She alleges that the elements of menacing in the second and third degree are identical to those needed to establish a civil assault, that the elements of criminal mischief and harassment are nearly identical to those for a civil battery, and that the finding that defendant had engaged in stalking in the fourth degree is conclusive as to plaintiff's cause of action for intentional infliction of emotional distress.

According to plaintiff, defendant committed an assault on her when he threw the liquid on her, thereby placing her in imminent apprehension of such harmful or offensive conduct and she observes that there is no dispute that he had engaged in such conduct. For the same reason, she maintains, defendant committed a battery on her.

Based on the IDV court's finding that plaintiff had suffered emotional trauma as a result of defendant's actions toward her, she asserts that she has established her cause of action for intentional infliction of emotional distress.

B. Defendant (NYSCEF 129)

Defendant denies that plaintiff establishes that she suffered severe emotional distress,

absent medical or other evidence, such as her therapy records, and observes that she offered no such evidence at the IDV proceeding. Moreover, whether defendant's alleged conduct was sufficiently outrageous is a question to be resolved by a jury. Reliance on the IDV court's findings is not appropriate here, defendant asserts, as the court did not determine that defendant's conduct was extreme or outrageous, or that he had intended to cause plaintiff severe emotional distress, and the court's finding that plaintiff suffered "emotional trauma" does not meet plaintiff's burden on this claim.

Moreover, defendant claims, discovery is incomplete as plaintiff's deposition has not been conducted, and defendant cannot adequately oppose this claim without such information.

Defendant also alleges that none of the family offenses which he was found to have committed stand-in for the elements of an assault or a battery. While the IDV court found that plaintiff had intended to damage plaintiff's personal property by throwing the liquid at her, it did not find that he had intended to harm her, nor was there evidence that she suffered bodily harm. Plaintiff also did not testify that she apprehended an imminent threat of harm before the liquid incident.

And, as defendant's plea to harassment in the second degree was withdrawn, defendant argues, plaintiff may not rely on it here. In any event, plaintiff submits no evidence of her alleged damages.

Defendant contends that the IDV court's decision is not entitled to *res judicata* or collateral estoppel effect as the issues resolved there are not identical to those in issue here, and he observes that in the IDV proceeding, plaintiff withdrew her claims of assault and did not assert a claim of battery or intentional infliction of emotional distress. He also contends that he did not have a full and fair opportunity to contest the claims as he was not permitted to conduct

discovery or assert affirmative defenses.

Defendant further claims that plaintiff's affidavit in support of this motion contains contradictory statements which raise triable factual issues, namely, that she now claims that the liquid hit her body even though she did not mention it in her complaint in this action or in her family offense petition, nor does such a claim appear in the criminal court complaint. And, given defendant's affirmative defenses, which plaintiff does not address, summary judgment is unwarranted, especially as his defense of self-defense constitutes a jury issue.

C. Plaintiff's reply (NYSCEF 145)

Plaintiff reiterates her prior arguments.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig*., 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co*., 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. *Res judicata*/collateral estoppel

A party claiming that one action bars a subsequent action must establish that there has been a judgment on the merits by a court of competent jurisdiction in which the issues of fact and

questions of law that were necessarily decided by that court are conclusive as to the claims raised in the subsequent action. (73A NY Jur 2d, Judgments § 330 [2021]).

An issue previously litigated is precluded where it was raised and decided against the opposing party in a prior proceeding, where "material facts or questions that were in issue in a former action and were admitted or judicially determined there are conclusively settled by a judgment rendered therein." (73A NY Jur 2d, Judgments § 339 [2021]). The party seeking to avoid such preclusion bears the burden of establishing that it did not have a full and fair opportunity to litigate the issue in the prior proceeding. (*Id.* at § 344).

As defendant's guilty plea to the harassment violation was conditional, and upon his satisfaction of the condition, withdrawn and the case thereafter dismissed, the plea is neither binding nor probative. (*Maiello v Kirchner*, 98 AD3d 481 [2d Dept 2012] [issue of civil liability not satisfied by defendant's conditional plea in criminal court]; *see also Lockwood v Lockwood*, 23 Misc 3d 679 [Fam Ct, Otsego County 2009] [adjournment in contemplation of dismissal not binding as not a final conclusion]).

As plaintiff never accused defendant of committing a battery or of intentionally inflicting her with emotional distress, and as she withdrew her assault claim, the issues decided in the IDV case are not identical to those in issue here. Thus, those claims were neither litigated nor decided. (*See Morrow v Gallagher*, 113 AD3d 827 [2d Dept 2014] [defendant not collaterally estopped from contesting rape claim as rape not a crime at issue in criminal case and to which he pleaded guilty]). While the IDV court found that plaintiff suffered "emotional trauma," there was no determination that plaintiff sustained severe emotional distress, that defendant intended to cause her emotional distress, or that his conduct was sufficiently outrageous to sustain that cause of action. (*See e.g., Richard L. v Armon,* 144 AD2d 1 [2d Dept 1989] [defendant's criminal plea to

sexual abuse of child did not constitute basis for finding him liable as matter of law for child's intentional infliction of emotional distress claim]).

Moreover, given the nature of the IDV proceeding, including the unavailability of discovery and defendant's inability to raise his affirmative defenses, and as the potential punishment at issue there was restricted to the issuance of an order of protection, defendant demonstrates that he did not have a full and fair opportunity to contest the claims raised here. (*See Gilberg v Barbieri*, 53 NY2d 285 [1981] [no collateral estoppel effect given to defendant's criminal plea to harassment in subsequent civil suit for assault; among others, criminal court proceeding brief and informal, defendant had no right to jury trial, and did not have same opportunity to litigate his liability there as he would have in civil court]; *Rice v Massalone*, 160 AD2d 861 [2d Dept 1990] [proceeding before Department of Motor Vehicle Administrative Law Judge did not provide defendant with same opportunity to contest liability, as incentive to litigate there not as compelling as in civil trial where issue was guilt or innocence of traffic infraction whereas in civil trial it was defendant's liability for over $2 million, and only two witnesses testified at hearing while more testified at civil trial]).

Plaintiff thus fails to establish, *prima facie*, that she is entitled to summary judgment on her claims against defendant.

In any event, as plaintiff has not been deposed and defendant did not obtain a copy of her therapist's records in time to oppose this motion, he demonstrates that there is outstanding discovery that is relevant to his defense, and that, therefore, summary judgment is premature. (CPLR 3212[f]).

IV. CONCLUSION

Accordingly, it is hereby

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

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before April 7, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on April 7, 2021 at 2:15 pm or virtually if necessary. The NOI is due by April 14, 2021.

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2/23/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE