

Peralta-Mera v Streep
2021 NY Slip Op 30994(U)
March 31, 2021
Supreme Court, New York County
Docket Number: 157258/2020
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

-----X

INDEX NO. 157258/2020

DAVID PERALTA-MERA,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001 002

CHARLES STREEP,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8-20, 22, 23, 25-48, 58

were read on this motion for change of venue.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to dismiss.

By notice of motion, defendant moves for an order changing venue of this action from New York County to Suffolk County, staying this action pending final resolution of a related criminal case, quashing subpoenas issued by plaintiff on Suffolk County law enforcement authorities, and awarding a protective order against the enforcement of those subpoenas. Plaintiff opposes, and by notice of cross motion, cross-moves for an order compelling defendant to produce certain discovery. Defendant opposes. (Mot. seq. one).

By notice of motion, defendant moves for an order dismissing the amended complaint for failure to state a cause of action. Plaintiff opposes, and by notice of cross motion, cross-moves for an order awarding costs for opposing the motion. Defendant opposes. (Mot. seq. two).

They are consolidated herein for decision.

I. BACKGROUND

A. Amended verified complaint (NYSCEF 32)

By amended verified complaint dated November 5, 2020, plaintiff, a resident of East Hampton in Suffolk County, alleges that on August 24, 2020, defendant, a resident of New York County, assaulted and battered him in a parking lot in East Hampton. He alleges that as defendant's conduct was intentional, malicious, racially motivated, and in violation of the Penal Law §§ 120.05-1 and 121.12, he is absolutely liable to him. Plaintiff seeks an award of punitive damages.

According to plaintiff, on November 5, 2020, the Suffolk County District Attorney's office amended a previously filed criminal complaint against defendant. He alleges that defendant "negligently and/or grossly negligently and/or recklessly precipitated plaintiff to the ground."

B. Nonparty witness affidavits (NYSCEF 56)

By affidavit dated November 9, 2020, a nonparty witness states that she, a resident of New York County, was in the parking lot at the time of the incident, and while she did not observe a physical confrontation, she saw defendant yell at plaintiff and then enter his car and speed away. She also saw plaintiff, covered in blood, stumble into his car. The police then arrived.

By affidavit dated November 9, 2020, a nonparty witness states that she, a resident of New York County, observed defendant "aggressively pick up" plaintiff, "slamming his body to ground," and then yelling at him. Thereafter, she saw defendant run to his car and flee the scene. Plaintiff was left "discombobulated and his face was extremely bloodied."

By affidavit dated November 10, 2020, a nonparty witness states that she, a resident of

New York County, observed defendant yelling loudly. He then “forcefully push[ed]” plaintiff, “picked [him] up in the air, [and] forcefully smash[ed] [him] to the ground.” She claims that plaintiff landed on his head, and that defendant kept screaming at him. Thereafter, defendant entered his car and sped from the scene. After the attack, plaintiff appeared disoriented and dizzy. He entered his car, and pulled into a parking spot.

II. MOTION TO DISMISS AND CROSS MOTION FOR COSTS (MOT. SEQ. TWO)

A. Contentions

1. Defendant (NYSCEF 49-52)

In support of its motion to dismiss, defendant contends that plaintiff alleges multiple causes of action without properly separating them and thus fails to satisfy the pleading requirements of CPLR 3014. According to defendant, plaintiff fails to differentiate between his claims for assault and battery, and that having alleged physical contact, the assault claim should be dismissed. Moreover, he asserts, plaintiff does not allege that he had been placed in imminent apprehension of harmful or offensive contact and that he was aware of imminent contact. Defendant also maintains that the battery claim is overly vague and bereft of sufficient facts about the alleged physical contact, as required by CPLR 3013. He also denies that plaintiff is entitled to a finding of absolute criminal liability and an award of punitive damages.

Plaintiff’s cause of action for negligence, defendant asserts, should be dismissed, as plaintiff alleges intentional conduct and, in any event, fails to allege the existence of a duty owed by defendant. Additionally, defendant seeks the dismissal of the cause of action for gross negligence, absent facts reflecting conduct of an “aggravated character.” To the extent plaintiff advances a claim of recklessness, defendant argues it should be dismissed as duplicative of the gross negligence claim.

2. Plaintiff (NYSCEF 53-56)

Plaintiff maintains that he properly set forth separate and distinct causes of action that were pleaded in the alternative, and facts specific to the claims may be amplified in a bill of particulars. Plaintiff maintains that he alleges both an assault and a battery claim, and denies that he must set forth the duty between defendant and himself in the complaint. In any event, he argues that defendant owed him a duty to “refrain from attacking and seriously injuring” him, and observes that the criminal charges against defendant are devoid of a “duty” element. Plaintiff also argues that “in the likely event that [defendant] is convicted in the criminal case,” defendant will be “absolutely liable,” claiming that such a conviction estops defendant from denying the conduct giving rise to the causes of action.

Plaintiff adheres to his claimed entitlement to punitive damages, and seeks an award of costs, claiming that defendant’s motion is frivolous, dilatory, and a waste of court resources.

3. Reply (NYSCEF 57)

Defendant reiterates his earlier contentions and denies that an award of costs is warranted.

B. Analysis

1. Pleading sufficiency

Pursuant to CPLR 3013, statements in pleadings must be “sufficiently particular” so as to give notice of the occurrence intended to be proved. Pursuant to CPLR 3014, pleadings shall consist of “plain and concise statements” and each cause of action must be separately stated and numbered. Even if not artfully pleaded, pursuant to CPLR 3026, pleadings are to be liberally construed and defects are to be ignored absent prejudice. Thus, defendant, as the party attacking the pleading, bears the burden of demonstrating prejudice resulting from an insufficient pleading

(*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 80 [1st Dept 2015]).

The complaint here contains only two headings for causes of action, whereas plaintiff maintains that he advances three causes of action for assault, for battery, and for negligence. Thus, defendant fails to establish that he is prejudiced by this defect.

2. Failure to state a claim

“In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff ‘the benefit of every possible favorable inference.’ ” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] quoting *AG Capital Funding Partners LP v State St Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). “The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’ ” (*511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] quoting *Polonetsky v Better homes Depot, Inc.*, 97 NY2d 46, 54 [2001]).

Although the complaint is almost entirely bereft of facts, affidavits may be offered to remedy defects in the complaint. (*Leon v Martinez*, 84 NY2d 83, 88 [1994], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, the nonparty affidavits afford defendant sufficient notice of the occurrence upon which he premises his claims.

3. Assault and battery

To state a claim for assault, plaintiff must allege “intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact.” (*Corcoran v City of New York*, 186 AD3d 1151, 1151 [1st Dept 2020], quoting *Gould v Rempel*, 99 AD3d 759, 760 [2d Dept 2012]). To state a claim for battery, plaintiff must allege that defendant intentionally touched him without consent. (*Corcoran*, 186 AD3d at 1151, citing *Wende C. v United Methodist Church*, 4

NY3d 293, 298 [2005], *cert denied* 546 US 818 [2005]). Plaintiff's allegations, as amplified by the nonparty witnesses' affidavits, are sufficient to state a claim for assault and for battery.

4. Negligence

To be held liable for negligence, the defendant must have breached a duty of care owed to the plaintiff. (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). Negligence claims, in contrast to those for assault and battery, lack the element of intent, and thus, allegations of intentional conduct preclude a claim of negligence, as the two states of mind cannot coexist. (*Borrerro v Haks Grp., Inc.*, 165 AD3d 1216, 1217–18 [2d Dept 2018]). Even if plaintiff's pleadings are most liberally construed, he plainly alleges intentional conduct, and thus, he cannot advance claims for negligence and/or gross negligence. (*See e.g. Morrow v MetLife Invs. Ins. Co.*, 177 AD3d 1288, 1289 [4th Dept 2019] [plaintiff failed to state cause of action for negligence and gross negligence where claims based on intentional conduct]).

5. Absolute liability and punitive damages

Plaintiff's request that defendant be held absolutely liable does not constitute an independent cause of action, and thus, it is not subject to dismissal.

A demand for punitive damages requires allegations of "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." (*Gamiel v Curtis & Riess-Curtis, P.C.*, 16 AD3d 140, 141 [1st Dept 2005]). Plaintiff's allegations are sufficient to sustain a demand for punitive damages. (*See* 36 NY Jur 2d, Damages § 190 [punitive damages recoverable in actions for assault and battery]; *O'Sullivan v Minjae Kim*, 29 AD3d 656 [2d Dept 2006] [affirming award of punitive damages in connection with assault claim]).

4. Costs

I decline to award costs.

III. MOTION TO TRANSFER VENUE, STAY PROCEEDINGS, QUASH SUBPOENAS, AND FOR PROTECTIVE ORDER AND CROSS MOTION TO COMPEL (MOT. SEQ. ONE)

A. Contentions

1. Defendant (NYSCEF 8-20)

Defendant contends that venue should be transferred to Suffolk County, as it is the county where the alleged incident occurred, where the related criminal complaint against defendant pends, where each party sought medical treatment, and where all witnesses and evidence are located. He observes that plaintiff served the East Hampton Village Police Department and the East Hampton Town Police Department with subpoenas for records of all radio and 911 calls related to the incident (NYSCEF 15, 16), and argues that they should be quashed and made subject to a protective order barring their enforcement, as 911 calls have no value at this stage of the proceeding, before he has answered the complaint. Moreover, he asserts, plaintiff's access to those records would prejudice him in his criminal case, as plaintiff is a witness and would use the sought-after records to tailor his testimony. He also seeks a stay of all proceedings in this case pending final resolution of the Suffolk County criminal case.

2. Plaintiff (NYSCEF 25-36)

Plaintiff contends that defendant's contentions that material witnesses will be inconvenienced is fatally conclusory absent supporting affidavits, and he observes that all of the nonparty witnesses who submitted affidavits reside in New York County. While a stay of depositions may be appropriate, plaintiff argues, a stay of all discovery is unwarranted, as the district attorney in the criminal case is obligated to provide defendant with, *inter alia*, contact information for all persons with relevant knowledge, statements by those with relevant

information, electronic records of all relevant records, including 911 calls, all related warrants, inventory of all seized property, and transcripts of all testimony and communications, and as defendant possesses these records, plaintiff claims he would be prejudiced by a stay.

Moreover, plaintiff seeks an order compelling defendant to disclose all discovery obtained in the criminal matter, pursuant to CPL 245.20.

3. Defendant's reply (NYSCEF 38-47)

Defendant denies that the witnesses affidavits plaintiff submits support maintaining venue in this county, as the witnesses' accounts differ from the video evidence which prove that they did not observe the entire incident, nor do they claim that testifying in Suffolk County would pose an inconvenience. Moreover, defendant submits an affirmation, dated November 26, 2020, of an EMT who witnessed the incident, resides in Suffolk County, spoke with plaintiff after defendant left, provided a statement to the police, and is willing to testify, but claims he would be inconvenienced by having to testify in New York County. The affirmation, as opposed to an affidavit, is submitted, defendant claims, because he was in Odessa, Ukraine, at the time. (NYSCEF 47). Defendant argues that other witnesses, including municipal employees, EMTs, and police officers reside and work in Suffolk County and would also be inconvenienced too.

Defendant reiterates that absent a stay of this action, his fifth amendment rights will be violated, and accordingly opposes plaintiff's cross motion to compel.

4. Plaintiff's reply (NYSCEF 48)

In further support of his cross motion, plaintiff reiterates his earlier contentions.

B. Analysis

1. Venue

Pursuant to CPLR 503(a), the place of trial of an action "shall be in the county in which

one of the parties resided when [the action] was commenced,” and as it is undisputed that defendant is a resident of New York County, venue is proper here.

Nevertheless, even if commenced in a proper venue, pursuant to CPLR 510(3), upon motion, an action may be moved to a different venue when “the convenience of material witnesses and the ends of justice will be promoted by the change.” The movant bears the burden of demonstrating that “the convenience of material witnesses would be better served by the change of venue.” (*T.D.M. v Pipala*, 223 AD2d 419, 419 [1st Dept 1996]).

When seeking to change venue for the convenience of witnesses pursuant to CPLR 510(3), the movants must provide:

(1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case.

(*Rodriguez-Lebron v Sunoco, Inc.*, 18 AD3d 275, 276 [1st Dept 2005], quoting *Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 572 [1st Dept 1992]).

While defendant submits an affirmation supporting a change of venue, he does so only in reply, and it is thus not considered, and in any event, the potential witness’s bare assertion of inconvenience is insufficient to warrant a change of venue. (*See e.g. Gersten v Lemke*, 68 AD3d 681 [1st Dept 2009] [bare assertion of inconvenience insufficient to transfer venue and supporting submissions filed in reply not considered]).

2. Stay

Pursuant to CPLR 2201, “the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” Where the basis for a stay is the pendency of a related criminal action, the court is to consider “avoiding the risk of inconsistent

adjudications, application of proof and potential waste of judicial resources” and whether “defendant will invoke his or her constitutional right against self incrimination.” (*Britt v Int’l Bus Servs., Inc.*, 255 AD2d 143, 144 [1st Dept 1998]). Plaintiff does not dispute that a stay of defendant’s deposition is warranted based on these factors.

While the invocation of “the privilege against self-incrimination is generally an insufficient basis for precluding discovery in a civil matter” (*Access Cap., Inc. v DeCicco*, 302 AD2d 48, 52 [1st Dept 2002]), defendant’s constitutional rights are not the sole consideration. Each matter concerns the same incident, and a conviction in the criminal case would likely estop defendant from denying certain facts, “thereby simplifying the issues.” (*Mook v Homesafe Am., Inc.*, 144 AD3d 1116, 1117 [2d Dept 2016]; *Belopolsky v Renew Data Corp.*, 41 AD3d 322, 323 [1st Dept 2007] [stay warranted where determination in one action may dispose of issues in instant action]). The conservation of judicial resources, along with the risk that defendant could “suffer the severe prejudice of being deprived of a defense” (*Mook*, 144 AD3d at 1117, quoting *In re Astor*, 62 AD3d 867, 869 [2d Dept 2009]), warrant a stay of this matter. That the prosecution in defendant’s criminal trial now has a broader obligation to produce certain discovery under CPL 245.20 does not impact the conservation of judicial resources and the protection of defendant’s constitutional rights. In any event, should any unreasonable delay arise in the criminal proceeding, plaintiff retains the right to move to vacate the stay. (*Britt*, 255 AD2d at 144).

3. Discovery

In light of the stay, the remaining portions of defendant’s motion to quash and for a protective order, and plaintiff’s cross-motion to compel are held in abeyance pending the stay.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion to dismiss is granted to the extent that plaintiff’s claims for negligence and gross negligence are severed and dismissed, and is otherwise denied, and the Clerk is directed to enter judgment accordingly (mot. seq. two); and it is further

ORDERED, that motion sequence one is decided as follows: (1) defendant’s motion to transfer venue is denied; (2) defendant’s motion to stay this action pending the resolution of the related criminal action is granted; and (3) defendant’s motions to quash subpoenas and for a protective order and plaintiff’s cross-motion to compel are held in abeyance pending the lifting of the stay.

3/31/2021

DATE

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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