

Martinelli v Showtime Networks Inc.

2021 NY Slip Op 33406(U)

September 27, 2021

Supreme Court, Rockland County

Docket Number: Index No. 031213/2019

Judge: Sherri L. Eisenpress

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
SHERWOOD MARTINELLI,

Plaintiff,

DECISION AND ORDER

(Motion #1)

-against-

Index No.: 031213/2019

SHOWTIME NETWORKS INC., THE MARK GORDON
COMPANY d/b/a ENTERTAINMENT ONE, ISAAC LIEV
SCHREIBER a/k/a LIEV SCHREIBER & GEOFFERY
TORRENS,

Defendants.

-----X
Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 9, were considered in connection with Plaintiff Sherwood Martinelli's Notice of Motion, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment as to liability in her favor as against defendants:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS 1-5/AFFIDAVIT OF PLAINTIFF SHERWOOD MARTINELLI	1-3
STATEMENT OF MATERIAL FACTS/AFFIRMATION IN OPPOSITION/EXHIBITS A-N/AFFIDAVIT OF TRACY PHILLIPS-BOONE/AFFIDAVIT OF MICHAEL DOWNEY	4-7
AFFIRMATION IN REPLY/STATEMENT OF MATERIAL FACTS	8-9

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff with the filing of the Summons and Complaint on March 3, 2019, and an Amended Complaint was filed on March 11, 2019. Issue was joined as to all defendants with the exception of Defendant Geoffery Torrens, by service of an Answer with affirmative defenses, and a cross-claim against Geoffery Torrens, on July 1, 2019. There is no Court record of Defendant Geoffery Torrens filing an Answer and no default

motion was made¹.

The Amended Complaint alleges that on June 7, 2018, during the course of filming the show "Ray Donovan," Defendant Liev Schreiber intentionally struck Plaintiff, making contact with the plaintiff's person and destroying personal property. The First Cause of Action alleges that Showtime and the Mark Gordon Company failed to supervise with reasonable care, was negligent in its hiring of Schreiber and failed to take any precautions to prevent an attack. The second cause of action against Defendant Schreiber is that he intentionally struck the plaintiff and destroyed personal property.

Plaintiff moves for summary judgment on a battery cause of action. He asserts that at the time of the incident, he was lawfully on a public sidewalk on Lydecker Street, in Nyack, NY, in an area which was beyond the set. He further alleges that Defendant Liev Schreiber became infuriated with him and yelled at Plaintiff to get out of his line of sight prior to shooting a scene. Plaintiff alleges that Defendant Schreiber became increasingly infuriated and then without provocation, charged Plaintiff in an aggressive and threatening manner, "while ducking and weaving, like a prize fighter, ultimately striking Plaintiff with Defendant's upper body while swinging to knock Plaintiff's camera." Plaintiff states that Defendant Schreiber struck Plaintiff's right shoulder and camera, causing the camera to be knocked out of Plaintiff's left hand, which was attached by a strap on his right shoulder while contemporaneously screaming and berating Plaintiff to "get the fuck of my light of sight." Plaintiff's asserts that he has established a prima facie case of battery in that Defendant Schreiber charged at him in an aggressive manner while making physical contact, and that Defendant Showtime and Entertainment One are vicariously liable for his actions.

In opposition to the summary judgment motion, Defendants submit the parties' testimony as well as affidavits from Tracy Phillips-Boone, a Wardrobe Supervisor on set, and

¹Although it is claimed that Defendant Torrens served a pro se answer upon Plaintiff's office, it was not filed with the Court.

Michael Downey, Assistant Unit Production manager, both of whom claim to have witnessed the subject occurrence. Defendant Schreiber and the witnesses submit that Plaintiff, who had been frequently on the set and disruptive to production, raised his camera to Defendant Schreiber's face and began taking pictures of him. Mr. Schreiber requested that he remove the camera and Plaintiff refused. Mr. Schreiber submits that he moved the camera away from his face and no contact was made with Plaintiff at any time. Mr. Schreiber and Defendants also assert that no verbal threats were made to Plaintiff. Defendants argue that summary judgment must be denied as there is overwhelming evidence showing that a battery did not occur between Defendant Schreiber and Plaintiff. Defendants note that the criminal case for harassment was dismissed against him. They contend that the motion must also be denied as a matter of law, as it is procedurally defective for failure to provide a Statement of Material Facts and that Plaintiff should be sanctioned for making a frivolous motion.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacaqino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York,

49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

"The elements of a cause of action [to recover damages] for battery are bodily contact, made with intent, and offensive in nature." Siegell v. Herricks Union Free School Dist., 7 A.D.3d 607, 609, 777 N.Y.S.2d 148 (2d Dept. 2004). "The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive." Cerilli v. Kezis, 16 A.D.3d 363, 364, 790 N.Y.S.2d 714 (2d Dept. 2005). However, "there is no requirement that the contact be intended to cause harm." Id. Given the divergent versions of the subject occurrence, the Court finds that there are triable issues of fact as to whether Defendant Schreiber struck Plaintiff, and if so, whether the touching was intentional and offensive. See Fugazy v. Corbetta, 34 A.D.3d 728, 825 N.Y.S.2s 120 (2d Dept. 2006). On a summary judgment motion, it is the court's function to assess credibility. Garcia v. Stewart, 120 A.D.3d 1298, 1299, 993 N.Y.S.2d 90 (2d Dept. 2014). As such, Plaintiff's summary judgment motion against Defendant Schreiber, Showtime, and the Mark Gordon Company is denied, as triable issues of fact exist. Lastly, Plaintiff's summary judgment motion against Defendant Jeffrey Torrens must also be denied. Plaintiff made absolutely no prima facie showing against this Defendant in its moving papers to such an extent that this Court is unaware of what role this defendant allegedly played in the subject occurrence.

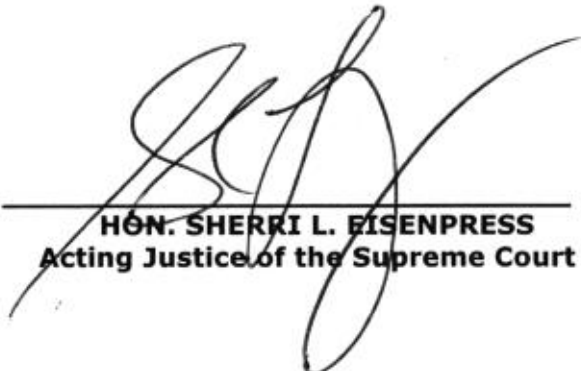
Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Plaintiff for summary judgment as to the issue of liability (Motion #1) is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a settlement conference on **NOVEMBER 5, 2021, at 10:00 a.m.** via Microsoft Teams. Counsel is directed to have settlement authority and must be able to contact their client upon request by the Court.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
September 27, 2021



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties via -NYSCEF-