SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

John Repetti

INDEX NO. 160267-2020

MOT. DATE

- v -

MOT. SEQ. NO. 001

Waylon Jacques

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This action arises from a physical alteration between the parties which occurred December 5, 2019 at 22 East 29th Street in Manhattan (sometimes the "premises"). Plaintiff now moves for summary judgment on the issue of liability (CPLR 3212). Defendant opposes the motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is granted.

It is undisputed that on December 9, 2020, the defendant pleaded guilty to attempted assault in the third degree in violation of PL 110/120[1]. Defendant was then sentenced to time served. Plaintiff has provided a copy of the transcript of defendant's allocution to the court, which provides in pertinent part as follows:

> THE COURT: By your plea of guilty do you admit that on or about December 5, 2019, at about 11:34 p.m., inside 22 East 29th Street, State of New York, County of New York, you did attempt to cause physical injury to another person and in attempting to do so, hit the person in the head, with the intention to cause them physical injury or attempting to cause them physical injury.
>
> Is that the conduct you engaged in at that date, time and place in New York State, New York County?
>
> THE DEFENDANT: Yes, sir.

Dated: 4/4/23

HON. LYNN R. KOTLER, 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

Plaintiff has also submitted his sworn affidavit wherein he states that on December 5, 2019, he was a patron inside the premise, and at approximately 11:34pm, defendant "initiated a verbal and physical altercation with me". Plaintiff specifically claims that the defendant "struck [his] head with a glass bottle/cocktail glass causing a laceration and other injuries.". In addition, plaintiff has submitted photographs to the court depicting the injuries he sustained and the bloody clothing he was wearing at the time of the underlying incident.

Plaintiff has asserted four causes of action against the defendant: [1] assault; [2] civil battery; [3] intentional infliction of emotional distress; and [4] negligent infliction of emotional distress. Defendant's answer asserts various affirmative defenses and a counterclaim for personal injuries against the plaintiff, alleging that "plaintiff assaulted and battered the defendant without any provocation or cause on the part of the defendant."

Plaintiff now argues that he is entitled to summary judgment on the issue of liability as no triable issues of fact remain based on the doctrine of collateral estoppel in connection with defendant's guilty plea and criminal conviction. Plaintiff's counsel does not specify which, if all four, causes of action plaintiff is entitled to summary judgment on, nor does plaintiff's counsel move with respect to defendant's counterclaim. In opposition to the motion, defense counsel submits an affirmation wherein he argues that the motion should be denied because plaintiff failed to submit a statement of material facts. Substantively, defendant argues that plaintiff was also charged with assault in connection with the underlying incident, and in light of the disposition of plaintiff's case, to wit, an adjournment in contemplation of dismissal, "a question of fact remains as to who assaulted who first and who responded in self defense."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff relies on the doctrine of collateral estoppel, which "precludes a party from relitigating an issue previously resolved against that party in a prior proceeding in which that party had a full and fair opportunity to contest the decision now said to be controlling" ((*Kuznitz v. Funk*, 187 AD3d 1006 [2d Dept 2020] citing *Buechel v. Bain*, 97 NY2d 295 [2001]). The party seeking to apply collateral estoppel must prove that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action. (*Id.*) "Where a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from relitigating the issue of his liability" (*Maiello v. Kirchner*, 98 AD3d 481 [2d Dept 2012]).

First and second causes of action

Civil assault is the intentional placing of another person in fear of an imminent battery. *Charkhy v Altman*, 252 AD2d 413, 678 NYS2d 40 [1st Dept 1998]). "To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact". *Holtz v Wildenstein & Co., Inc.*, 261 AD2d 336, 693 NYS2d 516 [1st Dept 1999]. 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 (*Kuznitz v. Funk*, 187 AD3d 1006 [2d Dept 2020]).

On this record, plaintiff has established entitlement to summary judgment on his first and second causes of action in light of his sworn affidavit and the defendant's open court admission to hitting the plaintiff in the head. In turn, defendant has failed to raise a triable issue of fact. Defendant has not submitted a sworn affidavit to the court and his attorney's attempt to raise a triable issue of fact vis-à-vis plaintiff's own charges arising from the underlying incident fail to defeat plaintiff's motion. There is no dispute that defendant initiated a verbal and physical altercation with plaintiff and then struck plaintiff in the head with a glass bottle/cocktail glass causing a laceration and injuries. Accordingly, plaintiff's motion is granted on the first and second causes of action.

Third cause of action

A cause of action for intentional infliction of emotional distress has four elements: "(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. American Broadcasting Companies Inc.*, 27 NY3d 46 [2016] quoting *Howell v. New York Post Co.*, 81 NY2d 115 [1993]). This cause of action is subject to a one-year statute of limitations (CPLR § 215[3]; see *Bellissimo v. Mitchell*, 122 AD3d 560 [2d Dept 2014]).

A plaintiff bears a heavy burden of alleging a claim for intentional infliction of emotional distress (*Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]). Plaintiff must assert conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and [is] utterly intolerable in a civilized community" (*Kickertz v. New York University*, 110 AD3d 268, 277-278 [1st Dept 2013] citing *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15 [2008]).

Here, plaintiff has failed to meet his burden. Plaintiff has not provided any evidence which would support the necessary element that defendant engaged in extreme or outrageous conduct. To the extent that plaintiff relies upon defendant's guility plea and criminal conviction, defendant did not admit to the type of conduct which would sustain a cause of action for intentional inflicent of emotional distress. Accordingly, the motion is denied as to the third cause of action.

Fourth cause of action

Generally, a cause of action for negligent infliction of emotional distress must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers plaintiff's physical safety or causes plaintiff to fear for his or her own safety (*Bernstein v. East 51st Street Development Co., LLC,* 78 AD3d 590 [1st Dept 2010] quoting *Sheila C. v. Povich*, *supra* at 130). A person "to whom a duty of care is owed ... may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations" (*Ornstein v. New York City Health and Hospitals Corp.,* 10 NY3d 1881 N.E.2d 1 [2008]).

In the First Department, a cause of action for negligent infliction of emotional distress must arise from "extreme and outrageous conduct" (see *Melendez v. City of New York*, 171 AD3d 566 [1st Dept April 18, 2019]; compare *Taggart v. Costabile*, 131 AD3d 243 [2d Dept 2015]; see also *Lau v. S & M Enterprises*, 72 AD3d 49 [1st Dept 2010]). "Whether the alleged conduct is outrageous is, in the first instance, a matter for the court to decide" (*Wolkstein v. Morgenstern,* 275 AD2d 635 [1st Dept 2000] quoting *Rocco v. Town of Smithtown*, 229 AD2d 1034, appeal dismissed 88 NY2d 1065). Further, a cause of action for negligent infliction of emotional distress should generally not be allowed if it is duplicative of tort or contract causes of action (*Wofkstein*, *supra*).

As with the third cause of action, plaintiff has failed to establish a prima facie claim for negligent infliction of emotional distress insofar as he has failed to establish through admissible evidence that the

defendant engaged in extreme and outrageous conduct. Accordingly, the motion is denied as to the fourth cause of action as well.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted only to the extent that plaintiff is awarded summary judgment on the issue of defendant's liability on his first and second causes of action for assault and battery; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are directed to meet and confer and complete a proposed preliminary conference order with regards to all remaining discovery on consent on or before May 16, 2023.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11:

> Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the nycourts.gov website at:

https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf

Proposed preliminary conference orders must be filed on NYSCEF.
If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 4/4/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.