

**Soliman v Shehu**

2023 NY Slip Op 34800(U)

April 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 507522/2019

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26<sup>th</sup> day of April 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

-----X  
AHMED SOLIMAN,

Plaintiff,

-against-

ANDI SHEHU AND RASIZ I. MANDAL,

Defendants.  
-----X

Index No.: 507522/2019

**Decision and Order**

Mot. Seq. #02

KINGS COUNTY CLERK  
FILED  
2023 APR 27 AM 9:57

The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmation) \_\_\_\_\_  
Reply Affidavits (Affirmation) \_\_\_\_\_

NYSCEF Doc. Nos.

41-43  
58  
60-61

Upon the foregoing papers, defendant Andi Shehu (“Defendant”) moves pursuant to CPLR 3211 and 3212 (Motion Seq. 02) for summary judgment, dismissing Plaintiff’s complaint. The self-represented plaintiff Ahmed Soliman (“Plaintiff”) opposes the motion. Co-defendant Rasiz I. Mandal (“co-defendant Mandal”) did not submit papers supporting or opposing the motion.

## BACKGROUND

This action arises from a physical altercation occurring on June 5, 2018 (the “June 5th altercation”) between Plaintiff, Defendant and co-defendant Mandal. Plaintiff asserts a First Cause of Action for assault and battery and a Second Cause of Action for intentional infliction of emotional distress. Plaintiff and Defendant have alleged divergent facts regarding the nature of the altercation. Defendant now moves for summary judgment as to both claims. Defendant also alleges Plaintiff failed to prosecute the matter after his attorney was discharged and thus also seeks dismissal on this basis.

### Defendant’s Contentions

Defendant asserts he acted as a “Good Samaritan” during the June 5<sup>th</sup> altercation when he tried to stop the altercation between Plaintiff and co-defendant Mandal (NYSCEF Doc. No. 42, p. 3, par.20). Defendant asserts that on the morning in question, he was “just a witness” (NYSCEF Doc. No. 42, at par. 23) to what he described as Plaintiff’s “attack” on co-defendant Mandal, initiated after an exchange of words between Plaintiff and co-defendant Mandal while co-defendant Mandal was sitting on the stairs of a property purportedly adjacent to that of Plaintiff’s (*id.*). Defendant claims he saw Plaintiff start to push co-defendant Mandal, strike him in the face, chest and other parts of his torso and then drag him into the street near parked cars and near oncoming traffic (*id.* at pars. 23-26). Defendant claims he witnessed Plaintiff “aggressively” bite co-defendant Mandal causing him to bleed; all the while putting him in a headlock on the ground while repeatedly striking him about his face and torso (*id.* at par. 26).

Upon witnessing the foregoing, Defendant claims he pulled Plaintiff’s leg in an attempt to stop Plaintiff from striking co-defendant Mandal (*id.* at par 27). He asserts

Plaintiff indeed stopped the altercation, followed by Defendant speaking with Plaintiff trying to calm him down (*id.* at par. 29). Defendant claims Plaintiff was “left without any visible injuries, bruises or other impediments” (*id.*).

Finally, Defendant contends it was co-defendant Mandal who was seriously injured by Plaintiff as a result of the altercation (*id.* at par. 28). Defendant also provides a surveillance video capturing the June 5th altercation which he claims, “clearly describe[s] factual information associated with this case” (*id.* at par 17) and is supportive of his arguments.

### **Plaintiff's Contentions**

Plaintiff asserts that at 8:15am on June 5, 2018, he crossed the street from his abode on 90th Street, Brooklyn, NY, to move his car as required by New York City alternate side street parking rules in effect that morning (NYSCEF Doc. No. 58, p.2, par. 24). He observed co-defendant Mandel exit a van purportedly driven by Defendant (*id.* at par. 22). Co-defendant Mandell allegedly approached Plaintiff from his blind-side, and struck him in the nose and temple, apparently causing Plaintiff to fall to the ground (*id.* at par. 24). Plaintiff asserts co-defendant Mandal continued to strike and kick him about his head and torso, with Defendant then joining in as an “accomplice” (*id.*). Plaintiff also claims Defendant and co-defendant Mandal both uttered a racial slur directed to Plaintiff during the altercation (NYSCEF Doc. No. 2 at p. 3, pars. 25-26).

As a result of the altercation and the injuries sustained therefrom, Plaintiff claims he was taken by ambulance to Lutheran Medical Center where he was treated for four broken ribs, a punctured lung, for which he underwent emergency surgery, and a broken nose (NYSCEF Doc. No. 58, p.2, par. 24). Plaintiff further claims he suffered multiple

lacerations and abrasions to his head, required stiches to his legs and otherwise experienced severe pain and suffering (*id.*).

Plaintiff also claims that while he was in the hospital, a series of derogatory and threatening notes were left on his vehicle, which were discovered by his wife. He alleges these notes were left by or at the behest of Defendant and/or co-defendant Mandel, designed to harass and intimidate him, and otherwise inflict emotional distress (NYSCEF Doc. No. 2 at p. 3, pars. 27-28). Finally, Plaintiff alleges the surveillance video is “misleading” since the time stamp indicates 10:30am rather than 8:15am as the start of the altercation (NYSCEF Doc. No. 58 at p.2, par. 24).

### **Defendant’s Reply**

Defendant asserts the surveillance video was not tampered with and that the time stamp is accurate (NYSCEF Doc. No. 60 at p. 2, pars. 6-7). He further contends Plaintiff’s allegations remain unsupported, citing to the alleged dismissal of a criminal complaint made by Plaintiff against Defendant (*id.* at pars.10-11). Defendant otherwise refutes the contentions of Plaintiff submitted in opposition to the motion and reiterates that he acted as a “Good Samaritan”. Defendant relies on the surveillance video to confirm the foregoing (*id.* at pars. 12-15, 18-20).

## **DISCUSSION**

### **A. The Standard of Review**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]). The “failure to make such a prima facie

showing requires denial of the motion, regardless of the sufficiency of any opposing papers” (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Derise v Jaak*, 127 AD3d 1011, 1011 [2d Dept 2021]; *Sosa v 46th St. Dev LLC*, 101 AD3d 490, 492 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2d Dept 1989]).

The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). It “must clearly appear that no material triable issue of fact is presented” (*Rebecchi v Whitmore*, 172 AD2d 600, 600 [2d Dept 1991]). In order to avoid summary judgment, the non-moving party “must make a showing by producing evidentiary proof in admissible form” (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 [1979]).

#### **B. Plaintiff's Assault and Battery Cause of Action**

Plaintiff alleges Defendant and co-defendant Mandal “intentionally placed Plaintiff in imminent apprehension of harmful contact and, without Plaintiff's consent, intentionally and offensively physically contacted Plaintiff's body causing multiple bone fractures and a punctured lung, among other severe and permanent physical injuries” (NYSCEF Doc. No. 2 at pars. 34-37). “To sustain a cause of action to recover damages for assault, there

must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact” (*Cotter v Summit Sec. Servcs., Inc.*, 14 AD3d 475, 475 [2d Dept. 2005]). “To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature” (*id.* at 476).

Here, based on the papers submitted and a review of the surveillance video, the Court finds there are material issues of fact in dispute as to Plaintiff’s cause of action for assault and battery. The Court finds the surveillance video is not dispositive of the factual claims asserted either by Plaintiff or Defendant. For example, at one point in the surveillance video, Defendant is seen pulling the leg of Plaintiff as he acknowledges doing. This same surveillance video footage, however, also shows Defendant striking Plaintiff in his back, in direct contravention of Defendant’s claim that he acted as a “Good Samaritan” and did not “physically menac[e]” Plaintiff (NYSCEF Doc. No. 42 at par. 20-21).

The Court further observes that the surveillance video does not capture the entirety of the altercation between Plaintiff, Defendant and co-defendant Mandal. Indeed, there are observable times when all the parties are seen within the frame of the surveillance video and other times when some or all of them are outside the frame of the surveillance video – all having some degree of interaction with non-parties to this action. At one critical juncture, the surveillance video fails to capture the full extent of the interaction between Plaintiff and co-defendant Mandal when they are engaged on the ground, between the cars, as alleged.

That part of Defendant's motion seeking summary judgment as to Plaintiff's First Cause of Action for assault and battery is therefore denied as the submitted proof raises triable issues as to what occurred at the time of the subject altercation and the actions of all the parties involved. Defendant's assertions to the contrary thus raise disputed facts for which a jury must decide.

### **C. Plaintiff's Intentional Infliction of Emotional Distress Cause of Action**

Plaintiff alleges Defendant and co-defendant Mandal's assault and battery, "and the repugnant circumstances attendant thereto", and the related subsequent actions including the posting of threats on Plaintiff's vehicle, evidenced "extreme and outrageous conduct . . . intend[ing] to cause or disregarded a substantial likelihood of causing, severe emotional distress to Plaintiff" (NYSCEF Doc. No. 2 at pars. 39-41).

"The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Noval v Sisters of the Heart of Mary*, 210 AD3d 1104, 1106 [2d Dept. 2022]; see also *Howell v. New York Post Co.*, 81 NY2d 115, 121 [1993]).

Here, whether the actions of Defendant and co-defendant Mandal rise to the level of "extreme or outrageous" conduct -- given the alleged injuries sustained by Plaintiff, the alleged threatening notes and the alleged racial slur -- are matters of factual dispute, for which a jury should decide. That portion of Defendant's motion seeking summary

judgment as to Plaintiff's Second Cause of Action for intentional infliction of emotional distress is denied. The parties' remaining contentions are without merit.

Finally, as no 90-day notice pursuant to CPLR 3216[b][3] has been served on Plaintiff, the action cannot be dismissed for lack of prosecution (*Yumga v Yonkers Contr. Co., Inc.*, 134 AD3d 1031, 1033 [2d Dept. 2019]). However, the parties are directed to appear for further conference in the Final Conference Part on June 7, 2023.

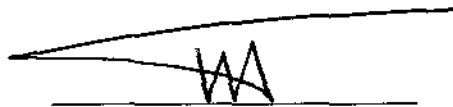
Accordingly, it is hereby

**ORDERED** that defendant Andi Shehu's motion pursuant to CPLR 3211 and 3212 for an order dismissing Plaintiff's complaint (Motion Seq. 02) is denied; and it is further

**ORDERED** that the parties shall appear in the Final Conference Part on June 7, 2023.

This constitutes the DECISION and ORDER of the Court.

ENTER



J.S.C.

HON. WAVNY TOUSSAINT  
J.S.C.

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