

**Damsky v Williams**

2024 NY Slip Op 34491(U)

November 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 517758/2016

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS - PART 24

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ALLAN DAMSKY,

Plaintiff,

Index # 517758/2016

-against-

**BENCH TRIAL DECISION**

SEDDRICK WILLIAMS,

Defendant.

-----X

**HON. LISA S. OTTLEY**

On May 22, 2024, a bench trial was held before this Court whereby both the plaintiff and defendant testified before the Court. Plaintiff, Allan Damsky, commenced this action against the defendant, Seddrick Williams, for (1) assault and battery, (2) intentional infliction of mental and emotional distress, and (3) negligent infliction of emotional distress. Defendant counterclaims for assault and battery, intentional infliction of mental and emotional distress, negligent infliction of emotional distress, and malicious prosecution.

Plaintiff's Case

Plaintiff, Allan Damsky, testified that he is a homeless man who was born and raised in Brooklyn, New York who has not had a residential address in years and has no family. He testified that on November 14, 2015, while traveling on the R train from Brooklyn to Queens to go shopping in Forest Hills he was physically assaulted by the defendant. He stated that when the train stopped, he was gathering his belongings when the doors to the train suddenly closed. Mr. Damsky testified that the station crew were on the platform, but they did not pay any attention and did not go up and down the platform to scan the train cars to see if there were any passengers left on the train. He further testified that he banged on the window, but no one was paying attention and the train pulled out of the station, which did not bother him because he thought he would get off on the other side. Mr. Damsky said he was sitting on the train as it was going through the tunnel when the defendant, Seddrick Williams, the conductor came through the cars, and was surprised to see him on the train. He could not recall exactly what Mr. Williams said to him, but he told Mr. Williams that he attempted to leave but the doors closed on him, and the train pulled out. Mr. Damsky testified that Mr. Williams began making threats that he would have him arrested and started calling him names, such as a moron and other stuff which began an argument between the two of them. He further stated that while he did not recall everything but

remembers that the situation escalated to name calling and he got fed up and when Mr. Williams was walking away, he said something about Mr. Williams mother, but did not recall exactly what he said. He stated that it was Mr. Williams who was exchanging the insults and who walked back toward him, asking him what he said and began punching him at least three or four times while he was sitting down. Mr. Damsky testified that he did not push or swing at Mr. Williams because he does not know how to fight and does not fight. He also stated that he did not make any attempt to assault Mr. Williams because he knew it was against the law to assault MTA personnel. He testified that he did not attempt to defend himself but pleaded with Mr. Williams to stop and apologized to Mr. Williams. Mr. Damsky testified that he did not call Mr. Williams a racial epithet. He further testified that after Mr. Williams assaulted him, Mr. Williams told him he was going to have him arrested for assault. He testified that there were no other passengers on the train and when the train doors opened, he left the train where he saw other MTA employees, who said that he had assaulted their friend. He further testified that he went to the dispatcher's booth to complain that he was assaulted by the train operator, and he showed his bruises. Mr. Damsky also testified that he spoke with the police who took him to the hospital where he was treated and given medication. He stated that he did not follow-up for more treatment after the incident. He could not recall where he went after leaving the hospital. Mr. Damsky testified that he felt abused, humiliated, and bullied and he stayed away from friends because of his appearance, and that he is afraid to ride the subway because he is very anxious.

#### Defendant's Case

The defendant, Seddrick Williams, testified that he is a train operator for the Mass Transit Authority and on November 14, 2015, he was working on the R line when he encountered the plaintiff, Allan Damsky. He testified that on the day of the incident as train operator, he was responsible for making announcements when the train pulled into the last stop and for car numbers one through four, and the conductor was responsible for car numbers five through eight. Mr. Williams testified that if a person remains on the train, you tell the person to detrain and if they refuse, you call the police. Mr. Williams further testified that when you encounter a person on the train, after the announcements, "you try not to be too aggressive, but you do have to be loud sometimes." He testified that once you pull out of the station to turn around and encounter a person on the train, he will first ask if they are o.k., they will answer yes or no and then you tell them to sit tight that you will be moving in ten minutes. He did not have a clear recollection as to the incident but remembered that when he encountered Mr. Damsky, that Mr. Damsky was upset, and he blamed him for closing the doors too early. He stated that he did not see Mr. Damsky because he was in car six and he was only required to check car numbers one through four. Mr. Williams further testified that once the doors close, it is a signal to move the train because everyone is off and everyone is away from the train, and he is cleared to move the train into the relay position. He testified that he is not responsible for closing the doors. He testified that once he moved the train to the designated stop sign, he secured his cab and began his walk through, encountered Mr. Damsky and asked him if he was okay. He testified that Mr. Damsky was physically upset and said, "you guys locked me on the train, and you closed the doors

too early.” He testified that Mr. Damsky was blaming him and started immediately name calling. He testified that Mr. Damsky used profanity, and he kept walking to get to the other end. Mr. Williams testified that Mr. Damsky stood up, followed him, and called him a racial epithet. He further testified that he turned around and told Mr. Damsky that he could talk to him when they get out of the train and then started walking and he recalls either being hit or pushed by Mr. Damsky, at which point he turned around and hit Mr. Damsky four times. Mr. Williams testified that he felt threatened. He stated that after he hit Mr. Damsky, that Mr. Damsky backed up and apologized and put his hands out with his head down saying, “I am sorry, I am sorry.” Mr. Williams testified that he then turned around, went to the door, unlocked it, locked it, and went to the next door, unlocked it and called the control center on his portable radio to report the incident, informing them that he had been attacked. He further testified that he was at the operating position, and he was going to pull the car into the station. He testified that a person at the station opened the doors which allowed Mr. Damsky to get off the train. Mr. Williams testified that he spoke with a superintendent who told him to write a G2 which is an incident report. He testified that he was then told that the dispatcher downstairs needed to see him, so he went downstairs where he saw Mr. Damsky standing with four police officer who arrested him. Mr. Williams testified that the case was dismissed and sealed. He further testified that he did not make a deal with the District Attorney’s office.

#### Assault and Battery

Both parties testified that an altercation between the two of them took place which led to the defendant, Seddrick Williams, being arrested once the train pulled into the subway station and after Mr. Williams was told to report to the downstairs dispatcher. The court finds the testimony of both parties credible in that neither denied that an altercation did in fact occur causing Mr. Damsky to be struck in his face and head by the defendant, which came about when, as testified to by Mr. Williams, the plaintiff hit or pushed him whereupon the defendant reacted resulting in the altercation.

To claim 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.” 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.” See, *Fugazy v. Corbetta*, 34 A.D.3d 728, 825 N.Y.S.2d 120 (2<sup>nd</sup> Dept., 2006); *Bastein v. Sotto*, 299 A.D.2d 432, 749 N.Y.S.2d 538 (2<sup>nd</sup> Dept., 2002).

In the case at bar, the parties assaulted one another when they engaged in physical contact that they described as offensive touching and putting each other in apprehension of each other. The two parties were alone in a closed subway car. They testified that the conversation between the two of them escalated into an altercation due to accusations, name calling, an exchange of insults, and eventually the assault of each party by one another. This court does not find the plaintiff’s testimony that he does not recall how the altercation came about, did not push, or attempt to defend himself during the altercation credible. Nor does the court find Mr.

Damsky's testimony credible that he remained seated the entire time during the altercation and took no physical action against the defendant. On cross-examination, Mr. Damsky testified that he may have stood up. He further testified that he was fed up and as Mr. Williams began walking away, although he could not recall what he said, he said something about Mr. Williams' mother, which caused Mr. Williams to come back towards him to strike him.

Mr. Williams reported the incident via his work radio stating that he, the defendant, had been attacked and that there was an incident on the train before the train pulled into the station. Mr. Williams also testified that he was defending himself when he struck Mr. Damsky, who had hit or pushed him while he was walking away. He testified that the plaintiff was coming toward him trying to reach out and grab him during the altercation. Mr. Williams admits that he did in fact strike Mr. Damsky about four times.

After the assault, the plaintiff was taken to the hospital and Mr. Williams was taken into custody by the police. The plaintiff testified that he was treated at the hospital, discharged, and given aspirin (81 mg). (*See, subpoenaed records on behalf of plaintiff*). The plaintiff testified that he suffered from pain in his head and had an open laceration (*See, plaintiff's photographs in evidence*). He testified that he had headaches that lasted a couple of weeks but did not have any vision problems or trouble sleeping. He could not remember whether he was told to come back to the hospital for a check-up, but did recall being told that if there were any problems to come back. He further testified that he had bandages, that he felt abused, humiliated, and bullied, and that he stayed away from his friends for a few weeks because of his appearance. Mr. Damsky further testified that he was afraid to ride the subway line, especially the Queens line and that he was very anxious.

#### Infliction of Mental and Emotional Distress

According to New York law, a cause of action alleging intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *See, Taggart v. Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 288 (2<sup>nd</sup> Dept., 2015). Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *See, Taggart v. Costabile, supra*. Here, you have two individuals who, unfortunately, were unable to refrain from getting into an altercation because of their respective behavior toward one another. This court does not find that the behavior testified to as outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and utterly intolerable in a civilized society. The court finds that the conduct complained of and testified to falls within the traditional torts of assault and battery, and the plaintiff's claim for intentional infliction of mental and emotional distress claims are subsumed by the assault and battery claims. *See, Melendez v. City of New York*, 62 Misc.3d 1206(A), 112 N.Y.S.3d 873 (Sup. Ct. Kings Co., 2019).

### Negligent Infliction of Emotional Distress

Negligence is distinguished from assault and battery by the absence of that intent which is a necessary ingredient of the latter. See, Chelsa v. McGregor, 209 A.D.3d 963, 176 N.Y.S.3d 687 (2<sup>nd</sup> Dept., 2022). Although the same act may constitute battery or negligence depending upon whether or not it was intentional, ..., there cannot be recovery for both. See, Chelsa v. McGregor, supra, citing Borrerro v. Haks Group, Inc., 165 A.D.3d 11216, 87 N.Y.S.3d 618 (2<sup>nd</sup> Dept., 2018). As such, if the only inference that may be drawn from plaintiff's evidence is that defendant's contact with the plaintiff was intentional, plaintiff may recover only in battery and the issue of negligence should not be submitted to the trier of fact. See, Chelsa v. McGregor, supra, citing, Borrerro v. Haks Group, Inc., supra.

Based upon the testimony at trial, the court finds that the only inference drawn from plaintiff and defendant's testimony is that the alleged injuries resulted from the defendant's intentional acts, rather than negligent conduct. Plaintiff's verified complaint's third cause of action for negligent infliction of emotional distress is in essence a cause of action for assault and battery and does not allege that the defendant's actions were negligent. In addition, a cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety or caused him or her to fear for his or her own safety. See, Chelsa v. McGregor, supra. The plaintiff has not shown nor was there testimony that the defendant breached a duty owed, and the testimony does not establish that the defendant's conduct unreasonably endangered plaintiff's physical safety or fear for his or her own safety. Both parties engaged in the altercation as a result of their own actions toward one another.

### Damages

On plaintiff's first cause of action for assault and battery, the plaintiff is seeking two million (\$2,000,000.00) and \$4,000,000.00 in punitive damages; on the second cause of action for intentional infliction of emotional distress two million (2,000,000.00) and \$4,000,000.00 in punitive damages; and on the third cause of action, two million (2,000,000.00) and \$4,000,000.00 in punitive damages.

As stated above, the two causes of action which fail based upon the testimony heard by this court are intentional infliction emotional distress and negligent infliction of emotional distress. Although the plaintiff testified that he felt abused, humiliated, bullied, stayed away from his friends for a few weeks, and is afraid to ride the subway line, his testimony and proof do not rise to the level of extreme and outrageous, nor negligence, to warrant an award for damages.

Regarding the cause of action for assault and battery, the court finds that although the plaintiff's proof is sparse as to his injuries since he was discharged from the hospital with a prescription of 81 mg of aspirin; and the pictures indicate that he suffered bruises to his head and ear caused by defendant's assault and battery, the injuries were superficial. In addition, his

feelings are subjective and not based on objective proof. However, the plaintiff is entitled to reasonable compensation. See, *Raymond v. Marchand*, 125 A.D.3d 835, 4 N.Y.S.3d 107 (2<sup>nd</sup> Dept., 2015), citing, *Levine v. Abergel*, 127 A.D.2d 822, 512 N.Y.S.2d 218 (2<sup>nd</sup> Dept., 1987). The plaintiff's subjective testimony of pain may be sufficient to establish an injury for which he is entitled to some compensation, but the proof must satisfactorily establish that the injury is more than minimal. See, *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 599 N.Y.S.2d 336 (2<sup>nd</sup> Dept., 1990).

The court finds that the plaintiff is entitled to reasonable compensation in the amount of \$1,000.00. However, the court does not find that the plaintiff is entitled to punitive damages. Punitive damages are generally reserved for rare cases exhibiting malice, fraud, oppression, insult, wantonness, or other aggravated circumstances which effect a public interest. See, *Laurie Marie M. v. Jeffrey T.M.*, *supra*.

As to defendant's counterclaims, the court finds his testimony credible regarding the plaintiff's conduct which escalated the encounter between the parties into the altercation, and that both parties assaulted one another. However, the defendant failed to establish damages for his assault and battery claim. In addition, the defendant's counterclaims for intentional infliction of mental and emotional distress, negligent infliction of emotional distress, and malicious prosecution were not proven and are dismissed.

Next, this court must address the fact that plaintiff was initially granted a default judgment against the defendant, in the amount of \$16,662.50 on June 7, 2019. The default judgment was vacated by the Hon. Kathy King on January 27, 2021, and the Appellate Division affirmed Justice King's order vacating the default judgment. See, *Damsky v. Williams*, 208 A.D.3d 1304 (2<sup>nd</sup> Dept., 2022). Thereafter, the defendant moved for the repayment of wages that were garnished from his salary, which was granted by the Hon. Aaron D. Maslow, who ordered the plaintiff to "make restitution to the defendant of the total amount along with interest at nine percent per annum on each individual amount garnished accruing as of the date of the respective garnishment, by October 31, 2023." On the date of this trial, May 22, 2024, the defendant's attorney informed the court that plaintiff had not complied with Justice Maslow's decision and order. The court directed plaintiff's counsel to comply with Justice Maslow's decision and order. After trial, the court received a copy of a letter from plaintiff's attorney to defendant's attorney that he was returning \$5,261.89 payable to the defendant, which plaintiff's attorney indicated was the amount he received for his services and disbursements regarding the case. To date, this court has not been informed as to any other monetary restitution made to the defendant.

Justice Maslow's decision is detailed as to the amount of the restitution, in paragraphs (2) and (3) which read as follows:

(2) Plaintiff shall provide defendant accurate documentary evidence as to the individual amount garnished from defendant's salary and the dates the garnishments took place, no later than October 20, 2023. In the event plaintiff complies with said mandate by October 20, 2023, plaintiff is then directed to make restitution to defendant of the total

amount along with interest at nine percent annum on each individual amount garnished accruing as of the date of the respective garnishment, by October 31, 2023.

Paragraph (3) reads in part<sup>1</sup> as follows:

“In the event plaintiff fails to comply with decretal paragraph (2), Defendant shall submit an affidavit of same to the Clerk and shall have judgment entered against plaintiff in the amount of \$14,207.36, along with interest at nine percent per annum accruing as follows...”

Partial compliance of Justice Maslow’s decision and order occurred on or about May 22, 2024, which was after October 31, 2023. In any event, the plaintiff **must** comply with the decision and order of Justice Maslow.

In addition, the defendant is directed to follow Justice Maslow’s decision and order which directs the defendant to submit an affidavit of same to the Clerk of the Court and shall have judgment entered against the plaintiff in the amount now due and owing, along with interest at nine percent per annum.

The amount of restitution to the defendant, as per Justice Maslow’s decision and order exceeds the amount of compensation this court has awarded the plaintiff, which is \$1,000.00 for the cause of action for assault and battery.

### Conclusion

After trial the court finds that the plaintiff has established his cause of action for assault and battery due to an altercation between plaintiff, Allan Damsky, and the defendant, Seddrick Williams, and

**IT IS HEREBY, ORDERED** that as compensation for his injuries, the plaintiff, Allan Damsky, is awarded \$1,000.00 (one thousand dollars), and it is further

**ORDERED** that the plaintiff, as ordered by Justice Aaron Maslow, make full restitution to the defendant, Seddrick Williams, of the amount garnished from his salary, with interest at nine percent per annum, less \$5,261.89 (five thousand two hundred sixty-one dollars and eighty-nine cents), which represents the amount returned on or about May 22, 2024, by plaintiff’s attorney, and it is further

**ORDERED** that plaintiff’s causes of action for intentional and negligent infliction of mental distress are hereby dismissed, and it is further

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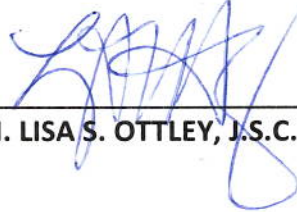
<sup>1</sup> The nine percent per annum increased amounts from August 2019 through January 21, 2021, are not included herein.

**ORDERED**, that defendant's counterclaims for intentional infliction of mental and emotional distress, negligent infliction of emotional distress, and malicious prosecution are dismissed, and it is further

**ORDERED**, that an award of damages for defendant's counterclaim for assault and battery is denied.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York  
November 29, 2024



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HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

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