SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

LOUIS PETRELLA,

Plaintiff,

- against -

JONATHAN LIEBERMAN,

Defendant.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 7041/11

MOTION SUBMISSION
DATE: 6/25/12

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

RELIEF REQUESTED

The plaintiff moves for an order pursuant to CPLR §3212 granting plaintiff summary judgment. The defendant submits opposition. The plaintiff submits a reply affirmation.

BACKGROUND

The plaintiff initiated this action to recover for injuries sustained June 3, 2010 at approximately 1:00 p.m., on Sunrise Highway, at or near the Long Island Railroad Station, (LIRR), Merrick, New York. The plaintiff's Verified Complaint alleges, as per the first cause of action, that the defendant carelessly, recklessly and negligently came into bodily physical contact with the plaintiff. As per the second cause of action, plaintiff alleges that the defendant intentionally came into violent bodily physical contact with the plaintiff, whereby plaintiff was caused to sustain injuries caused by the defendant's wanton and reckless acts. The plaintiff's Verified Bill of Particulars provides that the defendant carelessly, recklessly and negligently struck plaintiff's nose and jaw with his fists, twisted plaintiff's fingers and kicked plaintiff's knees. Plaintiff's injuries include a fractured jaw in two locations, whereby plaintiff underwent open reduction and internal fixation, a fractured nose and a fractured finger.

The defendant interposed a Verified Answer asserting the defenses of culpable conduct, plaintiff's voluntary participation in the altercation, justification of defendant's actions, and assumption of risk.

Following an automobile accident between the parties' respective vehicles, the plaintiff and defendant exited their vehicles and began arguing. The defendant was arrested and charged with Penal Law §120.00, Assault 3rd with the intent to cause physical injury to another person, causing injury to such person. The defendant and plaintiff were allegedly involved in a road rage incident that ended up in the parking lot of the LIRR Merrick Train Station, whereby the defendant, with a closed fist, struck plaintiff's face, breaking plaintiff's jaw in two places, and allegedly broke plaintiff's left ring finger.

The defendant submits that after the motor vehicle accident, both vehicles pulled over, the defendant asked the plaintiff if he was okay, and defendant told the plaintiff they should leave since there was no damage, and the defendant had a meeting. The plaintiff stated they could not leave, and defendant stated he was leaving because he had to get to a meeting. The defendant provides that plaintiff told the defendant that the defendant was not leaving, pulled his sunglasses down, came forward and said to the defendant, "You don't know who you're F'ing with", then pushed defendant with both hands and said "Don't F with me. You're messing with the wrong person". The defendant then swung and hit the plaintiff in the face, and the altercation began. As per the defendant, plaintiff "struck the first blow" when the plaintiff pushed him with both hands and threatened him.

The defendant plead guilty to a violation of §240.20(7) of the Penal Law which provides as follows.

> "A person is guilty of disorderly conduct when, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: ... 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose."

At the defendant's allocation, the Court stated specifically as to the June 3, 2010 incident, "On that date, time and at that location, how do you plead, guilty or not guilty, to violating the Penal Law, specifically Section 240.20(7), disorderly conduct, a violation not a crime?" The defendant responded guilty. The Court accepted the plea, which was offered on the condition that the defendant complete a twelve-week, anger management program, as well as 21 hours of community service, and a stay away Order of Protection.

APPLICABLE LAW

Where a party has had a full and fair opportunity to litigate an issue, that party is collaterally estopped from litigating the same issue in another proceeding. (*Montoya v. JL Astoria Sound, Inc.*, 92 AD3d 736). "In order for collateral estoppel to apply, two elements must be established: (1) that 'the identical issue was necessarily decided in the prior action and is decisive in the present action'; and (2) that the precluded party 'must have had a full and fair opportunity to contest the prior determination.'" (*Id.*, citing D*'Arta v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659). Issue preclusion is only applicable if there is an identity of issue which was necessarily decided in the prior action, and decisive in the present action, where there was a full and fair opportunity to contest the purported controlling decision. (*Schwartz v. Public Adm'r*, 24 NY2d 65).

"Generally, whether a party has had a full and fair opportunity to contest a prior decision 'requires consideration of the realities of the litigation' ... [and] the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even those factors may vary in relative importance depending on the nature of the proceedings." (*Marx v. Burke*, 2007 WL 2174774, citing *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, quoting *Gilberg v. Barbieri*, 53 NY2d 285).

"A conviction in a City Court for the petty offense of harassment does not collaterally estop, and cannot later be used to preclude the defendant from disputing the merits of a civil suit for assault involving the same incident ... [as] he was not afforded the same opportunity to litigate his liability in the City Court as he would in the Supreme Court." (*Gilberg v. Barbieri, supra*). In *Gilberg*, the Court of Appeals provided that harassment is a petty offense, and the City Court noted that the defendant was "not found guilty of a crime, [as] it's a violation'". "Petty infractions, like traffic violations, are more accurately described as noncriminal offenses." (*Id.*) The Court reasoned that granting collateral estoppel would not reduce litigation in the long run, but rather, would "provide an incentive to potential plaintiffs to file a minor criminal charge before commencing a civil action" ... whereby "[i]f the defendant is convicted the prosecution will have also won the plaintiff's civil action, without the expense of a civil trial action and, more important, without the plaintiff having to convince a jury of the merits of his action". (*Id.*)

DISCUSSION

The plaintiff moves for summary judgment on the issue of liability based on the doctrine of collateral estoppel. The plaintiff's contention that defendant's guilty plea to violating §240.20(7) of the Penal Law, disorderly conduct, precludes the defendant from contesting the action herein is unavailing. Here, clearly, the defendant did not plead guilty to a crime, but a violation. Moreover, here, the defendant was not afforded the same opportunity to litigate his liability in the District Court as he would in the Supreme Court. The defendant was not afforded the opportunity to fully contest a civil action for liability and assert his defenses of provocation, culpable conduct, and justification for his acts. In *Gilberg, supra*, the defendant's "conviction for the petty offense of harassment does not collaterally estop and cannot later be used to preclude the defendant from disputing the merits of a civil suit for assault involving the same incident and seeking $250,000.00 in damages ... and accordingly it is not unfair to permit him [an] opportunity to defend the civil complaint on the merits in a manner consistent with the potential magnitude of the suit".

On a summary judgment motion, evidence must be viewed in the light most favorable to the non-moving party. (*Gonzalez v. Metropolitan Life Insurance Company*, 269 AD2d 495). The non-moving party's evidence must be accepted as true and the non-moving party is entitled to every favorable inference which can be reasonably drawn from the evidence. (*Wong v. Tang*, 2 AD3d 840; *Farruck v. Board of Education of the City of New York*, 227 AD2d 440).

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v.*

Goodson, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga* Corp., 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). In reviewing a motion for summary judgment, the court evaluates the evidence in the most favorable light to the party opposing the motion. (*Sullivan v. Twentieth Century Fox Film Corp.*, *supra*).

Here, the defendant's plea to a violation of disorderly conduct does not estop the defendant from denying liability. Additionally, triable issues of fact exist as to the justification of the plaintiff's and the defendant's acts, purported provocation, and the extent of culpable conduct, if any.

In light of the foregoing, the defendant's motion for summary judgment is denied.

ENTER:

J.S.C.

Dated: July 25, 2012

ENTERED

JUL 24 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE

cc: Law Office of Ann Ball, P.C.
Mulholland Minion Duffy Davey McNiff & Beyrer