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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Hon. Joan A. Madden

Index Number : 113768/2010

THOMPSON, KIM ANGELIQUE

VS

LINARES, JORGE

Sequence Number : 001

SUMMARY JUDGMENT

PART 11

INDEX NO. _____

MOTION DATE ~~10/1~~

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: October 22, 2012

_____, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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KIM ANGELIQUE THOMPSON, a/k/a KIM THOMPSON MAS,

Plaintiff,

INDEX NO. 113678/10

-against-

JORGE LINARES, a/k/a JORGE ANTONIO LINARES,

Defendant.

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JOAN A. MADDEN, J.:

Plaintiff Kim Angelique Thompson ("Plaintiff") moves, pursuant to CPLR 3212, for summary judgment against defendant on its causes of action for assault, battery and intentional infliction of emotional distress against defendant Jorge Linares ("Defendant"). Defendant opposes the motion and cross-moves to dismiss plaintiff's intentional infliction of emotional distress claim as well as her independent claim for punitive damages pursuant to CPLR 3211(a)(7).

Background

Plaintiff and defendant were married on October 27, 2009. Plaintiff maintains that, on the night of their wedding, the two parties returned to the residence they shared, and that, during consensual vaginal intercourse between herself and defendant, defendant abruptly flipped plaintiff over onto her stomach and proceeded to engage in anal intercourse with her. Plaintiff's Verified Bill of Particulars, ¶ 14. Plaintiff maintains that she repeatedly screamed "stop" and physically resisted plaintiff's unwanted advances but was unsuccessful and suffered personal

injuries as a result. Id. On January 28, 2010, plaintiff reported the incident to the New York City Police Department, which issued a report on that same day. Id., ¶'s 16, 17.

Plaintiff commenced this action against defendant, alleging that defendant's conduct on the night in question caused plaintiff to experience severe physical and psychological injuries, and that plaintiff's conduct herein described constitutes battery, assault, and intentional infliction of emotional distress. Defendant interposed a timely answer denying all allegations made against him. Given the early stage of the proceedings, no discovery has been conducted.

The original top criminal charge filed against defendant was Penal Law 130.50 ("Criminal Sexual Act in the first degree"), which the prosecution moved to dismiss in initial plea proceedings in New York City Criminal Court. Linares Plea Proceedings (Jan. 11, 2011) at 4:10-4:13. In its place, defendant pleaded guilty to one count of Penal Law 130.52 ("Forcible Touching"), a class A misdemeanor. Id. at 5:15-5:18. As part of defendant's plea agreement, the prosecution agreed to vacate the charge of Forcible Touching and replace it with one count of Penal Law 240.20(1) ("Disorderly Conduct") if the defendant completed a counseling program, stayed out of trouble, and avoided arrests for one year. Id. at 3:15-3:19. On January 12, 2012, defendant once again appeared in New York City Criminal Court, where he demonstrated that he had complied with the conditions of his plea. Linares Plea Proceedings (Jan. 12, 2012) at 2:9-2:15. As a result, defendant withdrew his previously entered plea of guilty to "Forcible Touching" and entered a new plea of guilty to "Disorderly Conduct", a violation. Id. at 3:3-3:5, 3:15-3:18.

Plaintiff now moves for summary judgment on her causes of action for assault, battery and intentional infliction of emotional distress, arguing that defendant's guilty plea to Forcible Touching in criminal court collaterally estops him from re-litigating the claims asserted in this action. Moreover, although the defendant's guilty plea to Forcible Touching charge was withdrawn and the charge vacated in the criminal court, plaintiff contends that defendant's sworn admissions and declarations relating to the Forcible Touching in open court are sufficient to support her motion for summary judgment. Furthermore, as additional support for her motion, plaintiff submits, *inter alia*: a certified copy of defendant's plea proceeding in the criminal court on January 11, 2011, her supporting affidavit, her supplemental affidavit from plaintiff, and the transcript of a phone call between plaintiff and defendant which took place on March 2, 2010.

Plaintiff alleges that, when defendant contacted her via telephone on March 2, 2010, she recorded the conversation and turned over a copy of the recording to her attorneys. Thompson Supp. Aff. at ¶ 3. During this conversation, plaintiff expressed anger to the defendant regarding the events that took place on the evening of October 27, 2009. Defendant expressed remorse to plaintiff while taking responsibility for his actions that evening. In her supplemental affidavit, plaintiff alleges that this telephone conversation corroborates her allegation that defendant sexually assaulted plaintiff against her will. Id. at ¶ 4. Plaintiff alleges that this conversation demonstrates that "[defendant's] affidavit is untrue and created solely in an attempt to avoid the consequences of his earlier confession and admissions in open court." Id.

Defendant opposes the motion, asserting that plaintiff did not present undisputed facts supporting her claims of battery, assault, or intentional infliction of emotional distress.

Defendant argues that he never admitted her allegations during their phone conversation, and his responses were the result of a conscious effort to avoid an argument. Defendant argues that his original criminal plea has no estoppel effect because the now-vacated plea and allocution are inadmissible. Defendant also argues that collateral estoppel is inapplicable as he was not sentenced, thus the plea was not a "final judgment" and that, in any event, he did not plea and allocute to each of the elements of assault and battery.

Defendant also cross moves to dismiss plaintiff's intentional infliction of emotional distress claim and independent claim for punitive damages. Defendant argues that plaintiff's intentional infliction of emotional distress claim should be dismissed as defendant's alleged conduct falls within the ambit of plaintiff's traditional assault and battery claims. Defendant argues that New York does not recognize infliction of emotional distress claims in cases arising from marital disputes. Finally, defendant alleges that New York does not recognize separate cause of action for punitive damages.

In support of opposition and cross motion, defendant submits, *inter alia*: a certified copy of defendant's plea proceeding in the criminal court on January 12, 2012, two affidavits from defendant, and the transcript of a phone call between plaintiff and an acquaintance that took place on November 15, 2009.

In his affidavit, defendant states that he and plaintiff engaged in mutually consensual sexual relations on the night of October 27, 2009, as they had done had done on numerous occasions prior to that date. Linares Aff. at ¶ 14. Defendant states that he understood plaintiff to be a willing participant in their sexual relations that night, as she at no point indicated that the

sexual activity was non-consensual. Id. at ¶ 4. Defendant further states that the two parties continued to engage in sexual relations several times over the next several days. Id. at ¶ 7. Defendants states that he told plaintiff that he wanted a divorce on or about November 10, 2009, shortly after the two parties argued about plaintiff's desire to become pregnant. Id. at ¶¶ 8-9. According to defendant, plaintiff was furious that he wanted to end the relationship so soon after their wedding, and sought financial compensation from him in exchange for her consent to the divorce. Id. at ¶ 10. Defendant next asserts that plaintiff only filed a criminal complaint against him three months later after she realized he would not agree to her monetary demands. Id. at ¶ 12.

Defendant provides a written transcript of a telephone call he alleges took place between plaintiff and a mutual friend, Mr. Arnab Chaudhuri, on November 15, 2009. Linares Supp. Aff. at ¶ 8. Throughout this conversation, plaintiff expresses anger and frustration toward defendant and his decision to terminate their relationship. Portions of the conversation are spent discussing a possible monetary payment made by defendant to plaintiff in exchange for her agreeing to the divorce. Defendant maintains that this conversation illustrates that plaintiff was angry and bitter, which demonstrates her real motives behind her claims- to punish him for ending their relationship. Id. at ¶¶ 9-10.

Plaintiff's Motion

The doctrine of collateral estoppel prevents a party from re-litigating an issue that has previously been decided against him in a prior proceeding in which he had a fair opportunity to fully litigate the issue. Gilberg v Barbieri, 53 NY2d 285 (1981); People v Berkowitz, 50 NY2d

333 (1980). "[C]ollateral estoppel remains . . . a flexible doctrine based on fairness, and thus not subject to automatic application merely because its formal prerequisites are met." Samhammer v. Home Mutual Insurance Company of Binghamton, 120 AD2d 59 (3rd Dept. 1986).

While a criminal plea may serve as a basis for invoking collateral estoppel, the doctrine is applicable only when the criminal plea becomes a final judgment, which occurs after sentencing. See People v. Evans, 72 AD2d 751, 752 (2d Dept. 1979) ("Collateral estoppel can only be invoked when there is finality, i.e., a judgment of conviction...[i]t is elementary that there is no judgment until a sentence has been imposed."); NY CLS CPL § 1.20(15) (2011) ("judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence.").

In the present case, the record shows that it was agreed that defendant would not be sentenced as part of his original plea proceedings, pursuant to an understanding that he had to meet certain conditions over the course of the next year. When defendant demonstrated that he had met the conditions established in the original plea proceeding, the prosecution agreed to vacate defendant's plea to "Forcible Touching" in favor of a lesser charge. Defendant was thus never sentenced in accordance with his original plea to "Forcible Touching." Since the plea never became a final judgment, collateral estoppel is thus inapplicable.

In addition to her initial argument that collateral estoppel should apply to based on defendant's guilty plea to Forcible Touching, plaintiff also argues that defendant's sworn admissions made in open court in connection with that plea demonstrate that there are no issue of fact remaining in the case. This argument is unavailing. The record establishes that

defendant's original plea to "Forcible Touching" was vacated after he met the conditions of his plea agreement after one year. Defendant's original pleading was made in exchange for prosecution's promise that it would be vacated and replaced by a lesser charge one year later, in this case "Disorderly Conduct."

When, as here, a defendant makes a criminal plea in exchange for a promise that it would later be vacated and replaced with a plea to a lesser charge, the initial charge cannot serve as the basis for collateral estoppel in a subsequent action. See Marx v. Burke, 2007 WL 2174774 (Sup Ct Queens Co. 2007); accord Sullivan v. Breese, 160 AD2d 997, 998-999 (2d Dept. 1990) ("'the realities' of the criminal litigation against [defendant] indicate that he pleaded guilty to a promise...[which] had the 'practical effect of discouraging or deterring [him] from fully litigating' the issues involved in the criminal proceeding").

New York also precludes admission of the contents of the plea allocution, once the plea has been withdrawn. See People v. Moore, 66 NY2d 1028, 1029 (1985) ("[i]t is well settled in this State that 'a guilty plea, once withdrawn, 'is out of the case forever and for all purposes"...[t]his rule...applies to both fact of the plea and the contents of the plea allocution"); accord 5-16 Bender's New York Evidence §16.03 ("a plea of guilty that has been withdrawn may not be offered as admission"). "The effect of the court permitting the defendant to withdraw his plea was to restore him to 'pre-plea status'." Marx v. Burke, 2007 WL 2174774, citing Van Wie v. Kirk, 244 AD2d 13, 26-27 (4th Dept. 1998). Thus, the defendant's statements in criminal court are not binding upon defendant and do not eliminate all triable issues of fact.

Accordingly, plaintiff's motion for summary judgment must be denied.

Defendant's Cross Motion

Defendant cross-moves to dismiss plaintiff's cause of action for intentional infliction of emotional distress, and further argues that there is no separate cause of action for punitive damages. Plaintiff opposes the motion.

The tort of the 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. See, Howell v. NY Post Co., 81 NY2d 115, 121 (1993). The conduct complained of must be "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." Murphy v American Home Products Corp., 58 NY2d 293, 303 (1983)(internal quotations and citations omitted).

As the Court of Appeals recently noted, "New York does not recognize a cause of action to recover damages for the intentional infliction of emotional distress between spouses." Xiao Yang Chen v. Fisher, 6 NY3d 94, 98, n. 2 (2005)(internal citation and quotation omitted); Weicker v. Weicker, 22 NY2d 8, 11 (1968); see also, Reich v. Reich, 239 AD2d 246 (1st Dept 1997). In addition, there is precedent holding that a claim for intentional infliction of emotional distress is not recognized where the conduct complained of falls well within the scope of other traditional tort liability. Fischer v. Maloney, 43 NY2d 553, 557-558 (1978). Here, plaintiff's intentional infliction of emotional distress claim is based on the same conduct underlying her assault and battery claims. Leonard v. Reinhart, 20 AD3d 510 (2d Dept 2005). Accordingly, the

court is constrained to find that plaintiff's cause of action for the intentional infliction of emotional distress must be dismissed.

Lastly, plaintiff has conceded that her separate cause of action for punitive damages is improper, as New York law does not recognize an independent cause of action for punitive damages. Goldstein v. Winard, 173 A.D.2d 201, 202-203 (1st Dept. 1991). That being said, however, the court makes no determination as to whether plaintiff may recover punitive damages in the event defendant is found liable to her.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by plaintiff Kim Angelique Thompson is denied; and it is further

ORDERED that the motion to dismiss plaintiff's causes of action for the intentional infliction emotional distress and punitive damages by defendant is granted; and it is further

ORDERED that the compliance conference scheduled for October 11, 2012 at 9:30 am is hereby adjourned to November 1, 2012 at 9:30 am, shall be held in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: October 22, 2012

J.S.C.