

**Matter of Kaia H. v Sean H.**

2012 NY Slip Op 32984(U)

December 19, 2012

Family Court, Kings County

Docket Number: NA17385-6/09

Judge: Alan Beckoff

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At a Term of the Family Court of the State of New York, held in and for the County of Kings, at 330 Jay Street, Brooklyn, New York on the 19<sup>th</sup> day of December 2012.

P R E S E N T:

Hon. Alan Beckoff  
Judge

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In the Matter of :  
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**KAIA H. and NAILAH H.,**

**Docket No: NA17385-6/09**

Children under Eighteen Years of Age :  
Alleged to be Abused/Neglected by :

**DECISION ON**  
**SUMMARY JUDGMENT MOTION**

**SEAN H.,** :  
Respondent. :  
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In this child protective proceeding under Article 10 of the Family Court Act, Petitioner New York City Administration for Children’s Services (“ACS”) alleges that Respondent Sean H. sexually abused his daughter Kaia, who was then eleven years old. On October 3, 2012, ACS filed a motion for summary judgment claiming that no triable issues of fact existed because Respondent had been convicted in Kings County Criminal Court on February 23, 2012 of multiple counts of second and third degree sexual abuse, as well as second degree harassment and child endangerment, and that these crimes arose from the same incidents as alleged in the Article 10 petition. In support of its motion, ACS appended to its papers a certified copy of the Kings County Criminal Court complaint, a certified copy of the transcript from Kings County Criminal Court that showed Respondent’s conviction after a bench trial on the various charges, and a copy of the order of the Appellate Term, Second Department, dated May 21, 2012, reversing the Criminal Court’s order that granted Respondent’s motion to set aside the verdict. The trial court had vacated its own

verdict after Respondent argued that he was denied the right to a public trial because “Do Not Enter” signs were posted on the courtroom door during the proceedings. ACS argues that the allegations in the criminal proceeding are the same as in the Article 10 proceeding and that Respondent is therefore collaterally estopped from litigating them in Family Court.

Counsel for Respondent did not file opposing papers, but argued to this Court that there was a dissenting opinion in the Appellate Term’s order reinstating Respondent’s conviction and that he has a motion for leave to appeal pending in the Court of Appeals. The attorney for the child Kaia did not file any papers in response to the motion but stated in court that she supports it.

### **DECISION**

The Court of Appeals has approved of summary judgments in Article 10 proceedings. *See Matter of Suffolk County DSS v. James M.*, 83 NY2d 178 (1994). Summary judgment can only be granted if there are no triable issues of fact. *Id.* at 182. When a movant shows that no triable issues of fact exist, the opposing party must demonstrate by admissible evidence that a triable issue of fact exists or offer a reasonable explanation why the opposing party cannot make such a showing. *See Zuckerman v City of New York*, 49 NY2d 557 (1980). Unsubstantiated allegations are insufficient to raise a triable issue of fact and will not defeat summary judgment. *See Matter of Jimmy A.*, 218 AD2d 734 (2<sup>nd</sup> Dept., 1995).

FCA § 1012 (e)(iii) defines an abused child as “a child less than eighteen years of age whose parent or other person legally responsible for his care commits or allows to be committed an offense against such child defined in article one hundred thirty of the penal law...” The Article 10 petition here alleged that during his unsupervised visit with Kaia on the weekend of July 11-12, 2009,

Respondent forced the child to undress in front of him and sleep in the same bed. In bed, he would rub his penis against her buttocks and hold her vagina.<sup>1</sup>

According to the exhibits attached to Petitioner's motion papers, Respondent was convicted after trial of ten counts of Sexual Abuse in the Second Degree (Penal Law § 130.60, a class A misdemeanor), ten counts of Sexual Abuse in the Third Degree (P.L. § 130.55, a class B misdemeanor), one count of Endangering the Welfare of a Child (P.L. § 260.10, a class A misdemeanor), and Harassment in the Second Degree (P.L. § 240.26, a violation). A criminal conviction, whether from a plea or following a trial, that is based upon the same facts as a subsequent related civil proceeding, precludes relitigation of the issue of liability. *See D'Arata v. New York Central Mutual Fire Insurance Company*, 76 NY2d 659, 664 (1990); *City of New York v. College Point Sports Association, Inc., et al.*, 61 AD3d 33, 41 (2<sup>nd</sup> Dept., 2009). Here, Respondent's conviction on charges of sexually abusing the subject child Kaia precludes him from relitigating the same acts in this civil proceeding.

Respondent's argument is basically that his conviction is not really final because he still has a pending motion for leave to appeal from the Appellate Term's order.<sup>2</sup> This argument is unavailing because the simple fact remains that Respondent's conviction stands unless and until it is reversed or vacated. *See Ramos v. City of New York*, 61 AD3d 51 (1<sup>st</sup> Dept., 2009) (plaintiff permitted to

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<sup>1</sup> The petition also alleged that Respondent committed acts of domestic violence against the mother in the presence of Kaia and her then one-year-old sister Nailah, and that he would sit on the toilet with his pants down while holding Nailah in his lap.

<sup>2</sup> Also, his sentencing appears to have been adjourned several times for reasons that are not clear to this Court. The next scheduled date in Criminal Court is January 31, 2013.

renew summary judgment motion that had been granted upon his conviction on related charges after his conviction was reversed as being against the weight of the evidence); *Matter of Denise GG.*, 254 AD2d 582 (3<sup>rd</sup> Dept., 1998) (court rejected respondent father's claim that a question of fact was raised by his unsuccessful attempt to withdraw his guilty plea on the related criminal proceeding).

Furthermore, the sole basis for the Criminal Court's granting Respondent's motion to set aside his conviction was a purely procedural due process matter not related to the merits of the case. Respondent's claim that he was denied a public trial was supported by affidavits from two lawyers who said that they did not enter the courtroom when they saw the "Do Not Enter" sign. One of the lawyers also said that a court officer actually stopped him from entering. In reversing the Criminal Court and reinstating Respondent's conviction, the majority did not even remotely reach any issue on the merits either; it even said that the motion itself was procedurally defective. The dissent also did not address the merits; it said that the motion may not have been made properly but that it should have been granted as a matter of fairness and judicial economy.

If Respondent's conviction had actually been vacated or reversed *on the merits* then that would be another story. *See Cleary v. Bloomingdale's Inc.*, 2009 NY Slip Op 33027U, 2009 NY Misc LEXIS 6388 (Sup. Ct., New York County, 2009) (plaintiff's shoplifting conviction reversed by the Appellate Term both on the merits and in the interest of justice, so only partial summary judgment granted to defendant). But here it stands as presumptively valid and completely dispositive of the allegations in this child protective proceeding.

Accordingly, the Court grants Petitioner's motion for summary judgment and enters a finding

that Kaia H. is an abused child and Nailah H. is derivatively abused. This matter is to be set down for a dispositional hearing on a date to be determined.

**ENTER:**

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**ALAN BECKOFF, J.F.C.**

**DATED:      BROOKLYN, NEW YORK**  
**December 19, 2012**