Weiss v Nolan
2017 NY Slip Op 30828(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 160202/13
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

Weiss, Michael

-v-

Nolan, Jacob

INDEX NO. 160202/13

MOTION DATE 4/5/17

MOTION SEQ. NO. 011

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

In this action arising out of an attempted murder of plaintiff, defendant Pamela Buchbinder ("defendant") moves pursuant to CPLR 2221(e) for leave to renew plaintiff's motion for partial summary judgment and this Court's April 5, 2016 Order (the "April 2016 Order") granting plaintiff summary judgment on liability as to the claims for assault (first cause of action) and battery (second cause of action), to the extent that those judgments are against defendant.

Factual Background

By this Court's April 2016 Order, the Court granted plaintiff's motion for partial summary judgment on the issue of liability on his assault and battery claims against defendant. The decision was based on the submissions, oral argument, and the "unappealed May 19, 2014 decision." (See Order)

In support, defendant cites to newly discovered evidence, including, but not limited to recently discovered contemporaneous handwritten notes from co-defendant Jacob Nolan ("Nolan"), evidence and findings in connection with Nolan's criminal adjudication, and new challenges to the Family Court's December 3, 2015 Decision upon which this Court's April 2016 Order was based, all of which establish that defendant was not involved with Nolan's alleged assault and battery on plaintiff. Defendant contends that such facts were not offered on plaintiff's motion for partial summary judgment because of their non-availability, and would change the Court's prior determination as set forth in its April 2016 Order.

In opposition, plaintiff argues that because the Court's order was based on the collateral estoppel and *res judicata* effect of the Family Court's December 3, 2015 Decision and Order, defendant is estopped from challenging this Court's April 2016 as long as the Family Court order

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

Dated: _____ _____, 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
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remains in effect. During the Family Court proceeding, which involved the same parties and subject matter, defendant had a full and fair opportunity to litigate her involvement in the assault and battery. Thus, defendant cannot now attempt to re-litigate the Family Court's findings in the Supreme Court, a court with coordinate jurisdiction. Defendant's newly discovered evidence claims are barred under *res judicata* because the Family Court decided those issues and that decision still stands. Further, defendant fails to offer a reasonable justification for failing to submit the purported new evidence in her previous opposition to summary judgment, and, the purported new evidence is insufficient to change the outcome of plaintiff's summary judgment motion.

Discussion

A motion for leave to renew pursuant to CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221(e)(2), (3); *Orchard Hotel, LLC v. D.A.B. Group, LLC*, 114 A.D.3d 508, 982 N.Y.S.2d 4 [1st Dept 2014]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511, *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879.)" A motion for leave to renew pursuant to CPLR 2221(e) is properly denied where evidence not previously submitted are not truly "new" when the motion was brought (*Shomron v. Fuks*, 147 A.D.3d 685, 48 N.Y.S.3d 130, [1st Dept 2017]).

The Family Court order, after a seven-day trial, upon which this Court's April 2016 Decision was in large part based, indicates:

> The Court finds that the Petitioner has proven by a preponderance of the evidence that 1) the Respondent conspired with her cousin Jacob Nolan to kill him: 2) the respondent mother drew a map for Mr. Nolan to use to gain access to the father 's building in a manner which would not alert the Petitioner to Mr. Nolan's presence; 3) the mother went with Mr. Nolan the night before the attack to purchase one of the weapons used in the assault of the father; 4) the knife used by Mr. Nolan to stab the father was one taken from the mother's home for the purpose of the attack; 5) Mr. Nolan went to the father 's home, with the knowledge and direction of the mother, with the intent to kill him so the mother could collect on the life insurance policy naming their child as the beneficiary with her as the irrevocable trustee of the policy: 6) at the home, Mr. Nolan assaulted the Petitioner with a sledgehammer and stabbed him repeatedly with a kitchen knife; 7) the Respondent assisted, aided and abetted Mr. Nolan in the attack as evidenced by the above along with her phone calls with Mr. Nolan both before and after the assault.
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> * * * * *
>
> When determining what kind of visitation is appropriate, the issue of domestic violence should always be considered. The petitioner father has asked this court to find that the facts, as found by the court, are sufficient to establish that a family offense has been committed and moreover that those facts establish aggravating circumstances which would warrant the issuance an five year order of protection on behalf of both the father

and the child. The mother did not address the issuance of an order of protection in her summations.

A person is guilty of Assault in the third degree when with intent to cause physical injury to another person he/she causes such injury to that person. Physical injury is defined as impairment of physical condition or substantial pain. Penal Law §120.00 and Penal Law §10.00[9]

A person is guilty of Assault in the second degree when with intent to cause physical injury to another person, he causes such injury by means of a dangerous instrument. Penal Law § 120.05(2). A dangerous instrument is defined as an instrument, article or substance, including a "vehicle" as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury. Penal Law §10.00[13] (See Transcript pages 7-8, and 17, referencing the Family Court Order, Pages 13-14).

The Family Court found that plaintiff established "by a preponderance of the evidence" that defendant committed the above family offenses against him (Family Court Order, Page 14).

Defendant relies on three pieces of "new" evidence: (1) Nolan's handwritten notes stating that defendant "has nothing to do with this"; (2) defendant's motion in Family Court to vacate the Family Court order; and (3) the criminal trial jury's rejection of the contention that defendant masterminded the attack. None of these purported "new" facts merit a change in this Court's prior determination.

First, it is noted that the Court's prior decision was based on the doctrine of collateral estoppel and res judicata, and these "new" facts do not bear on the applicability of these doctrines. Defendant reliance on such "new" facts is misplaced, as any reliance on these facts at this juncture would require this Court to address the propriety of the underlying Family Court order, which this Court is without authority to undertake.

In any event, and even assuming this Court were to consider such "new" facts, such facts do not overcome plaintiff's showing of entitlement to partial summary judgment on the issue of liability.

First, defendant failed to show that she exercised due diligence in obtaining the purported "new" evidence of Nolan's handwritten notes (*see Orchard Hotel, LLC v. D.A.B. Group, LLC*, 114 A.D.3d 508). In particular, according to defendant, Nolan exchanged with his mother immediately after the attack while he was under arrest in the hospital certain handwritten notes indicating that defendant "has nothing to do with this." While defendant claims that such notes were in Nolan's criminal defense attorney's possession and were not produced until October 2016 despite defendant's diligence in seeking them, the record indicates that defendant's attorney had the notes in his possession for years, including in 2015 during the Family Court trial.

Nevertheless, as pointed out by plaintiff, such handwritten notes are unsigned, undated, unsworn, and unauthenticated. Indeed, the handwritten notes defendant purportedly received in October 2016 from defendant's former Family Court counsel (the law firm of Buchanan Ingersoll & Rooney, P.C.) were accompanied by a cover letter from Cindy D. Hinkle, stating "The handwritten notes are not signed and so we cannot definitely state that they are between Jacob Nolan and Debbie Nolan, but they do appear to be."

As to defendant's motion (dated November 28, 2016) in Family Court to vacate the Family Court order pursuant to CPLR 5704(a) and 5015 based on ineffective assistance of counsel and Nolan's handwritten notes, there has been no determination on such motion. To date, the original Family Court order stands, unaffected by any subsequent motion or appeal.

Finally, as to the claim that Nolan's criminal trial jury rejected Nolan's defense that defendant masterminded the attack on plaintiff by brainwashing him into committing the attack, the record merely indicates that the jury rejected Nolan's diminished capacity defense. There is no finding that defendant was not involved or did not participate the assault and/or battery attack of the plaintiff.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Pamela Buchbinder pursuant to CPLR 2221(e) for leave to renew plaintiff's motion for partial summary judgment and this Court's April 5, 2016 Order which granted plaintiff summary judgment on liability as to the claims for assault (first cause of action) and battery (second cause of action), to the extent that those judgments are against defendant is granted on renewal, and upon renewal, the Court adheres to its earlier determination.

ORDERED that defendant shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 4/20/17

HON. CAROL R. EDMEAD J.S.C.

J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

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