Gano v White
2019 NY Slip Op 34571(U)
January 29, 2019
Supreme Court, Monroe County
Docket Number: Index No. E2018003402
Judge: J. Scott Odorisi
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STATE OF NEW YORK
SUPREME COURT MONROE COUNTY

TARRYL GANO,

Plaintiff,

-vs-

RICKY WHITE, JR.,

Index #: E2018003402

Defendant.

Special Term
January 29, 2019

BENCH DECISION AND ORDER

Odorisi, J.

This lawsuit arises out of a 2011 crime. Pending before this Court are the following: (1) Plaintiff's October 4, 2018, motion [NYSCEF Docket # 5 – Motion # 1] for partial summary judgment in his favor on liability and dismissal of Defendant's affirmative defenses; (2) Defendant's October 9th discovery motion [NYSCEF Docket # 7 – Motion # 2]; and, (3) Defendant's January 4th cross-motion [NYSCEF Docket # 45 – Motion # 4] for summary judgment, or in the alternative, partial summary judgment. This Court: **DENIES** Plaintiff's motion; **GRANTS** Defendant's discovery motion; and, **DENIES** Defendant's cross-motion - all for the reasons set forth hereinafter.

LEGAL DISCUSSION

Plaintiff's Partial Summary Judgment Motion

Plaintiff is not entitled to partial summary judgment on liability (see CPLR 3212 (e)), and also may not have all of the defenses dismissed. See CPLR 3211 (b).

To start, this Court agrees with Defendant that Plaintiff's motion is premature as it was interposed before discovery was done, and while Plaintiff's numerous responses were overdue. See CPLR 3212 (f); Freier v. Amax, Inc., 217 AD2d 981 (4th Dept 1995) (Supreme Court did not abuse its discretion in denying summary judgment so that discovery could take place); Buffamante Whipple Buttafaro, Certified Pub. Accountants, P.C. v. Dawson, 118 AD3d 1283, 1284 (4th Dept 2014) (reversing granted summary judgment motion based upon CPLR 3212 (f)); Freier v. Amax, Inc., 217 AD2d 981 (4th Dept 1995) (Supreme Court properly denied summary judgment so that discovery could take place). As will be explained hereinafter, discovery, including depositions [especially Plaintiff's], is needed to flush out many issues of fact. See e.g. Genesee/Wyoming YMCA v. Bovis Lend Lease LMB, Inc., 98 AD3d 1242, 1245 (4th Dept 2012) (reversing summary judgment award so that depositions could take place); Coniber v. Ctr. Point Transfer Sta., Inc., 82 AD3d 1629 (4th Dept 2011) (Supreme Court properly concluded that it was premature to grant summary judgment in view of the limited discovery that was conducted); Syracuse Univ. v. Games 2002, LLC, 71 AD3d 1531, 1531-1532 (4th Dept 2010) (summary judgment motion was premature because discovery was not complete, including depositions).

Even considering the motion's merits, it still falters as Plaintiff did not meet his burden of proof. See generally Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Dix v. Pines Hotel, Inc., 188 AD2d 1007 (4th Dept 1992).

To begin with, one of Plaintiff's key exhibits - a witness police statement saying Defendant punched Plaintiff [NYSCEF Docket # 27] - is hearsay and is thus not in admissible form. See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 NY2d

1065, 1068 (1979) (reinforcing "strict requirement" that moving proof must be in admissible form); Stevens v. Kirby, 86 AD2d 391, 395 (4th Dept 1982) (police report was inadmissible hearsay).

Also, this Court disagrees with Plaintiff that offensive collateral estoppel mandates multiple liability findings in his favor. See e.g. Pink v. Ricci, 100 AD3d 1446, 1447 (4th Dept 2012) (the trial court erred in granting the plaintiffs' motion for partial summary judgment on liability).

The Court of Appeals as described the subject legal doctrine as follows:

> Collateral estoppel, an equitable doctrine, is based upon the general notion that a party . . . should not be permitted to relitigate an issue decided against it . . . As this doctrine has evolved, only two requirements must be satisfied. First, the party seeking the benefit of collateral estoppel must prove that the **identical issue was necessarily decided** in the prior action and is decisive in the present action . . . Second, the party to be precluded from relitigating an issue must have had a **full and fair opportunity to contest** the prior determination . . . Collateral estoppel, we have held, is grounded on concepts of fairness and **should not be rigidly or mechanically applied** . . .

D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 (1990) (internal citations omitted and emphasis added).

A criminal conviction - even one based upon a guilty plea - may serve as collateral estoppel in a subsequent civil litigation, but only if there is an identity of issues and a full and fair opportunity to litigate. See Allstate Ins. Co. v. Zuk, 78 NY2d 41, 45 (1991); Vavolizza v. Krieger, 33 NY2d 351, 355-356 (1974).

Here, Plaintiff did not demonstrate an identify of issues to affix Defendant's liability as a matter of law. See Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851,

853 (1985); Murray v. Sterner, 218 AD2d 334, 336 (4th Dept 1995) (trial court erred in applying the doctrine of collateral estoppel against the defendant). Defendant was not charged with menacing or harassment (see Penal Law {"PL"} §§ 120.13-120.15; 240.25-240.31), any form of assault (PL Art. 120), or false imprisonment. See PL §§ 135.10-135.20. Rather, Defendant was charged - as only an accomplice - with Robbery in the Second Degree per PL §§ 20.00 and 160.10 (1) [NYSCEF Docket # 52]. As Defendant was charged with, and pleaded guilty, under an accomplice theory, he may not have actually engaged in any offending criminal conduct directly against Plaintiff. In fact, Defendant admitted no such thing during the plea allocution [NYSCEF Docket # 29]. See e.g. Davis v. Hanna, 97 AD2d 943, 944 (4th Dept 1983) (because the criminal plea minutes do not set forth a factual basis for the offenses, it was error to apply collateral estoppel based upon the same).

More importantly, the elements of Robbery in the Second Degree do not fulfill all of the elements of the current civil claims of battery, assault, false imprisonment, and intentional infliction of emotional distress. Cf. S. T. Grand, Inc. v. City of New York, 32 NY2d 300 (1973) (bribery conviction dealing with specific contract proved that the same was illegal in later civil litigation) [NYSCEF Docket # 25, p. 4]. The relevant PL Section provides that:

> A person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> 1. He is aided by another person actually present

Penal Law § 160.10 (1). Compare with PL § 160.10 (2) (a) (physical injury is an

element).[1]

Forcible stealing is defined as:

> . . . when, in the course of committing a larceny, he uses or **threatens the immediate use** of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or **to engage in other conduct which aids in the commission of the larceny**.

Penal Law § 160.00 (emphasis added).

As can be seen by the statute's plain wording, forcible stealing need not involve actual use of physical force.

With the foregoing crime elements in mind in reviewing Defendant's plea colloquy, his limited admissions concerning an accomplice liability robbery are wholly insufficient to satisfy the liability components of Plaintiff's four civil claims. See PJI 3:2, 3:3, 3:5, 3:6. Further, Defendant's plea minutes do not contain any express waiver of potential defenses, such as, but not limited to, intoxication and/or lead paint poisoning. Taken as a whole, Plaintiff's exclusive reliance on the accomplice robbery plea to set liability is misplaced. See e.g. Innovative Transmission & Engine Co., LLC, v. Massaro, 63 AD3d 1506, 1508 (4th Dept 2009) (collateral estoppel doctrine did not apply regarding prior criminal trial).

[1] Defendant was not charged under subdivision (2) (a).

Additionally, and to the extent that Plaintiff's liability contentions encompass the issue of causation of any type of injuries, the issue of proximate cause is generally a factual question for a jury. See Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 312 (1980); Bd. of Trustees of IBEW Local 43 Elec. Contractors Health and Welfare, Annuity and Pension Funds v. D'Arcangelo & Co., LLP, 124 AD3d 1358 (4th Dept 2015). See also Coleman v. Wilson, 28 AD3d 1198, 1199 (4th Dept 2006) (summary judgment was not appropriate due to a triable issue of fact with respect to causation). Furthermore, Plaintiff does not submit any expert medical proof to substantiate his alleged physical and mental injuries, and Plaintiff is not qualified to do so in his own lay affidavit. See Dann v. Yeh, 55 AD3d 1439, 1441 (4th Dept 2008).

In the alternative, Defendant's opposition raised material issues of fact. See Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986). Defendant's exhibits call into question the exact events of the interaction between Plaintiff and Defendant [NYSCEF Docket #'s 52-54, 57].[2] This conflict in factual accounts creates a credibility question reserved for a jury to resolve [compare NYSCEF Docket # 34 with NYSCEF Docket # 57]. See S. J. Capelin Assoc., Inc. v. Globe Mfg. Corp., 34 NY2d 338, 341 (1974); Craft v. Maier, 167 AD2d 933 (4th Dept 1990). Furthermore, Defendant's expert medical proof further creates a question of fact over his mental state relevant to each civil claim [NYSCEF Docket #'s 56 & 58].

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[2] The criminal court records were obtained by a FOIL request. See Gier v. CGF Health Sys., Inc., 307 AD2d 729 (4th Dept 2003) (reversing and denying summary judgment in part due to hearsay submitted in opposition); Krampen v. Foster, 242 AD2d 913, 915 (4th Dept 1997) ("hearsay in opposing a motion for summary judgment 'is not to be shut out'").

Besides not getting a favorable liability adjudication, Plaintiff also cannot have all of Defendant's defenses dismissed via CPLR 3211 (b) under the liberal pleading standard. See CPLR 3026; Leon v. Martinez, 84 NY2d 83, 87 (1994) (motion to dismiss should have been denied); 190 Murray St. Assoc., LLC. v. City of Rochester, 19 AD3d 1116 (4th Dept 2005) (reversing order granting motion to dismiss). More specifically, Defendant's defenses concerning: others' liability [2nd affirmative defense]; comparative fault [4th affirmative defenses]; and, assumption of the risk [9th affirmative defense] - all remain viable defense strategies. See e.g. Captain v. Hamilton, 178 AD2d 938 (4th Dept 1991) (holding that the defendant's assault conviction did not determine the issue of plaintiff's culpable conduct; thus, the doctrine of collateral estoppel may not be invoked). As lead paint poisoning [5th affirmative defenses] was not part and parcel of the criminal plea, it remains a potential defense to liability. Moreover, the damages-oriented defenses [1st, 8th, and 10th] must be subject to further discovery, and cannot be dismissed at this early juncture. See CPLR 3211 (d).

However, Defendant waived his service of process defense [6th affirmative defense] by not moving to dismiss the case on that ground. See CPLR 3211 (e); Competello v. Giordano, 51 NY2d 904, 905 (1980) (the defendant waived the affirmative defense of lack of personal jurisdiction); Figueroa v. New York State Div. of Human Rights, 142 AD3d 1316, 1317 (4th Dept 2016) (failure to move to dismiss for lacking personal jurisdiction resulted in a waiver of that defense); Anderson & Anderson, LLP-Guangzhou v. Incredible Investments Ltd., 107 AD3d 1520, 1521 (4th Dept 2013) (the defendants waived personal jurisdiction defense by not moving to dismiss within 60 days after answer). In addition, the statute of limitations defense [7th affirmative

defense] is infirm as the Executive Law permits a civil suit within 3 years of the discovery of profits (see EL § 632-a (3)), so the normal 1-year limitations period for intentional torts does not apply. There is no dispute that the lead paint settlement was disclosed in 2016, and that Plaintiff timely commenced this action in 2018. Consequently, the statute of limitations defense is erroneous. Accordingly, only those two discrete defenses may be dismissed on legal grounds.

In sum, Plaintiff is not awarded any summary judgment relief, and must instead continue to prosecute this matter with most of Defendant's defenses in place.

Defendant's Discovery Motion

Given the denial of Plaintiff's motion, Defendant is now entitled to a discovery Order. See CPLR 3101 (a) & 3124; In re Estate of Morningstar, 17 AD3d 1060 (4th Dept 2005) (affirming grant of CPLR 3124 motion to compel discovery).

Plaintiff is initially correct that his summary judgment motion stayed discovery (see CPLR 3214 (b)), but as that is now denied, Defendant may proceed with its motion and discovery requests. See e.g. Bergerstock v. Auburn Mem. Hosp., 12 AD3d 1034 (4th Dept 2004) (reversing and granting motion to compel). Plaintiff is directed to respond to the overdue discovery within 30 days of E-filing of this Decision and Order. However, this Court declines to award Defendant his costs.

Defendant's Cross-Motion for Summary Judgment

As with Plaintiff, Defendant is also not entitled to summary judgment given numerous issues of fact on intent, liability, causation, and damages, including the propriety of punitive damages. Although Defendant may have some proof calling into doubt Plaintiff's physical and/or mental condition, it is way to early in the case's life to

negate damages as a matter of law based upon Facebook postings. This line of attack is better suited for questioning at Plaintiff's deposition, or cross-examination at trial.

In all, Defendant is not awarded any form of summary judgment.

CONCLUSION

Based upon all of the foregoing, it is the Decision and Order of this Court that:

1. Plaintiff's motion is **DENIED**.

2. Defendant's discovery motion is **GRANTED**.

3. Defendant's cross-motion is **DENIED**.

SCHEDULING ORDER

In this Court's discretion to manage its own cases, and after appropriate and due consideration; it is hereby

ORDERED, that time for completion of all discovery, including any depositions, shall be **September 20, 2019**; and it is further

ORDERED, that a Note of Issue and Statement of Readiness is to be filed on or before **October 4, 2019**. **FAILURE OF THE PLAINTIFF TO FILE A NOTE OF ISSUE AND CERTIFICATE OF READINESS BY THE DATE PROVIDED HEREIN WILL RESULT IN THIS MATTER BEING DEEMED STRICKEN "OFF" THE COURT'S CALENDAR WITHOUT FURTHER NOTICE PURSUANT TO 22 NYCRR § 202.27.** If so dismissed, the case may be restored without motion within one year of such dismissal by: (1) the filing of a Note of Issue and Certificate of Readiness; and, (2) the forwarding of a copy thereof with a letter requesting restoration to the Court's Assignment Clerk. Also, restoration after one year shall, before the filing of a Note of Issue and Certificate of Readiness, require the additional documentation of a sworn

affidavit by a person with knowledge showing a reasonable excuse for the delay, a meritorious cause of action, a lack of prejudice to the defendant, and the absence of intent to abandon the case. **THIS COURT SHALL AT ANYTIME AFTER THE DATE LISTED ABOVE, ENTERTAIN A DEFENSE MOTION TO DISMISS FOR WANT OF PROSECUTION WHICH RELIEF COULD INCLUDE A DISMISSAL OF THE COMPLAINT. THIS ORDER SHALL SERVE AS VALID 90-DAY DEMAND UNDER CPLR 3216 IF SO PROPERLY SERVED**; and it is further

ORDERED, that pursuant to CPLR 3212 (a) summary judgment motions are due within **sixty (60) days** of the Note of Issue filing date; and it is further

ORDERED, that any extensions of the above deadlines will be granted only upon the showing of good cause, set forth in writing, and on notice to opposing counsel, at least ***ten (10) business days*** in advance of the date to be extended. That writing **must be accompanied by a proposed Amended Scheduling Order**!

Signed at Rochester, New York on January 29, 2019.

HONORABLE J. SCOTT ODORISI
Supreme Court Justice