Godlis v Jones
2020 NY Slip Op 33979(U)
December 4, 2020
Supreme Court, New York County
Docket Number: 151600/2018
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MARC GODLIS

INDEX NO. 151600/2018

MOT. DATE

- v -

MOT. SEQ. NO. 5&600

MR. JONES, et al.

The following papers were read on this motion to/for partial sj (5) and quash (6)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is an action to recover for personal injuries sustained as a result of an alleged assault and battery at a bar. There are two motions pending before the court. The first motion, sequence 5, is by plaintiff and is for partial summary judgment against defendant Samuel M. Ferber, the man who allegedly head-butted plaintiff at the bar. That motion is submitted without opposition. Issue has been joined and note of issue is not presently filed. Therefore, summary judgment relief is available.

The second motion, sequence 6, is by defendant Ferber, who seeks to quash a subpoena served upon his father, Bruce Ferber. Plaintiff opposes that motion. Meanwhile, defendant Ferber cross-moves in the same motion sequence for summary judgment on the issue of liability and opposes plaintiff's motion for summary judgment. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court will first consider the motions for summary judgment.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Dated: 12/4/20

HON. LYNN R. KOTLER, 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**

A cause of action for assault must allege that the defendant engaged in an act which placed plaintiff in imminent apprehension of harmful contact (*see Fugazy v. Corbetta*, 34 AD3d 728 [2d Dept 2006]). The elements of a cause of action for battery are: [1] bodily contact; [2] that was harmful or offensive; [3] which defendant intended to make without plaintiff's consent (*see i.e. Wende C. v. United Methodist Church*, 4 NY3d 293 [2005]).

Meanwhile, self-defense is a justification for an assault and battery claim (*Bliss v. Johnson*, 73 NY 529 [1878]). However, the defense of justification is not available to the initial aggressor (*Killon v. Parotta*, 98 AD3d 828 [3d Dept 2012] rev'd on other grounds (28 NY3d 101 [2016]). Further, while the person acting in self-defense may "use no more force than that which reasonably appears necessary for protection" (*Barbagallo v. Americana Corp.*, 32 AD2d 622 [1st Dept 1969]), "an intent to inflict unnecessary injury must be established" because "[d]etached reflection cannot be demanded' of one facing a dangerous attack" (*Dupre v. Maryland Management Corp.*, 283 AD 701 [1st Dept 1954]).

A multitude of disputed issues of fact preclude summary judgment. Further, both plaintiff and defendant Ferber have presented very different versions of what transpired before the incident which require credibility determinations by a factfinder (*see i.e. Winslow v. Freeman*, 257 AD2d 698 [3d Dept 1999]). While defendant Ferber admits to having had "vodka and beer" on the night of the incident, he denied being incapacitated i.e. drunk. Although they were not friends, both knew of each other prior to the incident and both plaintiff and defendant Ferber claim the other had a reputation for getting into altercations. While plaintiff maintains that he just innocently bumped defendant Ferber's shoulder, Ferber insists that plaintiff pushed him and acted in a threatening manner. Plaintiff testified:

> The bar is very crowded, me and my friends were trying to make our way to the bar, as such we were not pushing but obviously people were shoulder to shoulder, so we were trying to make our way through the people. I bumped into Mr. Ferber. He took it very personally and got very aggressive very quickly for no reason, and we were face to face. I did not touch him in the slightest bit. He head butted me. My nose was fractured, bleeding and me and my friend left the bar and went to the hospital.

Meanwhile, defendant Ferber testified in relevant part as follows:

> Q. At the time that you saw Marc Godlis, what were your observations of Marc, what was he doing?
> A. He was pushing to get up to the bar.
> Q. What gave you that perception that he was pushing his way up to the bar?
> A. The fact that he pushed into me.
> Q. Could you hear any of the words from any people around you at the time that Marc bumped into you?
> A. No, nothing,
> Q. Did Marc say anything?
> A. Just shut up mind your own business. It was something like that. I don't recall exactly what he said.
> …
> Q. After Marc bumped into you, how close were you guys, were you about a foot away, inches away or how close?
> A. Inches.
> Q. Were you facing each other?
> A. Initially no, afterwards yes.
> Q. What happened after the conversation that you had with Marc, after he bumped into you?
> A. He said something. So I was in front of the bar and he bump into me and I turned around and I said relax and his response was shut up. It went further from there. Then there were words back and forth.

Q. What happened next?
A. You have a six foot something guy in front of you, a six foot something person getting into my face and I was standing by myself at the bar with someone that had a prior history that is hot headed.
…
A. I was scared and I started to defend myself.
Q. How did you defend yourself?
A. When Marc got in my face and obviously there was a height difference and he had bent down to get in my face to come at me and I was by myself so I lunged forward and I trusted (sic) my head against him because he was coming at me and I had to defend myself.
…
Q. So you just head butted him out of nowhere?
A. It was in self defense. I was by myself and I have this very large man, loud person who I have this knowledge of him getting into fights in the past specifically with people that I know and places that I have been in and I had to do what I had to do just to keep myself safe.

While defendant is certainly not entitled to summary judgment on his justification defense, a reasonable jury could credit defendant's testimony and find that plaintiff was the initial aggressor and that the defendant used reasonable force to defend himself. Indeed, after the incident, defendant did not take any further actions against the plaintiff. Defendant testified that it was plaintiff who wanted to fight the defendant afterwards, and that plaintiff had to be forcibly removed from the bar by his friend and the bouncer. On this record, summary judgment to either party is inappropriate.

For at least these reasons, the parties' applications for summary judgment are denied.

The court now turns to the motion to quash. "An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious[,] or where the information sought is utterly irrelevant to any proper inquiry" (*Kapon v. Koch*, 23 NY3d 32 [2014] quoting *Anheuser–Busch, Inc. v. Abrams*, 71 NY2d 327 [1988]).

Defendant Ferber argues that the subpoena to Bruce Ferber should be quashed because Bruce Ferber has no personal knowledge of any pertinent facts. In support of the motion, movant has provided an affidavit from Bruce Ferber stating that on the date of the incident, he was not at or near the bar. Defendant alternatively argues that the subpoena should be quashed because it fails to specify the subject matter for Bruce Ferber's testimony.

Plaintiff contends that the court should not consider Bruce Ferber's affidavit because it is notarized by his daughter who "maintains a pecuniary interest in the homeowner's policy covering the underlying incident." Substantively, plaintiff's counsel contends that "[i]t is readily obvious that the subpoena served upon Mr. Ferber was not served for the purposes of establishing any testimony pertaining to the resulting injuries sustained by Mr. Godlis, but rather for the purpose of the complete and total liability of the Defendant Samuel Ferber in connection with the subject assault and battery of the Plaintiff, along with Bruce Ferber's personal knowledge of the homeowner's insurance policy (and potential exclusions) relevant to the underlying incident." Plaintiff's counsel further points to defendant Ferber's testimony that he spoke to his father about the underlying incident.

At the outset, the court rejects plaintiff's spurious call to reject Bruce Ferber's affidavit because his daughter notarized his signature. The subpoena is both overbroad and defendant has otherwise established that it will not lead to any relevant testimony. As to the former, the subpoena merely advises Bruce Ferber that he is "to give testimony in this action on the part of the Plaintiff(s)" and therefore fails to "set forth what is sought with some degree of clarity" (*Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 AD2d 337 [1st Dept 1997]). Further, the court should not "permit the subpoena power to be used as a tool of harassment or for the proverbial 'fishing expedition' to ascertain the existence of evidence",

which is exactly what plaintiff is doing here. Bruce Ferber has no knowledge of the events on the night of the incident and, in turn, the matters which plaintiff's counsel proposes to question Bruce Ferber about are irrelevant to any material issue in this case. Therefore, defendant Ferber's motion to quash is granted and the subpoena on Bruce Ferber is quashed.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the parties' motions for summary judgment are denied; and it is further

ORDERED that defendant Ferber's motion to quash the subpoena to Bruce Ferber is granted and said subpoena is quashed; and it is further

ORDERED that the deadline to file note of issue is hereby extended to March 26, 2021.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/4/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.