Nan Yang v Rong Chen
2021 NY Slip Op 32620(U)
December 8, 2021
Supreme Court, New York County
Docket Number: Index No. 158011/2020
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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NAN YANG,

Plaintiff,

RONG CHEN,

Defendant.

Action No.1

INDEX NO. 158011/2020

MOTION DATE 11/10/2021

MOTION SEQ. NO. 003

DECISION AND ORDER

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RONG CHEN,

Plaintiff,

NAN YANG,

Defendant.

Action No.2

158182/2020

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The following e-filed documents, listed by NYSCEF document number 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64 (Motion 003)

were read on this motion to/for SUMMARY JUDGMENT.

In these two related actions to recover damages for assault and battery (Action No. 1) and to recover for breach of contract and unjust enrichment, among other things (Action No. 2), Nan Yang, who is the plaintiff in Action No. 1 and the defendant in Action No. 2, moves pursuant to CPLR 3212 for summary judgment (a) on the issue of liability on the complaint and dismissing the affirmative defenses and counterclaims in Action No. 1, and (b) dismissing the complaint in Action No. 2. Rong Chen, who is the defendant in Action No. 1 and the plaintiff in Action No. 2, does not oppose the motion. The motion is granted only to the extent that Yang is awarded summary judgment (a) on the issue of liability on the assault and battery cause of action in Action No. 1 and (b) dismissing the second, third, and fourth affirmative defenses and

all counterclaims in Action No. 1, without prejudice to Chen's continued assertion of the allegations set forth in his first, third, fourth, fifth, sixth, and eighth counterclaims in Action No. 1 as the main causes of action in Action No. 2. The motion is otherwise denied.

In her affidavit in support of her motion, Yang asserted that, on October 7, 2019, Chen grabbed her cellphone from her hand, grabbed her arm, and pushed her onto the floor repeatedly, causing her to sustain physical and emotional injuries. Chen did not submit any evidence disputing that allegation.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id*.; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st

Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact (*see Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 829 [2d Dept 2015]; *Gabriel v Scheriff*, 115 AD3d 791, 792 [2d Dept 2014]). "[T]o establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen" (*Tower Ins. Co. of N.Y. v Old N. Blvd. Rest. Corp.*, 245 AD2d 241, 242 [1st Dept 1997]; *see Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006]; *Roe v Barad*, 230 AD2d 839, 840 [2d Dept 1996]; *Zgraggen v Wilsey*, 200 AD2d 818, 819 [3d Dept 1994]). "An action for battery may be sustained without a showing that the actor intended to cause injury as a result of the intended contact, but it is necessary to show that the intended contact was itself 'offensive', i.e., wrongful under all the circumstances" (*Zgraggen v Wilsey,* 200 AD2d at 819; *see Villanueva v Comparetto*, 180 AD2d 627, 628 [2d Dept 1992]). The intent that must be shown is the intent to make contact (*see Lambertson v United States*, 528 F2d 441, 444 [2d Cir 1976], *cert denied* 426 US 921 [1976]). Lack of consent is considered in determining whether the contact was offensive (*see Zgraggen v Wilsey,* 200 AD2d at 819). Yang, by her affidavit, established her prima facie entitlement to judgment as a matter of law on the issue of liability on her cause of action to recover for assault and battery in Action No. 1. Inasmuch as Chen did not oppose the motion, summary judgment must be awarded to Yang on the issue of liability on that cause of action.

Yang also established her prima facie entitlement to judgment as a matter of law dismissing Chen's second affirmative defense in Action No. 1, which asserts that she lacked

standing, as she demonstrated an injury in fact that fell within the relevant zone of interests sought to be protected by law (*see Matter of Fritz v Huntington Hosp*., 39 NY2d 339, 346 [1976]; *see also Warth v Seldin*, 422 US 490, 498 [1975]; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). In addition, she established, prima facie, that Chen's third and fourth affirmative defenses in Action No. 1, asserting unclean hands and laches, respectively, are without merit, as those affirmative defenses may be asserted only in connection with causes of action seeking equitable relief, and not in an action at law such as Action No. 1 (*see Fade v Pugliani,* 8 AD3d 612, 615 [2d Dept 2004]; *Rocks & Jeans v Lakeview Auto Sales & Serv*., 184 AD2d 502, 503 [2d Dept 1992]). Hence, Yang is entitled to summary judgment dismissing Chen's second, third, and fourth affirmative defenses in Action No. 1.

Yang has failed, however, to establish a basis for striking Chen's affirmative defense of failure to state a cause of action. In the first instance, a motion to strike the affirmative defense of failure to state a cause of action does not lie, since assertion of that affirmative defense is "harmless" and mere "surplusage," and is only effective where a defendant makes a motion to dismiss on that ground (*see San-Dar Assoc. v Fried,* 151 AD3d 545, 545-546 [1st Dept 2017]*; Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352-353 [1st Dept 1977]; *see also Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]).

In any event, Yang has not made a prima facie showing that the affirmative defense of failure to state a cause of action lacks merit when applied to her negligence cause of action, and has not demonstrated, prima facie, that she is entitled to judgment as a matter of law on that cause of action. "[O]nce intentional offensive contact has been established, the actor [is not liable for] negligence, even when the physical injuries may have been inflicted inadvertently" (*Mazzaferro v Albany Motel Enters*., 127 AD2d 374, 376 [3d Dept 1987]), and a lack of care "does not convert the action from intentional tort to negligence" (*id*. at 377; *see Messina v. Matarasso*, 284 AD2d 32, 35-36 [1st Dept 2001]). New York does not recognize a cause of

action to recover for negligent assault or battery (*see Borrerro v Haks Group, Inc*., 165 AD3d 1216, 1218 [2d Dept 2018]; *Johnson v City of New York*, 148 AD3d 1126, 1127 [2d Dept 2017]). Although "the same act may constitute battery or negligence depending upon whether or not it was intentional, . . . there cannot be recovery for both" (NY PJI 3:3, Comment [2017 Update]; *see Borrerro v Haks Group, Inc*., 165 AD3d at 1218). Hence, those branches of Yang's motion that sought summary judgment on the issue of liability on her negligence cause of action and dismissing the first affirmative defense in Action No. 1 must be denied, regardless of the fact that Chen submitted no opposition.

With respect to the counterclaims that Chen asserted against Yang in Action No. 1, those counterclaims repeat, almost verbatim, the eight causes of action that Chen asserted against Yang in his October 5, 2020 complaint in Action No. 2, and also seek the imposition of sanctions and an award of attorneys' fees. Chen asserted his counterclaims in Action No. 1 on May 7, 2021, when he filed his answer in that action; by that date, this court, by order dated February 9, 2021, had already dismissed the causes of action in Action No. 2 that sought to recover pursuant to RPAPL 601 and for abuse of process. Yang established, prima facie, that there is a prior action pending for the same relief as sought by Chen in his counterclaims, and that those counterclaims may be dismissed on that ground alone (*see* CPLR 3211[a][4]). Since Chen did not oppose Yang's motion, she is entitled to summary judgment dismissing all of the counterclaims, albeit without prejudice to Chen's continued assertion, in Action No. 2, of the claims that were not dismissed by the February 9, 2021 order.

In connection with the branch of Yang's motion that sought summary judgment dismissing the non-dismissed causes of action asserted by Chen in Action No. 2, which allege breach of contract, unjust enrichment, conversion, false arrest/false imprisonment, and malicious prosecution, Yang made no showing whatsoever that she is entitled to judgment as a matter of law dismissing those causes of action. Since she failed to establish her prima facie

entitlement to judgment as a matter of law with respect thereto, summary judgment must be denied as to that branch of her motion, notwithstanding the absence of any opposition papers.

In light of the foregoing, it is

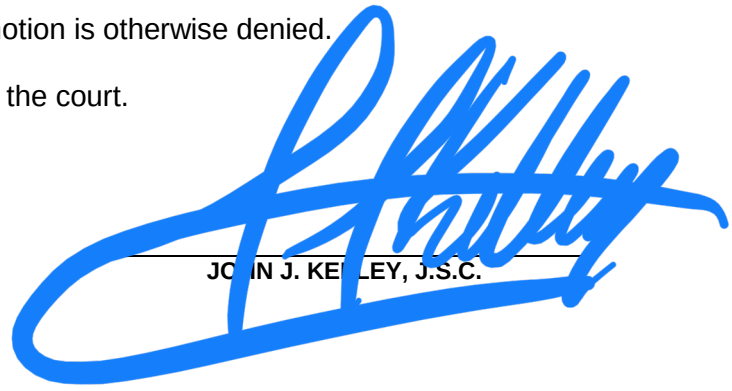
ORDERED that the motion of Nan Yang is granted to the extent that she is awarded summary judgment

(a) on the issue of liability on the assault and battery cause of action asserted Action No. 1 and

(b) dismissing the second, third, and fourth affirmative defenses and all counterclaims asserted by Rong Chen in Action No. 1,

those affirmative defenses and counterclaims are dismissed, without prejudice to Rong Chen's continued assertion of the allegations set forth in his first (breach of contract), third (unjust enrichment), fourth (conversion), fifth (false arrest), sixth (false imprisonment), and eighth (malicious prosecution) counterclaims in Action No. 1 as the first, third, fourth, fifth, sixth, and eighth causes of action in Action No. 2, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.



12/8/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE