

**DeFilippo v Lamonica**

2023 NY Slip Op 34659(U)

September 7, 2023

Supreme Court, Richmond County

Docket Number: Index No. 150116/2022

Judge: Ronald Castorina, Jr.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART IAS-7M

PRESENT: HON. RONALD CASTORINA, JR.  
JUSTICE OF THE SUPREME COURT

\_\_\_\_\_  
GARY R. DEFILIPPO, X

Plaintiff,

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-against-

ANTHONY J. LAMONICA,

Defendant.

**DECISION AND ORDER**

Motion Sequence: #002  
Motion Sequence: #003

\_\_\_\_\_  
X

[CASTORINA, J.]

The following papers, numbered via NYSCEF, to wit: 56-74, were read on Motion Sequences #002 and #003. Oral argument was conducted in person, at the courthouse on September 7, 2023. This is a Decision and Order on Motion Sequences #002 and #003.

**I. *Plaintiff's Motion for Summary Judgment***

Plaintiff's motion for Summary Judgment pursuant to *CPLR §3212* is hereby **DENIED** as there are multiple genuine issues of fact. A motion for summary judgment is a drastic remedy which should be granted only when there is no clear triable issue of fact presented" (*Rudnitsky v. Robbins*, 191 AD2d 488 [2d Dept 1993]). "Moreover, in deciding a summary judgment motion, the evidence must be construed in a light most favorable to the party opposing the motion" (*id. at* 489). "Where causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38 [2003] [*internal quotation marks omitted*]).

Here, it is clear to this Court that the parties maintain alternate and differing versions of the facts. Plaintiff argues that the Defendant entered his home, and Defendant alleges that he never entered the home. There are differing narratives as to the facts leading up to the confrontation

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between the parties, and there are differing narratives as to the alleged assault and battery. Therefore, the Plaintiff's motion is **DENIED**.

## II. *Defendant's Cross-Motion*

Defendant's Cross-Motions for Summary Judgment pursuant to CPLR 3211 [a][7] seeking dismissal of Plaintiff's purported cause of action for Intentional Infliction of Emotion Distress is **GRANTED**.

Defendant's Cross-Motions for Summary Judgment pursuant to *CPLR 3211 [a][7]* seeking dismissal of Plaintiff's purported cause of action for False Imprisonment is **GRANTED**.

Defendant's Cross-Motions for Summary Judgment pursuant to *CPLR 3211 [a][7]* seeking dismissal of Plaintiff's purported cause of action for Punitive Damages is **GRANTED**.

On a motion to dismiss pursuant to *CPLR § 3211*, the pleading is to be afforded a liberal construction (*see, CPLR § 3026*). The Court accepts the facts as alleged in the complaint as true, accord Plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481; *Rovello v Orofino Realty Co*, 40 NY2d 633). Under *CPLR 3211[a][1]*, a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see, e.g., Heaney v Purdy*, 29 NY2d 157). In assessing a motion under *CPLR 3211[a][7]*, however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, *supra*, 40 NY2d at 635,) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268; *Rovello v. Orofino Realty Co.*, *supra*, 40 NY2d at 636).

Here, the Complaint fails to make a *prima facie* case for either of the following causes of action: Intentional Infliction of Emotion Distress; Trespass; and Punitive Damages. Moreover, there is no medical treatment appurtenant to a claim for Intentional Infliction of Emotional Distress. At oral argument, Plaintiff, an attorney who represents himself, represented that the claims for Intentional Infliction of Emotional Distress, Trespass, and Punitive Damages were made by prior counsel in drafting the complaint, and that he recognizes that the those causes of action cannot be maintained, and therefore withdrew same on the record. Nonetheless, this court took a close look at the complaint, and after conducting its own analysis, does concur that those causes

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of action were not aptly stated, and cannot withstand the within *CPLR* §3211 motion. Instead, the only causes of action that Plaintiff maintains are viable, are those for Assault and Battery. Defendant has not moved to dismiss the claims for Assault and Battery.

Defendant's Cross-motion for Summary Judgment pursuant to *CPLR* § 3212 on liability in connection with the remaining cause(s) of action, is **DENIED**. To make a *prima facie* showing, the motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (*CPLR* §3212[b]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Verizon NY, Inc v Garvin*, 13 NY3d 851, 852; *Zuckerman v. City of New York*, 49 NY2d 557, 562). Here, Defendant fails to attach either an affidavit on personal knowledge, or a verified transcript from the examination before trial of any party. Defendant's Cross-motion relies on the unverified transcript attached to Plaintiff's motion. Therefore, and as such, the motion is procedurally defective and must be denied, without the court getting to the substantive merits of the motion.

### III. *Conclusion*

Based upon the foregoing, it is hereby,

**ORDERED** that Plaintiff's motion for Summary Judgment pursuant to *CPLR* §3212 is **DENIED**, and it is further;

**ORDERED**, Defendant's Cross-Motions for Summary Judgment pursuant to *CPLR* 3211 [a][7] seeking dismissal of Plaintiff's purported cause of action for Intentional Infliction of Emotion Distress is **GRANTED**, and it is further;

**ORDERED**, that Defendant's Cross-Motions for Summary Judgment pursuant to *CPLR* 3211 [a][7] seeking dismissal of Plaintiff's purported cause of action for False Imprisonment is **GRANTED** and it is further;

**ORDERED**, that Defendant's Cross-Motions for Summary Judgment pursuant to *CPLR* 3211 [a][7] seeking dismissal of Plaintiff's purported cause of action for Punitive Damages is **GRANTED**, and it is further;

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**ORDERED**, that Defendant's Cross-motion for Summary Judgment pursuant to *CPLR* § 3212 on the issue of liability in connection with the remaining cause(s) of action, is **DENIED**.

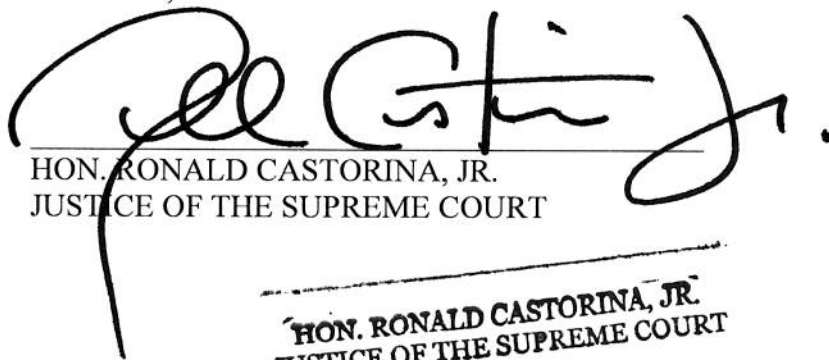
The remaining contentions and/or relief requested of/by the parties are either without merit, or unavailing, and are therefore **DENIED**.

The matter is sent to Part TRP for jury trial on the remaining cause(s) of action on October 16, 2023 at 9:30AM.

This shall constitute the Decision and Order of the court.

Dated: September 7, 2023  
Staten Island, New York

ENTER,



HON. RONALD CASTORINA, JR.  
JUSTICE OF THE SUPREME COURT

HON. RONALD CASTORINA, JR.  
JUSTICE OF THE SUPREME COURT