

Dow v Beck

2008 NY Slip Op 32562(U)

September 10, 2008

Supreme Court, Suffolk County

Docket Number: 0020590/2006

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 5-14-08 (001 & 003)
MOTION DATE 6-4-08 (002)
MOTION DATE 7-2-08 (004)
MOTION DATE 7-30-08 (005)
ADJ. DATE 7-30-08
Mot. Seq. # 001 - MotD
002 - XMD
003 - XMotD
004 - MotD
005 - XMD

-----X			SALENGER, SACK, SCHWARTZ et al.
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	:		Animal Rescue, Inc.
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Upon the following papers numbered 1 to 71 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; 15-32; Notice of Cross Motion and supporting papers 33-41; 42-47; 48-56; Answering Affidavits and supporting papers 57-58; 59-60; 61-62; 63-64; 65-66; Replying Affidavits and supporting papers 67-71; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further,

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ORDERED that the motion of the defendant Laurence Beck for summary judgment (Mot. Seq. # 001) is granted to the extent that it seeks dismissal of so much of the complaint as may be read to assert a cause of action sounding in common law negligence, and is otherwise denied; and it is further,

ORDERED that the cross motion of the plaintiff for summary judgment (Mot. Seq. # 002) is denied; and it is further,

ORDERED that the cross motion of the defendant The Buddy Project for Animal Rescue, Inc. for summary judgment (Mot. Seq. # 003) is granted to the extent that it seeks dismissal of so much of the complaint as may be read to assert a cause of action sounding in common law negligence, and is otherwise denied; and it is further,

ORDERED that the motion of the defendant Carol Anne Dow for summary judgment (Mot. Seq. # 004) is granted to the extent that it seeks dismissal of so much of the complaint as may be read to assert a cause of action sounding in common law negligence, and is otherwise denied; and it is further,

ORDERED that the cross motion of the plaintiff for summary judgment (Mot. Seq. # 005) is denied.

The plaintiff commenced the instant action to recover damages she sustained from a dog bite. The subject dog, a two-year old male Rottweiler, had been in an animal shelter for the majority of its life. It had been adopted out of the animal shelter briefly, but was returned after biting someone on May 29, 2006. The defendant Buddy Project for Animal Rescue, Inc. (hereinafter the Buddy Project), a non-profit organization which is dedicated to helping homeless animals find homes, undertook the task of finding the dog a new home. The defendant Carol Anne Dow volunteered to assist the Buddy Project in this objective by temporarily housing the dog at her premises while the Buddy Project attempted to place it in a permanent home. According to the President of the Buddy Project, Gina DeHaan, the dog was to remain at Dow's home while the Buddy Project raised money for training and then had the dog trained. Based upon the trainer's evaluation of the dog, it would ultimately be placed in either a proper home or a sanctuary.

The defendant Laurence Beck volunteered to assist the Buddy Project in this objective by transporting the subject dog. On June 10, 2006, he went to the animal shelter, filled out the paperwork required to remove the dog from the shelter, and transported the dog to Dow's home. Between June 10, 2006 and June 20, 2006 the dog remained at Dow's home. During this time period she was the party primarily caring for the dog in that she provided it with food, walked it, and placed it in and out of its crate. However, the dog was also walked and socialized by volunteers from the Buddy Project who visited it for one to two hours on an almost daily basis. On June 20, 2006, about ten days after its arrival at Dow's home, the dog bit the plaintiff Meredith Dow. Meredith Dow, the 18 year old daughter of Carol Anne Dow, did not reside with her mother and first met the dog only shortly prior to the incident.

By separate motions and cross motion, each of the defendants now move for summary judgment dismissing the complaint insofar as asserted against them on the grounds that they could not be held liable for the plaintiff's injuries because they did not own, possess, harbor, or exercise dominion or control over the dog. The plaintiff cross-moves for partial summary judgment in her favor on the issue of liability as against all defendants.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986] ; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Center, supra*). Once this showing has been made, however, 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 (*see, Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*).

The complaint alleges that the defendants are liable for the plaintiff's injuries as they owned, harbored, and/or controlled the subject dog and knew, or should have known, of its vicious propensities. Construed liberally in the plaintiff's favor, the complaint sets forth a cause of action sounding in strict liability (*see, Soscia v Soscia*, 35 AD3d 841, 829 NYS2d 543[2006]). However, to the extent that such complaint may be read to plead a cause of action sounding in common law negligence, such action cannot stand (*see, Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532 [2008]; *compare, Petrone v Fernandez*, __AD3d__, __NYS2d__, 2008 NY Slip Op 6198, 5 [2nd Dept. July 8, 2008]). Accordingly, the defendants' motions and cross motion for summary judgment are granted to the extent they seek dismissal of so much of the complaint as may be read to assert a cause of action sounding in common law negligence.

"To recover in strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner or the person in control of the premises where the dog was kept knew or should have known of such propensities" (*Jennings v Nespolino*, 6 AD3d 582, 774 NYS2d 795 [2004]; *see, Claps v Animal Haven, Inc.*, 34 AD3d 715, 825 NYS2d 125 [2006]; *Han v F & M Enter. of Corona Corp.*, 293 AD2d 572, 740 NYS2d 227 [2002]).

The defendant Laurence Beck failed to demonstrate a prima facie entitlement to judgment as a matter of law on the grounds that he did not own, possess, harbor, or exercise dominion or control over the subject dog (*cf., Schwartz v Nevatel Communs. Corp.*, 8 AD3d 469, 778 NYS2d 308 [2004]). In support of his motion for summary judgment Beck submitted, *inter alia*, the deposition testimony of the parties. During his deposition, Beck testified that he had signed adoption papers in order to remove the dog from the animal shelter including a document confirming that he was told that the dog had bitten on a prior occasion. Moreover, he admitted that he signed the dog's license as its "owner", retained the dog's paperwork, and never sought to transfer ownership of the dog to Dow or any other party (*see, Agricultural & Markets Law* § 113). The deposition testimony of the parties further discloses that during the ten days the dog was sheltered at Dow's home, Beck visited two to three times and that after the incident, Beck went to the animal shelter to sign documentation to surrender the dog to be euthanized. Based on these facts, genuine factual issues remain regarding Beck's ownership, control and custody of the dog (*see, Giglio v Marino*, 2 Misc3d 443, 768 NYS2d 809 [2003]; *cf. Bukhatetsky v Vysotski*, 296 AD2d 367 [2nd Dept 2002]). Accordingly, Beck's motion for summary judgment is denied.

The defendant Dow failed to demonstrate a prima facie entitlement to judgment as a matter of law by establishing that she did not own, possess, harbor, or exercise dominion or control over the subject

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dog. The evidence submitted in support of her motion for summary judgment, including her own deposition testimony, set forth that she was voluntarily providing temporary housing for the dog at the time of the dog bite incident. It further established that the incident occurred at her premises (*see, Belyski by Belyski v Pedone*, 240 AD2d 608, 659 NYS2d 1007 [1997]; *cf. Braithwaite v Presidential Prop. Servs., Inc.*, 24 AD3d 487, 806 NYS2d 681 [2005]; *see also, Bennett v White*, 37 AD3d 630, 830 NYS2d 352 [2007]). It is well settled that one who “harbors a domestic animal” will be held liable for injuries caused by the animal if that person knew or should have known that the animal has vicious propensities (*see, Belyski by Belyski v Pedone*, 240 AD2d 608, 659 NYS2d 1007 [1997]). Accordingly, Carol Ann Dow’s motion for summary judgment is denied.

The defendant Buddy Project failed to demonstrate a prima facie entitlement to judgment as a matter of law on the grounds that they did not own, possess, harbor, or exercise dominion or control over the subject dog. The Buddy Project did not present any evidence to refute that Beck was acting in his capacity as a volunteer of the Buddy Project at the time he retrieved the dog from the animal shelter, signed the adoption paperwork, and transported the dog to Dow’s home (*see, Robinson v Downs*, 39 AD3d 1250, 834 NYS2d 770 [2007]; *Daries v Haym Solomon Home for the Aged*, 4 AD3d 447, 772 NYS2d 362 [2004]; *Schwab v Campbell*, 266 AD2d 840, 697 NYS2d 424 [1999]; *Hannold v First Baptist Church*, 254 AD2d 746, 677 NYS2d 859 [1998]). Nor did it present any evidence to refute that Dow was acting in her capacity as a volunteer of the Buddy Project by providing temporary housing for the dog (*see, Robinson v Downs, supra; Daries v Haym Solomon Home for the Aged, supra; Schwab v Campbell, supra; First Baptist Church, supra*). Rather, the evidence before the court, including the testimony of the Buddy Project’s president Gina DeHaan, indicates that the actions of both Beck and Dow with respect to the dog were performed at the bequest of the Buddy Project in furtherance of the Buddy Project’s ultimate goal of finding the dog a new home. Based on these circumstances, there exists a triable issue of fact as to whether the Buddy Project exercised sufficient dominion or control over the dog to be held liable for the plaintiff’s injuries. Accordingly, the Buddy Project’s motion for summary judgment is denied.

The plaintiff’s cross-motion for summary judgment on the issue of liability as against all defendants (Mot. Seq. # 002) is also denied on the ground that she failed to meet her prima facie burden or demonstrating an entitlement to judgment as a matter of law. In support of her motion for summary judgment, the plaintiff submitted, *inter alia*, photographs of her injury, the dog’s adoption documents and license, and the documents signed for the surrender of the dog following the incident. She also relied upon the deposition testimony of the parties that was submitted on the defendants’ motions and cross motion. This evidence failed to establish, as a matter of law, that the defendants owned, possessed, harbored, or exercised sufficient dominion or control over the dog to be held liable. Rather, as discussed *supra*, the potential liability of each of the defendants for the dog bite incident remains a triable issue of fact for the jury. Moreover, and in any event, the plaintiff failed to establish a prima facie entitlement to summary judgment by demonstrating, as a matter of law, that the defendants knew or should have known of the dog’s vicious propensities (*see, Han v F & M Enter. of Corona Corp.*, 293 AD2d 572, 740 NYS2d 227 [2002]; *Belyski by Belyski v Pedone*, 240 AD2d 608, 659 NYS2d 1007 [1997]). The plaintiff relies upon the defendants’ general knowledge that the dog had bitten on a prior occasion. However, it is well settled that “[t]he fact that an animal may have previously responded by biting does not automatically establish, as a matter of law, either vicious propensities or knowledge thereof” (*Tessiero v Conrad*, 186 AD2d 330, 588 NYS2d 200 [1992]; *see, Johnson v Sloan*, 249 AD2d 915, 671 NYS2d 403 [1998]; *see e.g., Bailey v Veitch*, 28 AD3d 1079, 814 NYS2d 459 [2006]).

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The plaintiff's cross-motion for summary judgment on the issue of liability as against all defendants (Mot. Seq. # 005) is denied. This cross-motion violates the long established prohibition against successive motions for summary judgment (*Williams v City of White Plains*, 6 AD3d 609, 775 NYS2d 868 [2004]; *Klein v Auerbach*, 1 AD3d 317, 766 NYS2d 580 [2003]). In any event, the arguments contained within the plaintiff's second cross-motion for summary judgment are redundant of those contained in her original cross motion.

Dated: September 19, 2008



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION