`Gervais v Laino
2013 NY Slip Op 30841(U)
April 19, 2013
Supreme Court, New York County
Docket Number: 111537/10
Judge: Doris Ling-Cohan
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[* 1]
SCANNED ON 4/23/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN, Justice — PART 36

Danielle Gervais

-v-

Maresa Laino

INDEX NO. 111537/10

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits & memo | No(s). 1, 2

Answering Affidavits — Exhibits | No(s). 3, 4

Replying Affidavits ~~supplemental paper~~ | No(s). 5

interim order dated 7-16-2012 9 | 6, 7, 8, 9, 10

Upon the foregoing papers, it is ordered that this motion is for summary judgment is denied in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/19/13

[signature], J.S.C.
DORIS LING-COHAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

--------------------------------------x

DANIELLE GERVAIS,

Plaintiff,

Index No.: 111537/10

-against-

Motion Seq. No.: 001

MARESA LAINO,

DECISION

Defendant.

--------------------------------------x

FILED
APR 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

This case involves a dog bite, which occurred on July 22, 2009, while plaintiff was on the Great Lawn of Central Park, by a dog owned by defendant. Defendant's dog Ruby, is a mutt, described as a German Shepard, Collie mix. She weighs approximately 45 pounds. As a result of the attack, plaintiff suffered multiple lacerations to both sides of her face, lower jaw and chin, leaving permanent scars and requiring surgery.

At the time of the incident, defendant's dog was not on a leash, and had gotten stuck in a fence. According to plaintiff she approached defendant's dog when she heard it crying and saw it stuck in a fence. "When she walked over to the dog to see what it was caught on, the dog lunged forward and up and latched onto [her] face" . Affirmation in Opposition, Gervais Affidavit, ¶4. Plaintiff maintains that she did nothing to antagonize the dog, prior to the attack and, "as a dog owner [herself], [she] would never pull at any dog". *Id.*, ¶5. According to defendant, prior to the attack, plaintiff had "walked over [to Ruby], wrapped her arms around Ruby's neck and head and started pulling in an attempt to free Ruby from the fence". Notice of Motion, Laino Affidavit, ¶11. Clearly, there is a dispute between the parties, as to the details of the subject incident.

Preliminarily, the court notes that while the complaint does not expressly use the term "strict liability", the complaint does allege the necessary element to hold a defendant liable for a dog bite

under such theory, *inter alia*, that defendant had "knowledge of [her dog's] dangerous propensities". Notice of Motion, Verified Complaint, at 2. , Moreover, defendant, in seeking summary judgment of dismissal, and plaintiff in opposition, concede that the legal theory in this case is "strict liability". In fact, defendant specifically argues that "[d]efendant is not strictly liable and, thus, plaintiff's claim must be dismissed". Defendant's Memo of Law, at 2, Point I. Thus, the complaint is read to include a claim for strict liability, as both sides address their papers as to this claim.

As correctly argued by the parties, in New York, a plaintiff may only recover from injuries sustained from a dog bite, on a theory of strict liability, which requires that the plaintiff prove that the owner of the dog knew or had reason to know that the animal had vicious propensities. *See Bard v. Jahnke*, 6 NY3d 592, 599 (2006); *Collier v. Zambito*, 1 NY3d 444, 446-48 (2004); *Doerr v. Goldsmith*, ___ AD3d ___, 2013 NY Slip Op. 02501 (1st Dept April 16, 2013). Factors to be considered in determining whether an owner has knowledge of a dog's vicious propensities include: knowledge of a prior attack, the dog's tendency to growl or snap, whether the animal is kept as a guard dog, and whether the dog has proclivity to act in a way that puts others at risk of harm. *See Collier*, 1 NY3d at 447.

Here, in seeking summary judgment of dismissal, defendant maintains that plaintiff has failed to state a claim for strict liability and, thus, cannot succeed on her claim for damages resulting from the dog bite. Specifically, defendant asserts that she did not know, nor should she have known, that her dog had vicious propensities, thereby defeating plaintiff's claim for strict liability. In her affidavit in support, defendant asserts that her dog had never been aggressive towards her, another person, or another animal and that the incident involving plaintiff was the first instance in which her dog behaved viciously. Notice of Motion, Laino Affidavit, at 8-9. Moreover defendant maintains that her dog is not used as a guard dog. Defendant also submits statements from other individuals, who support defendant's position that they were not aware that her dog had any vicious propensities and not aware of any prior similar instances.

Defendant also argues that plaintiff assumed the risk by approaching the dog when it was in distress. Defendant argues that plaintiff's conscious decision to "meddle in a perilous situation and engage in behavior that constituted a provocation in the minds of both the dog and outside observers renders her liable for the unfortunate outcome". Memo of Law in Support at 4.

In opposition, plaintiff maintains that defendant knew or had reason to know of her dog's vicious propensities, and, therefore, defendant should be found strictly liable. In support, plaintiff relies upon defendant's neighbor Adrienne Meyer's ("Meyer") testimony at her deposition, in which she testified as to two (2) separate incidents that she experienced with defendant's dog, that occurred prior to the subject attack on plaintiff, which should have provided defendant with notice of her dog's vicious propensities. Exh, A, Supplemental Affirmation in Opposition, Meyer EBT Transcript, at 19, lines 18-25; at 20 lines 1-23; at 22, lines 7-10, 23-24; at 23, lines 1-23.

Summary judgment is a drastic remedy that deprives a litigant of his day in court and should be employed only when there is no doubt as to the absence of triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361, 362 (1974); *Holender v. Fred Cammann Productions, Inc.*, 78 AD2d 233 (1st Dept 1980). The movant must tender evidence, by proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment." CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 (1985). To grant summary judgment it must be clear that no material and triable issue of fact is presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility. *Dauman Displays, Inc. v. Masturzo*, 168 AD2d 204 (1st Dept 1990).

Based upon such standard, defendant's motion for summary judgment is denied. While defendant maintains that she had no prior knowledge, nor reason to know of any vicious propensities of her dog, in opposition, plaintiff has sufficiently raised a factual as to such issue to warrant that this

case proceed to trial. As indicated, plaintiff relies upon the deposition testimony of defendant's neighbor, Meyer, who testified that she complained to defendant about two (2) prior incidents when defendant's dog growled, snaped and bared its teeth, at Meyer's two dogs. Exh, A, Supplemental Affirmation in Opposition, Meyer EBT Transcript, at 13, lines 12-23; at 18 lines 7-13. Meyer also testified that defendant's dog had snapped at her dog and has acted in a threatening manner towards her dogs. *Id.* at 18, lines 7-13; at 14, lines 15-18. When asked to provide a time frame for such conduct by defendant's dog, Meyer indicated that it was in approximately 2006, prior to the subject incident with plaintiff. *Id.* at 15, line 9; at 16, line 12; at 41, lines 5-11. Ms. Meyer specifically recalled two (2) separate incidents that occurred with defendant's dog, prior to the subject incident, in which defendant's dog was unsupervised and off the leash, one in which defendant's dog lunged at her dog and Meyer had to block defendant's dog from attacking her dog and scream at her to get away. *Id.* at 19, lines 21-25; at 20, lines 15-23; at 23, lines 23-25; at 25, lines 1-4. In the other incident, defendant's dog lunged at Meyer's two (2) dogs and was growling and snapping at the other dogs, and Meyer had to chase defendant's dog away, since defendant did not come to restrain her dog. *Id.* at 22, lines 7-10, 23-35; at 23, lines 3-16, 20-25; at 24, lines 1-7. While defendant denies knowledge of such incidents, plaintiff has sufficiently raised an issue of fact. It is noted that, as indicated above, credibility issues are not to be determined on a motion for summary judgment and all evidence must be viewed in favor of the non-moving party, here, plaintiff.

Moreover, there is insufficient proof to establish that plaintiff assumed the risk of her injuries, as a matter of law, as the parties dispute plaintiff's actions and the facts surrounding the subject incident, and there is no evidence that plaintiff knew of the dog's vicious propensities or was warned by defendant of any possible vicious behavior. *Cf. Seiden v. A. Silmac Glass Corp.*, 251 AD2d 141 (1st Dept 1998)(the court held that plaintiff's fall and injuries were precipitated by his own actions as a matter of law, since *plaintiff knew of defendant's dog's aggressive propensities and, nevertheless, approached the dog* with "two-by-four", while the dog was chained so that he could not reach plaintiff and was being held by one of defendant's employees). Moreover, as provided in CPLR §1411 "the culpable conduct attributable to the [plaintiff]...including...assumption of the risk, *shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct

attributable to the [plaintiff] bears to the culpable conduct which caused the damages". (Emphasis supplied).

Accordingly, based upon the above, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated: 4/19/13

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\gervais dog bite.wpd

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