

Kachenkov v Vadala

2013 NY Slip Op 30971(U)

May 3, 2013

Sup Ct, Queens County

Docket Number: 12736/11

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Sergel Kachenkov and Marina Kachenkova,

Plaintiffs,

-against-

Mark Vadala, Kimberely Vadala, Daniel Hayes
and Dawn Mascolo,

Defendants.
-----X

Index No.: 12736/11
Motion Date: 2/28/13
Motion Cal. No.:
Motion Seq. No.: 5

The following papers numbered 1 to 14 read on this motion for an order pursuant to CPLR §3212 granting Mascolo Defendant’s motion for summary judgment in its entirety.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Memorandum of Law in Support.....	5 - 6
Affirmation in Opposition.....	7 - 10
Affirmation.....	11 - 12
Memorandum of Law in Further Support.....	13 - 14

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants, Daniel Hayes (“Hayes”) and Dawn Mascolo (“Mascolo”) (collectively as the “moving defendants”) move for an order pursuant to CPLR §3212, granting summary judgment and dismissing the verified complaint of plaintiffs Sergei Kachenkov (“Sergei”) and Marina Kachenkova (“Marina”).

Facts

On March 17, 2010, Sergei contends he sustained serious personal injuries when he was bitten by a dog owned by co-defendants, Hayes and Mascolo. Hayes and Mascolo were tenants in a premises located at 7935 68th Road, Middle Village New York (“defendants’ premises”). Defendants premises was owned by co-defendants Mark Vadala and Kimberly Vadala.

The first cause of action alleges that the defendants were negligent in owning the dog and failing to keep the dog in a separate area, leash the dog, failing to warn the plaintiff and allowing the dog to run through the public and plaintiff’s premises causing personal injury. The second cause of action is a derivative cause of action by Marina. The cause of action for gross negligence was withdrawn by stipulation.

Sergei and Marina testified at their deposition that the incident took place in their own backyard.

The Vadalas testified at their deposition that while they owned the defendants premises and knew about a dog at the defendants premises, they were never made aware of the dog’s vicious propensities and had no complaints about a dog prior to the subject incident.

Mascolo and Hayes testified that they never received complaints about their dog from tenants, neighbors or the plaintiffs. Hayes testified that it was plaintiffs’ dog that came onto his property and attacked his dog. His dog then chased plaintiffs’ dog onto plaintiffs’ alleyway but did not bite Sergei. Defendants deposition testimony indicates that Mascolo’s dog was friendly.

Sergei and Marina admitted, at their respective depositions, that they lack knowledge of any prior incident involving the dog. Sergei testified at his deposition that his dog was involved in at least three prior altercations with other animals.

The moving defendants' motion for summary judgment is granted, as more fully set forth below.

Discussion

Initially, the court notes that despite plaintiffs contentions, with respect to common-law negligence, there is no longer a "negligent dog-bite" cause of action in New York; accordingly, a party injured by a domestic animal can only recover in strict liability. (*Petrone v Fernandez*, 12 N.Y.3d 546 [2009].) "To recover in strict liability for damages caused by a dog bite, a plaintiff must prove that 'the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities'." (*Varvaro v. Belcher*, 65 A.D.3d 1225, 1225 [2nd Dept 2009]; *Christian v. Petco Animal Supplies Stores, Inc.*, 54 A.D.3d 707 [2nd Dept 2008].) The factors to consider when making a determination whether an owner had knowledge of a dog's vicious propensities include evidence of a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner of the dog's restraint, whether the animal is kept as a pet or a guard dog, and whether there have been prior complaints. (*Petrone v. Fernandez*, 53 A.D.3d 221 [2nd Dept 2008] *rev'd on other grounds* 12 N.Y.3d 546 [2009]; *Dykeman v. Heht*, 52 A.D.3d 767 [2nd Dept 2008]; *Bard v. Jahnke*, 6 N.Y.3d 592 [2006]; *Collier v. Zambito*, 1 N.Y.3d 444 [2004].)

Based on the deposition testimony presented by the moving defendants, there is no evidence that Debo had ever bitten, jumped, or growled at anyone prior to the incident in question, nor had the dog exhibited any other aggressive or vicious behavior. Further, the Vadalas and the moving defendants testified at their depositions that they thought the dog was friendly and that they received no complaints about Debo prior to the subject incident. Therefore, the moving defendants proved

that they did not know or should have known that Debo had vicious propensities. Accordingly, the moving defendants established their prima facie entitlement to judgment as a matter of law.

Plaintiffs contend that the moving defendants were aware of Debo's vicious propensities because Mascolo allegedly told Sergei to "be careful with your dog because we have the aggressive Pit Bull, stay away." In addition, plaintiffs contend that Debo is "vicious" because the moving defendants "chooses to keep his dog away from other people" and because Debo is an American Straffordshire Terrier which the public believes is an "aggressive" breed of dog. However, the mere issuance of a warning about a dog and the breed of the dog are insufficient to raise a triable issue of fact as to the dog's vicious propensities in the absence of any evidence that prior to this incident the dog exhibited any fierce or hostile tendencies. (*See Palumbo v. Nikirk*, 59 A.D.3d 691, 692 [2nd Dept 2009] *rev on other grounds* 12 N.Y.3d 546 [2009]; *Miletich v. Kopp*, 70 A.D.3d 1095 [3rd Dept 2010][breed of dog alone is insufficient to create an issue of fact]; *Sers ex rel. Sens v. Manasia*, 280 A.D.2d 539 [2nd Dept 2001].)

Plaintiffs also rely on self-serving hearsay statements of unidentified neighbors that Debo was aggressive. However, such self serving statements by unidentified neighbors is insufficient to defeat a motion for summary judgment. (*See Mauskopf v. 1528 Owners Corp.*, 102 A.D.3d 930 [2nd Dept 2013]; *Mallen v. Farmingdale Lanes, LLC*, 89 A.D.3d 996 [2nd Dept 2011].)

Further, there is also no basis to conclude that the moving defendants "violated the local regulation in question or that any violation which may have occurred was a proximate cause of the plaintiff's injury." (*Luts v. Weeks*, 268 A.D.2d 568, 569 [2nd Dept 2000].) Moreover, the local laws allegedly violated by defendants provide only evidence of negligence and do not form the basis for strict liability. (*Petrone*, 12 N.Y.3d 546, 550.)

Finally, Marina's claim for loss of consortium does not exist independent of Sergei's right to maintain an action for injuries he allegedly sustained. (*Klein v. Metropolitan Child Services, Inc.*, 100 A.D.3d 708 [2nd Dept 2012].)

Accordingly, plaintiff in opposition has failed to raise a triable issue of fact for trial.

Conclusion

For the reasons set forth above, the motion for summary judgment is granted and the complaint is dismissed as to Daniel Hayes and Dawn Mascolo.

Dated: May 3 , 2013

Bernice D. Siegal, J. S. C.