

Fleming v Ball

2014 NY Slip Op 32456(U)

September 12, 2014

Supreme Court, Suffolk County

Docket Number: 03321/2013

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Yvonne Fleming,

Plaintiff,

-against-

Alan Ball, William Asparro and Dorraine Asparro,

Defendants.

Index No.: 03321/2013

Motion Sequence No.: 003; MD

Motion Date: 4/25/14

Submitted: 6/4/14

Motion Sequence No.: 004; XMD

Motion Date: 6/4/14

Submitted: 6/4/14

Motion Sequence No.: 005; MD

Motion Date: 6/24/14

Submitted: 6/24/14

Clerk of the Court

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Upon the following papers numbered 1 to 31 read upon these motions for summary judgment and to amend the complaint: Notice of Motion and supporting papers (003), 1 - 10; Notice of Cross Motion and supporting papers (004), 11- 20; (005) 23 - 31; Replying Affidavits and supporting papers, 21 - 22; it is

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ORDERED that motion (003), (004), and (005) are consolidated for the purpose of determination; and it is further

ORDERED that motion (003) by defendants William Asparro and Dorraine Asparro for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion (004) by plaintiff Yvonne Fleming for an order pursuant to CPLR 3212 granting summary judgment in her favor against the defendants William and Dorraine Asparro on the issue of liability is denied; and it is further

ORDERED that cross motion (005) by plaintiff Yvonne Fleming pursuant to CPLR 3025 for an order permitting plaintiff to amend the complaint is granted, and the proposed supplemental summons and amended verified complaint are deemed served *nunc pro tunc*, and the Asparro defendants are directed to timely serve their answer, if so advised, pursuant to CPLR 3025 (d).

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when she was bitten by a dog owned by defendant Alan Ball, the tenant of defendants William and Dorraine Asparro (“the Asparros”) on January 14, 2013. In the complaint, the plaintiff alleges that the Asparros were negligent in, *inter alia*, failing to properly supervise their tenant’s dog. The Asparros now move for summary judgment on the ground that a landlord owes no duty of care to a plaintiff attacked off of his or her property by a tenant’s canine, and the plaintiff cross-moves for summary judgment in her favor against the Asparros on the issue of liability, and to amend the complaint to include a cause of action for strict liability against defendants William Asparro and Dorraine Asparro.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

“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” (*Christian v Petco Animal Supplies Store, Inc.*, 54 AD3d 707, 707-708, 863 NYS2d 756, 757 [2d Dept 2011]). In certain circumstances,

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a plaintiff may recover against a landlord for injuries caused by a tenant's dog on a strict liability theory if the "plaintiff can demonstrate the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog" (*McKnight v ATA Hous. Corp.*, 94 AD3d 957, 942 NYS2d 210 [2d Dept 2012]). However, a landlord is not liable for injuries caused by a tenant's dog when the incident that caused the injury did not occur on the landlord's property (see *Braithwaite v Presidential Prop. Servs, Inc.*, 24 AD3d 487, 806 NYS2d 681 [2d Dept 2005]; *Phillips v Coffee to Go*, 269 AD2d 123, 703 NYS2d 13 [1st Dept 2000]). Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog is restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm (*Henry v Higgins*, 117 AD3d 796, 967 NYS2d 72 [2d Dept 2014]).

In *Hall v United Founders, Ltd*, 112 AD3d 530, 977 NYS2d 239 [1st Dept 2013], the night watchman at a construction site was given permission to keep his dog at the premises. The dog escaped from the premises, and, with another dog, attacked plaintiff near the site. The court held that the owner, or a party in control of the premises, may be held liable for injuries resulting from a dog bite that occurred off the premises if the owner had knowledge of the vicious propensities of the dog, had control of the premises, and the capability to remove or confine the animal. The defendant in *Hall* established that he never received any complaints about the dog, was not aware of any previous incident involving the dog, and that it appeared friendly and well trained when he observed it. However, because a nonparty witness had seen the dog bite an electrician working at the construction site approximately one month before the subject incident occurred, and was present when the defendant's foreman called the owner and told him what happened, factual issues were raised to preclude summary judgment in favor of the owner, as the owner of the construction site had knowledge of the dog's vicious propensities concerning the electrician being bitten prior to plaintiff Hall.

Here, William Asparro testified that he leased an apartment on his property to Allan Ball in 2010. Pursuant to the terms of the lease, pets were not permitted. Sometime in 2011, Asparro noticed that Ball had a dog named Muscles on the premises, which Ball told him belonged to his ill mother, and he was taking care of it. Asparro testified that he told Ball to get rid of the dog. Asparro testified that the dog was removed, but he saw it back on the premises a couple of times. Asparro also testified that in April 2012, while Ball's girlfriend was walking the subject dog outside the fence of his property, the dog made contact with his arm and growled at him, but it did not bite him. Asparro went behind his fence, called 911, and filed a police report. The dog was gone the following day, but reappeared several weeks later, running towards him. Asparro, who had a plastic garbage pail in his hand at the time, hit the dog with the pail and the dog ran away. In October 2012, Asparro told Ball to vacate the premises. Ball did not leave nor did he pay rent, but he continued to remain in the apartment. Asparro stated he had financial problems and could not afford to evict Ball. Asparro learned of the January 14, 2012 incident involving the plaintiff the day after it happened.

The plaintiff testified at her deposition that Mr. Ball's dog attacked her across the street from the Asparros' property. While she testified at her deposition that she was unsure where the dog came from prior to the incident, at the "dangerous dog" hearing on February 13, 2013, the plaintiff testified

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that she heard loud voices, yelling, and first observed the dog, a white pit bull, at 41 Meade Avenue on the grass in front of the premises. The dog then came across the street and attacked her.

Defendant Ball testified that the dog was an American Bull Dog, and weighed 116 pounds. At the hearing of February 13, 2013, pursuant to Agriculture and Markets Law §123 (2), he stated he had the dog the entire time he rented from the Asparros, and that Asparros never asked him to get rid of the dog. He stated he was never told by Asparro that the dog attacked him on April 1, 2012 and he did not remember the police coming to the premises. He did not recall his dog attacking Asparro in October 2012. On January 14, 2013, at 5:52 a.m., he heard screams and stated that his dog, which was on a long retractable leash, had broken away. He did not see or hear the dog attacking anyone, and just heard loud screams. He saw a light flash and chased after his dog, but did not see the plaintiff. He then stated that he could not recollect what happened. He brought his dog back into the yard and into his apartment. Ball did not recall telling the police when they came to his house on January 14, 2013, that his dog had not been out of the house the entire day. He testified that he lied to the police.

Colleen Carlsen, testified that she lives next door to the Asparros. In April 2012, she observed Ball's dog attack Bill Asparro, who yelled at Ball's female friend to control the dog. The police arrived at Asparro's home after the attack. On the day the plaintiff was attacked, she heard screams and saw Laura, her neighbor across the street, helping the plaintiff into her house. She did not see the dog or Ball.

Dustin Philmus testified that Alan Ball is a good friend of his and he sees him every day. Ball's dog was with them everyday. He described the dog as very social with other dogs. He never observed the dog acting aggressively, though the dog barked when strangers approached. He was present on January 26, 2013, however, when Muscles bit someone on the hand in Lindenhurst while the dog was in a car.

By order dated February 15, 2013, Honorable David A. Morris declared Muscles a dangerous dog after the hearing on February 13, 2013. He found Ball's testimony concerning the attack to be lacking in veracity and truth.

It is undisputed that the plaintiff came into contact with the dog only once it had crossed the street away from the Asparros' premises. Asparro testified that he did not give permission for defendant Ball to keep the subject dog on the premises and told Ball on repeated occasions to get rid of the dog. However, there are factual issues concerning whether the dog had vicious proclivities based upon the dog growling at Asparro and charging him, and whether Asparro should have had the dog removed from the premises by either the police or animal control since he was aware of the dog's growling and charging, and concerns that the dog might put himself or others at risk of injury. These factual issues concerning the dog's vicious proclivities and issues of fact concerning whether the Asparros should have had the dog removed from the premises preclude summary judgment from being granted in both motions (003) and (004).

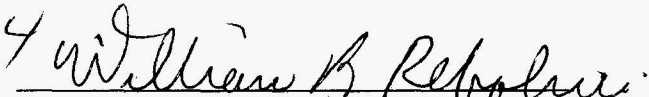
Accordingly, motions (003) and (004) are denied.

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In turning to motion (005), the plaintiff seeks to amend the complaint to include a cause of action for strict liability as against the Asparro defendants, and has submitted a proposed supplemental summons and amended verified complaint. Amendments to pleadings are to be liberally granted in the absence of prejudice to the nonmoving party, *Llana v Mobile Service Station*, 262 AD2d 457, 692 NYS2d 987. No undue prejudice has been demonstrated. Plaintiff set forth the reason for the delay in making this application on the basis that it became clear after defendant Asparro's deposition that the requisite factors to establish a cause of action as to the Asparro defendants based upon strict liability were present (see *Briggs v New York City Transit Authority*, 132 AD2d 451, 517 NYS2d 511 [1st Dept 1987]).

Accordingly, motion (005) is granted and the proposed supplemental summons and amended verified complaint are deemed served nunc pro tunc, and the Asparro defendants are directed to timely serve their answer, if so advised, pursuant to CPLR 3025 (d).

Dated:

September 12, 2014

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION