

Lowenberg v Krause
2015 NY Slip Op 31856(U)
October 1, 2015
Supreme Court, New York County
Docket Number: 158587/14
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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TERRENCE LOWENBERG,

Plaintiff,

Index No. 158587/14

- against-

STEVEN KRAUSE, FURKAN UZUNSAC sued
incorrectly herein as MAHMET UZANCS, BENJAMIN
KRAUSE and SANDRA KRAUSE,

Defendants.

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DONNA MILLS, J.:

Defendants Steven Krause, Benjamin Krause, and Sandra Krause (the Krauses) move for an order dismissing plaintiff Terrence Lowenburg's (plaintiff) claims for punitive damages. The Krauses do not set forth whether their motion is one based upon CPLR 3211 (failure to state a cause of action), or for summary judgment (no triable issue of material fact).

Plaintiff cross-moves for an order: pursuant to CPLR 3124 compelling the Krauses to respond to plaintiff's outstanding demands for discovery and inspection and demand for an examination before trial, or, in the alternative; pursuant to CPLR 3101 precluding the Krauses from introducing into evidence any testimony and any items of discovery as set forth in the demands of plaintiff; pursuant to CPLR 3211 dismissing any and all counterclaims and cross claims and dismissing defenses; pursuant to CPLR 3126 prohibiting Krause from supporting or opposing designated claims or defenses; and precluding Krause from introducing into evidence any of the items of discovery as set forth in the demands for discovery.

This is an action to recover damages for loss of consortium, and the injuries suffered by plaintiff's dog (loss of the left eye) when, in the course of being walked by a nonparty dog walker, plaintiff's dog was bitten by the Krause's dog. The Krause's dog was being walked by another dog walker, defendant Furkan Uzunsac. The complaint sets forth causes of action for strict liability (first, third, and fifth), and for punitive damages (second, fourth, and sixth). The third and fourth causes of action are against Furkan Uzunsac, and are not a part of the motion. Therefore, the motion to dismiss concerns only the second and sixth causes of action against the Krauses for punitive damages.

In support of their motion to dismiss the claims for punitive damages, the Krauses argue that a claim for punitive damages does not constitute a separate cause of action, and that there is no allegation that the Krauses acted intentionally so as to support a demand for punitive damages.

In opposition to the motion to dismiss the punitive damages claims, plaintiff argues that the Krauses knew of their dog's prior attack on a child, and knew that their dog had a vicious propensity.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The pleading is to be liberally construed, according the allegations the benefit of every possible favorable inference (*Ovitz v Bloomberg L.P.*, 18 NY3d 753, 758 [2012]).

"[T]he 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 eliminate any

material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). 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. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Conduct justifying an award of punitive damages must manifest:

"spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" [internal quotation marks and citation omitted] (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012]).

In *Gamiel v Curtis & Riess-Curtis, P.C.*, (16 AD3d 140 [1st Dept 2005]), the Court held that:

"To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another"

The allegations in the second and sixth causes of action satisfy these criteria. Generally, the owner of a domestic animal who either knows, or should know that the animal has a vicious disposition or vicious propensity, is strictly liable for an injury caused by the animal (*Petrone v*

Fernandez, 12 NY3d 546, 550 [2009]). Contrary to the Krauses' contention, in a dog-on-dog bite case, under appropriate circumstances, punitive damages are recoverable. For example, in *Nardi v Gonzalez* (165 Misc 2d 336 [Yonkers City Court 1995]), a dog named Ace, bit another dog. Punitive damages were found to be:

“needed to deter other dog owners from failing to protect humans and other animals from vicious and dangerous dogs. Further, such damages will encourage defendant to take appropriate measures in the future to protect her neighbors from Ace or similar like minded dogs. The court awards plaintiffs punitive damages of \$1,000.” (*id.* at 340)

Here, it cannot be said as a matter of law that a punitive damages claim is unwarranted. The complaint sets forth an allegation that includes a prior attack, and a proclivity to act in a way that puts others at risk of harm (*Hodgson-Romain v Hunter*, 72 AD3d 741, 741 [2d Dept 2010]). Plaintiff's allegations support a possible award of punitive damages.

Although punitive damages do not constitute a separate cause of action (*APS Food Systems, Inc. v Ward Foods*, 70 AD2d 483 [1st Dept 1979]), the court will not dismiss the second and sixth causes of action. The allegations, accepted as true, accorded the benefit of every possible favorable inference, and evaluated only as to whether they fit within any cognizable legal theory, sufficiently state plaintiff's strict liability claims. “Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the original trier of the facts” (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996] [citations omitted]).

Once the complaint is sustained as a strict liability complaint, I see no particular economy to anyone in considering whether the causes of action demanding punitive damages, based upon the same facts, are sufficient.

On plaintiff's discovery cross motion, defendants have made a discovery response.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the cross motion for discovery, is also denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 574 at

111 Centre St., on JAN. 8th, 2016, at 10:00 a.m/p.m.

Dated: 10/1/15

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.