

Scavetta v Wechsler

2016 NY Slip Op 32692(U)

April 25, 2016

Supreme Court, New York County

Docket Number: 155262/2014

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MON. CAROL H. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 155262/2014
SCAVETTA, GREGORY
vs.
WECHSLER, STUART
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/17/14
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this personal injury action, defendant Stuart Wechsler (“defendant”) moves, and plaintiffs Gregory (“plaintiff”) and Maria Scavetta (collectively, “plaintiffs”) cross move for summary judgment in their favor, respectively.

Factual Background

Plaintiffs allege that Gregory Scavetta suffered injuries resulting from an incident in which defendant’s dog, which was tied to a metal bicycle rack, fled and dragged the metal bicycle rack into his leg, causing him to fall and sustain injuries.

In support of summary judgment, defendants argue that plaintiffs’ sole claim for common law negligence is not a recognized cause of action for injuries resulting from domestic animals in this state. Even if plaintiffs’ complaint alleges a strict liability claim, there is no evidence that defendant knew or should have known of any propensity of the dog to put others at risk of harm.

In support of their cross-motion for summary judgment, plaintiffs clarify that they do not seek to hold defendant liable for the decisions made by the dog or liable with respect to the ownership, direction and control (or supervision) of the dog. Instead, plaintiffs contend, defendant is negligent for launching a force or dangerous instrument (*i.e.*, the metal bicycle rack) and created a unreasonable risk of harm. Plaintiffs assert that a rack, like other inanimate objects, is subject to the law of physics as created by its users. It was foreseeable that the metal rack would strike someone as it was dragged through the streets. Thus, defendant is negligent for attaching the leash to an unsecured, flimsy, light metal bicycle rack that defendant knew, or should have known, could be easily dragged by his dog through crowded street and sidewalks of New York City. Such circumstances render this incident different from the caselaw cited by defendant. Plaintiffs also submit a supplemental bill of particulars to clarify the defendant’s alleged negligence in tying the dog’s leash to an unsecured bicycle rack.

Dated: _____, J.S.C.

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

- 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

Discussion

“New York has repeatedly rejected application of a negligence standard when injury was caused by domestic animals; rather, in such cases discussion generally begins and ends with consideration of whether the animal in question was known to have vicious propensities (*Schwartz v. Armand Erpf Estate*, 255 A.D.2d 35, 38, 688 N.Y.S.2d 55 [1st Dept 1999], lv. dismissed 94 N.Y.2d 796, 700 N.Y.S.2d 428, 722 N.E.2d 508 *citing* *Brown v. Willard*, 278 AD 728, 103 N.Y.S.2d 58, *affd.* 303 N.Y. 727, 103 N.E.2d 343). In *Doerr v Goldsmith*, the Court of Appeals was “constrained” to “reject plaintiffs' negligence causes of action against defendants arising from injuries caused by defendants' dogs” in two separate cases (25 N.Y.3d 1114, 35 N.E.3d 796, 14 N.Y.S.3d 726 [2015]). In *Doerr's* first case on appeal, defendant was kneeling down, holding his dog, when co-defendant, on the opposite side of the street, called the dog over to her. Plaintiff was bicycling in the defendants' direction, and struck the dog and was thrown from his bike, resulting in injuries. Plaintiff sued in negligence only, alleging that defendants negligently controlled and directed their dog into plaintiff's path. In the second case before the Court, defendant released her husband's dogs from her house, which then ran into the road. Plaintiff, who was riding a bicycle, struck one of the dogs, and suffered injuries. Plaintiff sued in negligence, alleging that defendant failed to adequately supervise and restrain the dog, and in strict liability, alleging that defendant had knowledge of the dog's propensity to run onto the road. The Court of Appeals adhered to precedent, which held that in regard to injuries resulting from contact with a defendant's animal, a “plaintiff cannot recover in the absence of a showing that defendant had knowledge of the animal's ‘vicious propensity’ or ‘propensity to do any act that might endanger the safety of the persons and property of others’ (25 N.Y.3d at 1116, *citing* *Bloomer v Shauger*, 21 N.Y.3d 917, 989 N.E.2d 560, 967 N.Y.S.2d 322 [2013]).

Thus, “[W]hen harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in” *Collier v Zambito* (1 N.Y.3d 444, 807 N.E.2d 254, 775 N.Y.S.2d 205 [2004]) —*i.e.*, the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities (*Petrone v. Fernandez*, 12 N.Y.3d 546, 910 N.E.2d 993, 883 N.Y.S.2d 164 [2009] (a negligence cause of action does not survive *Collier* and *Bard*) *Bard v. Jahnke*, 6 N.Y.3d 592, 599, 815 N.Y.S.2d 16, 848 N.E.2d 463 [2006])[emphasis added]).

Here, plaintiffs intentionally did not include a strict liability cause of action and expressly stated that this action does not involve vicious propensities of the dog. (Cross-motion, ¶4). As such, plaintiffs' contentions that defendant's dog would “usually” chase or run toward people jogging or running, “pull toward most dogs” when on a leash, run if scared; and that the dog would chase a squirrel or anything that was moving, run towards food dropped on a sidewalk or street, run towards people and other dogs, or run when scared or after hearing a loud noise, and that plaintiff hired a private trainer because he “wanted the dog to behave,” and learn to “heel” and “stay” when told are inconsequential. Likewise that defendant tied his dog's leash to a bicycle rack that was unsecured and very light in weight, is also inconsequential. It is noted that the Court of Appeals reversed the Appellate Division's order which reasoned that “it is about the actions of a person that turned an animal into an instrumentality of harm.”

And, plaintiffs fail to cite any caselaw permitting this Court to distinguish this matter from *Doerr* on the ground that the defendant converted the object, *i.e.*, the *metal bicycle rack*,

into a dangerous instrument of harm.

Therefore, since negligence is no longer a basis for imposing liability, and plaintiffs expressly state that they do not pursue a strict liability claim premised upon any propensities of defendant's dog, the Court is constrained to dismiss plaintiffs' complaint is dismissed.

Consequently, plaintiffs' cross-motion for judgment in their favor lacks merit.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Stuart Wechsler for summary judgment dismissing the Complaint is granted, the Complaint is hereby dismissed; and it is further

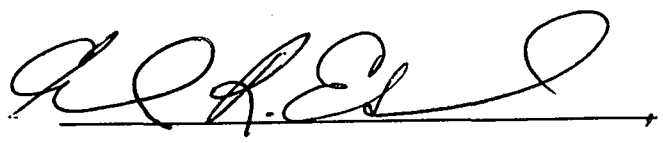
ORDERED that the cross-motion by plaintiffs for summary judgment in their favor is denied; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 4/25/14



HON. CAROL R. EDMED
J.S.C.
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