Barrone v Doe
2017 NY Slip Op 32212(U)
September 18, 2017
Supreme Court, Suffolk County
Docket Number: 13-16388
Judge: Denise F. Molia

SHORT FORM ORDER

COPY

INDEX No. 13-16388
CAL. No. 16-01337-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-21-16 (003)
MOTION DATE 12-9-16 (005)
ADJ. DATE 3-31-17
Mot. Seq. # 003 - MotD
Mot. Seq. # 005 - MG; CASEDISP

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PATRICIA BARRONE as parent and natural guardian of JEFFREY PATRICK BARRONE, an infant under the age of fourteen (14) years,

Plaintiffs,

- against -

"JOHN DOE" name being fictitious and intended to be the owner of the premises, JOSEPH LEIBLE and ELSA LEIBLE,

Defendants.

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THE CASSISI LAW FIRM, P.C.
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Upon the following papers numbered 1 to 49 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-29; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 30-36; 37-41; 42-43; Replying Affidavits and supporting papers 44-45; 46-47; 48-49; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Baywinds Trust s/h/a "John Doe" for an order (i) pursuant to CPLR 3212, granting summary judgment dismissing the complaint against it, (ii) pursuant to CPLR 3025 (b), granting leave to amend its answer by pleading cross claims against defendants Joseph Leible and Elsa Leible for common-law indemnification, contractual indemnification, and breach of contract for failure to procure insurance, and (iii) upon granting such leave, granting summary judgment in its favor and against defendants Joseph Leible and Elsa Leible for the relief demanded in the cross

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claims, is granted to the extent of granting summary judgment dismissing the complaint against it, and is otherwise denied; and it is further

ORDERED that the motion by defendants Joseph Leible and Elsa Leible for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them, is granted.

This is an action to recover damages, *inter alia*, for personal injuries allegedly sustained by plaintiff Jeffrey Patrick Barrone ("the plaintiff") on June 1, 2013 when he was attacked by a dog, a white Akita named Shiro, owned by defendants Joseph and Elsa Leible ("the Leibles"). The incident took place at the Leibles' residence, a building owned by defendant Baywinds Trust ("Baywinds") and occupied by the Leibles pursuant to a written lease agreement dated August 2, 2010. At the time of the incident, the plaintiff was 10 years old. The plaintiffs claim that all relevant times, the defendants had knowledge of Shiro's vicious propensities and ferocious nature.

The plaintiff testified at his deposition that just prior to the incident, he was playing a video game with his friend, Joseph Leible, and another boy, Dylan, in Joseph's bedroom. When Shiro entered the room, the plaintiff began to pet him on his back. About a minute later, Shiro bit the plaintiff on his right cheek. He does not remember if Shiro barked or growled prior to the incident, and does not believe that either he or the other boys did anything to cause Shiro to bite him. He had been to Joseph's house many times before the incident and knew Shiro "pretty well." Although he did not like to play with Shiro because the dog would "run at you," he was not afraid of Shiro and would pet him whenever he was inside the house. When he and Joseph would walk the dog, Shiro would growl and bark at other dogs as well as people and cars that passed by. He was not aware of Shiro having bitten anyone else, although Joseph had told him on many occasions of an incident in which Shiro had bitten another dog. Prior to the incident, he had seen Shiro tied to the railing in front of the house and had also observed a "Beware of Dog" sign at the house.

Patricia Barrone, the plaintiff's mother, similarly testified that she observed Shiro tied to a handrail adjacent to the cement steps in front of the Leibles' house "almost daily" and that there was a large "Beware of Dog" sign next to the front door. She had never seen Shiro attack any person prior to this incident; however, the Leibles had told her of an earlier incident that had taken place when Shiro was owned by Elsa Leible's brother-in-law in which a smaller dog had gone to eat at Shiro's bowl in the garage and Shiro had picked that dog up by the back of the neck and thrown it into the garage wall. The Leibles had also told her of an incident during that time in which Shiro had chased a deer and taken it down. She had observed Shiro barking at other dogs and chasing squirrels. She had also observed Shiro barking and growling at a meter reader. Elsa Leible had described Shiro to her as "unpredictable," noting that he was not trained to be around other kids, that he "could snap" and that she "always wanted to keep an eye on him" whenever the kids were around. Patricia had warned her son to stay away from the dog as much as possible but did not think that he would ever bother the kids; she was not as concerned about Shiro around her children as she was about Shiro around her dog.

Elsa Leible testified at her deposition that she and her husband acquired Shiro from her brother-in-law in North Carolina toward the end of October 2012. She had instructed the neighborhood children,

as a matter of caution, that they should not put their face or anything else in front of Shiro's, but never gave them instructions about petting or not petting him. She had also instructed the neighborhood children—mainly for the benefit of the Barrone children, because they had done it before–that they were not to come into the house without knocking or without her being there. She never warned the Barrone children not to play with the dog, and never told them that Shiro was unpredictable or that he could snap. Just prior to the incident, the plaintiff and his younger sister, Isabella, had been playing at the house, and she had sent them home because she had to take her own daughter, Alexandra, to a piano lesson. The plaintiff had then returned to the house without her knowledge or permission and proceeded to Joseph's bedroom, where the incident took place. Immediately afterward, Joseph and Dylan told her that the plaintiff had startled Shiro when he ran into the bedroom, that he had approached Shiro quickly and put his face near the dog's, and that Shiro had bitten him. When Patricia Barrone entered the house following the incident, she said to Elsa that she had warned the plaintiff not to put his face in front of a dog's face, and that he was always putting his face in front of his own dog's face, and that his own dog frequently snapped at him. When Elsa walked Shiro, he did not bark at people or other dogs, and did not attempt to run after people or other dogs. Shiro was generally kept inside and roamed freely throughout the house. When Shiro was inside, he would bark only if someone came to the front door. When he was tethered in the front yard, he did not bark when people walked by. She was not aware of any incidents involving Shiro prior to June 1, 2013 and never saw Shiro growl at anyone or jump toward anyone.

Laurene Chavez, a neighbor, testified at her deposition that prior to June 1, 2013, Shiro and her dog, a Husky, would play together "with absolutely no problems at all." She described Shiro as "very passive." While observing Shiro daily for a period of nearly two years, she never saw Shiro growl at anyone, jump on anyone, bare his teeth toward anyone, attack another animal, or wear a muzzle; more typically, she would observe Shiro tethered and lying down on the front lawn, watching the neighborhood kids play.

Richard Silverman, another neighbor, testified at his deposition that he owned a Miniature Dachshund, and that prior to June 1, 2013, Shiro and his dog would play together "very well." He was aware of no incidents regarding Shiro apart from the one involving the plaintiff. Although he observed Shiro about 20 times prior to the incident, he never saw Shiro act in a manner that he felt would put others at risk of harm, or growl at anyone, or bite anyone, or bare his teeth at anyone, or bark at any other animal, or chase any other animal. He described Shiro as "friendly" and a "marshmallow."

According to the affidavit and deposition testimony of Louis Bonavita, Baywinds' trustee, he visited the Leibles' residence only three or four times between the end of October 2012 and the end of July 2013. On only one of those occasions did he observe a dog at the premises. He described the dog as "white" and "very friendly." The dog was behind Elsa Leible after she opened the door and then retreated into the house; it did not bark, growl, snarl or do anything else to suggest it had any vicious propensities. He was not aware of any incident, other than the one involving the plaintiff, where the dog is alleged to have bitten or attacked anyone, nor was he aware of any incident where the dog exhibited any vicious propensities. Aside from the landscapers hired by Baywinds to provide landscaping services at the property, no one else from Baywinds visited the premises during that time.

Now, discovery having been completed, the defendants separately move for summary judgment on the ground, *inter alia*, that they lacked knowledge of any vicious propensity on the part of Shiro.

"An owner's liability for a dog bite or attack is determined solely by application of 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" (***Ayres v Martinez***, 74 AD3d 1002, 902 NYS2d 668, 669 [2010]). "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 Stores***, 54 AD3d 707, 707-708, 863 NYS2d 756, 757 [2008] [internal quotation marks omitted]). "Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (***Collier v Zambito***, 1 NY3d 444, 446, 775 NYS2d 205, 207 [2004] [internal quotation marks omitted]). "Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap or bare its teeth, the manner in which the dog was 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" (***Curbelo v Walker***, 81 AD3d 772, 773, 916 NYS2d 645, 646 [2011]).

Here, the defendants established their prima facie entitlement to summary judgment by demonstrating that they were not aware, nor should they have been aware, that Shiro had ever bitten anyone or exhibited any aggressive behavior. Although Shiro had lived with the Leibles, including two young children, for several months prior to the incident and had free range of the house, the defendants and their witnesses averred that they had no knowledge Shiro had ever acted in a hostile or aggressive manner, and that Shiro had never bitten, growled at, jumped on, bared his teeth toward, or attacked anyone during that time (*see* ***Xin Kai Li v Miller***, 150 AD3d 1051, 54 NYS3d 652 [2017]; ***Vallejo v Ebert***, 120 AD3d 797, 991 NYS2d 656 [2014]).

The plaintiffs, in opposition, failed to raise a triable issue of fact. To the extent the plaintiff seek to rely on observational evidence of Shiro's barking, chasing squirrels, and other similar acts, the court notes that those are normal canine behaviors; far from suggesting threatening or menacing proclivities, this is "what dogs do" (*see* ***Collier v Zambito***, *supra*). That Shiro may have growled at other dogs when he was on walks, or even growled at a meter reader is likewise insufficient to raise a triable issue of fact as to any vicious propensities (*see* ***Ioveno v Schwartz***, 139 AD3d 1012, 32 NYS3d 297, *lv denied* 28 NY3d 905, 45 NYS3d 372 [2016]). Evidence of a "Beware of Dog" sign on the property and that Shiro was frequently tethered in the front yard are similarly insufficient, absent proof of vicious behavior (*see* ***Vallejo v Ebert***, *supra*; ***Palumbo v Nikirk***, 59 AD3d 691, 874 NYS2d 222 [2009]). As to the incidents and characterizations of Shiro's aggressive and unpredictable behavior allegedly conveyed to Patricia Barrone by one or more of the Leibles, these are inadmissible hearsay–insufficient, on their own, to preclude the granting of summary judgment (*see* ***Ciliotta v Ranieri***, 149 AD3d 1032, 52 NYS3d 474 [2017]; ***Roche v Bryant***, 81 AD3d 707, 916 NYS2d 185 [2011]). And despite the stories the plaintiffs claim to have heard regarding Shiro, it does not appear that Patricia Barrone took any steps to prevent the plaintiff from playing at the Leibles' house, nor that the plaintiff, who was a frequent visitor there, was afraid of the dog (*see* ***Collier v Zambito***, *supra*; ***Ioveno v Schwartz***, *supra*).

Summary judgment is granted, therefore, dismissing the complaint in its entirety.

Baywinds further moves, *inter alia*, for leave to amend its answer to assert cross claims against the Leibles for common-law indemnification (now moot), contractual indemnification, and breach of contract for failure to procure insurance. Paragraph 35 of the defendants' lease agreement required the Leibles to obtain and keep in full force and effect a liability insurance policy naming Baywinds as an additional insured. Paragraph 36 provided that in the event of any claim against Baywinds for injury to person or property arising out of the Leibles' use and occupancy of the premises, the Leibles would indemnify Baywinds for all awards, costs, and expenses that might be imposed against or incurred by it.

As a general rule, leave to amend pleadings "shall be freely given" (CPLR 3025 [b]). However, where an amendment is sought after a long delay, and the case has been certified as ready for trial, judicial discretion in allowing such amendment "should be discrete, circumspect, prudent and cautious" (***Fischer v RWSP Realty***, 53 AD3d 595, 596, 862 NYS2d 539, 541 [2008]).

Here, while Baywinds was presumably aware of the facts underlying the proposed amendments throughout the pendency of the action, it waited until some four months after the filing of a note of issue before seeking leave to amend. It has offered no excuse for the delay. Instead, it argues that its seventh affirmative defense is, but for a "typographical error" in labeling, "essentially" a cross claim for indemnification and breach of contract–the implication being that there is no prejudice because the Leibles were at all relevant times aware of Baywinds' intent to pursue such claims. That argument is without merit. Notably, Baywinds' answer contains no separately captioned cross claims and no language in its "wherefore" clause demanding judgment against any codefendant. Consequently, there is nothing in the answer to put a codefendant on notice that Baywinds was pleading anything in its seventh affirmative defense other than a CPLR article 16 apportionment defense. It does not appear, moreover, that Baywinds ever demanded a defense or indemnification under the lease agreement.

Accordingly, given Baywinds' failure to articulate a reasonable excuse for delaying its application, leave to amend is denied (*see* ***Alrose Oceanside v Mueller***, 81 AD3d 574, 915 NYS2d 643 [2011]; ***Fischer v RWSP Realty***, *supra*).

Dated: 9-18-17

Denise F. [illegible]
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION