

Treasure v Vitol

2017 NY Slip Op 33364(U)

September 15, 2017

Supreme Court, Kings County

Docket Number: Index No. 500771/15

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

MONICA TREASURE,

Plaintiff(s),

-against-

GABRIEL VITOL & EDITH CHOU,

Defendant(s).

Index No. 500771/15
Motion Calendar No.
Motion Sequence No.

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award defendants summary judgment and a dismissal of the plaintiff's complaint.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits	_____ 3 _____
Replying Affidavits.....	_____ 4 _____
Exhibits.....	_____
Other:.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, Gabriel Vitol (“Vitol”) and Edith Chou (“Chou”) have moved for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of the defendants and against the plaintiff and dismissing plaintiff’s complaint upon the grounds that as a matter of law they bear no liability for the subject accident. The plaintiff, Monica Treasure (“Treasure”), opposes the relief sought by the defendants, and maintains that an award of summary judgment would be inappropriate in this matter, as they have raised a triable issue of fact as to whether the

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defendants' dog had exhibited prior vicious propensities that they knew or should have known, that would result in the defendants being liable for the injuries sustained by the plaintiff.

Background:

On or about June 10, 2014, ("the day of the incident") plaintiff was employed by the Sparkle Center, a cleaning company, where she worked as a cleaner in both private homes and apartments. On the day of the incident, Ms. Treasure was assigned to work at 111 Livingston Street, Apt. 17 E, Brooklyn, New York (which is the residence of the defendants). This was the second time that the plaintiff was assigned to work at their residence. It is undisputed that on the day of the occurrence, the plaintiff was working in the defendants' home for three hours without any incident. While the plaintiff was vacuuming in front of the couch in the living room, the pet dog, Bella, who was present in the apartment and situated behind the couch, leaped out and jumped up onto the plaintiff. It appears that the dog made contact with the plaintiff by biting the plaintiff on the right side of her face, as well as scratching her face with the front paws (see Treasure EBT pg. 48-49).

As a result of the incident, the plaintiff alleges that she sustained serious and permanent injuries. An action was commenced on plaintiff's behalf by her counsel, by the filing of a summons and complaint dated January 21, 2015. Issue was joined by the service of defendants' answer dated February 23, 2015. Plaintiff served her response to defendants demand for a Bill of Particulars on or about June 1, 2015. A deposition of the plaintiff, as well as that of the co-defendant Edith Chou, was conducted on December 3, 2015, and a deposition of co-defendant, Gabriel Vitol was conducted on May 26, 2016.

Defendants' contentions:

In moving to dismiss the plaintiff's complaint, the defendants allege that they bear no liability for the incident as a matter of law.

The defendants maintain that the plaintiff had been in the defendants' home to perform cleaning services on one prior occasion without incident. At that time, the dog was present in the home along with defendant Gabriel Vitol. The dog did not move towards the plaintiff nor did she touch her. Mr. Vitol did put a leash on the dog when they were leaving the apartment for a walk, and upon the dog's return, the dog did not interact with the plaintiff. Defendants contend that following the completion of plaintiff's work at defendants' residence on that day, the plaintiff did not make any complaints, with respect to the dog, to either the defendants or to her employer.

On June 10, 2014, when the plaintiff arrived at the apartment to work, she did not express any concerns regarding the dog to the defendants. Present in the home were defendant Mr. Vitol, his toddler, and a babysitter, as well as the dog who was situated in one of the rooms. The plaintiff proceeded to work in the home for three hours during which time she allegedly did not see the dog in and around the apartment. When the incident occurred, the plaintiff was using a vacuum cleaner and was cleaning near the front of the couch. The dog then without either having barked and without warning, allegedly jumped up from behind the couch and bit the plaintiff on the right side of her face, as well as scratched the plaintiff with her paws. Following the incident, the plaintiff did not leave the apartment, nor call an ambulance, but rather waited in the presence of the babysitter for Mr. Vitol, who had left the apartment, and had been called to return to the home.

Defendants assert that their dog never exhibited any vicious propensities and was trained in puppy school. Mr. Vitol testified that when he took the dog to the park, he never saw the dog become aggressive with the other dogs, but rather she played with other dogs. Mr. Vitol further

stated that the dog did not wrestle or bite the other dogs nor did she chase after the other animals. The dog was described as being a very happy, friendly dog.

Ms. Chou testified that when visitors come to the door of the apartment, the dog would just sniff them. She does not recall ever seeing the dog growl at anyone. The dog has not barked or growled at delivery persons nor has she shown her teeth or jumped on them. Instead the dog would sniff their heels, give them kisses or wag her tail. Ms. Chou stated that when she would use the vacuum cleaner, the dog would usually try to hide in her bed or in the corners of the other rooms in their apartment.

The dog had attended day care, was trained, and at one time had a walker when the need arose. Mr. Vitol states that he was never informed of any problems with the dog by dog walkers or day care personnel. Mr. Vitol testified that his family has had one nanny since 2012, and occasionally a temporary nanny, and that none of the nannies ever made any complaints about the dog.

Mr. Vitol testified that in 2011, he had a DNA test performed on the dog to identify the breed. The results showed that the dog was seventy-eighty percent Chihuahua and a mix of ten or eleven breeds and it was not thought that the dog was a pit bull.

On the day of the incident, Mr. Vitol states that he returned to the apartment within fifteen to twenty minutes after being informed of what had transpired between the plaintiff and his dog. When he entered the apartment, he observed the plaintiff sitting in the living room with two little scratches on the skin of her face, but there was no bleeding or swelling.

Defendants maintain that in order to prevail on a claim for injuries sustained due to a domestic animal, proof must be presented as to the animals vicious propensities and that the defendants know or should have known them (see Collier v. Zambito, 1 NY3d 444, 775 NYS2d 205 [2004]). Defendants contend that at no point did they have knowledge of any vicious

propensities or complaints with regard to the dog prior to this incident, as the dog had not inflicted injuries or displayed any tendencies which could be characterized as being vicious. Defendants allege that there is no evidence of any conduct on the part of their dog which would have placed them on notice as to the possibility of this incident occurring. Defendants further allege that there is no evidence that the dog displayed any behavior that could be classified as vicious or dangerous or beyond normal dog behavior which would include barking or jumping.

In addressing the argument of the plaintiff that the plaintiff having witnessed the dog barking the first time that the plaintiff went to the defendant's residence, should equate to a prior vicious propensity, the defendants maintain that "the mere fact that the dog previously barked at people, or even growled on one or two occasions at strangers coming to the defendants' home unannounced, was insufficient to raise a triable issue of fact as to whether it had vicious propensities" (see Vallejo v. Ebert, 120 AD3d 797, 798, 991 NYS2d 656 [2nd Dept. 2014]).

Plaintiff's contention:

The plaintiff, in opposing defendants' motion for summary judgment maintains that the defendants reasonably should have known of the vicious propensities of their dog which mauled the plaintiff and left her with disfiguring scars and severe and permanent injuries.

The plaintiff contends that the earlier time that she went to the subject apartment to work, the dog "gashed" at her when she came into the apartment and heard her voice. The dog barred her teeth, made a growling noise at the plaintiff, barked at her and gashed with her teeth. After this occurred, it is alleged that Mr. Vitol said that he better take the dog for a walk, he then held onto the dog by the collar until he could put the leash on (see Treasure EBT p. 26-27).

On the day that the plaintiff was injured, plaintiff states that the dog jumped up, leaped at her, bit her and scratched her with her paws. It was the nanny or babysitter, who was present in

the home, who was able to get the dog off of the plaintiff.

Plaintiff maintains that based upon her initial visit to the premises when the dog growled, barked, bared her teeth, gashed at her, as well as the decision by Mr. Vitol to take the dog out for a walk while plaintiff cleaned the apartment, are indications that the defendants knew about their dog's vicious propensities or should have known about them.

Plaintiff contends that the four factors that the Court of Appeals identified in Collier v. Zambito, 1 NY3d 444, 448, 775 NYS2d 205 [2004]) that could create the inference of vicious propensities: (1) if the dog was "known to growl, snap, or bare its teeth", (2) if the dog was restrained, how it was restrained and the reason for the restraint; (3) if it was a guard dog or (4) if the dog "reflects a proclivity to act in a way that puts others at risk of harm", were present in this matter, and would at the very least create a triable issue of fact as to whether defendants should be liable to the plaintiff.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law in making this determination with respect to the motion by the defendants for summary judgment and a dismissal of plaintiff's cause of action.

At issue before the Court, is whether the defendants' dog had exhibited a prior dangerous propensity or displayed any tendencies which could be characterized as being vicious, which would result in them being liable for the injuries that the plaintiff allegedly sustained as a result of the incident of June 10, 2014.

To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of

the dog's vicious propensities (see Petrone v. Fernandez, 12 NY3d 546, 883 NYS2d 164 [2009]).

In considering whether the dog had exhibited a vicious propensity, the Court has carefully reviewed the deposition testimony of the parties in which the defendants have been clear and unequivocal as to the disposition of their dog and the manner of her actions when in the presence of other dogs and individuals, regardless of whether they were previously known to her.

Mr. Vitol testified that he adopted or rescued Bella from a shelter in 2010 when Bella was approximately five to seven months old. The dog, who attended day care and was previously trained, lives in their home with their two children which includes a toddler, as well as a nanny, and at no point has the nanny or any of the fill-in nannies complained about the actions of their dog. Mr. Vitol who walks his dog regularly on both the streets and in the park near his residence in Brooklyn, New York, testified that his dog is not aggressive when in the presence of other dogs and does not wrestle or bite the other dogs nor does she chase after other animals. Their dog is described as being a very happy, friendly dog. The dog has also had dog walkers and none of them have had issues with her. When visitors or delivery people come to the door, the dog does not growl, bark or bare her teeth, but rather will sniff that individual or wag her tail. Their testimony as to the description of their dog with respect to its behavior and disposition has not been refuted by the plaintiff.

This case is akin to the matter of Vallejo v. Ebert, 120 AD3d at 798, where the Court in determining that the defendant established her prima facie entitlement to a judgment as a matter of law, considered evidence that the dog had been living with the defendant's family, which included a small child, without incident, for approximately four or five years (a lesser time here), before it bit the plaintiff. Prior to the incident, the defendant had not seen the dog exhibit aggressive behavior. Likewise, the Court in Iovenov v. Schwartz, 139 AD3d 1012, 32 NYS3d 297 [2nd Dept. 2016]), determined that the plaintiff had failed to raise a triable issue of fact regarding the

defendant's prior knowledge of the dog's alleged propensities after considering the deposition testimony of the defendants that prior to the alleged incident the dog, at most, barked at guests when they first came into the house, the dog did not snap its teeth nor did it chase people, and the dog was not kept away for the safety of others.

This Court does not find that the evidence tending to demonstrate a dog's vicious propensities which includes evidence of a prior attack, the dog's tendency to growl or 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 (see Bard v. Jahnke, 6 NY3d 592, 597, 815 NYS2d 16 [2006]; Collier v. Zambito, 1 NY3d at 446-447) was present here.

In opposition to the motion to dismiss, the plaintiff has offered testimony that the dog had previously bared its teeth and made a "gashing" of her teeth. In response, the defendant, Mr. Vitol proceeded to grab the dog by its collar and take her out of the apartment. The Court has considered this statement in a light most favorable to the plaintiff, as required to do so when determining a motion for summary judgment (see Torres v. Little Flower Children's Servs., 64 NY2d 119 [1984]). Nonetheless, the totality of the evidence in this case requires a conclusion that Bella, the subject of this matter, cannot be considered to have vicious propensities. No prior harmful act has been shown and the history of the dog does not show any prior aggressive or threatening actions.

This Court finds that the testimony offered by the defendants regarding the past behavior of their dog and not having exhibited a vicious propensity to be credible. This Court has afforded some significance to the plaintiff having worked at the defendants residence on a prior occasion. The plaintiff could have rejected the assignment if she was of the opinion that she felt threatened by the presence of the dog.

Where the defendants have established their entitlement to summary judgment, the burden

shifted to the plaintiff to come forward with competent evidence to raise a triable issue of fact (see Winegrad v. New York Univ. Med Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). This Court finds that the plaintiff failed to meet that burden and while the situation that occurred was unfortunate, but under the circumstances that incident, in and of itself, is not enough to find that there is a need for a trial in this matter to determine if the dog had exhibited vicious propensities that the defendants knew or should have known of.

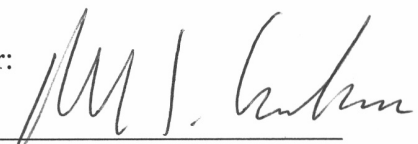
It is well settled that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law to direct judgment in favor of any party. Buller v. Giorno, 28 A.D. 3d 258, 813 N.Y.S.2d 394 [2003]).

Conclusion:


The motion by the defendants, Gabriel Vitol and Edith Chou, for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of the defendants and against the plaintiff, Monica Treasure, and dismissing plaintiff's complaint is granted.

This shall constitute the decision and order of the Court.

Dated: September 15, 2017
Brooklyn, New York

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Hon. Bernard J. Graham, Justice
Supreme Court, Kings County


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