

Viotto v O'Brien

2018 NY Slip Op 30033(U)

January 9, 2018

Supreme Court, New York County

Docket Number: 150193/2016

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

REGINA VIOTTO,

INDEX NO. 150193/2016

Plaintiff,

MOTION DATE 10/04/17

MOTION SEQ. NO. 001

- v -

JAMES O'BRIEN and VINO MAESTRO, LTD.,

Defendants.

The following papers, numbered 35-49, were read on this motion for summary judgment.

Notice of Motion—Memorandum of Law—Affirmation—Exhibits A-J | **No(s). 35-47**

Affirmation in Opposition | **No(s). 48**

Reply Memorandum | **No(s). 49**

Motion by Defendant Vino Maestro, Ltd. for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety as against said Defendant is denied.

In the instant action, Plaintiff alleges that she was bitten in the abdomen by a dog owned by Defendant O'Brien ("Defendant O'Brien") while she was working in Defendant Vino Maestro, Ltd.'s wine and liquor store ("Defendant Wine Store"). Defendant Wine Store moves for summary judgment arguing that it did not know that Defendant O'Brien's dog had such alleged vicious propensities, and therefore it cannot be held liable.¹ Defendant Wine Store further moves for summary judgment, arguing that Plaintiff has improperly alleged claims of negligence against it—rather than a claim for liability under the "one free bite" rule. For reasons stated below, this Court finds that both arguments fail, and accordingly the instant motion is denied.

¹ Defendant O'Brien has submitted no papers in support or opposition of the instant motion.

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

BACKGROUND

In Plaintiff's complaint, Plaintiff alleges that, on September 21, 2015 at approximately 9:50 P.M., she was "attacked and bitten by a dog named 'Emma' thereby sustaining severe injuries . . . due to the negligence of the defendants herein." (Martin Affirm., Ex. A [Complaint] ¶ 3.) Plaintiff further alleges that,

"The negligence, recklessness and carelessness of the defendant(s) consisted of among other things, negligently, recklessly and carelessly managing, maintaining and controlling the dog; in causing and allowing ferocious dog(s) to be without restraint upon the aforesaid premises without being properly guarded, restrained, muzzled or confined; and otherwise being negligent and careless on the premises."

(*Id.* ¶ 11.) In addition, Plaintiff alleges that:

"That at all times herein mentioned, defendant VINO MAESTRO LTD. knew or should have known and/or allowed the defendant JAMES O'BRIEN, their customer, who owned and maintained a dog well known to be vicious with a ferocious nature, propensity and disposition in and upon the premises. Said dog was accustomed to attacking people and/or biting and/or displaying ferocious propensities to them and the defendant well knew that said dog had on occasions prior thereto bitten various individuals."

(*Id.* ¶ 22.)

Plaintiff states that at the time of the accident, she had been working at the Defendant Wine Store since June 2015 as an independent contractor, providing marketing services and working in the front of the store in the "retail environment." (Martin Affirm., Ex. E [Plaintiff EBT] at 8:06-12:02, 20:03-09, 124:16-24.) Plaintiff states that Defendant Wine Store had an unwritten policy of allowing customers to bring their pets into the store, and the store kept treats for the dogs behind the counter. (*Id.* at 20:10-21:19, 25:18-26:04, 95:20-96:06.)

Plaintiff states that on the night of the accident Defendant O'Brien entered the store, as she and her coworkers were closing up, with his dog and a female companion. (*Id.* at 18:11-19:22.) Plaintiff states that on that night she did not

recognize Defendant O'Brien as someone she had seen at the store before, but that she recognized his female companion as a regular customer at the store. (*Id.*)

Plaintiff states that she asked Defendant O'Brien, "Can the dog have a treat?" and that Defendant O'Brien responded, "Absolutely." (*Id.* at 23:18-24:19, 26:15-29:22, 30:12-31:05, 33:07-35:16.) Plaintiff states that she had the treat in her hand and was proceeding to give the treat to the dog, when Defendant O'Brien stated, "Be careful, she can be aggressive." (*Id.*) Plaintiff states that right at that moment, the dog lunged forward and bit her on the left side of her abdomen. (*Id.*) Plaintiff states that she does not recall if Defendant O'Brien said anything further because she "immediately went into where the stock area was to see what had occurred." (*Id.*)

Plaintiff states that following the incident, she had a few conversations with the store manager Afrim Marsic concerning the incident. (*Id.* at 90:02-94:20.) Plaintiff states that these conversations took place in person and via telephone; and that the first conversation occurred the day after the incident and probably by Plaintiff texting Mr. Marsic because Mr. Marsic was traveling at the time. (*Id.*) Plaintiff further states that she had another conversation with Mr. Marsic in person at the store a few days after the incident, but before she went to the hospital, where Mr. Marsic told her that Mr. O'Brien had told him "the exact same thing he said to me, about the dog being aggressive." (*Id.*)

With regard to this alleged conversation between Plaintiff and Mr. Marsic, Defendant submits an affidavit from Mr. Marsic wherein Mr. Marsic states that he was out of the country from September 21, 2015 to September 27, 2015. Mr. Marsic further states that he does not know Defendant O'Brien, and "I never told or communicated to Regina Viotto that James O'Brien told me that his dog was aggressive." (Martin Affirm., Ex. H [Marsic Aff.] ¶ 7.) Mr. Marsic further states that "I did not meet or speak with Regina Viotto after she was allegedly bitten by a dog in September of 2015 and before she went to the hospital that month." (*Id.* ¶ 8.) In addition, Defendant Wine Store submits a document that it describes as "copies of [Mr. Marsic's] trip itinerary and flights showing he was in Macedonia when Viotto claims she spoke with him in person." (Memo in Supp. at 4-5; Martin Affirm., Ex. I [Flight Itinerary].)

In addition, Defendant Wine Store presents another document which it describes as Plaintiff's "redacted medical records" which purport to show that Plaintiff arrived at the hospital on September 25, 2015 and was discharged on

September 26, 2017. (Memo in Supp. at 9; Martin Affirm., Ex. J [Redacted Medical Records].)

DISCUSSION

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law.” (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted].) “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment.” (*Id.*) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

I. Plaintiff Has Properly Plead a Cause of Action Against Defendant Wine Store for Liability Under the “One Free Bite” Rule.

Defendant Wine Store argues that the instant complaint only pleads a claim of negligence against them and that said complaint does not plead a cause of action for liability under this state’s “one free bite” rule. (Memo in Supp. at 6-8.) Oral Arg. Tr. at 8:08-10:07.) This rule holds that “the owner of a domestic animal who either knows or should have known of that animal’s vicious propensities will be held liable for the harm the animal causes as a result of those propensities.” (*Collier v Zambito*, 1 NY3d 444, 446 [2004].) This rule has also been extended to property owners who allow pets onto their premises with actual or constructive knowledge of the pet’s vicious propensities. (*See Hall v United Founders, Ltd.*, 112 AD3d 530, 530 [1st Dept 2013]; *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707, 707–08 [2d Dept 2008]; *Claps v Animal Haven, Inc.*, 34 AD3d 715, 716 [2d Dept 2006].)

Under this rule, “[o]nce such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities.” (*Collier*,

1 NY3d at 448.) Negligence, however, is not a basis for imposing liability for dog bites. (*See Petrone v Fernandez*, 12 NY3d 546, 550 [2009].)

Reading the complaint in the light most favorable to Plaintiff, this Court finds that Plaintiff pleads a cause of action for liability under the “one free bite” rule, and the Court finds that the complaint does not plead a cause of action sounding in negligence. (*See Zellner v Odyll, LLC*, 117 AD3d 1040, 1040 [2d Dept 2014].) As such, this Court declines Defendant Wine Store’s invitation to grant it summary judgment on a finding that Plaintiff failed to properly plead liability under the “one free bite” rule.

II. There Are Material Issues of Fact that Preclude Summary Dismissal of Plaintiff’s Theory of Liability Under the “One Free Bite” Rule.

This Court further finds that there are issues of fact concerning Defendant’s potential knowledge of the subject dog’s alleged vicious propensities, which preclude dismissal of Plaintiff’s claims pursuant to the “one free bite” rule. Although Defendant Wine Store argues that it had no knowledge of the subject dog’s alleged vicious propensities, Plaintiff has testified that, a few days after she was bitten, she spoke at the store and in person to Afrim Marsic, the manager of the store, who told Plaintiff that he knew Defendant O’Brien and his dog and that Defendant O’Brien had told him that “the dog could be aggressive.” (Plaintiff EBT at 90:01-94:09, 121:16-19.)

Defendant Wine Store attacks the credibility of this testimony by Plaintiff, arguing that the alleged conversation never took place and could not have taken place because Mr. Marsic was in Macedonia at the time of the accident and for a week thereafter, “so he did not and could not have spoken with Viotto in person before she went to the hospital.” (Memo in Supp at 4; Oral Arg. Tr. at 12:12-20:22.)

In essence, Defendant Wine Store asks this Court to take Mr. Marsic’s testimony along with the printout of Mr. Marsic’s flight itinerary and to conclude that Plaintiff is lying (or at least incorrect) about having a conversation with Mr. Marsic, wherein Mr. Marsic told Plaintiff that Defendant O’Brien told him that his dog could be aggressive. Such a credibility determination is inappropriate for summary judgment, and the Court accordingly declines to make one. (*Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218, 218–19 [1st Dept 2002] [“[I]ssues as to

witness credibility are not appropriately resolved on a motion for summary judgment.”].)

In addition, even if the Court were inclined to weigh the credibility of Plaintiff’s testimony against Mr. Marsic’s, Defendant does not provide testimony or affidavits from appropriate individuals verifying the authenticity of the documents that it purports to be Mr. Marsic’s trip itinerary (Ex. I) or Plaintiff’s redacted medical records (Ex. J). As such, the Court will not accept these documents as evidence on this motion, and the instant motion effectively presents a question of whether one believes the word of Plaintiff or Mr. Marsic. (See *JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472, 472 [1st Dept 2014] [finding that complaint verified only by counsel was “insufficient to establish that the attached documents were admissible under the business records exception to the hearsay rule”].) Again, such a question is inappropriate for a motion for summary judgment.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendant Vino Maestro, Ltd. for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety as against said Defendant is denied.

This constitutes the decision and order of the Court.

Dated: January 9, 2018
New York, New York


J.S.C.
HON. ROBERT D. KALISH

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
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