

Cruz v 2726 Rte. 208 LLC
2018 NY Slip Op 34084(U)
August 29, 2018
Supreme Court, Orange County
Docket Number: Index No. EF003080/2016
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

JESSICA CRUZ,

Plaintiff,

- against-

2726 ROUTE 208 LLC and ROSA MORALES,
Defendant.

To commence the statutory time period
for appeals as of right (CPLR 5513[a]),
you are advised to serve a copy of this
order, with notice of entry, upon all
parties.

Index No. EF003080/2016

DECISION AND ORDER

Motion Date: August 8, 2018

The following papers numbered 1 through 12 were read and considered on, inter alia, a
motion by the Defendant 2726 Route 208 LLC, pursuant to CPLR §3212, for summary judgment
dismissing the complaint insofar as asserted against it.

Notice of Motion- Cheng Affirmation- Exhibits A-H 1-3
Notice of Cross Motion- Mainetti Affirmation- Exhibits A-F 4-6
Affirmation in Opposition and Reply- Cheng - Exhibit A 7-8
Further Affirmation in Opposition to Motion- Mainetti- Exhibits G-I 9-10
Further Affirmation in Support of Motion- Cheng- Exhibit A 11-12

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff commenced this action to recover damages arising from a dog bite.

The dog, a Labrador/pitbull mix named Charisma, is owned by the Defendant Rosa
Morales.

The Defendant 2726 Route 208 LLC (hereinafter "Landlord") is the owner of the property

at which the dog was housed.

Factual/Procedural Background

At an examination before trial, the Plaintiff testified that, on October 3, 2014, she was at the subject premises for her job as a home health care worker [for non-party Lois Agostini] (Motion, Exhibit E). It was her second or third time seeing the client (T-18). She had never seen a dog on the premises, or any fences or cages, for animals (T-40, 59). There was a sign on the property, but she doesn't know what it read (T-41).

On the day in question, she was bit by Morales' dog as she exited her patient's apartment and took a couple of steps toward her car (T-47-49). She did not hear any barking or growling before being bit (T-46-48). The dog "latched onto" her abdomen (T-48). It looked like a "pitbull on steroids" (T-49). As she was fighting the dog off, the owner's son came and pulled the dog off of her (T-52).

At an examination before trial, William Labate testified that he and his wife own the Defendant company, which owns the subject premises (Motion, Exhibit F). The subject property consists of two units (T-12-13). Lois Agostini is the tenant who occupies the other unit (T-33).

Labate testified that he generally visited the property once a month to collect rent, or portions of the rent (T-20). He knew that Morales had a dog for some time, because he saw it as a puppy (T-23). She told him that it was "lab mix" (T-24). The dog's name was Charisma (T-29). The dog never barked or growled at him (T-29-30). When he knocked on the door, the dog would bark (T-42). Once inside, the dog would lick him, and was playful (T-56). He saw the dog outside in a pen (T-32). There is a "Beware of Dog" sign on Morales' door, but he did not know when it was first put there (T-36).

Labate did not remember receiving any complaints about the dog from Agostini or any other person, other than about dog feces on the ground (T-37-38). After the incident, he spoke to Morales, who told him that the dog had gotten loose and bit the Plaintiff (T-45).

On December 4, 2014, the Town of Montgomery Justice Court (Ozman, J.) held a dangerous animal hearing (Motion, Exhibit H).

At the hearing, Morales admitted that Charisma was a dangerous animal and that it bit the Plaintiff without justification. She agreed that the dog would not be loose or out unless muzzled. Morales also testified that Labate charged her extra rent because of the dog. Further, that there was a sign on the door that read, "Beware of Dog," because the dog can be aggressive towards individuals she is not familiar with.

Morales did not answer or appear in this action.

The Landlord's Motion

Previously, the Landlord moved for summary judgment dismissing the complaint insofar as asserted against it.

In support of the motion, the Landlord submitted an affirmation from its attorney, Otto Cheng, in which Cheng argued, in relevant part, that the Landlord may not be held liable for the Plaintiff's injuries because it does not own the dog and did not have notice or knowledge of its alleged vicious propensities.

In prior submissions, the Plaintiff opposed the motion and cross moved for post-note of issue disclosure or, alternatively, to vacate the note of issue.

Counsel for the Plaintiff, Alexander Mainetti, argued that the Landlord may be held liable because it knew that a dog was on the premises with vicious propensities, and because it retained

sufficient control over the premises to have removed or confined the dog.

Mainetti asserted that the Landlord had prior notice of Charisma's vicious propensities because the dog barked when Labate knocked on the door, and because there was a "Beware of Dog" sign on Morales's door.

In addition, he noted, according to an appended statement from Agostini (the other tenant), Labate was made aware several months before the incident that Charisma had "aggressively jumped" on Agostini's brother, knocking him to the ground and causing him injury.

Mainetti argued that the Court should either allow post note of issue disclosure or, alternatively, allow the Plaintiff to vacate the Note of Issue and Certificate of Readiness and engage in further disclosure.

Appended as an exhibit to the Plaintiff's cross motion was a Deposition of Witness Statement signed by Lois Agostini, pursuant to CPL §120.00 [presumably used as a supporting deposition for the dangerous dog prosecution of Morales] (Exhibit A).

In the statement, Agostini asserted that, months before the incident at issue, Charisma got loose from her chain and "aggressively jumped" on her brother (Steven), knocking him to the ground and injuring his foot and ankle. Shortly thereafter, she asserted, she told Labate about the incident.

In opposition to the cross motion and in reply, Cheng argued that the Plaintiff failed to present any affirmative, admissible evidence of notice to the Landlord of any specific prior incident of biting by Charisma.

Moreover, he asserted, the Landlord lacked any control over the dog.

Cheng argued that Agostini's statement should be considered because it was not in admissible form, and because it was only belatedly offered.

In any event, he asserted, Agostini's statement, even if considered, did not raise a triable issue of fact that the Landlord was on notice that Charisma had a vicious propensity to bite. Indeed, he argued, the statement was "riddled with inconsistencies and vague statements that revealed the specious nature and lack of any factual basis for the assertions made."

In a Decision and Order dated April 2, 2018, the Court held the Landlord's motion in abeyance, and granted the Plaintiff's cross motion.

As to the relevant law, the Court held as follows.

To recover on a theory of strict liability in tort for a dog bite or attack against its owner, a plaintiff must prove that the dog had vicious propensities and that the owner knew or should have known of such propensities. *Carroll v. Kontarinis*, 150 A.D.3d 960 [2nd Dept. 2017]. Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm. *Carroll v. Kontarinis*, 150 A.D.3d 960 [2nd Dept. 2017]. The keeping of a dog as a guard dog may give rise to an inference that an owner had knowledge of the dog's vicious propensities. *Collier v. Zambito*, 1 N.Y.3d 444 (2004).

In general, the presence of a "Beware of Dog" sign, standing alone, is insufficient to impute notice of a dog's viciousness. *Vallejo v. Ebert*, 120 A.D.3d 797 [2nd Dept. 2014]; *Lugo v. Angle of Green, Inc.*, 268 A.D.2d 567 [2nd Dept. 2000]; *see also, Smedley v. Ellinwood*, 21 A.D.3d 676 [3d Dept. 2005]; *Shaw v. Burgess*, 303 A.D.2d 857 [3d Dept. 2003]. Further, the mere fact that a dog was kept enclosed or chained, or that barked at people, is insufficient to raise

a triable issue of fact as to whether it had vicious propensities. *Collier v. Zambito*, 1 N.Y.3d 444 (2004).

In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities - albeit only when such proclivity results in the injury giving rise to the lawsuit. *Collier v. Zambito*, 1 N.Y.3d 444 (2004); *Bard v. Jahnke*, 6 N.Y.3d 592 (2006); *Carroll v. Kontarinis*, 150 A.D.3d 960 [2nd Dept. 2017].

To recover against a landlord for injuries caused by a tenant's dog, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to remove or confine the dog. *Kraycer v. Fowler St., LLC*, 147 A.D.3d 103 [2nd Dept. 2017].

The courts have not attempted to formulate an overarching definition of what constitutes "sufficient control of the premises" to impose liability. However, instances in which such control has been found include where the tenancy was month-to-month, and the landlord could have terminated the tenancy (*see e.g., Wilson v. Bruce*, 198 A.D.2d 664 [3rd Dept. 1988]; *Cronin v. Chrosniak*, 145 A.D.2d 905 [4th Dept. 1988]); where the landlord allowed the tenant to keep an animal in violation of a lease provision prohibiting the same (*see e.g., Baisi v. Gonzalez*, 97 N.Y.2d 694 (2002)) and where the landlord rented premises to a tenant known to possess an animal with vicious propensities (*see e.g., Strunk v. Zoltanski*, 62 N.Y.2d 572 (1984)).

Here, the Court previously held, the Landlord demonstrated a *prima facie* entitlement to judgment as a matter of law with the testimony of Labate that he had not personally observed,

and had not otherwise been made aware of, any aggressive or vicious behavior by Charisma.

Rather, he testified, Charisma was friendly and playful toward him.

In opposition, the Court noted, the Plaintiff's submissions, in their form at that time, did not raise a triable issue of fact as to the liability of Landlord. However, the Court held, the submissions were sufficient to invoke the benefits afforded under CPLR §3212(f), and warrant further, limited discovery. The Court held that the Plaintiff had offered "considerably more than mere hope and speculation that relevant evidence might be uncovered, evidence that goes to the heart of whether the landlord had prior knowledge of the dog's alleged vicious propensities." The Court noted that, although the mere fact that Morales displayed a "Beware of Dog" sign on her door, and Charisma barked at Labate when he knocked at her door, was insufficient, either alone or together, to raise a triable issue of fact that Charisma had vicious propensities, the proffered statement of Agostini raised several issues, to wit: Whether, despite Labate's denial, he was apprised of the dog's vicious propensities well before the attack at issue.

In sum, the Court held, at a minimum, the depositions of Agostini and the animal control officer who responded to the incident were relevant and should be taken. However, the Court noted: "The extent to which that prior incident, as amplified by the investigation surrounding the dangerous dog prosecution, demonstrates the propensity of the dog to bite or attack, is another matter and is, and will be, dependent on the nature of the testimony elicited."

Thus, the Court held the Landlord's motion in abeyance pending completion of the additional, authorized limited discovery.

Subsequent Proceedings

Thereafter, both Agostini and the animal control officer (Ingrid Anna Ilkiw) were

deposed.

Agostini testified that she had been living at the subject premises since 2006. She had seen Charisma off of the leash on “quite a few times,” running around the building (T-7). Before the incident at bar, she told Labate several times that the dog should be kept on a leash (T-9). After the incident at bar, Charisma also jumped on her brother and knocked him down (T-11). She denied the accuracy of her prior statement that her brother was knocked down by Charisma before Charisma bit the Plaintiff (T-16). Rather, she testified, the two events happened the same day, at about the same time (T-17).

Agostini had heard Charisma growl and bark at people prior to the time Charisma bit the Plaintiff (T-18). Charisma barked when Labate would come to pick up the rent (T-19). Agostini “probably” told Labate that she felt unsafe around the dog (T-28). She knew of no other incidents at the property with Charisma (T-40). She used to buy food and feed Charisma while the dog was on a leash (T-41). Charisma was very happy and friendly (T-41). She would also walk Charisma without a problem (T-42). Neither of her brothers liked the dog (T-51-52). When asked if Labate ever spoke to her about Charisma, the following colloquy occurred.

A: I don't recall what [Labate] said but he didn't want [Morales] living there any more.

Q: Okay. And how do you know that he didn't want [Morales] living there any more?

A: Because the dog was dangerous.

Q: And did Mr. Labate – withdrawn. Did Mr. Labate tell you that he didn't want Rosa Morales living there any more?

A: Well, she can't be here with a dog that's dangerous.

Q: But did Mr. Labate ever -- my question is did Mr. Labate ever say that to you before Jessica Cruz's dog bite incident?

A: He might have said something to me, yeah.

At an examination before trial, Ingrid Anna Ilkiw, an animal control officer for the Town of Montgomery, testified that she responded to the biting incident at issue (T-10-12). She had not received a prior complaint about Charisma or the property at issue. She believed that she saw a “Beware of Dog” sign in Morales’ window when she first investigated the dog bite; although, in her opinion, the sign was inadequate, as it was too worn and faded (T-61-65).

At a conference held on July 17, 2018, the Court granted the parties permission to submit additional papers to address the additional testimony from Agostini and Ikew *supra*.

In further, supplemental opposition to the Landlord’s motion, the Plaintiff submits an affirmation from counsel, Alexander Mainetti.

Mainetti asserts that, according to Agostini, Charisma was a pit bull weighing approximately 50 pounds that she saw off the leash quite a few times, which she told Labate. Further, she testified, she told Labate that she feared for her safety around the dog, and that the dog had injured her brother Steven.

In addition, Mainetti notes, Agostini testified that Charisma would bark every time Labate came to collect the rent, and that her brothers were scared of the dog and did not want to come and visit. Further, Agostini testified that Labate advised her that he did not want Morales living at the property any longer because her dog Charisma was dangerous.

Mainetti notes that Agostini also testified that there was a “Beware of Dog” sign on Morales property and that Labate was aware of the same.

Mainetti notes that Ilkiw also testified that she saw a “Beware of Dog” sign at Morales's apartment.

In sum, Mainetti argues, the Landlord's motion for summary judgment should be denied, as there are numerous questions of fact as to the Landlords's knowledge of the dangers that Charisma posed to persons living at and visiting the property. These include that, prior to the incident at issue, Labate was notified by Agostini that there "Beware of Dog" sign(s) at Morale's apartment and that Charisma would run around the property off the leash. Further, that he was made aware that Agositini feared for her safety due to Charisma and that, prior to Cruz's dog bite incident, the dog had jumped on Agositini's brother and knocked him down. In addition, he asserts, Labate heard or should have heard Charisma barking constantly at the property whenever he would come to pick up rent and, prior to the incident at bar, he told Agostini that he wanted Morales to leave the property because he knew Charisma was dangerous.

In further support of the Landlord's motion, counsel for the Landlord, Otto Cheng, argued that neither the testimony of Ilkew nor of Agostini provided any affirmative evidence of notice of a specific incident of biting, which is the only proclivity at issue, to the Landlord. Indeed, he asserts, "[i]f anything, both Officer Ilkew and Ms. Agostini unequivocally confirm that, other than the alleged biting incident that is the subject of the matter at bar, neither non-party witness was aware of any other incidents of biting involving the subject dog, Charisma." Specifically, Ilkew "affirmatively and unequivocally testified that, other than the dog bite at issue, she had never been previously summoned to the subject premises for any other dog-related incidents." Further, she testified that no other previous biting incidents involving Charisma were ever reported to her.

Concerning Agostini, Cheng notes that she testified that her purported initial written statement to Ilkiw was incorrect in claiming that her brother was injured by Charisma prior to the

biting incident at issue. Indeed, Agostini testified that “she did not even thoroughly review the statement when it was read to her by an unknown individual who appeared unannounced at her residence at an unspecified period in time.”

In any event, he notes, Agostini admitted that the only injury sustained by her brother consisted of a sprained ankle. Further, he asserts, “while Agostini broadly claimed that she and her brother were generally ‘afraid’ of Charisma, her above admissions during her more detailed testimony clearly belie such a non-specific and unsupported claim.”

Otherwise, Cheng argues, the Plaintiff’s reliance on Agostini’s “speculative claims that she previously told Mr. Labate that she had seen Charisma on occasion without a leash, or that she was generally aware of the presence of a ‘Beware of Dog’ sign at Rosa Morales’ property, are of no consequence. The mere presence of Charisma being present without a leash or a general awareness of a ‘Beware of Dog’ sign- without anything more- simply cannot equate to specific knowledge of a vicious proclivity to bite.”

In sum, he asserts, the Landlord’s motion should be granted.

Appended to Cheng’s affirmation is a statement given to Ilkew by Patricia Hall on October 6, 2015.

In the statement, Hall asserts that she had been a neighbor of Morales for 2 ½ years and had never seen Charisma off the leash. Further, that Charisma played well with her beagle.

Discussion/Legal Analysis

The additional evidence submitted on this further motion practice warrants the grant of the Landlord’s motion.

Initially, it is noted, nothing in the testimony of Ilkiw would support a finding that the

Landlord (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to remove or confine the dog. Rather, Ilkiw testified that she had not been notified of any prior incident involving Charisma.

Further, the testimony of Agostini at her examination before trial was, in general, so confused, disorganized and internally inconsistent, as to lack probative value. Indeed, to the extent that it may be credited, the testimony actually weakened the Plaintiff's position, to wit: Agostini testified that the incident with Charisma and her brother occurred either after or at the same time as the incident with the Plaintiff. Further, for example, although portions of Agostini's testimony indicate that she was scared of Charisma, she also testified that she fed and walked Charisma (which does not appear factually true), and that Charisma was very friendly. Finally, although she testified that her brothers were scared of Charisma, she did not provide a factual basis for such a fear, *e.g.*, some specific, prior incident involving Charisma and either brother.

In sum, the additional evidence provided by the Plaintiff does not raise a triable issue of fact as to whether the Landlord may be held liable for her injuries.

Thus, the Landlord's motion for summary judgment must be, and is hereby, granted, and the complaint is dismissed as against it.

Accordingly, and for the reasons cited herein, it is hereby,

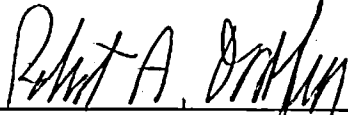
ORDERED, that the motion of the Defendant 2726 Route 208 LLC for summary judgment is granted, and the complaint, and all causes of action contained therein, is dismissed as against it; and it is further,

ORDERED, that the remaining parties, by and through counsel, are directed to, and shall, appear for a Pre-trial/Scheduling Conference on Tuesday, October 2, 2018, at 1:30 p.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York, to determine how, and within what time frame, the pending action will proceed to trial.

The foregoing constitutes the decision and order of the Court.

Dated: August 29, 2018
Goshen, New York

ENTER



HON. ROBERT A. ONOFRY, A.J.S.C.

TO: Mainetti, Mainetti & O'Connor, P.C.
Attorney for the Plaintiff
Office & P.O. Address
356 Meadow Avenue
Newburgh, New York 12550

Milber Makris Plousadis & Seiden, LLP
Attorney for the Defendant 2726 Route 208 LLC
Office & P.O. Address
709 Westchester Avenue, Suite 300
White Plains, New York 10604

cc: Rosa Morales
2728 Route 208, Apt. 1
Montgomery, New York 12589