

Amin v Cunha

2018 NY Slip Op 34128(U)

October 30, 2018

Supreme Court, Nassau County

Docket Number: Index No. 603263-17

Judge: Steven M. Jaeger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35

_____X

SHARDABEN AMIN,

Plaintiff,

Index #: 603263-17
Motion Sequence No.: 001
Mot. Submitted: 10/16/18

-against-

CARLOS CUNHA,

Defendant.

Present: Hon. Steven M. Jaeger
Decision & Order

_____X

Papers submitted on the motion (sequence 001):
Notice of Motion, Affirmation & ExhibitsX
Affirmation in Opposition & Exhibits.....X
Reply AffirmationX

Upon the foregoing papers, the defendant’s motion for summary judgment pursuant to CPLR §3212 dismissing the complaint is denied.

The eighty-four-years old plaintiff brings this personal injury action for dog bite injuries she sustained on August 11, 2015 while walking in front of the defendant’s home at 2493 Seventh Avenue, East Meadow, New York.

Standard for summary judgment

It is well-established that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the

moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proofs annexed to an attorney's affirmation (CPLR §3212[b]; *Olan v Farell Lines*, 64 NY2d [1985]).

“If a sufficient *prima* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of material issue of fact, the existence of which necessarily precludes granting of summary judgment and necessitate a trial (*Zuckerman v City of New York, supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]; *Recine v Margolis*, 24 Misc3d 1244(A)). Such facts presented by the opposing party must be presented by evidentiary form in admissible form. (*Friends of Animal Inc. v Associated Fur Mfgrs., Inc., supra*). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 AD2d 240 [1st Dept 199], *aff'd*, 76 NY2d 927 [1990]).

“Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of or where the material issue of fact is arguable, summary judgment must be denied” (*Museums at Stony Brook v Village of Patchogue Fire*, 146 AD2d 572, 573 [2d Dept 1989] [internal quotation marks omitted]; *Phillips v Kantor & Co.*, 31 NY2d 307, 311 [1972]).

Analysis

“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 [2d Dept 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 [2d Dept 2008] [internal quotation marks omitted], *emphasis added*). “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 [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 [2d Dept 2011]).

Here, the defendant has established his *prima facie* case by demonstrating that the defendant did not have notice of any vicious propensities (*see Christian v Petco Animal Supplies Store, Inc.*, 54 AD3d at 707). The defendant submitted affidavit stating the dog never bit anyone, hurt anyone or behaved viciously toward anyone prior to the subject incident (Cunha Affid. ¶4). The affidavit further states the dog never attacked anyone, nor did he exhibit any vicious propensities (Id. ¶5) (*Christian v Petco Animal Supplies Store, Inc.*, 54 AD3d at 707-708). The defendant also states that he has never received any complaints from anyone indicating that the dog was vicious, aggressive, threatening, menacing or dangerous or acted aggressively towards anyone. (Id ¶6)

In opposition, the plaintiff met her burden of establishing a triable issue of fact as to whether the dog had vicious propensities and whether the defendant had any prior knowledge of the dog's vicious or violent propensities (*see Bard v Jahnke*, 6 NY3d 592 [2006]). The plaintiff's documentary evidence in opposition consist of: a police report of the subject incident, her executed

deposition transcript¹, her bill of particulars and supplemental bill of particulars. The affirmation in opposition directs the Court's attention to the plaintiff's errata sheet wherein the plaintiff states that before the subject incident: "... I had pointed out to my daughter that this dog is barking and attacking at me, when the owner walks the dog on my street" (Affirm. in opp., ¶7, Plaintiff's errata sheet, ln. 9, and plaintiff's executed Tr.,p. 28, attached to plaintiff's opposition papers).

In reply, the defendant argues that since he was not the owner he could not have notice of the dog's prior barking at and attacking of the plaintiff alleged by the plaintiff. The reply affirmation² directs the Court's attention to the defendant's affidavit in support in which he unequivocally denies ownership of the dog on the date of the incident or any other time (Cunha affid., ¶2). However, this statement contradicts his prior deposition testimony where the defendant unequivocally states that he did own the dog on the date of the incident (Cunha executed Transcript, p. 7). This, at a bare minimum, creates a material issue of fact.

Even assuming *arguendo*, the defendant did not own the dog as recently alleged, the defendant testified that he owns the single-family home where he and his family resided and where the subject dog was kept (*Id.*, p. 8). The defendant was, therefore, in control of the premises where the dog was harbored. Moreover, the defendant further testified that at the time of the incident the dog was outside with the defendant while he was fixing the gate of the fence surrounding his house (*Id.*, p. 16). It is evident from the parties' conflicting testimony and papers that there is a material

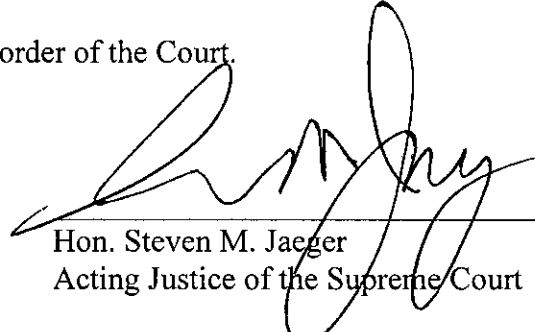
¹ Though the defendant submitted an unexecuted copy of the plaintiff's transcript, the plaintiff submitted an executed copy of her transcript along with her errata sheet.

² The defendant's reply affirmation states: "Most significantly, Carlos Cunha unequivocally stated in his affidavit that he did not own Smiley and therefore, was not the owner" (Reply affirmation, ¶4).

of issue of fact on the issue as to the dog's vicious propensities and defendant's prior knowledge. Based on the foregoing, the Court finds that the plaintiff has met her burden of establishing a material issue of fact.

Accordingly, the defendant's summary judgment motion is denied. This constitutes the Decision and Order of the Court. Any request for relief not addressed herein is denied.

This constitutes the decision and order of the Court.



Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

Dated: October 30, 2018
Mineola, NY

ENTERED

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