Myers v Lobman
2019 NY Slip Op 34418(U)
September 9, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 624489-2017
Judge: David T. Reilly

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, J.S.C.

INDEX NO.: 624489-2017

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DEBORAH MYERS,

Plaintiff,

-against-

JEFFREY LOBMAN,

Defendant.

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MOTION DATE: 03/06/19
SUBMITTED: 06/12/19
MOTION SEQ. NO.: 1
MOTION DEC.: MG

Upon the reading and filing of the following papers in this matter: (1) Defendant's Notice of Motion dated February 4, 2019 and supporting papers; and (2) Plaintiff's Affirmation in Opposition dated April 17, 2019 and supporting papers; and (3) Defendant's Reply Affirmation dated May 14, 2019 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the plaintiff's complaint is granted.

Plaintiff commenced this action seeking money damages for personal injuries that resulted from a dog bite which occurred on May 2, 2015. Plaintiff alleges that defendant was the owner of the dog, Bronson. The summons and complaint in this action were filed on December 22, 2017 and issue was joined when the defendant filed an answer on March 19, 2018.

In sum and substance plaintiff alleges that defendant, who was the boyfriend of plaintiff's daughter at the time of the incident, owned Bronson and knew that the dog had vicious propensities and was prone to attacking and biting people and other dogs. Plaintiff further alleges that on the day of the attack Bronson approached her, jumped on her, knocked her down and proceeded to bite her thigh area causing severe injuries.

Defendant now moves for summary judgment pursuant to CPLR 3212 dismissing the plaintiff's complaint based on the doctrines of res judicata and "law of the case." Defendant maintains that plaintiff commenced a prior action entitled Deborah Myers v Matthew Lobman and Marjorie Lobman, under Suffolk County Supreme Court Index No. 610792/2015 (Action #1). In that matter the plaintiff commenced an action against the parents of the defendant herein seeking money damages based upon the identical incident involving plaintiff and Bronson. In Action #1 the plaintiff alleged that Bronson was owned by the defendants Matthew and Marjorie Lobman whereas in this case she alleges that Bronson was owned by Jeffrey Lobman.

On September 14, 2018 plaintiff's complaint in Action #1 was dismissed by Order of Justice William B. Rebolini, JSC who presided over that matter and decided defendants' motion for summary judgment. Within that Order Justice Rebolini determined that Bronson had come to live at the plaintiff's home at the request of her daughter Brianna, the girlfriend of Jeffrey Lobman, and lived continuously with the plaintiff until the date of the incident. In granting defendants' motion the Court stated,

> Here, defendants have established, prima facie, that at the time of the incident, they did not harbor the dog Bronson but rather, the dog was being harbored by plaintiff at her home. From at least March of 2015 through May 2, 2015, plaintiff and her family were caring for Bronson on a daily basis, plaintiff fed Bronson with her other dogs, plaintiff allowed Bronson to sleep at her home with her other dogs and allowed Bronson to roam about her entire house. Plaintiff made no attempt to contact Jeff Lobman, the dog's owner, nor did she ever contact the defendants, the parents of Jeff Lobman, in regards to the care of Bronson or to request that they retrieve Bronson from her home. At the time of the incident, plaintiff was harboring Bronson by providing him with food and shelter (***Matthew H. v. County of Nassau,*** 131 AD3d at 145, 14 NYS3d at 46). For all intents and purposes, Bronson was a member of plaintiff's household at the time of the incident. Moreover, defendants relinquished any dominion or control of Bronson when they brought him to the veterinarian. Indeed, defendants "did not permit [the dog] to be on or in [their] premises" ***(Matthew H. v. County of Nassau,*** 131 AD3d 135, 144, 14 NYS3d 38 [2d Dept. 2015]).

The Court further held,

> Here, plaintiff has not raised any triable issue of fact which would defeat defendants' entitlement to summary judgment (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The uncontroverted evidence is that defendants took the dog Bronson out of their home and brought him to the veterinarian, that Brianna Myers, plaintiff's daughter, picked up Bronson from the veterinarian and brought Bronson to live with her and her parents, and that plaintiff and her family cared for the dog Bronson from March of 2015 until May 2, 2015, the date of the incident. The

undisputed evidence further establishes that from March of 2015 through the date of the incident on May 2, 2015, Bronson lived with, resided at, and was cared for exclusively by the plaintiff and members of her family, that Bronson ate out of the same dog bowls as plaintiff's other dogs, that Bronson slept in plaintiff's home with her other dogs, that at no time prior to the incident did plaintiff contact the defendants about removing Bronson from her home, and that defendants never went to her home to visit Bronson nor did they have any contact with plaintiff during the time that Bronson resided there. The evidence firmly shows that Bronson resided exclusively with plaintiff and her family without any contact with defendants from March 2015 through the date of the incident. The evidence clearly demonstrates that the defendants ceased harboring Bronson when they relinquished control of him by leaving him with the veterinarian. That Bronson temporarily resided with defendants previously, that their son, Jeff Lobman, had Bronson trained, micro-chipped, and neutered, and that defendants may have paid for Bronson's veterinarian bills months prior to Bronson's arrival at plaintiff's home, is of no significance. The undisputed evidence demonstrates that plaintiff was harboring Bronson at the time of the incident, of her own free will, and with her consent. Thus, this Court finds, as a matter of law, that at the time of the incident, plaintiff and her family completely harbored Bronson, and as such, the defendants cannot be liable for any alleged injuries sustained by plaintiff (***Matthew H. v. County of Nassau,*** 131 AD3d 135, 144, 14 NYS3d 38 [2d Dept. 2015]; ***Powell v. Wohlleben,*** 256 AD2d 396, 681 NYS2d 580 [2d Dept. 1998]).

Based upon Justice Rebolini's determination in Action #1, defendant here moves for summary judgment dismissing the plaintiff's complaint and argues that the issue of defendant's alleged negligence, if any, has been addressed in Action #1 and precludes recovery in the instant matter. Plaintiff has submitted opposition to the motion wherein she maintains that there has been little to no discovery conducted in this matter and that Justice Rebolini's determination in Action #1 did not address the issue of Jeffrey Lobman's ownership of Bronson such that the doctrine of res judicata does not apply. The motion is determined as follows.

The doctrine of collateral estoppel, or issue preclusion, is a narrower species of res judicata and precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***Ryan v New York Tel. Co.***, 62 NY2d 494 [1984]; ***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258 [2d Dept 2010]; Siegel, New York Practice §443 [6th ed 2019]). What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding (*see* ***Ryan v New York Tel. Co.***, supra). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was material to a prior judicial or quasi-judicial determination, the party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see* ***Id.***).

Here, Justice Rebolini determined that plaintiff harbored Bronson such that liability could

not be imposed against Matthew and Marjorie Lobman. It must necessarily follow that liability may not be imposed against Jeffrey Lobman, the defendant herein and the alleged owner of Bronson, based upon the exact same principle. Stated otherwise, there has been a prior judicial determination, as a matter of law, that plaintiff cannot recover from defendant because she completely harbored Bronson thereby precluding any finding of strict liability against Jeffrey Lobman. It does not matter in this respect whether Jeffrey Lobman was a party in the prior action, nor whether there has been only limited discovery in this matter.

Accordingly, defendant's motion is granted and the plaintiff's complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: **September 9, 2019**
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

___X___ FINAL DISPOSITION _____ NON-FINAL DISPOSITION