

King v Shannon

2019 NY Slip Op 34451(U)

August 14, 2019

Supreme Court, Orange County

Docket Number: Index No. EF009694/17

Judge: Robert A. Onofry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

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

SUPREME COURT : ORANGE COUNTY

-----X
LINDA KING,

Plaintiff,

- against -

PAMELA SHANNON, LINDA SHANNON and LEROY SMITH,

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. EF009694/17

-----X
PAMELA SHANNON,

Third-Party Plaintiff,

- against -

LEROY SMITH,

Third-Party Defendant.
-----X

DECISION AND ORDER

Motion Date: June 26, 2019

The following papers numbered 1 to 3 were read and considered on a motion by the Defendant/Third-Party Plaintiff Pamela Shannon, pursuant to CPLR § 3212, for summary judgment dismissing the complaint insofar as asserted against her.

Notice of Motion- Piantadosi Affirmation- Exhibits A-H 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied.

Factual/Procedural Background

The Plaintiff Linda King was allegedly injured when she was attacked by a dog in a two family home owned by the Defendant Pamela Shannon and occupied by Pamela Shannon and her daughter and son-in-law, Linda Shannon and Leroy Smith. Smith is the owner of the dog.

Pamela Shannon moves for summary judgment dismissing the complaint insofar as

asserted against her on the ground that there is no evidence that Smith's dog demonstrated vicious propensities and that she was aware of the same.

In support of her motion, she submits an affirmation from counsel, Michelle Piantadosi.

As relevant background, Piantadosi asserts as follows.

The Plaintiff was bit on August 18, 2017, when she was working as a home health aide for Smith at his home located at 33 Corlies Avenue, Poughkeepsie, New York. Pamela Shannon owns the property.

At her examination before trial, the Plaintiff testified that she was a home health aide for Smith, and had worked at the premises six days a week since September of 2016 (Exhibit D, p. 11:13-18). She first became aware of Nyia the second week of her employment (T-10). She was putting some garbage in a can behind the house and Nyia began barking "viciously" (T-10). She told Pamela Shannon that she was afraid of Nyia, and she advised her to ring the bell before entering the home to allow time for Nyia to be put away (Exhibit D, p. 9:19-25).

The Plaintiff testified that only the family could be around Nyia, and that Nyia was put away in Pamela Shannon's part of the house. The Plaintiff believed that Nyia was mean and vicious, and bit (T-8). Everyone ran from her (T-8). Prior to the incident, she had seen Nyia act mean "many times," including "[b]arking viciously, aggressively" (T-8). In fact, she was told not to enter the house if the dog was inside. Although she knew that all dogs barked, this was "a different type of bark" (T-9). It was an "attack" bark. "loud, extremely loud," and Nyia was "enraged, charging at the door" (T-9).

Prior to the incident, the Plaintiff was not afraid of dogs in general (T-9). However, she told Pamela Shannon that she was afraid of Nyia (T-9). Pamela Shannon told her that is why she

was told to ring the bell, to allow time to put the dog away (T-9).

The Plaintiff heard Nyia several times behind the screen door, growling at her and barking viciously and aggressively (Exhibit D, p. 16:23-25; p. 17:1-12). She had never seen Nyia bite someone, or been told that she had.

Prior to the date of the incident, the Plaintiff's only "interaction" with Nyia was through opposite sides of a door (Exhibit D, p. 18:16-25; p. 19:1-2).

On the date of the subject incident, the Plaintiff arrived at Smith's home at 6:50 a.m. She rang the bell and Nyia was put away while she worked (Exhibit D, p. 20:3-19). Later, when she returned from picking up medication for Smith, Smith asked her to put it inside on his bed (Exhibit D, p. 19:24-25; p. 20:1). When she walked into Smith's home she saw Nyia lying on her dog bed. She took three steps backwards and tried to run. While she was trying to run away, Nyia got up and slammed into the back of her legs. She went into the air and landed on the floor with her right ankle twisted (Exhibit D, p. 22-24). She was "bitten" by Nyia a total of three (3) times after she fell (Exhibit D, p. 25-28). However, none of the bites broke or punctured her skin (Exhibit D, p. 89:23-25).

At an examination before trial, Pamela Shannon testified that she is the owner of the property at issue (Exhibit E, p. 5:10-11). She occupies the upstairs apartment and leases the first floor apartment to Linda Shannon and Smith (Exhibit E, p. 15:24-25; p. 16:2-19). She was aware that they owned Nyia when they moved in (Exhibit E, p. 45:20-25; p. 46:19-20).

Pamela Shannon had minimal interaction with Nyia, but found her a nice, sweet and friendly dog (Exhibit E, p. 53:2-8; p. 54:8-10). She had heard Nyia growl before and observed her jump up and down and bark when cars drove by. No one had complained to her about Nyia,

and she had never seen Nyia bare her teeth or lunge at anyone (Exhibit E, p. 57:17-25; p. 58:2-16). Prior to the incident at bar, Nyia had never attacked anyone in any manner, or attacked or killed another animal (Exhibit E, p. 61:4-12). Pamela Shannon was at work when the incident occurred (Exhibit E, p. 71:9-14).

At an examination before trial, Smith testified that he adopted Nyia when she was ten (10) weeks old (Exhibit F, p. 47:2-21). He had never seen Pamela Shannon interact with Nyia (Exhibit F, p. 54:19-25; p. 55:2-9). Smith found Nyia a good, fun dog. (Exhibit F, p. 59:15-19). She did occasionally bark at strangers, but he had never heard any complaints about her (Exhibit F, p. 60:10-11; p. 60:23-25). Smith had never observed Nyia growl at anyone, lunge at the front door, or bare her teeth (Exhibit F, p. 60:12-22). Prior to the incident at bar, Nyia had never bitten anyone or injured anyone in any manner, and had never attacked or killed another animal (Exhibit F, p. 62:16-25). Pamela Shannon would have no reason to believe that Nyia was vicious or aggressive (Exhibit F, p. 128:11-17).

At an examination before trial, Linda Shannon testified that she took most of the responsibilities of caring for Nyia (Exhibit G, p. 36:13-15). Nyia barked at strangers, but she never growled at anyone, lunged at the front door, or bared her teeth in an aggressive manner (Exhibit G, p. 42:6-24). Prior to the incident at bar, Nyia had never bitten anyone or attacked anyone in any manner, nor had she ever attacked or killed an animal (Exhibit G, p. 44:20-25; p. 45:2-5).

Pamela Shannon did not any take part in caring for Nyia, and had no reason to believe that Nyia was vicious or aggressive (Exhibit G, p. 71:6-25).

In general, Piantadosi notes, to hold a landlord liable for a tenant's dog, a 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 allow the landlord to remove or confine the dog.”

Here, she argues, based on the testimony *supra*, there is no evidence that Pamela Shannon knew or should have known that the Nyia had any alleged vicious propensities. Indeed, she notes, no one, other than the Plaintiff, has even alleged that Nyia exhibited any vicious propensities prior to the date of the incident. That Nyia was kept enclosed, or barked at people, she asserts, is insufficient.

In sum, she argues, the complaint must be dismissed as against Pamela Shannon.

There is no opposition to the motion.

Discussion/Legal Analysis

The sole means of recovery of damages for injuries caused by a dog bite or attack is upon a theory of strict liability, whereby a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities. *Bukhtiyarova v. Cohen*, 172 A.D.3d 1153 [2nd Dept. 2019]; *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. *Bukhtiyarova v. Cohen*, 172 A.D.3d 1153 [2nd Dept. 2019]; *Carroll v. Kontarinis*, 150 A.D.3d 960 [2nd Dept. 2017].

In addition, vicious propensities may include behavior 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; albeit only when such proclivity results in the injury giving rise to the

lawsuit. *Collier v. Zambito*, 1 N.Y.3d 444 (2004); *Bukhtiyarova v. Cohen*, 172 A.D.3d 1153 [2nd Dept. 2019]; *Carroll v. Kontarinis*, 150 A.D.3d 960 [2nd Dept. 2017]; *Bard v. Jahnke*, 6 N.Y.3d 592 (2006).

To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, 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 allow the landlord to remove or confine the dog. *Bukhtiyarova v. Cohen*, 172 A.D.3d 1153 [2nd Dept. 2019].

Here, the testimony of Pamela Shannon, Linda Shannon and Smith is sufficient to demonstrate, *prima facie*, that Nyia did not have any known vicious propensities.

However, the testimony of the Plaintiff is sufficient to raise a triable issue of fact as to whether Nyia had vicious propensities.

Further, the Court finds issues of fact as to whether Pamela Shannon knew or should have known that Nyia had vicious propensities, and whether she had control over the premises (which she owned) sufficient to remove or confine the dog.

This includes the testimony of the Plaintiff that Nyia barked in a vicious manner from behind closed doors, and was locked away in Pamela Shannon's part of the two family home.

In addition, the Plaintiff testified as to various alleged behavior by Nyia that might be found to demonstrate vicious propensities that was common place or routine in nature. The Court notes that, in a related declaratory judgment action, *King v Liberty Mutual Insurance Company*, EF00161/19, Pamela Shannon, Linda Shannon and Smith successfully argued that the property at issue, although physically a two-family home, was in fact "a single,

multi-generational household.”

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

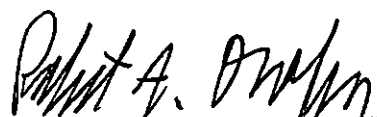
ORDERED, that the motion is denied; and it is further,

ORDERED, that the parties, by and through counsel, are directed to appear for a Status Conference on Tuesday, September 24, 2019, at 1:30 p.m., at the Orange County Court House, 285 Main Street, Court Room #3, Goshen, New York.

The foregoing constitutes the decision and order of the Court.

Dated: August 14, 2019
Goshen, New York

ENTER



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

TO: Denlea & Carton, LLP
Attorney for the Plaintiff
Office & P.O. Address
2 Westchester Park Drive, Suite 410
White Plains, New York 10604

Burke, Conway & Dillon
Attorneys for the Pamela Shannon
Office & P.O. Address
10 Bank Street, Suite 1200
White Plains, New York 10606

Marvin A. Cooper, P.C.
Attorneys for Linda Shannon and Leroy Smith
Office & P.O. Address
245 Main Street, Suite 510
White Plains, New York 10601