

Bochman v Colonial Prop. Mgt.
2019 NY Slip Op 34465(U)
June 6, 2019
Supreme Court, Orange County
Docket Number: Index No. EF006303-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

DONNA BOCHMAN,

Plaintiff,

-against-

COLONIAL PROPERTY MANAGEMENT and
WILLIAM SANTOS,

Defendants.

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. EF006303-2017
Motion Date: May 8, 2019

The following papers numbered 1 to 13 were read on Defendants' motions for summary
judgment, and Plaintiff's cross motion for a unified trial of liability and damages¹:

Table listing legal documents and page numbers: Notice of Motion (Santos) - Affirmation / Exhibits - Affidavit 1-3, Notice of Motion (Colonial) - Affirmation / Exhibits 4-5, Affirmation in Opposition / Exhibit 6, Notice of Cross Motion - Affirmation / Exhibits - Affidavit 7-9, Affirmation in Opposition / Exhibit (Santos) 10, Affirmation in Opposition (Colonial) 11, Reply Affirmation (Cross Motion) 12, Reply Affirmation (Santos) 13

¹Plaintiff withdrew that part of her cross motion wherein she sought an order striking
Defendants' answers.

Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

This is an action to recover for personal injuries sustained by plaintiff Donna Bochman on May 5, 2017, when she was bit by "Bentley", a pit bull owned by defendant William Santos, in an outdoor common area of an apartment complex operated by defendant Colonial Property Management in Middletown, New York.

According to Plaintiff:

I was walking to Apartment 4 and I was walking on the thing. I saw [Mr. Santos'] dog. I tried to move over. His dog came up to me, because his dog was in the middle, his dog came up to me and tried to sniff my crotch and I said no, I just put my hand no, and next thing I know his dog bit me. At that point I was shocked. My arm was in his mouth. Mr. Santos didn't seem to notice that the dog had me because he was walking and that's when I was "Oh, my God. Oh, my God." And I remember seeing him hit his dog to try and get him off. He's hitting Bentley, Bentley and he had to open his mouth to get him off of my arm. I just remember screaming "Oh, my God."

According to defendant Santos:

We was walking towards the parking lot, Miss Bochman was walking from the parking lot to the complex, you know, she called out his name, she knew him before so she knows who he is, so he got excited and as we walked on the little sidewalk, so I'm walking forward, she's coming down, she had bags in her hand, she had her hoodie over her head and she went down to pet him like she always did and I guess out of excitement he tried to grab the bags out of her hand and nipped her in the wrist, that's what I saw.

The incident left Plaintiff with a torn jacket and a 2.5 centimeter laceration with exposed subcutaneous fat in her right anterior forearm.

Both Defendants denied prior notice that Bentley had ever manifested any vicious propensities. Plaintiff testified that she had seen Bentley barking at people and chasing small animals, but acknowledged that she had never seen the dog bite anyone or jump on anyone prior to May 5, 2017. The evidence of vicious propensity herein consists of (1) Plaintiff's testimony

that Mr. Santos told her that Bentley had previously bitten her, which Mr. Santos denies; and

(2) certain entries in Bentley's veterinary records. The entry for March 29, 2015 states:

...P was in room for more than 1 hour, took multiple family members & VA to restrain for vaccines - recommend bringing in w/basket muzzle....

The entry for August 29, 2015 states:

Client brought pet in for Proheart injection - unable to restrain or muzzle pet - trying to bite owner...

The entry for September 25, 2015 states:

Unable to fully examine pet due to aggression - client declined sedation - after ½ hour struggle client was able to muzzle pet for Proheart inj....

The entry for April 19, 2016 states:

...Aggressive. Muzzle for exam.

The entry for September 27, 2016 states:

Aggressive. Needs to be sedated in order to exam....

A. Defendant Santos' Motion For Summary Judgment

In *Collier v. Zambito*, 1 NY3d 444 (2004), the Court of Appeals reaffirmed New York's longstanding rule that the owner of a domestic animal who knows or should have known of the animal's vicious propensities is strictly liable for the harm the animal causes as a result of those propensities. *Id.*, at 446. See, *Doerr v. Goldsmith*, 25 NY3d 1114, 1116 (2015); *Smith v. Reilly*, 17 NY3d 895, 896 (2011); *Petrone v. Fernandez*, 12 NY3d 546, 547-551 (2009); *Bernstein v. Penny Whistle Toys, Inc.*, 10 NY3d 787 (2008). In *Bard v. Jahnke*, 6 NY3d 592 (2006), the Court of Appeals explicitly held that "when harm is caused by a domestic animal, its owner's liability is determined solely by application of the [vicious propensity] rule articulated in

Collier.” *Id.*, at 599. Following *Bard v. Jahnke*, the Court of Appeals has consistently held that a cause of action for common law negligence against a dog’s owner is not available to plaintiffs injured due to the dog’s vicious propensities. *See, Doerr v. Goldsmith, supra; Smith v. Reilly, supra; Petrone v. Fernandez, supra; Bernstein v. Penny Whistle Toys, Inc., supra; Xin Kai Li v. Miller*, 150 AD3d 1051 (2d Dept. 2017).

“To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and the owner knew or should have known of the dog’s vicious propensities.” *Vallejo v. Ebert*, 120 AD3d 797 (2d Dept. 2014). *See, Lina Thai Wong v. Largana*, 170 AD3d 700, 700-701 (2d Dept. 2019); *Palumbo v. Kikirk*, 59 AD3d 691 (2d Dept. 2009). 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, 446-447 (2004) (quoting *Dickson v. McCoy*, 39 NY 400, 403 [1868]). “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’ (*Hodgson-Romain v. Hunter*, 72 AD3d 741...).” *Lina Thai Wong v. Largana, supra*, 170 AD3d at 701. *See also, Matthew H. v. County of Nassau*, 131 AD3d 135, 147 (2d Dept. 2015).

The evidence here is sufficient to demonstrate the existence of a triable issue of fact whether defendant Santos knew or should have known of Bentley’s vicious propensities. Contrary to defense counsel’s suggestion, defendant Santos’ alleged admission to Plaintiff that Bentley had previously bitten him may properly be considered in determining the issue. *See, e.g., Morse v. Colombo*, 8 AD3d 808, 809 (3d Dept. 2004); *Carter v. Metro North*

Associates, 255 AD2d 251, 252 (1st Dept. 1998); *Erosa ex rel. Erosa v. Mendoza*, 186 Misc.2d 485, 486 (App. Term 2000). The alleged admission, taken together with veterinary records which unambiguously reflect Bentley's propensity for aggression even to the point of biting his owner, gives rise to a triable issue of fact whether Mr. Santos knew or should have known of the dog's proclivity to act in a way that put others at risk of harm.

Consequently, the defendant Santos' motion for summary judgment is denied.

B. Defendant Colonial's Motion For Summary Judgment

"A landlord may be liable for the attack by a dog kept by a tenant if the landlord has actual or constructive knowledge of the animal's vicious propensities and maintains sufficient control over the premises to require the animal to be removed or confined." *Rodgers ex rel. McCoy v. Horizons at Monticello, LLP*, 130 AD3d 1285, 1286 (3d Dept. 2015). *See, Strunk v. Zoltanski*, 62 NY2d 572, 575 (1984). "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) 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." *Kraycer v. Fowler St., LLC*, 147 AD3d 1038, 1039 (2d Dept. 2017).

Defendant Colonial established *prima facie* entitlement to summary judgment "by demonstrating that it was not aware, nor should it have been aware, that the dog had any vicious propensities." *See, Kraycer v. Fowler St., LLC, supra*. In opposition, Plaintiff failed to demonstrate the existence of any triable issue of fact. As noted above, the evidence of evidence of Bentley's vicious propensity herein consists of Mr. Santos' admission to Plaintiff and certain

entries in Bentley's veterinary records, none of which was known, or should have been known, to defendant Colonial. In the absence of actual or constructive knowledge of the animal's vicious propensities, the defendant landlord cannot be held responsible for its tenant's dog's attack either in strict liability or in common law negligence. *See, Kraycer v. Fowler St., LLC, supra; Rodgers ex rel. McCoy v. Horizons at Monticello, LLP, supra; Strunk v. Zoltanski, supra.*

Consequently, the defendant Colonial's motion for summary judgment is granted.

C. Plaintiff's Cross Motion For Unified Trial

Pursuant to 22 NYCRR 202.42(a), bifurcated trials are generally to be held in personal injury cases. Plaintiff relies on one exception to this rule, to wit, that a unified trial is appropriate "where the plaintiff's injuries have an important bearing on the issue of liability." *See, Matthew H. v. County of Nassau, supra*, 131 AD3d 135, 148 (2d Dept. 2015). As the Second Department recognized in *Matthew H.*, the jury may consider "the nature and result of the attack on the plaintiff" in determining whether the dog has vicious propensities. *Id.* In that case, the infant plaintiff's injuries – infinitely more severe than Plaintiff's injuries here – were clearly indicative of the dog's viciousness and thus had an important bearing upon the question of liability. *Id.*, at 149.

Here, the *nature of Bentley's attack* may evince viciousness inasmuch as, on Plaintiff's account of the matter, Mr. Santos had to strike the dog to get him to release Plaintiff's arm. However, evidence of Plaintiff's *injury* – a small laceration on her right forearm – even if relevant and admissible is not especially probative of viciousness and hence does not have an important bearing upon the determination of liability. Under the circumstances, the Court in its discretion denies Plaintiff's motion for a unified trial of liability and damages.

It is therefore

ORDERED, that defendant William Santos' motion for summary judgment is denied,
and it is further

ORDERED, that defendant Colonial Property Management's motion for summary
judgment is granted, and the Plaintiff's complaint as against said Defendant is dismissed,
and it is further

ORDERED, that Plaintiff's motion for a unified trial of liability and damages is denied.

The foregoing constitutes the decision and order of the Court.

Dated: June 6, 2019 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE