

Orsini v Cromarty

2019 NY Slip Op 34602(U)

May 7, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 17-612159

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 17-612159CAL. No. 18-017800TSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH FARNETI
Acting Justice of the Supreme CourtMOTION DATE 2-14-19
ADJ. DATE 3-14-19
Mot. Seq. # 003 - MG-----X
CATHY ORSINI and AL ORSINI,

Plaintiffs,

- against -

WOODROW CROMARTY, DANIELLE
GRUNERT and D'MARIA'S BRIGHT
BEGINNINGS, LLC,Defendants.
-----XGRUENBERG KELLY DELLA
Attorney for Plaintiffs
700 Koehler Avenue
Ronkonkoma, New York 11779DEVITT SPELLMAN BARRETT, LLP
Attorney for Defendants Cromarty and Grunert
50 Route 111, Suite 314
Smithtown, New York 11787

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants, uploaded January 24, 2019; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiffs, uploaded March 7, 2019; Replying Affidavits and supporting papers by defendants, uploaded March 12, 2019; Other ; it is,

ORDERED that the motion by defendants Woodrow Cromarty and Danielle Grunert for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiffs Cathy Orsini and Al Orsini, her husband, on February 14, 2017, when Cathy Orsini was knocked down by a dog harbored by defendants Woodrow Cromarty and Danielle Grunert ("defendants") outside their home in West Babylon, New York. Plaintiffs allege that defendants were negligent in failing to secure the dog and allowing it to attack Cathy Orsini, when they knew, or should have known, of the dog's vicious propensities.

According to the deposition testimony of Cathy Orsini, she was walking her dog past the defendants' property owned by defendant Cromarty on February 14, 2017, when defendants' dog, a one-hundred-plus pound Bullmastiff named Dynasty, allegedly escaped from the fenced yard and knocked her to the ground, causing injury to her head and both wrists.

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Defendants now move for summary judgment dismissing the complaint on the basis they had no notice that the dog had vicious propensities. Defendants submit, in support of the motion, copies of the pleadings, the bill of particulars, and the transcripts of the deposition testimony of Cathy Orsini, Woodrow Cromarty, and Danielle Grunert. Plaintiffs oppose the motion, arguing that a triable issue of fact exists as to whether defendants knew, or should have known, of Dynasty's alleged vicious propensities. Plaintiffs submit the bill of particulars, the deposition testimony of Cathy Orsini, Woodrow Cromarty, and Danielle Grunert, along with an unsworn affidavit of Eric Orsini, and an Order of this Court dated January 23, 2019. The unnotarized affidavit of Eric Orsini has not been considered by the Court as it is not in admissible form (*see Alvarez v Prospect Hosp., supra; Simpson v Tommy Hilfiger U.S.A., Inc.*, 48 AD3d 389, 850 NYS2d 629 [2d Dept 2008]).

At her deposition, Cathy Orsini testified that on the date of the incident she was walking her son's dog on defendants' street when she observed Dynasty barking and jumping up on the fence. She testified that, under the force of Dynasty jumping, the fence came down and Dynasty came out from behind it. She testified that when she observed Dynasty "trotting" toward her, she turned and began to walk away, at which point Dynasty jumped on her back and knocked her to the ground.

At his deposition, Woodrow Cromarty testified that Dynasty never bit anyone, or got out of the yard before, that no one had ever complained to him about Dynasty's jumping, and that he did not have any signage on the property warning others of Dynasty's presence. Additionally, he testified that the dog never had any incident with any of the children or employees of the daycare that was operated in his home. He testified that Dynasty "rarely" jumped on anyone, estimating that it happened four or five times, mostly on him and more often when she was smaller.

At her deposition, Danielle Grunert testified that before defendants purchased the dog, she did extensive research on the breed and that she chose a Bullmastiff because dogs of that breed are regarded as "gentle giants." She testified that Dynasty was never involved in any fights, that she had never bitten or nipped at anyone, that she didn't chase anything, never jumped, and that she was unable to make it down a flight of stairs to the basement. She testified that on the day of the incident, the fence enclosing the backyard was not broken or in disrepair and that it had not been broken down. She further testified that when she came outside after learning that Dynasty had gotten out, she observed Dynasty sitting next to Cathy Orsini. She testified that her mother, Irene Shay, offered to drive Cathy Orsini home, adding that, during the ride, Cathy Orsini stated to Ms. Shay that her dog began barking when it saw Dynasty and wrapped its leash around her legs, causing her to trip. Danielle Grunert testified that Ms. Shay told her that Cathy Orsini also made the same statement to Al Orsini as Ms. Shay dropped her off at home.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for

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summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). On such a motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]). “In determining a motion for summary judgment dismissing a complaint, all of the evidence must be viewed in the light most favorable to the opponent of the motion, and all reasonable inferences must be resolved in that party’s favor” (*Santelises v Town of Huntington*, 124 AD3d 863, 865, 2 NYS3d 574 [2d Dept 2015]; *see Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921, 801 NYS2d 340 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

“New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal” (*Xin Kai Li v Miller*, 150 AD3d 1051, 1051, 54 NYS3d 652 [2d Dept 2017], quoting *Egan v Hom*, 74 AD3d 1133, 1134, 905 NYS2d 624 [2d Dept 2010]). “[C]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner’s knowledge of the animal’s vicious propensities, not on theories of common-law negligence” (*Morse v Colombo*, 31 AD3d 916, 917, 891 NYS2d 162, 163 [3d Dept 2006]; *see Xin Kai Li v Miller*, *supra*; *Claps v Animal Haven, Inc.*, 34 AD3d 715, 825 NYS2d 125 [2d Dept 2006]). “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 Store, Inc.*, 54 AD3d 707, 707-708, 863 NYS2d 756 [2d Dept 2008], citing *Claps v Animal Haven, Inc.*, *supra*; *see Petrone v Fernandez*, *supra*; *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]; *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205 [2004]). A plaintiff seeking to recover for damages caused by a dog bite may establish knowledge of vicious propensities with proof of a prior attack (*Petrone v Fernandez*, *supra*; *Bard v Jahnke*, *supra*). Also relevant to such issue is proof that the dog had a tendency to growl, snap or bare its teeth, the manner in which the dog was restrained, whether the animal was kept as a guard dog, or that the dog had a proclivity to act in a way that puts others at risk of harm (*Bard v Jahnke*, *supra*; *Collier v Zambito*, *supra*; *Hodgson-Romain v Hunter*, 72 AD3d 741, 899 NYS2d 300 [2d Dept 2010]; *Feit v Wehrli*, 67 AD3d 729, 888 NYS2d 214 [2d Dept 2009]; *Galgano v Town of N. Hempstead*, 41 AD3d 536, 840 NYS2d 794 [2d Dept 2007]). A similar act by the dog, such as a prior biting incident, imputes knowledge of vicious propensity (*Morse v Colombo*, *supra*).

Defendants established a *prima facie* entitlement to summary judgment through their submissions that they had no knowledge of Dynasty’s vicious propensities (*see Collier v Zambito*, *supra*; *Gammon v Curley*, 147 AD3d 727, 46 NYS3d 183 [2d Dept 2017]; *Curbelo v Walker*, 81 AD3d 772, 916 AD3d 645 [2d Dept 2011]; *Ayers v Martinez*, 74 AD3d 1002, 902 NYS2d 668 [2d Dept 2010]; *Hodgson-Romain v Hunter*, *supra*; *Christian v Petco Animal Supplies Store, Inc.*, *supra*). Defendant Cromarty testified that Dynasty never bit anyone, never got out of the yard, never had an incident with the children who were cared for in his home, and that she rarely jumped on anyone and that any prior jumping was playful, and occurred when she was a puppy. In her testimony, Danielle Grunert described Dynasty as “lazy,” and

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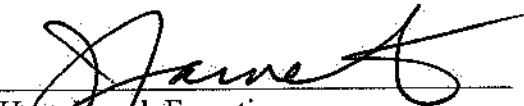
stated that Dynasty was never involved in fights with other dogs, socialized with people, and that she never chased anything or jumped.

Accordingly, the burden shifts to the non-moving party to raise a triable issue of fact as to whether the offending dog had vicious propensities and whether defendants had knowledge of the dog's vicious propensities (*Alvarez v Prospect Hosp., supra*). Plaintiffs offer Woodrow Cromarty's deposition testimony regarding his observations of Dynasty jumping four or five times in the past. At her deposition, Cathy Orsini stated that she had observed Dynasty on previous occasions and that Dynasty was up on the fence, that she was barking, and that she was shaking the fence. Additionally, plaintiffs submit an unnotarized affidavit of their son, Eric Orsini, a non-party witness. Eric Orsini's statement alleges that he has seen Dynasty on several occasions and that he has observed her to be loose and unsupervised roaming off defendants' property. He also states that he has observed Dynasty baring her teeth, growling viciously, jumping up on the fence and barking in a "violent" manner.

The Court finds plaintiffs' evidentiary showing is insufficient to defeat summary judgment. Evidence that the dog barked is insufficient to raise a triable issue of fact (*Ioveno v Schwartz*, 139 AD3d 1012, 32 NYS3d 291 [2d Dept 2016]). Further, plaintiffs' submission of evidence, that Dynasty would jump up on the fence and bark as pedestrians passed by the house, is insufficient to raise a triable issue of fact as to whether the defendants knew or should have known of Dynasty's alleged vicious propensities (*see Collier v Zambito, supra; Sorel v Iacobucci*, 221 AD2d 852, 633 NYS2d 688 [3rd Dept 1995]). " 'Normal canine behavior' does not establish vicious propensities, and 'rambunctious behavior' will show awareness of a vicious propensity only if it is the very behavior that resulted in [a] plaintiff's injury" (*M.B. v Hanson*, 168 AD3d 706, 708, 90 NYS3d 280 [2d Dept January 9, 2019], quoting *Clark v Heaps*, 121 AD3d 1384, 1384, 995 NYS2d 356 [3d Dept 2014]; *see Earl v Piowaty*, 42 AD3d 865, 839 NYS2d 861 [3d Dept 2007]). Here, Dynasty's alleged behavior of jumping up on the fence at the sight of another dog approaching is typical canine behavior and does not reveal a proclivity to behave in a manner that could cause injury (*see Smith v Reilly*, 17 NY3d 895, 933 NYS2d 645 [2011]; *Clark v Heaps, supra*).

Accordingly, defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: May 7, 2019


 Hon. Joseph Farneti
 Acting Justice Supreme Court

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