

A. A. v Whalen

2020 NY Slip Op 30466(U)

February 21, 2020

Supreme Court, New York County

Docket Number: 153708/2017

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

A. A., CLAUDIA VALENCIA

Plaintiffs,

- v -

CARLEY WHALEN, SCOTT WHALEN,

Defendants.

-----X

INDEX NO. 153708/2017

MOTION DATE 08/08/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for JUDGMENT - SUMMARY

In this personal injury matter regarding a dog bite, plaintiff A.A., an infant by his mother and natural guardian Claudia Valencia, allege that on June 23, 2016 defendants Carley Whalen and Scott Whalen’s dog, Cookie P. Monster Whalen (“Cookie”) bit him on his leg while he was by the elevator bank of the parties’ apartment complex located at 30 West Street in the city, state, and county of New York. Defendants move for summary judgment dismissing plaintiffs’ complaint pursuant to CPLR 3212. Plaintiffs oppose the motion.

FACTS

The facts surrounding the dog bite incident are, for the most part, not in dispute. A.A. testified that on the date of the incident, he was returning home from school with three friends (NYSCEF #23 – A.A. Tr at 9). A.A. and his friends were waiting for the elevator. When the elevator arrived, A.A. and his friends stepped back from the door to allow people to get off the elevator (id. at 11-13). A.A. briefly saw Cookie as it exited the elevator when Cookie lunged at and bit him on his left leg (id.). A dogwalker had Cookie on a leash at the time of the incident (id. at 14).

Surveillance footage confirms this sequence of events (NYSCEF #29). Indeed, a review of the footage shows A.A. and his friends waiting for the elevator, stepping aside when the doors opened, Cookie exiting the elevator, and then Cookie immediately lunging at and biting A.A. (id.).

Carley Whelan testified that she was present in the elevator bank when the incident occurred, which the surveillance footage confirms. Ms. Whelan was returning to her apartment after getting coffee (NYSCEF #22 – Carley Whelan Tr

at 49). Ms. Whelan did not see what exactly occurred when Cookie bit A.A. because “there were too many people waiting for the elevator” (*id.* at 54)¹. But she saw that A.A. was waving his hands around and that he and his friends were laughing when Cookie exited the elevator (*id.*).

Ms. Whelan testified to three prior incidents regarding Cookie’s behavior. The first incident occurred in 2015 or 2016 (NYSCEF #22 – Carley Whelan Tr at 31-32). In the first incident, the doorman for the building informed her that an individual attempted to pet Cookie. Ashley, Cookie’s dog-handler, allegedly told the other person not to pet Cookie. But the person disregarded the instruction and attempted to pet Cookie, who lunged forward and was pulled back by Ashley (*id.*).

The second incident occurred before 2016 when Cookie lunged at one of the building staff member when that staff member attempted to pet Cookie after being instructed not to pet the dog (*id.* at 39).

The third incident occurred when Cookie growled and lunged at a child who was the Whelans’ next door neighbor. Cookie growled at the child, and Ms. Whelan grabbed Cookie by the collar and held onto him until the child went back into the apartment (*id.* at 41-43). The building manager sent an e-mail to A.A.’s father corroborating this incident (NYSCEF #30).

Ms. Whalen additionally testified that Cookie does not like people touching him, and she was “very clear to people not to pet” Cookie (*id.* at 35-36). She stated that she does not like people touching her, so she figures Cookie feels the same as she does (*id.*). Ms. Whalen testified that she never noticed Cookie attempting to bite anyone and that Cookie is a happy dog that loves to play (*id.*).

Scott Whalen testified that Cookie’s dog-walker at the time of the incident was instructed to use the service elevator and the back exit because it was quiet with fewer people (NYSCEF #21 – Scott Whalen Tr at 30).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine

¹ The court notes that the surveillance footage shows only the four boys waiting for the elevator and no other individuals blocked Ms. Whelan’s view of the incident.

issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In New York, it has been long held that “the owner of a domestic animal who either knows or should have known of that animal’s vicious propensities will be held liable for the harm the animal causes as a result of those propensities” (*Collier v Zambito*, 1 NY3d 444, 446 [2004] citing *Hosmer v Carney*, 228 NY 73, 75 [1920]). “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’” (*id.* quoting *Dickson v McCoy*, 39 NY 400 [1868]). “Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice” (*id.*). “[A] triable issue of fact as to knowledge of a dog’s vicious propensities might be raised – even in the absence of proof that the dog had actually bitten some-one – by evidence that it had been known to growl, snap or bare its teeth” (*id.*). “In addition, an animal that behaves in a manner 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, can be found to have vicious propensities – albeit only when such proclivity results in the injury giving rise to the lawsuit” (*id.*).

Here, the undisputed testimony of Ms. Whelan shows that Cookie lunged at people on three separate occasions. Lunging has been held to constitute a vicious propensity (*see Pauszek v Waylett*, 173 AD3d 1631, 1632-1633 [4th Dept 2019] [“the act of lunging at people may also be considered a vicious propensity”]; *Sorel v Iacobucci*, 221 AD2d 852, 853 [3d Dept 1995] [finding that evidence of a dog that was known to bark and lunge when strangers were present is sufficient to raise a question of fact as to the dog’s known propensities]. Indeed, as defined by one court:

‘[l]unging’ would appear to fall within a lacuna on this continuum of canine behavior, perhaps less vicious than biting, snapping or growling but more threatening than barking. To ‘lunge’ according to Webster, is ‘to thrust or propel (as a blow).’ The word connotes aggression. As for the act itself, at least one appellate court has found that a dog’s lunging, *inter alia*, was ‘sufficient to raise a question of fact’ as to the dog’s vicious propensities. [Non-party’s] allegation that the defendants’ dogs ‘lunged’ at her ‘on many occasions’ allows the inference that that the dogs’ behavior was consistently and purposefully aggressive.

(*O’Brien v Amman*, 21 Misc 3d 1118(A) [Sup Ct, Allegany County 2008] [internal citations omitted]).

Even if lunging does not constitute behavior that would necessarily be considered dangerous or ferocious, it must still be considered as a proclivity to act in a way that puts others at risk of harm. Viewed most favorably for plaintiffs, a

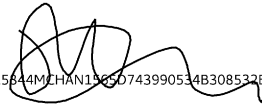
reasonable jury could conclude that the surveillance footage shows Cookie exiting the elevator and then immediately lunging and biting A.A. As such, there is a question of fact as to whether Cookie’s prior lunging incidents demonstrate a proclivity to act in a manner that resulted in the injuries giving rise to this lawsuit.

In an attempt to bat away this conclusion, defendants argue that this court is prohibited from reviewing plaintiffs’ submitted surveillance footage on the basis that the footage was not submitted in admissible form. While defendants are correct that the surveillance footage was not properly authenticated or attested to by affidavit, their argument does not affect the conclusion.

Plaintiffs rely on admissible evidence in their opposition, namely deposition evidence, which permits this court to review the surveillance footage in opposition to the motion (see *Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011]; *Koren v Weihs*, 201 AD2d 268, 269 [1st Dept 1994] [finding hearsay evidence admissible when submitted in opposition “if it is not the only evidence submitted, but also statements based upon the personal observations of the affiants”]). As such, there is no reason to exclude the surveillance footage from review on this motion.

In any event, even if this court were to ignore the surveillance footage, there would still be a question of fact based on the deposition evidence alone. Ms. Whelan testified that A.A. was waving his arms and making noise when Cookie exited the elevator². Ms. Whelan also testified that Cookie did not like to be touched and had lunged at people who attempted to pet him. Viewed most favorably for plaintiffs, a reasonable jury could conclude that Cookie had a proclivity to lunge at people that were attempting to touch him, and that Cookie lunged and bit A.A. because he was waving his hands. As such, the evidence, even without the surveillance footage, viewed most favorably for plaintiffs, raises a question of fact as to whether Cookie’s previous lunges, which were known to defendants, constitute a vicious propensity.

Accordingly, it is ORDERED that defendants’ motion for summary judgment is denied.


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<u>2/21/2020</u> DATE					<u>MARGARET A. CHAN, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

² The court notes that the surveillance footage does not show A.A. and his friends waving their arms or crowding the elevator door. Indeed, the footage reveals that A.A. and his friends stepped away from the elevator door when it opened, and Cookie exited.