Graham v Xiyun Gu
2020 NY Slip Op 30827(U)
March 9, 2019
Supreme Court, Kings County
Docket Number: 523861/2017
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of MARCH, 2020.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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KRISTEN GRAHAM,

Plaintiffs,

-against-

XIYUN GU,

Defendant.

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DECISION & ORDER

Index No. 523861/2017

The following *papers* numbered 17 to 30 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	17-22
Opposing Affidavits (Affirmations)	27-30

After oral argument and a review of the submissions herein, the Court finds as Follows:

Defendant XIYUN GU, moves this court pursuant to 3212 for an order granting the defendant summary judgment and dismissing the plaintiff's complaint. Plaintiff opposes the same.

MS

BACKGROUND/FACTS

This action arises from an incident in which the plaintiff's dog was allegedly injured in an alleged automobile incident which occurred on August 25, 2017.

It is alleged the plaintiff's mother was dog sitting and walked the dog on a leash at or around 10:30p.m. when the defendant allegedly ran over the plaintiff's dog. It is alleged the lease was attached to the dogs collar and was about 4 feet in length, it was able to extend but was fixed so it could not. It is alleged that as the plaintiff's mother and the dog were walking toward her home Brigham Street in Brooklyn, they had to pass a mutual driveway for people who live on Brigham for about four houses. The driveway stopped at the house before plaintiff's mothers' home. It is alleged, as plaintiff's mother walked towards the driveway, with "Delilah" the dog, being on her right side, she saw a white car hit the dog while they were on the sidewalk leading to the driveway. Plaintiff's mother testified at an EBT that she looked to her left before she approached the driveway but did not see that car. Plaintiff's mother also testified she was about one foot into the driveway and "Delilah" the dog was about halfway across the driveway when the car hit the dog. Plaintiff's mother testified she witnessed the white car hit "Delilah" the dog. It is alleged the front passenger wheel hit the back of the dog's body. It is further alleged, the car did not stop and continued down the driveway and stopped in front of a house on the same street. The plaintiffs mother testified she picked up the dog, ran to the house where the car stopped and asked the driver of the car if she saw that she hit the dog. It is alleged no one answered the plaintiff's mother. Plaintiffs mother recognized the women (it was her neighbor), the defendant in this action, XIYUN GU (a/k/a April). It is alleged the driver of the car went into her house and the plaintiffs mother went to the house and knocked

on the door, with the dog in her arms. It is alleged when the defendant came to the door, she said she didn't see the dog and she didn't hear plaintiff's mother screaming and she didn't see her come to the house with the dog in her arms. The defendant then went back into her house and called the police. The dog was going into shock and another neighbor drove the plaintiff's mother and the dog to VERG the Emergency Veterinary Hospital on Flatbush Avenue.

The following facts are undisputed. The plaintiff owns a dog named "Delilah" (hereinafter the dog) that is ten years old. The dog was gifted to the plaintiff by her ex-boyfriend when the dog was two months old. The dog did not come from a breeder or a pet store but from a friend of her ex-boyfriends who owned the dog's mother. There was no purchase price paid for the dog. There were four people in the car that allegedly ran over the dog. The dog stayed at the hospital overnight then was transferred to another hospital to undergo additional surgeries and had to undergo physical therapy. As a result of the accident, the dog had multiple fractures, sacral luxation and a shattered pelvis, an abdominal hernia and her tail had to be amputated. The total amount of bills for all procedures the dog needed to undergo to save its life was $26,536.52.

ARGUMENTS

Defendant contends the market value for a dog should be no more or no less than the purchase price originally paid for the dog. It is defendant's position that the plaintiff's damages cannot exceed the dog's market value, regardless of how much higher the actual veterinary bills may have been. Additionally, the defendant contends that a dog's market value is no less than the purchase price originally paid for minus depreciation. Defendant's further contend, the measure of damages for death or injury of a dog is the

same as might be applied in the case of an automobile or any other item of personal property.

Plaintiff contends they are not seeking the value of the dog, but they are seeking the reimbursement for veterinary expenses incurred due to defendant's negligence. Plaintiff contends there is some caselaw in New York and a breadth of caselaw all around the country in which owners were compensated medical costs in connection to a pet that was a direct result of negligent acts of another.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). **However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.** A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

In the present case, Defendant contends the plaintiff is entitled to value of the dog; plaintiff contends it is not seeking the value of the dog, and the dog did not die as result of the defendant's negligence but instead plaintiff is seeking reimbursement for the medical bills from the dog's injuries caused by the defendant's negligence.

Defendants rely on *Melton v. South Shore U-Drive, Inc.*, 32 AD2d 950, 303 NYS2d 751 (2d Dept. 1969) and *Rimbaud v. Beiermeister*, 168 AD2d 596, 154 NYS2d 333. to support their contention that the full market value of a dog fully compensates the plaintiff. Defendants further contend that since "Delilah" the dog was a Yorkshire Terrier mix, who was secured as a gift and who had no formal training classes, the value of the dog is market value which was zero at the time of the occurrence.

There has been a lack of cases on the subject of a dog's value in New York. It is well established that a pet is considered personal property in New York. "It is also well established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent destruction of a dog." *Jason v. Parks*, 224 AD2d 494, 495, 638 NYS2d 170, (2d Dept.1996). However, throughout the country there are a number of cases addressing the issue of medical expenses. Additionally, economists in an article for the Boston Globe have now attributed a price to the value of the life of a dog.

This article cites a paper recently published in the journal Benefit-Cost Analysis, titled "Monetizing Bowser: A Contingent Valuation of the Statistical Value of Dog Life." The paper attempts to quantify what the authors call the "value of statistical dog life," or VSDL, following a widely accepted method for putting a price tag on a typical human life. This article ultimately values the life of a dog at $10,000.00. *See;*

(Researchers have finally put a price on the life of a dog, available at https://www.bostonglobe.com/news/nation/2019/11/22/researchers-have-finally-put-price-tag-life-dog/QX0wPEGr1Kg5agq2ZNDvyN/story.html. (November 22, 2019) [last accessed March, 9, 2020]

Additionally, although few, there have been unreported cases in New York that have attempted to address the issue. The court in quoting *Zager v. Dimilia*, 138 Misc. 2d 448, 450–51, 524 N.Y.S.2d 968 (Just. Ct. 1988) concluded that "the proper measure of damages in a case involving injury suffered by a pet animal is the reasonable and necessary cost of reasonable veterinary treatment." *Id.* This approach is supported by case authorities and legal commentators from all over the country. (*See, Brown v Swindell*, 198 So 2d 432 [La Ct App 1967] [veterinary fee awarded; claim for emotional damages dismissed]; *Morgan v Patin*, 47 So 2d 91 [La Ct App 1950] [dog had no market value, veterinary fee awarded].) "[I]n cases of injury to animals ... the plaintiff ought to recover for expenses reasonably incurred in efforts to cure them, in addition to the depreciation in their value, or to their whole value, where they are finally lost. The law would be inhuman in its tendency if it should prescribe a different rule, even where the animal eventually dies; since it would then offer an inducement to the owner to neglect its sufferings." (2 *Shearman & Redfield, Negligence* § 752, at 1291-1292 [5th ed 1898].)

"What constitutes reasonable treatment must be determined on a case-by-case basis in light of the injuries suffered. The traditional restriction in personal property cases that the cost of repair should not exceed the market or "intrinsic" value of the property should not be applied in a case where neither market nor "intrinsic" value is capable of calculation and a living creature is involved." *(See, 7C Warren's NY Negligence, Personal*

Property, § 2.02.) However, "the treatment must be reasonable in light of the animal's injuries, condition and prognosis." "The burden of establishing both the reasonableness of the treatment and its cost lies with plaintiff." (*Parilli v Brooklyn City R. R.*, 236 App Div 577 [2d Dept 1932]; 7C *Warren's NY Negligence, Personal Property*, § 2.03; cf., 7A *Warren's NY Negligence, Personal Injuries*, §§ 4.01, 4.02 [plaintiff must establish necessity and reasonableness of medical services to recover same in personal injury action]); *id.*

More recently, in 2003 a New York District Court in Nassau County held that, a plaintiff should be awarded for the cost of dog's veterinary bills. "An injured party is under an obligatory duty ... to minimize ... the damages liable to result from ... injury ... [but the mitigation] must be reasonably warranted by and proportioned to the injury and consequences to be averted." *Citing*, *Niagra Mohawk Power Corp. v. Ferranti-Packard Transformers*, 201 AD2d 902, 904, 607 NYS2d 808, 810 (4th Dept.1994), *quoting Den Norske Ameriekalinje Actiesseelskabet v. Sun Printing & Publishing Assn.*, 226 NY 1, 7-8, 122 NE 463 (1919). The court also held "the Plaintiff was required to try and save the dog under the law." *Quoting, Mercurio v. Weber*, No. SC1113/03, 2003 WL 21497325, at 2 (NY Dist. Ct. June 20, 2003). Contrary to the defendant's contention that the plaintiff is only entitled to the value of the dog, it is the opinion of this court that there has been a clear shift in society and in New York in recognizing the value of a dog and the reimbursement for reasonable medical expenses incurred for a pet as a result of negligence.

Therefore, in the present case the defendant failed to make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence

of any material issue of fact. There has been absolutely no evidence presented other than conflicting stories regarding the happening of the accident. Clearly a she said she said situation. Defendant annexes no admissible proofs supporting their contention, other than conflicting EBT testimony. Moreover, all of these contentions raise questions of fact as to both parties' credibility. Credibility is solely for the jury (*Sorokin v. Food Fair Stores*, 51 A.D.2d 592, 593, 378 N.Y.S.2d 492, 493; *Pertofsky v. Drucks*, 16 A.D.2d 690, 227 N.Y.S.2d 508; *Ellis v. Hoelzel*, 57 A.D.2d 968, 968, 394 N.Y.S.2d 91, 93 (1977). As such, issues of fact and credibility of the parties remain and are best left for a jury. The issues of fact include but are not limited to the defendant's failure to establish they did not run over the plaintiff's dog, and the defendant fails to even address the medical expenses incurred, but contends only the plaintiff is entitled to the value of the dog which they claim is zero. Therefore, issues of fact exist.

Accordingly, the defendant's motion for summary judgment dismissing plaintiffs' complaint is hereby denied, for the reasons stated above.

This constitutes the Decision/Order of the Court.
Date: March 9, 2019

KINGS COUNTY CLERK
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RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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