Price v Gutchess
2020 NY Slip Op 35264(U)
June 29, 2020
Supreme Court, Cortland County
Docket Number: Index No. 17-496
Judge: Mark G. Masler

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York on the 12th day of June 2020.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

RICHARD PRICE and MAUREEN PRICE,
Individually and as Husband and Wife,

Plaintiffs,

- vs –

Index No. 17-496
RJI No. 2018-0863-C

LUCAS GUTCHESS, THERESA BROWN, JOHN P. MORSE, SHEILA MORSE,

Defendants.

DECISION AND ORDER

RICHARD PRICE and MAUREEN PRICE,
Individually and as Husband and Wife,

Plaintiffs,

-vs-

Index No. EF19-1474
RJI No. 2020-0254-M

EMILY SARASENE,

Defendant.

APPEARANCES:

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MARK G. MASLER, J. S. C.

Plaintiffs commenced the first action seeking to recover for injuries sustained when Richard Price (herein plaintiff; his wife sues derivatively) was bitten on December 19, 2016 by a dog purportedly owned by defendants Lucas Gutchess and Theresa Brown while on property owned by defendants John Morse and Sheila Morse. After depositions were completed in the first action, plaintiffs commenced the second action against defendant Emily Saracene,[1] who was Gutchess's girlfriend, alleging that she harbored Sampson at the time of the incident. In the first action, the Morse defendants move for summary judgment and, in the second action, Saracene moves to dismiss the complaint for failure to state a cause of action or, alternatively, for summary judgment. Plaintiffs cross move for consolidation of the actions and, in the second action, for leave to amend the complaint and for partial summary judgment establishing liability against Saracene.

The following facts are undisputed. Sampson was a male Rottweiler who was approximately five years old at the time of the incident. Gutchess first obtained possession of Sampson at the scene of a purported drug bust and was thereafter assisted in the adoption process by his friend, Brown. Although Sampson was licensed in Brown's name, he resided exclusively with Gutchess, who lived in a second-story apartment in a house as a neighbor of plaintiffs on Page Green Road in the Town of Cortlandville. On the evening of December 19, 2016, plaintiff drove to the house where Gutchess resided intending to visit a tenant who resided in the apartment located on the first floor of the building. When plaintiff exited his vehicle, he saw Saracene walking down the stairs with Sampson while holding his collar. Plaintiff approached

[1] Saracene was erroneously sued as Sarasene.

Saracene and Sampson at the bottom of the stairs, said hello to Saracene, and extended his right hand toward Sampson, who jumped and bit him in the left arm, causing serious injuries.

The complaint asserts causes of action against Morses for negligence and strict liability. The cause of action sounding in negligence must be dismissed because ordinary negligence alone is insufficient to establish liability for injuries caused by domestic animals (see Bard v Jahnke, 6 NY3d 592, 599 [2006]).[2] With respect to the remaining causes of action, "[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" (Craft v Whittmarsh, 83 AD3d 1271, 1271 [2011] [internal quotation marks and citations omitted]).

Morses met their prima facie burden of establishing entitlement to summary judgment by establishing they lacked prior knowledge that Sampson had any vicious propensities. At their examinations before trial, each testified that they had never received any complaints about Sampson's behavior and had no personal knowledge that he had ever exhibited vicious propensities toward anyone. Morses further noted that plaintiff testified at his examination before trial that he was also unaware of any complaints having been made to them regarding Sampson.

In opposition, plaintiffs do not submit any evidence contradicting Morses' prima facie showing that they had no actual or constructive notice that Sampson had any vicious propensities. Rather, they contend only that Morses' motion must be denied pending deposition

[2] In an exception not relevant here, a landowner or the owner of an animal may be liable for damages caused when a farm animal is negligently allowed to stray from the property on which the animal is kept (see Hastings v Sauve, 21 NY3d 122 [2013]).

of Saracene, whom they assert "may have information" relating to the claim against Morses. A summary judgment motion may be denied or held in continuance where it appears that facts essential to opposition of the motion may exist but cannot be stated (see CPLR 3212 [f]). However, a party who opposes summary judgment on the ground that "pertinent facts [] can be revealed through further discovery must make an evidentiary showing to support that conclusion" (Ivory Dev., LLC v Roe, 135 AD3d 1216, 1223 [2016] [internal quotation marks and citations omitted]). Plaintiffs' conclusory and speculative contention that further discovery is necessary identifies no material information that Saracene might have regarding the dispositive issue on this motion – whether Morses had any prior knowledge that Sampson had vicious propensities. Accordingly, Morses are entitled to summary judgment dismissing the complaint against them.

The complaint in the second action asserts causes of action against Saracene labeled as negligence and strict liability. As previously stated, the cause of action sounding in negligence must be dismissed because ordinary negligence alone is insufficient to establish liability for injuries of the type sustained by plaintiff. With respect to the remaining cause of action, the long-settled rule is that a person who owns or harbors "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] [citations omitted]; accord Zwinge v Love, 37 AD2d 874, 874 [1971]). Notably, the complaint fails to allege one of the essential elements of a cause of action for strict liability – that Saracene had actual or constructive prior knowledge that Sampson had any vicious propensities of the kind that resulted in plaintiff's injuries.

However, plaintiffs seek leave to amend the complaint to cure that omission by adding allegations that Saracene had the requisite prior knowledge that Sampson had vicious propensities.

> "The rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (Gulfstream Anesthesia Consultants, P.A. v Cortland Regional Med. Ctr., Inc., 165 AD3d 1430, 1433 [2018] [internal quotation marks, brackets, and citations omitted]).

There is no prejudice or surprise to Saracene. The second cause of action in the original complaint is clearly denominated as a claim sounding in strict liability, and plaintiffs' bill of particulars contains allegations that Saracene had prior knowledge that Sampson had vicious propensities. The proposed amendment seeks only to cure a pleading defect by further developing the facts supporting plaintiffs' attempt to state a cause of action for strict liability; accordingly, the motion to amend the complaint is granted (see id.).

Turning to the parties' competing motions for summary judgment regarding Saracene's liability, Saracene submitted an affidavit averring that she had no knowledge of Sampson ever having lunged at, jumped at, or bitten any person prior to the incident with plaintiff. In opposition, plaintiffs contend that Saracene had acquired knowledge of Sampson's vicious propensities through several specific incidents. They note that it is undisputed that Sampson was involved in two prior altercations with other dogs and that he had broken his prior restraints, requiring use of a "large" chain to keep him tied up. Plaintiffs also cite their testimony that Sampson had previously lunged at them.[3] Notably lacking, however, is any suggestion that

[3] Plaintiffs' argument that the incident itself proved vicious propensity is nonsensical.

Saracene had knowledge that these events had occurred. Thus, the specific instances cited by plaintiffs are insufficient to rebut Saracene's representations that she had not witnessed the prior altercations with other dogs, had never discussed such incidents with Gutchess, and never knew Sampson to lunge at anyone. Accordingly, plaintiffs failed to establish the existence of a triable issue of fact regarding whether Saracene had prior knowledge that Sampson had any vicious propensities.

Plaintiffs further contend that Saracene's motion must be denied pending her deposition. As previously noted, a party who opposes summary judgment on the ground that additional discovery is required must make an evidentiary showing to support that conclusion (see Ivory Dev., LLC v Roe, 135 AD3d at 1223). In that regard, plaintiffs correctly note that a deposition of Saracene would be probative of the extent of her care of Sampson, which is relevant to the determination of whether assumed a duty of care to plaintiffs by harboring or keeping Sampson.[4] However, plaintiffs identify no reason for why a deposition of Saracene would shed any additional light beyond her sworn affidavit on the crucial element of whether she had prior knowledge that Sampson had any vicious propensities. Accordingly, Saracene is entitled to

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While the incident necessarily demonstrates that Sampson had vicious propensities, it cannot logically establish the crucial element that defendant have prior notice of such propensities.

[4] The evidence regarding whether Saracene owed plaintiff a duty of care is largely undisputed. It appears that during the six to eight months preceding the incident, she was residing with her parents and visiting Gutchess at his residence five times each week, where she routinely walked Sampson, took him outside to be tied up, and fed him. Ordinarily, the fact that an occasional visitor to the premises of a dog owner "may have called the dog, given it commands or let it in and out of the premises would not have been enough to constitute [him or] her as its harborer or keeper" (Zwinge v Love, 37 AD2d at 874). Whether the level of care alleged here over a period lasting at least six months is sufficient to constitute harboring need not be decided, however, because plaintiffs failed to show the existence of a triable issue of fact on the dispositive issue of whether Saracene had prior notice that Sampson had any vicious propensities.

summary judgment dismissing the complaint, as amended.

Based on the foregoing: (1) In the first action, the motion for summary judgment made by the Morse defendants is granted, and the complaint against them is dismissed, with prejudice; (2) in the second action, (a) plaintiffs' motion to amend the complaint is granted, (b) Saracene's motion for summary judgment is granted, plaintiffs' cross motion for summary judgment establishing liability is denied, and the complaint is dismissed, with prejudice; and (3) plaintiffs' motion to consolidate the actions is denied as academic.

This decision constitutes the order of the court. The filing of this decision and order, or transmittal of copies hereof, by the court shall not constitute notice of entry (see CPLR 5513).

Dated: June 29, 2020
Cortland, New York

ENTER

MGML

Digitally signed by Hon. Mark G. Masler
DN: C=US, OU=Cortland County Supreme Court, O=Sixth Judicial District, CN=Hon. Mark G. Masler, E=crtmasler_chambers@nycourts.gov
Reason: I am the author of this document
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Hon. Mark G. Masler
Supreme Court Justice

The following documents were filed with the Clerk of the County of Cortland in Index No. 17-496:

- Notice of motion dated February 26, 2020.

- Undated affidavit of John Alden Stevens, filed on March 2, 2020, with Exhibits A-G.

The following documents were filed with the Clerk of the County of Cortland in Index No. EF19-1474:

- Notice of motion dated May 11, 2020.

- Affirmation of Michelle M. Davoli dated May 11, 2020, with Exhibits A-J.

- Affidavit of Emily Saracene, sworn to May 8, 2020.

- Notice of cross motion dated

- Undated affirmation of Christopher R. Burke, Esq., filed on June 4, 2020, with Exhibits 1-3.

- Affirmation of Michelle M. Davoli dated June 5, 2020.

The following documents were filed with the Clerk of the County of Cortland in both actions:

- Notice of cross motion dated April 20, 2020.

- The undated affirmation of Christopher R. Burke, Esq., filed on May 29, 2020, with Exhibits A-F.

- Decision and Order dated June 29, 2020.