

Sanchez v Bird

2021 NY Slip Op 33252(U)

April 9, 2021

Supreme Court, Rockland County

Docket Number: Index No. 033953/2018

Judge: Robert M. Berliner

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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.

-----X
IRMA SANCHEZ,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 033953/2018

MICHAEL BIRD and MARSHA BIRD,

Defendant.

Motion Sequence # 2

-----X
The following papers, numbered 1 to 4, were read on Defendants' motion for summary judgment dismissing Plaintiff's Complaint:

Notice of Motion/Affirmation in Support/Exhibits(A-F)	1-2
Affirmation in Opposition/	3
Reply Affirmation.....	4

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This action commences out of a tale of two dogs' playdate when Plaintiff allegedly sustained injuries from Defendants' dog knocking her down. On August 24, 2017, Plaintiff brought over her dog, Patron, for a playdate with Defendants' dog, Gismo, at Defendants' residence. Plaintiff alleges that Defendants' dog ran up to her and knocked her down during the playdate. She also alleges that Defendants knew of their dog's propensity to knock down individuals. On July 11, 2018, Plaintiff filed her Complaint seeking damages against Defendants for the alleged injuries she sustained when their dog knocked her down.

Now, before the Court is Defendants' motion for summary judgment dismissing Plaintiff's Complaint. Defendants allege that Gizmo does not have any vicious propensities. In support of their motion, Defendants contend that during the incident in question, their dog knocked Plaintiff

down to the ground as a result of playing with Plaintiff's dog in the yard. As such, according to Defendants, they cannot be liable for Gizmo's normal dog behavior. They also allege that Gizmo does not have any vicious propensities as evidenced by both Plaintiff and Defendant Michael Bird's examinations before trial. They testified that neither of them had seen or were aware of Gizmo biting, growling, or showing his teeth toward anyone. Defendants highlight the fact that Plaintiff testified that when their dogs played with each other, they did so in a playful manner and Gizmo did not act aggressively toward Patron. Defendants allege that the dogs had playdates frequently, at least one to two times per week prior to the incident.

In opposition, Plaintiff refutes Defendants contentions and alleges that there are genuine issues of material fact. Plaintiff alleges that Gizmo viciously knocked her down, and did not do so while playing with Patron because Patron was not in the area when she fell. Additionally, Plaintiff testified that about six months to a year prior to the August 24, 2017 incident, Gizmo knocked her down during a playdate between the two dogs at her residence. She testified that during this incident Gizmo went away from Patron to specifically go to her and then proceeded to knock her down. Plaintiff also argues that Defendant Michael Bird testified that Gizmo had previously knocked him down while Gizmo was playing with another neighbor's dog. Therefore, according to Plaintiff, this constitutes evidence of Gizmo's vicious propensity to knock down individuals.

In reply, Defendants allege that Plaintiff failed to raise a triable issue of fact. They allege that Defendant Michael Bird testified that the first incident where Plaintiff fell was due to both dogs knocking her down as they were both running at high speeds. Defendants continue to contend that during the August 24, 2017 incident, Gizmo was playing with Patron and did not intentionally attack Plaintiff.

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not

issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011].

“New York does not recognize a common-law negligence cause of action for injuries allegedly caused by a domestic animal . . . To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities.” *Gammon v Curley*, 147 AD3d 727 [2d Dept 2017][internal citations and quotation marks omitted]. “Vicious propensities include the propensity to do any act that might endanger the safety of the person and property of others[.]” *Lillo-Arouca v Masoud*, 163 AD3d 646 [2d Dept 2018]. “[A]n 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.” *Collier v Zambito*, 1 NY3d 444 [2004]; *see also Lipinsky v Yarusso*, 164 AD3d 896 [2d Dept 2018].

Here, the Court finds that Defendants established their prima facie entitlement to judgment as a matter of law. Both Defendant Michael Bird and Plaintiff testified their dogs had frequent playdates, where they would run around, and their interactions were playful. Also, they both testified that neither of them had seen Gizmo bite, growl, or bare his teeth at anyone. *See Jackson v Georgalos*, 133 AD3d 719 [2d Dept 2015]. In opposition, however, Plaintiff raised triable issues of fact based upon the conflicting testimonies of the parties. During her own EBT, she testified that during an incident about six months to one year prior to August 24, 2017, while playing with Patron, Gizmo left Patron and directly went to her and knocked her down. Meanwhile, Defendant Michael Bird testified that both the dogs knocked Plaintiff down during that incident because they were running while playing with each other. Additionally, Plaintiff testified that during the August 24, 2017 incident, Gizmo knocked her down while Patron was not in the area. Meanwhile, Defendant Michael Bird testified that though he was present, he did not see the cause of Plaintiff's fall. Defendants allege that Gizmo's actions of knocking people down while running and playing with other dogs is normal dog behavior and not actionable. However, as recognized by the Appellate Division Second Department, a dog behaving in a manner that is not necessarily

considered dangerous or ferocious “but nevertheless reflects a proclivity to act in a way that puts others at risk or harm” can be found to have vicious propensities. *Marek v. Burmester*, 37 AD3d 668, 669 [2d Dept 2007]. Therefore, in viewing the evidence in the light most favorable of the non-moving party, the Court finds that there are triable issues of material fact regarding whether the alleged incidents of Gizmo knocking down Plaintiff constitutes normal dog behavior or vicious propensities. *See Lina Thai Wong v Largana*, 170 AD3d 700 [2d Dept 2019][affirming dismissal of defendant’s motion for summary judgment where “[t]he parties provided conflicting testimony as to the nature of the contact between the plaintiff and the dog on the day of the incident and the parties’ prior observation of the dog’s behavior and disposition”]. Accordingly, the Court denies Defendants’ motion for summary judgment.

The foregoing constitutes the Decision and Order of the Court.

The parties are hereby notified of the **virtual pre-trial conference** scheduled for **April 23, 2021 at 11:00 am.**¹

Dated: New City, New York
April 9, 2021

ENTER


HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF

¹ This conference will be held virtually via Microsoft Teams. At least two business days prior to the conference, Plaintiffs’ counsel shall provide the Court with the email addresses of all counsel of record via letter on NYSCEF.