

Grajeda v Hablo

2021 NY Slip Op 33339(U)

July 16, 2021

Supreme Court, Orange County

Docket Number: Index No. EF001560-2019

Judge: Sandra B. Sciortino

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.

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
MARIA GRAJEDA and HUGO GRAJEDA

Plaintiffs,

-against-

**KARIN E. HABLO ORANGE COUNTY
COMMISSIONER OF FINANCE as Administratrix
of the Estate of David B. Sulyma,**

Defendant.
-----X

SCIORTINO, J.

The following papers numbered 1 to 22 were considered in connection with the application of defendant for summary judgment dismissing the complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation(Mapou)/Exhibits A - G	1 - 9
Affirmation in Opposition/Exhibits A - G/ Affidavit(Maria Grajeda)/ Affidavit(Hugo Grajeda)/Memorandum of Law/ Reply Affirmation	10 - 21 22

Background and Procedural History

This personal injury action arises out of an incident involving a dog attack which occurred on September 20, 2014 in front of plaintiffs' home in Chester, New York. Plaintiffs commenced this action by filing a Summons and Complaint on February 27, 2019. Defendant Sulyma died on February 29, 2016. On January 16, 2019 Karin E. Hablo, Orange County Commissioner of Finance, was appointed Administrator of the estate and permitted to accept service of the Complaint.

Defendant filed a Verified Answer on April 8, 2019. On or about July 26, 2019, plaintiffs served their Bill of Particulars. A “First Supplemental & Amended Verified Bill of Particulars” was served on September 3, 2020.

Examination Before Trial of plaintiff Maria Grajeda was taken on January 8, 2020. Plaintiff Hugo Grajeda discontinued his derivative claims by stipulation filed on January 30, 2020. Note of Issue was filed on December 23, 2020.

The relevant facts are:

On September 20, 2014, at approximately 3:00 p.m., plaintiff was on her front porch with her two dogs, Charlie and Sandy. The decedent defendant, Mr. Sulyma, lived next door with his two golden retrievers. Sulyma’s two golden retrievers approached plaintiff’s porch and started barking at plaintiff’s dogs. Sandy ran to the door of plaintiff’s home, and plaintiff let her inside. As plaintiff let Sandy inside, Charlie was attacked by Sulyma’s dogs. Plaintiff grabbed one of the dogs by the collar and attempted to separate them, but the attacks continued. As plaintiff attempted to grab Charlie, one of Sulyma’s dogs put his paws on plaintiff’s shoulder, causing her to fall to the ground on her right side. Plaintiff continued her attempts to get Charlie, but the dogs “were pulling [her] and pulling Charlie” toward defendant’s property. She fell “a couple times” as she attempted to intervene in the attack.

Plaintiff’s neighbor, Dave Whitney, was driving by when he heard plaintiff screaming. Whitney intervened and was able to separate the dogs. Plaintiff called the police.

After the dogs were separated, Sulyma came out of his house and called his dogs inside. Whitney attempted to give Charlie CPR but was unsuccessful. The police arrived, and plaintiff provided a description of the events. After the police left, plaintiff and her son took Charlie to

Goosepond Animal Hospital where plaintiff was informed that Charlie was dead.

After plaintiff returned home, she started feeling pain in her back, shoulder, and right side. Plaintiff, who had previously undergone a laminectomy and discectomy as the result of a 2010 accident, was concerned she had injured her back. After calling 911, she was taken by ambulance to the Cornwall Hospital emergency room. X-rays were taken of her right hand and right shoulder. Plaintiff was discharged the same day.

By Notice of Motion filed February 22, 2021, the defendant seeks summary judgment. Through affirmation of counsel, defendant avers that there was no indication prior to the September 20, 2014 incident that defendant decedent's two dogs had vicious propensities that were known, or should have been known, to the decedent.

In support of the motion, defendant submits uncertified police reports relating to the incident; an appearance ticket issued by the Dog Control Officer; a Dangerous Dog Complaint filed by plaintiff, and Town Judge Christopher J. Turpin's Notice of Findings to Owner of Dog arising out of the underlying incident. Defendant also submits six uncertified police reports regarding noise complaints prior to the date of the underlying incident. Defendant argues the absence of reference to anything other than barking in the appended reports is affirmative proof that the decedent defendant's dogs did not have violent propensities prior to the incident. Defendant argues plaintiff's deposition testimony is nothing more than conclusory assertions that have no support in the record.

Discussion

Summary judgment is a drastic remedy, and may be granted only when the moving party has tendered sufficient evidence to demonstrate the absence of any material issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)). For the purposes of this motion, the statements made by

the non-moving party are accepted as true (*Vega v. Restani Const. Corp.*, 18 NY3d 499 [2012]). Where there is any doubt about the existence of fact issues, summary judgment is inappropriate (*Stillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

There is no such thing as negligence liability when harm caused by a domestic animal is concerned (*Petrone v. Fernandez*, 12 NY3d 546 [2009]). The law imposes strict liability on the owner of a dog who inflicts injuries on others, if the owner knew or should have known that the dog had the propensity to be vicious (*Powell v. Wohlleben*, 256 A.D.2d 396 [2d Dept 1998]). 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” (*Collier v. Zambito*, 1 NY3d 444, 446 [2004]). Evidence of a dog’s vicious propensity can include whether the dog had previously bitten someone, the manner in which the dog was restrained, whether the dog had been known to growl, snap, or bear its teeth, or the dog’s “proclivity to put others at risk of harm” (*See, generally, Collier* at 447; *Bard v. Jahnke*, 6 N.Y.3d 592, 597 [2006]). However, the vicious nature of an attack alone is not sufficient to raise a question of fact as to vicious propensities. (*Malepezzi v. Ryan*, 28 AD3d 1036, 1038 [3d Dept 2006])

For a defendant to be entitled to judgment as a matter of law, he must establish that he was not aware, nor should he have been aware, that the dog had ever bitten anyone or exhibited any aggressive behavior (*Carroll v. Kontarinis*, 150 AD3d 960 [2d Dept 2017], *citing Collier*, 1 NY3d at 447; *Jackson v. Georgalos*, 133 AD3d 719, 720 [2d Dept 2015]; *Hodgson-Romain v. Hunter*, 72 A.D.3d 741 [2d Dept 2010]).

Plaintiff testified about incidents with Sulyma’s dogs prior to September 20, 2014. Sulyma’s dogs would come onto plaintiff’s property two to three times per week, as Sulyma would leave the

gate to his yard open. Plaintiff and her husband often complained to the Sulyma about the dogs being on their property and “barking nonstop” in the middle of the night. The barking resulted in the police being called numerous times. If plaintiff had her dogs on her deck, Sulyma’s dogs would try to “grab” or “get” her dogs, growl, and bare their teeth. As a result, plaintiffs set up chicken wire fencing around their deck. On one occasion plaintiff’s son witnessed the Sulyma’s dogs killing a small deer, and on another occasion, killing another small animal. In response to the attack, defendant “mentioned something like, oh well, they attacked anything that moves. They will attack.”

Accepting the plaintiff’s deposition testimony as true, as the Court is constrained to do on a summary judgment motion, defendant has failed to demonstrate a *prima facie* entitlement to judgment as a matter of law. The question of the whether defendants’ dogs had vicious propensities prior to September 20, 2014 is a triable issue of fact which must be determined by a jury.

In light of the foregoing, defendant’s motion for summary judgment is denied.

Plaintiff’s second cause of action premised on a violation of the local leash law is deemed withdrawn.


Any matter not addressed herein is denied.

A virtual conference is scheduled for August 24, 2021 at 9:00 a.m. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: July 16, 2021
Goshen, New York

ENTER:


HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*