Hickson v Brown
2021 NY Slip Op 33350(U)
March 2, 2021
Supreme Court, Columbia County
Docket Number: Index No. E012019014025
Judge: Andrew G. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

JULIE HICKSON,

Plaintiff,

-against-

DECISION AND ORDER

FREDDA BROWN and LEAH BROWN-OLIVA,

Defendants.

All Purpose Term
Hon. Andrew G. Ceresia, Supreme Court Justice
Index No. E012019014025

Appearances:

Nicole P. Bini, Esq.
Greenberg & Greenberg
Attorneys for Plaintiffs
4 East Court Avenue
Hudson, New York 12534

Kyle A. Satchell, Esq.
Santacrose & Frary
Attorneys for Defendants
Columbia Circle Office Park
One Columbia Circle
Albany, New York 12203

Ceresia, J.

In the above-captioned personal injury action, defendants moved for summary judgment dismissing the complaint, and plaintiff opposed and cross-moved for summary judgment on the issue of liability. The Court will determine both motions herein.

The following facts are undisputed. On October 27, 2018, plaintiff was walking her dog, Juno, through a neighborhood in the town of Chatham, Columbia County, when she approached a residence located at 144 Hudson Avenue. The residence was owned by defendant Fredda Brown, who leased a portion of it to her daughter, defendant Leah Brown-Oliva. Brown-Oliva had just exited the residence with her own dog, Josie, who was secured by a retractable leash. As Brown-Oliva was closing the door behind her, Josie began running toward plaintiff and Juno, pulling the retractable leash out of Brown-Oliva's grasp. Josie and Juno quickly became engaged in a fight, as plaintiff and Brown-Oliva attempted to separate the dogs. During the struggle, the retractable leash that was still attached to Josie became wrapped around plaintiff's legs, and she fell to the ground. Eventually, the dogs were separated, and plaintiff and Juno walked away. However, plaintiff later went to an urgent care center, where she was found to have fractures in both of her hands.

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 in admissible form to demonstrate the absence of any material issues of fact (see Ferluckaj v Goldman Sachs & Co., 12 NY3d 316, 320 [2009]; Smalls v AJI Industries, Inc., 10 NY3d 733, 735 [2008]; Ayotte v Gervasio, 81 NY2d 1062 [1993]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of NY, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v AJI Industries, Inc., supra, quoting Alvarez v Prospect Hosp., supra). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit 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 NY, supra; Alvarez v Prospect Hosp., supra). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Wells v 3M Corp., 137 AD3d 1556, 1559 [2016]; McKenna v Reale, 137 AD3d 1533, 1534 [2016]).

In a case such as this, "'the Court of Appeals has made clear that a cause of action for ordinary negligence does not lie against the owner of a domestic animal which causes injury. Rather, the sole viable claim is for strict liability,' which must be established by 'evidence that the animal's owner had notice of its vicious propensities'" (Filer v Adams, 106 AD3d 1417, 1419 [2013], quoting Alia v Fiorina, 39 AD3d 1068, 1069 [2007]; see Petrone v Fernandez, 12 NY3d 546, 550 [2009]; Collier v Zambito, 1 NY3d 446, 446-47 [2004]). This principle applies even where it is not alleged that there was any direct animal attack or bite but, rather, it is alleged that the owner failed to restrain the animal (see Filer v Adams, supra; Petrone v Fernandez, supra; Scavetta v Wechsler, 149 AD3d 202, 203 [2017]; Clark v Heaps, 121 AD3d 1384, 1384 [2014]) or failed to properly handle the animal (see Brady v Contangelo, 148 AD3d 1544, 1545 [2017]).

Here, defendants have submitted evidence that they had no prior knowledge of any vicious propensities on Josie's part. That is, defendants have submitted Brown-Oliva's sworn deposition testimony, wherein she testified that Josie behaved well with her children, was walked regularly without a muzzle, did not act in a protective or fearful manner, and did not growl at or chase other animals (see Yong Aff. in Support, Ex. F, at 12-13). Brown-Oliva also testified that this incident was the first time that something like that had happened (see id. at 8). Additionally,

defendants have submitted the sworn deposition testimony of Brown, who stated that Josie was pleasant to be around; was not excitable, protective, or fearful; and, to her knowledge, had never bitten or fought with another dog before (see Yong Aff. in Support, Ex. E, at 10-12).

In opposition, plaintiffs point to Brown-Oliva's testimony that Josie had run away a few times before (see Yong Aff. in Support, Ex. F, at 12), arguing that this shows that Josie could foreseeably be a danger to others. It is true that "'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*'" (Barone v Phillips, 83 AD3d 1523, 1524 [2011] [emphasis in original], quoting Collier v Zambito, supra at 447; see Hamlin v Sullivan, 93 AD3d 1013, 1014 [2012]). However, the mere fact that Josie had "[run] away a few times" (Yong Aff. in Support, Ex. F, at 12) does not raise a question of fact as to whether such behavior reflected a proclivity to put others at risk of harm (see Bloomer v Shauger, 94 AD3d 1273, 1276 [2012] [holding there was no question of fact as to proclivity to cause harm where horse had previously avoided being attached to a lead line but, in doing so, had never pulled her head back in the manner that caused the plaintiff's injury]; Barone v Phillips, supra [finding no question of fact where dog had previously run wild but owners had never seen it chase or run toward a person]; Zelman v Cosentino, 22 AD3d 486, 487 [2005] [finding no question of fact where dog had previously escaped but had never jumped on or attacked anyone]). Significantly, the record is devoid of any evidence that Josie, in running away in the past, had ever run toward or acted aggressively toward another animal or person.

Based upon all of the foregoing, defendants have made a prima facie showing of

entitlement to judgment as a matter of law by demonstrating that they had no prior notice of any vicious propensities on the part of Josie. Plaintiff, in turn, has failed to raise any triable questions of fact in that regard. As such, defendants' motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied.

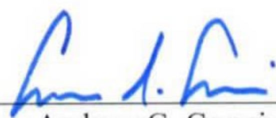
Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted and the complaint is hereby dismissed, and it is further

ORDERED, that plaintiff's cross-motion for summary judgment on the issue of liability is denied.

This shall constitute the Decision and Order of the Court. The Court has uploaded the original Decision and Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the County Clerk's Office. Counsel for the defendants is not relieved from the applicable provisions of CPLR § 2220 and § 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the action, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Dated: March 2, 2021
Troy, New York



Andrew G. Ceresia
Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated October 4, 2020; Affirmation of Jeffrey P. Yong, Esq.; Exhibits A-F;
2. Notice of Cross-Motion, dated October 23, 2020; Affirmation of Nicole P. Bini, Esq.;
3. Affirmation in Reply/Opposition of Giovanna Condello, Esq., dated November 20, 2020.