

Roque v Garnett-Arty
2021 NY Slip Op 33518(U)
May 20, 2021
Supreme Court, Nassau County
Docket Number: Index No. 608503/2018
Judge: David P. Sullivan
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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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VILMAY ROQUE,

Plaintiff,

-against-

KAREN GARNETT-ARTY and FERNAND ARTY,

Defendants.

-----X

KAREN GARNETT-ARTY and FERNAND ARTY,

Third-Party Plaintiff,

-against-

ALL ISLAND FENCE & RAILING,

Third-Party Defendant.

-----X

DF EASTWOOD CONSTRUCTION CORP, d/b/a
ALL ISLAND FENCE & RAILING, s/h/a ALL
ISLAND FENCE & RAILING,

Fourth-Party Plaintiff,

-against-

LI LANDSCAPING SOLUTIONS CORP.,

Fourth-Party Defendant.

-----X

The following papers having been read on this motion:

Notice of Motion (Defendants/Third-Party Plaintiffs)..... 1

IAS/TRIAL PART 22
NASSAU COUNTY

Motion Seq. No. 001, 002
Index No. 608503/2018
Motion Submitted: 05/20/2021

Notice of (Cross-) Motion (All Island Fence).....2
 Opposition (Plaintiff)3
 Opposition (to Cross-Motion) (Plaintiff).....4
 Opposition (to Cross-Motion) (Defendants/Third-Party Plaintiffs).. 5
 Reply (Defendants/Third-Party Plaintiffs)..... 6

Defendants/Third-Party Plaintiffs move this Court for an order, pursuant to CPLR §3212, seeking summary judgment dismissing Plaintiff’s complaint in its entirety. Third-Party Defendant has cross-moved for summary judgment as well, seeking dismissal of the third-party complaint. Plaintiff has submitted identical opposition papers to each motion, Defendants/Third-Party Plaintiffs have opposed the cross-motion, and the Court has also received reply to the motion by Defendants/Third-Party Plaintiffs. After review and consideration, the motion by Defendants/Third-Party Plaintiffs is hereby denied, whereas the cross-motion by Third-Party Defendants is hereby granted in full.

On December 11, 2017, at approximately 9:30am, Plaintiff was out walking her dog near the intersection of Warwick Road and Hathaway Avenue in Elmont, Nassau County, New York. As she approached the property owned by Defendants/Third-Party Plaintiffs, she and her dog crossed to the other side of the street due to the excessive barking of two dogs owned by Defendants/Third-Party Plaintiffs. Unfortunately, the two dogs were able to get out from the enclosed yard, charged at Plaintiff’s dog, and began attacking it. Plaintiff attempted to intervene to protect her own dog but was knocked to the ground by the dogs owned by Defendant/Third-Party Plaintiffs, causing injury to Plaintiff.

Subsequently, Plaintiff commenced the within action against Defendants/Third-Party Plaintiffs, sounding in strict liability only. Defendants/Third-Party Plaintiffs then commenced a third-party action against Third-Party Defendant, who had previously installed the fencing at

their property, seeking indemnification and/or contribution. Both Defendants/Third-Party Plaintiffs and Third-Party Defendants now seek summary judgment dismissing all claims against them, respectively.

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. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal. Ostrovsky v. Stern, 130 AD3d 596, 13 NYS3d 462 (2nd Dept., 2015). 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. Orsini v. Cromarty, 191 AD3d 1011, 142 NYS3d 591 (2nd Dept., 2021). Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snape, or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm. Cosgrove v. Trump National Golf Club, 134 AD3d 882, 21 NYS3d 343 (2nd Dept., 2015).

Here, the Court finds that Defendants/Third-Party Plaintiffs have not met their burden on the motion and have failed to demonstrate a prima facie entitlement to judgment as a matter of law based upon their submission. In support of the motion, they submitted the deposition transcript of Defendant/Third-Party Plaintiff Garrett-Arty and the interrogatory responses of Defendant/Third-Party Plaintiff Arty. The testimony elicited during the deposition indicates that the subject dogs were only restrained when small children were over their house or guests who may be fearful of dogs, and the subject dogs were put in their kennel, with such restraints being only precautionary. Aside from these limited circumstances, the subject dogs were allowed throughout the house of Defendants/Third-Party Plaintiffs and were only put in their kennels in the basement during overnights and when not anyone was home.

Defendants/Third-Party Plaintiffs have also submitted the deposition transcript of Plaintiff in support of their motion. In it, Plaintiff testified that whenever she passed Defendant/Third-Party Plaintiffs' house, there were dogs that would regularly growl at her and/or her own dog. Plaintiff's testimony indicates that the dogs owned by Defendants/Third-Party Plaintiffs would growl to such an extent that, as a precaution, she would cross to the opposite side of the street as she passed by, which was on an almost daily basis.

Given the state of the evidence before the Court, it cannot be said as a matter of law that the dogs owned by Defendants/Third-Party Plaintiffs did not have vicious propensities that they either knew or should have known about. Indeed, the Court has been presented with conflicting testimony as to the behavior of the subject dogs involved, and such credibility of the parties is best left for a jury to decide. See Ruiz v. Griffin, 71 AD3d 1112, 898 NYS2d 590 (2nd Dept., 2010). Accordingly, the motion by Defendants/Third-Party Plaintiffs is hereby denied.

To establish a claim for common law indemnification, a third-party plaintiff is required to prove not only that it was not negligent, but also that the proposed indemnitor was responsible for the negligence that contributed to the accident, or in the absence of any such negligence, had the authority to direct, supervise, and control the work giving rise to the injury. Bellefleur v. Newark Beth Israel Medical Center, 66 AD3d 807, 888 NYS2d 81 (2nd Dept., 2009). To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that a duty was owed to the plaintiff as an injured party and that a breach of that duty contributed to the alleged injuries. Eisman v. Village of East Hills, 149 AD3d 806, 52 NYS3d 115 (2nd Dept., 2017). The critical requirement is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought. Id at 808-809, 118.


Here, the Court finds that Third-Party Defendant has demonstrated its entitlement to judgment as a matter of law. The testimony put forth in the moving papers indicates that the area in which the dogs owned by Defendants/Third-Party Plaintiffs were able to get out through was not installed or repaired by Third-Party Defendants; rather, the area in which the dogs were able to escape the backyard of Defendants/Third-Party Plaintiffs was left intact at the request of Defendant/Third-Party Plaintiff Arty when they had fencing installed by Third-Party Defendants earlier that year. Defendant/Third-Party Plaintiff Arty also confirmed in his interrogatories that the gate installed by Third-Party Defendant was working properly on the date of the incident. Neither set of opposition papers have raised a triable issue as to the fence installation performed by Third-Party Defendant that could support denying the cross-motion. Accordingly, the cross-motion is hereby granted in full and the third-party complaint is hereby dismissed forthwith.

Third-Party Defendants shall file and serve a copy of the within order with notice of entry upon Plaintiff and Defendants/Third-Party Plaintiffs within thirty (30) days from the date of this order. Thereafter, Plaintiff and Defendants shall appear in the DCM Trial Part of Supreme Court, Nassau County, on September 28, 2021.

This hereby constitutes the Decision and Order of this Court.

Dated: May 20, 2021
Mineola, New York

ENTER


HON. DAVID P. SULLIVAN, J. S. C.

ENTERED

May 21 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE