

Gillum v Fitzgerald
2021 NY Slip Op 33530(U)
September 30, 2021
Supreme Court, Nassau County
Docket Number: Index No. 605522/2019
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

DAVID GILLUM,

Plaintiff,

-against-

ROSEMARY FITZGERALD,

Defendant.

X

X

Index No. 605522/2019

Mot. Seq. No. 001

Decision and Order

Papers submitted:

Defendant’s Notice of Motion _____X

Defendant’s Affirmation in Support with Exhibits _____X

Defendant’s Affidavit _____X

Plaintiff’s Affirmation in Opposition with Exhibits _____X

Defendant’s Reply Affirmation _____X

Defendant seeks an Order of the Court pursuant to CPLR § 3212 granting summary judgment in favor of Defendant and dismissing Plaintiff’s Complaint.

The underlying action arises from alleged injuries Plaintiff suffered in connection with an incident involving a dog, which occurred on September 16 2018 at or in the vicinity of 176 Ellison Avenue, Roosevelt, County of Nassau, State of New York.

Plaintiff commenced the underlying action by the filing of a Summons and Complaint dated April 16, 2019. Defendant interposed a Verified Answer and issue was joined on or about June 14, 2019.

Background/Facts

Plaintiff was deposed on February 18, 2020. He testified that on September 16, 2018, a dog “came after him and tried to attack him”, while he was on Ellison Avenue in Roosevelt as he was headed home from the Velt Deli, located on the corner of Fulton Avenue and Nassau Road. Plaintiff testified that as he was on the way home from the deli a man was standing with an unleashed dog, which started coming after Plaintiff. Plaintiff further testified that he had seen the dog on other occasions over the past seven years in the yard barking viciously as Plaintiff walked by. Plaintiff testified that the dog did not jump on him nor did the dog bite him, and that the dog never made contact with Plaintiff. Plaintiff testified that as the dog came toward him, he tried to run at which time Plaintiff slipped off the curb, and fell onto his knee, injuring his knee and right elbow.

Defendant attested that neither she nor any member of her family at the address cited owns a dog or owned a dog on the date in question, and therefore, cannot be liable for Plaintiff’s injuries as a matter of law.

Analysis/Law

To grant summary judgment, it must clearly appear that no material triable issue of fact is presented (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*see Barr v. Albany County*, 50 N.Y.2d 247 [1980]; *Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]; *Daliendo v Johnson*, 147 A.D.2d 312 [2d Dept. 1989]). It is the existence of an

issue, not its relative strength that is the critical and controlling for the Court's consideration when making its determination (*see Barrett v Jacobs*, 255 N.Y.520 [1931]). The evidence should be construed in a light most favorable to the party moved against for summary judgment (*Corvino v Mount Pleasant Cent. Sch. Dist.*, 305 AD2d 364 [2d Dept. 2003]); *Weiss v Garfield*, 21 A.D.2d 156 [3rd Dept. 1964]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (*see Palacino v. Equity Mgmt. Group*, 272 A.D.2d 457 [2d Dept. 2000]; *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]; *Moskowitz v. Garlock*, 23 A.D.2d 943 [3d Dept. 1965]).

Upon review and consideration of all papers submitted, material issues of fact exist rendering summary judgment unwarranted.

Accordingly,

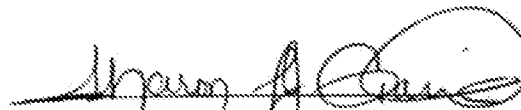
It is

ORDERED, that Defendant's motion for an Order of the Court pursuant to CPLR § 3212 granting summary judgment in favor of Defendant and dismissing Plaintiff's Complaint, is Denied.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
September 30, 2021



HON. SHARON M. J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

ENTERED

Oct 04 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE