

**Farrell v Boushie**

2021 NY Slip Op 33571(U)

July 30, 2021

Supreme Court, Franklin County

Docket Number: Index No. E2019-390

Judge: Robert G. Main, Jr.

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Franklin, at the Courthouse in the Village of Malone, New York, on the 19<sup>th</sup> day of May, 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF FRANKLIN

-----x

AMY C. FARRELL and KEVIN L. LADUE,

AMENDED  
DECISION AND ORDER

Plaintiffs,

Index Number E2019-390

-against-

RJI Number

16-1-2019-0392

PETER M. BOUSHIE,

Defendant.

-----x

DECISION AND ORDER

MAIN, JR., A. J. Plaintiffs move for summary judgment. Plaintiff, Amy C. Farrell, alleges that she was injured by a vicious dog belonging to defendant. Plaintiff, Kevin L. Ladue, the husband of Amy C. Farrell, alleges that he was deprived of his wife's services, society, and companionship as a result of her injuries.

New York's courts have long recognized that the owner of a dog "who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446 [2004]). Liability in such cases is absolute. It is not dependent upon proof of negligence on the part of the dog's owner (*Velez v Andrejka*, 126 AD3d 685 [2d Dept 2015]).

Plaintiffs' Complaint alleges:

"4. At all times herein mentioned, defendant, Peter M. Boushie, was an owner of a dog, a husky, named O'Malley.

...

9. Prior to the incident involving plaintiffs, defendant['s] ... dog ... bit Shelly J. Brown ...

10. Defendant's dog which bit Shelley J. Brown was O'Malley.

11. Shelley J. Brown was caused to suffer injuries from the bite on her right arm, including three puncture wounds and a possible broken knuckle on her right hand.

...

13. Defendant was aware or should have been aware of the dog bite by his dog O'Malley to Shelley J. Brown contemporaneously with or shortly after the bite occurred."

In paragraph "1" of defendant's Answer to the Complaint, he admitted the allegations contained in paragraphs "4", "9", "10", "11", and "13" of the complaint, quoted above. Hence, there is no factual dispute regarding the allegation that defendant knew, or should have known, about the prior bite.

In paragraphs "5" through "8" of the Complaint, the plaintiffs allege that prior to allegedly injuring plaintiff Amy C. Farrell, and prior to injuring Shelley J. Brown, the dog also injured Chad T. Williams by biting him. However, in paragraph "3" of the Answer, defendant denied these allegations.

During the discovery process, plaintiffs served the defendant with a Notice to Admit pursuant to Civil Practice Law and Rules § 3123 (a). The statute states that

"[e]ach of the matters to which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully

either admit or deny those matters" (Civil Practice Law and Rules § 3123 [a]).

Defendant did not respond to the Notice to Admit, which mirrored paragraphs "5" through "8" of the Complaint. Therefore, the following allegations, taken from the Notice to Admit, are deemed admitted by defendant for purposes of this summary judgment motion:

"1. Defendant Peter M. Boushie's dog ... on or about July 15, 2016, bit Chad T. Williams ...

2. Defendant's dog which bit Chad T. Williams was O'Malley.

3. Chad T. Williams was caused to suffer injuries from the bite on his right lower arm, including broken skin, discoloration and swelling.

4. Defendant was aware of the dog bite by his dog O'Malley to Chad T. Williams shortly after the bite occurred."

Based upon defendant's own admissions, he was aware that his dog, O'Malley, had bitten and injured two people prior to the incident involving plaintiff, Amy C. Farrell, herein. There is no factual dispute that defendant was aware of his dog's vicious propensities.

Furthermore, there is no factual dispute that defendant's dog actually bit plaintiff, Amy C. Farrell. In his Answer, defendant denied "knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs" "21" through "29" (the allegations pertaining to the actual dog bite). However, in opposition to this summary judgment motion, defendant concedes the attack. Rather than arguing that there is no proof of the attack itself, he argues that plaintiff, Amy C. Farrell, assumed the risk of such an attack by trying to bring defendant's loose dog back to defendant's property.

Having conceded every fact necessary to establish his own strict liability for the injuries caused by his dog, defendant asserts the affirmative defense that plaintiff, Amy C. Farrell, assumed the risk of being injured by trying to bring the dog back to defendant's property. That defense fails under the substantive and procedural facts of this case.

Defendant pleaded the affirmative defenses of "assumption of the risk" and "contributory negligence" in his Answer. However, his opposition to the motion for summary judgment is not based on contributory negligence. Only assumption of the risk is raised.

The Complaint alleges that

"19. Plaintiff Amy C. Farrell was not aware of the prior incidents involving bites to Chad T. Williams or Shelley J. Brown by Defendant's dog on or before July 8, 2018."

Defendant, in his Answer, denied "knowledge or information sufficient to form a belief as to the truth of" that allegation. However, two and one-half years have expired since the filing of that Answer. This Court has issued several discovery orders dated December 26, 2019, September 10, 2020, and January 21, 2021. Despite the expiration of every discovery date, defendant fails to set forth any facts which call into question the assertion that the plaintiff, Amy C. Farrell, lacked knowledge of the dog's vicious propensity at the time of the attack.

"It has been held that a plaintiff has not assumed a risk unless he knows and fully appreciates such risk; the failure to use reasonable care to discover the risk may constitute contributory negligence, but it is not assumption of risk" (*McCabe v Easter*, 128 AD2d 257, 259 [3d Dept 1987]).

Plaintiff, Amy C. Farrell, has alleged that she was not aware of the risk posed by defendant's dog. After two and one-half years of litigation, defendant has not offered anything to contradict that assertion.

"[B]are allegations are insufficient to create a genuine issue of fact. (See, e.g., *Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 342; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259.) Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion. (*Shapiro v Health Ins. Plan of Greater N. Y.*, 7 NY2d 56, 63; *Bank for Sav. v Rellim Constr. Co.*, 285 NY 708, 709.) Rather, the [opposing party] must establish the existence of material facts of

sufficient import to create a triable issue. (CPLR 3212, subd [b]; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, supra, p 259; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3212.05c.)" (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]).

There being no reference to contributory negligence in defendant's opposition papers, and there being no factual support for the affirmative defense of assumption of risk, the motion for summary judgment will be granted as to the defendant's strict liability for the consequences of the dog bite.

This does not relieve plaintiff, Kevin L. Ladue, of his burden to prove that he was deprived of his wife's services, society, and companionship as a result of her injuries. Nor does it absolve plaintiffs of the obligation to establish their respective damages.

NOW, THEREFORE, for the reasons set forth herein, it is

ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, granted; and it is further

ADJUDGED that defendant be, and he hereby is, strictly liable for the injuries caused to the plaintiffs by his dog; and it is further

ORDERED that the matter be, and the same hereby is, adjourned for a jury trial on the issue of the deprivation of services to plaintiff, KEVIN L. LADUE, and of any damages, on the 12<sup>th</sup> day of August, 2021 at 2:00 p.m., or as soon thereafter as counsel can be heard.

ENTER

  
\_\_\_\_\_  
Acting Supreme Court Justice

Dated at Malone, New York, this 30<sup>th</sup> day of July, 2021.