Lauder v Vealey
2021 NY Slip Op 33575(U)
May 28, 2021
Supreme Court, Orange County
Docket Number: Index No. EF006172-2019
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------x

KELLY LAUDER,

Plaintiff,

-against-

CHARLES VEALEY III and MARY E. VEALEY,

Defendants.

----------x

To commence the statutory time period 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.

Index No. EF006172-2019
Motion Date: May 21, 2021

The following papers numbered 1 to 7 were read on Defendants' motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavits (2) 1-4

Affirmation in Opposition - Affidavit 5-6

Reply Affirmation 7

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

A. Factual and Procedural Background

On December 14, 2018, Plaintiff Kelly Lauder, the proprietor of a dog-walking business, was walking her client's dogs on property adjacent to that of defendant Charles and Mary Vealey when she was injured by the Vealey's family dog, a Labrador / Pit Bull mix named Orion. Mr. Vealey was outside playing with Orion on his property. Orion was wearing his training

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collar. Mr. Vealey decided to go back inside. Orion was following, but at some point Mr. Vealey noticed that Orion was no longer by his side. Plaintiff testified that Orion came charging toward her. She continued:

> Q Can you describe how the dog came into contact with you from the time that you saw that dog again a few feet away from you until the time he made contact ?
>
> A The dog just sprinted right into my left knee. It was like bulldozed right through me like I wasn't even there.
>
> .....
>
> Q What part of the dog contacted your left knee ?
>
> A I want to say in the angle that he was coming from, possibly. It's hard to say, but I think it was more of like his shoulder, maybe chest area, that came into contract with my knee.
>
> .....
>
> Q Did he jump at all when he came into contact, or was he still running at the time ?
>
> A He was still running.
>
> Q Did he continue to run past you after making contact with you ?
>
> A Yes, he did, and then he came looping back around.

Plaintiff acknowledged that Orion was not barking, growling, snapping or snarling at any time during this encounter. She further acknowledged that she had been knocked down by other dogs while at dog parks and that she regarded this as a "typical" experience.

Plaintiff commenced this personal injury action, alleging claims sounding in negligence and strict liability. In support of their motion for summary judgment, Defendants established *prima facie* that they had no prior knowledge of:

> (1) Orion acting in a vicious manner, showing signs of aggression or acting in such a way as to put others at risk of harm;

(2) Orion biting, trying to bite, growling at, baring his teeth at, snapping at, attacking, snarling at, lunging at, nipping, or running into any person or animal;

(3) Orion running at any person or animal, requiring such person or animal to move out of Orion's way; or

(4) Orion jumping on any person or animal except once when invited to do so.

They further established that they had never needed to restrain Orion to prevent him from harming any person or animal.

In opposition to Defendants' motion, Plaintiff proffered the sworn statement of one of Defendants' neighbors, who stated:

> I have seen [Orion] run loose on several occasions. I have seen him wearing an electric collar but he is still able to run loose and onto other properties. I know the dog is very strong as on one occasion he jumped on me while playing with my dog....I see the dog often running loose on my neighbor's property. If I see the dog now I brace myself because I know how strong he is when playing with my dog.

B. Legal Analysis

In *Collier v. Zambito,* 1 NY3d 444 (2004), the Court of Appeals reaffirmed New York's longstanding rule that the owner of a domestic animal who knows or should have known of the animal's vicious propensities is strictly liable for the harm the animal causes as a result of those propensities. *Id.,* at 446. *See, Doerr v. Goldsmith,* 25 NY3d 1114, 1116 (2015); *Smith v. Reilly,* 17 NY3d 895, 896 (2011); *Petrone v. Fernandez,* 12 NY3d 546, 547-551 (2009); *Bernstein v. Penny Whistle Toys, Inc.,* 10 NY3d 787 (2008). In *Bard v. Jahnke,* 6 NY3d 592 (2006), the Court of Appeals explicitly held that "when harm is caused by a domestic animal, its owner's liability is determined solely by application of the [vicious propensity] rule articulated in *Collier*." *Id.,* at 599. Following *Bard v. Jahnke*, the Court of Appeals has consistently held that a cause of action for common law negligence against a dog's owner is not available to plaintiffs

injured due to the dog's vicious propensities. *See, Doerr v. Goldsmith, supra*; *Smith v. Reilly, supra*; *Petrone v. Fernandez, supra*; *Bernstein v. Penny Whistle Toys, Inc., supra*; *Xin Kai Li v. Miller,* 150 AD3d 1051 (2d Dept. 2017).

"To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and the owner knew or should have known of the dog's vicious propensities." *Vallejo v. Ebert,* 120 AD3d 797 (2d Dept. 2014). *See, Lina Thai Wong v. Largana,* 170 AD3d 700, 700-701 (2d Dept. 2019); *Palumbo v. Kikirk,* 59 AD3d 691 (2d Dept. 2009). 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, 446-447 (2004) (quoting *Dickson v. McCoy,* 39 NY 400, 403 [1868]). Thus:

> [A]n 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 or harm, can be found to have vicious propensities – albeit only when such proclivity results in the injury giving rise to the lawsuit.

Collier v. Zambito, supra, 1 NY3d at 447.

"'Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm' (*Hodgson-Romain v. Hunter,* 72 AD3d 741...)." *Lina Thai Wong v. Largana, supra,* 170 AD3d at 701. *See also, Matthew H. v. County of Nassau,* 131 AD3d 135, 147 (2d Dept. 2015).

In contrast, "normal canine behavior" such as "running around" is not evidence of vicious propensities. *See, Collier v. Zambito, supra*, 1 NY3d at 44; *Long v. Hess,* 162 AD3d 1646, 1647 (4th Dept. 2018); *Brady v. Contangelo,* 148 AD3d 1544, 1546 (4th Dept. 2017); *Bloom v. Van*

Lenten, 106 AD3d 1319, 1321 (3d Dept. 2013); *Hamlin v. Sullivan,* 93 AD3d 1013, 1014 (3d Dept. 2012); *Debellas v. Verrill,* 53 AD3d 593, 594 (2d Dept. 2008). Accordingly, where injury has resulted from a collision between the plaintiff and a running dog, strict liability may ensue only if there is evidence of prior notice of the dog's propensity to run into people and knock them over.

In *Long v. Hess, supra,* the Court wrote:

> Immediately prior to the incident, plaintiff threw a ball for her dog, plaintiff's dog retrieved the ball and, as he had frequently done in the past, Kane ran alongside plaintiff's dog back toward plaintiff. Both dogs were running fast in plaintiff's direction and, when it appeared that Kane was not going to veer off to th side, plaintiff turned away, whereupon Kane allegedly struck her leg. Despite evidence that Kane may have clumsily run around the dog park and similarly made contact with another visitor on a prior occasion, we conclude that, unlike situations in which a dog purposefully jumps onto or charges at a person [cit.om.], "[Kane's alleged] act of running into plaintiff in the course of...playfully [running alongside another dog at a dog park] merely consisted of normal canine behavior that does not amount to a vicious propensity" (*Bloom,* 106 AD3d at 1321...).

Id., 162 AD3d at 1647)

In *Bloom v. Van Lenten, supra,* the Court wrote:

> Plaintiff's claim here is that Delilah knocked her down by running into her as the dog was running and playing in the backyard with other dogs. Plaintiff does not allege that the dog jumped on her, bit her or otherwise took any purposeful action that was directed at her. Delilah's act of running into plaintiff in the course of being playfully chased by other dogs merely consisted of normal canine behavior that does not amount to a vicious propensity...

Id., 106 AD3d at 1321.

In *Hamlin v. Sullivan, supra,* the Court wrote:

> A group of dogs, including Quinn, were running in a large circular loop around two adjoining fields, chasing one another. Quinn ran past defendant and, within seconds, ran into plaintiff, hitting her in the area of her knees and lower legs, knocking her legs out from under her and causing her to fall. Galt and Zimmerman testified that it appeared

> that Quinn was trying to stop when he hit plaintiff because he had turned his body to the side just before impact....[Defendant's] evidence was sufficient to shift to plaintiff the burden of raising a question of fact as to defendants' knowledge that Quinn had a proclivity to run into people and knock them over [cit.om.].
>
> Plaintiff's evidence was insufficient to meet that burden....Banach stated that Quinn was "hyper, friendly, over-friendly" and would frequently "jump" on people, including her.... Banach's testimony was insufficient to raise a triable issue of fact regarding the dog's vicious propensities and defendant's notice of these propensities. Inasmuch as the behavior of which defendant admittedly had notice – jumping on people – was not the behavior that resulted in plaintiff's injury, and plaintiff failed to produce any evidence that defendant had notice of a proclivity by Quinn to run into people and knock them over, plaintiff failed to raise a question of fact to preclude summary judgment [cit.om.].

Id., 93 AD3d at 1014-15.

Finally, in *Debellas v. Verrill, supra,* the Court wrote:

> The plaintiff allegedly fell to the ground and sustained injuries to her leg and foot when two dogs, owned separately by the defendants, collided with her while running with each other at an off-leash area of Coindre Hall Park....[T]he defendants established their prima facie entitlement to judgment as a matter of law with respect to the cause of action sounding in strict liability by demonstrating that their dogs had never collided with people on any prior occasion [cit.om.]. In opposition, the plaintiff failed to raise a triable issue of fact. Further, the plaintiff may not recover on her common-law negligence cause of action [cit.om.].

Id., 53 AD3d at 594.

Applying the teaching of those cases to the case at bar:

(1) It is alleged here only that Orion ran into the Plaintiff while she was walking other dogs. There is no evidence of growling, snarling, snapping, biting, jumping up, etc.

(2) Neither is there any evidence that Orion "purposefully" charged at Plaintiff. She herself testified that Orion was not growling, snarling or snapping, bulldozed through her "like I wasn't even there" and continued running past her after contact occurred.

(3) Defendants established *prima facie* entitlement to summary judgment by proving

that they had no knowledge of vicious propensities on Orion's part, and, most particularly, no knowledge that he had ever collided with people on prior occasions.

(4) Accordingly, the burden shifted to Plaintiff to produce evidence that Defendants had notice of a proclivity on Orion's part to collide with people and knock them over. Plaintiff failed to meet her burden of proof.

(5) Plaintiff's evidence that Orion was known to run loose is inconsequential. Running is normal canine behavior which does not evidence vicious propensity. That Orion was allowed to run *loose* matters not, for Plaintiff cannot recover in negligence, only in strict liability based upon proof of notice of vicious propensity.

(6) Plaintiff's evidence that Orion once jumped on Defendants' neighbor while playing with his dog is also inconsequential because this was not the type of conduct that caused Plaintiff's injury, and in any event, there is no evidence that the episode in question was known to Defendants.

In sum, Plaintiff has no valid claim sounding in common law negligence, and she has failed to demonstrate the existence of any triable issue of fact precluding summary judgment on her claim sounding in strict liability. Consequently, Plaintiff's Complaint must be dismissed.

It is therefore

ORDERED, that Defendants' motion is granted, and Plaintiff's Complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: May 28, 2021 E N T E R
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.