Futerko v Sideratos
2021 NY Slip Op 33583(U)
October 4, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 610001/2019
Judge: Vincent J. Martorana
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INDEX NO: 610001/2019

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

MATTHEW FUTERKO,

Plaintiff,

- against-

JOHN SIDERATOS,

Defendant.

ORIG. RETURN DATE: 02/26/21
ADJOURNED DATE: 05/13/21
MOTION SEQ. NO.: 002 - MG

PLTF'S/PET'S ATTY:
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Holtsville, New York 11742

DEFT'S/RESP'S ATTY:
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Upon efiled documents numbered 24-37; 40-43; 45; it is

ORDERED that Plaintiff's motion seeking summary judgment against Defendant on the issue of liability and dismissal of Defendant's fifth affirmative defense is granted.

The within action seeks damages for personal injuries allegedly sustained by Plaintiff as a result of a bite inflicted by Defendant's dog, Zeus, on December 21, 2018. Issue has been joined, discovery commenced and Plaintiff now seeks summary judgment against Defendant on the issue of liability and further seeks dismissal of Defendant's fifth affirmative defense which asserts culpable conduct on the part of Plaintiff.

Plaintiff alleges that on December 21, 2018, he was visiting his cousin, Defendant John Sideratos, when he was attacked by Defendant's pit bull. In his answer, Defendant admits that he owned the premises, that Plaintiff was lawfully at the premises and that Defendant owned a pit bull named Zeus. At deposition, Plaintiff testified that Defendant had locked Zeus up in the laundry room while he visited but then Plaintiff asked to see Zeus. Plaintiff reports that Defendant hesitated but then went to release Zeus, warning that Zeus might jump on him. Plaintiff then avers that, while he was sitting on the couch in Defendant's home, Zeus lunged at him and grabbed Plaintiff's face in his jaws, holding on for about ten seconds to the area just under Plaintiff's right eye and under Plaintiff's bottom jaw until Plaintiff pinched the dog's nose and Zeus released his grip. Plaintiff was taken to the hospital by ambulance where he received stitches to his face.

Plaintiff testified at deposition about several different prior incidents involving Zeus and aggressive behavior toward Defendant's relatives. This testimony is hearsay. However, Plaintiff also offers an affidavit of non-party Emily Cimilluca ("Cimilluca") who attests that she was bitten

by Zeus in 2012 while visiting Defendant's home with his then-girlfriend, Kim. She states that while standing in the home, she shifted her weight from one leg to the other and Zeus jumped up and bit her face. Cimilluca further avers that a plastic surgeon at the hospital stitched up her face, requiring approximately six stitches under her left eye and that Defendant paid her medical bills so Cimilluca wouldn't go to court. Defendant claims that he recalls being told that Cimilluca was scratched and that he does not remember paying any medical bills. Plaintiff also provides a copy of a notice issued by the Suffolk County Department of Health dated May 3, 2012 which was sent to Defendant advising him that his dog was involved in a biting incident, that the dog must be confined until it is confirmed that it does not have rabies and that Defendant must provide proof of vaccination status. The accompanying Animal Bite Supplemental Form indicates that the person bitten was Cimilluca. Defendant claims that he does not remember receiving the letter. Plaintiff also submits certified veterinarian records in support of his motion. A note dated June 27, 2016 indicates that the "dog is aggressive and hard to predict how he will handle." Another note on that date indicates that the owner expressed that the dog is selective of who he likes and he wanted to know if neutering will fix it. Defendant counters that he does not recall telling the veterinarian that Zeus was selective of who he likes.

Defendant asserts that there are material issues of fact as to whether or not he knew or should have known that Zeus' had vicious propensities because Plaintiff testified that he had not previously seen Zeus behave aggressively, because the alleged prior incidents involving Defendant's relatives did not occur and because he did not recall that Zeus actually bit affiant Cimilluca's face, necessitating stitches. Plaintiff also did not recall receiving a letter from the Suffolk County Department of health regarding Zeus having bitten Cimilluca and he did not recall telling the veterinarian that Zeus had behavioral issues. Defendant submits affidavits of his cousin, Jerry Giordano, and uncle, Anthony Giordano, attesting that Zeus did not engage in aggressive behavior toward them or their family members. Defendant further asserts that summary judgment must be denied because Defendant has not been deposed and because Defendant expects Plaintiff to produce non-party witnesses.

A party moving for summary judgment "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 Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Stonehill Capital Mgmt., LLC v. Bank of the West.***, 28 NY3d 439, 448, 45 NYS3d 864 [2016](quoting ***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (***S.J. Capelin Associates v***

Globe Mfg. Corp., 34 NY2d 338, 357 NYS2d 478 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned or speculative and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93 [1968]; ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]***;*** ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425). Pursuant to CPLR §3212(f), summary judgment may be precluded under circumstances where discovery is incomplete; however, the discovery sought must be more than a fishing expedition. It may not be predicated upon speculative hope that evidence supporting a theory may be uncovered (***Greenberg v. McLaughlin***, 242 AD2d 603, 604, 662 NYS2d 100, 101 [2d Dept 1997]; ***Zarzona v. City of New York***, 208 AD2d 920, 920, 617 NYS2d 534, 535 2d Dept 1994]; ***Price v. Cty. of Suffolk***, 303 AD2d 571, 756 NYS2d 758 [2d Dept 2003]). A mere hope that further discovery will uncover some helpful fact is insufficient to deny summary judgment as premature; there must be a real basis for the assertion that such discovery is necessary (***Zarzona v. City of New York***, 208 AD2d 920, 617 NYS2d 534 [2d Dept 1994]; ***Greenberg v. McLaughlin***, 242 AD2d 603, 662 NYS2d 100, 101 [2d Dept 1997]; ***Price v. Cty. of Suffolk***, 303 AD2d 571, 756 NYS2d 758, 759 [2d Dept 2003]).

"To recover in strict liability in tort for damages caused by a dog, a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities" (***Ioveno v. Schwartz***, 139 AD3d 1012, 1012–13, 32 NYS3d 297, 298–99 [2d Dept. 2016]; ***I. A. v. Mejia***, 174 AD3d 770, 771, 105 NYS3d 103, 105 [2d Dept. 2019]). The sole means of recovery for damages is to produce evidence sufficient to establish strict liability; no recovery is available for ordinary negligence (***Bukhtiyarova v. Cohen***, 172 AD3d 1153, 102 NYS3d 57 [2d Dept. 2019]; ***King v. Hoffman***, 178 AD3d 906, 114 NYS3d 467 [2d Dept. 2019]; ***Petrone,*** *supra;* ***Ostrovsky v. Stern***, 130 AD3d 596, 13 NYS3d 462 [2d Dept. 2015]). An owner of a domestic animal who knows or should have known of its vicious propensities will be liable for damage caused by the animal's exercise of such propensities (***Collier v. Zambito***, 1 NY3d 444, 807 NE2d 254 [2004]; ***Hai v. Psoras***, 166 AD3d 732, 87 NYS3d 239 [2d Dept. 2018]; ***Costanza v. Scarlata***, 188 AD3d 1145, 132 NYS3d 844, [2d Dept. 2020]; ***Petrone v. Fernandez***, 12 NY3d 546, 910 NE2d 993 [2009]; ***Drakes v. Bakshi***, 175 AD3d 465, 104 NYS3d 701 [2d Dept. 2019]). "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***, *supra, quoting* ***Dickson v. McCoy***, 39 NY 400, 403 [1868]; *see also* ***Bukhtiyarova v. Cohen***, 172 AD3d 1153, 102 NYS3d 57 [2d Dept. 2019]; ***King v. Hoffman***, 178 AD3d 906, 114 NYS3d 467 [2d Dept. 2019]; ***Drakes***, *supra;* ***Lina Thai Wong v. Largana***, 170 AD3d 700, 93 NYS3d 597, (Mem) [2d Dept. 2019]). Evidence of a dog's vicious propensities may be proof of a prior attack; a tendency to growl, snap or bare its teeth; a habit of acting in ways that risk harm to others; the fact of being kept as a guard dog or the occasions and manner in which the animal is restrained (***Collier,*** *supra;* ***Feit v. Wehrli***, 67 AD3d 729, 888 NYS2d 214 [2d Dept. 2009]; ***Lina Thai Wong,*** *supra;* ***Bukhtiyarova,*** *supra;* ***King*** *supra;* ***Bard v. Jahnke***, 6 NY3d 592, 848 NE2d 463 [2006]). "Knowledge of an animal's vicious propensities may also be discerned, by a jury, from the nature and result of the attack" (***I. A. v. Mejia***, 174 AD3d 770, 771, 105 NYS3d 103, 105 [2d Dept. 2019] *quoting* ***Matthew H. v. County of Nassau***, 131 AD3d 135, 148; see also ***Hai v. Psoras***, 166 AD3d 732, 87 NYS3d 239 [2d Dept. 2018]).

Based upon the evidence presented, Plaintiff has made a *prima facie* case that Defendant knew or should have known of Zeus' vicious propensities and Defendant has failed to raise a triable issue of fact. Defendant's argument that he must be deposed before summary judgment may be granted is unavailing. Defendant has not presented a credible argument that discovery is necessary to aid in his defense. Furthermore, it is unclear that Plaintiff exercises any control over non-party witnesses such that he could be compelled to produce them. Based upon the foregoing, summary judgment is granted in favor of Plaintiff and against Defendant on the issue of liability. Additionally, as Defendant has failed to present any evidence to controvert Plaintiff's version of events, Defendant's fifth affirmative defense of culpable conduct on the part of Plaintiff is dismissed.

Dated: October 4, 2021
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION